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SYMPOSIUM:
CONSTITUTIONAL FOUNDATIONS

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Symposium

Constitutional Foundations

Footholds of Constitutional Interpretation

Alexander Tsesis*

The United States Constitution is an ancient document, the oldest functioning national constitution in the world.[1] Its clauses were composed at a time when the art of constitution making was little understood.[2] Inevitably, it is chock-full of ambiguities. What precisely does "due process" mean?[3] What are the "privileges and immunities" of citizenship?[4] What constitute "high [c]rimes and [m]isdemeanors," and what about "good [b]ehaviour"?[5] At what stage of negotiations with foreign envoys must a president seek the advice and consent of the Senate before entering into a treaty?[6] By what metric should "general [w]elfare" be measured and which branch(es) of government should measure it?[7] What forms of commerce may Congress regulate?[8] What matters can Congress keep secret without publishing its

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1. Norway's constitution of 1814 is the next oldest. William W. Van Alstyne, *Quintessential Elements of Meaningful Constitutions in Post-Conflict States*, 49 WM. & MARY L. REV. 1497, 1500 n.11 (2008); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 399 & n.28 (2008).

2. *Cf.* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 368 (1995) (stating that the period of modern constitution making began in the late eighteenth century with the writing of the United States Constitution and the various American state constitutions); Stanley N. Katz, *A New American Dilemma?: U.S. Constitutionalism vs. International Human Rights*, 58 U. MIAMI L. REV. 323, 337 (2003) (discussing the United States' production of the first written constitution out of a tradition of unwritten constitutionalism).

3. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

4. *Id.* art. IV, § 2, cl. 1; *id.* amend. XIV, § 1.

5. *Id.* art. II, § 4; *id.* art. III, § 1.

6. *See id.* art. II, § 2, cl. 2.

7. *See id.* pmbl.; *id.* art. I, § 8, cl. 1.

8. *See id.* art. I, § 8, cl. 3.

deliberations in official journals of debates?[9] Which of the Executive's functions are reviewable? These and a host of other questions do not lend themselves to easy, much less irrefutable answers. The Constitution's open-ended clauses make it ripe for deliberation and analysis. In the end, we are left with supreme legal authority that remains stable but sets out methods for amendment; contains protections for political, civil, and procedural rights; and provides the basic structure of governance.

Constitutional theory is the method of unpacking the text, understanding its relation to society, determining the role of the three branches of government, and developing a consistent and predictable interpretation. Philip Bobbitt elegantly describes six accepted grammatical modalities of U.S. jurisprudence:

> the historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).[10]

Bobbitt's approach resists any grand constitutional meanings.

Missing from Bobbitt's list, as Mark Tushnet points out, is the possibility that ideological purpose might itself be a modality of constitutional argument.[11] The source for ideology need not be the metarule Bobbitt conceives it to be but, as Tushnet further explains, might supply an additional mode.[12] Elsewhere, Tushnet states that "the substantive criteria for identifying the people's vital interests" are grounded in the Declaration of Independence and the Preamble to the Constitution.[13] Sanford Levinson similarly posits that "[t]o the extent that recourse to transcendental and ostensibly eternal natural law is different from reference to more contingent social norms of an 'ethos,' then reference to natural law might serve as a seventh modality."[14]

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9. *See id.* art. I, § 5, cl. 3.

10. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991).

11. Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on* Constitutional Interpretation, 72 TEXAS L. REV. 1707, 1720 (1994).

12. *Id.*

13. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 13 (1999). Jack Balkin has also argued that the substantive vision of the Constitution's political and substantive framework lies in the Preamble and Declaration of Independence. Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 856–57.

14. Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 850 (1993).

Bobbitt's lexicographical description of constitutional interpretation is closely connected to John Hart Ely's suggestion that the Constitution is principally concerned with "political process" and "representative-reinforce[ment]," not "particular substantive values."[15] Ely contends that the Constitution's primary concern with representative democracy implied that judicial review must reinforce participation-oriented policy.[16] Ely asserts that the Constitution was principally concerned with judicial protection of participation in democratic governance.[17] Judicial review, on his reading, "unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) [is] entirely supportive of, ... representative democracy."[18] Contrary to Tushnet's and my point of view,[19] Ely believes that talk of rights, in the Declaration of Independence, was no more than legal posturing to convince rather than set any public principles.[20]

While Ely convincingly argues that the judiciary must guard against political failures to secure equal participation for all segments of the population, he mistakenly discounts the ethical values inherent in portions of the Constitution that provide for equal participation, equal treatment, and fundamental rights. The document no doubt sets out many of the processes intrinsic to governance—such as the timing of presidential elections, the sequencing of presidential vetoes and legislative overrides, and the diversity required for federal assertion of subject matter jurisdiction. However, there are other clauses that should, or at least can reasonably, yield substantive understandings, such as the Free Speech, Establishment, Due Process, and Equal Protection Clauses. Some portions of the Constitution that are concerned with process, such as the Habeas and Ex Post Facto Clauses, also place a value on rights like liberty and justice. As H. Jefferson Powell points out, many of the process elements of the Constitution, such as protection of property rights against misappropriation, are substantive in purpose.[21] Judges cannot, Powell demonstrates, "identify legitimate occasions for

15. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74, 88 (1980).

16. *Id.* at 87.

17. *Id.* at 88.

18. *Id.*

19. *See* Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 701–10 (2012) (describing the Declaration of Independence as "the substance of the law, and the Constitution as the framework for upholding it"); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 365 (2004) (discussing congressional enforcement power under the Thirteenth Amendment as upholding the promises of the Declaration of Independence and the Preamble).

20. ELY, *supra* note 15, at 49.

21. *See* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 188 (1993) ("[M]any of the genuinely process-centered elements of the Constitution originally had substantive purposes beyond the creation of a democratic process.").

judicial intervention without" making "substantive political and moral choices."[22]

The critique of any accepted method of interpretation is itself a meta-analysis of existing norms and hierarchies, which might take the form of extralegal arguments—be they philosophical, sociological, or political. Reflection on whether any line of analysis is valid to a given situation is a parsing of its meaning and the context of its application to a particular case or legislative enactment, not only on whether a judge correctly compartmentalizes a case into one or more Bobbittian modalities. One of the best known statements for a "moral reading" of the Constitution appears in Ronald Dworkin's writings.[23] Dworkin means that all levels of society—be they lawmakers, judges, or citizens—should interpret abstract clauses of the Constitution to derive from "moral principles about political decency and justice."[24] The central political ideal embodied in the Constitution, Dworkin argues, is the concept of justice in a "society of citizens both equal and free,"[25] where judges must be constrained by the principle of "equal concern and respect."[26] The judiciary plays an important role in American constitutional practice in which "judges [historically] have final interpretive authority."[27] Even if Dworkin is correct in identifying the overlapping concerns of equality and liberty in the Constitution, his method still raises the normative question of whether unelected members of the judiciary should have the final say about the values of a representative democracy in which the people are sovereign.

A variety of scholars, like Daniel Farber and Suzanna Sherry, call out Dworkin and other expositors of foundational theories for presuming that there are "clear-cut answers" for "difficult moral dilemmas."[28] Farber and Sherry's criticism is not, however, limited to progressive thinkers like Dworkin. They also take Robert Bork, Antonin Scalia, and Richard Epstein to task.[29] The three latter theorists adopt various strands of originalism, currently one of the most popular approaches to constitutional interpretation.

The driving spark of originalism is the desire for interpretive consistency. Its proponents seek to restrain judges in order to prevent them from politicking from the bench.[30] But just as Dworkin's method leads him

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22. *Id.* at 189.

23. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

24. *Id.*

25. *Id.* at 73.

26. *Id.* at 17.

27. *Id.* at 35.

28. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 139 (2002).

29. *Id.* at 4.

30. *See, e.g.*, Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64

to introduce a liberal agenda, so too originalists have, until recently, tended to favor conservativism, putting the objectivity of both into doubt. Bork, who represents the early direction of the movement, adopts a position that "original intent is the only legitimate basis for constitutional decisionmaking."[31] Early criticism of original intent theorists was pointed and effectively reframed the debate. Justice William Brennan, arguably the most influential living constitutionalist, asserts that originalism was naught but "arrogance cloaked as humility."[32] He adopts a nontextualist method, in which scholars and judges were to flesh out the many ways constitutional tradition evolved through judicial opinions and practices of other public institutions.[33] Living constitutionalism, too, has its detractors, who point to its downplaying of constitutional text as a threat to a well-ordered society, putting at risk the very institutions of an accountable democracy.[34]

As debates over the value of text and evolving meaning developed, originalism morphed into several versions. In response to criticism that original intent arguments are unworkable, the originalist school of thought has branched out into various, nonoverlapping theories about which Framers' views on the Constitution are relevant for contemporary interpretation; the relative weight an interpreter should give to Madison's *Notes of Debates in the Federal Convention of 1787*, the *Federalist Papers*, and the states' ratifying conventions; the original public meaning of text at the time of its ratification, be it in the original Constitution or through Article V amendments; the value of constructing the understanding of a hypothetical, reasonable person living at the time of ratification; the authority of judges to interpret abstract constitutional provisions, such as the Due Process or Equal Protection Clauses; and the capacity of judges to ascertain the Framers' original expectations in matters of constitutional principles.[35] Jack Balkin has found an opening in this intellectual fracas to endorse a liberal strand into

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FLA. L. REV. 1485, 1488–89 (2012) (stating that advocates believe that adherence to originalism "will restrain activist judges from replacing the social policy choices of the political branches with their own").

31. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

32. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 325 (1986) (internal quotation marks omitted).

33. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) ("Our constitutional tradition, however, has not focused on the document alone, but on the decisions and practices of courts and other institutions. And this tradition has included major elements of nonoriginalism.").

34. Redish & Arnould, *supra* note 30, at 1491.

35. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716–36 (2011) (discussing the varying theoretical approaches that fall under the rubrics of Old and New Originalism).

the mix, which he calls "living originalism."[36] James Ryan has also entered the originalist brew from a progressive angle he associates with textualism.[37]

All this disagreement has led some to throw up their hands and deny that "originalism" refers to anything like a coherent theory, much less one that can give unambiguous answers to difficult constitutional questions or even credible archeological answers about the thought processes of the Framers and their contemporaries. Like Sherry and Farber, Harvie Wilkinson writes critically against judicial reliance on any one theoretical method of constitutional interpretation.[38] Wilkinson is not only critical of originalism and living constitutionalism but also argues that Richard Posner's pragmatism "substitutes judicial fiat for representative policymaking."[39] Wilkinson's deferential method is laudable for its willingness to avoid political judging under the veneer of methodological consistency but provides no way to determine whether a holding is legitimate. His critiques of cases like *Roe v. Wade*[40] and *Bush v. Gore*[41] raise the question of how an observer can know any given decision is true to the text and purpose of the Constitution without positing any consistent framework about its structure, historical value, or overarching purpose.[42]

We are left with sustained debates about the Constitution's meaning. As irresolvable as the different points of view seem to be, we as a people are left with the need to better understand an ancient document in the context of contemporary disputes of tremendous significance, from gay marriage to welfare benefits and from executive power to judicial authority. Debate on these matters seems not only inevitable but necessary in a pluralistic, representative democracy.

The articles in this issue are part of a symposium on constitutional foundations that I organized at the University of Texas School of Law. It brought together scholars to discuss the extent to which text, precedent, and doctrine are based on objective norms, relative rights, original meanings, and social sentiments. Some of the key questions participants discussed include: Is ours a living constitution? If we choose originalist interpretation, should we rely on the Framers' intent or on their meaning? Does the interpretation of the text require dictionary, cultural, or literal definition? When examining

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36. *See* JACK M. BALKIN, LIVING ORIGINALISM 339 (2011).

37. *See* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524–25 (2011).

38. *See* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 3–4 (2012) ("[T]he theories are taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive.").

39. *Id.* at 92–93.

40. 410 U.S. 113 (1973).

41. 531 U.S. 98 (2000).

42. *See* WILKINSON, *supra* note 38, at 116 ("[J]udges should pay attention to the text, structure, and history of the Constitution and not go creating rights out of whole cloth.").

the structure of the Constitution, should courts focus exclusively on a relevant passage or the contextual meaning of one clause relative to others? Does the Constitution grant courts the authority to expand its meaning through common law precedents? How can judges infer the Constitution's meaning from ambiguous passages like the Necessary and Proper Clause and the Due Process Clause of the Fourteenth Amendment without succumbing to personal opinion and politics? To what extent is the judiciary a countermajoritarian institution, and to what extent is it an impediment to social progress? Do international norms become relevant to U.S. constitutional interpretation because they gain popular acceptance in the United States, because they are based on principles, or only because of treaty obligations? How should courts balance sovereignty concerns with principles in cases implicating federalism?

Jack Balkin begins his essay with an anecdote from the performance of Giuseppe Verdi's opera, *Il Trovatore*.[43] He tells the story in which the conductor could choose either to follow the musical score or to improvise over a portion of it. He uses this story as a springboard for demonstrating that the Warren Court improvised by finding that the Equal Protection Clause of the Fourteenth Amendment applied to the federal government, even though it only addresses states' conduct on its face. Balkin shows that law in action is essential for applying legal texts to the development of law. Law in social practice, just like music and performing art in social contexts, is more than simply the prescription of written text. Differing social milieus will require contextual variations from the exact wording of written text. Legitimate alterations in each are not unbounded, but limited by traditions, institutions, and conventions of the profession. Balkin writes about the evolution of accepted practices—what counts as authentic, or "on-the-wall," may later be discredited as inauthentic, or "off-the-wall"; at other times the process goes the other way as interpretive methods that had previously been discounted later become accepted. Just as the performance of Verdi's opera is subject to change in response to the will of the audience, so too constitutional interpretation should be responsive to popular demand as it evolves. As an example of how legal issues that were once off-the-wall become on-the-wall, Balkin recounts how the nascent gay rights movement did not persuade the majority in *Bowers v. Hardwick*.[44] After seventeen more years of advocacy, however, the Court had changed its perspective on what counted as on-the-wall by accepting the evolving public opinion that gays and lesbians have the same privacy rights as all Americans.

In her essay, Amy Coney Barrett focuses on how justices should approach those constitutional precedents with which they disagree.[45] She

43. Jack M. Balkin, *Verdi's High C*, 91 TEXAS L. REV. 1687 (2013).

44. 478 U.S. 186 (1986).

45. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711 (2013).

argues that an unappreciated function of stare decisis is the way in which it mediates disagreements between the justices about constitutional interpretation. Sometimes a justice will think a case is in error not because it was wrongly decided by its own rights but because she disagrees with the interpretive premise from which it proceeds. For example, an originalist may find fault with a case that takes an evolutionary approach, or a living constitutionalist may think mistaken a case that puts an undue focus on history. Barrett asserts that in such cases, a rigid rule of stare decisis would not serve the interests of a pluralistic society. A more relaxed rule, by contrast, promotes stability while still accommodating the diversity of views about the nature of the Constitution. The presumption in favor of precedent puts the burden on the later majority to explain why their vision is superior, and if they cannot do so, the precedent remains. Barrett concedes that soft stare decisis in constitutional cases causes more instability than would a strong one but says that some fluctuation in constitutional law is the inevitable byproduct of pluralism. She also emphasizes that features of the judicial system other than stare decisis protect those who rely on precedent.

Mitchell Berman and Kevin Toh distinguish three different issues about which originalists and nonoriginalists could be seen as disagreeing: first, the issue of what the constitutional law is or consists of; second, the issue of how best to gain epistemic access to the constitutional law; and third, the issue of how judges should adjudicate constitutional disputes.[46] Originalists typically formulate their position as one about the first issue, and they assert that the constitutional law is or consists solely of the meanings of the inscriptions in the constitutional text. Nonoriginalists, on the other hand, typically seem to formulate their position as one about the third issue and argue that judges should take into account a number of different types of facts or considerations when they adjudicate constitutional disputes. Berman and Toh set aside the possibility that originalists and nonoriginalists are thereby furnishing different answers to different questions and delve into the possibility that the real and fundamental issue that the two groups of theorists disagree about is what the constitutional law is or consists of. Berman and Toh opine that the best way to discipline the debate between originalists and nonoriginalists, so as to facilitate any future progress in the debate, is to articulate a nonoriginalist take on what the constitutional law is or consists of. With this goal in mind, they address what some originalists see as a significant, and even insurmountable, stumbling block to articulating a nonoriginalist conception of the constitutional law. This is what the authors call "the combinability problem," which has to do with the purported difficulty or even impossibility of the constitutional law being determined or constituted by a number of different kinds of facts or considerations.

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46. Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEXAS L. REV. 1739 (2013).

Berman and Toh take up this problem, distinguish different versions of the problem, dismiss various versions of it as pseudo problems borne out of confusions on the part of the theorists who proffer it, and eventually settle on a version of the combinability problem that they consider more serious than others. According to this last version of the problem, if there were multiple sets of determinants of the constitutional law, then judges cannot be conceived as "finding" preexisting law, but instead must be conceived as "making" new law or acting in extralegal ways. Berman and Toh argue that even this last version of the problem can be effectively disarmed. If the constitutional law consists of a set of norms, which make legally relevant a number of different kinds of facts—semantic, psychological, historical, structural, moral, prudential, etc.—then judges and others can see the activity of constitutional interpretation that takes into account these myriad kinds of nonlegal facts as attempts to delineate the facts that the preexisting legal facts make legally relevant and salient. That is a conditional conclusion. Berman and Toh argue that in order to substantiate the antecedent of the conditional, and thereby show that a pluralistic, nonoriginalist conception of what the constitutional law is or consists of is a plausible position, we can rely on the epistemological method of reflective equilibrium to show that the constitutional law indeed consists of a set of norms that refer to and make legally relevant a number of different kinds of nonlegal facts.

James Fleming criticizes the claim that originalism is the best and only legitimate mode of interpretation.[47] An over-inclusive definition of originalism—one that is so broad as to include all aspirational and philosophical conceptions of the Constitution, rather than a narrow definition that confines its meaning to historically bounded rules—only obfuscates substantially different modes of analysis. Traditional originalism is too authoritarian to help explain cases like *Griswold v. Connecticut*[48] and *Roe v. Wade*. It would render each succeeding generation subservient to the Founders' supposed will on contemporary political disputes.

Originalists, according to Fleming, mistakenly reject the value of moral and political theory for interpretation. Their shortsightedness overlooks the fit of aspirational principles for engaging in a moral reading necessary to making the best of "our imperfect Constitution." The best work in current constitutional theory, he believes, is "constructivist," deriving constitutional meaning through historical retrospective. History provides a story line of possibilities useful for illuminating our national experiences and helping to sort through constitutional commitments, but it is not determinative. Interpretation, Fleming argues on the basis of a dichotomy borrowed from Ronald Dworkin, should look to history and justificatory fit. History helps screen out unrealistic and naive interpretations. Clashes among competing

47. James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEXAS L. REV. 1785 (2013).

48. 381 U.S. 479 (1965).

theories require determination of what justification can meet our best aspirations as a people.

B. Jessie Hill argues that the act of constitutional interpretation cannot rely solely on text but must be grounded in context.[49] Relevant context extends beyond the historical record of the Constitution to social and cultural factors. As her starting point, Hill relies on an insight from postmodern literary theory that theoretical coherence is unattainable because each act of interpretation requires pragmatic considerations. Pragmatic considerations create an inevitable unpredictability in judicial decision making. Hill illustrates her point through doctrinal examples drawn from First and Fourteenth Amendment jurisprudence. Circumstances that the Framers of the Constitution could not have anticipated, stemming from political, societal, and cultural changes over time, have altered the meaning of constitutional terms like "citizenship" and "religion." Case law should reflect that social changes have shifted and altered their meanings. The malleability of legal language, Hill suggests, raises problems for both originalist and living-constitutionalist theories. Judges should not avoid these and other ideologies and constitutional theories; rather, they must be close readers of the text, capable of incorporating social and cultural understanding into legal interpretation.

Randy Kozel's contribution seeks to demonstrate that the treatment of constitutional precedent ultimately depends on one's interpretive method and underlying normative premises.[50] Rather than appealing to a unified doctrine of stare decisis that incorporates all the benefits and burdens of precedent, Kozel believes that a judge must consult a particular interpretive method in order to ascribe value to the importance of interpreting the Constitution correctly. Certain implications of precedent—including the disruptiveness of reversal, the workability of prior case law, and the coherence of past holdings with extant jurisprudence—may continue to play a role in inquiries about the durability of past decisions. But Kozel argues that justices reviewing dubious precedents must also draw on their basic intuitions about constitutional theory in order to give content to the benefits and harms of mistaken interpretations. Such assessments must be derived from a unified interpretive method and normative foundation, which combine to allow a justice to determine how crucial it is to maintain the predictability and consistency of the constitutional law even at the expense of preserving flawed rules of decision.

In her article, Gillian Metzger examines how administrative agencies interpret and implement the U.S. Constitution.[51] Agencies engage in

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49. B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment,"* 91 TEXAS L. REV. 1815 (2013).

50. Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEXAS L. REV. 1843 (2013).

51. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEXAS L. REV. 1897 (2013).

administrative constitutionalism in a variety of ways, such as issuing guidance about primary and secondary education; issuing rules about matters like housing; and providing constitutional counsel on policy matters, such as presidential military discretion. Administrative constitutionalism typically manifests through ordinary legal forms aimed at furthering practical public and statutory aims but also has consequences for the interpretation of constitutional matters like federalism, separation of powers, and individual rights. Metzger explores the extent to which agency expression of constitutional matters does and should differ from the approaches taken by courts and Congress.

Those who argue against administrative constitutionalism claim that it risks encouraging nonelected agency officials to act in ways that exceed—or even are at odds with—their delegated authority, undermining separation of powers and democratic accountability principles. In Metzger's view, however, administrative constitutionalism is likely to further, rather than undercut, constitutional purposes. As Metzger points out, an agency implementing a statutory scheme can readily bring its expertise to bear on constitutional considerations. An agency can further rely on its expertise to research and assess details of specific constitutional causes of action—such as those of pregnant workers claiming gender discrimination at the hands of their employers—in a manner more in keeping with constitutional norms than a judge might afford them. The scheme of administrative constitutionalism rejects judicial exclusivity in determining constitutional meaning. As entities that come into regular contact with the public through individuals, social groups, and businesses, agencies are likely to be more in tune with popular involvement in the construction of constitutional meaning than the judicial branch. Metzger's concern is that the difficulty of identifying instances of administrative constitutionalism may undercut the virtues it has to offer as a form of constitutional interpretation, and she argues that the challenge is to craft doctrines that encourage greater transparency.

Neil Siegel, in his essay, argues the Commerce Clause is best read in light of the background purpose of Article I, Section 8.[52] The Clause provides Congress the authority to address commercial collective action problems. Siegel traces the theory of collective action problem solving to the drafting of the Constitution, which, in part, was meant to develop a methodology for resolving national problems that had been intractable under the Articles of Confederation. His description of the purposes behind the inclusion of the Commerce Clause is similar to the perspective Justice Ginsburg enunciated in her concurrence to *National Federation of Independent Business v. Sebelius*.[53] Ginsburg, joined by three other Justices,

52. Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEXAS L. REV. 1937 (2013).

53. 132 S. Ct. 2566 (2012).

emphasized the state-level collective action impasse on healthcare that Congress addressed through the Patient Protection and Affordable Care Act (ACA). The collective action approach to the Commerce Clause, as Siegel asserts, posits that Congress has the necessary and sufficient power to rely on its commerce power whenever two or more states face a collective action problem. This approach, unlike a nationalist defense of the commerce power, does not inquire whether the regulated subject matter substantially affects interstate commerce in the aggregate. Neither does the collective action approach focus on the formal distinction between economic and noneconomic conduct, as do the defenders of a limited commerce power.

Besides laying out a general theory, Siegel also responds to federalist and nationalist criticism. He believes that the nationalist test too narrowly defines multistate collective action problems, without adequately accounting for interstate externalities. Unlike nationalist defenders of federal commerce power, Siegel does not focus on whether the regulated activity substantially affects interstate commerce in the aggregate. Siegel's collective action approach also differs from federalist defenders of commerce authority because his collective action approach neither focuses on the activity–inactivity dichotomy nor the formalistic contrast between economic and noneconomic conduct. As opposed to these two approaches, Siegel argues that collective action analysis of Congressional Commerce Clause authority should focus on the materiality of externalities, how meaningfully federal regulation addresses interstate externalities, and whether Congress provided a reasonable basis for passing a statute in question.

David Strauss analyzes whether the aphorism that the Constitution is the handiwork of "we the people" has democratic resonance.[54] Common law constitutionalism, as he explains, provides the basis for democratic decision making. That mode of analysis resolves controversial questions on the basis of judicial and nonjudicial precedents, using text only for ceremonial purposes in ambiguous cases. A common law judge will resolve cases using judicial precedents as well as a variety of nonjudicial bases, such as statutes, customs, and social trends.

Strauss disputes the claim that democratic institutions do not justify courts advancing policies in the same way as democratically elected legislators' policy making. The Constitution and its amendments are themselves the products of bygone generations, not the outcomes of contemporary debates and deliberations. Neither does relying on periods of heightened political involvement—such as the Revolution, Reconstruction, and the New Deal—enhance current democracy because the outcomes of those political moments were also based on the decisions of past generations. Constitutional evolution, Strauss believes, is best achieved through common law constitutionalism. While federal judges are unelected, they are

54. David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEXAS L. REV. 1969 (2013).

embedded in the democratic process, as Strauss explains, through confirmation hearings, requiring the support of elected officials. Judges who after confirmation become outliers have little influence in the multimember institution made up of district, appellate, and supreme courts. What's more, setting of precedents, such as those dealing with racial and gender equality, often reflects popular sentiments. Strauss points out that judges typically do not deviate too far from popular opinion in order to retain the widespread support for judicial review.

In my article, I posit that constitutional interpretation should be guided by a normative maxim.[55] I use the term "maxim" to refer to the directive of constitutional authority. The character of the maxim is informed by values the people adopted into the Declaration of Independence and the Preamble to the Constitution. It mandates the proper scope of sovereign authority—setting and ordering its priorities. All three branches of government must abide by its formula for representative governance. That maxim or directive for legitimate authority can be stated briefly: The underlying purpose of government is to secure equal rights for the common good. This charge of legitimate governance has deontological and consequentialist components, calling for the protection of individual rights for the general welfare. The underlying maxim of the Constitution sets the rubrics of public conduct, requiring federal and state actors to develop, enforce, and abide by socially beneficial policies that safeguard fundamental rights—such as travel and privacy—on an equal basis.

On the federal level, all three branches of government must abide by the Constitution's formula for representative governance. The people's charge to representatives and judges is to advance policies likely to protect individuals' fundamental interests as the necessary means of furthering the common good. To take just one example of this methodological thinking, by enacting the ACA, Congress sought to provide coverage to benefit individuals and thereby improve public health. Publicly administered healthcare programs, which also include Medicaid and Medicare programs, are not only of a private nature. The government can reduce the risk of epidemics and the overall cost of emergency care, which is more expensive than preventative care, and thereby provide a means of furthering the general welfare. Congress is of course free to debate the legitimacy of specific terms of the ACA and to modify, improve, or even abolish the law; but whatever is put in its place should further both private and public interests. After laying out my interpretive methodology, I elaborate the relevance of a maxim-based approach to constitutional interpretation and then compare and contrast it with the views espoused by adherents of originalist, living constitutionalist, and legal process schools of thought. The article ends by demonstrating the maxim's relevance to contemporary legal issues.

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55. Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEXAS L. REV. 1609 (2013).

Mark Tushnet evaluates why people agree to make constitutions and how such documents articulate the views of the people.[56] Constitutions are necessary for establishing statehood, asserting sovereignty, and defining public powers. A constitution could represent the will of an existing people or provide the groundwork from which a people will be constituted. His essay describes the general process of drafting constitutions, but Tushnet does not delve into substantive decisions of adopting specific provisions. To illustrate his discussion, he relies on comparative constitutionalism, evaluating sections of the Indian, Canadian, United States, Irish, and German constitutions.

Constitutions are drafted by newly formed states emerging from colonial powers—as was the case in 1787–1789 in the United States and in the twentieth century in various African countries. A newly drafted constitution might also define a fresh relationship between the government and the people in a previously existing country whose political status has changed, as was the case in France. Contemporary norms for legitimate constitution making—the process of drafting and ratification—typically involve diverse groups of people. The advent of the Internet can facilitate the ability of various constituents to be engaged in that process, as was the case in Iceland where all citizens could make suggestions to constitutional provisions through crowdsourcing. The drafting process itself might not be so populist, as even in Iceland, someone had to choose from among the suggested constitutional provisions. This necessary selectivity did not diminish from the initial effectiveness of allowing ordinary people to exercise political power through crowdsourcing. This new openness differs significantly from the method used to negotiate constitutional terms in secrecy, as had occurred in the United States during the 1787 Philadelphia Convention. The definitional relevance of popular input does not imply that all drafting must be done in public; indeed, Tushnet points out that some of the difficult bargains can best be achieved in backrooms and over dinner tables.

The subject of Laura Underkuffler's article is the Supreme Court's rather ad hoc doctrinal approach to the Takings Clause of the Constitution.[57] She and other scholars argue that this area of law is "largely incoherent." While the right to property is typically thought to be a core constitutional interest that should warrant clearly stated protections and tests to restrain state intrusions, the Court has not provided a clear doctrinal test, as it has with other fundamental rights like free speech and freedom of religion. For instance, in the area of regulatory taking—where the owner retains title to the land but a government entity uses all or part of it for some public purpose—there are few clear rules about calculating the required compensation for the

56. Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEXAS L. REV. 1983 (2013).

57. Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEXAS L. REV. 2015 (2013).

land's substantial or total destruction. Ambiguous precedents also exist on related matters, such as whether an owner can bring a cause of action when the taken property has increased in value. Takings Clause cases are also unusual, as Underkuffler points out, because in them the Court makes no explicit mention of interpretive methodologies such as originalism, historical development, textual analysis, or popular understanding.

Underkuffler calls for a greater doctrinal clarity. The stakes in property cases differ from those in disputes involving personal autonomy because property claims are "rivalrous"; unlike the exercise of speech or religion, the losing party to property conflicts will be excluded from possession of the disputed land or object. Part of the solution lies, Underkuffler asserts, in a consistent definition of "property." The Court's current approach is to leave that definition to each state to parse on its own, which is unlike the uniform way it handles other individual rights. What is needed, she concludes, is a neutral and objective doctrine that recognizes the intrinsic balancing of private and public interests that results from changes in status quo through such matters as environmental regulation.

No single symposium can resolve the many outstanding debates about constitutional interpretation. The contributions in this issue provide food for thought for anyone seeking to develop legitimate interpretive methodologies and analytical reasoning, which are so critical to understanding and addressing pressing constitutional topics like affirmative action, marriage, voter registration, civil liberties, abortion, free speech, and establishment of religion.

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Maxim Constitutionalism: Liberal Equality for the Common Good

Alexander Tsesis*

This Article argues that the central purpose of U.S. constitutional governance is the protection of individual rights for the common good. Members of all three branches of government must fulfill that public trust through just policies and actions. The maxim of constitutional governance establishes a stable foundation for the rule of law, requiring government to function in a nonarbitrary manner. It provides the people with consistency and predictability about the scope of governmental powers and responsibilities.

The foundational dictate of governance is incorporated into the U.S. constitutional tradition through the Declaration of Independence and the Preamble to the Constitution. Those two documents reflect the national commitment to promulgating laws that are conducive to both the public good and the personal pursuit of happiness. The federal legal system must integrate protections of rights for the common good into statutes, regulations, and judicial opinions that address a plethora of social demands and problems.

The project of maxim constitutionalism runs counter to positivist skepticism about the validity of fundamental constitutional principles. This Article seeks to demonstrate that maxim constitutionalism reflects the normative underpinning of legal order that is compatible with pluralistic self-governance. The protection of rights for the common good facilitates the workings of a polity that tolerates debate and deliberation. The administration of laws for the public benefit enjoins tyrannical majoritarianism and abuse of state authority.

Like originalism, maxim constitutionalism utilizes historical analysis. But it departs from originalism by denying that the original meaning of the Constitution's text should be determinative. Maxim constitutionalism is a binding norm that is independent of any individual mind frame, whether past or present. In addition, though the forward progress of constitutionalism is informed by judicial opinions, it is not defined by them alone. Congress must also play a central role in identifying rights and promulgating statutes for their protection. Recognizing this bedrock purpose of governance distinguishes maxim constitutionalism from prominent strands of living constitutionalism by furnishing an objective and enduring standard for evaluating the legitimacy of governmental actions. The assessment of public conduct is not procedurally

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neutral but substantively rich in its account of how governmental actors should further the public good through a legal system designed to secure life, liberty, and the pursuit of happiness for an equal citizenry.

I. Introduction

Modern dilemmas about national politics, interstate commerce, antidiscrimination laws, and a host of other matters simply cannot be resolved by resort to the constitutional text alone. But where to turn for clarity? Surely the text must be the starting point, else the Constitution ceases to be the highest law of the land. Yet the myriad judicial doctrines, such as the reasonable protection of privacy, that have become part of the constitutional narrative are binding even though they recognize unenumerated interests.[1]

The Judiciary has been the final arbiter of the Constitution's obscure passages since *Marbury v. Madison*.[2] Yet the Court has not always been objective in its reading of the Constitution, often issuing political opinions influenced by the leanings of its members.[3] Its opinions and doctrines have

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1. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965). Writing for the Court, Justice Douglas declared:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. . . . Yet the First Amendment has been construed to include certain of those rights.

Id.

2. 5 U.S. (1 Cranch) 137, 178 (1803) ("The judicial power of the United States is extended to all cases arising under the constitution.").

3. *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 53–54 (2005) (asserting that "landmark Supreme Court decisions of the past one

often been influenced by political and social proclivities and contemporary trends.[4] Its ideological and doctrinal fluctuations clearly distinguish the entity from the fundamental U.S. law that is to guide its decision making. Stability of constitutional norms, therefore, cannot be based exclusively on judicial pronouncements.

The Legislative Branch has even less claim to constitutional objectivity than the Judiciary because senators and representatives are overtly interested in pursuing popularly supported policies, particularly during election years. While Congress is directly elected by the people to represent their interests, the Constitution's internal structure—particularly the separation of governmental functions—creates checks on lawmakers and their constituents that are meant to prevent tyrannical majorities from running roughshod over the rights of minorities.[5] Indeed, the colonists made their initial protests, which eventually led to independence and, consequently, constitutional ratification, against laws passed by the British Parliament,[6] evincing their rejection of legislative supremacism.

The notion that the Framers might have placed constitutional definition in the hands of the President is, of course, entirely specious. Of the three branches of government, the Framers believed the Executive Branch to be most prone to corruption.[7] The Declaration of Independence is a litany of accusations against the monarch.[8] A firm constitutional structure delimiting presidential powers and demarcating rights and principles is necessary to prevent the exploitation of military command to maintain autocracy.[9]

Checks and balances on the powers of all three branches limit government, setting limits on legitimate exercise of powers. The three

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hundred years" would have likely come out differently if the Court had "been differently but no less ably manned").

4. *See, e.g.*, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 6 (2010) (describing the concept of "balanced realism," which understands judges as being influenced by their own political and moral views and personal biases, but also as constrained by social and institutional factors).

5. *See generally* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961) (articulating the general need for a separation of powers to preserve liberty as well as the specific need to counteract the inevitable predominance of Congress with bicameralism, different methods of election, and different principles of action).

6. Widespread colonial opposition to authoritarian British legislation began with objections to the Revenue Act of 1764, followed by protests against the Stamp Act of 1765 and the Townshend Duties of 1767. DAVID J. BODENHAMER, THE REVOLUTIONARY CONSTITUTION 27–29 (2012); JOHN FERLING, JOHN ADAMS: A LIFE 37–58 (1992); *see* ALEXANDER TSESIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 18 (2008).

7. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 306 ("In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.").

8. THE DECLARATION OF INDEPENDENCE paras. 3–29 (U.S. 1776).

9. *See generally* THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 5 (responding to critical misrepresentations of the new presidential power by listing the specific powers granted to the Executive under the Constitution).

branches of government are not only bound by their separate spheres of authority but also, and more importantly, as this Article seeks to demonstrate, by the central purpose of protecting rights for the general welfare. By itself, structural design does not set values, like privacy and justice, that society requires judges, congresspeople, and presidents to safeguard against arbitrary intrusions. Substantive public values are necessary for resolving the conflicts of interest that are inevitable in a pluralistic society.

The Constitution, therefore, provides not merely rules of administration but also of social ethos. We might expect the underlying purpose of government to be based on some general principles, exclusive of written laws; on some intent of the framing or contemporary generation; on the will of national and state leaders; or on some combination of those factors. In a representative democracy with a written constitution, the document is a codification of social ethics conducive to the betterment of the populace as a whole.[10] This perspective differs from the originalist point of view, which emphasizes the subjective original intents of the Framers, the text's public meaning at the time of ratification, or some hypothetical reasonable Framer.[11] By embracing an overarching and enduring principle of representative governance, my approach also differs from that of living constitutionalists, who believe progress can be made through judicial precedents with essentially no reference to constitutional text.[12] Furthermore, I seek to identify a substantive meaning for the U.S. legal identity that undergirds procedural justice.

In this Article, I posit that a simple maxim is at the root of the Constitution. I will be using "maxim" to refer to the directive of constitutional authority. That maxim is informed by values the people

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10. *See* JOHN RAWLS, A THEORY OF JUSTICE 196 (1971) ("The citizen accepts a certain constitution as just, and he thinks that certain traditional procedures are appropriate."); Justice William J. Brennan, Jr., Speech Given at the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), *available at* http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html (sharing his view that constitutional interpretation requires consideration of "substantive value choices" and highlighting their application to modern circumstances); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasizing that the exercise of constitutional interpretation must involve a consideration of the written text but also expressing the view that what the text tells us is necessarily limited).

11. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (discussing the defects and benefits of originalism as opposed to other methods of constitutional interpretation).

12. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1726 (2003). Professor Strauss writes:

> [I]t is a persistent feature of American constitutional law that while arguments based on a careful parsing of the text of the Constitution sometimes play a large role in resolving relatively unimportant issues, the text plays essentially no operative role in deciding the most controversial constitutional questions (about discrimination, fundamental rights, and freedom of expression, for example), which are resolved on the basis of principles derived primarily from the cases.

Id.

adopted into the Declaration of Independence and the Preamble to the Constitution. It mandates the proper scope of sovereign authority, setting and ordering its priorities. All three branches of government must abide by its formula for representative governance. Stated briefly, I claim that maxim or directive for legitimate authority to be: *The underlying purpose of government is to secure equal rights for the common good.*

That is the people's charge to their representatives and judicial appointees through the original Constitution and its amendments. And it is that mandate by which the legitimacy of all federal and state conduct should be judged.

I begin this Article by laying out the structure of effective social maxims. I am interested in the extent to which a society can construct a social ethos through constitutional structure. Part II further examines the rhetorical effectiveness of maxims as well as how their inclusion in the Preamble and Declaration have influenced American constitutional history. Part III places my proposed constitutional maxim within the context of two constitutional interpretive methods: originalism and living constitutionalism. The Article ends by demonstrating the maxim's relevance to contemporary legal issues.

II. Constitutional Maxim

I begin this part of the Article by developing a general theory of legal maxims. After defining the concept, I discuss the seminal sources of what I call American maxim constitutionalism: the Declaration of Independence and the Preamble to the Constitution. Finally, I formulate a universal maxim that is derived from their general statements on rights and the common good.

The efficacy of any theory of constitutional interpretation will depend, in no small part, on its ability to appeal to common opinion without being in flagrant conflict with existing jurisprudence. This Article examines whether a unified constitutional maxim can appeal to the commonly accepted principles of normative, procedural, and structural justice.

A. Maxims

Maxims are rules for governing public or private behaviors. In this section I will speak of maxims in general terms and will flesh out their relation to the Constitution in greater detail later in the Article.[13]

In the private realm, maxims are ethical postulates for interpersonal behaviors. For anyone living in a community, maxims provide normative baselines for interacting with others. They are general statements of ethics that are applicable in specific circumstances. Their generality is likely to generate differences of opinion about content, relevance, and scope. Such differences are acceptable and, indeed, to be expected in a pluralistic society

13. *See infra* subpart II(C).

that treats individuals with respect. Government (with its constitution, statutes, regulations, judicial opinions, and directives) is created, in part, to establish the extent to which ethics are to be enforceable by public institutions. It must provide individuals with the opportunity to develop private moralities, be they religious or secular, that they consider to be uniquely favorable in their pursuits of happiness. Public obligation, on the other hand, in the form of laws that provide avenues of redress to prevent and punish disobedience, such as the protection of political involvement or the enjoyment of public spaces, also places restraints on personal choices deemed deleterious to some higher purpose.

In the public sphere, where maxims are the sources of laws and regulations, they are impartial statements of rules that establish the baselines for legal justification, government structure, and individual rights.[14] At the foundation of legal authority, that is, in the constitutional context, a universal rule must be proscriptive on government as a whole, setting a baseline for legitimate restraints and powers.[15]

Philosophers often associate the term "maxim" with Kantian philosophy,[16] so to avoid confusion, it is important at the outset for me to briefly differentiate my use of the term from its most common usage. Immanuel Kant used the term in relation to his categorical imperative: "Act according to a maxim which can at the same time make itself a universal law."[17] My explanation of constitutional maxims is related to, but not identical to, Kant's definition. He refers to a maxim as "a subjective principle of action."[18] Subjective states of mind help individuals in their

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14. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) (stating that the "rights of personal liberty" apparently must be protected under "[t]he fundamental maxims of a free government"); Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 7 n.8 (1955) (asserting that political maxims about government structure were among the principles embodied "in concrete political forms" that are tied to the populace); Horace H. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 9, 22 (1911) (stating that legislative infringements of "fundamental maxims of a free government" generally conflict with positive provisions "of both State and National organic law"); *see* D.S. Shwayder, *Moral Rules and Moral Maxims*, 67 ETHICS 269, 275 (1957) ("[M]axims ... will include principles of impartiality, universality, and the like. Learning the very language of 'right' and 'wrong' is conjugate with learning maxims. Functioning as they do, maxims want no moral justification, for they set the boundaries of moral justification.").

15. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297–99 (defending the Constitution's separation of powers by arguing that it is consistent with the separation-of-powers maxim as conceived by Montesquieu).

16. H.J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY 135–37 (Univ. of Pa. Press 1971) (1947) (explaining the centrality of maxims to Kant's doctrine).

17. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 53 (Thomas K. Abbott trans., The Liberal Arts Press 1949) (1785) (emphasis omitted) (setting out the form, subject, and characterization of maxims).

18. *Id.* at 38 n.7; *see also* PATON, *supra* note 16 (explaining the relation of Kant's subjective maxims to objective principles); *cf.* CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 57 (1996) (asserting that Kant's introduction of the "subjective principle" definition of a maxim was clumsy (internal quotation marks omitted)).

daily decision making and vary from person to person based on inclinations, while objective reasoning pertains to the conduct of all rational beings as moral agents using human reasoning to govern conduct.[19] A maxim is subjective if it is something that cannot be generalized and objective when it can be made an obligatory rule of conduct for all rational beings.[20] This distinction strikes me as unconvincing because no rational being can act on an objective imperative without filtering it through some form of individual consideration.[21]

The constitutional maxim I propose is more closely related to what Kant calls the "objective principle," by which he means "practical law."[22] In this Article, I do not discuss the subjective bases for rational and irrational moral actions; my focus is rather on a public, social maxim that establishes an aspirational goal for policy making. The constitutional maxim I formulate in this Article is that of a public ethos underlying the structural basis of governance. It is objective but not expected, or even anticipated, to produce uniform conduct (e.g., never lying, irrespective of the consequences), but rather complex, contextual thinking about ideals like liberty, equality, and justice that forces each generation to reassess and evaluate its legal culture embodied in policies, laws, judicial opinions, and other public practices.

The maxim I formulate need not be connected with Kantian philosophy or any advancement of it, such as Alan Gewirth's Principle of Generic Consistency: "Act in accord with the generic rights of your recipients as well as of yourself."[23] Benjamin Cardozo, before he had become a Supreme Court justice, may have been correct to say: "Our jurisprudence has held fast to Kant's categorical imperative . . . . We look beyond the particular to the universal, and shape our judgment in obedience to the fundamental interest of society that contracts shall be fulfilled."[24] But I do not think it necessary to import Kantianism into constitutional law; indeed, there are too many raging debates about Kantian notions of personal autonomy and its obligation to public duties for me to do them any justice in an article of this scope.[25] Jeremy Waldron has recently pointed out that personal autonomy deals with a person's decision to follow certain desires, while Kantian moral autonomy

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19. *See* Ping-cheung Lo, *A Critical Reevaluation of the Alleged "Empty Formalism" of Kantian Ethics*, 91 ETHICS 181, 185 (1981) (differentiating Kantian subjective and objective ends).

20. Peter Welsen, *Schopenhauer's Interpretation of the Categorical Imperative*, 61 REVISTA PORTUGUESA DE FILOSOFIA 757, 761 (2005).

21. *See* Reginald Jackson, *Kant's Distinction Between Categorical and Hypothetical Imperatives*, 43 PROC. ARISTOTELIAN SOC'Y 131, 155–56 (1943) (arguing that Kant's differentiation between maxims as subjective and law as objective should be rejected).

22. KANT, *supra* note 17, at 38 n.7.

23. ALAN GEWIRTH, REASON AND MORALITY 135 (1978) (emphasis omitted).

24. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 139–40 (1921).

25. For an exposition of this debate and an attempt to reconcile personal autonomy by theorists like Joseph Raz and contemporary Kantians like Onora O'Neill, see generally Robert S. Taylor, *Kantian Personal Autonomy*, 33 POL. THEORY 602 (2005).

relates to an individual's universal obligation to other rational persons.[26] This Article deals with neither of those two subjects. I am, rather, concerned with the central obligation of representative democracy in general and its application to the United States in particular.

The maxim that undergirds the Constitution is not a statement of personal obligations to autonomous, moral others; rather, it is a statement of the people's expectations from a representative government answerable to the will of its constituents and meant to benefit the public good. From the moral standpoint, the obligation accrues from the nature of each individual being's ability to act autonomously; from the constitutional standpoint, the maxim is binding on government actors and concerns their use of power to fulfill obligations as citizens exercising the public trust. The maxim of constitutional governance is a general statement of purpose, public objective, and aim that universally applies to all public action.

A prescriptive maxim in a representative polity dictates universal governmental obligations but does not provide the detailed content that the Constitution fills out, statutes detail, and judicial rulings interpret. Maxims' statuses as the undergirding precepts of governance place a duty on all three branches of government to set policies consistent with their dictates.[27] James Madison, in a similar vein, related his hope that the American people would demonstrate "their devotion to true liberty, and to the [C]onstitution" by establishing a national government that would maintain "inviolably the maxims of public faith, the security of persons and property, and encourage[], in every authori[z]ed mode, that general diffusion of knowledge which guarantees to public liberty its permanency, and to those who possess the blessing, the true enjoyment of it."[28] The nature of government must be described in general terms against which the uses and abuses of authority can be tested.

The Constitution sets mandatory guidelines against which ordinary statutes and government actions must be evaluated. Any state conduct that violates its precepts is illegitimate either on its face or in its application.[29] The lasting effect and influence of a constitutional principle are based not merely on its written authority but on its grounding in acceptable legal mores, which are themselves predicated on decades, or sometimes even

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26. Jeremy Waldron, *Moral Autonomy and Personal Autonomy*, *in* AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS 307, 307 (John Christman & Joel Anderson eds., 2005).

27. For a helpful definition of maxims in the moral realm, see Talbot Brewer, *Rethinking Our Maxims: Perceptual Salience and Practical Judgment in Kantian Ethics*, 4 ETHICAL THEORY & MORAL PRAC. 219, 222 (2001) ("Maxims . . . come into view when we adopt the interpretive posture that construes behavior as action, hence as morally assessable.").

28. James Madison, *President's Message*, N.Y. COM. ADVERTISER, Dec. 6, 1816, at 2.

29. For divergent views on facial and as-applied constitutional challenges, compare Scott A. Keller and Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes* In Toto, 98 VA. L. REV. 301 (2012), with Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

centuries, of cultural, political, and judicial developments. A Constitution that benefits only the few—one that the majority of the population does not wish and that favors just the privileged—has failed to live up to the common good by excluding segments of society from the equality of goods.

A written Constitution and its implicit norms must be universal in their treatment of people in ways that enable society to shed past practices of discrimination, chauvinism, bigotry, and other historical forms of intolerance. The Equal Protection Clause, Privileges and Immunities Clause, Due Process Clause, Guarantee Clause, and a host of other portions of the Constitution that I will discuss later in more detail, play a role in fleshing out the contours of representative democracy. They are general and require the wisdom of all segments of society, and they benefit from a history of legal trial and error.[30] Respect for tenets best assures compliance with constitutional norms, which nevertheless remain ineffective without the regulations needed to morph ideals into enforceable policies. Without civil rights laws—be it the Civil Rights Act of 1964,[31] the Voting Rights Act of 1965,[32] or the Americans with Disabilities Act of 1990[33]—those clauses of the Constitution remain naught but unfulfilled generalities. The simple maxim, "Treat other people equally," is meaningful but publicly unenforceable unless legislators through statutes, judges through judgments, and the executive through administrative agencies parse who is subject to the imperative (is it all three branches of government or just some of them?), what treatment is due (is it action or inaction?), whom "people" refers to (is it all people or only a certain class of them?), and how equality should be interpreted within the context of various social and individual interests. Specific laws are elaborations on more general clauses of the Constitution—like the Equal Protection and Necessary and Proper Clauses—and overarching principles of government—like each person having a coequal entitlement to a fair administration of the laws. The elements of statutes, therefore, need not be explicitly stated in the Constitution. In enacting them, Congress should flesh out its explicit and implicit Article I powers, without abridging the underlying purpose of representative democracy. The Judiciary, in turn, should either defer to the legitimate compromises that

30. *Compare, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 548 (1896) ("[W]e think the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . . ."), *with* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("[W]e hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

31. Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h-6 (2006).

32. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

33. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, 47 U.S.C. §§ 225, 611 (2006).

lawmaking requires or strike laws that cater to special interests in violation of constitutional limits.

People are more likely to abide by reasonable proscriptions that positively affect the common good and protect individual rights.[34] Government institutions enjoy broader support through consistent and neutral application of fair statutes that protect constitutional entitlements.[35] Legislation consistent with constitutional mores is more likely to receive widespread support and compliance, even when it places limits on conduct.[36]

For the sake of predictability and clarity, maxims must be based on some authoritative text that supplies key aspects of governance. Even democracies that have no written constitutions have some statement of purpose. For instance, in England the Magna Carta sets the baseline for procedural fairness and bars executive tyranny.[37] Israel, another representative democracy that operates without a written constitution, holds to a principle of equality found in its Declaration of Establishment, which requires the nation to "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture."[38] Israel's Basic Law also sets the ideal that in a Jewish and democratic state, "All persons are entitled to protection of their life, body and dignity."[39]

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34. *See* Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1057–58 (2012) (referring to social theory, which posits that states are more likely to elicit compliance when they rely on legitimacy—established through fairness and consistency).

35. *Id.* at 1052–58 (surveying research showing "that it is common for people to evaluate institutions, including governmental entities, not solely on the basis of the goods they produce, but also on the basis of whether they behave in a consistent, neutral fashion").

36. I am here extending Immanuel Kant's concept of moral sensitivity and justified "moral salience" to the constitutional realm. *See* BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 78, 83 (1993) (explaining that a "Kantian moral agent" must be "trained to perceive situations in terms of their morally significant features" and that "[g]ross failures of perception . . . would be counted as marks of moral pathology").

37. *See* Hurtado v. California, 110 U.S. 516, 531–32 (1884) (asserting that the Magna Carta "[a]pplied in England only as a guard against executive usurpation and tyranny"); Gardner v. Trs. of the Vill. of Newburgh, 2 Johns. Ch. 162, 165–66 (N.Y. Ch. 1816) (stating that a riparian right is "an ancient and fundamental maxim of common right to be found in *magna charta*"); FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND 368 (2d ed. 1776) (reviewing the Magna Carta "maxim" that "no man shall be taken and committed to prison, but by *judicium parium, vel per legem terrae*, that is, by due process of law"); Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 602 (2008) (stating that an "ancient maxim of fairness" is contained in "the Magna Carta's injunction that justice delayed is justice denied" (citing MAGNA CARTA cl. 40 (1215) ("To no one will we sell, to no one deny or delay right or justice.")).

38. Declaration of the Establishment of the State of Israel, 5708–1948, 1 LSI 3 (1948).

39. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391. Several other pluralist democracies have religious clauses as universal protections of rights within their written constitutions. For instance, the Constitution of Ireland is promulgated, "[i]n the Name of the Most Holy Trinity, from Whom is all authority and to Whom . . . all actions . . . must be referred," and acknowledges, "all our obligations to our Divine Lord, Jesus Christ." IR. CONST., 1937, pmbl., *available at* http://www.taoiseach.gov.ie/eng/Historical_Information/About_the_Constitution,_Flag,_Anthem_Harp/Constitution_of_Ireland_August_2012.pdf. The Polish constitution asserts that the

Even a system governed with a unified central purpose requires a multiplicity of precepts to guide more specific areas of law: To state the obvious, a one-clause statement of national purpose would never be sufficient to provide the accountability required of representative governance. Constitutional principles in a representative democracy must be general enough to cover a wide variety of foreseeable and unexpected circumstances that are likely to affect the populace as a whole, rather than only a portion of the population.[40] The Preamble, the Equal Protection Clause, and the Due Process Clause are pregnant with notions of public safety, evenhandedness, and fair administration but on their face are too broad to apply to specific cases without additional elaboration.[41] Those portions of the Constitution embody ideals that the nation has recognized through a complicated system of ratification[42] for the benefit of its citizens and the polity as a whole. The Supremacy Clause holds all levels of government—the federal, state, and local levels—to some nationally recognized norms.[43] Parts of the Constitution are purposefully formulated in

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country's "culture [is] rooted in the Christian heritage of the Nation and in universal human values." KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] pmbl., *available at* http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm. The Greek Constitution sets out that it is written, "[i]n the name of the Holy and Con-substantial and Indivisible Trinity." 2008 SYNTAGMA [SYN.] [CONSTITUTION] pmbl., *available at* http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf. For a more complete list and discussion of religious clauses in constitutions see SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 64–70 (2012).

40. R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 36 (1981) ("A principle which is going to be useful as a practical guide will have to be unspecific enough to cover a variety of situations all of which have certain salient features in common."); Ray Nichols, *Maxims, "Practical Wisdom," and the Language of Action: Beyond Grand Theory*, 24 POL. THEORY 687, 691 (1996) ("Maxims' brevity, pith, and point enable them to catch attention and catch in the memory. When formulated as terse tropes, they compress much into little, so that they can be variously acted on.").

41. *See* U.S. CONST. pmbl.; *id.* amend. XIV, § 1 (Due Process and Equal Protection Clauses); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181 (1999) (relating the principles of the Preamble "to the principle of universal human rights justifiable by reason in the service of self-government"); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 711 (2000) (stating that racial profiling "violates fundamental principles of human dignity at the core of the Equal Protection Clause"); Alexander Tsesis, *Contextualizing Bias Crimes: A Social and Theoretical Perspective*, 28 LAW & SOC. INQUIRY 315, 334 n.26 (2003) (reviewing FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999)) (asserting that the Due Process and Equal Protection Clauses are meant to protect human rights).

42. U.S. CONST. art. V (establishing the process for amending the Constitution); *id.* art. VII (providing the process for initial ratification of the Constitution).

43. Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007 n.177 (2007) ("Supreme Court review of state court judgments and the availability of the inferior federal courts to assure the constitutionality of state laws and the states' compliance with federal norms under the Supremacy Clause are fundamental to the overall operation of the U.S. Constitution and the American court systems."); Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 236 (2012) ("From a purely structural standpoint, Supreme Court review of state court decisions under the

general terms to grant federal and state governments interpretational and experimentational latitude while staying true to national ideals.[44]

Ordinary people untrained in the law need not remember the precise language of the Constitution. However, for the principles to have widespread impact, the public must have an accurate understanding of its substance to hold government accountable to established standards of public conduct. Such an understanding is critical for the internalization of ideals that can help evaluate the legitimacy of state and private conduct. For the people to accept a public policy, they must regard it to be in accordance with some broadly conceived ideal of governance, such as fairly apportioned representative democracy. That ideal encompasses a generally accepted public norm of political self-determination, given more specificity in the Fifteenth and Nineteenth Amendments, from which more detailed legal prescriptions, like the Voting Rights Act of 1965, can be developed.

In a federal system, the Constitution has a binding effect, setting common norms for state and federal governments.[45] States can diverge widely in their specific policies, but courts remain essential to deciding whether states' laws violate baseline structural tenets, such as those of democratic representation;[46] substantive principles, such as those of racial equality;[47] and procedural limitations on the use of power, such as personal jurisdiction.[48] Those basic elements of government can be modified or

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Supremacy Clause might be sufficient to prevent state courts from straying too far from desirable national norms or engaging in questionable interpretations of the federal Constitution.").

44. States are often regarded as laboratories of political experimentation. This view comes from Justice Louis D. Brandeis's statement in a case about Oklahoma's right to pass a regulation for the ice industry. *New State Ice Co. v. Liebmann* has become best known for the statement: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Scholars tend to quote that passage without continuing on to what comes after it, which points to the supremacy of certain federal standards: "This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable." *Id.* (footnote omitted).

45. *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (incorporating the Sixth Amendment protection requiring states to provide legal counsel for defendants in criminal cases who cannot afford to pay for an attorney); Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (incorporating the Fourth Amendment protection against unreasonable searches and seizures to state proceedings); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment protection of free speech against the states).

46. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (holding that state congressional districts must adhere to the principle of "equal representation for equal numbers of people"); Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960) (holding that an Alabama law should be overturned if it were proven that it redrew voting lines to exclude black voters).

47. *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (declaring Virginia's antimiscegenation statute unconstitutional); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overturning the Topeka school district's policy of racial segregation).

48. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing the minimum contacts standard for personal jurisdiction); Burger King Corp. v. Rudzewicz, 471 U.S.

wholly changed by Article V amendments, not ordinary statutory initiatives.[49]

The Constitution has so rarely been altered, with only twenty-seven amendments having been ratified in the course of the document's two-and-a-quarter centuries of existence, that a response to contemporary conditions has often required a modified understanding of the ancient text.[50] Any alteration of meaning through the common law, statutes, or executive orders must nevertheless maintain fidelity to the Declaration of Independence and Constitution's main purpose of securing the common good by protecting inalienable rights.[51] This cornerstone of expanding constitutional doctrine provides a focal point for differentiating between legitimate and illegitimate changes. A maxim of constitutional government establishes consistent, fundamental standards for rational social advancement.

462, 472–75 (1985) (determining that jurisdiction over a defendant can be established through purposeful availment, reasonable anticipation, and relatedness).

49. In this Article I do not have space to address whether so called "superstatutes" may also achieve constitutional change. For an expostulation of superstatutes, see WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010). They argue that "[a]s a matter of law's hierarchy of formal authority, superstatutes are subordinate to the Constitution—but in the functional terms of public values and social norms, superstatutes resemble Constitutional rules" in a variety of ways. *Id.* at 27. Jack Balkin, while not using the term "superstatute," gives examples of entitlements that have become so fundamental to the United States' "constitutional regime":

> Social Security, Medicare, and other social safety-net programs; national fair labor and consumer protection standards; federal workplace safety and environmental protection regulations; a large federal bureaucracy to carry out these programs; centralized fiscal and monetary policies; an enormous peacetime defensive capability complete with elaborate intelligence programs and permanent standing armies . . . ; civil rights laws . . . ; the Voting Rights Act and other regulations of democratic practice; equal rights for women; elaborate rules of criminal procedure; and robust free-speech protections.

Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1135–36 (2012). To this list of statutes born on the convictions of social conscience should be added immigration and naturalization regulations, the Federal Reserve system, the administration of public safety measures with national implication through the Food and Drug Administration, the national aviation system, interstate highways, and a variety of programs regarded as essential federal entitlements. But I remain unconvinced that these carry constitutional force because any of them can be modified, tweaked, or even altered without going through the complexities of the amendment process.

50. *See Brown*, 347 U.S. at 489–90, 492–93 (discussing how changes in public education required a different reading of the Fourteenth Amendment).

51. Jack Balkin has similarly explained that constitutional law develops through "various constructions, institutions, laws, and practices that have grown up around the text." JACK M. BALKIN, LIVING ORIGINALISM 35 (2011) [hereinafter BALKIN, LIVING ORIGINALISM]. Balkin is informed by the aspirational values that are embedded in the semantics of the constitutional language. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 231–32 (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION] ("Fidelity to original semantic meaning is consistent with a wide range of possible future constitutional constructions that implement the original meaning and that add new institutional structures and political practices that do not conflict with it."). This Article, on the other hand, claims there is a universal principle of liberal equality for the common good that undergirds the text of the Constitution and governs constitutional heuristics.

Inevitably, in a pluralistic democracy like the United States, differences will arise in emphasis and understanding of history and constitutional norms. To avoid endless conflicts and constitutional crises, the Supreme Court sets authoritative definitions of constitutional meaning.[52] Several scholars, however, have argued against judicial supremacy in interpretation, expressing the view that the Necessary and Proper Clause, the Commerce Clause, the Reconstruction Amendments, and several other constitutional provisions empower Congress to also identify and enact laws for the protection of fundamental rights.[53] More legislative involvement in interpretation would allow ordinary citizens to further engage in the development of policies for the protection of rights and the advancement of general welfare.[54]

While maxims are overarching legal standards, they are not identical to legal rules. Maxims are first-order generalizations. They provide broadly worded principles for governance, not algorithms for proscribing specific conduct or elements of liability.[55] Maxims provide the background information for consistent, coherent, predictable, and procedurally even-handed governance. Take, for instance, the maxim that all people have inalienable rights. For the time being, I am taking this as a given to set the parameters of the argument, but will link it to the Declaration of Independence and analyze it later in the Article.[56] Such a concept is necessary for determining whether *Brown v. Board of Education*[57] or *Plessy*

52. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."). The Supreme Court claims to itself the exclusive prerogative to define substantive rights implicit in Section One of the Fourteenth Amendment, leaving to Congress the subordinate power of correcting state violations of rights that the Court has previously identified. *See* City of Boerne v. Flores, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law.").

53. *See, e.g.*, TUSHNET, *supra* note 41, at 13 (arguing that responsible public officials can repudiate the theory of judicial supremacism); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–23 (1999) (criticizing the Court for narrowly construing congressional power under Section Five of the Fourteenth Amendment); Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 697, 732, 736 (2009) (exploring the basis for legislative development of civil rights laws that further fundamental constitutional principles without violating Supreme Court precedents).

54. *See* Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 718 (2012) (criticizing the Supreme Court's decision in *City of Boerne* as "effectively restrict[ing] the people from developing constitutional values through their elected representatives and plac[ing] the exclusive power to protect rights in the only unelected branch of government").

55. *See* Nancy Sherman, *Wise Maxims/Wise Judging*, 76 MONIST 41, 41 (1993) (describing the categorical imperative in nonalgorithmic terms as requiring assessment of "the salient features of complex situations," but not as determinative of precise conduct divorced from relevant specificity).

56. *See infra* section II(B)(1).

57. 347 U.S. 483, 493 (1954) (holding that segregation of children in public schools based solely on race denies equal protection of the laws guaranteed under the Fourteenth Amendment). If the Court had stopped with *Brown*, an outside observer might have said that segregation was only

v. Ferguson[58] is the correct interpretation of the Equal Protection Clause. When the Equal Protection Clause is taken to mean each person is equal to others by virtue of his or her humanity and is an intrinsic member of the community whose collective good composes general welfare, then systematic separation and degradation of the races runs counter to a core constitutional value.

Maxims are statements of overarching legal commitments to principles like sovereignty, federalism, justice, and equality. By themselves, maxims and principles are morally and socially pregnant; however, they only become enforceable through specific laws and judicial opinions. This is as much true of the civil rights clauses, such as the Equal Protection Clause, as it is for structural parts of the Constitution, such as the multiple clauses defining the functions of the three branches of government.[59]

The maxim that government must treat people with equal dignity for the common good, which I claim is at the root of U.S. constitutionalism, acquires meaning within the context of specific constitutional clauses and their legal and cultural interpretation. Legal meaning partly becomes ingrained in precedent. Standing alone, maxims are necessary to resolving legal disputes, but they are not sufficient for deciding outcomes. Precedents establish

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prohibited at public elementary and secondary schools. Instead, drawing on the decision's principles of equality and civic participation, rather than narrowly corralling it within the confines of the specific holding, the Court followed up with a series of per curiam desegregation opinions that often cited *Brown* but rarely gave any analysis for extending its holding to segregated facilities unrelated to education. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61, 61–62 (1963) (per curiam) (relying on *Brown* to find that the segregation of public facilities, such as courtrooms, is constitutionally impermissible); Turner v. City of Memphis, 369 U.S. 350, 351, 353 (1962) (per curiam) (holding that public segregation in airport dining facilities violates the Fourteenth Amendment); Holmes v. City of Atlanta, 223 F.2d 93, 94–95 (5th Cir.), *vacated per curiam*, 350 U.S. 879 (1955) (vacating a decision that had declared the segregation of public golf courses to be constitutional); Dawson v. Mayor of Balt. City, 220 F.2d 386, 387 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (finding that racial segregation of public beaches and bathhouses was not constitutionally permissible); Bynum v. Schiro, 219 F. Supp. 204, 205–06 (E.D. La. 1963), *aff'd per curiam*, 375 U.S. 395 (1964) (granting injunctive relief for the desegregation of a city auditorium).

58. 163 U.S. 537, 548 (1896) (deciding that forced segregation on public carriers did not violate the Equal Protection Clause).

59. The failure to mention state sovereignty in the text of the Constitution is in contrast with the Articles of Confederation which stated: "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION OF 1781, art. II. However, given passages like the Tenth Amendment and the Senate Composition Clause of Article One, Section Three, that presume sovereign states and the federal government's relationship to them, federalism is clearly embedded into the Constitution. And while separation of powers is not explicitly named in the Constitution, the document's structure and history justify it. *See* Morrison v. Olson, 487 U.S. 654, 689–90 (1988) (holding that in judicial determinations of whether Congress can restrict the President to remove executive officers, the analysis must be "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed'"); INS v. Chadha, 462 U.S. 919, 957–59 (1983) (holding a legislative veto provision to be an unconstitutional violation of the doctrine of separation of powers).

analytical tools—such as balancing tests[60] and levels of scrutiny[61]—for constitutional construction. For instance, the truism that courts must protect constitutional rights against government intrusion provides the necessary condition for legitimate adjudication[62] but by itself is insufficiently detailed for resolving specific property, contract, estate, and other disputes. Stare decisis provides specificity for achieving the ends established through general statements of socio-legal norms. In the courts, the people effect constitutional change through individual cases or class actions that are ripe for adjudication, brought by those with proper standing.

The people also play a legislative role by lobbying their representatives. The maxim that "state actors treat similarly situated people alike"[63] sets a broadly stated norm of governmental action. Its enforcement is made possible by the Equal Protection Clause, which, in turn, statutes translate into a cognizable cause of action. Title VII,[64] for instance, creates a claim with

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60. For a history of the evolution of the judicial balancing tests see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 18, 28, 131 (1992).

61. *See* G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1184–85 (2005) (relating the evolution of the tiered scrutiny standards from *Carolene Products* through the Warren, Burger, and Rehnquist Courts).

62. This maxim is embodied in the seminal *Carolene Products* footnote. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). At its core, Justice Harlan F. Stone's famous statement asserted the legitimacy of judicial oversight of state actions that arbitrarily harm minority interests: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 153 n.4. That dictum later became the cornerstone for heightened judicial scrutiny. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1288 (2007) (following the development of the Court's position that some rights enjoy a preferred position).

63. *See* McDonald v. City of Saint Paul, 679 F.3d 698, 705 (8th Cir. 2012) ("In general, the Equal Protection Clause requires that state actors treat similarly situated people alike." (internal quotation marks omitted)); Rylee v. Chapman, 316 F. App'x 901, 907 (11th Cir. 2009) (per curiam) ("The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people alike."). The Supreme Court regards the Equal Protection Clause to be "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). This maxim is fleshed out in a variety of other cases holding that the state cannot treat similarly situated persons differently absent some reason. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 597 (2008); Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring); Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam). The maxim of equality evolved significantly earlier than the ratification of the Fourteenth Amendment. More than two thousand years ago, the philosopher Aristotle wrote that, "Democracy . . . arises out of the notion that those who are equal in any respect are equal in all respects; because men are equally free, they claim to be absolutely equal." 2 ARISTOTLE, *Politics*, *in* THE COMPLETE WORKS OF ARISTOTLE V.1.1301a28–1301a30, at 1986, 2066 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation).

64. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination:

> (a) Employer Practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

specific elements and available remedies meant to hold responsible employers for violating the maxim of equality by infringing the rights of employees because of their sex, race, religion, color, or national origin.[65] On the structural side, federalism is nowhere explicitly found in the Constitution, but precedent and U.S. culture have made it among the most stable constitutional values for gaining an individual voice in the administration of goods and services. This unwritten, structural constraint on the uses of federal power is linked to specific provisions of the written Constitution, such as the Tenth Amendment,[66] Guarantee Clause,[67] Necessary and Proper Clause,[68] and Supremacy Clause.[69] At a more concrete level, the Court has found that Congress cannot commandeer state legislatures to avoid violating the sovereignty of the states.[70] Congress may nevertheless set limits in safeguarding individuals' ability to enjoy the benefits of organized society

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> conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2006).

The Supreme Court upheld Title VII under the Commerce Clause, but Congress passed the statute pursuant to that and its Fourteenth Amendment enforcement power. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1976) (Brennan, J., concurring) ("Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause and in § 5 of the Fourteenth Amendment." (citation omitted)); Jones v. Am. State Bank, 857 F.2d 494, 498–99 (8th Cir. 1988) ("Title VII was passed pursuant to congressional authority under section 5 of the fourteenth amendment.").

65. 42 U.S.C. § 2000e-2 (2006).

66. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 801 (1995) (asserting that the Tenth Amendment differentiates between the powers of the federal and state sovereigns).

67. The Supreme Court has stated that the Guarantee Clause "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights." Printz v. United States, 521 U.S. 898, 919 (1997) (quoting Helvering v. Gerhardt, 304 U.S. 405, 414–15 (1938)).

68. *See* United States v. Comstock, 130 S. Ct. 1949, 1967–68 (2010) (Kennedy, J., concurring) (stating that the "essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; [this] is a factor suggesting that the power is not one properly within the reach of federal power").

69. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (asserting that "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause").

70. *See* New York v. United States, 505 U.S. 144, 161 (1992) (asserting that Congress cannot "commandeer" the state legislative process (internal quotation marks omitted)).

through laws like the Patient Protection and Affordable Care Act[71] and Medicaid.[72]

B. *Textual Source of Constitutional Directive*

Authoritative text is needed to transform maxims from a series of unrealized goals into enforceable norms. In the United States, the Constitution is regarded to be the sole fundamental law with supreme authority over any other public mandate. Its provisions incorporate the more fundamental principles of justice and political accountability, which predate the Constitution and are predicated on the postulate that all people have equal intrinsic rights (to such conduct as travel, speech, the formation of relationships, safety, etc.) that government must protect for the public good.[73] Official misconduct that violates this objective of governance is illegitimate and undermines the people's sovereign directive to form government responsible for representing their interests and protecting their individual, nonintrusive pursuits of happiness.

The maxim of equal rights for the public good is an abstract concept, one that has moral or philosophical value but only becomes a constitutional norm through formal adoption. At the country's founding, the Declaration of Independence adopted a normative structure that recognized the equality of human rights,[74] asserted that the people are the source of sovereignty,[75] and required public officers to answer to the will of their constituents.[76]

The Declaration's statement of national principles is often overlooked in constitutional discourse but should be understood to be relevant to interpretation of the Constitution's text and ethos.[77] The Declaration of Independence is a substantive statement of rights and representative democracy. The Preamble to the Constitution is likewise typically thought to be unenforceable,[78] despite its overarching statements of national purposes

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71. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012) (asserting that "[n]othing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use" but prohibiting Congress from penalizing nonparticipating states).

72. *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 512 (1990) (determining that a "provision of federal funds is expressly conditioned on compliance with the amendment and the Secretary is authorized to withhold funds for noncompliance with this provision").

73. *See* Alexander Tsesis, *Undermining Inalienable Rights: From* Dred Scott *to the Rehnquist Court*, 39 ARIZ. ST. L.J. 1179, 1184–86 (2007) (surveying Revolutionary literature and determining that "an undeniable commitment to inalienable rights permeated early American theory of government").

74. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

75. *Id.*

76. *Id.*

77. *See* Tsesis, *supra* note 54, at 701–10 (discussing the legitimate role of the Declaration of Independence in constitutional interpretation).

78. Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 119–23, 123 n.22 (1990) (explaining the "uncontroversial and perfectly consistent" proposition—argued by

and governmental obligations. These two texts jointly require all three branches of government to protect rights for the common good. Both the Declaration and the Preamble contain guiding principles about governmental powers, duties, and limitations. Despite the Supreme Court's relative neglect of those documents, throughout the nation's history progressive movements have incorporated them into their demands for social change.[79]

1. Declaration of Independence.—The Continental Congress adopted the Declaration of Independence to explain the purposes of the American Revolution and set norms for representative politics.[80] A review of principles the nation espoused in this statement of its ideals reveals contours of the founding social maxim to safeguard inalienable rights and the pursuit of happiness through representative governance.[81] The Declaration asserted some of the ideals of representative governance that were often voiced in the colonies prior to its adoption.[82] It left a deep imprint on the civic expectations of its contemporaries and those of future generations.[83]

Justice Harlan and reiterated by other courts—that the Preamble to the Constitution "has never been regarded as the source of any substantive power conferred on the Government of the United States").

79. *See, e.g.*, Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 38–41 (2005) (highlighting Virginia and Francis Minor's use of the Preamble to support their argument for women's suffrage); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 362 (1993) (referencing famous speeches that invoked the "eternal" language of the Declaration of Independence—Lincoln's Gettysburg Address and Martin Luther King Jr.'s speech at the Lincoln Memorial—and their associated social movements to show that "[t]hroughout our history, most Americans have regarded the Declaration of Independence as expressing the greatest ideals of this country").

80. CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 6 (1922) ("The ostensible purpose of the Declaration was, therefore, to lay before the world the causes which impelled the colonies to separate from Great Britain."); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1222 (1987) (discussing the "basic normative principles" announced in the Declaration of Independence).

81. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

82. Two signers of the Declaration commented on the document's reliance on commonly accepted colonial thought. Richard Henry Lee and John Adams asserted that the document was unoriginal. To their claims, Jefferson responded that he had all along wanted it to reflect the political climate of America rather than his personal views. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 342, 343 (Paul Leicester Ford ed., N.Y.C., G.P. Putnam's Sons 1899) (stating that the Declaration of Independence "was intended to be an expression of the American mind"). Adams, who would later serve as President of the United States, and one of the most powerful representatives to the Continental Congress, wrote that there "is not an idea in [the Declaration] but what had been hackneyed in Congress for two years before." 2 JOHN ADAMS, *Autobiography*, *in* THE WORKS OF JOHN ADAMS 503, 514 n.1 (Charles Francis Adams ed., Bos., Charles C. Little & James Brown 1850).

83. *See* ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 1 (2012) ("A closer look at more than two centuries of speeches and writings reveals that the Declaration of Independence has had a remarkable influence on American policy making.").

The Declaration's statements against George III contrasted the policies of autocratic rule with the newly founded country's duty to safeguard the inalienable rights of the people.[84] Some paragraphs condemned the British monarch for refusing to respond to colonists' petitions for representation in Parliament.[85] Colonial representatives also adopted the statement that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."[86] Thomas Hartley, a member of the Pennsylvania ratifying convention, explained the meaning of this section of the Declaration:

> As soon as the independence of America was declared in the year 1776, from that instant all our natural rights were restored to us, and we were at liberty to adopt any form of government to which our views or our interests might incline us.—This truth, expressly recognized by the act declaring our independence, naturally produced another maxim, that whatever portion of those natural rights we did not transfer to the government, was still reserved and retained by the people . . . .[87]

Elsewhere, an unidentified author wrote that the United States determined that "if universally embraced, . . . the maxim, that 'all men are born free, equal, and independent'" would "render the human race secure and happy."[88] These statements were only the first attempts at understanding the Declaration's implications for constitutional democracy. Every generation since then has put effort into explaining and defining the document's meaning.[89]

The Declaration's axiomatic statement about human nature and government obligations was inspirational to a variety of progressive social movements, like the feminist movement and the abolitionist movement, who understood its ideology to apply to all the people, not merely to white men.[90]

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84. THE DECLARATION OF INDEPENDENCE paras. 6–7 (U.S. 1776).

85. *Id.* paras. 5, 30.

86. *Id.* para. 2.

87. *State Convention, Friday, November 30*, INDEP. GAZETTEER (Phila.), Jan. 3, 1788, at 2.

88. *From the Republican Ledger*, The Examiner, *No. VII*, CONST. TELEGRAPHE (Bos.), Feb. 1, 1800, at 1 (asserting this statement of human rights in defense of the French Revolution).

89. *See* Colloquy, *Fidelity as Synthesis*, 65 FORDHAM L. REV. 1581 (1997).

90. *See, e.g.*, DECLARATION OF SENTIMENTS AND CONSTITUTION OF THE AMERICAN ANTI-SLAVERY SOCIETY 3–4 (Phila., Anti-Slavery Soc'y 1861), *available at* http://archive.org/stream/declarationofsen00amer#page/n5/mode/2up (calling the Declaration of Independence and its guarantee of "life, LIBERTY, and the pursuit of happiness" the "corner-stone" of the country); THE PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 15TH AND 16TH, 1851, at 11 (N.Y.C., Fowlers & Wells 1852), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/naw:@field%28DOCID+@lit%28rbnawsan8287 div1%29%29. The resolution advanced at that convention stated:

> *Whereas*, according to the Declaration of Independence of the United States, all men are created equal and endowed with inalienable Rights to Life, Liberty, and the pursuit of Happiness; therefore, *Resolved*, That we protest against the injustice done to Woman, by depriving her of that Liberty and Equality which alone can promote

While their views did not figure into antebellum government decisions, these social activists were instrumental in developing the cultural progress needed for formulating the Due Process, Citizenship, Privileges or Immunities, and Equal Protection Clauses of the Fourteenth Amendment.[91]

Prior to the ratification of the Constitution, the Declaration clearly committed the nation to rely on the "just [P]owers" derived "from the Consent of the Governed" in order "to secure" equal liberty for all Americans, irrespective of their state of origin.[92] The purpose for consenting to a unified national authority was clearly to establish safeguards for the inalienable rights that the document acknowledged to be the birthright of all people. The Declaration of Independence was a sophisticated compact that explained the unity of liberty and equality into "a maxim worthy of the dignity of man."[93] This commitment to joint government united all thirteen colonies.

Contrary to the claims of some scholars, the founding generation understood the Declaration of Independence to be more about equality than a collective right to oppose tyranny, although that certainly was part of the manifesto's meaning.[94] For some of the most influential Founders, the Declaration was more than a statement of sovereignty. It expressed universal principles about intrinsic human worth. James Wilson, who was later a member of the Constitutional Convention and then the Supreme Court of the United States, asserted that the statement of equality and inalienable rights found in the second paragraph of the Declaration of Independence provided the "broad basis on which our independence was placed."[95] He further asserted that the system of the Constitution was erected "on the same certain and solid foundation."[96] On this reading, the Constitution's specific grants of

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> Happiness, as contrary alike to the Principles of Humanity and the Declaration of Independence.

Id.

91. *See, e.g.*, TSESIS, *supra* note 6, at 100 (claiming that the terms of the Fourteenth Amendment incorporated traditional abolitionist natural rights views, allowing the Amendment's future reach to extend far past the contemporary sensibilities of the Framers).

92. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

93. *See New-York, October 2*, YOUTH'S NEWS PAPER (N.Y.C.), Oct. 7, 1797, at 16 (asserting that "[l]iberty and equality well explained and understood" is such a maxim).

94. *See, e.g.*, Jack Rakove, *Fitly Spoken*, NEW REPUBLIC, Aug. 9, 2012, http://www.tnr.com/book/review/liberty-equality-alexander-tsesis?page=0,1 (rejecting the view that the Declaration was meant to be a universal statement of equality and arguing for the more narrow reading). While colonists sought primarily to assert their independence by explaining the rationale for the revolution, they also thought it of vital importance to explain the principles for governance binding on the newly independent nation. *Cf.* DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 21 (2007) (asserting that "[t]he primary purpose of the American Declaration . . . was to express the international legal sovereignty of the United States" and thus claiming less import for the statements of universal rights).

95. 1 DEBATES OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, ON THE CONSTITUTION, PROPOSED FOR THE GOVERNMENT OF THE UNITED STATES 59, 63 (1788).

96. *Id.* at 63.

power were predicated on the principles adopted into the Declaration of Independence. Samuel Adams, one of the most influential Revolutionary leaders and a signer of the document, was more specific in explaining how the Declaration helped frame U.S. social ethics. As acting governor for the state of Massachusetts, he asserted to both branches of the state's legislature that when "the Representatives of the United States of America" agreed "all men are created equal, and are endowed by their Creator with certain unalienable rights," they proclaimed "the doctrine of liberty and equality" to be part of the "political creed of the United States."[97]

The great Quaker abolitionist Anthony Benezet wrote that the guarantees of the U.S. creed covered all colonial inhabitants, irrespective of race and class. The Declaration's statements about the people's right to separate from Great Britain, he wrote, "apply to human nature in general, however diversified by colour and other distinctions."[98] Just two years after the Continental Congress adopted the Declaration of Independence, Benezet already believed that its statement about "all [m]en [being] created equal" with the inalienable rights of "Life, Liberty, and the Pursuit of Happiness" placed certain moral demands on the nascent nation.[99] The document's binding recognition of rights and statement against political oppression were also a telling condemnation "against the slavery of the Negroes."[100] In the same year, 1778, Jacob Green delivered a sermon in New Jersey. Like Benezet, Green expostulated about the incompatibility of the Declaration's statements of human equality and entitlement to liberty with the retention and promotion of slavery.[101] Understanding of the Declaration as a statement of the nation's commitment to the universal rights continued into the next decade. In a two-column side-by-side presentation, New Jersey Quaker

97. Samuel Adams, Mass. Lieutenant Governor, Speech to the Massachusetts House of Representatives and Senate (Jan. 17, 1794), *in* MASS. MAG., Jan. 1794, at 59, 63 (emphasis omitted).

98. ANTHONY BENEZET, SHORT OBSERVATIONS ON SLAVERY 2 (Phila., Joseph Crukshank 1781). For a similar reliance on the Declaration as a statement of national principle, see THE CONSTITUTION OF THE PENNSYLVANIA SOCIETY, FOR PROMOTING THE ABOLITION OF SLAVERY, AND THE RELIEF OF FREE NEGROES, UNLAWFULLY HELD IN BONDAGE 21 (Phila., Francis Bailey 1788); JAMES DANA, THE AFRICAN SLAVE TRADE. A DISCOURSE DELIVERED IN THE CITY OF NEW-HAVEN, SEPTEMBER 9, 1790, BEFORE THE CONNECTICUT SOCIETY FOR THE PROMOTION OF FREEDOM 28 (New Haven, Thomas & Samuel Green 1791); WARNER MIFFLIN, A SERIOUS EXPOSTULATION WITH THE MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 9 (Phila., Poughkeepsie, Dutchess Cnty. 1794).

99. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

100. ANTHONY BENEZET, SERIOUS CONSIDERATIONS ON SEVERAL IMPORTANT SUBJECTS; VIZ. ON WAR AND ITS INCONSISTENCY WITH THE GOSPEL. OBSERVATIONS ON SLAVERY. AND REMARKS ON THE NATURE AND BAD EFFECTS OF SPIRITUOUS LIQUORS 28 (Phila., Joseph Crukshank 1778).

101. JACOB GREEN, A SERMON DELIVERED AT HANOVER (IN NEW-JERSEY) APRIL 22D, 1778. BEING THE DAY OF PUBLIC FASTING AND PRAYER THROUGHOUT THE UNITED STATES OF AMERICA 12–13 (Chatham, N.J., Shepard Kollock 1779).

David Cooper drew readers' attention to the Declaration of Independence's statement of rights and obligations, while on the right-hand column he wrote:

> If these solemn truths, uttered at such an awful crisis, are self-evident: unless we can shew that the African race are not men, words can hardly express the amazement which naturally arises on reflecting, that the very people who make these pompous declarations are slave-holders, and, by their legislative conduct, tell us, that these blessings were only meant to be the rights of whitemen not of all men. . . .[102]

Taking the Declaration outside the realm of religious dialogue, in a speech before the American Philosophical Society, George Buchanan quoted the document to demonstrate that its principles were incompatible with the oppression of the "[u]nfortunate Africans."[103] These antislavery views were by no means held by all Americans, but they demonstrated that from the time of the nation's founding, a variety of visionary thinkers regarded the Declaration to be an inspirational statement of government obligation to protect intrinsic human freedom on an equal basis.

The Declaration of Independence so quickly gained colonial assent because its author, Thomas Jefferson, drew his inspiration from ideas about governance that enjoyed widespread support throughout the colonies.[104] His contemporaries distinguished the "maxim" of "[l]iberty and equality," which was thought to be "worthy of the dignity of man," from the privileges of European nobility.[105]

The Declaration's maxim of universal rights set a norm that made government beholden to the people and their will to pursue happiness and the general welfare.[106] Writing in a weekly Philadelphia newspaper, a

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102. DAVID COOPER, A SERIOUS ADDRESS TO THE RULERS OF AMERICA, ON THE INCONSISTENCY OF THEIR CONDUCT RESPECTING SLAVERY: FORMING A CONTRAST BETWEEN THE ENCROACHMENTS OF ENGLAND ON AMERICAN LIBERTY, AND, AMERICAN INJUSTICE IN TOLERATING SLAVERY 12 (Trenton, N.J., Isaac Collins 1783) (emphasis omitted).

103. GEORGE BUCHANAN, AN ORATION UPON THE MORAL AND POLITICAL EVIL OF SLAVERY 13–14 (Balt., Philip Edwards 1793).

104. Letter from Thomas Jefferson to Henry Lee, *supra* note 82, at 343 (asserting that he did not seek "to find out new principles, or . . . merely to say things which had never been said before[,] but to place before mankind the common sense of the subject" that reflected the "sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right").

105. *New-York, October 2*, *supra* note 93; *see also Hints for a Form of Government for the State of Pennsylvania*, PA. EVENING POST (Phila.), July 16, 1776, at 351 (proposing the formation of a Legislative Council in order to give "great security to public counsels, and prevent[] rash acts of government").

106. I make no attempt here to fully define the terms "happiness" and "general welfare." Stated briefly, my position is neither empirical utilitarianism, hedonism, nor deontology. I have adopted the term maxim constitutionalism to designate my approach, which claims that following a maxim committed to the protection of fundamental human entitlements is most likely to lead to general welfare. My approach is closely analogous to rule utilitarianism but differs from it because I rely on a fundamental maxim of conduct rather than a plethora of rules.

I believe that the public sphere requires the principled administration of law. The equitable exercise of government authority to protect individuals is necessary for the elevation and expansion

contributor stated that the same "[s]ages, who penned the Declaration of Independence, laid it down, as a fundamental principle, that government derives its just powers from the *consent of the people* alone."[107] Prior to the ratification of the Bill of Rights, and later the Reconstruction Amendments, the Declaration of Independence was the most detailed statement of the directive for government to safeguard liberty and equality.[108] Echoing the sentiments of the Declaration, an author calling himself simply "A Ploughman" wrote in a Philadelphia newspaper, "It is a general maxim that government was instituted for the protection and happiness of the people."[109] The idea of popular government was very different for the revolutionary generation than for us—they accepted and participated in conduct toward women and minorities that we are now aware violated the very principles laid down[110]—but the shortcomings of their conduct does not gainsay the continued worthiness of the universal ideals for governance they established.

The act of independence was meant to grant the people power over their political, civil, and social destinies. Constituting a government to effect the people's "Safety and Happiness"[111] required the passage of laws that foreseeably placed limits on individual liberty to protect the common good. In the words of a contemporary, a "fundamental maxim" of lawmaking was "that a part of our liberty must be given up for the security of the rest."[112] Limits on liberty were necessary for securing civil equality. Natural liberty, as Samuel Adams explained, could be "abridged or restrained, so far only as

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of public happiness and overall welfare. Checks and balances on the three branches of government are made to protect the individual from official overreaching and to facilitate debate about how best to achieve the public good. Respect for individuals and a rational policy for achieving social improvement are intrinsic to the pursuit of happiness. Certain rules of social conduct, developed through representative governance, are critical to the pursuit of the common good.

Constitutionally protected well-being is the integration of social satisfactions, obtained through public institutions like representative governance, and personal satisfaction with one's life and available opportunities for succeeding. Without reasonable regulation for justly resolving conflicts of interest, powerful interests can exploit their positions to unfairly, inequitably, and arbitrarily amass goods at the expense of outside groups. The pursuit of happiness, thus, requires fair laws that benefit the common good by protecting individuals' quest for personal aspirations.

107. *American Intelligence*, FREEMAN'S J.; OR, N.-AM. INTELLIGENCER (Phila.), Aug. 24, 1791, at 3.

108. *See Debates in the Pennsylvania State Convention, For and Against the Federal Constitution*, WORCESTER MAG., Dec. 1787, at 163, 164 (arguing that the first two paragraphs of the Declaration of Independence better protect people's rights than the original Constitution).

109. A Ploughman, *To the People*, INDEP. GAZETTEER (Phila.), Oct. 5, 1782, at 1.

110. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV (providing that the whole number of "free Persons" and three-fifths of persons who are not free be added for purposes of legislative apportionment); MARY BETH NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750–1800, at 45–46 (1980) (commenting that colonial common law did not give married women the right to "sue or be sued, draft wills, make contracts, or buy and sell property").

111. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

112. Miscellanies, NEW-HAVEN GAZETTE & CONN. MAG., Mar. 1, 1787, at 9 (internal quotation marks omitted).

is necessary for the great end of society."[113] According to this model, legal limits should provide the preconditions necessary for each person to be able to improve his or her capabilities to live a fulfilling life. For instance, property rights place limits on acquisition, use, and control of chattel and real estate.[114] These limits are necessary for each person to be safe in the enjoyment of possessions knowing that legal prescriptions place reciprocal obligations on each member of society.[115]

A representative republic's ultimate goal was to provide laws conducive to happiness. Because they constituted the final authority, the people could steer government to develop opportunities for living contentedly. John Adams expressed an oft-stated theme in his *Thoughts on Government* that "happiness of society is the end of government."[116] Along these lines, Dickinson thought the "right to be happy" was attainable only in a free society.[117] Indeed, where a government did not promote the welfare and happiness of the people, it was their right to "amend, and alter, or annul, their Constitution, and frame a new one."[118] Years before the Revolution, James Otis Jr. eloquently described the government's duty "to provide for the security, the quiet, and happy enjoyment of life, liberty, and property. There is no one act which a government can have a *right* to make, that does not tend to the advancement of the security, tranquility and prosperity of the people."[119]

On a structural level, the Declaration established several key components of constitutional governance over a decade before the Philadelphia Constitutional Convention. The Declaration of Independence's recitation of reasons for independence made clear that the new government would need to separate the responsibilities of the Executive and Judicial Branches of government[120] and the Executive and Legislative Branches of

113. Samuel Adams, The Rights of the Colonists, A List of Violations of Rights and a Letter of Correspondence (Nov. 20, 1772), *available at* http://www.constitution.org/bcp/right_col.htm.

114. *See* RESTATEMENT (SECOND) OF TORTS §§ 157–66, 222A–42 (1965) (outlining causes of action for trespass to land and conversion).

115. GEWIRTH, *supra* note 23, at 240–41.

116. 4 JOHN ADAMS, *Thoughts on Government*, *in* THE WORKS OF JOHN ADAMS 193, 193 (Charles Francis Adams ed., Bos., Charles C. Little & James Brown 1865).

117. 1 JOHN DICKINSON, *An Address to the Committee of Correspondence in Barbados*, *in* THE WRITINGS OF JOHN DICKINSON 251, 262 (Paul Leicester Ford ed., Phila., Historical Soc'y of Pa. 1895) (arguing that "[i]f there can be no happiness without freedom, I have a *right to be free*") (emphasis omitted).

118. Letter from Samuel Adams to John Adams, (Nov. 25, 1790), *in* 4 SAMUEL ADAMS, THE WRITINGS OF SAMUEL ADAMS 344, 344 (Harry Alonzo Cushing ed., 1908).

119. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 10 (Bos., Edes & Gill 1764).

120. *See* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (asserting several condemnations against the King of England: "He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries").

government.[121] The separation of the Legislative and Judicial Branches would come later, in the text of the Constitution. But the ideal of separating the function of the three branches came even before July 4, 1776, with some in the popular press going so far as to call it a maxim of governance.[122] Recognizing separation of powers to be fundamental for government, a citizen from Pennsylvania wrote that, "It is a determined maxim in politics, that the legislative and executive powers of government should be carefully kept separate and distinct."[123] James Madison likewise took the "political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct" to be essential for constitutionalism.[124]

Among other elements of the future Constitution that the Continental Congress first set down in the Declaration was the requirement that a representative polity must be beholden to the will of the people.[125] In this, the document adopted an accepted maxim that wisdom of governance lies with the body of the people.[126] A decade later, in the 1780s, a New York

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121. *See id.* para. 7 ("He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People."). The reverse is also true. Congress cannot use its authority to infringe on Article II powers. *See* Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.").

122. For a contemporary example of an author who regarded political-branch separation to be "a maxim in government," see *American News:* Philadelphia, Feb. 11, PA. MERCURY & UNIVERSAL ADVERTISER (Phila.), Feb. 11, 1785, at 3. *See also* Instructions to the Representatives of the Town of Boston, NEW ENG. CHRON. (Bos.), May 30, 1776, at 2 ("'Tis essential to Liberty, that the legislative, judicial and executive Powers of Government, be, as nearly as possible, independant [sic] of, and separate from each other."); *Williamsburg, May 24*, PA. EVENING POST (Phila.), June 6, 1776, at 281 (reprinting the Virginia Declaration of Rights, which included a provision "[t]hat the legislative and executive powers of the state should be separate and distinct from the judicative").

123. A Citizen, A Word of Advice: or, The Pennsylvania Assemblyman's *Vade Maeum*, PA. PACKET (Phila.), Nov. 5, 1785, at 2.

124. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297. In *Federalist 48*, James Madison pointed out that the concentration of power in the hands of the Executive or Legislative Branches can lead to tyranny. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 306–07. Alexander Hamilton, writing in *Federalist 73*, pointed out that the Judiciary too can become a tool for tyranny if it becomes overly entangled in executive politics. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 5, at 445. Hamilton argued against Anti-Federalists who were concerned that the exclusive concentration of power in the Supreme Court to interpret the Constitution would result in an entity that could mold the meaning of the document to its own opinion with no possibility of revision by the Legislature. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 5, at 481–90.

125. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring it to be "the Right of the People to alter or to abolish" tyrannical government "and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness"). A contemporary expounded on the relation of the Declaration's statement between "self-evident" truths and voting by quoting from the document and then asserting: "This equality and—what is consequential to it—the unerring maxim that governments derive their just powers from the people, have been maintained by those great and good men of all nations whose labours have benefitted mankind . . . ." *To the Legislature of the State of New-York, Letter II*, REPUBLICAN WATCH-TOWER (N.Y.C.), Mar. 5, 1803, at 2.

126. A Dialogue Between a *Ruler* and a *Subject*, ESSEX GAZETTE (Salem), Mar. 24, 1772, at 138 ("[I]t is an old maxim, that the body of the people never can be deceived; that the wisdom of

author explained that it was well-established that, "it is a fundamental maxim in this government, that the people should chuse [sic] their ... magistrates."[127] The Declaration made clear that a representative government must respond to political petitions.

The Declaration of Independence set a baseline expectation of representative governance.[128] The document was still a rough sketch with much need of elaboration. Professor Jack Balkin has similarly asserted, "American constitutionalism is and must be a commitment to the promises [of] the Declaration."[129] Details of how the Declaration's visionary statements might be carried out would come first and foremost from the Constitution, which defined the powers of government and proclaimed its purpose to be the protection of liberty and the promotion of the general welfare.

2. Preamble to the Constitution.—The Declaration of Independence was written by Thomas Jefferson, adopted by the Continental Congress, and approved by the states,[130] but the power to pass it came from the people, who emerged from colonialism into a newly formed national community.[131] The

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the state lies with them, and they always judge right with regard to the conduct of their rulers."); *By the Great and General Court of the Colony of Massachusetts-Bay*, PA. EVENING POST (Phila.), Feb. 27, 1776, at 99. The author noted:

> It is a maxim that in every government, there must exist somewhere, a supreme, sovereign, absolute, and uncontroulable [sic] power: But this power resides always in the body of the people; and it never was, or can be delegated to one man, or a few; the great Creator having never given to men a right to vest others with authority over them, unlimited either in duration or degree.

Id.; *Litchfield,* April *12*, WKLY. MONITOR (Litchfield, Conn.), Apr. 12, 1785, at 3 ("That, 'the supreme power in a republican government must ever remain with the people,' is a maxim no less rational than necessary . . . .").

127. Cato, *From the New-York Packet: To the Considerate Citizens of the State of New-York*, INDEP. GAZETTEER (Phila.), Dec. 6, 1786, at 3.

128. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 4–5 (1991) ("The principal drafter of the Declaration of Independence held the view—indeed was the architect of its expression, for the Declaration is the political basis for the idea of the constitution—that the state was the creation of sovereign power, not the other way around.").

129. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 51, at 18.

130. TSESIS, *supra* note 83, at 12–31 (narrating events surrounding the drafting, adoption, and acceptance of the Declaration).

131. *See* THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (declaring independence "in the Name, and by Authority of the good People"); *id.* para. 1 ("[I]t becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them . . . ."); *id.* para. 2 ("[W]henever . . . Government becomes destructive . . . , it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."); *id.* para. 30 ("A Prince whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People."). One of the functions of the Constitution, as James Madison explained it, is to protect the aggregate interest of the community against political factions. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 5, at 75–79 (noting that a republican government, which the Constitution

Constitution, which Congress passed eleven years after independence, was a more pragmatic document than its 1776 progenitor, but it retained the people's will to establish a government favorable to their collective interests.[132] The Constitution sets out the structure of government while the Declaration remains the source of ideals that should inform the exercise of authority. The Declaration remains a statement about the legitimacy of revolution in response to tyranny and oppression, while the Constitution establishes institutional powers for the exercise of public offices.[133]

With no bill of rights in the original Constitution, the Preamble set a national norm for government to safeguard liberty for the general welfare. The Preamble asserted that the good to be achieved by government should inure to the population of all the states.[134] According to an accepted maxim of interpretation, contemporaries of the Constitution believed that the Preamble asserted the primary objectives of the Constitution as a whole.[135] Those objectives included the security of inalienable rights.[136] While it did

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would empower, could help guard the public good against harm from factions regardless of whether they make up a minority or a majority of citizens).

132. *See* Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 597 (2011) ("The 'We the People' of the Preamble is manifestly an expression or instantiation of a people's fundamental right, proclaimed in the Declaration of Independence, 'to alter or to abolish [governments], and to institute new government . . . .'" (alteration in original)).

133. Alex Gourevitch recently described an on-point dichotomy between the Declaration of Independence as a revolutionary document, to which progressive social movements turned for ideas, and the Constitution, which he refers to as "a body of established doctrine and law" that demands "authoritative interpretation." Alex Gourevitch, *The Contradictions of Progressive Constitutionalism*, 72 OHIO ST. L.J. 1159, 1159–60 (2011) (emphasis omitted).

134. One of the Preamble's greatest contemporary expositors, James Wilson, delegate to the Pennsylvania constitutional ratifying convention, explained the great balance between state sovereignty and the good of the nation: "[W]hat is the interest of the whole, must, on the great scale, be the interest of every part. It will be the duty of a State, as of an individual, to sacrifice her own convenience to the general good of the Union." James Wilson, Speech to the Pennsylvania Convention (Dec. 11, 1787), *in* PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 391 (John Bach McMaster & Frederick D. Stone eds., Phila., Historical Soc'y of Pa. 1888).

135. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 (Bos., Billiard, Gray & Co. 1833) (asserting that "[i]t is an admitted maxim in the ordinary course of the administration of justice" that preambles to statutes, and accordingly, the Preamble to the Constitution, are "a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions"); *see also* G.W.F. MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY 344, 363–64 (Bos., Saxton & Peirce 1841) (asserting that "judges of the courts of New York and Pennsylvania referred directly to the preamble of the Constitution as the basis on which the government was to be founded" and providing an example of this occurring).

136. Some state constitutions of the Revolutionary Era also contained preambles asserting that the social contract required government to protect society, individual rights, and to provide for safety and happiness. A well-known example of a preamble stating that representative government is developed to protect people's equal, natural rights is that of the 1776 Constitution of Virginia:

> A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

not confer specific powers, as Justice Joseph Story wrote in his commentary to the Constitution, statesmen and jurists referred to the Preamble when interpreting the Constitution.[137] Professor Charles Black pointed out that the Declaration of Independence and the Preamble are "[t]he two best sources" for "striving toward rational consistency, . . . keeping the rules of legal decision in tune with the society's structures and relationships, . . . [and]

> SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
>
> SEC. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

VA. CONST. of 1776, Declaration of Rights §§ 1–2, *available at* http://www.nhinet.org/ccs/docs/va-1776.htm. Another example is the Preamble to the Massachusetts Constitution of 1780, which continues to be in force today, declaring:

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

MASS. CONST. pmbl. The Pennsylvania Constitution of 1776 contained a closely related preamble tying government to the promotion of welfare by the protection of individual rights:

> WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness.

PA. CONST. of 1776, pmbl., *available at* http://avalon.law.yale.edu/18th_century/pa08.asp. While the wording of the Preamble to the Vermont Constitution of 1777 was not identical, it is conceptually alike in its regard for rights and the general welfare:

> WHEREAS, all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.

VT. CONST. of 1777, pmbl., *available at* http://avalon.law.yale.edu/18th_century/vt01.asp. In addition, the Maryland Constitution of 1776's first paragraph condemns Great Britain, and the second paragraph introduces the structure of state government in these words, "That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole." MD. CONST. of 1776, Declaration of Rights, art. I, *available at* http://avalon.law.yale.edu/17th_century/ma02.asp. Like the U.S. Constitution's Preamble, Maryland's preamble commits government to follow the people's will to secure the common good. North Carolina's vested power in the people at the beginning of its Declaration of Rights. N.C. CONST. of 1776, Declaration of Rights, art. I, *available at* http://avalon.law.yale.edu/18th_century/nc07.asp.

137. *See* 1 STORY, *supra* note 135, at § 460 ("There does not seem any reason why, in a . . . constitution . . . , an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in [interpretation].").

reaching toward higher goals."[138] Along the same lines, Professor Mark Tushnet has stated, "The Declaration and the Preamble provide the substantive criteria for identifying the people's vital interests."[139] To elaborate on the significance of national consistency in substantive criteria, Charles Black posited that even without a First and Fourteenth Amendment it is not fathomable to think a law prohibiting the public from discussing political candidates for Congress could be remotely valid, given the importance of public communication to our "national government."[140] The Declaration and the Preamble are at the root of the written Constitution's meaning, and their core directive is for government to secure equal rights for the common good.

Similar to my earlier examination of the Declaration's directive, a historical analysis of the Preamble to the Constitution is critical to understanding the governing principles of U.S. constitutionalism. History, however, is the starting point. If it were the end point of analysis, Americans would surely benefit from the wisdom of the Framers but also be burdened by their narrow-mindedness.

The Preamble establishes that government must make an effort to advance general welfare by eschewing the racism, ethnocentrism, and sexism of the past. The framing generation failed to fully exercise the implicit values of the Preamble's promise to "secure the Blessings of Liberty."[141] Racialism is only the most glaring example of its shortsightedness and outright hypocrisy. Northern states ended slavery,[142] but on a national level the Founders made no constitutional or statutory effort to abolish the institution.[143] Many, indeed, viewed the Constitution as a license for slavery because of its Three-Fifths, Fugitive Slave, and Importation Clauses. On the other hand, John Parrish, a Maryland antislavery advocate, asserted that it would be "ignoble" and "below the dignity" of politicians to define the

138. Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, *in* POWER AND POLICY IN QUEST OF LAW 187, 192 (Myers S. McDougal & W. Michael Reisman eds., 1985).

139. TUSHNET, *supra* note 41, at 13; *see also* H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 28 (2008) ("The Preamble states the purposes of the instrument, or rather of the decision to make the instrument law, in terms most of which seem oriented toward human good broadly conceived rather than toward institutional goals narrowly defined."); Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049, 1053–54 (1995) ("[W]hen placed in its proper historic setting, 'We The People,' far from expressing a genuine unity, actually embodies a stark contradiction. The meaning of 'We The People' in the Preamble to the 1787 Constitution cannot be grasped without reference to the proposition that 'all men are created equal' . . . .").

140. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 42–43 (1969).

141. *See supra* note 103 and accompanying text; U.S. CONST. pmbl.

142. TSESIS, *supra* note 6, at 31–33.

143. *See* James P. Parke, *Review of* 'Memoirs of the Life of Anthony Benezet,' 6 CHRISTIAN DISCIPLE 65, 69 (1818) ("[W]e formed a Constitution 'to promote the general welfare and secure the blessings of liberty to ourselves and our posterity;' but in which we also took care to hold in absolute slavery . . . !" (emphasis omitted)).

Preamble as a license for states to persist in slavery.[144] He believed that the Preamble should be understood within the context of the Declaration of Independence's proclamation "'that all have an unalienable right to life, liberty, and the pursuit of happiness.'"[145]

The Preamble begins by announcing that the people at large, not the states, ordained the creation of the Constitution.[146] It thereby reestablishes the directive of the Declaration that government's primary obligation is to the people. All legitimate uses of power derive from their original grant of authority, not beyond it. Anti-Federalists, who were opposed to ratification of the Constitution, warned that the Preamble's use of "We the People" rather than "We the States" demonstrated the plan to establish "a compact between individuals entering into society, and not between separate States."[147] For those disposed against stronger national government than existed under the Continental Congress, there was indeed much to be concerned about because the Constitution expressly failed to use wording comparable to the Articles of Confederation, which had explicitly reserved state sovereign independence.[148] This omission indicates a greater centralization of power, social norms, and structural provisions. Only with the ratification of the Tenth Amendment would the states' retained, reserved powers be mentioned, and even then unspecifically and only in the context of national authority.[149]

The Anti-Federalists and Federalists did agree that the Preamble was meant to be a statement that the people would retain their natural rights in the newly formed republic, but many Anti-Federalists thought the original Constitution was insufficient for safeguarding those rights.[150] Opponents of

144. JOHN PARRISH, REMARKS ON THE SLAVERY OF THE BLACK PEOPLE 8 (Phila., Kimber, Conrad & Co. 1806).

145. *Id.* at 8–9.

146. U.S. CONST. pmbl. ("We *the people* of the United States . . . do ordain and establish this Constitution . . . ." (emphasis added)).

147. *Philadelphia, December 8*, CUMBERLAND GAZETTE (Portland, Me.), Jan. 3, 1788, at 1 (emphasis omitted).

148. ARTICLES OF CONFEDERATION of 1781, art. II ("Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."); *State Convention*, SALEM MERCURY, Feb. 5, 1788, at 1 (describing an effort to include an addendum into the Constitution explicitly asserting the continued independence of the states); *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania, to Their Constituents*, PROVIDENCE GAZETTE & COUNTRY J., Jan. 26, 1788, at 1 (asserting an anti-federalist complaint at the omission of state independence).

149. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

150. *State Convention*, PA. HERALD & GEN. ADVERTISER (Phila.), Dec. 8, 1787, at 2 (providing a transcript of ratification debate arguments concerning the sufficiency and insufficiency of the Preamble to protect natural rights, including a claim that the Declaration better protects rights than the Preamble); A True Friend, *To the Advocates for the New Federal Constitution, and to Their Antagonists*, INDEP. GAZETTEER (Phila.), Dec. 22, 1787, at 2 (pressing for adding a new preamble

ratification warned that the federal government's power to "provide for the common defence [and] promote the general Welfare"[151] might allow the nation to negatively impact "the personal rights of the citizens of the states, and put their lives in jeopardy."[152] Naysayers were unable to prevent its ratification. In response to the Anti-Federalists, the Constitution's supporters defended the power of Congress to "promote the general Welfare" through national legislation arguing that states were just as prone to corruption as the federal government.[153] Alexander Hamilton, in *Federalist No. 84*, wrote that the Preamble's assertion that "'We the people of the United States'" established a federal government "'to secure the blessings of liberty to ourselves and our posterity'" should be understood to be a "recognition of popular rights."[154] With this assurance, Hamilton continued, no "minute detail of particular rights" was needed because the people never gave up their rights through the Constitution, but only meant the instrument to "regulate the general political interests of the nation."[155] Better to give power to the wisest of the nation, so another author argued, to set unified policies for the whole.[156] The first ten amendments, known as the Bill of Rights, gave more express content to the Preamble's protection of rights for the promotion of the general welfare.[157]

The Preamble established the object of national governance to be the welfare of the people of the United States.[158] The creation of the national

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to the Constitution, which would enumerate rights). It was precisely the broad power to "promote the general Welfare" without any limiting bill of rights that concerned some of the Constitution's opponents. One opponent of ratification raised the concern in these terms:

> To judge of what may be for the general welfare, and such judgments when made, the acts of congress become supreme laws of the land. This seems a power co-extensive with every possible object of human legislation. Yet there is no restraint in form of a bill of rights, to secure . . . that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose.

Miscellany: From the Virginia Gazette: Copy of a Letter from the Hon. Richard Henry Lee, Esq., one of the Delegates from This State in Congress, to his Excellency the Governor, Oct. 16, 1787, N.Y. J. & DAILY PATRIOTIC REG., Dec. 22, 1787, at 2.

151. U.S. CONST. pmbl.

152. Speech of John Williams, *in* THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF NEW-YORK, ASSEMBLED AT POUGHKEEPSIE, ON THE 17TH JUNE, 1788, at 91 (N.Y.C., Francis Childs 1788), *available at* http://www.constitution.org/rc/rat_ny.htm.

153. M'Kean, *Federal Constitution*, SALEM MERCURY, Jan. 15, 1788, at 1.

154. THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 5, at 512 (emphasis omitted).

155. *Id.*

156. M'Kean, *supra* note 153.

157. *See To the Public*, PHILA. GAZETTE, Jan. 1, 1794, at 1 ("THE PEOPLE, whose rights are protected, will be the friends and supporters of a Constitution established by *themselves*, for the express purpose of promoting the 'General Welfare.'").

158. Poplicola, *For the Herald of Freedom*, HERALD FREEDOM, & FED. ADVERTISER (Bos.), Aug. 18, 1789, at 178 ("[T]he present national government is the people's government: that from them it originated . . . for the great and beneficial purposes expressed in the preamble to the constitution. Every lodgment of power, every relinquishment of natural right, . . . has the welfare of the people of the United States for its ultimate object . . . .").

community, as lexicographer Noah Webster explained in a tract, meant for "government to be established to secure to individuals their natural rights, their liberty and property."[159] The integration Webster saw of individuals and the community as a whole is an example of the commonly held view that public policy should protect the right to achieve private benefits for the common good.[160]

Standing on their own, the Preamble's statements on the overall purpose of government were insufficient for governance. The remainder of the Constitution gave content to the people's will to form a union for the general welfare and common defense, where just governance would facilitate the enjoyment of individual liberty. The Constitution likewise set a structure for the governed to enjoy their inalienable rights of life and liberty in safety and happiness. Together the Declaration of Independence and the Preamble asserted the purpose of national government: The protection of inalienable rights for the general welfare became the social ideal for both the founding and subsequent generations. Like its earlier counterpart, more specific clauses of the Constitution detailed how the three branches of government were to achieve the Preamble's asserted aims. Specific clauses of the Constitution, in turn, were themselves only starting points for developing the statutes, precedents, and executive orders necessary for fleshing out the contours of federal government.

One structural protection of these rights, as James Madison wrote, was "the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct."[161] This was not an abstract commitment but an "essential precaution in favor of liberty."[162] Madison made this statement at a time when he had not fully agreed to the addition of a bill of rights, of which he would eventually become the chief architect. Needed instead, he believed, were strong checks and balances capable of restraining

159. Noah Webster, Jun., *A Letter to the President of the United States*, *in* MISCELLANEOUS PAPERS, ON POLITICAL AND COMMERCIAL SUBJECTS 33, 34 (N.Y.C., E. Belden & Co. 1802).

160. *See, e.g.*, NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 116–17 (Rutland, J. Lyon 1793) (arguing that humans are social beings who agree to constitutional governance for the common good to protect their rights).

161. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297; *see also Politics: From the* NEW YORK EVENING POST, An Examination of the President's Message, Continued (Phila.), Mar. 20, 1802, at 85, *reprinted in* 2 PORT FOLIO 85 (Oliver Oldschool ed., Phila., H. Maxwell 1802) ("It is a fundamental maxim of free government, that the three great departments of power, legislative, executive, and judiciary, shall be essentially distinct and independent the one of the other."). Madison recognized that the separation of powers requires checks and balances among the three branches of government. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 305 ("[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").

162. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297–98; *see also* James Madison, *The Letters of Helvidius, No. II*, *in* ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST ON THE NEW CONSTITUTION app., at 482 (Hallowell, Glazier, Masters & Co. 1831) (discussing the maxim of the separation of powers).

the will of tyrannical majorities.[163] The structural solution combined the need for efficient governance with the "intrinsic value" of preserving innate liberty.[164] The institutional processes of lawmaking, enforcement, and adjudication were tied to the protection of inalienable rights.

C. *Maxim Constitutionalism*

Fair administration of the three branches of government, exercising their separate powers in accordance with impartial social rules, is only one aspect of unwritten constitutionalism[165] subject to the overarching purposes of the maxim constitutionalism adopted in the Declaration of Independence and the Preamble.[166] Both of these documents, I suggest, describe representative governance committed to the protection of justice and furtherance of the common good, which constitute the object of U.S. constitutional law. That objective derives from the people's collective will to be governed according to laws that protect their fundamental rights and further public well-being in a manner that benefits the common interests of the populace. However, the Declaration's and the Preamble's statements of national purpose, neither of which contained any specific enumeration of powers, were too nebulous for effectuating the maxim of constitutional purpose; the ethos of governance did not by itself give any indications of who was to promulgate laws, execute them, and adjudicate legal conflicts. The Constitution supplied the administrative details missing from the Declaration and the Preamble. The combination of a workable structure and a national purpose served to create a functioning government, albeit one that each generation would need to interpret to achieve the central goal of protecting rights for the common good.

In his dissent to *Poe v. Ullman*,[167] Justice John Harlan spoke of the dual ethical aspects of U.S. constitutionalism: "[T]he balance which our Nation,

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163. Jack N. Rakove, *Parchment Barriers and the Politics of Rights*, *in* A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991, at 98, 134 (Michael J. Lacey & Knud Haakonssen eds., 1991) (listing Madison's ultimately abandoned proposals for curbing majoritarian abuses).

164. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297–98.

165. *See* Richard A. Paschal, *Congressional Power to Change Constitutional Law: Three Lacunae*, 77 U. CIN. L. REV. 1053, 1108 (2009) ("[O]ne of the most prominent examples of an unwritten structural principle in American constitutionalism is the separation of powers."); Garrick B. Pursley, *Federalism Compatibilists*, 89 TEXAS L. REV. 1365, 1387 (2011) (book review) ("[T]he Constitution's broad structural norms entrenching the separation of powers and federalism are not communicated directly by any single textual provision.").

166. *See* BILL WHITEHOUSE, REFLECTIONS ON EDUCATION AND LEARNING 25 (2009) ("The separation of powers among the Executive Branch, the Legislature, and the Judiciary was intended as a system of procedural checks and balances to protect the integrity of the principles and purposes inherent in the Preamble."); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 407 & n.67 (1996) (providing examples of provisions in "the Declaration of Independence [that] condemned England's tyrannical violation of separation of powers").

167. 367 U.S. 497 (1961).

built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[168] Harlan located this balance between individual and social rights in the Due Process Clause of the Fourteenth Amendment,[169] whose source I believe should be traced even further back to the Declaration of Independence and the Preamble to the Constitution. In a different opinion, the Court struck down a racist municipal ordinance against Chinese immigrants, quoting a portion of the Declaration of Independence and placing its statement of rights in the context of constitutional society: "[F]undamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws . . . ."[170] The penumbras of the Bill of Rights, on which Justice William O. Douglas pinned the right to privacy in *Griswold v. Connecticut*,[171] and the unenumerated rights, on which Justice Goldberg relied in his concurrence to that case,[172] are based on interests retained by the people and their limited grant of governmental authority.[173]

This balance of public and private interests is both a semantic part of the Constitution and one that the Court should aim to achieve in constructing (that is, applying) the Constitution to specific cases; any distinction between interpretation and construction on the matter of highest constitutional importance is artificial when it comes to the judicial obligation to protect fundamental rights and to balance individual interests with public policy, safeguarding the good of the whole.[174] All judges are products of their own time, and none can be sure of the original semantic meaning of any clause of the Constitution. All that can be done is fair and just application of specific clauses on the basis of legislative intent or countermajoritarian construction.[175] However, significant deviation from the underlying purpose of national union, which requires public actors to protect individuals for the benefit of the common good, violates the organizing principle to which the

168. *Id.* at 542 (Harlan, J., dissenting).

169. *Id.* at 540, 543.

170. Yick Wo v. Hopkins, 118 U.S. 356, 370, 374 (1886).

171. 381 U.S. 479, 483–84 (1965).

172. *Id.* at 486–87 (Goldberg, J., concurring).

173. *See id.* at 486–88 ("[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.").

174. For a definitional distinction between constitutional interpretation and constitutional construction see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) ("*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances."). More convincing than this differentiation, which tends to separate a joined effort of applying textual semantics, is John Hart Ely's distinction between "interpretivism" and "noninterpretivism." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980).

175. *See infra* subpart III(A).

people pledged their lives, fortunes, and honor.[176] Antidiscrimination laws are built on the predicate that the protection of individual rights is essential to social life. As Justice Kennedy explained in a case finding unconstitutional a majoritarian initiative against antihomophobic regulations, a state's interest in its citizens' well-being is meant to protect "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[177] The Declaration of Independence and the Preamble to the Constitution jointly announce that the people have granted power to public servants for the purpose of furthering general welfare through a representative government whose aim is to safeguard inalienable rights in order to facilitate the equal pursuit of happiness. Together they compose a statement of secular morality, stated in terms of reciprocal demands and obligations needed for a pluralistic society each of whose members has a unique vision of what constitutes the good life. They do not create the right to freedom and well-being, to which all humans are entitled by birth, but formally adopt it as the core obligation of federal government. The Declaration's reference to "unalienable Rights"[178] takes for granted that people retain human dignity and create a representative government to protect those entitlements. The Preamble's General Welfare Clause expands on statements in the Declaration predicating the need for government to protect the public good.[179]

A constitutional maxim relevant to any representative democracy that is committed to citizens' equality must respect different, often contradictory, religions, aesthetics, and practices. This is a universal predicate of all representative democracies, with the Declaration and the Preamble providing the people's binding decision to institute it in the United States. Any nation committing itself to representing the interests of all its people—not merely a few, as is the case with plutocracies, autocracies, tyrannies, and aristocracies—on a procedurally equal basis must create a structure of governance with the power to protect and further interests likely to achieve the public good. Representational democracy enables ordinary constituents to participate in voting and lobbying for change. Law must reflect mutually respectful and accommodating social attitudes that only resort to coercion, through criminal and civil penalties, when the agent commits intentional or negligent harms. The maxim of freedom and general welfare has remained stable, thanks in no small part to its codification in the Declaration and the Preamble, but generations have grappled with its meaning and the nation's failure to live up to its stated ideals. Americans have come to the point in

176. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.").

177. Romer v. Evans, 517 U.S. 620, 631 (1996).

178. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

179. *See id.*

their history where much of the public recognizes morally, religiously, and ethnically diverse people's correlative right to live a satisfying life in a politically engaged society that tolerates secular and religious education,[180] male and female aspirations[181] and sexual practices,[182] and a host of other interests necessary for self-fulfillment, even though they are not explicitly enumerated in the Constitution.

A central principle of moral governance interlinks a wide community of equals. A society committed to benefitting individuals for the common good is inherently tolerant, pluralistic, and respectful of human beings. Any other policy is contradictory of maxim constitutionalism because it would deny the rights of individuals and thereby decrease the general welfare. The rights that maxim constitutionalism protects are generic—such as liberty and well-being—and belong to everyone equally by their very humanity, as volitional beings seeking goods and benefits.[183] Government's obligation in such a social environment is to account for and respond to the interests of everyone as they are expressed through constitutionally predictable structures for assimilating collective wisdom into nondiscriminatory laws. The representative process is meant to give practical effect to the people's will.

In the United States, general statements about norms, such as freedom of speech and religion or the freedom from unreasonable searches and seizures, are integrated into the Constitution's structural provisions, such as those limiting executive, legislative, or judicial powers.[184] People are more likely to subject themselves to authority when they have accurate reason (based on past practices and policy statements) to believe that political power will be used to safeguard their fundamental liberties on an equal footing with similarly situated persons.[185] One seeks to contribute to social success where

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180. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (holding that parents have the right to choose whether to send their children to public or parochial school).

181. *See* United States v. Virginia, 518 U.S. 515, 519 (1996) (finding the Equal Protection Clause applicable to gender classification of a military education institution).

182. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the Due Process Clause protects sexual privacy).

183. The public position I am adopting is closely related to Alan Gewirth's private Principle of Generic Consistency: "*Act in accord with the generic rights of your recipients as well as of yourself.*" GEWIRTH, *supra* note 23. This precept requires "action in accord with the recipients' generic rights of freedom and of well-being," which Gewirth calls "*generic rules.*" *Id.*

184. *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1023 (2011) ("The Bill of Rights is centrally concerned with allocation and separation of powers . . . ."); *id.* at 1039–40 (arguing that the Fourth Amendment is fundamentally a limit on executive power). *See also* Rosenkranz, *supra* note 29, at 1252–53 (arguing that the First Amendment is expressly a limit on congressional power).

185. *See* Luis E. Chiesa, *Outsiders Looking In: The American Legal Discourse of Exclusion*, 5 RUTGERS J.L. & PUB. POL'Y 283, 309 (2008) ("[O]bedience to authorities and cooperation with the government decreases as the perceived legitimacy of law enforcement agencies diminishes."); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1161 (2000) ("A legitimate form of government receives obedience not for its policy choices, the charisma of its leaders, or the internalized moral values of a given individual; rather, government decisions are deferred to and its commands obeyed because the State has the 'right' to demand compliance.").

she and those close to her stand to benefit from the protection of laws that place just limits on their personal choices without interfering with the core right of free personal development. For instance, the right to compulsory public education places limitations on those parents who would prefer to keep their children home, but society limits familial choice in this regard because the state's functions include the protection of minors' eventual ability to function outside the home after reaching the age of majority.[186] In order to enjoy their liberties on an equal footing with others, some amount of education must be compulsory to enable children to pursue public and personal goals. Put in general terms, the majority in *Plyler v. Doe*[187] recognized that "[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."[188] (The Court's later assertion that public education is not a constitutional value,[189] therefore, deflates its earlier pronouncement on the role of schooling as an individual right essential in a polity committed to public good.[190]) Maxim constitutionalism is a value in many other opinions. The legitimacy of seminal decisions like *Heart of Atlanta Motel, Inc. v. United States*,[191] *Tennessee v. Lane*,[192] and *National Federation of Independent Business v. Sebelius*,[193] and of footnote four of *United States v. Carolene Products Co.*[194] does not rest on the composition of the political majority, nor even on the specific constitutional clauses Congress relied upon to pass laws, but on the extent to which the upheld legislation protected individual rights and advanced general welfare. This is not an ends-justifies-the-means argument; instead, it requires policymakers to rely on the directive of constitutional

186. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

187. 457 U.S. 202 (1982).

188. *Id.* at 222–23 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)) (internal quotation marks omitted).

189. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.").

190. *Id.* at 110–11 (Marshall, J., dissenting) ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." (quoting *Brown*, 347 U.S. at 493) (internal quotation marks omitted)). Even as the majority in *Rodriguez* rejected the claim that education is a constitutional right, it admitted that "'the grave significance of education both to the individual and to our society' cannot be doubted." *Id.* at 30 (majority opinion) (quoting Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971)).

191. 379 U.S. 241, 261–62 (1964) (holding that Title II was an appropriate exercise of the commerce power when applied to a public accommodation serving interstate travelers).

192. 541 U.S. 509, 524–29 (2004) (upholding Congress's Fourteenth Amendment Section Five authority to pass Title II of the Americans with Disabilities Act, which created a private cause of action against states for disability discrimination).

193. 132 S. Ct. 2566, 2595–96, 2600 (2012) (finding that the Patient Protection and Affordable Care Act's mandate to buy health insurance or pay a tax penalty is within Congress's taxing power).

194. 304 U.S. 144, 153 n.4 (1938) (stating that heightened scrutiny may be appropriate in cases involving interference with the political process and discrimination against "discrete and insular minorities").

governance set down in the Preamble and Declaration to rely on specific constitutional clauses to exercise their separate powers and to act for social betterment while not violating the people's intrinsic rights.

This exercise of authority is the procedurally neutral means of seeking to fulfill the ideal running through the normative and structural parts of the Constitution: Protection of liberties as the only legitimate means of advancing the common good.[195] I call this ideal of representative governance "maxim constitutionalism." It prohibits the exploitation of any person or group of persons to benefit some other corporate or natural party. It is the foundational standard of constitutionalism, which sets that baseline norm against which all statutes, judicial rules, and executive orders must be evaluated. I believe that the underlying purpose of unified government is the protection of individual rights to secure the public good. Put in the negative, where individuals are denied the ability to exercise their correlative right to equal liberty, the common good suffers at least by the diminished happiness of those who are negatively affected by the injustice. The general directive of governance combines the inalienable-rights statement of the Declaration of Independence and the general-welfare statement of the Preamble to the Constitution into a unified norm of national purpose: The protection of rights for the public benefit. This norm plays a legitimizing function, providing a universal principle for public debates about refining or altogether abolishing past legal practices.[196] The ultimate purpose of representative governance plays a justificatory role necessary for evaluating what Joseph Raz has called "non-ultimate goods."[197] The existence of a central norm disciplines interpretation of the Constitution, the enactment of law, and the exercise of executive authority.

A maxim that is suitable for constitutional governance must be elegant, pithy, and general. Elegance is needed to capture the attention of ordinary people, who might otherwise find the subject too dull, turgid, and esoteric. Brevity is requisite for collective memorization, which becomes unsustainable as the maxim becomes too lengthy. Finally, generality is

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195. Alasdair MacIntyre, to the contrary, believes that constitutional decision making should neither try to invoke presumed "shared moral first principles" nor try to create them. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 253 (3d ed. 2007). For a refutation of MacIntyre, see POWELL, *supra* note 139, at 103–16.

196. My approach rejects a nihilistic perspective and adopts an objective understanding of constitutional interpretation. *See* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) ("Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation."); *see also id.* at 762–63 (arguing against a nihilistic interpretation of the Constitution that would drain it of meaning); THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 5, at 27 (asserting that the "public good" is the "true interest[]" of choosing whether to adopt the Constitution).

197. JOSEPH RAZ, THE MORALITY OF FREEDOM 200 (1986) ("The relation of ultimate values to intrinsic values which are not ultimate is an explanatory or justificatory one. Ultimate values are referred to in explaining the value of non-ultimate goods.").

essential for consistent dealing with a plethora of disputes; developing a variety of principles, rules, and regulations stemming from the constitutionally granted authority to the three branches of government; and finding consensus in a common-sense public morality that does not deteriorate into a democratic tyranny targeting minorities and otherwise disempowered persons.

As Mark Tushnet pointed out, "[t]he Declaration's principles define our fundamental law."[198] He further drew attention to how these "principles" should rest on the Declaration and the Preamble, which together obligate "the people of the United States . . . [to realize] universal human rights."[199] Both the Declaration and the Preamble imply that persons are volitional agents who willingly participate in representative government to achieve a collective purpose. That collective purpose is the protection of the human entitlement to strive for self-fulfillment. The statement "life, liberty, and the pursuit of happiness" provides a reference point for identifying the inalienable rights of people and then holding government accountable for their protection.

The intersection between the Declaration of Independence and the Preamble to the Constitution is evident through a number of their passages. The "Pursuit of Happiness"[200] described in the former should be understood as well-being, and the Preamble's use of "general Welfare" makes the federal government responsible for its promotion through official measures.[201] The latter provision is also tied to the Declaration's mandate to institute a government that is "most likely to effect" the people's "Safety and Happiness."[202] The Declaration speaks in clear terms on the innate nature of life, liberty, and the pursuit of happiness that is relevant to understanding the Preamble's stated goal of laying out a constitutional order capable of

198. TUSHNET, *supra* note 41, at 14.

199. *Id.* at 51, 53.

200. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

201. Justice Louis D. Brandeis's dissent in an overruled case nicely merges the Declaration's recognition of human aspirations with the constitutional grants of authority:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

202. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration's second paragraph provides:

> [W]henever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

Id.

securing liberty.[203] Independent states are described as having the "Power to levy War, conclude Peace, [and] contract Alliances" in the Declaration.[204] While the Preamble states that the national government is formed in part to "provide for the common defence,"[205] the meaning does not differ from its predecessor. A portion of the Declaration of Independence condemns the British monarch because "[h]e has refused his Assent to Laws, the most wholesome and necessary for the public Good."[206] The implication is that the people have a right to make laws for the public good, and the Preamble echoes that sentiment by asserting that the people formed the federal government to "promote the general Welfare."[207] The documents complement each other, with the Preamble being the segue to the written Constitution from the Declaration's promises of liberal equality.

The general statements found in the Declaration of Independence and the Preamble cannot provide concrete answers about the specific responsibilities allotted severally to the three branches of government. Pregnant terms like safety, happiness, general welfare, liberty, and equality have always required elaboration.[208] Without legal detail these broad terms can mean different things to various interest groups who can seek to manipulate them for mere rhetorical effect.[209] What's more, these social concepts lack the requisite prioritization needed to resolve the inevitable conflicts of pluralistic society.[210] This is not to say that they do not place imperative obligations on government actors and institutions but that the details must be fleshed out in accordance with some central maxim that must guide state actors to formulate policy, choose between differing courses of action, and enforce enacted decisions.

The significance of government deriving its power from the people, for instance, clearly requires the administration of representative government. While "the people" is an abstract construct for representative governance, not necessarily tied to a specific generation of Americans but to the ideal of an

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203. U.S. CONST. pmbl. (asserting the people's decision to develop a constitution "in Order to form a more perfect Union . . . and secure the Blessings of Liberty to ourselves and our Posterity").

204. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

205. U.S. CONST. pmbl.

206. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

207. U.S. CONST. pmbl.

208. *Cf.* RAZ, *supra* note 197, at 91 (discussing how "various attitudes towards society . . . can all be regarded as so many variations on a basic attitude of identification with the society, an attitude of belonging and of sharing in its collective life").

209. *Cf.* John Hayakawa Török, *Freedom Now!—Race Consciousness and the Work of De-Colonization Today*, 48 HOW. L.J. 351, 394 n.277 (2004) (recalling that Fidel Castro used the Declaration of Independence in his own legal defense and noting the power of "invoking the American Revolution for rhetorical effect, while redefining its meaning").

210. *See* Martin Edelman, *Written Constitutions, Democracy and Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 592 (2005) (stating that while constitutions "proclaim all the values their framers believe essential to a good society," they do not prioritize those values, leaving that job to "implementers and interpreters").

engaged political community, what is clear is that government institutions were created for their benefit. That end is furthered through the administration of laws prohibiting certain government conduct, such as intrusion into bodily integrity,[211] and enabling other action, such as the distribution of vaccinations,[212] and the provision of social security benefits[213] and affordable health care.[214] The details of such negative and proscriptive laws are worked out through political debates, judicial deliberation, and executive enforcement.[215]

The sovereignty of the people is announced in the Constitution even before the functions of the three branches of government are enumerated.[216] The separation of powers, therefore, is a structure of governance for exercising public functions for the betterment of the population as a whole. Where any branch—be it legislative, executive, or judicial—acts solely to compound its authority or to augment the aggrandizement of its officeholders, the real interest of constitutional self-governance, which is the protection of the people's interests for the betterment of the whole, is violated. Officials who seek their personal interests or who overreach into the province of the other two coequal branches of government engage in the type of autocracy that the statements of independence and constitutional norms enjoin.

Binding details on the exercise of power are necessary because an overgeneralized maxim of liberal equality would allow for radically subjective decision making. The Declaration of Independence and the Preamble to the Constitution assert nationally recognized norms to which citizens can refer in order to examine the legitimacy of government conduct. The conversation of constitutional law—in which ordinary citizens and government officials participate—requires a clearly organized principle to provide for a common structure. This structure allows like-minded as well as adversarial parties to understand each others' meanings, no matter how

211. *See* Vacco v. Quill, 521 U.S. 793, 807 (1997) (reaffirming the "well-established, traditional rights to bodily integrity").

212. *See* Jacobson v. Massachusetts, 197 U.S. 11, 27–29, 38–39 (1905) (upholding the constitutionality of wide-scale vaccination).

213. *See* Helvering v. Davis, 301 U.S. 619, 634–36, 640–41 (1937) (upholding the constitutionality of the Social Security Act).

214. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (finding the individual mandate of the Affordable Care Act to be constitutional).

215. The Patient Protection and Affordable Care Act presents an example of this process. *See id.* (ruling on the constitutionality of the law); Sarah Kliff, *For Obamacare, Four More (Uncertain) Years*, WONKBLOG, WASH. POST (Jan. 21, 2013, 12:42 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/21/for-obamacare-four-more-uncertain-years/ (describing the Executive-centered process of implementing the law); Emily Smith, *Timeline of the Health Care Law*, CNN (June 17, 2012, 11:16 AM), http://www.cnn.com/2012/06/17/politics/health-care-timeline (recounting the long legislative road to passing the law).

216. *See* U.S. CONST. pmbl. (setting forth at the outset that "[w]e the People" establish the Constitution and therefore possess sovereign authority).

different their backgrounds or perspectives.[217] A unified maxim defining national norms establishes a term of reference for all public conduct. Clauses of the Constitution flesh out the specifics set out more broadly in the Declaration's and the Preamble's statements of legitimacy.

Yet, particular clauses of the Constitution are subordinate to the single most important purpose of governance, the protection of rights for the common good. A universal maxim provides a determinate basis for governance while allowing divergent interpretations to play themselves out in litigation and legislative policy. Given the racialist and sexist lenses of constitutional construction of the framing generation, some principle was needed for future change, and, yet, that change could not be made without reference to the history and progressive trajectory of the nation.[218] Even a comprehensive directive for the exercise of authority is useless unless it informs practical judgment, and an independent decision maker without a fixed aspiration is blown about by the whims of present circumstances. As the philosopher Richard Hare wittily put it,

> It would be foolish, in teaching someone to drive, to try and inculcate into him such fixed and comprehensive principles that he would never have to make an independent decision. It would be equally foolish to go to the other extreme and leave it to him to find his own way of driving.[219]

Professor Lawrence Lessig makes a similar point, asserting that legal interpretation requires fidelity to founding principles in the context of contemporary circumstances unforeseen in the founding era.[220] A basis of authority is essential for consistency, predictability, and reliability, but so too is independent judgment about how to apply it.

Where specific clauses of the Constitution fail to achieve this ultimate purpose—as was the case with the Three-Fifths,[221] Fugitive Slave,[222] and Importation Clauses[223]—the people can use the amendment process to correct deficiencies and guarantee norms. First, the Bill of Rights enumerated some

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217. H.P. Grice has characterized the process through which participants in a communication, such as a dialogue about the meaning of the Constitution or about a mundane subject, agree to advance the conversation along a mutually accepted trajectory. H.P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975).

218. *See, e.g.*, BALKIN, LIVING ORIGINALISM, *supra* note 51, at 249–55 (affirming the Fifth Amendment's role in desegregation and rejecting that succeeding generations are bound by the "expected application of 1791," so long as the "proposed construction . . . makes the most sense of the clause in the context of the larger constitutional plan").

219. R.M. HARE, THE LANGUAGE OF MORALS 76 (1952).

220. *See* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1367–86 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 401–07, 410–14 (1995).

221. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.

222. *Id.* art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

223. *Id.* art. I, § 9, cl. 1.

of the most important rights guaranteed by the blueprint of governance found in the Declaration and the Preamble.[224] None of the first ten Amendments, however, guaranteed the right to vote or the protection of speech against state, as opposed to federal, intrusion; more conspicuously, a nation founded on the notion that everyone was born equal did not even mention equality, which until ratification of the Fourteenth Amendment would remain a constitutional ideal determinately stated only by the Declaration. The Reconstruction Amendments were a correction to the injustice of inequality that was endemic to the original Constitution. Many of the Thirteenth, Fourteenth, and Fifteenth Amendments' framers regarded them as reparative of the initial Framers' failure to live up to the country's founding principles.[225] The Nineteenth Amendment was likewise meant to correct a deficiency of the original constitutional compact[226]—a deficiency that discounted the inalienable and political rights of half the adult population of the United States—and helped steer the country in the direction of the promises embodied in the Declaration of Independence and the Preamble. Other Amendments, such as the Twelfth Amendment and Twenty-Seventh Amendment, are more focused on the proper workings of government. But they also warded off corruption, with the Twelfth Amendment designed to prevent the intrigues that were corrosive to President John Adams's administration[227] and the House run-off election that resulted in the election of President Thomas Jefferson and the tainted vice presidency of Aaron

224. I develop this concept on the basis of Justice Brennan's idea that the original Constitution provided the structure for government, and the Bill of Rights and the Civil War amendments augmented the text to have a "sparkling vision of the supremacy of the human dignity of every individual" that fosters and protects "the freedom, the dignity, and the rights of all persons within our borders." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEXAS L. REV. 433, 439–41 (1986).

225. *See* TSESIS, *supra* note 6, at 91–93, 99–109.

226. *See* Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2177–78 (1993) (stating that the "conceptual underpinnings" of the Nineteenth Amendment were "not only . . . a means to improve women's lives, but also . . . symbolize[d] recognition of women's equal personal rights and equal political privileges with all other citizens" (internal quotation marks omitted)).

227. *See* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 60 (2008) (discussing how the Twelfth Amendment altered presidential elections); Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 931 n.23 (2001) ("The Framers of the Twelfth Amendment obviously had the then-recent Adams-Jefferson administration to look back on, and may have rejected [the runner-up] alternative for similar reasons.").

Burr.[228] The Twenty-Seventh meant to prevent legislative corruption through irregular compensation.[229]

Implicitly, the Amendment Clause of the Constitution[230] contains the power to effectuate positive change for achieving social progress. But how can we know whether society is progressing to the promise of liberty and the common good? Progress is made for the people as a whole, not only for some segments of society.[231] Favoritism for only some classes of the population, or for some individuals to the arbitrary exclusion of others, neither protects the collective rights of the people nor is conducive to the general welfare, which is a collective, not a balkanized, term. Balance and context are requisite for each decision made by each of the three branches of government. If the people disagree with the balance, they can elect new politicians and press for the appointment of judges more true to maxim constitutionalism and the Constitution as a whole.

The statement of national purpose found in the Declaration of Independence presupposes that all humans have innate rights, and the Preamble establishes one of the country's principal aims as the protection of the general welfare.[232] Public policy must aim to further the common good through institutions working to protect essential human entitlements. This, no doubt, is a very broad directive of governance in need of much

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228. *See* Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 HOFSTRA L. REV. 497, 573 (2011) ("[T]he Twelfth Amendment was a direct response to the electoral crisis that erupted in the presidential election of 1800 pitting then-Vice President Thomas Jefferson against Aaron Burr."); Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 84 IND. L.J. 1337, 1353 (2009) ("The Twelfth Amendment was added to the Constitution in the aftermath of the fiasco of 1800, where Thomas Jefferson and Aaron Burr tied for first and Thomas Jefferson was chosen only two days before inauguration on the thirty-sixth ballot.").

229. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 502–08 (1992) (discussing the origin and the development of the Twenty-Seventh Amendment and noting its purpose as a restraint on Congress's ability to set its own wages).

230. U.S. CONST. art. V.

231. *See* U.S. CONST. pmbl. (enumerating the purposes of the Constitution as including promotion of the *general* welfare); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (recognizing the equality of all men and stating that governments are established to ensure the unalienable rights of all).

232. The Declaration of Independence derives from a natural-rights theory that ties duties, responsibilities, and entitlements to attributes that are intrinsic to human nature. *See* Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1382 (2010) (discussing "American natural-rights morality" within the context of "the theory of unalienable and natural rights set forth in the Declaration of Independence"); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 425 (2012) (mentioning the "Declaration of Independence['s] . . . grand proclamation of natural rights"). Natural law philosophy ties norms to human characteristics. *See* Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2023 (2012) ("Natural law norms are natural because they are tied to human nature: they identify which actions are right and wrong by reference to a being with human characteristics.").

elaboration, but the same can be said of subordinate constitutional principles. For instance, the general tenets of the Equal Protection and Due Process Clauses are clearly binding and supreme over any violative state action, but their wording is indeterminate without the added specificity provided by statutes, regulations, and judicial decisions. The American constitutional project, then, is an evolving process of identifying, developing, negotiating, and working out reasonable policies likely to benefit private and public interests. The constitutional text is a necessary component of this deliberative process,[233] as is the aspirational directive to pursue justice and equality.[234] The text does not, however, have a static meaning but is malleable enough to react to collective wisdom through legislative debate, judicial deliberation, and administrative regulation.[235] The anchor for constitutional evolution this Article seeks to demonstrate is the maxim that government must "promote the general [w]elfare"[236] through laws and policies that the people, through their elected representatives, regard as "most likely to effect their Safety and Happiness."[237] This is the framing standard against which all other policies must be evaluated. Each generation of Americans seeks to disambiguate this broad purpose of governance through political debate, compromise, experimentation, and reconsideration.

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233. The Supreme Court has often recognized that liberty claims can arise "from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or [they] may arise from an expectation or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (citation omitted); *see also* Saenz v. Roe, 526 U.S. 489, 508 (1999) (finding that Congress is implicitly prohibited from passing laws violative of the Constitution and from enabling states to commit such violations); Printz v. United States, 521 U.S. 898, 907 (1997) (asserting that certain judicial power was "perhaps implicit in one of the provisions of the Constitution, and was explicit in another"); Goldberg v. Kelly, 397 U.S. 254, 261–63 (1970) (concerning the due process required before welfare entitlements are abridged).

234. The ambiguity of some of the most indeterminate portions of the Constitution led Justice Oliver Wendell Holmes to throw up his hands and declare that equal protection claims were "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 205, 208 (1927). Refusing to parse fundamental rights and equal protection, Holmes countenanced popular prejudice against black voters in *Giles v. Harris*, 189 U.S. 475 (1903), and against the reproduction of the allegedly mentally handicapped in *Buck*. *See Giles*, 189 U.S. at 486–88 (refusing to balance the private interest to vote against the public interest of efficient administration of the franchise); *Buck*, 274 U.S. at 205–06 (presuming that "experience has shown that heredity plays an important part in the transmission of insanity [and] imbecility"). Holmes's Social Darwinistic notion of popular governance sought to legitimize the exercise of popularly passed laws even when they were meant to further class prejudice and disregard the political will of disempowered individuals. Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 765–70 (2000). It was his skepticism about broad principles of rights that also led Holmes to declare: "Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments." Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

235. *See* Fiss, *supra* note 197, at 753–54 (defending a view that public morality is embodied in the text of the Constitution and necessary for explaining why the Constitution should be obeyed).

236. U.S. CONST. pmbl.

237. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

III. Theoretical Context

The Declaration of Independence and the Preamble to the Constitution declared the people to be sovereign and set normative limits on the administration of government.[238] The central purpose of governance, to safeguard the people's rights on an equal basis for the betterment of society, is the duty of all three branches of government. Constitutional interpretation should play a role in exercising each of the Branches' respective functions.

Most theories of constitutional interpretation, nevertheless, focus almost exclusively on various methodologies of judicial interpretation.[239] This Part of the Article analyzes three prominent theories of interpretation: originalism, living constitutionalism, and proceduralism. I make no effort to provide an exhaustive analysis of any of these three schools of thought. The discussion of maxim constitutionalism in the context of other interpretative methods is rather meant to examine whether there is any advantage to relying on a central constitutional ethos of national purpose. This Part of the Article concludes with an analysis of whether a process-based understanding of the Constitution is sufficiently robust to formulate civil rights policy.

A. Originalism

In the last four decades, originalism has left a significant mark on academic and judicial writings.[240] The stated aim of its supporters is for judges to interpret the Constitution according to the Framers' initial meaning

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238. *See id.*; U.S. CONST. pmbl.

239. *See* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 3 (2009) ("The initial problem is that when Americans think of constitutional change, they focus on judicial interpretations, not on the role of their elected representatives or of citizens themselves."); Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 629 (2012) ("[T]he assumption that legislatures are incapable of taking the Constitution seriously is, as Judge Posner's treatment illustrates, even more taken for granted and less examined by legal scholars today than judicial supremacy. It needs and deserves more serious treatment.").

Philip Bobbitt has identified the six legitimate modalities (i.e., forms) of constitutional interpretation to be textual, historical, structural, prudential, ethical, and doctrinal arguments. BOBBITT, *supra* note 128, at 11–22. By legitimate, Bobbitt refers to the grammatically correct methods for courts to understand the Constitution. *Id.* at 23. But for him, unlike me, legitimate does not refer to any overarching constitutional ethos. *See* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEXAS L. REV. 1771, 1775–76 (1994). Professors Balkin and Levinson note:

> The lay reader is apt to be confused by Bobbitt's use of "legitimacy," for there is an almost irresistible temptation to impute a moral valence to something that is "legitimate." However, Bobbitt insists that this temptation must be resisted, at least if we want to understand how our constitutional grammar works.

Id.

240. *See, e.g.*, BALKIN, LIVING ORIGINALISM, *supra* note 51, at 3 (arguing that originalism and living constitutionalism are compatible); Scalia, *supra* note 11, at 864 (analyzing nonoriginalism and originalism and classifying himself as a "faint-hearted originalist"); Strang, *supra* note 233, at 2003–14, 2026–39 (discussing the history of originalism and its innate virtue); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1162 (2012) (challenging originalism as a way of interpreting the Constitution).

or intent.[241] This method is meant to prevent judges from rendering decisions on the basis of political predispositions.[242] Early originalists like Judge Robert Bork argued that judicial restraint required judges to "stick close to the text and the history, and their fair implications."[243] "[T]he only legitimate basis for constitutional decisionmaking," Bork wrote, is "original intent."[244] For Bork and other early expositors of this schema, much of the Warren Court's legacy was based on faulty reasoning rather than verifiable "meaning attached by the framers to the words they employed in the Constitution."[245] Reagan Administration Attorney General Edwin Meese III took this line of thought into the public sphere. Meese advocated a "jurisprudence of original intention" requiring judges to consult "the original intent of the Framers."[246] Scholars, judges, and politicians who promoted the intentionalist branch of originalism believed the Framers established interpretive standards that they intended to be binding on their own and future generations.[247]

Intentionalists' historical claims came under fire for being inferential, driven by legal and political agenda, and often historically inaccurate. The record of ratification conventions, Madison's notes of the Constitutional Convention, and political pamphlets of the day are too inconsistent, incomplete, and partisan to make incontrovertible or decisive conclusions about their contribution to contemporary debates.[248] Furthermore, the Framers were not intellectually unified. Simply put, it is disingenuous to

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241. *See* BALKIN, LIVING ORIGINALISM, *supra* note 51, at 7–9 (discussing the version of originalism popularized by Justice Scalia, which uses the "original meaning" to interpret the Constitution (citing Scalia, *supra* note 11, at 862–64)).

242. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 195 (2008) ("Justice Scalia has long advocated originalism on the grounds that it constrains judicial discretion and so enables judges to enforce the Constitution as law, not politics."); Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 248 (2008) (stating that Justice Scalia's "interest in originalism is explicitly connected with his interest in rule-bound law and in constraining judicial discretion; on his account, originalism is uniquely capable of ensuring that constitutional law is not a matter of judicial will or ad hoc, case-by-case judgments").

243. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

244. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

245. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 108 & n.71, 402 (2d ed. 1997).

246. The Hon. Edwin Meese III, Att'y Gen. of the U.S., Address before the D.C. Chapter of the Federalist Society Lawyers Division at the Golden Palace 8, 10, 12–13 (Nov. 15, 1985), *available at* http://www.justice.gov/ag/aghistory/meese/1985/11-15-1985.pdf. Concerning the importance that Meese's public adoption of originalism played in the growth of this intellectual movement, see Ian Bartrum, *Originalist Ideology and the Rule of Law*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 1, 1–2 (2012).

247. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985) (distinguishing the intentionalist branch of originalism).

248. *See* Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 46 (2012) (discussing the incompleteness of the historical record of the constitutional period).

ascribe a collective conscience to individuals as disparate in their views as Alexander Hamilton and Thomas Jefferson.[249] While at the time of ratification, the Early Republic only had one political party, the acrimonious disputes between Federalists supporting the Constitution and Anti-Federalists opposing it without changes to the Philadelphia Convention's formuli were anything but unified.[250] Sometimes there was overlap even among rivals, which allowed Hamilton and Jefferson to work in the Washington administration and Federalists to acquiesce to Anti-Federalists' demands for a written bill of rights, but there were also profound differences of opinion, such as Hamilton's preference for strong national government and Jefferson's advocacy for local agronomic self-government, or the Federalists' willingness to ratify the original Constitution with only implicit protections of rights and the Anti-Federalists' condemnation of the omission of those written guarantees.[251] Some of the most influential Framers' views evolved, indeed morphed, after ratification. Jefferson, for instance, clearly changed his view about the capacity of the United States to expand territorially without constitutional amendment after France agreed to sell the Louisiana Territory.[252] James Madison initially argued against inclusion of a bill of rights in the Constitution, fearing that it would be construed to only protect enumerated rights and thereby leave other natural rights unprotected against government intrusion.[253] But he later served as the floor leader in the House of Representatives[254] on behalf of adopting the Bill of Rights.[255] This

249. *See* NOBLE E. CUNNINGHAM JR., JEFFERSON VS. HAMILTON: CONFRONTATIONS THAT SHAPED A NATION (2000) (discussing their divergent views).

250. *See, e.g.*, 1 FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Richard Leffler eds., 1989) (compiling writings by some of the leading scholars and theorists of the eighteenth century to highlight the intense constitutional debate among Federalists and Antifederalists); DAVID J. SIEMERS, RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME (2002) (confirming as much).

251. *See* Powell, *supra* note 247, at 891 & n.31, 904–14 (detailing the hermeneutical views of Federalists and their Anti-Federalist opponents).

252. HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON 363–64 (Library of Am. ed., Penguin Books 1986) (1889).

253. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON 295, 297 (Robert A. Rutland & Charles F. Hobson eds., Univ. Press of Va. 1977) (conditioning any support for a bill of rights on whether "it be so framed as not to imply powers not meant to be included in the enumeration" and noting the inefficacy of state bills of rights in preventing government intrusion); *Amendments to the Constitution* (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 196, 206–07 (Robert A. Rutland & Charles F. Hobson eds., Univ. Press of Va. 1979) (calling the enumeration argument "one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system").

254. *See* Carey Roberts, *James Madison in the U.S. House of Representatives, 1787–1797: America's First Congressional Floor Leader*, *in* A COMPANION TO JAMES MADISON AND JAMES MONROE 127, 127–42 (Stuart Leibiger ed., 2012) (discussing Madison's role as floor leader).

255. *See* Letter from James Madison to Thomas Jefferson, *supra* note 253, at 295, 297–99 ("My own opinion has always been in favor of a bill of rights.").

fluctuating political landscape did not alter the nation's permanent commitment to the maxim of individual rights for the common good.

There is, further, no reason for most Americans to seek a return to an era when racism, chauvinism, and classism were regarded as legitimate standards for political and social exclusion. The failures of the founding generation did not gainsay the nation's obligation to abide by the constitutional directive of socially responsible governance. In the post-Reconstruction and post-Civil Rights Era, a vastly more inclusive comprehension of fundamental rights and the common good has become part of federal law through statutes like the Civil Rights Act of 1964,[256] the Voting Rights Act of 1965,[257] the Age Discrimination in Employment Act,[258] and the Americans with Disabilities Act.[259] The Declaration of Independence, Bill of Rights, and the northern manumission acts[260] of the post-Revolutionary Era are just some examples of accomplishments of the framing generation from which we stand to learn. But they also pursued inimical policies, like passage of the Fugitive Slave Act of 1793[261] and ratification of the Importation Clause[262] and the Three-Fifths Clause,[263] that raise some serious doubt about their judgments and motivations. History is a tool for understanding various advancements of and failures to live up to the core commitment of U.S. constitutionalism, but no generation is required to adopt the complete will of its predecessors, warts and all.

Moreover, given that the Declaration of Independence and the Preamble attribute sovereignty to the people rather than the Framers of the Constitution—as might have been the case had the country become a plutocracy or aristocracy—it's unclear why the views of prominent men of the day should be more determinative than those of ordinary persons living during that period.[264] Presumably the preferences of persons engaged in drafting, writing, and ratifying the Constitution through state ratifying conventions should receive great weight with respect to the document's

256. Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h-6 (2006).

257. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

258. Age Discrimination in Employment Act, 29 U.S.C. §§ 625–26 (2006).

259. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, 47 U.S.C. §§ 225, 611 (2006).

260. *See, e.g.*, Act of Feb. 24, 1820, 1820 N.J. Laws 74; Act of Mar. 1, 1780, ch. 146, 1780 Pa. Laws 282; *see also* David Menschel, Note, *Abolition Without Deliverance: The Law of Connecticut Slavery 1784–1848*, 111 YALE L.J. 183, 184 nn.3–4 (2001) (collecting various abolition measures in Massachusetts, Vermont, New Hampshire, Pennsylvania, New Jersey, New York, Connecticut, and Rhode Island); A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1257–69 (1993) (discussing the Virginia Manumission Act of 1782).

261. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793).

262. U.S. CONST. art. I, § 9, cl. 1.

263. *Id.* art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.

264. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15, 220–21 (1980) (discussing the difficulty original intentionalists face in defining the class of people who adopted the Constitution and then applying it to cases in controversy).

meaning to the founding generation. But if the Declaration and the Preamble are to be taken at their word, then a much greater number of people's views should be taken into account for determining constitutional intentions and meanings. Professors Keith Whittington and Michael McConnell have gone further, arguing that originalist judges must give effect to the will of the people living at the time of ratification.[265] But even if that were normatively correct, the ideas, opinions, and leanings of such a diffuse group cannot be ascertained with certainty, neither from our vantage point, almost two-and-a-half centuries later, nor at the time of ratification.

"The People" is, instead, a dynamic constitutional concept embracing the idea that each generation is obligated to identify rights intrinsic to the pursuit of happiness and to demand that government provide the legal means of achieving the general welfare.[266] The structural parts of the Constitution provide the means for the three branches of government to pursue those ends. The people have exercised their sovereignty not only at the constitutional ratifying convention: their will is a continuously evolving force that is exercised through elective politics and representative governance. Understanding statements about unalienable rights found in the Declaration or the general welfare in the Preamble certainly requires retrospection. They are clauses that owe their existence to a specific colonial conflict with Britain. But like the abstract statements of the Bill of Rights and Reconstruction Amendments, such as those found in the Ninth Amendment[267] and the Equal Protection Clause,[268] our constitutional tradition is a steady stream of concretizing through Article V amendments and, to a less binding degree, precedent, legislation, and regulation. The broadly stated directive for government to protect rights—in the form of life, liberty, and the pursuit of happiness—for the general welfare—through substantive and procedural due process—invites debate and resolution, not stasis. The concrete structures of the Constitution, such as the age at which a person can become president[269] or the number of senators who represent each

265. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 124–25, 155–56 (1999) (discussing originalism in the context of popular sovereignty); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1529 (1989) (book review) ("The force of the originalist argument is that the people had a right to construct a Constitution, and that what they enacted should therefore be given effect . . . .").

266. *See supra* subpart II(C).

267. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.").

268. *See id.* amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

269. *See id.* art. II, § 1, cl. 5 ("No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . . .").

state in Congress,[270] are there to provide a framework for achieving the underlying purpose of representative governance.

Finding themselves in the crosshairs of historical and analytical criticism, originalists shifted their attention to structural originalism, the focus of which was on the text and design of the Constitution; consequentialism, with an emphasis on beneficial results; and "popular-sovereignty" originalism.[271] The most prominent, and currently most influential, branch draws its inspiration from the presumed original public meaning.[272] That shift did not obviate the problem of identifying an unambiguous source and understanding of the founding generation. An advocate for classic originalism critically pointed out that "public meaning originalism will generate more cases of constitutional indeterminacy than will the originalism of original intentions."[273] There is, furthermore, disagreement among public-meaning originalists. As Professors Thomas Colby and Peter Smith recently pointed out, original-meaning scholars are split between those that credit original understanding to ratifiers, the public, drafters, or hypothetical reasonable persons at the time of ratification.[274] There is little in common among these disparate camps of originalism except, as Professor Lawrence Solum has synthetically stated, that they all maintain there is a fixed-in-time constitutional meaning that constrains modern interpretation,[275] but they vociferously differ about the details. Professor Andrew Koppelman has stated that, ironically, while "[o]riginalists do not think that their field is in crisis[, t]hey should," because their approaches are

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270. *See id.* amend. XVII, § 1, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . . .").

271. *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEXAS L. REV. 1843, 1870–71 (2013).

272. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92–93 (2004) (asserting that originalism has itself changed from a focus on original intention to original meaning and using Robert Bork and Antonin Scalia as examples of originalists seeking the original meaning of the text); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447–71 (2006) (emphasizing that originalism is part of the Constitution's original meaning); Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250–51 (2010) (defending an original meaning interpretation of the First Amendment); Randy E. Barnett, Op-Ed., *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, http://online.wsj.com/article/SB121452412614009067.html ("Justice Scalia's opinion is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court.").

273. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 721 (2009).

274. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 251–52, 254–55 (2009).

275. *See* Larry B. Solum, *What Is Originalism?: The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY 12, 36 (Grant Huscroft & Bradley W. Miller eds., 2011).

so methodologically fragmented.[276] The different meanings of the "originalism" label renders untenable the central claim of the movement that it provides certainty in adjudication.[277] The reality, to the contrary, is that, as with all other approaches, judges who adhere to originalism must make normative decisions where constitutional clauses are not fully explained by the historical record, which is often ambiguous or plain nonexistent.[278]

The ideology most originalists espouse is too closely related to the conservative political agenda to ignore the overlap between it and party partisanship.[279] An originalist judge, whether relying on intentionalism or public meaning, cannot avoid exercising discretion when deciding facial or as-applied challenges.[280] Conservatives tend to think the federal government has overextended its regulatory reach into areas that the Constitution has left to state decision makers. Hence an eighteenth- and nineteenth-century mentality, that idealized a period of balanced federalist powers, goes hand-in-hand with a nostalgic, albeit unworkable, method for understanding the Constitution. That notion of the past is more ideological than it is historical.

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276. Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1918 (2012); *see also* Colby & Smith, *supra* note 274, at 244 ("A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.").

277. It is important to mention, although I am unable to deal with it at any depth in this paper, that an emerging line of reasoning shared among some post-intentionalist originalists no longer adopts their forerunners' claims of adjudicatory certainty, but rather claims a more modest proposition that the Constitution is binding and no changes to it can be made without the Article V process. *See, e.g.*, Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1563 (2012) ("I am in no position to make strong claims about the degree of interpretative determinacy of reasonable-person originalism, either absolutely or comparatively . . . . [I]t requires a specification of a standard of proof for interpretative claims; the extent of interpretative indeterminacy will vary, perhaps wildly, with changes in the standard of proof."); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43, 50–52 (1987) (admitting that originalist theory cannot provide absolute certainty but disputing that this is fatal to the originalist position); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing A "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1494 (2012) ("Indeed, the irony of the originalist school of interpretation is that an interpretive paradigm supposedly so committed to the unchanging goals of the Constitution has itself been subjected to more stylistic changes than spring fashion design.").

278. *See* BALKIN, LIVING ORIGINALISM, *supra* note 51, at 48, 92.

279. *See* Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1192–94 (2011) (arguing that originalism ties conservative politics to the Constitution). As Justice William J. Brennan Jr. put it, originalism "feigns" deference to the Constitution's Founders, "[b]ut in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Brennan, *supra* note 224, at 435. Frank Cross has pointed out that liberal judges, just as their conservative counterparts, have often deployed originalist arguments for ideological reasons. Cross, *supra* note 249, at 49–50.

280. *See* Colby & Smith, *supra* note 274, at 292 ("[O]riginalism often fails to constrain judges because the process of applying the original meaning . . . to the particular problem at hand still leaves room for substantial discretion on the part of the judge to follow her personal preferences—especially when that meaning . . . is articulated at a broad level of generality.").

For instance, as Jamal Greene has pointed out, Justice Antonin Scalia's originalist proclamation in *District of Columbia v. Heller*[281] that the Second Amendment protects the right to private gun ownership[282] is rejected by almost all historians of the eighteenth century.[283] For originalists, then, the ideological value of labeling something as historical can be of greater value than analyzing the matter according to the historical record.

History is of vital importance to the interpretation of the Constitution. However, sifting through precedents, social developments, statutory emendations, social and political advocacy, and other relevant data of legal culture does not call for blind adoration of the past. Indeed, the use of constitutional language appears too rarely in the historical record, often in contexts unrelated to interpretive canon, to provide definitive answers to disputes about textual meaning.[284] Rather, the previous generations' legal conclusions, insights into human behavior, legislative enactments, constitutional adjudications, administrative changes, and the plethora of other achievements best make sense within a unified framework of national ethos. That framework is neither beholden to the intent of the founding generation nor to the public meaning of the Constitution's wording. Originalism requires inferences outside its stated purpose when addressing questions far beyond the Framers' foresight, such as the Fourth Amendment's application to searches and seizures using global positioning systems (GPS),[285] thermal imaging devices,[286] and telephone booths.[287] Sometimes resort to the historic record by both the majority and dissent amounts to two reasonable interpretations of the extant sources that arrive at opposite conclusions. This was the case in *U.S. Term Limits, Inc. v. Thornton*,[288] which held unconstitutional a state's limitations on the number of terms representatives

281. 554 U.S. 570 (2008).

282. *Id.* at 636. Scalia calls himself a "faint-hearted originalist." Scalia, *supra* note 11, at 864. And Barnett has critically asserted that "Justice Scalia is simply not an originalist" because of the Justice's willingness to sometimes be pragmatic about allowing precedents to override original meaning. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006). *But see* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 272, at 138–39 ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.").

283. Greene, *supra* note 279, at 1193.

284. Redish & Arnould, *supra* note 277, at 1502 (noticing that original meaning suffers from "an overwhelming archaeological problem due to the simple lack of relevant data" and the ambiguous use of words "in entirely unrelated contexts").

285. United States v. Jones, 132 S. Ct. 945, 949 (2012) (holding that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" (footnote omitted)).

286. Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that the use of a thermal heat device to ascertain behavior occurring inside a home was a search for Fourth Amendment purposes).

287. Katz v. United States, 389 U.S. 347, 353 (1967) (deciding that people have a reasonable expectation of privacy in phone booths, where they are protected against unreasonable searches).

288. 514 U.S. 779 (1995).

and senators could serve in the U.S. Congress.[289] Legitimacy of constitutional determinations is, rather, based on whether government action or inaction is made in accordance with the underlying directive of representative democracy, established in the Declaration of Independence and the Preamble, to protect individual rights for the common good. And that judgment is a contested one. The details must be hashed out in legislative debates, judicial conferences, and presidential cabinet meetings. If the people dislike the conclusions reached by powerful actors, they can vote them out of office and start afresh in the next election cycle. Elected officials can then engage in the appointment of judicial candidates committed to the maxim of representative governance.

Jack Balkin has recently proposed a "living originalism" approach, which frames the Constitution in general terms, based on original "semantic content."[290] He bases the approach on neither the original intent nor the original expected application of the Founding Fathers. Living originalism, instead, requires fidelity to the content of provisions like the Equal Protection Clause,[291] but recognizes that "changing social demands and changing social mores" should influence constitutional construction.[292] This is a welcome understanding that mores play a central role in decision making. Balkin writes that future generations must abide by the Constitution's original framework.[293] This "framework consists of the original semantic meanings of the words in the text (including any generally recognized terms of art) and the adopters' choice of rules, standards, and principles to limit, guide, and channel future constitutional construction."[294]

This approach provides Balkin with a method of explaining the legitimacy of modern precedents like *Roe v. Wade*,[295] despite the dearth of grounding that opinion has in any original semantic meaning of the Fourteenth Amendment's Privileges or Immunities Clause.[296] Social mobilization is crucial to his model "in building the Constitution" and shaping constitutional construction.[297] Balkin does not, however, adopt a central principle for judicial review and all other functions of governance to

289. *Id.* at 783.

290. BALKIN, LIVING ORIGINALISM, *supra* note 51, at 12–13.

291. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551–53 (2009).

292. *Id.* at 551.

293. *See* BALKIN, LIVING ORIGINALISM, *supra* note 51, at 4 ("The text of our Constitution is a framework. . . . The ratification of the Constitution begins a constitutional project that spans many generations. Each generation must do its part to keep the plan going and to ensure that it remains adequate to the needs and the values of the American people." (citation omitted)).

294. Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 817.

295. 410 U.S. 113 (1973).

296. *See* BALKIN, LIVING ORIGINALISM, *supra* note 51, at 215–18 ("[T]he right to abortion had not . . . gained the status of a privilege or immunity of national citizenship, when the Court decided *Roe* . . . .").

297. *Id.* at 81–82.

help explain, justify, or condemn any given trajectory of U.S. social, political, and constitutional change. A unified principle of governance provides a grounding on which social groups can demand change. Its simple ideals do not require advocates for change to be specialists in constitutional law, they need only seek the protection of individual rights in order to further the general welfare, where everyone is treated as an equally valuable member of society regardless of ethnic background, affluence, or political clout. I agree with Balkin's model of social advocacy but believe that maxim constitutionalism adds a necessary grounding for construction left out of his formulation of constitutional advancement.

In this Article I suggest that the central purpose of government is contained in the maxim that the people have created a representative polity whose *raison d'être* is the use of constitutional powers to safeguard inalienable rights to further public good. This is a normative matter, not merely a semantic one. That norm is stable and provides the initial constitutional content to publicly eschew intolerance and group animus. The protection of rights is viewed under my maxim-constitutional approach to be essential for pluralism because it requires the Executive, Legislative, and Judicial Branches to respect individual difference while administering just laws for the betterment of the whole. While Balkin is correct that the Constitution provides the aspiration for "higher law,"[298] it is not the document itself but the human aspiration to live in a society obligated to protect the individual's unobtrusive pursuit for the good life that is at the core of legitimate state power.[299] That will to power is best exercised through a representative government, responsive to the will of constituents but not beholden to the discrimination of the majority. Freedom of human sexuality, which the Court recognized under the term "privacy" in *Griswold v. Connecticut* and *Lawrence v. Texas*,[300] is an example of one constitutional right that is based on innate human aspirations instead of textual semantics, original intents, or original meanings. Maxim constitutionalism, then, regards key constitutional provisions, foremost paragraph two of the

298. Balkin, *Nine Perspectives*, *supra* note 295, at 846 (emphasis omitted). Balkin further writes that some are "underlying principles" of the Constitution that are "implied from various parts of the text" while others, "like equal protection [and] freedom of speech" appear in the text. BALKIN, LIVING ORIGINALISM, *supra* note 51, at 259. All this is convincing. My difference with this reading is first that there is a central maxim of constitutional construction that gives meaning to all the other written and unwritten principles of the Constitution. Secondly, the maxim of government's obligation to protect individual rights for the common good does not derive from text but from the people's innate rights to freedom and well-being. The text of the Declaration of Independence and Constitution binds the federal government to protect and enforce the people's will through specific constitutional clauses, statutes, judicial decisions, and executive action.

299. Put into the formulation of the Declaration of Independence, the people "institute" government on the "Foundation o[f] such Principles" and organize "its Powers in such Form, as to them . . . seem most likely to effect their Safety and Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

300. 539 U.S. 558 (2003).

Declaration of Independence and the Preamble to the Constitution, to be defined by ontological human rights, not determinative of them. The maxim of individual rights for the common good is that principle upon which all other constitutional principles must be justified, and it owes its authoritative place to neither historic semantics nor extant text but to the rational worth of people establishing a government capable of protecting their essential interests as the best means of enjoying well-being. Put another way, the rights protected by the Constitution are preconstitutional.

B. Living Constitutionalism

In response to Balkin's living originalism, a proponent of a rival school of interpretation asserted that any form of originalism that calls for "constitutional construction . . . is not originalist; it is living constitutionalist."[301] The leading theory of living constitutionalism contends that judicial precedent is the primary means for evolving and adapting the Constitution to social progress without needing to formally amend its antedated provisions.[302] Balkin, in response, suggested that judges should be unwilling to defend decisions that are not faithful to the Constitution's original framework.[303] Original intent and original meaning proponents would be even more averse than Balkin to following precedents that deviated from the will of the Founding Fathers or the framing generation.[304]

Living constitutionalism is usually associated with judicial decisions that redefine the meaning of the Constitution. Scholars and judges in this school of thought argue that constitutional meaning resides not in the text nor can it be construed through any form of originalism; rather, they seek to demonstrate how precedents define and alter the significance of various clauses.[305] The Supreme Court is regarded as the locus of constitutional change, redefining the Constitution through major precedents during the New Deal, the Civil Rights Era, and throughout the course of U.S. history.[306] The Judiciary is therefore responsible for updating constitutional principles. Justice William Brennan cautioned that when judges rely on judicial review to guide constitutional meaning they should act "with full consciousness that

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301. Strauss, *supra* note 241, at 1166.

302. STRAUSS, *supra* note 12, at 1, 3 (defining the living Constitution as "one that evolves, changes over time, and adapts to new circumstances, without being formally amended").

303. *See* BALKIN, LIVING ORIGINALISM, *supra* note 51, at 123–24.

304. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 983 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("*Roe* was plainly wrong—even on the Court's methodology of 'reasoned judgment,' and even more so (of course) if the proper criteria of text and tradition are applied.").

305. *See* STRAUSS, *supra* note 12, at 3, 4 ("Our constitutional system . . . has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself.").

306. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

it is . . . the community's interpretation that is sought."[307] Brennan recognized the value of reviewing the history of the framing, but wrote that the "ultimate question" is what the words of the Constitution mean today.[308]

Brennan's approach left undefined how a Justice should pick among contradictory community opinions to decide which is worthy of her or his attention. The maxim of constitutional interpretation I have developed in this Article might help to fill that gap and prevent exclusionary members of the community from having too much influence on the Court's reasoning. The maxim of liberal equality for the common good can provide structure, requiring the President and Congress to likewise be aware and direct their public conduct in a manner likely to protect fundamental interests for the general welfare. As Balkin pointed out, living constitutionalism can also be associated with the other branches of government guiding constitutional development.[309] Similarly Professor Bruce Ackerman praised the common law approach to adaptation but criticized the judge-centered approach for slighting "the central importance of popular sovereignty."[310]

Balkin's and Ackerman's criticisms about placing too much trust in judges to guide constitutional evolution reject Professor David Strauss's vigorous defense of common law constitutionalism. Strauss believes that in the United States "precedent and past practices are, in their own way, as important as the written U.S. Constitution."[311] He further argues that Supreme Court decisions should be at the forefront, or, as he puts it, should be the "all-but-exclusive" means, of constitutional change, even when the precedents are not clearly based on the text of the Constitution.[312] This precedent-centered model emphasizes the importance of building on past understandings and altering them in light of new sensibilities.[313] It takes for granted the progressive nature of stare decisis and puts resolution of political disagreement into the hands of unelected judges.[314] One limitation with such an approach is that it overlooks analytically faulty precedents and the

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307. Brennan, *supra* note 224, at 434.

308. *Id.* at 438.

309. Balkin, *supra* note 291, at 561.

310. Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1801 (2007).

311. STRAUSS, *supra* note 12, at 3.

312. *Id.* at 116. As Professor Strauss writes:

> The mechanisms of constitutional change that make up the living Constitution—the evolution of precedents and traditions—are much more important. The living Constitution is the primary—I will go so far as to say the all-but-exclusive—way in which the Constitution, in practice, changes. The formal amendments are a sidelight.

Id. As examples of common law progress made without reliance on originalist or textualist bases, Strauss names school desegregation, gender equality, checks against state racial discrimination, and voting apportionment. *Id.* at 12–15.

313. *Id.* at 34–36, 38.

314. Judge Wilkinson has stated that living constitutionalists' reliance on judicial supremacism for achieving social improvement is antidemocratic. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 19–20 (2012).

Judiciary's periodic regressive decision making. The resolution of disputes between different democratic factions are typically thought to be in the realm of bicameral conferences and congressional–executive deal making, not judicial oversight.[315] Strauss's defense of the gradual common law process of precedents does not gainsay the fault of a system that would have to rely on judges almost exclusively for progress.[316]

Supreme Court precedents have well-known high and low points. Some of the most obvious examples of judicial manipulation of the Constitution to suit justices' political and economic world views were *Dred Scott v. Sandford*[317] and *Lochner v. New York*.[318] In both cases, the Court construed substantive due process to impede legislators from safeguarding the rights of vulnerable groups and to address a public crisis—the crisis of slavery in the first and public health in the second.[319] In the case of slavery, it was Article V of the Constitution that eventually facilitated change, through passage of the Reconstruction Amendments.[320] Even after the ratification of the Amendments, the Court denied the constitutionality of a federal statute that prohibited the segregation of public places of accommodation, like inns

315. *See id.* at 21 (critiquing living constitutionalism for relying on judges to achieve functions ordinarily left for the political branches of government); *see also id.* at 22 ("America would be a much impoverished country if the political branches and the states surrendered all constitutional discourse to the courts, yet that is exactly what living constitutionalism has encouraged them to do."). Strauss's passing suggestion that living constitutionalism could be advanced "without judicial review" does not fully resolve the difficulty of overreliance on the courts. STRAUSS, *supra* note 12, at 48. He immediately follows that statement by suggesting that the alternative to common law living constitutionalism is for Congress to "conscientiously" apply "earlier decisions and understandings," which begs the question of whose "decisions and understandings" other than judges would become the authoritative voice on constitutional meaning. *Id.* Strauss doesn't answer this question, so a bit of conjecture is necessary: If it is the past "decisions and understandings" of Congress itself, then some central meaning other than simply the abstract notion of updating the Constitution is necessary to avoid fundamental changes with each election cycle. If the Executive Branch's "earlier decisions and understandings" could guide the evolution of constitutional meaning, the risk of autocracy would be heightened contrary to the warnings of the Declaration of Independence.

316. As examples of gradual change Strauss discusses how Supreme Court doctrine evolved from *Plessy v. Ferguson* to *Brown v. Board of Education* and beyond. STRAUSS, *supra* note 12, at 77–80, 85–92. That the Court eventually got it right is no justification for the personal and social harms of state Jim Crow practices that were justified on the basis of the *Plessy* rationale.

317. 60 U.S. (19 How.) 393 (1857).

318. 198 U.S. 45 (1905).

319. *Dred Scott*, 60 U.S. at 450 ("[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law."); *Lochner*, 198 U.S. at 64–65 (finding unconstitutional a statute that regulated the working hours of bakers for being an abridgment of the right to contract). In *Dred Scott* the Court struck down the Missouri Compromise, which Congress had enacted to accommodate Northern efforts to limit, and Southern efforts to facilitate, the expansion of slavery. *See* TSESIS, *supra* note 6, at 66–68. The New York law struck down in *Lochner* addressed the high mortality and epidemic rate among bakers resulting from their long exposure to airborne flour dust. 198 U.S. at 70–72 (Harlan, J., dissenting).

320. *See* U.S. CONST. amends. XIII, XIV, XV.

and theaters,[321] and in another case turned back a private claimant's assertion that women have the same privilege and immunity as men to pursue careers, over the lone dissent of Chief Justice Chase.[322] With *Lochner*, the abandonment of judicial manipulation came through presidentially initiated programs during the New Deal. At first, the Court refused to go along with the increased nationalization of economic regulations and only conceded the validity of federal economic stimulus after striking several pieces of legislation that had been aimed at ending the Great Depression.[323] The interpretational finality that the Court has bestowed upon itself has sometimes led to social uplift but at other times hung like a millstone around the necks of progressive social movements. One of the Constitution's structural complications is the difficulty of ratifying amendments under Article V—an even greater complication when the Court prevents the advancement of civil rights and by its narrow interpretation harms classes of people seeking to pursue their equal right to happiness.

That said, it is incontrovertible that the Court has also played a visible role in advancing general welfare and the equal protection of fundamental rights. But in contrast to Strauss's model, progress has often occurred through cases that broke with past precedents rather than through gradual, inevitable change. *Brown v. Board of Education* was one of the decisions in which the Court overtly helped end a social evil by relying on the public value of democracy and the individual value of equal treatment.[324] In that case, the Court cited previous decisions that required limited desegregation, like *McLaurin v. Oklahoma State Regents*[325] and *Sweatt v. Painter*,[326] but those two cases were still rooted in the *Plessy v. Ferguson* regressive doctrine of separate but equal accommodations.[327] The moral clarity of

321. The Civil Rights Cases, 109 U.S. 3, 17 (1883) (finding the Civil Rights Act of 1875 to be unconstitutional); *see also* the Civil Rights Act of 1875, ch. 114, §§ 1–2, 18 Stat. 335 (creating a private cause of action and making it a misdemeanor to deny any U.S. citizen "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement").

322. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 137–39, 142 (1873) (holding that women were not entitled to enter occupations of their choice on the basis of a national privilege protected by the Fourteenth Amendment).

323. *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 323–24 (1999) (relating how the Roosevelt administration's economic policies were efforts to end the Great Depression and provide the impoverished with the opportunity to prosper); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940, at 231–37 (1963) (discussing Roosevelt's response to the Supreme Court's initial undermining of his reform efforts and the gradual break from past precedents).

324. Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954).

325. 339 U.S. 637, 641–42 (1950) (holding that a university's segregation policy requiring a black student to sit apart from other students violated his right to equal protection under the law).

326. 339 U.S. 629, 633–34 (1950) (holding that a newly constructed segregated law school for blacks did not provide blacks with an equal educational opportunity).

327. *Brown*, 347 U.S. at 493; *see also* Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt's Theory of the Constitution*, 17 WM. & MARY BILL RTS. J. 157, 181 (2008) ("*Sweatt* (and *McLaurin*, decided the same day) simply concluded that the particular acts of segregation did

Brown came from its deviation from precedent to protect the right of each student to an equal education and the common value of informed politics. The unanimous majority recognized that a pluralistic society's obligation to secure the common good of educated, political participation required the equal protection of minorities.[328] When Herbert Wechsler criticized *Brown* for not being based on a neutral principle[329] he was correct, but his criticism of the Court's value-rich approach was off target. *Brown* was in keeping with the dual constitutional aim of protecting individuals for the mutual good of the population as a whole. The Declaration of Independence was first to place civic morality into political discourse. The Constitution later openly recognized the public's interest in federal enforcement of individual rights through a variety of amendments, beginning with the Bill of Rights. What the Bill of Rights failed to require of the states was supplied by incorporation through the Fourteenth Amendment, with its grant of congressional authority to enforce national, constitutional norms and judicial authority to apply them to the states. The philosopher John Rawls explained the intertwining of personal and civic interests in education, stressing the "important . . . role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of his own worth."[330] Similarly, Justice Brennan, writing in a concurrence, explained that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."[331]

Just as *Brown* was a definitive break, so too the abandonment of *Lochner* made a sharp turn from previous common law constitutionalism. In *West Coast Hotel Co. v. Parrish*,[332] the Court belatedly acknowledged that legislators can pass minimum wage laws for the sake of "public interest with respect to contracts between employer and employee."[333] In short order, the Court followed up in *United States v. Darby*,[334] upholding the Fair Labor

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not satisfy the *Plessy* doctrine."). Strauss contends that while *Plessy* remained the law of the land after *McLaurin* and *Sweatt* "the legal landscape" had changed so much "that this progression of precedents had left separate but equal hanging by a thread." STRAUSS, *supra* note 12, at 90. There is no indication, however, that the South understood *McLaurin* and *Sweatt* to mandate desegregation as *Brown* required. To the contrary, the Court signaled in *McLaurin* and *Sweatt* that a truly equal system of accommodations that separated blacks and whites would not violate the Equal Protection Clause. *See McLaurin*, 399 U.S. at 640–41 ("State-imposed restrictions *which produce inequalities* cannot be sustained." (emphasis added)); *Sweatt*, 339 U.S. at 633–34 (stating that the two law schools were not "substantially equal").

328. *See Brown*, 347 U.S. at 493–95.

329. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–34 (1959).

330. RAWLS, *supra* note 10, at 101.

331. Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

332. 300 U.S. 379 (1937).

333. *Id.* at 392–93.

334. 312 U.S. 100 (1941).

Standards Act of 1938.[335] This new line of cases, then, carved a legislative path for Congress to use its Commerce Clause power to set policies for the general welfare that could better the conditions of individual workers. The Court recognized the constitutionality of protecting workers by enforcing statutes that were rationally designed to expand ordinary people's ability to participate in a national economy.[336] Some judicial opinions, congressional statements, and academic publications in the late 1930s and early 1940s claimed a connection between increasing the wages of economically disempowered individuals and the improvement of living conditions in the United States as a whole.[337] This too was the connection between individual rights and the general welfare that I argue is at the forefront of legitimate-exercise governmental authority.

The possibility of change through the constitutional maxim interlinking the constitutional values of rights and general welfare, which are set down in the Declaration of Independence and the Preamble to the Constitution, is even more readily visible in the gender equality cases. That is, underlying common law constitutionalism is a maxim that creates the reaches of legitimacy for the exercise of federal power. The Court only began to adequately address the endemic harms of gender stereotypes in 1971, with its decision in *Reed v. Reed*.[338] Decisions that followed discarded the Court's previous tolerance for chauvinistic policies, such as it had upheld in *Bradwell v. Illinois*[339] and *Minor v. Happersett*.[340] Without overturning either decision, since the 1970s the Court has swept away its previous rationalizations for

335. *Id.* at 114 ("Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles . . . injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.").

336. *See id.* at 109–10, 115 (recognizing Congress's power to prohibit interstate shipment of goods produced under conditions that perpetuate workers receiving substandard wages).

337. *See, e.g.*, Andrews v. Montgomery Ward & Co., 30 F. Supp. 380, 384 (N.D. Ill. 1939) ("Certainly it cannot be maintained now that Congress may not, in the interests of the general welfare of the country, prohibit the shipment in interstate commerce of the products of under paid and sweated labor."); *To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States: Hearing on H.R. 9072 Before a Subcomm. of the H. Comm. on Labor*, 74th Cong. 1 (1936) (discussing "[a] bill to rehabilitate and stabilize labor conditions in the textile industry of the United States; to prevent unemployment, to regulate child labor, and to provide minimum wages, maximum hours, and other conditions of employment in said industry; to safeguard and promote the general welfare; and for other purposes"); David Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. CHI. L. REV. 607, 647 (1939) ("It may be relatively simple to demonstrate that the wage and hour law has a reasonable relationship to the health of male workers, the harmonious functioning of industry and the general welfare of the community.").

338. *See* 404 U.S. 71, 74 (1971) (holding that a statutory preference for male estate administrators violated the Equal Protection Clause).

339. *See* 83 U.S. (16 Wall.) 130, 139 (1873) (rejecting a Fourteenth Amendment claim that prohibiting women from practicing law was a violation of the Privileges or Immunities Clause).

340. *See* 88 U.S. (21 Wall.) 162, 174–75 (1874) (holding that the Fourteenth Amendment did not protect women's right to vote).

arbitrary treatment of women in professional and political life.[341] The change was not based on the text of the Constitution, nor can the advancement of women's rights be readily explained as judicially spearheaded progress. In fact, it was the outcome of advocacy that had begun with first- and second-wave feminists, not judicial leadership.[342] In cases like *Nevada Department of Human Resources v. Hibbs*,[343] which held states were not immune from the Family and Medical Leave Act,[344] the Court followed the evolution of more evenhanded family, professional, and political norms;[345] the Justices did not set them. To put it another way, the correctness of the Court's recognition of women's equality is not based on the Justices' discursive reliance on past precedents but on the constitutional value of laws safeguarding intrinsic human equality to enjoy the benefits of living in a representative republic.[346] If the Court had remained recalcitrant in upholding states' uses of gender stereotypes, its decision making would have been better adjudged by the maxim of constitutional governance, which sets the ethos of national constitutionalism, rather than past precedents, which have sometimes been mired in longstanding prejudices.[347]

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341. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that laws that establish classifications based on gender must serve important governmental objectives and must be substantially related to the achievement of those objectives to be constitutionally in line with the Equal Protection Clause); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (stating that classifications based on sex are inherently suspect and must be subjected to close scrutiny).

342. *Cf.* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1034 (2002) ("Like the gains won by the civil rights movement, constitutional protections for women's right to vote grew out of decades of social movement activity; but unlike the gains the civil rights movement won, constitutional protections for women's right to vote were secured through Article V lawmaking."); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 297–98 (2001) (discussing the first and second waves of the feminist movement and arguing that the text plays a role).

343. 538 U.S. 721 (2003).

344. *Id.* at 725.

345. *See id.* at 729–35 (describing severe state law restrictions on women's employment sanctioned by earlier Courts, crediting Congress for propelling reform, and upholding the FMLA as a reasonable legislative response to testimony about continued discrimination through family leave policies).

346. *See id.* at 736 (commenting that stereotypes about women in the home and in the workplace have caused "subtle discrimination"). Lower courts have also recognized "that because sex-based classifications may be based on outdated stereotypes of the nature of males and females, courts must be particularly sensitive to the possibility of invidious discrimination in evaluating them." Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1300 (8th Cir. 1973); *see also* Hibbs v. Dep't of Human Res., 273 F.3d 844, 860 (9th Cir. 2001) (finding "the stereotypical assumption that women are marginal workers whose fundamental responsibilities are in the home" to be illegitimate), *aff'd*, 538 U.S. 721 (2003); Faulkner v. Jones, 10 F.3d 226, 231 (4th Cir. 1993) (holding that while legislative distinctions based on sex may be upheld for important governmental interests, gender stereotypes could not overcome intermediate scrutiny).

347. *See supra* p. 1614 (positioning the maxim of constitutional governance within a general theory of legal maxims as one that creates a series of binding obligations on the government to its citizens).

Strauss's common law living constitutionalism is significant because it draws attention to the important role precedents play in constitutional change. But to his account should be added a stable principle against which developing doctrine must be tested. The principle cannot come solely from historical sources, many of which are tainted with discriminatory intents and meanings of the past. Even the text of the Declaration of Independence and the Preamble to the Constitution are not transparent.

C. *Normative Compass*

The directive for government to protect equal rights for the betterment of the whole lays a constitutional foundation on which each generation can build a legal infrastructure for personal achievement and social improvement. A maxim grounded in the principles of the Declaration of Independence and the Preamble to the Constitution establishes a consistent, stable, and reliable standard for regulation and policy making. But these documents' directive of governance will not always provide lawmakers and judges with obvious answers to pressing dilemmas. Rather, the maxim of governance is the people's overarching directive that government must follow, be it the legislature in enacting laws, the executive in enforcing them, or the judiciary in adjudicating their validity or application.

When confronted with conflicting constitutional pressures from the public and private sectors, a well-established principle of adjudication requires the Court to balance relevant interests.[348] In the previous Supreme Court term, for instance, the Justices found that even though the majority of states and the federal government permitted mandatory lifelong incarcerations for juveniles convicted of murder in adult courts, the punishment violated the Eighth Amendment.[349] The Court earlier had held unconstitutional the statutes of thirty-seven states, the District of Columbia, and the federal government that provided life-without-parole sentences for some juveniles convicted of nonhomicidal offenses.[350] The lesson from these decisions is that the effort to achieve social justice—in these cases retribution and deterrence for crimes—cannot be based on procedures that inadequately guard an individual's ability to expect a sentence commensurate with his or

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348. The Court annunciated the best known constitutional balancing test for civil cases in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Due Process requires the following three considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

349. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460, 2471–73 (2012).

350. Graham v. Florida, 130 S. Ct. 2011, 2023, 2034 (2010).

her culpability. While incarceration is a necessary restraint on liberty to protect the public, it does not follow that lifelong deprivation of liberty, with its negative impact on juvenile convicts' ability to pursue a good life, is justified.

In both cases, the Court assessed the social standard and national consensus for heavy punishments against juvenile offenders but found that the dominant statutory regime was an unconstitutional deprivation of liberty without sufficient judicial latitude to engage in individualized reflection on a juvenile defendant's lower blameworthiness.[351] A stable principle of justice exercised in a civil society should recognize the directive of balancing a state's need to safeguard public peace and an individual's need for fair treatment that does not arbitrarily deprive one of the ability to pursue happiness. Justice Brennan, though a living constitutionalist, recognized that the Constitution contained "substantive value choices" that prevent legislatures from being hijacked by majoritarian processes.[352]

Thus, as many scholars have pointed out, the Court has often functioned as a countermajoritarian institution.[353] But the judiciary is not entirely immune from political influences,[354] as the Court demonstrated in its adoption of the gun lobby's interpretation of the Second Amendment[355] and its order in favor of the Republican Party to stop the Florida ballot recount during the George Bush–Al Gore presidential election of 2000.[356] Additionally, the Supreme Court has also periodically given more weight to state policies than civil rights legislation. For instance, a bare majority decided that sovereign immunity trumped the rights of the disabled under the

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351. *See Miller*, 132 S. Ct. at 2468 (stating that previous juvenile-conviction precedents and "our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult"); *Graham*, 130 S. Ct. at 2030 (commenting that the "irrevocable judgment" accompanying a sentence of life without parole is inappropriate "in light of a juvenile nonhomicide offender's . . . limited moral culpability").

352. Brennan, *supra* note 224, at 437.

353. For some of the voluminous literature on the Court's role in preventing majorities harming minorities see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (2d ed. 1986) (arguing that the "root difficulty" of judicial review is that it is a "counter-majoritarian force in our system"); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 523–607 (2002) (describing a wide variety of countermajoritarian approaches); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1340–41, 1351–52 (2004) (arguing that "taking political ignorance into account severely weakens the claim that judicial review of federalism is . . . countermajoritarian").

354. *See* Posner, *supra* note 3, at 52–53 (discussing political motivations in the judicial process).

355. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (holding that the Second Amendment guarantees a private right to gun ownership); *see also* Siegel, *supra* note 242, at 237–39 (tracking the historical ideals and influence of the gun lobby and attributing their influence to the *Heller* majority).

356. Bush v. Gore, 531 U.S. 98, 110–11 (2000).

Americans with Disabilities Act[357] and the elderly under the Age Discrimination in Employment Act.[358] In these cases, the Court wasn't acting as a countermajoritarian institution, preventing minority abuse; to the contrary, it struck down legislation that protected members of vulnerable groups' abilities to participate in the common good of civil society.

The Supreme Court has increasingly limited Congress's ability to perform its functions "in [a] manner most beneficial to the people," a policy concern long recognized to be a legitimate use of legislative authority.[359] In Chief Justice Marshall's structural scheme, the Court has for more than two centuries retained the right to determine whether a law was "repugnant to the constitution" because "the constitution controls any legislative act repugnant to it."[360] In a Warren Court decision, *Cooper v. Aaron*,[361] the Supreme Court asserted even more clearly that the "federal judiciary is supreme in the exposition of the law of the Constitution"[362] and ordered that the South desegregate pursuant to the earlier holding in *Brown v. Board of Education*. While the Court identified its power to review government conduct in order to preserve the Constitution as the supreme law against overreaching of either of the other two branches of government or the states,[363] nothing in either of those cases asserted that the Court was the exclusive interpreter of the document. Indeed, such an exclusive grant of power to the unelected judiciary seems to be counterintuitive given that the obligation to safeguard rights for the general welfare places duties on all three branches. In *Cooper*, in particular, the point was that no state entity should undermine a Supreme Court holding interpreting the Constitution,[364] but that decision did not remove from Congress or the President any authority to initiate policies furthering constitutional values.

Justice William Brennan's majority opinion in *Katzenbach v. Morgan*,[365] decided eight years after *Cooper*, brought the point home, finding

357. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that state employers are immune from private monetary damages claims under the ADA).

358. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that state employers are immune from private monetary claims under the ADEA).

359. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("[W]e think the sound construction of the constitution must allow to the national legislature that discretion, . . . which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.").

360. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803) (establishing judicial review).

361. 358 U.S. 1 (1958).

362. *Id.* at 18.

363. *Id.* (stating that "[e]very state legislator and executive and judicial officer" is bound to support the Constitution, which includes the interpretations handed down by the Court in its decisions).

364. *Id.* at 18–19 (explaining that in order for the Constitution to remain the "supreme law of the land," no exercise of state power may contravene the judgments of the courts of the United States).

365. 384 U.S. 641 (1966).

that Congress had the authority to explore and exercise the range of its Fourteenth Amendment Section Five power.[366] The express constitutional grant of authority in the Enforcement Clause did not, the Court found, relegate Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."[367] Instead the Court took a position, which the Rehnquist Court later repudiated,[368] that Section Five "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[369] Taken together, *Cooper* and *Morgan* required Congress to follow judicial interpretation but also recognized that legitimate congressional initiative can be based on the independent exercise of constitutional authority, without having to wait for judicial guidance.

Judicial deference to congressional expansion of rights coupled with its interpretational assertiveness required a balanced effort for safeguarding constitutional rights and structural integrity for governing a pluralistic society, committed both to popular representation and countermajoritarian norms. According to the *Cooper–Morgan* line of reasoning, the Constitution grants the Judicial and Legislative Branches separate powers to protect rights against state practices that arbitrarily exclude some segment of the population or individual from enjoying the basic rights of education and political participation.

In several subsequent cases, the Court augmented its power and, in the process, diminished Congress's ability to set agendas in keeping with the maxim directive of the Declaration of Independence and the Preamble to the Constitution. Beginning with *City of Boerne v. Flores*,[370] the Rehnquist Court systematically narrowed Congress's Section Five powers.[371] It implicitly overruled *Morgan*, holding, instead, that Congress cannot rely on Section Five to investigate and promulgate laws to expand rights beyond those the Court previously determined to be protected by the Constitution.[372]

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366. *See id.* at 650 ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18."). *Morgan* arose as a challenge to Congress's earlier reliance on Section Five for passing the Voting Rights Act's prohibition against a state's use of literacy tests as a precondition of voting. *Id.* at 643–46.

367. *Id.* at 648–49.

368. *See infra* text accompanying notes 371–85.

369. *Morgan*, 384 U.S. at 651. In *Morgan*, the Court adopted Brennan's earlier concurrence, which had asserted that the "proper perspective [views] § 5 of the Fourteenth Amendment . . . as a positive grant of legislative power." United States v. Guest, 383 U.S. 745, 784 (1966) (Brennan, J., concurring in part and dissenting in part).

370. 521 U.S. 507 (1997).

371. *Id.* at 519.

372. *See id.* at 536 (holding that the RFRA is unconstitutional because it cannot be considered enforcement legislation under Section Five of the Fourteenth Amendment).

Congress may only pass laws that are congruent and proportional to a judicially defined constitutional violation.[373]

This rule of interpretation should have rung hollow in a representative democracy founded on the notion that the people are sovereign. But here, in *Boerne*, the Court was announcing that it would have none of it. Henceforth, only the unelected guardians seated on the Court would announce what constituted a constitutionally protected right; and, while litigants could engage the federal judiciary, the people would be excluded from that process.

The Court then continued on the same trajectory in *Kimel*, which found Congress could not impose the private monetary remedy of the Age Discrimination in Employment Act (ADEA) on state employers.[374] The majority in *Kimel* invoked state sovereign immunity against private-party causes of action by citizens of their own state.[375] As Justice David Souter pointed out in a previous dissent, the doctrine of sovereign immunity was judge-made common law that the Supreme Court had elevated to a constitutional doctrine[376] and, in *Kimel*, employed to trump Congress's Section Five authority to provide relief against state employer discrimination.[377] So too in *University of Alabama v. Garrett*,[378] the majority rejected Congress's power to require that state agencies abide by the national norm for the treatment of the disabled as it was codified in the Americans with Disabilities Act (ADA).[379] Resorting to its self-proclaimed exclusivity of constitutional interpretation, the Court rejected Congress's capacity to advance and protect the ability for a vulnerable group—the disabled—to bring claims against state employers.[380]

In another blow to popular sovereignty, the Court, in *United States v. Morrison*,[381] struck down a law passed by Congress with widespread bipartisan support, the Violence Against Women Act (VAWA).[382] Congress

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373. *Id.* at 519–20.

374. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000).

375. *Id.*

376. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 183–84 (1996) (Souter, J., dissenting) (asserting that while "[t]he *Hans* doctrine was erroneous . . . it has not previously proven to be unworkable or to conflict with later doctrine" and hence is a part of stare decisis but arguing that where Congress clearly abrogated that sovereign immunity, as it did with the ADEA, the restriction against federal courts hearing private suits does not govern); Hans v. Louisiana, 134 U.S. 1, 14–15 (1890) (holding that states are immune from federal suits brought by private parties who are citizens of that state). *But see* Alden v. Maine, 527 U.S. 706, 733 (1999) ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.").

377. *Kimel*, 528 U.S. at 92.

378. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

379. *Id.* at 374.

380. *See id.* at 365 (prefacing its analysis with reference to the "long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees").

381. 529 U.S. 598 (2000).

382. *Id.* at 605, 627; Preeta D. Bansal, *The Supreme Court's Federalism Revival and Reinvigorating the "Federalism Deal,"* 21 ST. JOHN'S J. LEGAL COMMENT. 447, 451 (2007)

passed the statute to protect the victims of sexual violence against gender discrimination in state courts.[383] This was the sort of Section Five use of power that *Morgan* envisioned to be at the discretion of Congress.[384] It involved the protection of victims of violence and aimed at social welfare by providing a remedy for individual litigants and preventing the drain of billions of dollars from the national economy resulting from battered women missing work and receiving healthcare.[385]

The principal problem with the rules announced in the *Boerne* line of cases was not simply that they were not originalist[386] nor that they were inconsistent with prior precedent like *Morgan* and, therefore, out of step with living constitutionalism.[387] The Court's main failing in *Kimel*, *Garrett*, and *Morrison* was to reject that Congress could use its Section Five power to act as a coequal player for the expostulation of the constitutional directive for protecting liberal equality for the common good.

The Declaration's directive for government to set policies "most likely to effect [the people's] Safety and Happiness"[388] and the Preamble's mandate to "promote the general Welfare"[389] place an obligation on all three branches of government. The Court is not exclusively responsible for identifying fundamental rights essential for the pursuit of happiness and engagement in the common good of social governance. Indeed, the Legislative Branch will often have more resources and hear from far more constituents,[390] making it

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("[A] . . . coalition of states supported the creation of a federal civil cause of action against gender violence enacted by an overwhelming bipartisan majority of Congress in the [VAWA]."); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1766 (2012) ("VAWA passed Congress with bipartisan support.").

383. J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 435 (2003) (recounting the congressional purpose behind the passage of VAWA).

384. Katzenbach v. Morgan, 384 U.S. 641, 651, 658 (1966) (finding constitutional the Voting Rights Act provision prohibiting enforcement of the English literacy requirement and citing it as a correct exercise, under Section Five of congressional discretion in determining whether particular legislation secures the guarantees of the Fourteenth Amendment).

385. *Morrison*, 529 U.S. at 632–33 (Souter, J., dissenting) (citing congressional findings that "violent crime against women costs this country at least [$] 3 billion . . . a year. . . . [E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence" (alteration in original) (internal quotation marks omitted)).

386. For a discussion of reasons why *Boerne*'s interpretation of Section Five is not historical, see Erwin Chemerinsky, *Politics, Not History, Explains the Rehnquist Court*, 13 TEMP. POL. & CIV. RTS. L. REV. 647, 650–51 (2004).

387. *See supra* text accompanying notes 371–85; *cf.* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 676–77 (2006) (characterizing Justice Kennedy's *Boerne* decision as narrowing former interpretations of constitutional rights).

388. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

389. U.S. CONST. pmbl.

390. *See* Mary B. Mazanec, CONG. RESEARCH SERV., ANNUAL REPORT OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR FISCAL YEAR 2011, at 1, 26 (2012), *available at* http://www.loc.gov/crsinfo/about/crs11_annrpt.pdf (stating that the

critical for the people to engage in the popular sovereignty guaranteed by these statements of constitutional governance. The judicial-centered approach announced in *Boerne*, *Kimel*, *Garrett*, and *Morrison* forecloses constituents who wish to effectively lobby their congressional representatives to advocate for laws necessary for eradicating historical or novel forms of discrimination from doing so. The Supreme Court's narrow reading of Section-Five-reconstructed federalism disrupts the structure of governance set by the Declaration of Independence and the Preamble to the Constitution.

The Constitution—the structure of which I believe allows the Supreme Court and Congress to uphold and identify fundamental rights essential for the public good—provides a balanced approach to protecting the common social interests in equality, life, liberty, and the pursuit of happiness. The balance is between the Court's countermajoritarian function and Congress's representative role. This balance provides official channels for carrying out the Declaration and the Preamble's directive to protect individual rights for the general welfare. It is, therefore, essential that neither the Court nor Congress hamstrings the other's authority to safeguard essential rights for pursuing the common good. When Congress passes a law, such as Title VII of the Civil Rights Act of 1964,[391] that is rationally related to the socially beneficial goal of protecting civil rights, the Court lacks the authority to strike it. Likewise, when it is the Court that asserts a right, such as privacy,[392] it is not within Congress's power to override the ruling.

D. Neutral Principles

An evaluation of whether public policies and judicial opinions protect the people's pursuit of happiness and provide for the general welfare can be either normative or procedural. This section analyzes a number of neutral standards of interpretation and evaluates them in light of the substantive maxim constitutionalism that I have proposed in this Article.

Professor Philip Bobbitt developed a discursive analysis for judicial reasoning. His six modalities—historical, textual, structural, doctrinal, ethical, and prudential—of legitimate legal analysis provide no normative foundation for interpretation.[393] Bobbitt articulated the rationales judges

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Congressional Research Service, an organization whose mission is to provide Congress with policy research and analysis, had a Fiscal Year 2011 appropriation of $111 million).

391. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000e (2006).

392. The Supreme Court has identified a variety of privacy rights in a series of cases. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (finding that the Due Process Clause encompasses a right to sexual privacy); Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing reproductive privacy); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding it unconstitutional for a state to intrude into the privacy of marital contraceptive decisions).

393. BOBBITT, *supra* note 128, at 12–13; *see* Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEXAS L. REV. 1869, 1913–14 (1994) [hereinafter Bobbitt, *Reflections*] (refusing to make normative claims about the legitimacy of the modalities of argument as an abstract principle and explaining that a "proposition of constitutional law is true if it forms part of the rationale offered in

provide for their holdings, but he recognized no value to a metatheory.[394] The modalities are descriptive, but Bobbitt's methodology contained no underlying constitutional purpose for determining whether a judge's reliance on them is purely formalistic or substantively valid.

The inquiry that I have suggested is at the root of maxim constitutionalism, of whether policy protects individual rights for the common good, plays no explicit role in his modalism. Even if it falls under Bobbitt's "ethical" mode,[395] it is *one* value rather than, as I suggest, the *core* value of the Constitution. Hence a judge applying any or several of the six accepted rationales need not reflect on whether a law infringes on fundamental rights and excludes a group from the enjoyment of mutual benefits of representative democracy. The modes do not discriminate between their proper use by proslavery antebellum judges, by judges in Jim Crow courtrooms, or by judges in post-Civil Rights Era settings. The ethical semantic in his system lacks an objective component that could be used to test a judge's use of normative language against some ontological norm of human nature or empirical analysis of representative democracy.[396]

The modal approach only allows for neutral rather than normative criticism of judicial opinions. Bobbitt's discussion of Chief Justice Taney's opinion in the *Dred Scott* case, for instance, did not criticize the Court for the faulty holding that free and enslaved blacks were an "inferior class of beings" who could not hold citizenship in the United States.[397] Bobbitt only drew attention to the textual implications of Taney's reasoning:

> A *textual* modality may be attributed to arguments that the text of the Constitution would, to the average person, appear to declare, or deny, or be too vague to say whether, a suit between a black American citizen resident in a state and a white American citizen resident in another state, is a "controversy between citizens of different states." I would imagine that the contemporary meaning of these words is rather different than that which Taney found them to mean to the framers and ratifiers of 1789.[398]

This retrospective statement left unexamined whether Taney's assertion that the Constitution precluded blacks from being citizens violated their

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support of a legal decision and if that rationale is composed of the kinds of arguments recognized in legal practice as legitimate").

394. *See* BOBBITT, *supra* note 128, at xii–xvii (explaining how turning the modalities of interpretation into tools for validating ideological preferences undermines the legitimating force the modalities strived to find in constitutional law).

395. *Id.* at 13 (defining the "ethical" modality as based on "deriving rules from those moral commitments of the American ethos that are reflected in the Constitution").

396. *See* Bobbitt, *Reflections*, *supra* note 393, at 1914 (denying that the types of constitutional argument are capable of being validated through his theory in a way external to the arguments' use in practice).

397. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1856).

398. BOBBITT, *supra* note 128, at 14 (involving Article III's provision for federal diversity jurisdiction).

inalienable and political rights and, thereby, diminished their opportunity to enjoy the common good.

Contemporary critics of *Dred Scott*, like abolitionists and the then newly formed Republican Party, certainly thought Taney to be acting against the nation's normative standards.[399] A meeting of "colored" citizens in New Bedford, Massachusetts determined that *Dred Scott* was not merely a wrong statement as a matter of interpretation but substantively flawed.[400] Their meeting convened with a statement that "colored people of this country have ever prove[n] . . . their loyalty to its interests and general welfare."[401] Participants resolved that "the infamous 'Dred Scott' decision is a palpably vain, arrogant assumption, unsustained by history, justice, reason[,] or common sense."[402] The New Hampshire Senate and House of Representatives jointly issued a statement that the people of that state confirmed their "devoted attachment to the principles embodied in the Declaration of Independence" and the Preamble to the Constitution and, therefore, rejected the *Dred Scott* decision as "subversive."[403]

Merely looking at the text, without reflecting on national ideals, Bobbitt's description of the case leaves the impression that it is contemporary linguistic usage that should be determinative of constitutional meaning rather than some central purpose of representative constitutionalism or intrinsic dignity of humans, irrespective of their race. A normative approach to interpretation makes clear that *Dred Scott* is not only a textual misreading of

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399. A Milwaukee newspaper summed up a Republican Convention that had convened in Madison, Wisconsin at the end of summer 1857:

> Our Platform, too, is as good as our ticket. It reaffirms the principles upon which the original organization of our party was based; renews the pledges of opposition to the extension of slavery, to the Fugitive Slave Act, and to the admission of any more slave States into the Union; denounces all proscription on account of birth, creed, or color: declares for equal rights to all citizens of the Republic, native, or foreign-born; takes high and impregnable grounds against the Dred Scott decision, and on that issue appeals from the *dicta* of partizan Judges to the great tribunal of THE PEOPLE. We stand, therefore, in this canvass as the advocates of FREE SOIL and FREE LABOR, of EQUAL RIGHTS and CIVIL and RELIGIOUS LIBERTY, of STATE SOVEREIGNTY and the true Interpretation of the Federal Constitution; and as the opponents of slavery aggression and slavery extension, of political proscription, and of judicial misconstructions of the great charter, ordained and established by the fathers and founders of our Republic "to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of LIBERTY to ourselves and our posterity."

The Republican Ticket and Platform, MILWAUKEE DAILY SENTINEL, Sept. 8, 1857, at 2. Southern newspapers took a decidedly states' rights view of *Dred Scott*, and rejected abolitionist claims of individual rights and general welfare. *See, e.g.*, *The Fruits of Constitutional Construction*, CHARLESTON MERCURY, Apr. 22, 1857, at 2 (characterizing the Northern position with respect to *Dred Scott* as "consolidatio[nist]" and rejecting abolitionism in the name of the general welfare as "a simple question of a grant of power").

400. W.C.N., *Meeting of Colored Citizens*, LIBERATOR (Bos.), July 9, 1858, at 112.

401. *Id.*

402. *Id.*

403. *National Resolves*, N.H. STATESMAN (Concord), Aug. 13, 1859, at 4.

the Declaration of Independence,[404] the nation's history,[405] and judicial authority.[406] Taney's principal flaw was normative: His opinion denied that the "general welfare" of the nation must apply to all persons in the United States, not merely those of European descent.[407]

Following the Civil War, textual formalism led to the Court's adoption of a narrow reading of the state action requirement in the *Civil Rights Cases*.[408] In that case, the Court interpreted the words of the Fourteenth Amendment—"[n]o state shall"[409]—to mean that the Amendment applies only to public forms of discrimination.[410] That decision struck down a national desegregation statute, undermining the purposes of Reconstruction, in the name of literal textualism.[411] The historian Eric Foner asserted that the doctrine remains "a major barrier" to the promotion of racial equality.[412] And Michael Klarman similarly asserted that the state action requirement is "among the most formidable barriers to securing racial justice."[413] Several scholars—including Robert Glennon, John Nowak, Charles Black, William Van Alstyne, Ken Karst, and Harold Horowitz[414]—have suggested a

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404. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) (asserting that the Framers regarded the Declaration of Independence to only apply to whites and not to blacks).

405. Chief Justice Taney claimed misleadingly that at the time of the Articles of Confederation blacks were neither citizens of the United States nor of their own states. *Dred Scott*, 60 U.S. at 418–19. *But see id.* at 572–73 (Curtis, J., dissenting). Justice Curtis corrected Taney, listing several states as examples:

> At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

Id.

406. In his opinion, Chief Justice Taney determined that a federal court could not hear Dred Scott's freedom suit on the basis of diversity jurisdiction because he and his family could not acquire state citizenship. *Id.* at 454 (majority opinion).

407. For a more thorough discussion of *Dred Scott* and Chief Justice Taney's flawed reasoning, see TSESIS, *supra* note 6, at 77–82.

408. 109 U.S. 3 (1883).

409. U.S. CONST. amend. XIV, § 1.

410. *The Civil Rights Cases*, 109 U.S. at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."); *see also id.* at 19 ("This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force.").

411. *See id.* at 25 ("[N]o countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void . . . .").

412. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1604 (2012).

413. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 152 (2004).

414. *See* Robert J. Glennon Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 225–26 (noting that the

descriptive way for courts to surmount that barrier by conceiving certain forms of private discrimination to be tied with state involvement, such as a court's enforcement of racist real estate covenants.[415] These scholars have offered an analytically sound position, given the oft ambiguity of the public–private dichotomy. Licensing, for instance, is required of most business activities, from running a hot dog stand to trading secured instruments.[416] But the Court has maintained the validity of the state action doctrine, partly relying on it in *Morrison* to strike down the civil action provision of the Violence Against Women Act.[417]

The core problem with the state action doctrine is not only that it often leads courts to overlook the role of states in private-business discrimination, but also that it prevents Congress from passing laws to protect an individual's right to enjoy public accommodations on the basis of equality. Current public-accommodations laws can only be passed to regulate activities with a substantial effect on the national economy.[418] This is unfortunate because Congress may find that certain wrongs that bear little or minimal economic harm—such as discrimination against a sparse, geographically isolated, unincorporated organization; be they committed to humanism, the rights of the handicapped, or some other lawful association[419]—require action to abide by the directive of constitutional governance of the Preamble and Declaration.

On the ethical side, Bobbitt recognized that the Declaration of Independence provides the "political basis for the idea of the constitution."[420] To him, the Declaration's guarantee of "[u]nalienable rights" means that the people have not, and indeed cannot, renounce their sovereignty over state

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traditional "all-or-nothing theory" of state action became increasingly difficult to accept); Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (contemplating the consequences of a shift away from strict state action doctrine); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 5–8 (1961) (addressing the ad hoc state action doctrines protruding from Fourteenth and Fifteenth Amendment cases); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 218 (1957) (stating that a private corporation may be an unconstitutional state actor even though it is not a state agent).

415. Their suggestions tie back to the Court's holding that court enforcement of racial covenants is a form of state action. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

416. *See, e.g.*, 15 U.S.C. § 78(a)(1) (2006) (requiring brokers and dealers of securities to register with the Securities and Exchange Commission); Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 873 (1998) (stating that operating a hot dog stand on a New York City street requires a license).

417. United States v. Morrison, 529 U.S. 598, 621–23 (2000).

418. United States v. Lopez, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

419. *Cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 275 (1964) (Black, J., concurring) ("I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce . . . .").

420. BOBBITT, *supra* note 128, at 4–5.

power.[421] Bobbitt is certainly basing this point on the people's retention of sovereignty. He did not, however, take the Declaration to be an overarching statement of national purpose to protect intrinsic human rights and thus did not couple it with the Preamble's mandate that government "promote the general Welfare[] and secure the Blessings of Liberty."[422] This is the maxim-based approach I have developed in this Article. But for Bobbitt, "American *constitutional* ethos" is of a more limited nature, "confined to the reservation of powers not delegated to a limited government."[423] His ethical modality refers to the "characterization of American institutions and the role within them of the American people."[424] But Bobbitt provided no metamethod for identifying whether, at any given point in history, American institutions and the people involved in them aimed to protect fundamental rights for the general welfare or were energized into relying on a modal judgment by prejudice and exclusion. Without acknowledging an underlying purpose, Bobbitt's modes of legal practice provide no means of deciding whether judicial holdings and explanations are formalistically logical but unfaithful to the nation's core commitment to sustaining equal liberty for the common good. The modalities, then, are not means of determining whether a judicial rationale is true to an underlying constitutional purpose but "no more than instrumental, rhetorical devices to be deployed in behalf of various political ideologies."[425]

Bobbitt is, of course, not the first to defend neutral principles. Professor Herbert Wechsler's exposition of neutral principles was not only descriptive but also required a court to parse the meaning of the Constitution and apply it to specific cases without being influenced by the judge's personal and political convictions.[426] In his best known exposition of this line of reasoning, Wechsler critiqued the Court's principled holding against school segregation in *Brown v. Board of Education*.[427] Legitimacy lies in a judge's following precedents announced in previous decisions, applying the doctrine of stare decisis, without deviating from them to achieve desired ends.[428] And with the *Brown* decision, Wechsler wrote that, as much as he supported the sentiment for desegregating schools, he could find no neutral constitutional principle for the decision.[429]

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421. *Id.* at 5 (internal quotation marks omitted).

422. U.S. CONST. pmbl.

423. BOBBITT, *supra* note 128, at 21 (endnote omitted).

424. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 94 (1982).

425. BOBBITT, *supra* note 128, at 22.

426. *See* Wechsler, *supra* note 329, at 19 (repeating that "even though [an] action involves value choices" courts have the duty to treat constitutional cases in an "entirely principled" manner without regard for "any immediate result that is involved").

427. *Id.* at 32–33.

428. *Id.* at 16.

429. *Id.* at 34.

Wechsler's reasoning was suspect for a number of reasons. For one, certain portions of the Constitution—like the Equal Protection Clause, the Eighth Amendment prohibition against cruel and unusual punishment, and the First Amendment protections for speech and religion—appear to be value rich, in need of interpretation, and not neutral in value. Their evaluation and the reevaluation of past interpretations of them—like *Plessy v. Ferguson*, which *Brown* functionally overturned[430]—are based on a deep understanding of the entire structure of popular governance, with a concomitant respect for inalienable rights and equal legal status. The Equal Protection Clause was one of the great culminations of the Union victory over the Confederacy, and, even under the most minimal reading, it secured equality of citizenship for blacks and persons of all races. Although not explicitly mentioned in *Brown*, the right to civic participation also played a role in the Court's reasoning. The First Amendment secured political speech, and its safeguards were incorporated through the Fourteenth Amendment. And the *Brown* Court found that integrated education was essential for equality and civic dialogue.[431] Where a new case before the Court concerns a moral dilemma for society, the Supreme Court must stay true to stare decisis but also choose whether to overrule its past error or to broadly interpret its previous decisions.[432]

Furthermore, where previous decisions have misguided constitutional law—as was the case with *Plessy v. Ferguson*—a new course must be steered, one that deviates from past precedents but is true to constitutional principle. This position bears some overlap with Ronald Dworkin's assertion that the Supreme Court should make decisions on the basis of the principle "that government must treat people as equals."[433] The analysis in this Article demonstrates that the nation adopted the equality principle of the Declaration of Independence into the Constitution and made it a directive to govern the conduct of all three branches. This is by no means neutral but instead maxim oriented.

I disagree with Dworkin, however, that reflection "about how the general welfare is best promoted" should play no role in constitutional interpretation.[434] To the contrary, the Preamble mandates policy reflections on the general welfare, and such reflection allows for the differentiation between the exclusionary reading of equality in *Plessy* and the inclusionary

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430. *See* Brown v. Bd. of Educ., 347 U.S. 483, 490–91, 495 (1954) (noting that the "separate but equal" doctrine made its first appearance at the Court in *Plessy* and stating that this doctrine "has no place" in the field of public education (internal quotation marks omitted)).

431. *See id.* at 493 (stating that equal education is the "very foundation of good citizenship").

432. Mark Tushnet has pointed out how every new case is distinct from past relevant holdings, requiring judges to decide between various possible constructions—narrow and broad—of old principles when applying them to new dilemmas. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 814–15 (1983).

433. RONALD DWORKIN, A MATTER OF PRINCIPLE 69 (1985).

434. *Id.*

version in *Brown*. It was only in the latter that the Court formally recognized that equality must include the ranks of all Americans, joined together in the pluralistic efforts of representative governance.[435] The task of identifying how the maxim of equal liberty for the common good applies to specific social dilemmas requires a balance of authority between the President, Congress, and the Supreme Court. It is for all of us as a people to determine, reconsider, and hone the meaning of representative democracy. The balance of rights and public needs remains a policy-by-policy, case-by-case, law-by-law, and regulation-by-regulation determination. All of these avenues of lawmaking must be undertaken without offending the central maxim of constitutionalism. There will inevitably be conflicts between the branches. As I have explained elsewhere, in these interbranch policy disputes, legislative expansion of equal rights to discrete and insular minorities should take precedence over constitutional common law that constricts national authority.[436] Congress as well as the Court can identify groups that have historically been persecuted and are covered by Thirteenth and Fourteenth Amendment enforcement clauses. But space constraints in this Article do not allow me to elaborate any further on this balance of powers.

Conclusion

The core purpose of representative constitutionalism is the protection of individual rights for the general welfare. This maxim of governmental purpose for adjudication, regulation, and legislation is incorporated into the Declaration of Independence and the Preamble to the Constitution. That ideal purpose of representative democracy is at the core of U.S. governance. It sets the directive for all three branches to legitimately exercise their respective powers. The historical failures to live up to that standard did not alter the Constitution's aspirational value and objective. To the contrary, its existence provides the stable, public goal of legitimate progress within a verifiable legal norm. The specific powers enumerated in the Constitution and allocated to the several branches of government provide the structure to achieve the aim for which the people have established these United States.

435. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 81–82 (2000) (arguing that *Brown* "sought to bring people together in inclusive institutions").

436. Tsesis, *supra* note 54, at 735–41.

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Verdi's High C

Jack M. Balkin*

I. Introduction: A Judgment from the Balconies

In December of 2000, Riccardo Muti, one of the most distinguished Verdi interpreters of his generation, opened the new opera season at Milan's La Scala Opera House with a performance of Verdi's *Il Trovatore*.[1] The opening night at La Scala is not only the most eagerly awaited musical event in Italy; it is also one of the country's most important social occasions.[2] The usual attendees include politicians, aristocrats, movie stars, and upwardly mobile businesspeople, as well as the *loggionisti*, the diehard opera fans who wait in line for hours for standing-room tickets at La Scala, and who "are known for shouting out their candid appraisals of the singers from the upper galleries."[3] Muti's performance was important for another reason: it began a yearlong celebration of the one hundredth anniversary of Verdi's death, featuring many performances of the beloved composer's operas.[4] Muti's *Il Trovatore* featured the thirty-two-year-old tenor Salvatore Licitra, whom some critics had dubbed "the new Pavarotti."[5] (Licitra, blessed with the most golden and powerful voice, was, sadly, to die eleven years later from injuries sustained in a motor-scooter accident.)[6]

Jay McInerney, writing in *The New Yorker*, reported that the new season was off to a flying start until the end of the third act, when Licitra delivered one of the opera's famous arias, the rousing cabelleta "Di quella pira."[7] At the end of the aria the crowd suddenly erupted with loud booing and cries of "Shame!" emanating from the upper galleries.[8] The well-heeled patrons in the lower boxes and orchestra seats tried in vain to quiet the offenders.[9] "Then, in a voice nearly as loud as any heard from the stage that night, one of

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1. Jay McInerney, *Milan Notebook: A Night at La Scala*, NEW YORKER, Dec. 25, 2000 & Jan. 1, 2001, at 60, 60.

2. *Id.*

3. *Id.*

4. *Id.*; Wilborn Hampton, *Domingo's Voice Fails; Return Brings Cheers*, N.Y. TIMES, Dec. 15, 2001, http://www.nytimes.com/2001/12/15/arts/domingo-s-voice-fails-return-brings-cheers.html.

5. McInerney, *supra* note 1.

6. Zachary Woolfe, *Salvatore Licitra, Operatic Tenor at Met, Is Dead at 43*, N.Y. TIMES, Sept. 5, 2011, http://www.nytimes.com/2011/09/06/arts/music/salvatore-licitra-tenor-at-the-met-dies-at-43-after-crash.html?ref=salvatorelicitra&_r=0.

7. McInerney, *supra* note 1.

8. *Id.*

9. *Id.*

the *loggionisti*, a bank teller named Mauro Fuolega, shrieked, 'It's the conductor's fault!'"[10] Muti indignantly stopped the performance and glared up at his critic in the gallery.[11] "Let's not turn Verdi's centennial into a circus," he declared, and he resumed conducting the opera over the murmurings of the shocked audience.[12]

What had just happened? It turns out that it was a dispute about interpretation. Licitra did not sing a high C, "the famous *do di petto*, with which tenors have traditionally ended" the aria.[13] (The term *do di petto* means "C from the chest," the idea being that the tenor employs his chest register—a difficult feat—rather than using his head register and singing falsetto.)[14] As Mr. Fuolega's exclamation suggested, the problem was not with Salvatore Licitra, who could no doubt have produced the high C with aplomb. Instead, Licitra was following the orders of Maestro Muti, who had told him to sing the G below the high C. Muti's reason was simple: The G, and not the C, appears in Verdi's original score.[15] Verdi's high C, it turns out, is not Verdi's at all; it was added to the opera by later interpreters.[16]

At a post-performance dinner Muti "explained that the *do di petto* [in the aria] had originated with the nineteenth-century French tenor Carlo Baucardé."[17] Other tenors adopted the practice because they wanted to end the third act with an impressive vocal display guaranteed to bring down the house.[18] Eventually it became the traditional method of performing the aria on stage, in concerts, and in recordings.[19] Muti, on the other hand, "said that he had considered it his duty to honor the composer's intentions by leaving out the high C."[20] This was not, in fact, the first time that Muti had performed *Il Trovatore* this way. In 1977, at the Teatro Comunale in Florence, Muti had also insisted on the G, and, as Verdi scholar Philip Gossett reports, "all that anyone talked about was the end of 'Di quella pira.'"[21]

Well, who is right? Is it Mauro Fuolega and other members of the audience, who expect their thrilling high C, or Riccardo Muti, who can point to the text? And how should we go about deciding the question?

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. RICHARD MILLER, NATIONAL SCHOOLS OF SINGING: ENGLISH, FRENCH, GERMAN, AND ITALIAN TECHNIQUES OF SINGING REVISITED 109–10 (1997) (distinguishing the *do di petto* from the use of falsetto).
15. PHILIP GOSSETT, DIVAS AND SCHOLARS: PERFORMING ITALIAN OPERA 124 (2006).
16. *See id.*
17. McInerney, *supra* note 1.
18. GOSSETT, *supra* note 15, at 124.
19. *See* McInerney, *supra* note 1.
20. *Id.*
21. GOSSETT, *supra* note 15, at 124.

Contrast this story with a second one. In 1954, the U.S. Supreme Court decided a series of school desegregation cases from Virginia, Kansas, South Carolina, and Delaware collectively called *Brown v. Board of Education*.[22] At the same time, it also heard a case from the District of Columbia, *Bolling v. Sharpe*.[23] The issue in *Bolling* and *Brown* was the same: the constitutionality of segregated schools.[24] But the problem was that *Bolling* involved the District of Columbia, a federal territory, not a state.[25] The Supreme Court decided *Brown* under the Equal Protection Clause of the Fourteenth Amendment, which says that "no state shall . . . deny . . . the equal protection of the laws."[26] The text of the Equal Protection Clause of the Fourteenth Amendment does not seem to mention the federal government, although the text of the Fifteenth Amendment does, and the Thirteenth Amendment, which outlaws slavery throughout the United States, also binds the federal government.[27]

Thus, Justice Warren and his colleagues were faced with a genuine problem. The text does not seem specifically to mention an equality guarantee against the federal government. Hence Chief Justice Warren and his brethren read an equal protection guarantee into the Fifth Amendment's Due Process Clause.[28]

So we have two cases. In 2000 Riccardo Muti refuses to read the customary high C into Verdi's score when a G appears there. In 1954, Earl Warren and his brethren read an equal protection guarantee into the Fifth Amendment's Due Process Clause.

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22. 347 U.S. 483, 486 (1954).

23. 347 U.S. 497 (1954).

24. *Id.* at 498.

25. *Id.* at 499.

26. U.S. CONST. amend. XIV, § 1; *Brown*, 347 U.S. at 495.

27. Of course, depending on how broadly one reads the Thirteenth Amendment—for example, as a general prohibition on nondomination, or as a general guarantee of equality in civil society—it could form the basis for *Bolling*. *See* Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1470 (2012) (noting that the principle against nondomination could extend to many different areas of social life); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1816 (2010) (noting that many Reconstruction Republicans assumed that once blacks were free, they enjoyed full and equal civil rights). The Citizenship Clause of the Fourteenth Amendment also applies to both the states and the federal government and might be an alternative basis for *Bolling*. *See* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166569. Both of these solutions, however, would raise interpretive questions of their own, akin to the debates discussed in the text.

Ironically, the Reconstruction Republicans who wrote the Fourteenth Amendment assumed that the Fifth Amendment's Due Process Clause *already* contained a guarantee of equal protection, and they based the language of the equal protection on what was then a familiar nineteenth-century interpretation of the Due Process Clause. *See* JACK M. BALKIN, LIVING ORIGINALISM 251–55 (2011) ("[T]he very words 'equal protection' were added to the Constitution based on a widely accepted construction of the Fifth Amendment's due process clause." (emphasis omitted)).

28. *See Bolling*, 347 U.S. at 499 ("[D]iscrimination may be so unjustifiable as to be violative of due process.").

What do these stories have in common? They are both problems of performance—one in music and one in law. When law professors have looked for analogies between law and the arts, they have generally turned to poems and novels.[29] Sanford Levinson and I, who were both part of the early law and literature movement,[30] have concluded that this analogy is incomplete.[31] A much better analogy, we think, is to the performing arts—such as music and drama—that perform written texts and to the institutions and ensembles that are charged with the responsibilities and duties of public performance.[32] Not all of the performing arts perform written texts, but many of them do, and the performer's obligation to put a text into action before an audience offers the most interesting and fruitful analogy to the problems of legal interpretation.

Different genres of the performing arts, of course, use texts in different ways. This Essay will primarily focus on classical music and opera, in which the score offers a fairly comprehensive—if incomplete—set of directions. In many genres of the performing arts, like improvisatory theatre or jazz, the relevant text may be quite barebones, with most of the work left to the performer. Yet even where the text is the most detailed, it cannot perform itself; it has to be brought to life through performance. There is often more than one way to do this, and the performer's art depends on how this is achieved.

The life of the law, like that of music or drama, is in performance. The American Legal Realists famously distinguished "law on the books" from "law in action."[33] In fact, law in action is paramount; someone must apply legal texts in order for law to function as an ongoing institution. The social practice of law is more than legal texts, just as the social practice of music is more than written scores and the social practice of drama is more than written scripts.

Poetry and novels can be read silently to one's self. Music and drama are normally performed before an audience. (Sometimes, of course, the performers overlap with the audience, as in a group sing-along.) Performers must decide, often under very imperfect circumstances, how a text should be applied in the social context before them. Performers seek to persuade their

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29. J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513, 1518 (1999) [hereinafter Balkin & Levinson, *Interpreting Law and Music*]; Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1607 (1991) [hereinafter Levinson & Balkin, *Other Performing Arts*].

30. *See, e.g.*, J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Sanford Levinson, *Law as Literature*, 60 TEXAS L. REV. 373 (1982).

31. Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29; Levinson & Balkin, *Other Performing Arts*, *supra* note 29, at 1608–14.

32. Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29.

33. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14 (1910); *see also* Karl Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 435 n.3 (1930) (reiterating the distinction while criticizing Pound's conception).

audiences that their interpretations are true, valuable, and authoritative. Whether or not they succeed in this task, what they do affects people, for good or for ill.[34]

Viewing law as a performing art puts in the foreground what is less salient in comparisons between law and literature: the crucial role of the *audience* in performances, whether musical, dramatic, or legal. Law, like music and drama, involves more than a reader and a text. It involves a complex of reciprocal influences between the creators of texts, the performers of texts, and the audiences affected by those performances.

The performing arts therefore normally involve a *triangle of performance*.[35] There is the person or institution that creates the text: the composer, the framer, or the adopter. There is the performer whose job is to make sense of the text and bring it to life in the real world. And finally, there is the audience before whom the text is performed.[36]

Why are audiences so important? First, the presence of an audience creates distinctive responsibilities for the performer—responsibilities of faithful performance not only to the author of the text, but also to the audience. Part of the point of being a performer is to perform *before* someone—to move, impress, or affect an audience. Performance is a relationship to another, with effects and responsibilities that come with that relationship.[37]

Second, the interactions between the members of the audience and the performer may affect how performers behave and subtly or profoundly shape the result. That is why live performance can often be so different from prerecorded or televised performance in terms of energy, spontaneity, and emotional connection. The members of the audience not only affect the performers; they also affect each other's experiences of the work. Expressions of excitement or boredom, applause, booing, laughter—even intrusions like smells, conversation, and background noise—shape the success and reception of a performance.

Third, audiences play a crucial role in validating, authorizing, and legitimating performance. Performances occur within traditions, institutions, and conventions of performance in which the audience plays a part. For example, people behave differently and expect different things at the opera than they do at a rock concert.

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34. Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29, at 1519–21.

35. *Id.* at 1520.

36. *Id.* at 1519–20. Note that, under different circumstances, the three legs of the triangle of performance can be combined in different ways. The author or composer can perform his or her own work; the members of the audience can also be the performers; or the performers can perform a work before its author. There is also the limiting case in which the author, performer, and audience are identical.

37. *Id.* at 1519–21.

Fourth, in the broadest sense, the audience for performance is the interpretive community in which performance occurs.[38] Traditions, institutions, and conventions of performance generate and enforce evaluative standards about when performances are authentic or inauthentic, legitimate or illegitimate, successful or unsuccessful. When people assess the quality of performances, they employ the conventions, traditions, and assumptions of interpretive communities.[39] These communities evaluate, legitimate, and judge performances and, on occasion, even sanction or discipline them.

Standards of good and bad performance, what is authentic and inauthentic, or "on-the-wall" and "off-the-wall," change and evolve over time, as performers and the various audiences for performance interact, contend, and struggle over the right way to interpret and perform texts. Performance, therefore, always involves negotiation, not only between the performers and the audiences immediately before them, but within the larger interpretive communities in which performance occurs.

The interpretive problems faced by Riccardo Muti and Earl Warren arise because a particular kind of text has to be performed before a particular kind of audience. It has to be put in action and applied to a real, live situation. In law and the performing arts, the combination of a text and an audience create distinctive problems for the performing artist.

As we shall see, it turns out that arguments about how to perform *Il Trovatore*—and other pieces of music and drama—have a remarkable similarity to debates about interpretation in law, and particularly American constitutional law. In this Essay, I will discuss three of these similarities. The first is that both law and the performing arts use very similar modalities of argument for justifying interpretations. Second, in law and the performing arts, not everything goes. Both law and the performing arts are constrained by canonicity, convention, and genre. Third, in both law and the performing arts, evolving conventions of performance depend heavily on what audiences think. There are multiple audiences at work in any performance, and these audiences are mediated by important and sometimes quite powerful institutions. Changes in interpretation and in interpretive conventions depend on gaining the support of various institutions over time.

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38. On the theory of interpretive communities, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14, 171 (1980) (defining interpretive communities as those that share interpretive strategies for reading and writing texts). Although Fish first invoked the idea in the context of literary interpretation, the idea of an interpretive community makes equal sense in the context of the performing arts.

39. *See* Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29, at 1520 ("Judgments about faithfulness and authenticity ... occur against the backdrop of the many different communities that help shape the tradition, including the audience of fellow performers and laypersons.").

II. The Modalities of Argument in Law and the Performing Arts

How should one go about deciding whether Muti should have left out the high C, the *do di petto*? How should one decide whether Chief Justice Warren should have read an equal protection guarantee into the Due Process Clause of the Fifth Amendment? That is another way of asking how performers establish the legitimacy or the authority of their particular interpretations. Because law, music, and drama involve the performance of texts, the kinds of arguments that people make to justify their interpretations in each activity are remarkably similar.

Philip Bobbitt has offered a well-known list of the modalities of argument in constitutional law: text, history, structure, precedent, consequences, and ethos.[40] A modality, Bobbitt tells us, is a way of explaining why an interpretation is true or correct.[41] It is a way of justifying what we are doing when we interpret. It turns out that the modalities of argument in debates about performing music and drama are quite similar. This similarity is not an accident. It comes from the fact that all three enterprises require us to put texts into practice, and in doing so, we have to explain why we are interpreting a text in practice in one way rather than another.

Begin with arguments from the text. At first glance, Muti's position might seem particularly strong: The score says G, not C. As Philip Gossett notes, "the [high C] in question never existed in *any* printed edition of the opera. The 'great moment' is in fact an interpolation."[42] But as most lawyers and musicians will tell you, it's not as simple as that. Much depends on the background conventions through which one reads and interprets texts. We always read texts against a background set of assumptions, practices, and canons for reading them.

Take the example of repeats in a musical score. In the sonata-allegro form, for example, there is normally a repeat sign at the end of the exposition and before the development section.[43] Sometimes the composer even writes a little extra music to smooth the transition back to the beginning of the exposition.[44]

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40. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7, 93 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION].

41. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 40, at 11.

42. GOSSETT, *supra* note 15.

43. *See* James Webster, *Sonata Form*, *in* 23 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 687, 692 (Stanley Sadie & John Tyrrell eds., Macmillan Publishers Ltd. 2d ed. 2001) (describing the sonata form).

44. *See id.* ("In 18th-century music the exposition is almost always directed to be repeated, with or without a transition back to the opening.").

It turns out, however, that sometimes classical music performers take the repeats and sometimes they don't.[45] Why would they feel authorized not to take the repeats? After all, the score says "repeat." But as Bill Clinton would put it, it all depends upon what the meaning of "repeat" is.

In fact, there are many reasons why a performer might not take all the repeats written in the score. The performer wants the audience to receive the best aesthetic experience. In a live concert, taking all the repeats might make the work too long and tire the audience.[46] For the same reason, the full text of Shakespeare's *King Lear*—and many other of his most famous plays—is rarely performed.[47] In a recording, by contrast, many performers—and many music critics—will insist on taking all the repeats, even if the piece becomes much longer as a result.[48] However, most music in the standard classical repertoire was written before the advent of musical recordings.[49] In practice, the repeat sign does not invariably require repeats; it depends on the circumstances of the performance and nature of the audience, and performance practices have changed from the Classical era to the present.[50]

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45. *See* STEPHEN DAVIES, MUSICAL WORKS AND PERFORMANCES: A PHILOSOPHICAL EXPLORATION 213–14 (2001) (noting that exposition repeats are often omitted, and "if ignoring them does not unbalance the movement . . . their observance is unnecessary now because the audience is likely to be conversant with the work or to listen intently"); Michael Broyles, *Organic Form and the Binary Repeat*, 66 MUSICAL Q. 339, 339 (1980) ("Virtually every performer of the literature of the eighteenth century must face the question whether or not to repeat and often feels compelled to choose between fidelity to the score and artistic intuition."); Hugh MacDonald, *To Repeat or Not to Repeat?*, 111 PROC. OF THE ROYAL MUSICAL ASS'N 121 (1984–1985) (noting that although today "[t]he decision whether or not to observe a repeat is shared between current convention and the caprice of the performer," performance practices have changed considerably since the eighteenth century and that it is more likely that repeats were once mandatory).

46. *See* Levinson & Balkin, *Other Performing Arts*, *supra* note 29, at 1600–01 (noting the contrasting views of pianist Alfred Brendel and musicologist Neal Zaslaw regarding following repeats in a musical score).

47. *See* ALAN C. DESSEN, RESCRIPTING SHAKESPEARE: THE TEXT, THE DIRECTOR, AND MODERN PRODUCTIONS 12 (2004) (explaining that several "well-known scripts (e.g., *Richard III*, *Hamlet*, *King Lear*) are almost always streamlined so as to avoid four hours in the theatre"); Nelson Pressley, *For Modern Shakespeare, Directors' Adaptations May Be Kindest Cuts of All*, WASH. POST, Aug. 12, 2011, http://www.washingtonpost.com/lifestyle/style/for-modern-shakespeare-directors-adaptations-may-be-kindest-cuts-of-all/2011/08/03/gIQAEQJ5AJ_story.html (describing commonplace practices of directors in cutting text and rearranging scenes).

48. *See, e.g.*, IVAN MARCH ET AL., THE PENGUIN GUIDE TO RECORDED CLASSICAL MUSIC 2010, at 635–37 (2009) (praising Leopold Stokowski, Claudio Abbado and Claus Peter Flor for including the first movement exposition repeats in Mendelssohn's symphonies and criticizing Herbert von Karajan for omitting them); GUNTHER SCHULLER, THE COMPLEAT CONDUCTOR 207 (1998) ("I think it is mandatory for us performers to respect [Beethoven's] decision of a first ending and an exposition repeat.").

49. *See* TIMOTHY DAY, A CENTURY OF RECORDED MUSIC: LISTENING TO MUSICAL HISTORY 2–4 (2000) (noting that "[t]he first cylinder recordings issued commercially in any quantities went on sale in 1890" and "[t]he first grammophone records appeared on the market in 1894").

50. *See, e.g.*, Jonathan Dunsby, *The Formal Repeat*, 112 J. ROYAL MUSICAL ASS'N 196, 206 (1986–1987) ("Historically, the non-observance of Classical repeats is largely indefensible . . . [yet] it can be said with confidence that the time will never come when every performer observes all notated formal repeats in tonal music."); MacDonald, *supra* note 45 (arguing that repeats in the eighteenth century were mandatory although performers today often omit them).

Here we see the crucial role of the triangle of performance. Performance is always before an audience, and responsibilities toward the audience and the need to communicate to an audience shape conventions of performance and expectations about how to read and interpret a musical score.

Thus, Muti cannot justify his performance merely by pointing to the text. We have to understand what the text means in the light of performance practices of nineteenth-century Italian opera. To be sure, Muti wants to be scrupulous about the score, but that is a scrupulousness born of the late twentieth/early twenty-first centuries. It reflects the influence of a number of scholarly and performance movements in classical music, of which the most famous is the movement for "authentic" or historically informed performance.[51] What seems obvious to a late twentieth-century maestro might not be obvious to a nineteenth-century conductor, performing before a restive (and often talkative) audience in a provincial opera house in Italy. The opera of the nineteenth century was much more of a popular entertainment than it is today, even in Italy itself, and performers adjusted accordingly.[52]

It was commonplace for artists to add ornamentation and grace notes to arias and sometimes even to transpose arias to keys that were easier to sing.[53] (In fact, as Hillary Porris has shown, well into the nineteenth century singers sometimes inserted entire arias by other composers.)[54] Composers expected some alteration, but they did not want too much of it, and hence there was always a creative tension between authors, conductors, and singers.[55] In the twenty-first century we might assume that the composer's views should always prevail, but in the nineteenth century, composers only sometimes got their way, and sometimes, when the piece was performed by an equally temperamental diva or divo, they had to grin and bear it.

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51. For introductions to the historically informed performance movement of the late twentieth century, see AUTHENTICITY AND EARLY MUSIC (N. Kenyon ed. 1988); JOHN BUTT, PLAYING WITH HISTORY (2002); BERNARD D. SHERMAN, INSIDE EARLY MUSIC: CONVERSATIONS WITH PERFORMERS (1997).

52. *See* Prudence Dunstone, *Italian Vocal Music in the Early Nineteenth Century: Historical Versus Modern Interpretive Approaches*, *in* MUSIC RESEARCH: NEW DIRECTIONS FOR A NEW CENTURY 40, 45–46 (Michael Ewans et al. eds., 2004) ("Composers' scores of this period were never intended to be definitive documents. On the contrary, they were plastic, and constantly adapted to the practical needs of the performers at hand. . . . [R]estoring a composition to its original autograph form . . . does not necessarily produce a performance in accordance with the expectations or even the intentions of the composer.").

53. GOSSETT, *supra* note 15, at 293 (noting Verdi's assumption that singers would ornament unless he gave explicit instructions to the contrary); Dunstone, *supra* note 52, at 51 ("Transposition and alterations to provide interest and to suit individual singers were commonplace.").

54. *See* HILARY PORISS, CHANGING THE SCORE: ARIAS, PRIMA DONNAS, AND THE AUTHORITY OF PERFORMANCE 3–4 (2009) (describing the phenomenon of "'aria insertion[,]' . . . the practice that allowed singers to introduce arias of their own choice into opera productions").

55. *See id.* at 23–24 (explaining that although "[l]ike his predecessors, Verdi allowed star performers to influence the shape and contents of his operas, particularly early on in his career," he increasingly sought to prevent theaters, performers, and censors from mangling his operas).

Textual arguments, therefore, must always be understood in the larger context of performance conventions. To know what the text means, we also have to know what kinds of glosses and forms of improvisation conductors and performers are allowed within the tradition—or, if we are devotees of historically informed performance, were allowed in the relevant period.

Moreover, we might also have to look at the purpose behind the text to see what kinds of glosses are reasonable and permissible. The reason why Verdi wrote a G might have less to do with what he actually wanted and more to do with the cast of characters he had to work with at the premiere. Philip Gossett explains that "Verdi wrote the role of Manrico for Carlo Baucardé, a tenor whose effective range it presumably reflects."[56] Verdi "did not feel that Baucardé had a usable high *c*, nor a high *b*, and only a most uncertain high b[-flat]."[57] If Verdi had believed that Baucardé could regularly hit the high C with confidence, Verdi might have included it in the original score. Today, however, given that the best tenors can sing the high C (and bring down the house) perhaps it is more consistent with Verdi's intentions to allow the interpolation. This is an argument from hypothetical original intention. An analogous argument in constitutional law would be that if the Framers were alive today, and understood modern markets and modern telecommunications and transportation technologies, they would have accepted an expansive power to regulate interstate commerce.

Baucardé, it turns out, was more confident of his abilities than Verdi was, and he began throwing in high Cs shortly after *Il Trovatore*'s premiere.[58] In his study of Verdi's operas, Julian Budden relates that Baucardé supposedly added not one but two high Cs—one at the end of the aria and one at the words "O teco almeno"—in a performance in Florence in 1855.[59] Another tradition states that they were introduced by the famous mid-nineteenth-century tenor Enrico Tamberlick.[60] Tamberlick, it seems, really liked to show off his range. He once tried to astonish the composer Gioacchino Rossini by producing a high C-sharp.[61] Rossini was not amused. He told Tamberlick that he could hang his C-sharp in the hall of the opera house and pick it up on the way out after the performance.[62]

By contrast, Budden explains, "Verdi was more complaisant."[63] Before approaching Verdi with a request to include the *do di petto*,

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56. GOSSETT, *supra* note 15, at 125.

57. *Id.* at 126.

58. 2 JULIAN BUDDEN, THE OPERAS OF VERDI 98 (1978); HERBERT LINDENBERGER, SITUATING OPERA: PERIOD, GENRE, RECEPTION 11 (2010).

59. BUDDEN, *supra* note 58.

60. *Id.* at 98, 531.

61. *Id.* at 98, 530.

62. *Id.* at 98.

63. *Id.*

> Tamberlick had already experimented with it in various provincial theatres where, he told the composer, it was in great demand with the public. "Far be it from me," Verdi had answered, "to deny the public what it wants. Put in the high C if you like provided it is a good one."[64]

This famous anecdote contains a wealth of possible interpretive arguments. For example, modern tenors might argue that Verdi had sanctioned the high C if it was performed properly. The best interpretation of the score, then, is "sing the high C if you can do it really well; otherwise, stick to the G." This could either be an argument from original intentions (Verdi actually approved of a C by the right singer), or an argument for interpreting open-ended texts in a way that produces the best results. When the conventions of performance allow for some leeway, the singer may choose the interpretation that produces the best aesthetic consequences. Put in Dworkinian terms, when the conventions of musical practice allow it, we should attempt to make the score the best it can be.[65]

On the other hand, one might argue that it doesn't matter what Verdi intended after the fact; what matters is the score he actually wrote. Original public meaning should trump original intentions, and what Verdi thought later on cannot change the nature of the work he actually composed. But this simply brings us back to what original public meaning was. Any opera composer writing in Italy knew that the singers would interpolate notes to show off their skills, and that the audience would expect and even demand this.[66] Conversely, "[p]erformers of Italian opera have been making internal cuts in musical numbers since the operas were written, and it seems unlikely that they will stop in the foreseeable future."[67] Therefore we cannot understand the original public meaning of a nineteenth-century Italian opera score in the same way we might approach one written in the twenty-first century. The original public meaning might include the convention that the score is always subject to tasteful embellishments.[68]

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64. *Id.* at 98–99.

65. *See* RONALD DWORKIN, LAW'S EMPIRE 52–55, 421–22 n.12 (1986) (arguing that in constructive interpretation, social practices should be understood in their best light).

66. *See* GOSSETT, *supra* note 15, at 293 (explaining that more than any other form of classical music, nineteenth-century Italian opera retained eighteenth-century performance conventions in which composers "expected soloists (vocal and instrumental) to ornament lyrical lines" and that "only in Italian opera was ornamentation integral to the performance of newly composed notated works"). Gossett offers the example of the first performance of Rossini's most famous opera, *Il barbiere di Siviglia* (*The Barber of Seville*), in which the lead tenor Manuel García "was paid three times as much for singing the work as Rossini was for composing it," and Rossini was required by contract "to make where needed all those alterations necessary either to ensure the good reception of the music or to meet the circumstances and convenience of those same singers, at the simple request of the Impresario, because so it must be and no other way." *Id.* at xv.

67. *Id.* at 263.

68. One might argue that the original expected application of Verdi's score is less important than whether the text of the score gives later interpreters discretion to add interpolations. On the other hand, the score itself does not tell us how much discretion it affords; we may need to

Here again, the triangle of performance matters greatly to interpretation. When Verdi explained that he would not "deny the public what it wants,"[69] he was adverting to the duty of both composers and performers to the audience. Ultimately, the audience—or audiences, for there are always multiple audiences implicit in any performance—would be the judge of which interpretation was the best one. "At the time of Muti's *Trovatore* in Florence [in 1977]," Gossett reports, "one Italian critic commented that the high *c*, even if not written by Verdi, was a gift that the people had given to Verdi."[70] Such a gift, once given, could not easily be refused. This looks remarkably like an argument for popular or democratic constitutionalism. Under the same reasoning, it does not matter that the framers and adopters of the Fourteenth Amendment did not intend or expect that the Equal Protection Clause would one day require integrated public schools, the legality of interracial marriage, or equal rights for women and gays. These rights are a "gift" to the Constitution from later generations of the American people.

Verdi's remark might also form the beginning of an argument from *precedent*. If tenors regularly sing the high C, and audiences have come to expect it, at some point this gloss appropriately becomes part of the score *as performed*, regardless of what the text—viewed in isolation from performing practices—might say. Perhaps Verdi would not have wanted the C initially, but the regular interaction of performers and audiences has authorized a tradition of performance that audiences expect and appreciate.[71] For them, the real and true *Il Trovatore* is the version with the high C. These expectations are worth respecting. As noted above, they are a gift of the Italian people to Verdi, and to spurn them would be both ungracious and impolite.

Under this account, Maestro Muti is not a traditionalist, and merely the humble servant of Giuseppe Verdi. His insistence on following the literal text is revolutionary. It is designed to shock the audience and arouse it from its dogmatic slumbers. The audience has gotten lazy and too used to judging the musical merits of the opera based on a few high notes. By returning to the original text, Muti wants to push back at them, perhaps even teach them a lesson about musical excellence.

This example is by no means unusual. Arguments for discarding traditional interpretive glosses and returning to an imagined origin (like the original meaning of a text) are usually revolutionary, not conservative.

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understand mid-nineteenth-century performance practices to help us answer this question. *Cf.* BALKIN, *supra* note 27, at 46 (arguing that "fidelity to a written constitution requires that we do our best to respect the text's allocation of freedom and constraint for future constitutional construction," which may require us to understand "how language was generally and publicly used").

69. BUDDEN, *supra* note 58 at 98–99.

70. GOSSETT, *supra* note 15, at 127.

71. *See, e.g.*, LINDENBERGER, *supra* note 58 ("Do not these practices have the authority that attaches to long-standing precedent? Does one want to allow an audience accustomed to the high *c* to feel let down as Act III comes to its dramatic conclusion?").

Protestantism, with its desire to return to scripture alone, and to the pure Christianity of the early church fathers, is a good example.[72] American conservatives' turn to originalism was part of a revolutionary mobilization for political change—movement conservatism—which was not conservative in the Burkean sense but sometimes quite radical in its political goals.[73]

The idea that the high C is the gift of the people to Verdi brings us to the next of Bobbitt's modalities—arguments from ethos. Mauro Fuolega and his fellow critics in the audience were not merely invoking precedent. They were, in effect, accusing Muti of defacing an honored symbol of Italian art. By its nature, they might have argued, Italian opera celebrates bravura display—it revels in emotional excess and feats of artistic one-upmanship. By ordering Licitra to suppress the natural instincts of every red-blooded Italian tenor, Muti had been false to the ethos and character of a longstanding, transgenerational institution. In the same way, defenders of the result in *Bolling v. Sharpe* might argue that the arc of the American Constitution bends toward justice, that the deep meaning of the American constitutional tradition is the fulfillment in history of the Declaration's guarantee that all persons are created equal. A judge who refuses to integrate the District of Columbia schools because of a too-narrow construction of the Constitution's words does not really understand the meaning of America or the great narrative of American progress.

In addition to arguments about text, history, precedent, consequences, and ethos, there are also arguments about structure. In constitutional law, structural arguments concern how the various parts of a constitution fit together and how institutions created by the text should properly interact. Because they often invoke historical sources, structural arguments are sometimes confused with arguments from original intention or original meaning, but they are actually quite different. They are arguments about a constitution as a system, and about how the parts must work together in order to achieve a constitution's larger goals. Structural principles may arise from the interaction of different parts of the Constitution, and they do not have to be intended by anyone in particular.[74]

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72. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889 (1985) (noting that Protestant emphasis on *sola Scriptura* "rejected the rich medieval tradition of interpretation . . . [and] spurned the medieval acceptance of Pope and council as authoritative interpreters").

73. *See, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 238 (2011) ("The conservative movement's turn to originalism was natural for a revolutionary political movement. . . . Arguments for a return to origins, for stripping away encrustations of existing practice and looking to the original meaning of past commitments are the familiar language of dissenters.").

74. BALKIN, *supra* note 27, at 142 ("Structural principles do not have to have been intended by anyone in particular; indeed, they may only become apparent over time as we watch how the various elements of the constitutional system interact with each other."); *id.* at 262 ("[S]tructural principles might emerge from the constitutional system that no single person or generation

Chief Justice Warren offered a structural argument in *Bolling v. Sharpe* when he said that it would be "unthinkable" to bind the states to a guarantee of racial equality but not the federal government.[75] The point of the Civil War and Reconstruction was to establish a single national standard for basic civil rights and civil liberties.[76] If *Brown v. Board of Education* was correct that racial equality (at least in public education) was a basic right of national citizenship, *a fortiori* it had to apply to the national government. The same structural logic justified another of the Warren Court's most important achievements—its decision to apply almost all of the Bill of Rights to the states through the Due Process Clause.[77]

Philip Gossett offers structural arguments both for including and for not including the *do di petto* in *Il Trovatore*. "Looking exclusively at the end of the aria," he explains, "the interpolated note is nothing but harmless pyrotechnics. As assertive a cabaletta as Verdi ever wrote, the piece closes the third act, brings down the curtain, and moves the opera precipitously to the final catastrophe."[78] In fact, Gossett argues, "Verdi's conclusion demonstrates his wish to preserve an unusual level of tension."[79] Ordinarily the tenor would have descended from the G to a lower C at the aria's conclusion; however, Verdi keeps the tenor on G, "so that [the tenor] Manrico concludes on the fifth of the *C major* chord, while the first tenors [in the chorus] take the *e* below it and the second tenors and basses sing middle *c*. The result is a full tonic triad, with Manrico alone on the highest note."[80]

But if creating tension was Verdi's structural goal, why not "intensify this effect further, by giving *c*, *e*, and *g* to the male chorus, with [the tenor] free to ascend to high *c*?"[81] As noted above, Gossett believes that Verdi did not choose this path in part because he was worried about Baucardé's range and consistency. But modern tenors can routinely hit the note confidently and powerfully.[82] Thus there is a structural argument for heightening dramatic impact—and fulfilling the opera's larger purpose—when a tenor is available to sing the high C.

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intended. . . . We must look to other generations as well as the founding generation to understand how constitutional structures should work (and how they might fail to work).").

75. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

76. Balkin, *supra* note 27, at 1809.

77. *See* Duncan v. Louisiana, 391 U.S. 145, 148–51 (1968) (applying the Sixth Amendment jury trial right to states and listing cases applying different portions of the Bill of Rights to the states).

78. GOSSETT, *supra* note 15, at 124–25.

79. *Id.* at 125.

80. *Id.*

81. *Id.*

82. *See* 3 RICHARD TARUSKIN, THE OXFORD HISTORY OF WESTERN MUSIC: THE NINETEENTH CENTURY 579 (2005) ("[S]ingers since Caruso have treated the composer's notation as a minimum expectation. Indeed, any singer who does not have a version of that final roulade up to Caruso's high C runs the risk of being hissed off the stage.").

But there is also a structural argument in the opposite direction. "The real disaster of the interpolated high *c*," Gossett argues, "is its effect on the choice of an appropriate tenor to sing the role of Manrico. The *sine qua non* for an opera house today, as it casts the part, has become the ability of a tenor to let loose a stentorian high *c* at the end of 'Di quella pira.'"[83] The musical tail has begun to wag the operatic dog. "The interpolated note has come to dominate the conception of the part, and everything else is planned around an effect that Verdi never intended."[84] In order "[t]o produce the high *c*, furthermore, singers generally cut the cabaletta by half and omit the notes that they should be singing with the chorus, so as to preserve breath and energy for the final pitch."[85]

Whichever way one reasons, Gossett believes that the structure—or the artistic integrity—of the opera is ultimately more important than scrupulous adherence to the written text:

> [W]hether Manrico does or does not produce a high *c* is of little artistic importance. What is artistically devastating is that the perceived need to hit the stratospheric note has transformed our conception of the role. Give me a tenor who can sing Manrico as Verdi conceived the part and chooses to add a ringing high *c*, and I will join the *loggione* in applauding him. Failing that, let Manrico, in Rossini's famous words to the same Tamberlick, leave his high *c* on the hat rack, to be picked up on his way out of the theater.[86]

III. Constraint in Performance: Off-the-Wall and On-the-Wall

At a conference on law and music held at the University of Texas in 2001, the *do di petto* produced an interesting conversation about interpretive constraint, genre, and power. Comparing music to law, the distinguished musicologist Lewis Lockwood noted that opera singers were constrained by "the laws of music" and harmony.[87] Whether or not a high C was acceptable in 1850, surely a tenor could not get away with singing an F-sharp. At the aria's conclusion, the tenor and the chorus are singing a C major chord.[88] The tenor can sing a G, or an E, or a C (the notes of the C major triad).[89] But, Lockwood explained, "[i]t cannot be any other pitch. It might be A if you want to turn it into Kurt Weill. . . . But nobody in his right mind would try that. My fear is if somebody did do it, the gallery gods would rise and

83. GOSSETT, *supra* note 15, at 126.

84. *Id.*

85. *Id.*

86. *Id.* at 127.

87. Lewis Lockwood, What Are the Links Between Law & Performing Arts?, Panel at the University of Texas Law and Art Symposium: From Text to Performance: Law and Other Performing Arts 19 (Mar. 4, 2002) (transcript on file with author).

88. G. VERDI, IL TROVATORE 325 (Dover 1994) (1853).

89. GOSSETT, *supra* note 15, at 125.

cheer."[90] Then, further analogizing from music to law, Lockwood suggested that "the singing of an F-sharp is musically—pardon the expression—'illegal,' whereas singing an E would not be.... [Y]ou can not quite treat *Il Trovatore* as if it were that varied."[91]

In fact, Lockwood's argument is not so much about the "laws of harmony" as about the constraints of canon, convention, and genre. His reference to the twentieth-century composer Kurt Weill—who, among other things, brought jazz influences into European classical music[92]—is the telltale sign.

Take the question of genre. The kinds of harmonic innovations singers are permitted to interpolate depend on the kind of music *Il Trovatore* is. Jazz singers like Ella Fitzgerald or Sarah Vaughan can add blues notes to a Cole Porter standard, but this would normally be impermissible in Verdi.

Mid-nineteenth-century Italian opera was not particularly daring harmonically, at least in comparison to contemporaries like Richard Wagner or Franz Liszt, much less later composers like Claude Debussy or Arnold Schoenberg.[93] Verdi's musical palate did not employ the complex rhythms, blues notes, or harmonies of mid-twentieth-century American jazz. In a Duke Ellington composition a final C major chord can have a D on top because it is a ninth. One could also have an F-sharp in a serial composition of the early twentieth century, or as part of a chord with an augmented fourth (or a diminished fifth) in a Wagnerian opera.[94] (In fact, if the D resolved to a C or the F-sharp to a G, they would be permissible as a passing note or as an appoggiatura even in the Italian opera of Verdi's time.)

Lockwood is correct that under the harmonic conventions of mid-nineteenth-century Italian opera both the D and the F-sharp are out of bounds. They are "illegal," however, not because the laws of harmony in general demand it, but because the conventions of Italian opera do. As long as performers and audiences agree to abide by those conventions, such interpretations are "off-the-wall." An "on-the-wall" interpretation, by contrast, is one that is within the genre and conventions of performance, even if it is not the best, the most skillful, or the most riveting interpretation.

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90. *See* Lockwood, *supra* note 87, at 19–20.

91. *Id.* at 21.

92. *See* JÜRGEN SCHEBERA, KURT WEILL: AN ILLUSTRATED LIFE 75 (Caroline Murphy trans., 1995) (describing Weill's introduction of popular forms and jazz elements in the 1920s).

93. *See* HARVARD UNIV., THE HARVARD DICTIONARY OF MUSIC 381 (Don Michael Randel ed., 4th ed. 2003) (viewing Wagner's *Tristan und Isolde* as a turning point in the development of western harmony, leading to the "'total chromaticism' of the 20th century," the experimentalism of composers like Claude Debussy, Maurice Ravel, Béla Bartók, and Igor Stravinsky, and, in Arnold Schoenberg, a "chromaticism [that] goes beyond tonality altogether"). Verdi's *Il Trovatore* premiered in 1853, six years before Wagner finished *Tristan und Isolde*, and some twelve years before *Tristan*'s first performance in 1865. *Id.* at 588–89, 911.

94. *See id.* at 911 (describing the harmonic structure of the "Tristan chord").

The point, however, is that conventions of appropriate performance can and do change over time. Within Verdi's own lifetime, harmonic conventions were drastically expanded (he died in 1901),[95] and by the first few decades of the twentieth century composers began experimenting with atonality, serialism, and jazz harmonies.[96] Today one could interpolate a D or an F-sharp only as a deliberate allusion to other genres of music, or as an attempt to superimpose another harmonic tradition on Verdian opera. Whether this would be successful would depend on whether it was accepted by audiences and adopted by other performers. Like Lockwood, I am dubious that this would work, but in studying the history of artistic interpretation, one learns never to say never.

Put another way, genre and convention shape what performers can do and cannot do in performance, but genre and convention are subject to the history of subsequent performance. Performers sometimes have incentives to stretch or alter conventions, or otherwise push the performative envelope in order to create new effects for audiences.

Consider Maestro Muti's choice of G instead of C in this light. Although Muti claimed that he was merely acting as the faithful servant of Verdi's text, he was actually confounding the existing conventions of Italian opera, which celebrate bravura display and emotional exaggeration. His "self-effacing deference" might actually be "arrogance cloaked as humility," as Justice William Brennan once said of the philosophy of original intention.[97]

In fact, by deliberately refusing to perform the traditional *do di petto*, Muti's strict adherence to the printed text could be said to be off-the-wall, and the audience let him know it in no uncertain terms. But that judgment can change over time. If enough conductors, performers, and critics get behind Muti's approach, it may eventually become accepted as not only a permissible way to perform Verdi, but the correct way, even in very traditional venues like La Scala.

An important example of how performance practices move from off-the-wall to on-the-wall is the authentic performance movement. At first, audiences and critics resisted the authentic performance movement because they disliked the textures, timbres, and tempi employed by authenticists.[98] Eventually, however, audiences and critics were won over, and it became expected that performers would play music—especially music of the

95. McInerney, *supra* note 1.

96. *See* ALEX ROSS, THE REST IS NOISE: LISTENING TO THE TWENTIETH CENTURY 33–52, 74–77, 196–97 (2007) (describing the development of atonal and twelve-tone composition and the influence of jazz in early-twentieth century classical music).

97. Justice William J. Brennan, Jr., Speech by Justice William J. Brennan, Jr. at Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 14 (1986).

98. Levinson & Balkin, *Other Performing Arts*, *supra* note 29, at 1611 nn.53 & 55, 1616–17.

Baroque and early Classical eras—using "authentic" techniques.[99] Conductors who continued to use large orchestras with traditional string vibrato in baroque and classical pieces were sometimes described as playing "big band" versions of the classics.[100]

Similar points apply to legal interpretation. Constraint in legal interpretation comes from analogous ideas of genre, convention, and canon, which are enforced by a wide range of institutions. Nevertheless, just as in musical performance, things can move from off-the-wall to on-the-wall over time. In fact, the history of American constitutional law is the history of ideas and arguments moving from off-the-wall to on-the-wall and, in some cases, becoming the new orthodoxy of a later era.[101]

In music, as in law, the most important factor in moving things from off-the-wall to on-the-wall is whether enough people are willing to get behind these new ideas, and whether people who are well-placed in terms of power, position, and influence are willing to put their resources and reputations behind them.[102] The constitutional arguments of the gay rights movement took many years to be taken seriously. In 1986, Justice Byron White dismissed as off-the-wall the idea that the Constitution prevented states from imprisoning people for same-sex relations: "[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[103] At that point, the modern gay rights movement (measured

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99. *Id.* at 1611.

100. *See, e.g.*, MARCH ET AL., *supra* note 48, at 698 (describing Sir Colin Davis's performances of Mozart symphonies as "big-band Mozart" that "reflect little or no influence from period performance").

101. *See* BALKIN, *supra* note 73, at 12, 61, 69–70, 88, 119, 177–83 (2011) (explaining the importance of the ideas of off-the-wall and on-the-wall constitutional arguments to constitutional change).

102. *See id.* at 88. As I have explained elsewhere:

> Law, and especially constitutional law, is grounded in judgments by legal professionals about what is reasonable: these judgments include what legal professionals think is obviously correct, clearly wrong, or is a matter of dispute on which reasonable minds can disagree. But what people think is reasonable depends in part on what they think that other people think. Arguments move from off the wall to on the wall because people and institutions are willing to put their reputations on the line and state that an argument formerly thought beyond the pale is not crazy at all, but is actually a pretty good legal argument. Moreover, it matters greatly *who* vouches for the argument—whether they are well-respected, powerful and influential, and how they are situated in institutions with professional authority or in institutions like politics or the media that shape public opinion. The Obama Justice Department has now officially taken the view that discrimination against homosexuals should be subjected to close judicial scrutiny, and the president has recently declared himself in favor of legalizing same-sex marriages. Together these announcements give enormous momentum to the decades-long struggle for constitutional rights for gays and lesbians.

Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

103. Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

from the 1969 Stonewall Riots) was only 17 years old.[104] Seventeen years later, however, in *Lawrence v. Texas*,[105] what was once off-the-wall had become on-the-wall. What Justice White thought facetious a majority of the Supreme Court now thought the best interpretation of the Due Process Clause.[106] How did the gay rights movement succeed? It did so through gradually changing public opinion at the national, state, and local levels; through efforts at shaping popular culture; through legislative lobbying; through litigation campaigns; through decisions by gays and lesbians to publicly announce their sexual orientation and live openly; and through repeated arguments made by political, legal, cultural, and academic elites.[107] As more and more people in influential and powerful institutions accepted and argued for equal rights for homosexuals, these ideas became increasingly acceptable to the general public and to legal elites.

In like fashion, the success of the authentic performance movement came slowly, over time, as historically informed performers began to infiltrate and later dominate concert halls and recording studios, win over critics, and reproduce themselves in conservatories and music academies. Like the success of the gay rights movement, the success of the authentic performance movement is a Gramscian-style "march through the institutions."[108]

This offers us yet another way of explaining the idea that the *do di petto* is a gift from the people to Verdi. The "gift" in this case is the result of years of practice and mobilization in various institutions of power and influence that reshape musical common sense and move things from off-the-wall to on-the-wall. The result of this effort is an interpretation that now seems reasonable, obvious, or natural. What the people gave to Verdi—or to the interpretation of Verdi—was a conception of reasonableness; in the same way, what generations of social and political movements have bestowed on the Constitution is a sense of reasonableness about how to make sense of abstract or vague texts like "freedom of speech" or "equal protection of the laws."

One of the most important sources of power in shaping canon, convention, and genre is the audience. Performers generally attempt to

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104. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 15 (1999).

105. 539 U.S. 558 (2003).

106. *Id.* at 578–79.

107. *See supra* note 102 and accompanying text. *See generally* LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION (2012).

108. *See generally* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (describing the "war of position" between intellectuals). The term "march through the institutions," although often associated with Gramsci, was actually coined in the twentieth century by the German student activist Rudi Dutschke. ROGER KIMBALL, THE LONG MARCH: HOW THE CULTURAL REVOLUTION OF THE 1960S CHANGED AMERICA 15 (2000).

influence and communicate with their audiences; if audiences don't like what performers do, it undermines their ability to perform.

The important point is that the audience that happens to be at La Scala at a particular moment is not the only one that matters for shaping the conventions of performance. Perhaps Maestro Muti may not care much for the people in the balconies—indeed, he rebuked them—but there are other audiences about which he cares deeply. Just as there can be multiple authors and multiple performers, there can also be multiple audiences, in different places and at different times, each of whom may place duties, expectations, or constraints on the performer. Audiences exist in institutions, and their views are mediated by these institutions. When we talk about the role of the audience in shaping performance, then, we are really talking about the role of institutions that affect performance and before which performance occurs.

First, audiences may be differentiated by *time* or *space*: When Riccardo Muti conducts at La Scala, his performance may be recorded for later audiences, who may listen or watch it in many different places, and in many different situations—in a movie theatre, sitting at home, or driving in a car. The creation of technologies for recorded performance in the twentieth century greatly multiplied the number of potential audiences for any single performance.

Second, audiences may be differentiated by *expertise*. Muti's performance before a live audience at La Scala reaches out to laypersons who know little of opera, to professional musicians in attendance, and to the *loggionisti* who are devoted—and often critical—fans.

Third, audiences may be differentiated by *role*. The same performance may be reviewed by professional music journalists and music critics. It may be evaluated by impresarios and record companies who may want to hire Muti, Licitra, or the other performers for future concerts and recordings.

Fourth, audiences may be differentiated by their respective places in *professional culture*. Most of the members of the audience at La Scala are probably not conductors or opera singers themselves. Nevertheless, well-trained musicians often perform against the background of the expectations and judgments of other professional or professionally trained musicians. Musicians' performances may also be shaped—consciously or unconsciously—by the expectations and judgments of their former teachers, by their peers, or by fellow members of the genre or the "school" of performance to which they belong. Even if these fellow professionals are not in the live audience, they nevertheless shape—sometimes subtly, sometimes profoundly—what a performer believes he or she must do, and what makes for a good, bad, or mediocre performance. Indeed, a performer may regard a standing ovation from the untutored as less important than the judgment of peers or teachers gained over decades of interaction. The internalized audience may be more powerful than the audience immediately before an interpreter.

As these examples demonstrate, the triangle of performance is usually embedded in *institutions*. Whether or not these institutions are salient in any particular performance, their influence is always present. An opera performance, for example, occurs in an opera house paid for by subscriptions or subsidized by taxpayers and managed by a company. The conductors and performers are conservatory-trained and owe debts of influence to teachers and colleagues. Their work is reviewed by journalists and critics, and the artists seek to attract contracts from recording companies and performance opportunities from other opera companies and musical organizations.

The relationships and duties of interpretation between author, performer, and audience, therefore, are always mediated by institutional structures, including the forms of power and the social conventions that come with them. For example, Muti's performance at La Scala either made use of or was the result of, among other things, opera companies, conservatories and apprenticeships, competitions, record companies, and the Internet/YouTube (where a version of Muti's La Scala interpretation currently appears).[109]

Similar points apply to the triangle of performance in law. A judge who decides a case is constrained by and responding to a wide range of influences: the appointments process, the party system, legal education and legal culture, the opinions of professional peers, and the multiple social institutions that constitute one's lived experience. (Consider, for example, how desegregation of institutions like the United States Army and Major League Baseball paved the way for *Brown v. Board of Education.*)[110] Conventions of interpretation and expectations about proper performance change as a result of controversies and struggles within these various institutions. This is as true for music as it is for law.

IV. Conclusion: Performance and Canonicity

Throughout this Essay I have noted similarities between legal and musical performance, showing how these similarities arise from the fact that in law and in many performing arts performers need to interpret a text and put it into action. For that reason, both law and the performing arts feature a triangle of performance between authors, performers, and audiences, and both law and the performing arts use similar modalities of argument to legitimate the choices made by interpreters.

I close however, with an important area of difference. It concerns canonicity: the kinds of performances that participants deem mandatory or canonical, and how that canonicity is enforced through institutions.

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109. Radio Televisione Italiana, *Il Trovatore*, YOUTUBE (Mar. 12, 2013), http://www.youtube.com/watch?v=6AGQeg0M28Y.

110. *See* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Interpretation*, 90 VA. L. REV. 1537, 1547 (2004) (noting the importance of Jackie Robinson's and Harry Truman's actions in shaping a political culture in which *Brown v. Board of Education* became possible).

First, note that it is mandatory to interpret and apply laws in a sense in which it is not mandatory to interpret artistic works like *Il Trovatore*. Conductors and opera companies do not have to perform *Il Trovatore* (unless, that is, they are contractually obligated to do so); they can choose to perform another work instead. By contrast, laws presumptively apply to particular situations; ordinarily they must be performed if they are deemed relevant.

Second, when the Supreme Court decides a case like *Bolling v. Sharpe*, its decision is binding on all the lower courts and upon the Supreme Court itself (unless the Court overturns or limits the decision). Lower courts and the Supreme Court are supposed to follow the original decision, or at least give very good reasons why they should not. And if a lower court disobeys the interpretation of a higher court, a higher court has the right to reverse it. On the other hand, when Riccardo Muti decides that he is going to perform the G in the printed score instead of the traditional high C, his decision does not have the same effect. Nothing prevents another opera conductor from performing the high C that very same night in another opera house somewhere in the world. And if another conductor does so, there is very little that Muti can do other than criticize.

In the United States, court decisions are organized hierarchically—with higher courts able to supervise and reverse lower courts—whereas opera performances are not. Interpretations of the highest courts are canonical: They are mandatory guidelines for how lower courts should perform the law.

Indeed, rival interpretations of the Constitution are normally frowned on; the goal, if not the practical reality, is that the judicial system should converge toward a single interpretation even if this is not always realistic. In music and many other performing arts, however, it is possible to have multiple interpretations of the same work. In fact, a multiplicity of interpretations is often encouraged and admired because it allows performers to demonstrate the quality and uniqueness of their particular genius.

By contrast, a legal system like that in the United States has far less patience with idiosyncratic judges who pride themselves on showing off their talents by deciding cases in ways that no other judges would. One might argue for interpretive convergence on rule of law grounds: although in practice it may make a great deal of difference before whom a litigant appears, the ideal is that the law for each person should be the same regardless of the judge involved.

Nevertheless, this difference is not due not to inherent features of law and the performing arts, but rather to how these institutions are structured and to their governing conventions. It is certainly possible to imagine art forms in which the best performance is one that conforms as much as possible to a canonical example. Consider, for example, the desire of many

popular music fans to hear a live version that is as close as possible to the recorded version they know and love.[111]

Conversely, it is possible to have legal systems that are not hierarchically ordered, or that are pluralist, or that countenance a wide range of different interpretive results. To some extent even the American system of law contemplates the possibility that the different branches of government may interpret the Constitution differently. Judicial supremacy may exist in the United States, but it is also controversial.

In fact, the point of comparing law to the performing arts consists precisely in the fact that as soon as we attempt to list clear differences, we begin to see how internally differentiated both categories are. What we discover are a variety of different performance practices within law, music, and drama, with different methods of enforcing genre, convention, and constraint.

The big division, then, is not law versus music or drama. Instead we should ask what kind of practice we are dealing with and how it is organized institutionally. What are the traditions of performance that apply to the practice, and how are these traditions enforced? What are the forms or sources of authority to engage in performance? What degree of variation is permitted or encouraged between different interpreters? How is convergence in interpretation encouraged or enforced? How do the conventions of good and bad, correct and incorrect performance change over time, and what role do institutions play in facilitating or resisting these changes? These questions are as relevant to legal performance as to the performance of music or drama. They are why law, like music or drama, is a performing art.

111. *See, e.g.*, Chris Nelson, *Lip-Synching Gets Real*, N.Y. TIMES, Feb. 1, 2004, http://www.nytimes.com/2004/02/01/arts/music-lip-synching-gets-real.html?pagewanted=print&src=pm ("[F]or an increasing portion of the pop music audience, perfection is more desirable than authenticity—especially when they're paying almost $100 a ticket for an elaborately choreographed concert.").

* * *

Precedent and Jurisprudential Disagreement

Amy Coney Barrett*

Introduction

Over the years, some have lamented the Supreme Court's willingness to overrule itself and have urged the Court to abandon its weak presumption of stare decisis in constitutional cases in favor of a more stringent rule.[1] In this Article, I point out that one virtue of the weak presumption is that it promotes doctrinal stability while still accommodating pluralism on the Court. Stare decisis purports to guide a justice's decision whether to reverse or tolerate error, and sometimes it does that. Sometimes, however, it functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution.[2] Because the justices do not all share the same interpretive methodology, they do not always have an agreed-upon standard for identifying "error" in constitutional cases. Rejection of a controversial precedent does not always mean that the case is wrong when judged by its own lights; it sometimes means that the justices voting to reverse rejected the interpretive premise of the case. In such cases, "error" is a stand-in for jurisprudential disagreement.

The argument proceeds in three parts. After Part I explains the general contours of stare decisis, Part II develops the thesis that, at least in controversial constitutional cases, an overlooked function of stare decisis is mediating jurisprudential disagreement. Identifying this function of stare decisis offers a different way of thinking about what the weak presumption accomplishes in this category of precedent. On the one hand, it avoids entrenching particular resolutions to methodological controversies. This reflects respect for pluralism on and off the Court, as well as realism about the likelihood that justices will lightly let go of their deeply held interpretive commitments. On the other hand, placing the burden of justification on those justices who would reverse precedent disciplines jurisprudential disagreement lest it become too disruptive. A new majority cannot impose its vision with only votes. It must defend its approach to the Constitution and be sure enough of that approach to warrant unsettling reliance interests. Uncertainty in that regard counsels retention of the status quo.

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1. *See infra* notes 22–24 and accompanying text.

2. *Cf.* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 537 (1999) ("Anyone who cares about constitutional law confronts a large and proliferating number of constitutional theories, by which I mean theories about the nature of the United States Constitution and how judges should interpret and apply it.").

Insofar as it keeps open the prospect of overruling, the weak presumption undeniably comes at a cost to continuity. Part III observes, however, that less rides on the strength of stare decisis than is commonly supposed. Discussions of stare decisis tend to proceed as if horizontal stare decisis—the Court's obligation to follow its own precedent—is the only mechanism for maintaining doctrinal stability. Other features of the system, however, also serve that goal, and may well do more than horizontal stare decisis to advance it. In particular, the prohibition upon advisory opinions, the obligation of lower courts to follow Supreme Court precedent, the Court's certiorari standards, its rule confining the question at issue to the one presented by the litigant, and the fact that the Court is a multimember institution whose members have life tenure are all factors that work together to contribute to continuity in the law. To be sure, overruling precedent is disruptive. But some instability in constitutional law is the inevitable byproduct of pluralism. Were there greater agreement about the nature of the Constitution—for example, whether it is originalist or evolving—we might expect to see greater (although of course still imperfect) stability. In the world we live in, however, that level of stability is more than we have experienced or should expect in particularly divisive areas of constitutional law.

I. The Doctrine of Stare Decisis

Stare decisis is a many-faceted doctrine. It originated in common law courts and worked its way into federal courts over the course of the nineteenth century.[3] By the twentieth century, the doctrine had become a fixture in the federal judicial system.[4] That is not to say that its shape was then or is now fixed. On the contrary, the strength of stare decisis is context dependent.

Stare decisis has two basic forms: vertical stare decisis, a court's obligation to follow the precedent of a superior court, and horizontal stare decisis, a court's obligation to follow its own precedent.[5] Vertical stare decisis is an inflexible rule that admits of no exception.[6] Horizontal stare decisis, by contrast, is a shape-shifting doctrine. For one thing, its strength

3. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1065 (2003) (describing the development of stare decisis in the federal judicial system).

4. *See* Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008) (asserting that "by 1900 the Supreme Court had settled into the practice of citing and relying upon its precedents as modalities of argumentation and sources of decision").

5. Barrett, *supra* note 3, at 1015.

6. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

varies according to the court in which it is invoked.[7] It is virtually nonexistent in district courts, which do not consider themselves bound to follow their own prior decisions.[8] It is a virtually absolute rule in courts of appeals, which prohibit one panel from overruling another, allowing only the rarely seated en banc court to overrule precedent.[9] In the Supreme Court, stare decisis is a soft rule; the Court describes it as one of policy rather than as an "inexorable command."[10] The strength of horizontal stare decisis varies not only by court, but also by the subject matter of the precedent. The Supreme Court has divided precedent into three categories, and courts of appeals have generally followed suit.[11] Statutory precedents receive "super-strong" stare decisis effect, common law cases receive medium-strength stare decisis effect, and constitutional cases are the easiest to overrule.[12] Its rationale for giving constitutional precedent only a weak presumption of validity is that while Congress can correct erroneous statutory interpretations by passing legislation, the onerous process of constitutional amendment makes mistaken constitutional interpretations difficult for the People to correct.[13]

As this discussion reflects, there is nothing inevitable about the shape of stare decisis. It is a judge-made doctrine that federal courts have given varied force in varied contexts. This Article is concerned with the force that stare decisis should have in one particular context: when a Supreme Court justice confronts constitutional precedent with which she disagrees. To be sure, stare decisis does far more than simply constrain judging. Precedent influences the decision in every case insofar as it gives a justice a way of thinking about the problem she must decide.[14] Justices can more easily apply

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7. Barrett, *supra* note 3, at 1015. In addition to the variations described in the text, both vertical and horizontal stare decisis are dependent upon jurisdictional lines. District courts need only obey decisions of the court of appeals in the circuit in which they sit, and courts of appeals are not bound by the decisions of their sister circuits. *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 516–18 (2000).

8. *See* Barrett, *supra* note 3, at 1015 & n.13 ("As a general rule, the district courts do not observe horizontal stare decisis.").

9. *See id.* at 1015 (suggesting that courts of appeals feel the restrictions imposed by horizontal stare decisis more strongly than do district courts or the Supreme Court).

10. Payne v. Tennessee, 501 U.S. 808, 827–28 (1991).

11. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321 & nn.20–22 (2005). As I have discussed elsewhere, the categories make much less sense at the circuit level, whatever their merit at the Supreme Court. *Id.* at 327–51.

12. *Id.* at 321 & n.22.

13. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.").

14. *See* Barrett, *supra* note 3, at 1068 ("[J]udges do not decide cases in a vacuum; rather, precedent always affects the way they view the merits."). In this regard, stare decisis promotes efficiency. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion) (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921), for

the Constitution's broad language because precedent offers them a framework for doing so; Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[15] is a notable example. Decided cases enable the justices to reason by analogy, and the doctrine itself is a reference for arguments grounded in other modalities like text, structure, ethics, prudence, and history.[16] Because of these and many other contributions, stare decisis can fairly be characterized as the workhorse of constitutional decisionmaking.[17] The doctrine has its greatest bite, however, when it constrains a justice from deciding a case the way she otherwise would.[18] In this situation, a justice must decide, to paraphrase Justice Brandeis, whether it is better for the law to be settled or settled right.[19] This is the decision upon which this Article will focus.

Scholars have a range of views about how the Court should behave when deciding whether to overrule constitutional precedent. Those who favor weak stare decisis tend to do so because of their methodological commitments. Thus, some living constitutionalists have argued for freedom to overrule lest precedent hinder progress,[20] and some originalists have argued for freedom to overrule lest doctrine trump the document.[21] Those

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the proposition that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it").

15. *See* 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring) (articulating a three-part framework for evaluating presidential assertions of power).

16. *Cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) (describing the modalities of constitutional argument).

17. *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 65 (2008) ("The extreme frequency with which the justices cite, or ground their opinions in, precedent establishes precedent as a, if not the, principal mode of constitutional argumentation."). For an excellent catalogue of the many contributions other than constraint that stare decisis makes to constitutional law, see *id.* at 147–76.

18. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (1997) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) ("The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.").

19. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

20. For example, Justin Driver argues that common law theories of constitutional adjudication risk overemphasizing the importance of stare decisis, for judges should feel free to "cast aside their predecessors' outmoded thinking." Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2012); *see also id.* ("Living constitutionalism, properly conceived, must create significant leeway for judicial interpretations that deviate from even well-settled precedents.").

21. Some originalists insist that the Court may never follow precedent that conflicts with the Constitution's original meaning. *See, e.g.*, Randy E. Barnett, Response, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (describing himself as a "fearless originalist[]" because he is willing to reject stare decisis when it would require infidelity to the text); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994) (arguing that it is unconstitutional to

who favor more robust stare decisis tend to do so because of the values the doctrine serves, including judicial restraint,[22] the rule of law,[23] and the legitimacy of judicial review.[24] Here, I develop an account of weak stare decisis, but it is not grounded in the claim that any particular methodological commitment demands that approach. Instead, I argue that the variety of such commitments on the Court makes a more relaxed form of constitutional stare decisis both inevitable and probably desirable, at least in those cases in which methodologies clash.

Before I develop this argument, a word of clarification is in order. Studies of stare decisis sometimes describe the way the doctrine restrains the Court as an institution,[25] but I will view the problem from the perspective of an individual justice. Each justice doubtless takes into account the interests of the institution in deciding whether overruling is appropriate. At least before it issues a decision, however, the Court does not have an institutional view about whether the precedent under consideration is right or wrong. Assessment of a precedent's consistency with the Constitution can depend upon a justice's interpretive commitments; the question for a justice who disagrees with a prior decision is whether the constraint of precedent overrides those commitments. Thus, while stare decisis serves institutional interests, this Article treats its tether as operating upon the individuals rather than the entity.

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adhere to precedent in conflict with the Constitution's text). Other originalists concede that the Court may do so in rare circumstances. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 834 (2009) ("Under our consequentialist approach, the goal is to use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (characterizing himself as a "faint-hearted originalist" because of his willingness to follow some precedents that may conflict with the Constitution's text).

22. *See, e.g.*, Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977, 981 (2008) ("A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy.").

23. *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 159 (2006) (advancing a neoformalist argument as to why "the Supreme Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions").

24. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) (arguing that the Court should follow precedent even when overruling it would not unduly disrupt societal expectations or institutions in order "to demonstrate—at least to elites—the continuing legitimacy of judicial review").

25. *See, e.g.*, *id.* at 755 n.184 (explaining that the author "focuses on stare decisis in terms of the Court rather than in terms of the obligation of an individual member of the Court towards precedent").

II. Errors and Jurisprudential Disagreement

The classic formulation of stare decisis asks a justice to weigh the benefits of error correction against the costs of overruling.[26] In many cases, the justices will have a shared sense of how a prior case should be judged. *Arizona v. Gant*[27] is a good example. There, the Court addressed the question whether to overrule *New York v. Belton*,[28] which held it categorically permissible for police to search the interior of a car after arresting someone who had recently been in it.[29] The decision whether to overrule *Belton* turned on the same issue that the Court considered in *Belton* itself: whether the rationale of *Chimel v. California*[30] permits the search of an automobile incident to arrest after the scene has been secured.[31] The *Gant* Court thought that its predecessor had misapplied that governing precedent.[32]

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26. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 362 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 858 (1992) (plurality opinion) ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection . . . ."); Payne v. Tennessee, 501 U.S. 808, 842–43 (1991) (Souter, J., concurring) ("[W]hen this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent."); Oregon v. Mitchell, 400 U.S. 112, 218 (1970) (Harlan, J., concurring in part and dissenting in part) ("I think it my duty to depart from [these cases], rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.").

27. 556 U.S. 332 (2009).

28. 453 U.S. 454 (1981).

29. *See Gant*, 556 U.S. at 341 (characterizing this as the dominant view of *Belton*); *see also id.* at 357 (Alito, J., dissenting) (asserting that the categorical rule established by *Belton* "could not be clearer").

30. 395 U.S. 752 (1969).

31. *See id.* at 763 (maintaining that the Fourth Amendment permits a warrantless search of the area "'within [an arrestee's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence"); *see also Belton*, 453 U.S. at 460 (extending *Chimel* to hold that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" (footnote omitted)).

32. *Gant*, 556 U.S. at 350 (criticizing *Belton*'s assumption that articles inside a passenger compartment are typically "within the area into which an arrestee might reach" (internal quotation marks omitted)). The *Gant* dissenters would have reaffirmed *Belton* because of both the merits and stare decisis. *Id.* at 358–65 (Alito, J., dissenting). Justice Breyer noted that he would have chosen a new rule had the case been one of first impression, but he did not think that the existing rule caused enough harm to justify overruling it. *Id.* at 354–55 (Breyer, J., dissenting). In this regard, Justice Breyer apparently viewed the *Belton* rule as lying within the prior Court's discretion to adopt, even if he would have exercised that discretion differently. *See id.* This is the kind of situation in which Caleb Nelson has persuasively argued, by way of analogy to the "second step" of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), that the presumption against overruling makes the most sense. Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 7 (2001) ("Before we let current judges substitute their discretionary choices for the discretionary choices made by their predecessors, we may well want to require a 'special justification' (such as the proven unworkability of the prior judges' chosen rules)."). Cases representing discretionary choices are particularly well-suited to the application of stare decisis considerations like whether a precedent is workable, has been undermined by changed circumstances or subsequent case law, or would be

Justices may disagree about whether a rule like *Belton*'s is necessary to protect police safety and preserve evidence, but that disagreement does not flow in any strong way from a justice's fundamental approach to the Constitution. In other words, it is not the kind of case that turns on issues like the weight given original public meaning, the relevance of foreign law, or whether constitutional meaning evolves.

There are other cases, however, that do turn on such disagreements. In these cases, the calculation of "error" may greatly depend upon the eye of the beholder. Randy Kozel has observed that "[p]recedents are neither good nor bad; it is interpretive method that makes them so,"[33] and there is no doubt that there are some questions of constitutional interpretation upon which members of the Court are sharply divided.[34] These differences surface early. Nominees to the Court are routinely asked to describe their judicial philosophies, reflecting the public's expectation that they have one and keen interest in what it is.[35] However cagey a justice may be at the nomination stage, her approach to the Constitution becomes evident in the opinions she writes. For example, it would be difficult for a modern justice to avoid revealing her position on whether the original public meaning of the Constitution controls its interpretation.[36] Justices must decide whether function can trump form,[37] and whether the content of the Equal Protection and Due Process Clauses is static or evolving.[38] They must decide whether

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costly to change. *See, e.g.*, *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (identifying factors relevant to deciding whether to overrule).

33. Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEXAS L. REV. 1843, 1846 (2013).

34. *See* Fallon, *supra* note 2, at 561 ("In practice, the demand that everyone should actually coalesce on a constitutional theory, and accept it as justifying constitutional outcomes, is too stringent to be realistic; reasonable disagreement is endemic to free societies." (citation omitted)). Fallon identifies a rough division between "text-based theories," which focus on the written Constitution, and "practice-based theories," which try to account for "a constitutional 'practice' in which judges sometimes decide cases based on considerations that go beyond the constitutional text." *Id.* at 538. He draws another rough distinction between theories that "seek to identify substantive values that constitutional adjudication ought to advance" and formalist theories that prescribe interpretive methodology rather than values. *Id.*

35. *See, e.g.*, Sheryl Gay Stolberg, *Kagan Promises 'Modest' Approach*, N.Y. TIMES, June 28, 2010, http://www.nytimes.com/2010/06/29/us/politics/29kagan.html (describing Elena Kagan's judicial philosophy as a "core theme" of her confirmation hearings).

36. *Compare* McDonald v. City of Chi., 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring) ("I believe the original meaning of the Fourteenth Amendment offers a superior alternative [to the Court's atextual, ahistorical approach] . . . ."), *with id.* at 3117 (Stevens, J., dissenting) ("Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the Second Amendment, the evidence often points in different directions.").

37. *Compare* INS v. Chadha, 462 U.S. 919, 959 (1983) (holding that the one-house veto violated the formal requirements of bicameralism and presentment), *with id.* at 999 (White, J., dissenting) (insisting that the separation of powers doctrine is not only about form, but also about "accommodation and practicality").

38. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 122–30 (1989) (plurality opinion) (emphasizing the centrality of history and tradition in identifying "fundamental rights" protected by

the laws and traditions of foreign countries are fair game or out of bounds in the interpretation of our Constitution.[39] And these, of course, are just a few of the general issues upon which a justice must take a position. Even apart from opinions, justices particularly passionate about their philosophies take them on the road. Justice Brennan praised living constitutionalism in speeches and articles.[40] Justice Scalia has made the case for originalism in books, articles, and public appearances,[41] and Justice Breyer has energetically made the case for his constitutional philosophy of "active liberty."[42] Other justices, too, have taken their views about the Constitution to the court of public opinion.[43]

When the evaluation of precedent turns on a question on which the justices are sharply divided, it is difficult to say that there is an agreed-upon means of identifying error.[44] An erroneous precedent is one that reflects the "wrong" constitutional philosophy: a judge espousing an approach of active liberty may judge an originalist precedent mistaken, not because it incorrectly determined the relevant provision's original public meaning, but

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the Due Process Clause), *with id.* at 137–41 (Brennan, J., dissenting) (disputing the role of tradition in substantive due process decision making).

39. *Compare* Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (extensively considering international opinion regarding the execution of juveniles), *with id.* at 622–28 (Scalia, J., dissenting) (vehemently objecting to the majority's reliance upon foreign law). *Compare also* Lawrence v. Texas, 539 U.S. 558, 573, 576–77 (2003) (considering the views of foreign countries with respect to consensual homosexual conduct), *with id.* at 598 (Scalia, J., dissenting) (maintaining that the laws of foreign countries are irrelevant to the interpretation of our Constitution and insisting that "'this Court . . . should not impose foreign moods, fads, or fashions on Americans'" (citing Foster v. Florida, 537 U.S. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari))).

40. *See, e.g.*, Justice William J. Brennan, Jr., Address at the Text and Teaching Symposium, Georgetown University: Constitutional Interpretation (Oct. 12, 1985), *available at* http://teachingamericanhistory.org/library/index.asp?document=2342. Describing his approach to constitutional interpretation, Justice Brennan said:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time[?] For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Id.

41. *See generally, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); SCALIA, *supra* note 18.

42. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005). Justices Breyer and Scalia have publicly debated their competing philosophies. *See, e.g.*, Stephen Breyer & Antonin Scalia, Remarks at the U.S. Association of Constitutional Law Discussion at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), *available at* http://www.freerepublic.com/focus/f-news/1352357/posts.

43. *See, e.g.*, Earl Warren, *The Law and the Future*, FORTUNE, Nov. 1955, at 106, 224 ("[I]t is the spirit and not the form of law that keeps justice alive.").

44. *See* Kozel, *supra* note 33 (describing how different approaches to interpretation can lead to different analyses of precedent and how these differences have led to dissonance in constitutional adjudication).

because it treated that meaning as dispositive. *Lawrence v. Texas*[45] is an example of a case reflecting both jurisprudential disagreement and rejection of a precedent on its own terms. *Lawrence* overruled *Bowers v. Hardwick*[46] to hold unconstitutional a Texas statute criminalizing certain forms of sexual conduct between two persons of the same gender.[47] In reaching a contrary conclusion about a statute criminalizing homosexual sodomy, *Bowers* had relied heavily on the fact that the country had a long tradition of such statutes.[48] *Lawrence* challenged *Bowers*'s historical account—i.e., finding the case wanting on its own terms—but said that in any event, current attitudes, rather than tradition, should control—i.e., that *Bowers* took the wrong approach to the Due Process Clause.[49] The case thus turned on a flashpoint in Fourteenth Amendment jurisprudence: whether history and tradition control the definition of protected rights. Disagreement on this point was also the primary reason that the *Lawrence* dissenters defended the merits of *Bowers*.[50]

Consider other situations in which overruling represents a clash of jurisprudential commitments.[51] *Roper v. Simmons*[52] overruled *Stanford v.*

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45. 539 U.S. 558 (2003).

46. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

47. *Lawrence*, 539 U.S. at 578.

48. *Bowers*, 478 U.S. at 192 (denying the existence of "a fundamental right . . . to engage in acts of consensual sodomy" because "[p]roscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights" (citation omitted)); *id.* at 193 n.6 (cataloging state criminal sodomy laws in existence when the Fourteenth Amendment was ratified).

49. On the former point, see *Lawrence*, 539 U.S. at 571 ("[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate."). On the latter, see *id.* at 571–72 ("In all events we think that our laws and traditions in the past half century are of most relevance here . . . . '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" (alteration in original)).

50. *See id.* at 598 (Scalia, J., dissenting) (asserting that "an 'emerging awareness' does not establish a 'fundamental right'"). The dissenters also objected to the majority's use of foreign law in determining current attitudes about homosexual conduct. *See id.* ("Much less do [constitutional entitlements] spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.").

51. My focus here is on jurisprudential rather than political disagreement. *But see* SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 110 (1995) (contending that the choice to overturn precedent is driven by "the personal policy preferences" of the justices). I conceive of justices as being driven by first-order commitments to constitutional methods rather than solely by partisan political preference. To be sure, a justice's first-order jurisprudential commitments tend to break down along political lines, with conservative justices tending toward originalism and liberal justices tending toward a more evolutionary approach. That does not mean, however, that votes are driven by partisan political preferences for particular results rather than by different starting points on the nature of the Constitution. *Cf.* Richard H. Fallon, Jr., Keynote Address, *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116–17 (2008) ("[A]lthough lawyers, judges, and law professors need to reckon with findings that Supreme Court Justices typically vote consistently with their ideological values in the contested cases on their

Kentucky[53] to hold that the Eighth Amendment prohibited capital punishment for juveniles.[54] While the Court criticized *Stanford* on that case's own terms,[55] its decision was driven by a disagreement with the *Stanford* majority about whether the "Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders."[56] *Payne v. Tennessee*,[57] another Eighth Amendment case, similarly rejected the very premises of controlling precedent.[58] There, the Court overruled two cases that held unconstitutional the admission of victim impact evidence in a capital sentencing hearing because it refused to accept the "two premises" on which the precedent rested: that victim impact evidence "do[es] not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."[59] *Adarand Constructors, Inc. v. Pena*[60] overruled *Metro Broadcasting, Inc. v. Federal Communications Commission*[61] because of disagreement about the deeply contested question whether racial classifications drawn in affirmative action statutes should be subject to strict scrutiny.[62] *Mapp v. Ohio*[63] overruled *Wolf v. Colorado*[64] to hold the Fourth Amendment's exclusionary rule applicable to the states, a decision that flowed from the *Mapp* majority's fundamentally different position on incorporation.[65] *Seminole Tribe v. Florida*[66] overruled *Pennsylvania v.*

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docket, it does not follow that the Justices do not adhere to legal norms."). If one is cynical enough to think that votes are driven almost entirely by partisan preference, there is very little reason to give precedent significant weight—or, for that matter, to believe judicial review legitimate. *See infra* notes 108–11 and accompanying text.

52. 543 U.S. 551 (2005).

53. 492 U.S. 361 (1989), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005).

54. *Roper*, 543 U.S. at 578–79.

55. *See id.* at 574 (asserting that *Stanford* incorrectly counted the number of states prohibiting juvenile capital punishment and explaining that while *Stanford* properly focused on attitudes in 1989, the proper focus for the *Roper* Court was attitudes in 2004).

56. *Id.*

57. 501 U.S. 808 (1991).

58. *Id.* at 827–30 (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

59. *Id.* at 819; *see also id.* at 819–27 (discussing the use of victim impact evidence).

60. 515 U.S. 200 (1995).

61. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

62. *Adarand*, 515 U.S. at 227.

63. 367 U.S. 643 (1961).

64. 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

65. *Compare Wolf*, 338 U.S. at 27–28, 33 (holding that the right to privacy is implicit in the Fourteenth Amendment's concept of "ordered liberty," but refusing to hold the Fourth Amendment applicable to the states (internal quotation marks omitted)), *with Mapp*, 367 U.S. at 657 (treating the applicability of the exclusionary rule to the states as "an essential part of both the Fourth and Fourteenth Amendments").

66. 517 U.S. 44 (1996).

Union Gas Co.[67] to hold Congress incapable of abrogating state sovereign immunity in reliance upon its commerce power, a view resting upon an interpretation of the Eleventh Amendment that has long been a matter of heated dispute.[68]

In cases like these, stare decisis seems less about error correction than about mediating intense jurisprudential disagreement. Asking whether a prior case is in "error" according to a shared standard does not generally require a justice to relinquish her fundamental interpretive commitments. But when a justice rejects the premises of a precedent rather than its conclusion, affirming it requires her to let those commitments go. Seen in this light, it is unrealistic to think that the Court should give its constitutional precedent more weight than it currently does, at least in those cases that strike at a justice's core positions. (Indeed, the fact that statutory and common law cases more rarely involve fundamental commitments may be one reason why more robust stare decisis is easier to sustain in those contexts.) Justices are unlikely to set aside easily their most closely held jurisprudential commitments; in fact, history shows that they have been unwilling to do so. They express the hope that "the intelligence of a future day" will turn their dissents into majorities.[69] And sometimes they cling to dissents repeatedly in future cases, steadfastly refusing to give stare decisis effect to a precedent with which they disagreed at the time it was decided.[70]

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67. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

68. *See* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1352–56 (1998) (describing the debate).

69. *See* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 68 (1928) ("A dissent in a court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."); *see also, e.g.*, Scalia, *supra* note 21, at 864 (expressing the hope that "at least some of [my] dissents will be majorities"); Ruth Bader Ginsburg, Remarks at the 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_10-21-07.html (expressing the hope that a future majority of the Court will adopt her dissenting position in *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

70. Allison Orr Larsen calls this the practice of "perpetual dissent." *See generally* Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008). The consistent dissent of Justices Brennan and Marshall to the death penalty is perhaps the best known, but by no means the only, example. *See id.* at 451 (asserting that after the Court upheld the constitutionality of the death penalty, Justices Brennan and Marshall registered more than 2,100 dissents to that view); *see also, e.g.*, Tennard v. Dretke, 542 U.S. 274, 293 (2004) (Scalia, J., dissenting) ("I have previously expressed my view that this 'right' to unchanneled sentencer discretion has no basis in the Constitution. I have also said that the Court's decisions establishing this right do not deserve *stare decisis* effect." (citation omitted)); McConnell v. FEC, 540 U.S. 93, 326 (2003) (Kennedy, J., concurring in part and dissenting in part) ("I dissented in *Austin* [*v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)], and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting) ("I would affirm the judgment below because I continue to believe that the Constitution does not constrain the size of punitive damage awards." (internal quotation marks omitted)); United States v. Morrison, 529 U.S. 598, 662 (2000)

One function of stare decisis is to keep these kinds of disagreements in check. In hot-button cases where differences in constitutional philosophy are in the foreground, the preference for continuity disciplines jurisprudential disagreement. Absent a presumption in favor of keeping precedent, and absent the system of written opinions on which stare decisis depends, new majorities could brush away a prior decision without explanation. If only the votes mattered, and neither deference to precedent nor a reason for departing from it was required, a reversal would represent an abrupt act of will more akin to a decision made by one of the political branches. But in a system of precedent, the new majority bears the weight of explaining why the constitutional vision of their predecessors was flawed and of making the case as to why theirs better captures the meaning of our fundamental law.[71] Justifying an initial opinion requires reason giving, particularly if the majority is challenged by a dissent. Justifying a decision to overrule precedent, however, requires both reason giving on the merits *and* an explanation of why its view is so compelling as to warrant reversal.[72] The need to take account of reliance interests forces a justice to think carefully about whether she is sure enough about her rationale for overruling to pay the cost of upsetting institutional investment in the prior approach.[73] If she is not sure enough, the preference for continuity trumps. Stare decisis protects

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(Breyer, J., dissenting) (continuing to reject the interpretation of the Commerce Clause advanced in *United States v. Lopez*, 514 U.S. 549 (1995)); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., concurring in part and dissenting in part) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent."); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) ("I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*."); Shaw v. Hunt, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting) ("As I have explained on prior occasions, I am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided.").

71. William Cranch praised the connection between stare decisis, opinion writing, and accountability in the preface to his Supreme Court reports, where he observed that a judge "can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public." William Cranch, *Preface* to 5 U.S. (1 Cranch) iii, iii–iv; *see also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 664 (1999) (citing Cranch, *supra* at iii). In this regard, deference to precedent encourages both humility and respect for other justices. *Cf.* Gerhardt, *supra* note 4, at 1295 (asserting that "fidelity to precedent generally . . . constitutes an indispensable feature of 'judicial modesty' . . . that calls upon Justices and judges to be respectful of the opinions of others to the fullest extent possible and not to decide more than is required in any given case").

72. *See* Payne v. Tennessee, 501 U.S. 808, 848–49 (1991) (Marshall, J., dissenting) (stating that the Supreme Court has "never departed from precedent without 'special justification'").

73. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("But even when justification [for overruling precedent] is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute."); *see also* Arizona v. Gant, 556 U.S. 332, 354–55 (2009) (Breyer, J., dissenting) (observing that while he would "look for a better rule" than that established by precedent if the case were "one of first impression," stare decisis counseled the Court to stay the course).

reliance interests by putting newly ascendant coalitions at an institutional disadvantage. It doesn't prohibit them from rejecting a predecessor majority's methodological approach in favor of their own, but it makes it more difficult for them to do so. The doctrine thus serves as an intertemporal referee, moderating any knee-jerk conviction of rightness by forcing a current majority to advance a special justification for rejecting the competing methodology of its predecessor.[74] It also channels disagreements into the less disruptive approach of refusing to extend precedent—an approach that maintains better continuity with the past than does the abrupt turn of getting rid of it altogether.

Although it was not fashioned with this goal in mind, the traditionally weak presumption of stare decisis in constitutional cases is both realistic about, and respectful of, pluralism. And it accommodates not only a pluralistic Court, but also a pluralistic society.[75] In hard cases, Americans largely look to the Court to flesh out the terms of our compact.[76] We accept the Court's opinions as contingent resolutions of disputes about the content of the Constitution; we abide by them unless and until they are changed. That said, challenges to precedent reflect a general unwillingness to permit a process short of constitutional amendment to articulate the terms of our fundamental law in a permanent way. Challenges to precedent generally originate with litigants[77] and are a means of pushing back against the proposition that the Constitution embodies the principles the Court says it does—for example, that the right to terminate a pregnancy is a fundamental one[78] or that Congress's power to regulate interstate commerce does not support statutes like the Gun-Free School Zones Act.[79] That is not to say that every such challenge should succeed.[80] But the weak presumption permits disputes like these to be aired. Robert Post and Reva Siegel have argued that "[b]acklash to judicial decisions interpreting [the Fourteenth, Eighth, and First Amendments] demonstrates that for some constitutional questions,

74. *See* Barrett, *supra* note 3, at 1018–19 (emphasizing that even if a court has the authority to overrule precedent, it will not do so absent "special justification," which requires more than a mere showing that the prior case is erroneous (internal quotation marks omitted)).

75. *See* Sanford Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 386 (1982) (describing competing ways of understanding the Constitution as "the result of a genuine plurality of ways of seeing the world, rather than of the obdurate recalcitrance of those who refuse to bend to superior argument").

76. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (referring to the Court's duty "to say what the law is").

77. *See infra* notes 117 & 124–26 and accompanying text.

78. Roe v. Wade, 410 U.S. 113, 164 (1973).

79. United States v. Lopez, 514 U.S. 549, 567 (1995).

80. *Cf.* Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) ("[I]t should go without saying that the vitality of the[] constitutional principles [announced in *Brown v. Board of Education*, 347 U.S. 483 (1954)] cannot be allowed to yield simply because of disagreement with them.").

authoritative settlement is neither possible nor desirable."[81] There is insufficient space here to explore the claim that authoritative settlement through judicial decisions is normatively undesirable. But as a descriptive matter, Post and Siegel's claim rings true. Soft stare decisis helps the Court navigate controversial areas by leaving space for reargument despite the default setting of continuity.

It is probably true that justices who subscribe to text-based theories are more likely than others to encounter conflict between precedent and jurisprudential commitment. Caleb Nelson has observed that "the more determinate one considers the underlying rules of decision in a particular area, the more likely one may be to conclude that a past decision in that area is 'demonstrably erroneous.'"[82] It makes sense that one committed to a textualist theory would more often find precedent in conflict with her interpretation of the Constitution than would one who takes a more flexible, all-things-considered approach.[83] Indeed, Michael Gerhardt has said that, at least as of 1994, "no two justices in this century have called for overruling more precedents than Justices Black and Scalia,"[84] both of whom were textualists, even though Black was a liberal and Scalia a conservative. Gerhardt's more recent statistics show that each of the two self-identified originalists, Justices Thomas and Scalia, urged and joined in overruling precedents more than any other justice during the last eleven years of the Rehnquist Court,[85] although Gerhardt also points out that one must be careful

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81. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007). This is consistent with Michael Gerhardt's observation that reversals of constitutional precedent are concentrated in a few areas:

> [T]he areas in which the Court has overruled itself six or more times are criminal procedure (forty), Fourteenth Amendment Due Process Clause (nineteen), the Commerce Clause (eighteen), Fourteenth Amendment Equal Protection Clause (eight), Eleventh Amendment (seven), Article I other than Commerce Clause (six), and freedom of expression or speech (six). The Court has overruled itself fewer than six times in other areas of constitutional law.

Gerhardt, *supra* note 4, at 1282 (footnote omitted).

82. Nelson, *supra* note 32, at 50. "Demonstrably erroneous" is the standard that Nelson would apply to the determination of whether precedent should be overruled. *See generally id.*

83. *Cf. The Nomination of Elena Kagan to be An Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 89 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm ("I think in general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing."); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) ("I have said I do not have an overarching judicial philosophy that I bring to every case, and I think that's true.").

84. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 33 (1994).

85. GERHARDT, *supra* note 17, at 12. Gerhardt gives the following statistics for the average number of times a Justice called for the overruling of precedent per year during this period: "2.07 for Justice Thomas, 1.84 for Justice Scalia, 1.74 for Chief Justice Rehnquist, 1.78 for Justice Kennedy, 1.75 for Justice O'Connor, 1.45 for Justice Stevens, 1.4 for Justice Souter, 1.27 for Justice Breyer, and 1.0 for Justice Ginsburg." *Id.*

in the inferences one draws from the numbers, which "do not indicate either why or on what basis the justices urged overruling."[86] Even assuming, however, that the higher numbers for textualists are driven by methodological commitment, Gerhardt's statistics also show that calls for overruling are not confined to that quarter.[87] As discussed above, the tension between jurisprudential commitment and precedent is one experienced by justices across the spectrum,[88] even if some may experience it more frequently than others.

III. Institutional Legitimacy and Reliance Interests

Because stare decisis is relatively weak in constitutional cases, the moderating function is the main contribution of the constraint against overruling in cases involving deep-seated jurisprudential disagreement. It forces the Court to proceed cautiously and thoughtfully before reversing course, but it does not force the Court to retain precedent. Yet while this may be consistent with the Court's actual practice, it is contrary to the arguments of those who have argued in favor of a significantly stronger role for stare decisis in constitutional cases.[89] It also arguably gives short shrift to the risks associated with departures from precedent—in particular, preservation of the Court's institutional legitimacy and the protection of reliance interests.[90] This Part considers those concerns in turn and concludes that even a weak system of constitutional stare decisis protects institutional legitimacy and reliance interests more than is commonly supposed.

A. Institutional Legitimacy

Leaving room for new majorities to overrule old ones allows changed membership to change what the Court says the Constitution means. One of the stated goals of stare decisis, including stare decisis in constitutional cases, is institutional legitimacy, both actual and apparent.[91] If the Court's opinions change with its membership, public confidence in the Court as an institution

86. *Id.* at 13.

87. *See supra* note 85.

88. *See supra* notes 45–70 and accompanying text.

89. *See supra* notes 22–24 and accompanying text.

90. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

91. *See* Solorio v. United States, 483 U.S. 435, 466 (1987) (Marshall, J., dissenting) ("[B]edrock principles are founded in the law rather than in the proclivities of individuals." (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (suggesting that stare decisis preserves the perception of "the judiciary as a source of impersonal and reasoned judgments"); *see also* Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260, 1262–63 (1990) (arguing that strong precedent rules are justified because they protect the Court's institutional legitimacy).

might decline.[92] Its members might be seen as partisan rather than impartial[93] and case law as fueled by power rather than reason.[94]

Others have challenged the view that protecting the Court's reputation is a valid reason to retain precedent.[95] Akhil Amar captures the criticism well: "[I]t does not seem to me that when the Supreme Court has made a mistake, it ought to respond by not telling the citizenry because it fears that the American people cannot handle the news."[96] But even assuming that the Court should make decisions with an eye toward its reputation, there is little reason to think that reversals would do it great damage. Stare decisis is not a hard-and-fast rule in the Court's constitutional cases, and the Court has not been afraid to exercise its prerogative to overrule precedent.[97] Still, public

92. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (arguing that "[a] basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government" and contending that "[n]o misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (contending that the Court's institutional strength is weakened when it views its decisions as little more than a "restricted railroad ticket, good for this day and train only"); Earl M. Maltz, Commentary, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 484 (1980) (insisting that adhering to precedent is necessary because the public will not accept the Supreme Court's authority unless it believes that "in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes"); Monaghan, *supra* note 24, at 753 n.170 (describing Judge Posner's opinion that "a general failure to adhere to precedent in constitutional cases would weaken the legitimacy of the federal judiciary by weakening the popular acceptance of judicial decisions").

93. *See* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) ("[E]limination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is.").

94. *See Payne*, 501 U.S. at 844–45 (Marshall, J., dissenting) (lamenting that "[p]ower, not reason, is the new currency" of the majority that believes "itself free to discard any principle of constitutional liberty" that it has the votes to overrule).

95. *See, e.g.*, *id.* at 834 (Scalia, J., concurring) (arguing that "the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes" undermines the Court's legitimacy); Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (contending that "[t]he jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to [precedent], a decision contrary to the public sense of justice as it is, operates . . . to diminish respect for the courts . . . ." (quoting Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959))); *see also* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 834 n.114 (2009) (arguing that the "institutional legitimacy" rationale "is troubling because it suggests that hiding and perpetuating errors is superior to acknowledging and correcting them"); Nelson, *supra* note 32, at 72–73 ("[T]he legitimacy argument may well strike [some] as a giant ruse: It concedes that the public's acceptance of court decisions rests on the idea that judges act like scientists rather than politicians, but it tells courts to act like politicians in order to preserve that idea.").

96. Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 967 (2008).

97. Consider just a few of the well-known fluctuations in the Court's constitutional case law. The Court has flipped twice on the question whether Congress can regulate state governments with respect to prescribing wage and hour limitations for state employees. *Compare* Maryland v. Wirtz, 392 U.S. 183, 201 (1968), *with* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985), *and* Nat'l League of Cities v. Usery, 426 U.S. 833, 840 (1976). The Court has also changed course on the question of incorporation, *compare* Adamson v. California, 332 U.S. 46, 51 (1947),

confidence in the Court remains generally high.[98] Moreover, members of the public (and particularly elites) regularly argue that the Court should overrule certain of its cases.[99] If anything, the public response to controversial cases like *Roe* reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle rather than desire that precedent remain forever unchanging. Court watchers embrace the possibility of overruling, even if they may want it to be the exception rather than the rule.

The "protecting public confidence" argument seems to assume that the public would be shaken to learn that a justice's judicial philosophy can affect the way she decides a case and that justices do not all share the same judicial philosophy.[100] This, however, is not news to the citizenry. Americans understand that there is a difference between Justice Scalia's originalism and Justice Breyer's "active liberty"; that is why Supreme Court nominations are an issue in presidential elections.[101] Many Americans are informed enough

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and Palko v. Connecticut, 302 U.S. 319, 323 (1937), *with* Mapp v. Ohio, 367 U.S. 643, 654–55 (1961); the protection given by the Free Exercise Clause, *compare* Sherbert v. Verner, 374 U.S. 398, 410 (1963), *with* Emp't Div., Dep't of Human Res. of State of Or. v. Smith, 485 U.S. 660, 672 (1988); the scope of the Commerce Clause, *compare* Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 561–62 (1923), *and* Lochner v. New York, 198 U.S. 45, 58 (1905), *with* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937); the lawfulness of segregation, *compare* Plessy v. Ferguson, 163 U.S. 537, 552 (1896), *with* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954); and the freedom of corporations to engage in political speech, *compare* McConnell v. FEC, 540 U.S. 93, 170 (2003), *and* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 655 (1990), *with* Citizens United v. FEC, 558 U.S. 310, 319, 365–66 (2010).

98. *See Supreme Court: Gallup Historical Trends*, GALLUP, http://www.gallup.com/poll/4732/supreme-court.aspx (showing that a majority of Americans have approved of the way the Supreme Court has handled its job in the past decade).

99. *See, e.g.*, Monaghan, *supra* note 24, at 761 (describing how elites in the 1950s believed that the Court should end segregation despite stare decisis principles); Doug Kendall, Citizens United, *President Obama, and His Liberal Naysayers*, HUFFINGTON POST (Nov. 2, 2012, 10:04 AM), http://www.huffingtonpost.com/doug-kendall/citizens-united-president_b_2064049.html (describing President Obama's hope that the Supreme Court will overrule *Citizens United* and his support for a constitutional amendment overruling the case if the Court does not).

100. *See* Payne v. Tennessee, 501 U.S. 808, 853 (1991) ("[T]his Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing 'principles . . . founded in the law rather than in the proclivities of individuals.'" (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))); *see also* Monaghan, *supra* note 24, at 752 (arguing that adhering to contested precedent "demonstrate[s]—at least to elites—the continuing legitimacy of judicial review" by sending the message that "the law is impersonal in character").

101. *See* Abby Livingston & Mark Murray, *Context of Obama's 'Empathy' Remark*, FIRST READ, NBC NEWS.COM (May 1, 2009, 4:58 PM), http://firstread.nbcnews.com/_news/2009/05/01/4430634-context-of-obamas-empathy-remark (reporting on President Obama's commitment to appoint Supreme Court justices who interpret the Constitution in favor of the powerless rather than in a "cramped and narrow way"); Jeffrey Rosen, *Can Bush Deliver a Conservative Court?*, N.Y. TIMES, Nov. 14, 2004, http://www.nytimes.com/2004/11/14/week inreview/14jeff.html (reporting on President Bush's pledge to appoint Supreme Court justices who would be "strict constructionists").

to have a general preference for one or the other,[102] and while each side undoubtedly suspects the other of being motivated by politics rather than sincere jurisprudential commitment, judicial supremacy is alive and well. That Americans—and thus Supreme Court justices—disagree about how to interpret the Constitution is a fact of our political culture. These disagreements not only look forward at what the Court should do in cases it has yet to confront, but also backward in critiques of cases the Court has already decided.

The above speaks to the Court's *apparent* legitimacy. The question remains whether overruling precedent affects the Court's *actual* legitimacy. Does the Court act lawlessly—or at least questionably—when it overrules precedent? I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.[103] That itself serves an important rule-of-law value.[104] Of course, constant upheaval in the law would disserve rule-of-law values insofar as it would undermine the consistency—and therefore the predictability—of the law.[105] But constant upheaval is not what a weak presumption of stare decisis has either promised or delivered. The Court follows precedent far more often than it reverses precedent.[106] And even though overruling is exceptional, it is worth observing that the Court's longstanding acceptance of it lends legitimacy to the practice. Our legal culture does not, and never has, treated the reversal of precedent as out-of-bounds.[107] Instead, it treats departing from precedent as a permissible move,

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102. *See* Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 414 (2011) (describing "the collapsing wall between methodological and popular discourse").

103. While originalists are best known for making this point, *see, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994), nonoriginalists too express fidelity to their best understanding of the Constitution when they choose to overrule precedent, *see, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 895 (1996) (arguing that "[i]f one is quite confident that a practice is wrong—or if one believes, even with less certainty, that it is terribly wrong—this conception of traditionalism permits the practice to be eroded or even discarded").

104. *Cf.* Kozel, *supra* note 33, at 1862 (observing that "[e]xcessive deference to flawed constitutional precedents can . . . create systemic concerns for the rule of law" insofar as "society is forced to endure pervasive misapplications of its most important document").

105. *Id.* at 1857 (asserting that "adherence to precedent advances the rule of law . . . by fostering a sense of uniformity, consistency, and reliability").

106. *See* Gerhardt, *supra* note 4, at 1282 (arguing from statistics that most of constitutional law is stable because, historically, reversals have been concentrated in a few areas of doctrine).

107. By way of contrast, imagine if the Court began deciding all cases without opinion. It is very unlikely that opinion writing is constitutionally required. The early Court did not always issue opinions, and when it did, it often issued them seriatim rather than as a majority. *See* Lee, *supra* note 71, at 670 n.117 (describing John Marshall's "rejection of 'the custom of the delivery of opinions by the Justices *seriatim*,' in favor of the new practice of 'announcing, himself, the views of that tribunal'" (quoting 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800–1815, at 16 (1919))). Opinion writing is such an entrenched practice, however, that the legal community would likely view its elimination as illegitimate, even if not unconstitutional.

albeit one that should be made only for good reason. Because there is a great deal of precedent for overruling precedent, a justice who votes to do so engages in a practice that the system itself has judged to be legitimate rather than lawless.

Critics sometimes suggest that reversals occur because new appointments make new political preferences dominant.[108] It is surely true that reversal is more likely to result from a new justice's heretofore unexpressed opinion than from an existing justice's change of mind.[109] But the criticism is framed to suggest that overruling is driven by—and therefore tainted by—partisan political preferences. To be sure, partisan politics are not a good reason for overturning precedent. But neither are they a good reason for deciding a case of first impression. One who believes that an overruling reflects votes cast based on political preference must believe that all cases (or at least all the hot-button ones) are decided that way, for there would be no reason for politics to taint reversals but not initial decisions. If all such decisions are based on politics, there is no reason why the precedent—itself thus tainted—is worthy of deference. (Nor, for that matter, would there be reason to accept the legitimacy of judicial review.) Basic confidence in the Supreme Court requires the assumption that, as a general matter, justices decide cases based on their honestly held beliefs about how the Constitution should be interpreted. If one is willing to make that assumption about the decision of cases of first impression, one should also be willing to make it about the decision to overrule precedent. A change in personnel may well shift the balance of views on the Court with respect to constitutional methodology. Yet the fact that a reversal flows from a disagreement between the new majority and its predecessors about constitutional methodology does not itself render the overruling illegitimate, as criticisms of overruling sometimes suggest.[110] Reversal because of honest jurisprudential disagreement is illegitimate only if it is done without adequate consideration of, and due deference to, the arguments in favor of letting the precedent stand.[111]

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108. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) ("Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."); BRENNER & SPAETH, *supra* note 51, at 110 (contending that the changed membership of the Court explains reversals, for the choice to overturn precedent is driven by the "personal policy preferences" of the justices); *cf.* CARDOZO, *supra* note 14, at 150 (arguing that a court's changed composition should not occasion changed precedent).

109. *See infra* note 128 and accompanying text.

110. *See supra* notes 92–94 and accompanying text.

111. *See supra* notes 71–73 and accompanying text.

B. *Reliance*

Reliance interests are one of the classic concerns of stare decisis.[112] Indeed, while the doctrine serves many goals, the protection of reliance interests is paramount.[113] Treating the Supreme Court's constitutional precedent as always subject to revision risks undermining the stability of constitutional law. People must be able to order their affairs, and they cannot do so if a Supreme Court case is a "restricted railroad ticket, good for this day and train only."[114] It is inescapably true that a weak presumption of validity protects reliance less than a virtual rule against overruling.

Horizontal stare decisis, however, is not the only—or necessarily even the primary—mechanism for protecting reliance interests in the Supreme Court's constitutional cases. Indeed, other features of the federal judicial system, working together, do more than the constraint of horizontal stare decisis to keep the Court's case law stable.

1. Vertical Stare Decisis.—Even when a Supreme Court opinion reflects sharp disagreement on the Court, and even when the public is divided in its views about the opinion, lower courts are forbidden to revisit it.[115] Vertical stare decisis locks in the holding of a Supreme Court case in lower courts, and this is a significant stabilizing force in constitutional law.

2. Advisory Opinions.—The Court cannot choose to revisit precedent simply because it disagrees with it. Article III requires that a controversy exist.[116] Litigants must bring cases in lower courts and take their losses to the Supreme Court in order for the question to be on the table. If litigants have no interest in questioning the continued validity of a precedent, the

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112. *See, e.g.*, *Payne*, 501 U.S. at 827 ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, *fosters reliance on judicial decisions*, and contributes to the actual and perceived integrity of the judicial process." (second emphasis added)).

113. *See id.* at 828 (arguing that stare decisis should have the most force in cases in which reliance interests are particularly strong).

114. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

115. *See supra* note 6. To be sure, some may argue that a lower court judge should be free to follow her best judgment about what the Constitution requires rather than a Supreme Court opinion in conflict with that judgment. The federal judicial hierarchy and the Supreme Court's authority to review state court judgments make this a different question than the one posed by a Supreme Court justice confronted with her Court's own precedent. *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (offering constitutional and prudential rationales to justify the system of judicial hierarchy). For present purposes, it suffices to make the descriptive observation that federal and state judges do not consider themselves free to depart from Supreme Court precedent and that vertical stare decisis thus serves as a stabilizing force.

116. U.S. CONST. art. III, § 2. For a discussion of the foundations of the rule against advisory opinions, see generally Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73, 129–30 (2007).

Court will have no opportunity to decide it.[117] The ban on advisory opinions prevents a justice from roaming through the Court's cases to remake them all in her own interpretive image.

3. Certiorari Standards.—It takes not only litigants, but also lower courts and the justices themselves to put an issue on the Court's agenda. In contrast to the lower federal courts, which must take all comers, discretionary jurisdiction permits the Court to pick and choose the questions it hears. One way in which the Court maintains stability in the case law is by *not* granting certiorari to revisit well-settled questions.[118] Indeed, even if an individual justice thinks some well-settled case wrongly decided (to use the classic example, the constitutionality of paper money), the certiorari process permits her to avoid confronting the question whether it should be overruled.

As a general rule, the Court takes cases presenting an important question upon which lower courts are divided.[119] This rule protects reliance interests by putting a challenge to precedent on the Court's agenda only when disagreement below signals to the Court that reconsideration of the precedent may be timely.[120] This disagreement does not typically express

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117. Henry Monaghan identifies the constitutionality of remittitur practice as an example of an issue that is off the Court's agenda because it is one "about which there is no current interest." Monaghan, *supra* note 24, at 746 n.133. Monaghan identifies horizontal stare decisis as the force keeping such issues off the Court's agenda. *Id.* at 744. I tend to agree with Max Radin, however, that it is "estoppel or the force of custom" rather than the force of stare decisis that performs this agenda-limiting function. *See id.* at 757 & n.189 (internal quotation marks omitted) (describing Radin's position and noting that "[o]n this view, Radin would certainly deny that my agenda-limitation illustrations are examples of stare decisis at all" (citation omitted)). Once the legal system widely acquiesces in a holding, reliance interests give it a force that derives from something other than the Court's relatively weak commitment not to depart from its precedents. *See infra* notes 129–48 and accompanying text.

118. *See* GERHARDT, *supra* note 17, at 45 ("[I]n the certiorari process, the justices often demonstrate their desire to adhere to or accept precedents they might not have decided the same way in the first place.").

119. *See* SUP. CT. R. 10(a) (identifying conflict between federal courts of appeals as a reason for granting certiorari); *id.* R. 10(b) (identifying conflict between state courts of last resort or between state courts of last resort and a United States court of appeals as a reason for granting certiorari). The Court is also willing to grant certiorari when the issue is "an important question of federal law that has not been, but should be, settled by this Court," or when a lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* R. 10(c). The Court rarely takes a case seeking only the correction of an error below. *Id.* R. 10. In addition to the above guidelines, the Court will not take a case that has jurisdictional or factual quirks that would complicate the Court's consideration of the merits. *See* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, APPELLATE.NET (1999), http://www.appellate.net/articles/certpractice.asp (noting that the Court screens out cases containing issues that might prevent a clean ruling on the merits of a cert-worthy question). The need to wait for the right case is a further limitation upon the Court's ability to revisit precedent.

120. Some have stressed stare decisis's role in "conserving and perpetuating shared values" as a virtue of the doctrine. Monaghan, *supra* note 24, at 751; *see also* Merrill, *supra* note 22, at 981 (maintaining that "a strong theory of precedent in constitutional law . . . would reduce the prospects for change through constitutional interpretation"). *But see* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006) (observing that

itself by some courts of appeals or state supreme courts flouting precedent; vertical stare decisis prevents that.[121] But lower courts can resist the extension of a holding by distinguishing it.[122] The emergence of splits about the scope of a holding may reflect significant dissatisfaction with the holding itself.[123] If, moreover, affected litigants and judges below have not overwhelmingly acquiesced in a decision, that itself is a signal that its resolution may not be permanent and that interested parties should rely upon it advisedly.

4. Question Presented.—Generally speaking, the Court will not reach out to decide a question that a petitioner has not proposed.[124] This is not a

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while self-professed Burkeans argue in favor of retaining precedent as a means of preserving tradition, "there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution and of appealing to it to trump both contrary caselaw and contrary practices and traditions"). It is undoubtedly true that the large body of precedent that is never disturbed contributes to this aim. But the kinds of cases that the Court reverses are often ones implicating values on which society is divided. *See supra* note 81 and accompanying text.

121. *See* Caminker, *supra* note 115, at 824–25 (outlining the duty of lower courts to obey precedents of those courts that have "revisory jurisdiction" over them).

122. *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 16 (2008) ("Where judges do not wish to follow a precedent it is commonly assumed that they will either distinguish the precedent from the present case or overrule the precedent on the basis of an especially compelling reason or set of reasons.").

123. While not a constitutional case, *Pearson v. Callahan*, 555 U.S. 223 (2009), illustrates well the way in which dissatisfaction below can prompt overruling above. The Court observed that "[l]ower court judges . . . have not been reticent in their criticism of [*Saucier v. Katz*, 533 U.S. 194 (2001)]" and that "application of the rule has not always been enthusiastic." *Id.* at 234. That fact, combined with separate opinions in other cases from members of the Court, spurred reconsideration, and ultimately reversal, of the Court's holding in that case. *Id.* at 235–36; *see also, e.g.*, Arizona v. Gant, 556 U.S. 332, 338 (2009) ("The chorus that has called for us to revisit [*New York v. Belton*, 453 U.S. 454 (1981)] includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles."). *Gregg v. Georgia*, 428 U.S. 153 (1976), also illustrates this phenomenon. After *Furman v. Georgia*, 408 U.S. 238 (1972), held unconstitutional all of the death penalty statutes before the Court in that case, "at least 35 States . . . enacted new statutes that provide[d] for the death penalty for at least some crimes." *Gregg*, 428 U.S. at 179–80 (plurality opinion). Reviewing one of these statutes in *Gregg*, the Court retreated from *Furman* and permitted the death penalty when safeguards were present. *Id.* at 206–07. Pushback from the states caused the Court to change course, even though it did not overrule *Furman* outright. *See id.* at 180–81, 186–87 (finding important that "capital punishment itself has not been rejected by the elected representatives of the people" and invoking "[c]onsiderations of federalism" in deciding that capital punishment is not per se unconstitutional).

124. *See* SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The certiorari petition thus generally gives the Court notice of what it is getting into. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 376–77 (2010) (Roberts, C.J., concurring) (asserting that the Court had not considered whether to overrule precedent in other corporate speech cases because "[n]ot a single party in any of those cases asked us to . . . , and as the dissent points out, the Court generally does not consider constitutional arguments that have not properly been raised" (citation omitted)); Lawrence v. Texas, 539 U.S. 558, 564 (2003) (noting that the petition granted had expressly sought the overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986)). To be sure, the request is not always express in the petition for certiorari, for the Court considers itself free to entertain issues "fairly included" within the questions presented in the petition. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 456–58 (9th

firm constraint, for the Court can order supplemental briefing on a question raised by neither the petition for certiorari nor the merits brief, and it has exercised this power on occasion to order the parties to address whether precedent should be overruled.[125] Such orders are controversial, however, and issue only with the support of multiple justices.[126] The general rule of confining the issues to those pressed by the litigants, along with the need for multiple votes to exercise an exception to this rule, is another check on a justice ready to continue a disagreement that the litigants who sought review or the justices who granted certiorari on a specific question are not ready to reopen. The rule discourages—though does not forbid—the Court from stretching too far. And like the certiorari process, it provides the justices with a way of avoiding the question whether a troublesome precedent should be overruled. A justice who thinks precedent wrongly decided is not necessarily eager to confront that question. As I will discuss below, this is particularly true for so-called superprecedents.

5. Multi-member Court.—The Court's composition of nine is another factor promoting stability. It takes more than one vote to reverse course. It takes four votes for a grant of certiorari and five votes for a majority on the merits.[127] Thus, at least four justices must be willing to entertain a question that could provoke an overruling, and the existing resolution will not be disturbed unless at least five justices are certain enough of their own approach to assume the risk of disturbing reliance interests.

6. Life Tenure.—Life tenure gives the Court relatively stable membership. The slow rate at which seats turn over itself encourages continuity in case law. Justices do change their minds, but overruling is more likely when fresh eyes see a case. Indeed, Michael Gerhardt notes that

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ed. 2007) (describing circumstances in which the Court has deemed questions "fairly included" with those on which it granted certiorari).

125. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792, 797 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986) after calling for supplemental briefing on the question whether it should be overruled); Payne v. Tennessee, 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled). This practice has been sharply criticized. *See, e.g.*, *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is "unusual and inadvisable for a court"). The Court has also occasionally reconsidered precedent without even asking the parties to argue the point, a practice which is also criticized. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 673–74 (1961) (Harlan, J., dissenting) (criticizing the Court for having "reached out" to decide whether to overrule precedent when the issue was neither raised nor briefed by the parties (internal quotation marks omitted)).

126. The number of justices required to order briefing or reargument on a question not raised by the parties appears to be a question of internal practice, for it is not addressed in the Supreme Court Rules. Given that the practice is controversial and has been done over dissent, it is unlikely that it can be done without the support of at least five justices. *See supra* note 125.

127. *See* Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957) (discussing the origins of the "rule of four," which requires four votes to grant certiorari).

in the Supreme Court's history, only four constitutional precedents have been reversed in the absence of any change to the Court's composition.[128]

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These factors operate in all of the Court's cases, but their effect is particularly acute when it comes to so-called superprecedents.[129] Superprecedents are cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds.[130] Michael Gerhardt offers the following explanation:

> [T]he point at which a well-settled practice becomes, by virtue of being well-settled, practically immune to reconsideration is the point at which that precedent has become a superprecedent. Nothing becomes a superprecedent, at least in my judgment, unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.[131]

The following cases are included on most hit lists of superprecedent[132]: *Marbury v. Madison*,[133] *Martin v. Hunter's Lessee*,[134] *Helvering v. Davis*,[135] the *Legal Tender Cases*,[136] *Mapp v. Ohio*,[137] *Brown v. Board of Education*,[138]

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128. GERHARDT, *supra* note 17, at 11.

129. *See generally* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006) (identifying the origin of the term superprecedent and the role of such decisions in the Senate judicial confirmation process). The term was popularized by Senator Arlen Specter, who asked John Roberts during his confirmation hearing whether he agreed that there were "super-duper precedents" in constitutional law. *Id.* at 1204 (internal quotation marks omitted). Other commentators have debated the strength of superprecedent. *Compare* Fallon, *supra* note 51, at 1116 ("[T]he claim that there are superprecedents immune from judicial overruling seems basically correct."), *and* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–82 (2006) (endorsing the proposition that some bedrock precedents are so entrenched that they cannot be overruled), *with* Barnett, *supra* note 21, at 1233 (arguing that no case should be immune from overruling if it conflicts with the Constitution's text).

130. *See* Gerhardt, *supra* note 129, at 1221 ("Super precedent is a construct employed to signify the relatively rare times when it makes eminent sense to recognize that the correctness of a decision is a secondary (or far less important) consideration than its permanence.").

131. Gerhardt, *supra* note 4, at 1293. *Cf.* McGinnis & Rappaport, *supra* note 95, at 836–37 (arguing that an originalist should follow nonoriginalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic—as they would be with respect to paper money—or when the principles would be supported by constitutional amendment in the absence of the cases—as they would be with respect to race and gender discrimination).

132. *See, e.g.*, Gerhardt, *supra* note 129, at 1208–11, 1213–16 (identifying several "superprecedent" cases); Farber, *supra* note 129, at 1180 (citing New Deal-economic and twentieth-century Bill of Rights-incorporation cases as examples of "bedrock precedents").

133. 5 U.S. (1 Cranch) 137 (1803) (holding constitutional the exercise of judicial review).

134. 14 U.S. (1 Wheat.) 304 (1816) (holding constitutional the exercise of Supreme Court review of state court judgments).

135. 301 U.S. 619 (1937) (holding constitutional the Social Security Act).

136. Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870) (holding constitutional the issuance of paper money).

137. 367 U.S. 643 (1961) (holding the Fourth Amendment incorporated against the states through the Fourteenth Amendment).

138. 347 U.S. 483 (1954) (holding that the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools).

and the *Civil Rights Cases*.[139] These opinions are invoked as evidence that there are at least some occasions on which stare decisis undeniably and absolutely constrains the Court.

In my view, however, "superprecedents" do not illustrate a "super strong" effect of stare decisis at all. Stare decisis is a self-imposed constraint upon the Court's ability to overrule precedent. The force of so-called superprecedents, however, does not derive from any decision by the Court about the degree of deference they warrant. Indeed, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[140] shows that the Court is quite incapable of transforming precedent into superprecedent by *ipse dixit*.[141] The force of these cases derives from the people, who have taken their validity off the Court's agenda. Litigants do not challenge them. If they did, no inferior federal court or state court would take them seriously, at least in the absence of any indicia that the broad consensus supporting a precedent was crumbling. When the status of a superprecedent is secure—e.g., the constitutionality of paper money—a lawsuit implicating its validity is unlikely to survive a motion to dismiss. And without disagreement below about the precedent, the issue is unlikely to make it onto the Court's agenda.[142]

To be sure, even if they are not challenged, some of these foundational cases lie in the background of the decisions that the Court makes each term. No one would question the vitality of *Marbury v. Madison* in a petition for certiorari, but that case underlies every exercise of judicial review. The legitimacy of incorporation is water under the bridge, but a case reviewing whether a particular state action was consistent with the Fourth Amendment is premised upon it. Again, however, it is the mechanisms described above rather than stare decisis itself that insulate these precedents from reconsideration. Unless a justice wants to pick a fight with a superprecedent—and can persuade four others to go along with her—the rule confining the Court to addressing issues raised in the petition for certiorari and briefs keeps the question of overruling off the table.[143] Not even originalists claim a responsibility to exhume and rectify every nonoriginalist

139. 109 U.S. 3 (1883) (holding the Fourteenth Amendment applicable only to state action).

140. 505 U.S. 833 (1992).

141. In an op-ed in *The New York Times*, Senator Specter characterized *Roe v. Wade* as a superprecedent. Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES, July 24, 2005, http://www.nytimes.com/2005/07/24/opinion/24specter.html. Scholars, however, do not put *Roe* on the superprecedent list because the public controversy about *Roe* has never abated. *See, e.g.*, Fallon, *supra* note 51, at 1116 ("[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed."); Gerhardt, *supra* note 129, at 1220 (asserting that *Roe* cannot be considered a superprecedent in part because calls for its demise by national political leaders have never retreated).

142. *See supra* notes 119–23 and accompanying text.

143. *See supra* notes 124–26 and accompanying text.

precedent in the United States Reports.[144] Assuming *arguendo* that a justice thinks any particular superprecedent was wrongly decided,[145] the question of its soundness is not one that she will be asked—or likely want—to decide.[146] It thus seems inapposite to phrase the question as whether stare decisis forecloses the justice from reversing such a case. With no question on the table, there is no opportunity for the real constraint of stare decisis to kick in. Indeed, the justice would only face the question of overruling if the precedent lost its "super" status.[147]

That is not to say that the concept of widespread public acceptance of Supreme Court precedent is unimportant to constitutional theory. On the contrary, it is central. In particular, it provokes the question whether the behavior of nonjudicial actors can transform constitutional law outside of the Article V process. That is a difficult question, but it is one focused more on factors external to the Court than upon the Court's internal horizontal stare decisis doctrine. Once a case like *Brown v. Board of Education* achieves superprecedent status, its vitality is out of the Court's hands for as long as the widespread buy-in continues. Public support does not immunize these cases from overruling; it immunizes them from being challenged in the first place.[148] The phenomenon that scholars call superprecedent thus does not

144. Indeed, Justice Scalia has argued precisely the opposite. *See* SCALIA, *supra* note 18, at 138–39 ("[O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.").

145. Superprecedent is most often raised as a challenge to originalism. If many of the Court's foundational cases are inconsistent with the Constitution's original public meaning, the argument goes, originalism is unsustainable. *See* Gerhardt, *supra* note 129, at 1224 ("Originalists . . . have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law."). Originalists have resisted the premise of the challenge, at least in part. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 948–53, 962–71 (1995) (arguing that *Brown v. Board of Education* is consistent with the original meaning of the Fourteenth Amendment); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 900–07 (2009) (arguing that *Brown*, the *Legal Tender Cases*, and cases validating the administrative state are consistent with an originalist understanding of the Constitution). To the extent any long-standing precedent is in fact inconsistent with the Constitution's meaning, some originalists have attempted to justify adhering to it, while others would let go of the precedent in favor of the text. *See supra* note 21.

146. Sometimes a challenge may be to a new application of a foundational precedent rather than to the precedent itself. For example, an originalist may be deeply skeptical that the Due Process Clause protects substance as well as procedure, but the basic existence of substantive due process doctrine is no longer subject to challenge. The system requires the justice to respect that starting point; she cannot pick a fight that litigants (and other justices) have not. The justice may, however, respond by refusing to read that foundational precedent expansively, thereby simultaneously protecting reliance interests and the integrity of the Constitution on the question she has been asked to decide.

147. *Cf.* Gerhardt, *supra* note 4, at 1294–95 ("The larger the constituency—the more public authorities who are persuaded to reconsider some question of constitutional law—the more public and social support there would be to allow a heretofore well-settled issue to be reopened.").

148. This is not to say that such a case should be overruled if public acceptance wanes and a challenge makes its way to the Court. *See supra* note 80 and accompanying text. It is simply to say

have much to tell us about the strength that the Court ought to accord its constitutional precedent that the mine-run of constitutional cases does not. While superprecedent is important to constitutional theory, it has much less to contribute to a theory of stare decisis.

Discussions of reliance on precedent sometimes proceed as if everything depends on horizontal stare decisis. The gravitational pull of horizontal stare decisis is one means—and an important one—of encouraging stability. Even apart from that presumption, however, the system has features that temper the risk of swings in the Court's case law. These features also work toward ensuring that the law does not fluctuate simply because of the will of one justice, or even five, but because of an emerging sense among litigants and lower court judges that it might be time for the Court to change course.

Conclusion

The Court did not adopt the weak presumption in constitutional cases because it wanted to accommodate pluralism, but the presumption serves that end. Rather than extinguishing disagreement, constitutional stare decisis moderates it. The doctrine enables a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation.

Because disagreement about the right way to interpret the Constitution is focused most sharply upon the Supreme Court, stare decisis does not necessarily serve this same mediating function in the constitutional cases decided by lower courts. And because fights about the content of our fundamental law are different in kind than debates about how to interpret more transitory statutes, the thesis developed here is not necessarily applicable to statutory stare decisis. But in the Supreme Court's constitutional cases, recognition of the doctrine's role in tempering disagreement offers insight into one of the functions it serves and one of the reasons why the Court may be unwilling to give constitutional precedent more force.

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that the case lacks the superprecedent status that immunizes it from overruling by removing it from the Court's docket.

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Pluralistic Nonoriginalism and the Combinability Problem

Mitchell N. Berman* & Kevin Toh**

Introduction

The following statements are representative of what contemporary originalists and nonoriginalists say in their debates with each other about constitutional interpretation and adjudication:

(O) "Originalists do not give priority to the plain dictionary meaning of the Constitution's text because they like grammar more than history. They give priority to it because they believe that it and it alone is law."[1]

(N) "[T]he Court should interpret written words, . . . in the Constitution . . . , using tools that help make the law effective in practice. Judges should use traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences, to help find proper legal answers."[2]

Although it is usual to read this pair of passages and similar ones as presenting radically divergent and conflicting positions,[3] that is not required. For, strictly speaking, these two passages offer different answers to different questions. (O) on its face articulates a position about what the law is or consists of. The content of the constitutional law, according to (O), consists of the meanings of the inscriptions in the text that is called "The Constitution" of the United States. (N), on the other hand, apparently stakes out a position about how judges should decide or adjudicate constitutional disputes. They should resolve such disputes, (N) says, by appealing to the named multiplicity of considerations or factors. A view about what the law is or what it consists of does not by itself entail or presuppose any position about how judges are supposed to adjudicate constitutional disputes; and a view about how judges should go about adjudicating constitutional disputes

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1. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994).

2. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 73–74 (2010).

3. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–56 (1989) (emphasizing the differences between originalism and nonoriginalism).

does not by itself entail or presuppose any position about what the law is or consists of. The positions articulated by (O) and (N), therefore, seem compatible.

In fact, however, the actual proponents of each view are very likely to reject the other view. The current proponents of the view articulated by (O) maintain that, subject to a few standard qualifications,[4] judges deciding constitutional cases must enforce the constitutional law.[5] And most actual proponents of the view that (N) articulates presumably reject the idea that the constitutional law consists solely of the meanings of the inscriptions in the constitutional text.[6] The bottom line is that although frequent and even typical contemporary formulations of originalism and nonoriginalism outline positions that are strictly speaking consistent with each other, almost certainly the proponents of the two views actually do disagree with each other. But while nonoriginalists have frequently challenged the position articulated by (O)—i.e., the originalist position about what the law is or consists of—they have very rarely articulated a positive position that can be deemed a straightforward alternative and competitor to (O).[7] Consequently, originalists have been placed in a position of having to engage with nonoriginalist positions that have not been spelled out.

Some originalists do not see a need to scrutinize the details of the nonoriginalist position that (N) can be taken as implying or suggesting. For according to them, any view of our constitutional law that conceives it as consisting of a plurality of considerations or factors is bound to be unstable or even incomprehensible.[8] A number of constitutional theorists have explicitly articulated this "combinability problem," as we will call it, and our sense is that the problem resonates with very many constitutional theorists, including even some nonoriginalists.[9] The purported problem, to reiterate,

4. The exceptions, recognized by some but not all self-described originalists, include: those relating to deference to judicial precedents that may appear erroneous when measured against the originalist standard; a "faint-hearted" willingness not to enforce legal norms that are too morally objectionable or that are likely to provoke overwhelming public opposition; and a prerogative to displace or supplement some interpreted norms with constitutional "constructions." *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (1997) [hereinafter SCALIA, INTERPRETATION] (asserting that "*stare decisis* is not *part of* [Scalia's] originalist philosophy; it is a pragmatic *exception* to it"); Scalia, *supra* note 3, at 864 (stating that "faint-hearted originalist[s]" would not uphold a statute that legalized flogging as punishment).

5. *See* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823–24 (1997) (distinguishing between originalists' position on the content of the law and their position on adjudication and making the sociological observation that originalists believe that judges should enforce the law).

6. *See infra* subpart I(C).

7. *See infra* subpart I(C).

8. *See infra* Parts III–IV.

9. *See infra* Parts III–IV.

attaches to nonoriginalism precisely because and insofar as nonoriginalism is pluralistic.[10]

One primary purpose of this Article is to discredit the combinability problem, and thereby facilitate development and eventual acceptance of pluralistic nonoriginalism. The other, perhaps more important, purpose is to devise a pluralistic nonoriginalist conception of constitutional law that is clear and plausible enough to provide a focal point for debates about constitutional interpretation. We will begin in Part I by introducing some terminological regimentation that should prove helpful for our subsequent exposition and by disambiguating different theses that originalists and nonoriginalists, respectively, could be seen as advocating. We propose in Part II a template for a pluralistic nonoriginalist conception of constitutional law that is plausible in its own right and that also will enable us to address later on in Part IV what we deem the most forceful version of the combinability problem. We turn to the combinability problem in earnest in Part III. Despite the explicit articulations in the literature, it is no trivial matter to figure out what exactly the combinability problem is and why exactly pluralistic nonoriginalist conceptions of the constitutional law are supposed to suffer from it. Accordingly, we disambiguate and try out three different versions of the problem, disarming each in turn. In Part IV, we identify a fourth version of the combinability problem, which strikes us as most serious. The idea, in short, is that legal norms, or norms generally, cannot be constituted by considerations, facts, or reasons of many kinds. We argue that the force of even this last version of the problem is merely apparent and that the problem gains traction only by way of understanding the nature of constitutional law that is far from nonoptional and ultimately less credible than an alternative. We will invoke the template for pluralistic nonoriginalism that we sketched in Part II to discredit the fourth version of the problem. Our goal throughout this Article is not so much to *solve* the combinability problem, but instead to *dissolve* it by exposing and making explicit a number of assumptions and predilections among constitutional theorists that are very much dispensable in favor of some more credible alternatives.

I. Preliminaries

A. Terminology

We begin with some terminological regimentation, and some related observations, to facilitate the reader's comprehension of our subsequent discussion.

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10. For a previous expression of this point, see Mitchell N. Berman, *Constitutional Interpretation: Non-Originalism*, 6 PHIL. COMPASS 408 (2011).

Imagine that, by reasoning as follows, we conclude that a set of laws that make up a certain regime of criminal punishment—call the regime "CP"—is constitutionally prohibited:

(1) Inflictions of cruel and unusual punishments are constitutionally prohibited.

(2) CP calls for inflictions of punishments that are cruel and unusual.

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(3) CP is constitutionally prohibited.

Here, we could say that the unconstitutionality of CP *consists of* two things—i.e., the constitutional prohibitedness of inflictions of cruel and unusual punishments, and the cruel and unusual nature of the punishments that CP calls for. A number of other idioms are available to designate this relation between (3) on the one hand and (1) and (2) on the other. We could say, for example: that CP's unconstitutionality is *grounded in* (1) and (2); that CP is unconstitutional *in virtue of* (1) and (2); that CP's unconstitutionality is *determined by* (1) and (2); etc. We will use the term "determination" to refer to the relation that such locutions posit between the facts like (1) and (2) on the one hand and facts like (3) on the other.[11] And we will use "determinants" to refer to the facts that determine, and "resultants" to refer to the facts that are determined.

Some observations go with these terminological stipulations. *First*, notice that once we know the determinants of a legal fact like (3), we also know one good way that we can come to have justified or warranted belief that (3) is the case. In other words, an *epistemological* implication about the relevant evidence can be inferred from an assertion of a determination relation. If we were warranted in thinking that (1) and (2) are the case, then we would also be warranted in believing that (3) obtains. So, one very good way of establishing that (3) is the case is to show that (1) and (2) obtain.

Second, having said what we have just said, we also need to caution. Not all of the facts that count as evidence are determinants, and that means that we sometimes come to have justified or warranted belief that a fact obtains by way of our exposure to some facts that are not determinants. For example, the fact that a local meteorologist has said that it will rain tomorrow is good evidence that it will rain tomorrow, and hearing him say so justifies a belief that it will rain tomorrow. But the fact that it will rain tomorrow does not consist of—is not determined by—the fact that the local meteorologist has said so. The lesson is that we need to be careful not to confuse

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11. One of us (Toh) is not entirely happy with thinking of (1)–(3), and other such sentences, as representing *facts* because doing so begs some important metanormative questions—namely, those about the meanings of normative claims and the metaphysical status of norms and values. But given the purpose of this paper and its intended audience, no harm is likely to come from relying on the formulations we use.

determinants and evidence. Some facts are evidence without at the same time being determinants. The two sets of facts overlap, but there are bound to be divergences.

Third, a fact that is a resultant may in turn be a determinant of a further resultant, and a fact that is a determinant of a resultant may itself be a resultant of some more fundamental determinants. Notice that instead of worrying about the determinants of a legal fact like (3), we could worry about the determinants of a legal fact like (1). We may ask: What grounds (1), or by virtue of what is (1) true? It may be the case, for example, that (1) is made true by something like the following pair:

(4) For all P, if the Founders drafted a text that says that P, and the state ratifying conventions ratified that text shortly after 1789, then P is a constitutional law.

(5) The Founders drafted a text that says (1), and the state ratifying conventions ratified that text shortly after 1789.

If these were really the case, then (4) and (5) would be the determinants of (1). (4) would be a more fundamental legal fact, and (5) is a nonlegal, historical fact that (4) makes legally relevant.

Fourth, and last, notice that any kind of nonlegal fact may be made legally relevant by way of determinant legal facts. Notice that (2) is a (partly) moral fact, and that (5) is a historical fact. Both kinds of facts, and any other kinds—semantic, psychological, historical, prudential, structural, etc.—could be made legally relevant, and generative of further legal facts, by the operations of fundamental legal facts like (1) and (4). This is a very important point and will play a crucial role in our subsequent arguments.

Equipped with these observations, we proceed by first resuming the task we began in the introductory Part—that of distinguishing different originalist and nonoriginalist theses.

B. Originalism

A fuller version of the passage that we quoted and labeled "(O)" in the introductory part reads:

> The central premise of originalism (and of Marshall's opinion in *Marbury*) is that the text of the Constitution is *law* that binds each and every one of us until and unless it is changed through the procedures set out in Article V. It follows that the Constitution is thus like other legal writings, including statutes, contracts, wills, and judicial opinions. The meaning of all such legal writings depends on their texts, as they were objectively understood by the people who enacted or ratified them. Originalists do not give priority to the plain dictionary meaning of the Constitution's text because they like

> grammar more than history. They give priority to it because *they believe that it and it alone is law.*[12]

According to this view, what the inscriptions in the constitutional text say or mean, and that alone, is the constitutional law. The view could be formulated as:

> (OL) The Constitution or the constitutional law consists solely of the meanings of the inscriptions in the constitutional text.

Here, Steven Calabresi and Sai Prakash, the authors of the above passage, are advancing a *legal* claim or, more precisely, designating what they deem the primary determinant of the ultimate constitutional facts. (OL) makes legally relevant certain semantic facts—namely, the meanings of the inscriptions in the text of the U.S. Constitution—and together with those semantic facts determines the most fundamental or ultimate constitutional facts, or the facts regarding what the Constitution calls for. Putting aside complexities presented by whatever contributions judicial decisions might make to the content of constitutional law, (OL) represents a common originalist legal position.[13]

A certain epistemological position follows from originalists' legal position (OL), and we can formulate it as follows:

> (OE) In order to figure out what the constitutional law calls for, judges and others should find out only what the meanings of the inscriptions in the constitutional text are, and any other evidence that bears on the meanings of those inscriptions.

Since what the inscriptions mean is what the Constitution calls for, in order to figure out what the Constitution calls for, one must seek out the meanings of the inscriptions in the constitutional text. And any facts that bear on what the inscriptions mean, and only such facts, are good evidence for beliefs about what the Constitution calls for. As we observed above, some facts that are not determinants of a particular fact may be good evidence for thinking

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12. Calabresi & Prakash, *supra* note 1, at 551–52 (last emphasis added) (footnotes omitted).

13. It is a common originalist position, but not the only one. Some originalists—from icons like Bork and Scalia to contemporary theorists like John McGinnis and Michael Rappaport—advance claims that, on their face, appear to be about how judges should decide constitutional cases and *not* about what the law is. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("The judge must stick close to the text and the history, and their fair implications, and not construct new rights."); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1698–99 (2010) (providing normative and consequentialist justifications for why judges should render originalist decisions); Scalia, *supra* note 3, at 863 (asserting that originalism in judicial review is preferable because its "practical defects" are "less severe"). That is, some originalists seem more plainly to be playing in the same space that nonoriginalists seem mostly to occupy. We explore some consequences of this intramural division within the originalist camp in Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism From Old: A Jurisprudential Take*, 82 FORDHAM L. REV. (forthcoming 2013).

that that fact obtains. For example, what a particular late-eighteenth-century dictionary says is clearly not a determinant of the constitutional law but may still be good evidence for what the Constitution demands. And that is the case only if we have good grounds for thinking that the particular dictionary is a reliable tracker of the meanings of the terms as they are used in the constitutional text. The exact kind of investigation that (OE) calls for then depends on the kind of investigation that is needed to figure out the meanings of inscriptions and to discern the facts that bear on those meanings. Randy Barnett has opined as follows:

> It cannot be overstressed that the activity of determining semantic meaning at the time of enactment . . . is *empirical*, not normative. Although we can choose to use words however we wish, . . . the social or interpersonal linguistic meaning of words is an empirical fact beyond the will or control of any given speaker . . . . Although the objective meaning of words sometimes evolves, words have an objective social meaning at any given time that is independent of our opinions of that meaning, and this meaning can typically be discovered by empirical investigation.[14]

If this were really the case, then what (OE) calls for is strictly non-normative, empirical reasoning.

In addition to their legal and epistemological positions, summarized as (OL) and (OE) above, there is another issue on which many originalists can be seen as taking a position. That issue can be called "the issue of judicial duty," or more plainly the issue of what judges should do when they are adjudicating constitutional cases. In the following passage, which strikes us as representative of views espoused by many originalists, Nelson Lund seems to be taking a firm position on this third issue, while also asserting (OL):

> I have always had a very simple-minded view of judicial duty in constitutional cases: Supreme Court Justices should just apply the law. . . .
>
> If I had to put a label on my own position, it would be "originalism." The Constitution is a written document that means what its words, in context, would reasonably have been understood to mean at the time it was adopted.[15]

Notice that the issue of what judges should do in constitutional disputes is distinct from the legal issue of what the constitutional law is or consists of, and also from the epistemological issue of how to find out what the constitutional law is or calls for. There is logical room for thinking that even if the constitutional law clearly calls for P, judges should not apply P or not

14. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011).

15. Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors*, 19 GEO. MASON L. REV. 1029, 1029 (2012).

apply P in some specified situations.[16] Lund, like many originalists, rejects this last position. Subject, then, to the caveats flagged earlier,[17] this common originalist position on adjudication could be summed up as follows, at least on a first pass:

> (OA) In constitutional cases, when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them only according to the meanings of those inscriptions.

We believe that the dominant strand of contemporary originalism can be accurately characterized in terms of the three theses we have distinguished and formulated in this section. We hope that distinguishing the three theses will facilitate progress in the debate between originalists and their opponents.

C. *Nonoriginalism*

We shall use the term "nonoriginalism" to refer to constitutional theories that reject originalism. Another term often used to refer to the alternative to originalism—"living constitutionalism"—seems to us to bring with it various associations that are unnecessary and undesirable.[18] Now, how should we characterize nonoriginalism? Although it is fairly plain that nonoriginalists disagree with all three of the originalist theses that we distinguished in the preceding section, their positive positions on these three issues are considerably less clear.

Common nonoriginalist positions on the issue of adjudication are easiest to decipher. Larry Sager, for example, begins his *Justice in Plainclothes*[19] by observing: "Various accounts of our practice disagree on the important question of whether the Constitution contains an essentially complete set of instructions for constitutional judges or whether conscientious judges and courts must make important judgments on their own[] . . . ."[20] And his position is that "conscientious judges" should indeed make important independent judgments, and in particular judgments of political morality, and adjudicate constitutional cases before them in ways that further political justice for their community. "Judges are not merely or even primarily instruction-takers," says Sager, "their independent normative judgment is expected and welcomed."[21] Similarly, other nonoriginalists have asserted that judges should, in their constitutional adjudications, "help make the law effective,"[22] proceed with "heightened . . . concern for consequences,"[23]

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16. Once again, see Lawson, *supra* note 5, at 1831–35 for this very point.

17. *See supra* note 4.

18. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24 & n.52 (2009).

19. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

20. *Id.* at 1–2.

21. *Id.* at 76.

22. BREYER, *supra* note 2, at xiii–xiv.

exercise judgment to "account for competing considerations,"[24] etc. There is no canonical list of nonsemantic considerations that nonoriginalists believe that judges should take into account in deciding constitutional cases. But perhaps their counterpart to (OA) can be formulated as:

> (NA) In constitutional cases, even when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them not merely according to the meanings of those inscriptions, but also in light of certain nonsemantic considerations, including some normative ones.

The "even when" clause is inserted to distinguish nonoriginalists from those originalists who countenance reliance on nonsemantic, and perhaps even normative, considerations when the meanings of relevant constitutional provisions are unclear or otherwise underdeterminative.[25]

Although (NA) is inconsistent with (OA), it is compatible with (OL) and (OE). But clearly, a "nonoriginalism" that is committed to the latter two theses would be a fairly shallow form of nonoriginalism.[26] The above-quoted passages from Sager, for example, explicitly rule out neither (OL) nor (OE). Our guess is that Sager means to opt for a more thoroughgoing nonoriginalism, but that is not obvious from what he says. Similar diagnoses could be offered for other nonoriginalists' proposals. Philip Bobbitt famously enumerated six "modalities" of constitutional argument: historical, textual, structural, doctrinal, moral, and prudential.[27] Similar lists abound in

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23. RICHARD A. POSNER, HOW JUDGES THINK 238 (2008).

24. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 4 (2009).

25. The so-called New Originalists, for example, think that when the meanings of constitutional provisions are unclear or otherwise underdetermined, judges should move from constitutional interpretation to constitutional construction, and that the latter kind of adjudicative activity legitimately relies on nonsemantic and even normative considerations. That, in any event, appears to be Whittington's position. *See, e.g.*, Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120–21 (2010) ("Interpretation attempts to divine the meaning of the text. There will be occasions, however, when the Constitution as written cannot in good faith be said to provide a determinate answer to a given question. This is the realm of construction." (footnote omitted)). Barnett and Solum maintain that construction is ineliminable even when the communicative content served up by interpretation is entirely clear. That is, interpretation, for them, always delivers only semantic meaning or communicative content; construction is always necessary to deliver *law*, even when the law precisely corresponds to the communicative content. *See, e.g.*, Barnett, *supra* note 14, at 66; Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 100, 107 (2010). But we think this is an idiosyncratic and unnecessary wrinkle that other originalists have not fully appreciated and are unlikely to find congenial. *See generally* Berman & Toh, *supra* note 13.

26. In case this is not obvious, we are not making any normative assessments in calling such theories "shallow." We are merely giving a comparative description.

27. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION].

the nonoriginalist literature. Richard Fallon, for example, identified five "kinds of constitutional argument" that are near universally acknowledged as legitimate: arguments about the meanings of constitutional text; arguments about the Framers' intent; arguments about purposes presupposed by constitutional provisions; arguments from judicial precedents; and evaluative and policy arguments.[28] It is not always clear what such lists are supposed to represent. Do they amount merely to nonoriginalist positions on what judges should do when they decide constitutional cases, and hence versions of (NA)? Or do they amount to nonoriginalist positions on the epistemological issue of how best to uncover the constitutional law—hence, versions of (NE)—or even nonoriginalist positions on the legal issue of the fundamental legal facts in the American legal system—hence, versions of (NL)?

The term "constitutional argument" is equivocal, and so is "constitutional interpretation." A theory of constitutional interpretation may be thought of as a theory of how to discover the constitutional law, or as a theory of how judges should decide constitutional cases based on their findings of what the law is and possibly some other considerations as well.[29] And nonoriginalists have rarely been explicit about which of these two they are offering. Perhaps it is a significant fact that recently some of them seem to have refrained intentionally from using the term "interpretation" to characterize what they are theorizing about.[30] And at least some nonoriginalists have explicitly opted to use alternative terms—e.g., "constitutional decisionmaking"—to clarify their subject matter.[31] Presumably, the idea is that whereas constitutional interpretation has to do

28. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987).

29. *See* JACK M. BALKIN, LIVING ORIGINALISM 4 (2011) (distinguishing "interpretation-as-ascertainment" from "interpretation-as-construction"); Jeffrey Goldsworthy, *The Case for Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 42, 60 (Grant Huscroft & Bradley W. Miller eds., 2011) (distinguishing "clarifying" from "creative" interpretation); Kent Greenawalt, *Constitutional and Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 269–70 (Jules Coleman & Scott Shapiro eds., 2002) (noting a variety of meanings of legal interpretation); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 448 (1989) ("[I]nterpretation is a portmanteau word so capacious that virtually nothing that a court might 'do' to or with a statute could not be thought interpretation in a semantically permissible, indeed orthodox, sense.").

30. *See, e.g.*, POSNER, *supra* note 23, at 15 (describing the book as "an effort to develop a positive decision-theoretic account of judicial behavior"). Although David Strauss described his "common law" approach to constitutional adjudication as "common law constitutional interpretation" when he introduced his ideas nearly two decades ago, *see* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996), that phrase does not appear in his more recent book-length development, DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) [hereinafter STRAUSS, THE LIVING CONSTITUTION]. At the live conference for this symposium, Strauss confirmed that he thinks "interpretation" a misleading and unfortunate term for the central activity that courts are engaged in when adjudicating constitutional disputes.

31. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 182 (2008).

with finding out what the constitutional law is, constitutional decisionmaking, or some such, has to do with the wider question of how judges should decide constitutional cases. These could be taken as indications that what nonoriginalists are really advancing is an alternative to (OA), and no more. This inference is possibly bolstered by the fact that some nonoriginalists have characterized constitutional argumentation, the subject matter of their theorizing, as a species of practical reasoning. Justice Breyer, for example, in additional passages that further develop the idea presented in the passage we quoted at the beginning of this Article, has said:

> In constitutional matters, too, language, history, purposes, and consequences all constrain the judge in that they separate better from worse answers even for the most open questions. . . .
>
> . . . .
>
> This may sound complicated, but consider how most practical arguments proceed: Should we invite your cousin to the wedding? Should we relocate the plant, when and where? As is true of any practical argument, including moral arguments, rarely does a single theory provide a determinative answer.[32]

It is not always clear just what nonoriginalists mean by practical reasoning. But the impression that writers like Breyer give is that what they are theorizing about is a set of judgments or an activity that is aimed not merely at delineating what the preexisting legal facts are, but at making up the judging persons' minds as to what to do based on both legal and nonlegal considerations.[33]

If we treat, as the foregoing considerations encourage us to do, nonoriginalist proposals as proposals for (NA) or its variants, then the debate about originalism should be conceived as a moral or all-things-considered normative debate about how judges should behave. For the "should" of (OA) and (NA) presumably is a moral "should," or perhaps an all-things-considered "should." If alternatively the "should" were conceived as a legal "should," then (OA) would be a trivial implication of (OL), and (NA) would either be a trivial implication of the nonoriginalist analogue of (OL) or a

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32. BREYER, *supra* note 2, at 84–85.

33. The distinction that Breyer and similar-minded constitutional theorists seem to be working with, at least implicitly, is the distinction that moral philosophers often make using the terms "realism" and "voluntarism." *See generally, e.g.*, CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY (1996). *Cf.* Christine M. Korsgaard, *Realism and Constructivism in Twentieth-Century Moral Philosophy*, 28 J. PHIL. RES. (SUPPLEMENT) 99 (2003), *reprinted in* THE CONSTITUTION OF AGENCY: ESSAYS ON PRACTICAL REASON AND MORAL PSYCHOLOGY 302 (2008). According to realism, relevant judgments are meant to discern or find some preexisting facts, and their correctness-makers consist of such facts. According to voluntarism, on the other hand, relevant judgments are substantially a matter of *willing* as well as of discerning or finding, and their correctness-makers consist at least partly of the desiderata of willing well. We will discuss these matters further in Part IV below.

blatant contradiction of such. Some originalists have discerned the resulting conception of the debate and have expressed some frustration about it. Jeffrey Goldsworthy, for example, says:

> The controversy over constitutional interpretation is concerned mainly with clarifying interpretation [i.e., the type of interpretation that aims to reveal "a meaning that, despite being previously obscured, was possessed by the text all along"[34]]. The central question is not how judges should decide constitutional disputes when the constitution itself proves insufficiently determinate to provide a solution, but how they should ascertain whether or not it does provide a solution and, if so, what that solution is.[35]

Goldsworthy, for one, seems to think that some nonoriginalists are mistakenly applying the lessons of constitutional cases where the law is indeterminate to all constitutional cases, and that the resulting conception of the debate between originalism and nonoriginalism in terms of (OA) and (NA) trivializes or marginalizes it.[36]

We agree. We think that the debate between originalists and nonoriginalists is more substantial than the debate about (OA) and (NA). Or at least it is not just a debate about those theses about adjudication. We believe that *the debate is best conceived as a legal one about what the constitutional law is or consists of.* (There also would be an epistemological difference implied by that legal difference.) The problem is that nonoriginalists have not set out, not clearly anyway, an alternative positive legal position—something that merits the label "(NL)."[37]

We suspect that the debate over constitutional interpretation has been significantly hampered by the absence of a clear articulation of the nonoriginalist alternative to (OL). We also suspect that nonoriginalists' near-universal reticence in spelling out (NL) has been motivated by their inability to devise a conception of how the various different kinds of facts that they typically speak of could fit together into one coherent picture of what the constitutional law is. As we pointed out in the Introduction, some originalists believe that nonoriginalists' reticence is well-motivated, that there is an insuperable obstacle to combining the different kinds of facts or considerations that nonoriginalists typically discuss—viz., the combinability

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34. Goldsworthy, *supra* note 29, at 60.

35. *Id.*

36. *See id.* at 60–61 (arguing "[t]here should be little controversy" that if originalism "does not resolve the dispute," nonoriginalist thought may be used, but that it is impermissible for judges to "change a constitution when it has a determinate meaning").

37. A notable and important exception is Ronald Dworkin who consistently presented a clear legal picture of what the law of a community consists of, which includes a picture of what the *constitutional* law of a community consists of, as well as the accompanying epistemological picture. *See generally, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter Dworkin, *Hard Cases*], *reprinted in* TAKING RIGHTS SERIOUSLY 81 (1977).

problem.[38] We will do two things in the remainder of this Article. First, in the next Part, we will formulate (NL) and provide a template of how the facts could line up so that (NL) provides an accurate picture of our constitutional law. The picture we devise is not meant to be a wholly accurate picture of how things actually are. In order to get at the accurate picture, a considerable amount of further legal and constitutional research will need to be carried out. It is our view that what is sorely lacking in the current constitutional dialectic, what seems to be a stumbling block to the right kind of legal and constitutional research, is the lack of a picture or template of how the various kinds of facts could fit together into a single coherent constitutional fact. Our template in the next Part is meant to fill this gap. Second, in Parts III and IV, we will defuse the combinability problem. That problem, or the various versions of that problem we will disambiguate, have nothing on our template. The appearance of the problem arises, we believe, from a number of confusions or mistakes on the part of those who proffer it. We propose to make further progress in articulating the nonoriginalist legal position by exposing these errors.

II. A Template for a Pluralist Nonoriginalist Conception of Constitutional Law

Once again, there is no canonical list of the nonsemantic facts that nonoriginalists deem legitimate inputs for constitutional interpretation. But we can use something quite like Bobbitt's list of modalities as our placeholder and formulate the pluralist nonoriginalist legal and epistemological positions as follows:[39]

(NL) The Constitution or the constitutional law consists of multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.

(NE) In order to figure out what the constitutional law calls for, judges and others should find out multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents;

38. *See infra* Parts III–IV.

39. We have dropped the structural considerations from Bobbitt's list because: (i) we are unsure as to how to formulate a fundamental constitutional norm about structural features in a noncircular way—that is, without mentioning in the formulation of the norm what the Constitution envisions; and (ii) that set of considerations might be better construed as a subset of moral or ethical considerations. Nothing of substance should hang on this, however.

(iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.

And we can further update (NA) as follows:

(NA') In constitutional cases, even when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them in light of multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.

Our central goal is to firm up (NL). A success in that endeavor would bring affirmations of (NE) and (NA') in its wake. Now we turn to articulating a clear picture of the relation that (NL) bears to the constitutional law.

A. Ultimate Constitutional Facts

That relation, as we conceive it, is a little different from the relation that (OL) supposedly bears to the constitutional law, and we believe that a proper understanding of that difference would go a significant way in clarifying what (NL) says and in enhancing its plausibility.

The difference between the two relations can be summed up in the following two figures:

Figure O: The Originalist Picture.

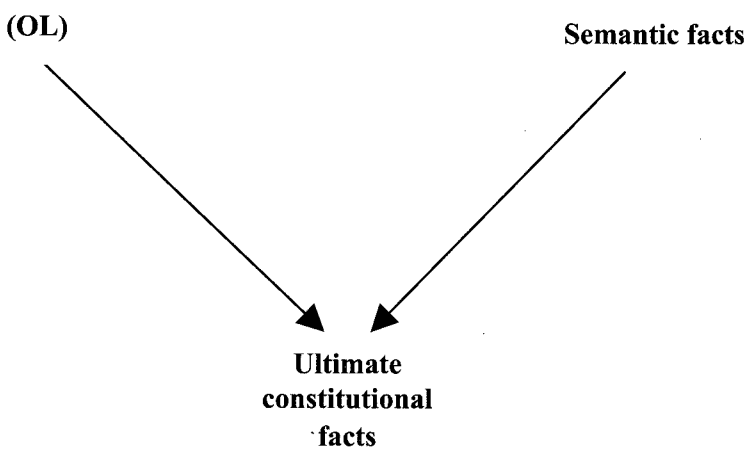
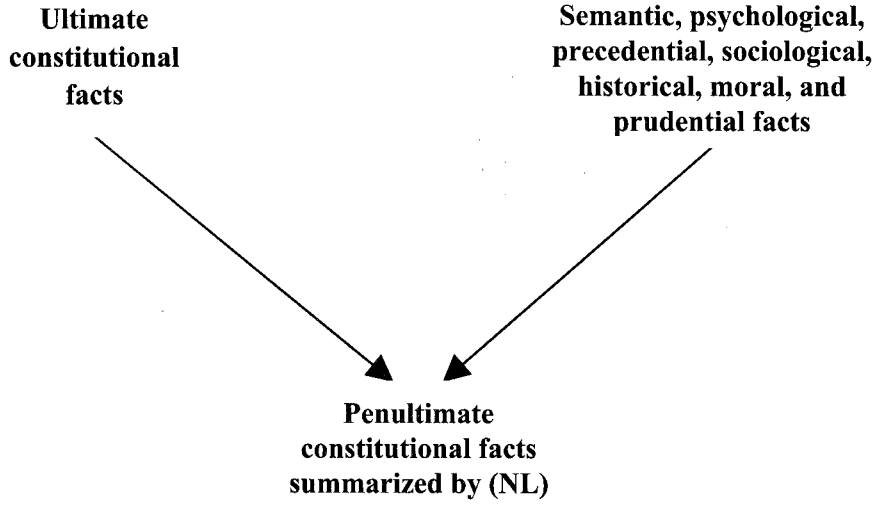


Figure N: The Nonoriginalist Picture.



As Figure O indicates, and as we observed before in subpart I(B), originalists who espouse (OL) typically see that thesis and the meanings of the inscriptions in the constitutional text as jointly determining the most fundamental constitutional facts—i.e., the norms that make up the Constitution. We, on the other hand, take the norms that make up the Constitution, and the nonlegal facts that those norms make legally relevant, as the ultimate determinants of any constitutional law. Unlike (OL) then, (NL) is not an ultimate determinant of the constitutional law. Instead, as Figure N indicates, it can be plausibly construed as a summary of the *pen*ultimate constitutional facts.

Many constitutional theorists and practicing lawyers and judges—not just avowed originalists but others as well—implicitly assume that the norms that are found in the text of the Constitution are the ultimate constitutional facts, and Figure O articulates that assumption. But this is far from a non-optional picture, and nonoriginalist conceptions of constitutional law may require something like what is pictured in Figure N. Our constitutional practice, and the constitutional judgments that we often make, posit fundamental constitutional facts that "lie behind," so to speak, the text of the Constitution and that are represented, implied, evidenced, or presupposed by that text. David Strauss, for example, has argued, with much plausibility in our view, that appeals to judicial precedents are the main driving force in our actual constitutional argumentative practice.[40] But the doctrine of precedent cannot be found in the text of the Constitution. Nor, of course, is the norm or

40. STRAUSS, THE LIVING CONSTITUTION, *supra* note 30, at 34.

doctrine of judicial review. The motivation to posit fundamental constitutional facts, including some versions of the doctrine of precedent and of the doctrine of judicial review, is analogous to the motivation that scientists have to posit fundamental laws of nature to explain and systematize our observations of natural phenomena, or the motivation that moral philosophers have to posit fundamental moral principles to justify and systematize our moral judgments.

Obviously, it would take much legal and constitutional research to figure out which norms exactly we should posit as the most fundamental constitutional facts of the American legal system. Once again, however, providing an accurate list of those facts is not our goal in this paper. Instead, we are concerned with sketching a template of how the pluralist nonoriginalist conception of the constitutional law could be true, as we see a sore lack in the current literature of just such a template. Let us then proffer the following list of the ultimate constitutional norms as illustrative of what the real version of such a list might look like:

(a) In cases of first impression, if the issue in question is explicitly addressed by a part of the text of the Constitution, what is plainly said in the text is controlling.

(b) Even in cases of first impression, the plain meaning of the text of the Constitution should be set aside if it conflicts with what historical evidence clearly indicates were the Founders' shared intentions.

(c) Legal standards that have a long history of acceptance and practice by courts and the society more generally have pro tanto legal legitimacy. Such standards and the practices around them may be viewed as legally recognized depositories of common practical wisdom that have developed incrementally and have been subjected to repeated testing.

(d) What is set up by the Constitution is a system of government in which no single branch of the government or a faction in the society can concentrate upon itself political, social, or military powers. Power corrupts, and the system of government envisioned is one in which mutual checks and balances ward off power-induced corruptions as much and as long as humanly possible.

(e) What the Constitution calls for is an economic system of free trade and competition that enables citizens to vigorously pursue economic well-being free from the constraints of mercantilism and other kinds of economic entrenchments, and to bring about thereby continuously improving collective well-being.

(f) Constraints and costs imposed on individual citizens by laws and institutions must not violate their dignity as

human beings and the widest conception of autonomy that such dignity implies and that is compatible with citizens' mutual exercises of such autonomy.

(g) Compliance with all of the aforementioned fundamental norms must be pursued while maintaining collective survival and security.

Although we ourselves find this list highly plausible, we reiterate that we are not arguing that this very list is accurate of how things actually are. Instead, we are merely asserting here that something like this list could comprise the most fundamental constitutional norms of our system, or a significant part thereof. And if that were so, then it would be quite unsurprising that (NL) is true. These fundamental constitutional facts make legally relevant the various kinds of nonlegal facts that (NL) enumerates, including many nonsemantic facts, and even some normative facts. And if the actual list were anything like our list, then it would not be surprising and we should expect that the penultimate constitutional facts are partly determined by those many kinds of facts, and not just semantic facts as (OL) would have it.

B. Determinants of the Ultimate Constitutional Facts?

As we see it, there are two main objections to the kind of picture of the ultimate constitutional facts and their relation to (NL) that we are sketching. One is the combinability problem that we shall begin to address in the next Part. The other problem, which we address in the balance of this Part, could be formulated as follows: If the ultimate constitutional norms of our legal system are something like (a)–(g) that we outlined in the preceding subpart, what makes those norms the most fundamental constitutional norms? To put it slightly differently, in virtue of what are those norms, whichever they are, the most fundamental constitutional norms? Unless this question can be answered in a satisfactory way, the objection would continue, the relevant norms would be sort of left hanging in the air, and the plausibility of (NL) would be left largely unaccounted for.

Many people that we have conversed with believe that something like this question needs to be addressed. In fact, many contemporary legal theorists, both legal philosophers and jurisprudentially informed constitutional theorists, think that a central goal of the branch of legal philosophy that goes by the name "general jurisprudence" is to furnish answers to this question.[41] The two main schools of jurisprudence in their

41. *See generally, e.g.*, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 74–102 (2001); ANDREI MARMOR, SOCIAL CONVENTIONS 155–75 (2009); SCOTT J. SHAPIRO, LEGALITY 35–50 (2011); John Gardner, *Law as a Leap of Faith*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 19 (Peter Oliver et al. eds., 2000); Leslie Green, *Positivism and Conventionalism*, 12 CANADIAN J.L. & JURIS. 35 (1999). These legal philosophers are followers of Joseph Raz, who in turn traces the problem to Hans Kelsen. *See generally* Joseph Raz, *Kelsen's Theory of the Basic Norm*, 19 AM. J. JURIS. 94 (1974), *reprinted in*

minds are the two main camps in answering this question. Natural law theorists are supposed to have taken the position that it is in virtue of some moral considerations or facts that particular norms or the conjunction of them amount to the ultimate legal norm of a legal system. Legal positivists are supposed to have argued that it is in virtue of some social facts that some particular norms or a conjunction of them is the most fundamental norm of a legal system.

We ourselves believe that the question should be taken up with extreme caution, for the question is an output of some much-tangled strands of contemporary legal philosophical thinking, and we believe that one should be quite suspicious of the thought that there is a genuine, nonspurious question in place here. One of us has elaborated on these themes at some lengths elsewhere,[42] and in this Article we limit ourselves to just three observations that we hope go some distance toward blunting the worry behind the question. First, whatever bind that nonoriginalists are in by not providing an answer to this question is not really any worse than the bind that originalists are in. On first glance, originalists may be seen to do somewhat better than nonoriginalists in addressing this question. For according to them, certain norms are the most fundamental constitutional norms of our legal system in virtue of (OL) and the relevant semantic facts. So they furnish an answer to the relevant question. But any advantage that originalists may claim is quite negligible and short-lived, for as one of us has argued elsewhere, originalists have offered no persuasive story as to what makes it the case that (OL) is the determinant of the most fundamental of our constitutional facts.[43] All of the proposals we are aware of that justify treating (OL) as the primary determinant of the ultimate constitutional facts are defective and susceptible to obvious counterexamples.

Second, we are skeptical that the jurisprudential story that is most popular with legal theorists, both originalists and nonoriginalists—namely, the story that relies on H.L.A. Hart's theory of the nature of law as laid out in his seminal *The Concept of Law*, or more precisely the orthodox understanding of that theory prevalent among contemporary legal philosophers—can furnish the help that is claimed for it. According to the orthodox understanding, the norm or the conjunction of norms that is jointly

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THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 122 (1979); Joseph Raz, *Legal Validity*, 63 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 339 (1977) [hereinafter Raz, *Legal Validity*], *reprinted in* THE AUTHORITY OF LAW, *supra*, at 146. There is also the Dworkinian tributary to the dialectic that yields the problem. *See* Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972) [hereinafter Dworkin, *Model II*], *reprinted as The Model of Rules II*, *in* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 37, at 46.

42. Kevin Toh, *Jurisprudential Theories and First-Order Legal Judgments*, 8 PHIL. COMPASS 457 (2013) [hereinafter Toh, *Jurisprudential Theories*]; Kevin Toh, Legal Philosophy à la Carte (September 2011) (unpublished manuscript) (on file with author) [hereinafter Toh, Legal Philosophy].

43. Berman, *supra* note 18, at 59–68.

accepted and treated as the ultimate criterion of legal validity by the officials of a legal system is actually the most fundamental legal norm—or what Hart calls the "rule of recognition"[44]—of that legal system. This particular reading of Hart's legal theory is what most legal philosophers take away from *The Concept of Law*,[45] and jurisprudentially informed constitutional theorists have followed in the track.[46] The thought prompted by this understanding of Hart's theory then is that the determinants of the ultimate constitutional norms are the psychological and behavioral facts that amount to American legal officials' joint acceptance of those norms, or the conjunction of them, as the ultimate criterion of legal validity.

There are, however, some quite significant problems for such a "Hartian" conception of the determinants of the ultimate constitutional norms. For one thing, the prospects of making a plausible empirical case that a particular set of norms is commonly accepted by the legal officials of the

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44. H.L.A. HART, THE CONCEPT OF LAW 100 (3d ed. 2012).

45. For example, Scott Shapiro, in his recent book *Legality*, says:

> [I]f Hart is correct, and social practices explain how legal systems are possible, then legal reasoning must always be traceable to a social rule of recognition. Arguments about who has authority to do what, what rights individuals have, which legal texts are authoritative, and the proper way to interpret them must ultimately be resolved by reference to the sociological facts of official practice.

SHAPIRO, *supra* note 41, at 102. This typical construal of Hart's theory began with Dworkin's influential articles in the 1960s and 1970s. *See generally* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter Dworkin, *Model I*], *reprinted as The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY, *supra* note 37, at 14; Dworkin, *Model II*, *supra* note 41. While many have come to look askance at other parts of Dworkin's arguments, this take on Hart's theory has pretty much stuck. *See, e.g.*, Raz, *Legal Validity*, *supra* note 41, at 150–51; Eugenio Bulygin, *Sobre La Regla De RECONOCIMIENTO*, *in* DERECHO, FILOSOFÍA Y LENGUAJE: HOMENAJE A AMBROSIO L. GIOJA 31 (1976), *reprinted in* ANÁLISIS LÓGICO Y DERECHO 383, 385–86 (1991); Jules L. Coleman & Brian Leiter, *Legal Positivism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241, 246 (Dennis Patterson ed., 1996); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1222 (2009) [hereinafter Leiter, *Theoretical Disagreement*]; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 166–72 (1982); Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 3, 2003), http://plato.stanford.edu/entries/legal-positivism.

46. See, for example, the articles collected in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew D. Adler & Kenneth Einar Himma eds., 2009). Fallon for one has relied on Hart's theory, as outlined above, to accuse originalists of an "implicit jurisprudential mistake in failing to acknowledge that the foundations of law lie in current practices of acceptance." Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra*, at 47, 64 [hereinafter Fallon, *Precedent*]; *cf.* Fallon, *supra* note 28, at 1213. He explains that "the fact that a [constitutional] provision was once intended or understood to have future binding force cannot suffice to make that provision law today unless a *current* rule or practice of recognition gives that intent or understanding legally controlling force." Fallon, *Precedent*, *supra*, at 52. For an argument for originalism that relies on this orthodox understanding of Hart's theory, see Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 954 (2009). One constitutional theorist has tried to "operationalize" Hart's theory, thus understood, by trying to ascertain exactly which group of people's practices determines our constitutional law. *See generally* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

American legal system as the ultimate criterion of legal validity of their community are rather dim. Of course, some extensive empirical studies would be required to substantiate any position on this issue. But as Dworkin has consistently argued over the years, and as Fallon agrees, at least the initial overwhelming appearance is that the American constitutional practice is marked by controversies and disagreements about what the constitutional law consists of, and not by any marked agreement or consensus.[47] Even if some broad agreement or consensus could be discerned, the agreement or consensus would not be sufficiently thorough or fine-grained to yield a set of complex norms of the sort that we would need.[48]

More importantly, as Dworkin has also pointed out, and as the two of us have argued separately elsewhere, the Hartian approach taken here matches neither our phenomenology when we make legal or constitutional judgments, nor the observed sociology of our practice of making legal and constitutional judgments.[49] The fact is that the lack of official consensus about the ultimate

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47. *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 37, at 1–86, 355–99; Dworkin, *Model I*, *supra* note 45; Fallon, *supra* note 28, at 1231–37.

48. *See, e.g.*, Kent Greenawalt, *The Rule of Recognition and the Constitution*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 46, at 2, 2–3, 42–43 (applying Hart's theory to the United States and questioning his notion that the ultimate rule of recognition will allow for clear identification of what counts as law and easy prediction of legal outcomes). While agreeing with Dworkin's initial point that mature and thriving legal systems may not include official consensuses about the ultimate criteria of legal validity, Fallon has recently held out hope that some further psychological facts, namely the facts about judges' broadly shared dispositions about how to decide cases, could be relied upon to identify the rule of recognition of the American legal system:

> [R]eferences to the rule or rules of recognition mark the existence of broadly shared, often tacit understandings on the part of those at the center of constitutional practice (most notably Supreme Court Justices and judges, but also other[] [officials] . . .) about how to "go on" in ways that will be acknowledged by others as appropriate or correct.

Fallon, *Precedent*, *supra* note 46, at 56. We do not, however, think that this is a very promising way to go. The fact is that the totality of a population's dispositions is limited and finite, whereas there are an unlimited number of potential legal controversies, including controversies about the ultimate determinants of the constitutional law, in which judges would have to make decisions that outstrip the existing dispositions of the relevant population. In fact, appealing to judges' dispositions does not appear to settle the debate about what the constitutional law consists of. Fallon appeals to Wittgenstein's celebrated discussion of rule-following to buttress his position just described. *Id.* at 56 & n.46. In one of the most influential commentaries on Wittgenstein's discussion of rule-following, however, Saul Kripke has forcefully argued against the view that the facts of a person or population's psychological dispositions can be appealed to to distinguish correct extrapolations of a rule from incorrect ones. *See* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982). And Kripke's reasoning is partly based on the point that we have just made—i.e., that the totality of a person or population's disposition is finite, whereas there is no limit to the applicability of rules. *See id.* at 22–37.

49. *See* Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 46, at 269; Kevin Toh, *The Predication Thesis and a New Problem about Persistent Fundamental Legal Controversies*, 22 UTILITAS 331 (2010) [hereinafter Toh, *The Predication Thesis*]. Although we agree on this broad point, neither of us agrees with all the details of the other's exposition of this point. One of us has also argued extensively elsewhere that the supposedly Hartian approach that we have outlined in the text is not really Hart's, and that Hart's real position is quite compatible with both the observation that a legal system may be marked with controversies about the ultimate

criterion of legal validity does not detract from judges' or anyone else's sense of entitlement to make judgments about what the constitutional law consists of that they deem correct. For example, Justice Scalia knows that there is no common acceptance of any originalist standard of constitutional interpretation,[50] and in any case would not abandon his commitment to originalism even if a thorough sociological study were to show that there is no such common acceptance. And even if a consensus among the officials about the ultimate criterion of legal validity were to exist in our community, judges and others would not feel that the question of what the ultimate criterion of legal validity in our legal system is is a closed question. We would not think that a judge or anyone else is making a legal or constitutional mistake merely because he is flouting the prevailing consensus about the ultimate criterion of legal validity.[51] Simply put, we do not think, and our practice does not display our commitment to the idea, that the real ultimate determinant of our constitutional law is the official consensus or agreement.

Third, and most important, in our opinion, there is no happy or unproblematic version of the question about the determinants of the ultimate constitutional norms. Let us explain.[52] The question, once again, could be formulated as:

(Q0) What makes it the case that some norms are the ultimate constitutional norms of our legal system?

Or, put another way:

(Q0') In virtue of what are certain norms the ultimate constitutional norms of our legal system?

What exactly is being asked by these questions? There are multiple possibilities, none quite satisfactory. The question could be conceived as an

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criteria of legal validity among its officials and members, and the phenomenological cum sociological point about our legal and constitutional judgments. *See* Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 LEGAL THEORY 75 (2005); Toh, *The Predication Thesis*, *supra*; Toh, Legal Philosophy, *supra* note 42. Thus, the quotation marks around the term "Hartian" when used in the text above.

50. *See* Scalia, *supra* note 3, at 852 (observing that "originalism is not, and had perhaps never been, the sole method of constitutional exegesis"); SCALIA, INTERPRETATION, *supra* note 4, at 38 ("The ascendant school of constitutional interpretation affirms the existence of [']The Living Constitution['], a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law.").

51. Brian Leiter has asserted that a judge who does so would be making a mistake—viz., a jurisprudential mistake stemming from his jurisprudential ignorance. *See* Leiter, *Theoretical Disagreement*, *supra* note 45. We do not share this diagnosis.

52. The way that we defuse the relevant question in what follows is the way we believe that we should defuse what Shapiro calls "the Possibility Puzzle," which is the motivating puzzle of his arguments in *Legality*. *See generally* SHAPIRO, *supra* note 41, at 35–50, 79–117.

empirical one about etiology and could be formulated as one of the following:

(Q1) What caused a particular set of norms to come to be treated as the ultimate constitutional norms of the American legal system?

(Q1') What causes a particular set of norms to be treated as the ultimate constitutional norms of the American legal system?

But this cannot really be the crucial question. There is nothing really puzzling about such empirical questions. We, or the specialists among us, should be able to gather the pertinent historical, anthropological, sociological, and psychological evidence to answer such questions.

Alternatively, the question could be conceived as a particular metaphysical question as follows:

(Q2) What facts constitute or amount to our community's treating a particular set of norms as the ultimate constitutional norms of the American legal system?

Here, there is a philosophical problem, and it is actually to this question that Hart provided an answer in terms of officials' shared acceptance of a set of norms. The mistake that the orthodox understanding of Hart's legal theory makes is to conflate this question with a slightly different question that (Q0) or (Q0') could be construed as raising. Notice that as an answer to (Q2), as we believe that it was meant to be, Hart's proposal is a cogent and forceful answer that has hardly been bettered.[53] And it is not really vulnerable to the Dworkinian worries that we outlined above. It is only when (Q0) or (Q0') is construed as a question about the determinants of our ultimate constitutional norms, not as a question about the determinants of the psychological phenomenon of treating certain norms as the ultimate constitutional norms, that Hart's proposal is vulnerable to those worries. This is a clear indication that (Q2) is not really the right version of the relevant question. And if,

53. In case the reader thinks that there is really no difference between (Q0) and (Q0') on the one hand and (Q2) on the other, think of the moral analogues of these several questions. The difference between the questions is much more obvious in the moral context, and that enables us to see the distinction more clearly in the legal context as well. It may be argued, however, that in the legal context, the whole *raison d'être* of legal positivism is to collapse the distinction between these two sets of issues and questions. We are suspicious of that line of thinking, however. Hart is the paradigmatic legal positivist of recent times, and he sought to clearly mark the distinction between the two sets of issues and questions by his famous distinction between internal and external legal statements. *See* HART, *supra* note 44, at vi, 88–89, 102–05, 291; *see also* Eugenio Bulygin, *Norms, Normative Propositions, and Legal Statements*, in 3 CONTEMPORARY PHILOSOPHY: A NEW SURVEY 127, 136 (Guttorm Fløistad ed., 1982). Unfortunately, that distinction has been all but overlooked in recent years, much to the detriment of recent legal philosophical thinking. One of us has argued against what he considers inadequate arguments by Joseph Raz for overlooking the distinction. *See* Kevin Toh, *Raz on Detachment, Acceptance and Describability*, 27 OXFORD J. LEGAL STUD. 403 (2007).

contrary to what we have just argued, the relevant question were (Q2), then we have a ready answer in Hart's proposal.

Perhaps the relevant question is not an empirical or metaphysical question of the preceding sorts, but is instead a first-order *legal* question. In that case, it could be formulated as:

(Q3) What legally validates certain norms as the ultimate constitutional norms of the American legal system?

But notice that if we take seriously the functional role of the norms like (a)–(g) as the ultimate constitutional norms, then (Q3) cannot be taken as a genuine, nonspurious question. Such norms are supposed to be the ultimate legal norms in the American legal system, and that means that there cannot be a set of facts or considerations that *legally* validates those norms as the ultimate constitutional norms of the American legal system.[54]

Finally, the question could be construed as one of the following moral or all-things-considered normative questions:

(Q4) What makes it the case that we have reasons to comply with the ultimate constitutional norms of the American legal system?

(Q5) What makes it the case that we have duties or obligations to comply with the ultimate constitutional norms of the American legal system?

Despite the fact that many legal philosophers have assumed that an adequate conception of the ultimate norms of legal systems must answer such normative questions,[55] there is no good ground for the presumption that ultimate legal norms must be justifiable, morally or all things considered, for them to qualify as the ultimate legal norms.[56] It follows that our conception of certain norms as the ultimate legal norms of the American legal system is not held hostage by the possibility of providing satisfactory answers to (Q4) or (Q5).

It follows that none of (Q1)–(Q5) could be thought the right construal of the crucial question we began with. And once we exclude these versions of the question, it is not clear that there is any genuine, nonspurious question

54. On this point, as applied to Hartian rules of recognition, Raz, for one, has vacillated. Sometimes, he seems to say that a rule of recognition is legally validated by its being accepted and followed by legal officials as the ultimate legal norm; at others, he asserts that it is a mistake to talk about the legal validity of a rule of recognition. *Compare, e.g.*, Raz, *Legal Validity*, *supra* note 41, at 150–51, *with* Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment*, 4 LEGAL THEORY 1 (1998), *reprinted in* BETWEEN AUTHORITY AND INTERPRETATION 373, 381 (2009).

55. *See, e.g.*, JOSEPH RAZ, PRACTICAL REASONS AND NORMS 49–58 (Princeton Univ. Press 1990) (1975); Dworkin, *Model II*, *supra* note 41, at 48–58; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 171 (1982).

56. For a set of compelling arguments to this effect, see David Enoch, *Reason-Giving and the Law*, *in* 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW 1 (2011).

left to be asked. Social scientists can worry about (Q1), legal philosophers about (Q2), lawyers and judges among us about (Q3), and moral and political philosophers about (Q4) and (Q5). But there is no further question of similar shape or wording, as far as we can determine, that we need to have answered in order for us to deem it a strong and nonproblematic possibility that there is some set of norms such as (a)–(g) that are the ultimate constitutional norms of the American legal system, and that (NL) is an accurate summary of the penultimate constitutional facts that such ultimate constitutional norms determine along with the various kinds of nonlegal facts that they make legally relevant. Of course, as Figure O in subpart A of this Part indicates, originalists believe that there are determinants of the ultimate constitutional facts—namely, (OL) and the semantic facts that (OL) makes relevant. But the important point here is that the lack of any such determining facts for the ultimate constitutional facts is not worrisome. It is perfectly sensible to think that the ultimate determinants of our constitutional facts are the ultimate constitutional norms and not something else that determines those ultimate constitutional facts.[57]

Some of our readers may retain a nagging sense that there is some genuine or nonspurious question which is a version of (Q0) and (Q0'), and which is not covered by any of our (Q1)–(Q5). To such readers, we simply issue a challenge: Try to come up with a formulation of a question that we must answer with respect to a set of purported ultimate legal norms of a legal system—a question which is not covered by our (Q1)–(Q5). Our current diagnosis is that any nagging sense results from a conflation of the several questions that we have disambiguated. But we would be happy to be surprised.

III. The Combinability Problem

No nonoriginalist says that meanings of constitutional inscriptions are irrelevant to constitutional interpretation. Instead, nonoriginalists argue that facts or considerations other than such semantic facts are legitimate inputs

57. Here, our position is analogous to that of Paul Horwich, who has argued that the ultimate epistemic norms, such as that of *modus ponens*, are the ultimate determinants of epistemic justification and that it is a mistake to seek further justification of such norms. *See generally* PAUL HORWICH, *Meaning Constitution and Epistemic Rationality*, *in* REFLECTIONS ON MEANING 134 (2005) [hereinafter HORWICH, *Meaning Constitution*]; Paul Horwich, *Ungrounded Reason*, 105 J. PHIL. 453 (2008), *reprinted in* TRUTH-MEANING-REALITY 197 (2010). Horwich's arguments are reactions to some philosophers who have argued that fundamental epistemic norms (e.g., the norm of *modus ponens*) are justified by the rules that are constitutive of certain concepts (e.g., the rules that are constitutive of the logical connective "if . . . then . . ."). *See, e.g.*, CHRISTOPHER PEACOCKE, A STUDY OF CONCEPTS (1992); Paul Boghossian, *How Are Objective Epistemic Reasons Possible?*, 106 PHIL. STUD. 1 (2001); Paul Boghossian, *Knowledge of Logic*, *in* NEW ESSAYS ON THE A PRIORI 229 (Paul Boghossian & Christopher Peacocke eds., 2000). Such proposals for "semantogenetic justification," as Horwich dubs them, HORWICH, *Meaning Constitution*, *supra*, at 136, of our fundamental epistemic norms bear at least some superficial resemblance to the originalist picture summed up in Figure O.

for constitutional interpretation. And as the above-mentioned lists of Bobbitt and Fallon indicate, nonoriginalists typically include psychological, historical, structural, doctrinal, and normative considerations among the nonsemantic considerations that are legitimate grounds of constitutional interpretation.[58] Some have argued that such a "pluralist" approach to constitutional interpretation is inherently unstable, if not downright incoherent or impossible, because it is difficult or even impossible to combine different types of considerations. It is to this "combinability problem," or the various versions it could take, that we now turn. This is the second of the two main objections to our picture of pluralistic nonoriginalism that we address in this Article.

No legal theorist has been as forthright and unqualified in his assertion of the combinability problem as Larry Alexander. In the most extensive of his discussions of this problem that we are aware of, and speaking of legal interpretation in general, Alexander says:

> There are some theories of interpretation that not only require a combination of different empirical inquiries or of empirical and moral inquiries, but also require that the results of those different inquiries be "blended" to arrive at the authoritative meaning of the legal norm. For example, some theorists argue that the meaning of a statute is a product of its text, its authorial intentions, its past judicial interpretations, and what is good and just. Moreover, these different factors are not arranged in some clear lexical order—with text constraining intentions and both constrained by justice, for example—but rather are factors to be mixed together in some interpretive stew.
>
> How is the legal interpreter to ascertain the meaning rendered up by such a nonstructured combination of different inquiries and types of reasoning? It is here that some special faculty, the ability to engage in what some call "practical reason," enters the picture. We grasp the meaning of a posited legal norm through practical reasoning in light of text, authorial intentions, history, and morality. . . .
>
> I have written elsewhere on why I think the claims on behalf of such practical reason are hogwash. No one—not even lawyers—can meaningfully "combine" fact and value, or facts of different types, except lexically in the manner I described above. Any non-lexical "combining" of text and intentions, text and justice, and so forth is just incoherent, like combining *pi*, green, and the Civil War. There is no process of reasoning that can derive meaning from such combinations.[59]

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58. *See supra* notes 29–31 and accompanying text.

59. Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 521 (1998) (footnotes omitted).

This is strong stuff, and we suspect that not all legal theorists who believe that nonoriginalists suffer from a combinability problem will want to sign on to every aspect of Alexander's exposition. But the suspicion that there is such a combinability problem seems quite widespread. Fallon, who is a nonoriginalist, takes the problem seriously enough to consider it one of the most important and pressing problems in constitutional law[60] and to propose a solution to it in a long article. Listing the different kinds of constitutional argument that we have already listed above in subpart I(C), Fallon says that the problem, which he calls "the commensurability problem," "is to show how arguments of all of these various kinds fit together in a single, coherent constitutional calculus," and he says that difficult constitutional cases cannot be resolved without solving the problem.[61]

Despite these statements of the problem, however, we are not at all sure about its nature and contours. The following subparts of this Part and the first subpart of Part IV try out different interpretations of the problem and try to settle on a version that makes best sense of what constitutional theorists like Alexander and Fallon may be getting at.

A. Moral–Political and Epistemological Versions

Let us first quickly set aside two versions of the combinability problem that plainly should not bother or detain us for long. The first of the two is the version that is familiar as an objection to Bobbitt's work on constitutional interpretation. When Bobbitt introduced his six modalities of constitutional argument in his 1982 book, *Constitutional Fate*, many critics took issue with his failure to provide any meta-rule or other guidance regarding what judges should do to address any legal indeterminacies that would obtain when the modalities point in different directions.[62] This is a supposed defect that Bobbitt claimed as a virtue in his 1991 follow-up volume, *Constitutional Interpretation*.[63] In that later work, he argued that a choice among the outcomes that each modality "legitimates" can only be effectuated by a "recursion to conscience," and that the need for conscientious choice, far

60. Fallon, *supra* note 28, at 1191.

61. *Id.* at 1189–92; *see also, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1787 (1997) ("Because multiple sources will sometimes give rise to conflicting and incommensurate arguments, . . . an eclectic theory would appear to require some metaprinciple that mediates among conflicts between different kinds of arguments."); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 295 (2005) (criticizing Fallon's inclusion of precedent in his interpretive method because the consideration of multiple sources of constitutional meaning creates the need for a system of rules about the priority of the various modalities).

62. *See, e.g.*, Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107, 1111 (1993) ("Despite the clear power of *Constitutional Fate*, critics identified [some] substantial shortcomings. . . . [P]erhaps mo[st] troubling, *Constitutional Fate* presented no methodology for decisionmaking when conflicts between the various modes of argument arise. It was, therefore, massively indeterminate.").

63. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 27, at 31–42.

from undermining the moral justifiability of a system of constitutional governance complete with judicial review, supplies the requisite justification.[64] As Bobbitt put it:

> The US Constitution engages our moral sensibilities by the clash of its interpretive modalities, which require the moral instance of our judgment. The justice of the system lies in the extent to which it is able to confer legitimacy on the right moral actions of its deciders. It is thus the very fact that legitimate rationales *do* conflict that enables justice to be done.[65]

Many readers deemed this an inadequate solution and argued that judicial choice among practice-legitimated outcomes, unconstrained by law, exacerbates countermajoritarian objections to judicial review and therefore fails to provide moral justification for the practice.[66]

For our purposes, the important thing to recognize about this particular running of the debate—which we have, of course, ruthlessly simplified—is that those who insisted that Bobbitt's multimodal account required a meta-rule did not charge that combining or integrating the diverse modalities is impossible. Instead, they charged that insofar as the independent modalities, or their outputs, necessitated the exercise of conscientious choice, they deliver a practice of judicial review that fails some test of political justice.[67] We ourselves are not moved by that particular objection. In broad outline, we believe that the standard responses to the countermajoritarian objection to judicial review[68] are adequate to justify the American practice of it, even to the extent that unelected judges appeal to many kinds of considerations and do not rely on a meta-rule that would adjudicate among them. Whether we are right about that or not, the combinability problem that interests us for now and that Larry Alexander's arguments invoke is one that charges pluralism with incoherence or a like defect, and not with violating claimed principles of political morality.

Another version of the combinability problem that can be rather quickly dispatched is the one that construes it as an epistemological problem. Fallon's talk of the need for the different types of constitutional arguments to fit together into a single calculus possibly indicates his view that there is a problem of combining different types of evidence in investigations aimed at

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64. *Id.* at 184.

65. *Id.* at 170.

66. *See, e.g.*, H. Jefferson Powell, *Constitutional Investigations*, 72 TEXAS L. REV. 1731, 1741 (1994) (identifying without endorsing this line of criticism).

67. *Id.*

68. *See generally, e.g.*, Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981), *reprinted in* A MATTER OF PRINCIPLE 33 (1985); Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992), *reprinted as What the Constitution Says*, *in* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 72 (1996). And for Bobbitt's own response, see Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEXAS L. REV. 1869 (1994).

gaining access to constitutional facts.[69] And some of what Alexander says in the long passage we quoted above[70] suggests that he is invoking the same epistemological problem, although in his correspondence with us he has explicitly disavowed this version of the combinability problem. In any case, the problem, as so construed, lacks substance. Paleontologists, for example, have no problem combining different types of evidence—the shape and size of the fossils, the information from carbon dating, the surrounding geological formations, accumulated evidence about the location's environment in different time periods, well-confirmed zoological theories about the present-day organisms that might have descended from older organisms, etc.—in determining the nature of the organism whose fossils they are studying. And physicians have no problem combining different types of evidence—the patient's particular symptoms, the past treatment history, the patient's travel history, prevailing medical theories about various maladies, etc.—when they diagnose a patient. In our attempts to find out what is the case, we routinely seek hypotheses that would best explain many different kinds of available evidence, and we see no reason to think that such inference patterns are inappropriate or especially problematic in legal or constitutional investigations.

A judge who really is unable to proceed in the absence of a decision procedure or calculus that sets out how the different types of evidence are to be combined would be a victim of a serious cognitive impairment. The decision procedures of the sort that legal theorists like Alexander and Fallon could be read as hankering after are not only an epistemological chimera but also wholly unnecessary for conducting our epistemic lives. If anything, the thought that such procedures are necessary would hamper our inquiries. Our epistemic lives can be difficult enough without putting artificial and unnecessary straitjackets on our thinking, and the decision procedures in question would be such straitjackets.

B. The Metaphysical Version—I

As the third paragraph of the long quoted passage at the beginning of this Part indicates, Alexander seems to think that there is a general metaphysical problem with combining facts and norms, or facts of different varieties. In the "elsewhere" that the first sentence of that paragraph refers to, after noticing that some legal theorists conceive statutory interpretation as a form of practical reasoning that takes into account normative considerations, Alexander helpfully distinguishes the metaphysical (or "ontological" in his terminology) issue from the epistemological one.[71] He concentrates on the former, and asks:

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69. *See* Fallon, *supra* note 28, at 1189–92.

70. *See supra* text accompanying note 59.

71. *See* Larry Alexander, *Practical Reason and Statutory Interpretation*, 12 LAW & PHIL. 319 (1993).

> [M]y second question . . . [is] how normative and factual are supposed to blend. If the practical reason approach to statutes is supposed to tell us what statutes "are", then why isn't the metaphysical mixing of norm and fact—of, say, what is just and what someone said or thought at a particular time or place—incomprehensible, somewhat like mixing "pi, green, and the Civil War"?[72]

Alexander's metaphysical objection here is no easier to understand than the epistemological version of the combinability problem, and his explanation of the objection in the passages subsequent to the just-quoted passage, and his citations, indicate that the objection most likely stems from incomplete and wayward understandings of some philosophical issues. But the metaphysical version is the one that Alexander has reaffirmed in his communication with us, and for this reason we dwell on it at a greater length.

Before we get to the philosophical issues just mentioned, notice that the kind of blending of the factual and the normative that Alexander deems impossible and incomprehensible is very much unremarkable and commonplace. For example, the fact that a particular thing is a *weed* consists of the fact that the thing has a biological makeup of a plant and the fact that it is undesirable in gardens. Analogous things can be said about the fact that some person is *cowardly*,[73] the fact that some musical performance is *pedestrian*, etc. Far from treating combinations of facts and norms as problematic, there is a minor cottage industry in contemporary Anglo-American philosophy of exploring the facts or statuses that are partly factual and partly normative, and the concepts—the so-called *thick concepts*—which we deploy to think and talk about such facts and statuses. In fact, some philosophers have gone to some lengths to deny that the factual and normative components of the relevant facts are separable or detachable from each other, not that they cannot be combined.[74] If, as Alexander asserts, blending of norms and facts were impossible and incomprehensible, then much of our social world, including our moral and legal worlds, would be ill-founded and incomprehensible.

Alexander's talk of "lexical order[ing]"[75] may indicate his willingness to countenance what could be described as "structured" blended facts—i.e., the facts in which the different constituents, both normative and non-normative, are cleanly ordered in particular ways. Perhaps the worry then is that the kind of blended facts that pluralist nonoriginalism envisions are a lot

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72. *Id.* at 322.

73. BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 140–41 (1985).

74. *See, e.g.*, *id.* at 132–55; John McDowell, *Non-Cognitivism and Rule-Following*, *in* WITTGENSTEIN: TO FOLLOW A RULE 141 (Steven H. Holtzman & Christopher M. Leich eds., 1981). For a proposal to construe our legal concepts as thick concepts, see David Enoch & Kevin Toh, Legal *as a Thick Concept*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 257 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

75. Alexander, *supra* note 59.

"messier." We are not sure that all of the blended facts that we discussed above have the kind of neatness that would be provided by a lexical ordering. But there are even clearer examples to undercut this particular strand of the worry. Think, for example, of what it takes for an organism to be *healthy*. To be healthy, an organism must have a number of different properties many of which are "contingently clustered," to borrow the philosopher of science Richard Boyd's terminology.[76] These properties are likely to include bodily integrity, resistance to diseases, a certain level of psychic well-being, disposition to longevity, ability to reproduce, etc. Such properties are contingently clustered in the sense that in at least certain conditions, they tend to co-occur in nature because the existence of some of the properties, through various causal mechanisms, reinforces the existence of other properties in the set. Boyd calls such clusters of properties "homeostatic cluster[s]" and argues that they are ubiquitous in nature.[77] Think of what it takes for a piece of land to be *arable*, what it takes for an animal to be *domesticated*, what it takes for a tune to be *catchy* or *hooky*, etc. All of these higher-order properties, we conjecture, could be conceived as homeostatic clusters in Boyd's sense. At least some of the properties in any such cluster would be unnecessary for the existence of the cluster; and it would be unclear which collections of the relevant properties would be sufficient for the existence of the cluster. There appears then to be no problem with "messy" blended facts that do not consist of any neat necessary and sufficient constituent facts.

It may also be worth pointing out that the particular example that Alexander has repeatedly brought up—namely, the allegedly impossible and nonsensical blending of pi, green, and the Civil War—is not a problem. It is quite easy to think of such a blending. Imagine a Civil War monument that consists of a sculpture in the middle of a circular green field. Here, we would have a fact that unproblematically combines pi, green, and the Civil War. Such a Civil War monument may not be actual, but it certainly is metaphysically possible.[78]

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76. Richard N. Boyd, *How to Be a Moral Realist*, *in* ESSAYS ON MORAL REALISM 181, 197–98 (Geoffrey Sayre-McCord ed., 1988).

77. *Id.* at 196–97.

78. Sometimes, Alexander has extended his list and talked about the supposed impossibility of combining pi, green, the Civil War, and the categorical imperative. LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 214 (2008). We can then imagine a monument of the above description that was built using labor practices that complied with the categorical imperative. With or without the categorical imperative, we anticipate that some readers will feel that these proposed counterexamples to Alexander's slogan are a trick and that they do not really threaten the particular manner in which pi, green, and the Civil War—and the varied factual and normative considerations that pluralism invokes—are supposed to be uncombinable. That is certainly possible. We hope, then, that our proposed counterexamples will spur Alexander or like-minded critics to explicate the nature of alleged uncombinability more precisely.

C. *The Metaphysical Version—II*

Let us now turn to the philosophical themes that seem to be at least partly motivating or buttressing Alexander's line of thinking. We believe that we can further undermine that line by exposing what we suspect are confusions about these themes. Right after the passage we quoted at the beginning of the last subpart, Alexander says:

> At least since Hume, philosophers have been wary of ontologically mixing the normative and the factual. And some have been skeptical about the existence of any normative ontological realm that is not completely reducible to the factual. For instance, John Mackie thought that moral realism requires "queer" metaphysical entities. Even if we can give a satisfactory non-reductionist account of moral ontology, however, are not the moral–factual blends that ontological practical reason refers to vastly more queer?[79]

A lot is tangled in this short passage, but once untangled the philosophical issues that Alexander is referring to do not in any way question the status of blended facts the way that he appears to be thinking.

To begin, Alexander is quite right that J.L. Mackie, in the introductory chapter of his book *Ethics: Inventing Right and Wrong*, questioned the reality of moral facts that our moral discourse posits, and called them metaphysically "queer," because our cognition of them is supposed to have noncontingent influence on our wills and action.[80] Mackie averred that no other facts we posit in our explanations of the world are like that and that we should be extremely wary of positing such sui generis facts. There are three standard responses to Mackie's queerness argument in the philosophical literature: (i) some have argued that moral facts do not actually have the kind of noncontingent connection to our will and action, and that they are just natural facts quite like other kinds of facts that we posit in our natural and social sciences, which have only contingent connections to our will and action;[81] (ii) some have agreed with Mackie that moral facts, if they existed, would be queer, but that our moral discourse is better conceived as a non-fact-positing discourse like our imperatival discourse;[82] and (iii) some have argued that moral facts do have the kind of noncontingent sway on our wills

79. Alexander, *supra* note 71, at 322 (citations omitted).

80. *See* J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 15–49 (1977).

81. *See generally, e.g.*, FRANK JACKSON, FROM METAPHYSICS TO ETHICS 113–38 (1998); Boyd, *supra* note 76; Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986); Nicholas L. Sturgeon, *Moral Explanations*, *in* MORALITY, REASON AND TRUTH 49 (David Copp & David Zimmerman eds., 1984).

82. *See generally, e.g.*, A.J. AYER, LANGUAGE, TRUTH AND LOGIC 104–26 (Penguin Books 2001) (1936); R.M. HARE, THE LANGUAGE OF MORALS (1952); Charles Leslie Stevenson, *The Emotive Meaning of Ethical Terms*, 46 MIND 14 (1937). These are works by the authors that Alexander cites in his footnote 7, which is attached to the second of the sentences quoted in the text. Alexander, *supra* note 71, at 322 n.7.

and actions, but still that we should not refrain from positing them for they are nonoptional for our moral thinking and discourse, and further that there are plenty of other seemingly strange facts we posit in our thinking, such as sets in mathematical thinking, possible worlds in counterfactual thinking, and the myriad of astounders we posit in quantum mechanics.[83]

An important point here is that even if moral facts were problematically queer, blended facts would be no more problematically queer than the simple unblended moral facts. What makes moral facts queer, according to Mackie, is that they have noncontingent influence on our wills and action. Blended facts are not different in this regard. The fact that a particular action would be cowardly—i.e., a blended fact—generates reasons for us to refrain from engaging in such an action. This noncontingent relation between a blended fact and the reasons we have to act in a particular way could be considered queer, but it is no queerer than the similar relation between, say, the fact that a particular action would be wrong—i.e., a simple, nonblended normative fact—and the fact that we ought not to engage in that action. A second, more important point is that we cannot merely stop with the conclusion that moral facts are queer and that we ought not to posit them in our moral thinking unless we cease moral thinking altogether. We need to opt for one of the standard options, or some other option that has so far been overlooked by philosophers, or at least think that an option, whichever it is, is satisfactory. Mackie himself, later in his book, flirts with the second "nonfactualist" or "noncognitivist" option.[84] Since Alexander does not refrain from moral thought and talk,[85] he supposedly thinks that one of the options, even if he himself has not identified it, is available. But if we opted for one of the options, then with that option, moral facts, or normative facts more generally, would not be problematically queer. Moreover, since, as we have observed already, blended facts are no queerer than simple normative facts, blended facts would not be problematically queer either. In sum, Mackie and similar-minded philosophers give no support to Alexander's claim that blended facts are metaphysically problematic and that philosophers have been treating them as such. Arguably, Alexander would be entitled to appeal to Mackie and similar-minded philosophers to substantiate his claim if he himself refrained from normative thought and talk, but that is not the case.

Alexander also thinks that Hume can be a source for his metaphysical qualms about blended facts. We can think of two philosophical themes that Hume is often associated with that Alexander may be thinking of. The first is the so-called Hume's law, according to which a normative conclusion

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83. *See generally, e.g.*, DAVID ENOCH, TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM (2011); RUSS SHAFER-LANDAU, MORAL REALISM: A DEFENCE (2007); RALPH WEDGWOOD, THE NATURE OF NORMATIVITY (2007).

84. MACKIE, *supra* note 80, at 50–63.

85. *See, e.g.*, Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006).

cannot be inferred from purely factual premises alone.[86] Notice that in a practical syllogism like the following:

(6) One ought to maximize prospects of happiness.

(7) Among the available options, φ-ing would maximize the prospect of happiness.

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(8) One ought to φ.

a normative conclusion (8) is inferred from a normative premise (6) and a descriptive or factual premise (7). Hume's law says that derivations of normative conclusions like (8) would be illicit if the set of premises contained only descriptive or factual premises. Whether this is right, or whether it should really be attributed to Hume, is immaterial. What should be noticed is that there is nothing here about the problematic nature of blended facts. In fact, here, we can think of (8) as representing a blended fact that consists of the normative fact represented by (6) and the descriptive fact represented by (7).

A second Humean theme that we can think of has to do with Hume's emphasis on the distinction between cognitive psychological attitudes like belief on the one hand and conative psychological attitudes like desire on the other.[87] In contemporary terminology, these two sets of attitudes are "modally" separable.[88] A belief that P differs from a desire that P in that the two react differently to an indication that not-P is the case. Upon learning that not-P, a person who has a belief that P would abandon that belief, whereas a person who has a desire that P would not. This and other such modal differences stem from the very natures of belief and of desire, or of cognitive and conative attitudes more generally. A belief that P would not be abandoned in reaction to a clear indication that not-P is not really a belief, or is at least a very defective belief. Now, according to noncognitivist conceptions of moral and normative discourses we have already mentioned, which some have traced to Hume,[89] our moral and normative judgments belong to the category of conative or noncognitive psychological attitudes. If we were to adopt this view and combine it with the Humean modal separability point, then it would follow that the kinds of psychological

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86. *See generally, e.g.*, ARTHUR N. PRIOR, LOGIC AND THE BASIS OF ETHICS (1949); Nicholas L. Sturgeon, *Moral Skepticism and Moral Naturalism in Hume's* Treatise, 27 HUME STUD. 3 (2001).

87. *See generally, e.g.*, MICHAEL SMITH, THE MORAL PROBLEM 92–129 (1994).

88. *Id.* at 119. The senses of "modal" and its cognates used here are different from the senses that Bobbitt and his followers use when they speak of different modalities of constitutional interpretation. Or we believe that that is the case most of the time. For Bobbitt's discussion of what he means by "modality" see BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 27, at 11–22.

89. *See* SIMON BLACKBURN, ESSAYS IN QUASI-REALISM 5 (1993); RICHARD B. BRANDT, ETHICAL THEORY 205 (1959); J.L. MACKIE, HUME'S MORAL THEORY 52 (1980).

attitudes that moral and normative judgments are would be quite different, viz., modally separable, from the kinds of psychological attitudes that purely descriptive or factual judgments are. Perhaps what Alexander has in mind is this modal separability point combined with the noncognitivist conception of normative judgments. But once again, these philosophical themes do not help Alexander's case against blended facts. If noncognitivism is right, then in making normative judgments, we are not positing any facts but expressing our conative or noncognitive attitudes. And in making what could be called "blended judgments"—i.e., judgments that deploy thick concepts like "weed," "courageous," etc.—we are describing some prosaic facts—e.g., that thing is a plant, that person fears yet confronts danger—and simultaneously expressing some conative attitudes—e.g., boo to that thing growing in the garden, hurray to that person. There is nothing in Hume or Humean thinking that makes such combinations of cognitive and conative attitudes, or any verbal manifestations of them, problematic or illicit. And if constitutional interpretation is a type of judgment that is partly factual and partly normative, we have the option of following the just-outlined Humean-noncognitivist line of analyzing them as combinations of cognitive and conative psychological attitudes.[90]

Simply put, there is no support in any serious philosophical themes we can think of for Alexander's metaphysical objection to the blending of norms and facts. And this further undercuts his claim that there is a metaphysical problem with blended facts.[91]

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90. For an exploration of the possibility that legal concepts are thick concepts and that legal judgments are blended judgments deploying such concepts, but without the noncognitivism, see Enoch & Toh, *supra* note 74.

91. In his reaction to an initial draft of this Article, Alexander objected to our use of weeds and cowardice as counterexamples to his position. According to him, weeds are plants that share certain biological properties and which we happen to share in our negative evaluations. They do not really involve blending of facts and norms, in his opinion. Alexander seems to think that a similar diagnosis of cowardice is available. *See* E-mail from Larry Alexander, Warren Distinguished Professor of Law, Univ. of San Diego Sch. of Law, to authors (Feb. 7, 2013, 6:28 PM) (on file with authors). But this reaction displays a misunderstanding of the kind of metanormative theorizing that is called for. There are certain facts that look like they have normative properties of either blended or pure kinds. Such facts count as data, and philosophers have come up with some standard strategies—the three that we have enumerated in the text—to explain such data. *See supra* notes 81–83 and accompanying text. One of these is the noncognitivist strategy—(ii) in our list. Alexander is simply taking it for granted that that strategy is the one to go with to explain the "weediness" of certain plants and, presumably also, for the cowardliness of some people. Alexander presents no argument for that assumption. Moreover, if this noncognitivist strategy is the way to go for weeds and cowards, why does it not work for other (apparent) blended facts? Why in particular would it not work for apparently blended constitutional facts? We could construe our judgments attributing such constitutional facts as cognitions of certain prosaic, empirical facts and our normative attitudes, of both moral and prudential kinds, of approving them. Why would that not work? Again, Alexander offers no argument. Alexander is simply assuming that one metanormative strategy is the way to go for some of the data, and that no strategy works for some other parts of data. But as far as we are aware, he has offered no argument for these assumptions and has offered no hint as to how to carve up the data.

IV. The Legal Version of the Combinability Problem

There is no general epistemological problem about making judgments based on multiple sets or sorts of considerations. Nor is there a general metaphysical problem about the possibility of combining facts and norms, or facts of different sorts. Construed either of those two ways, the combinability problem is a pseudo-problem that gains traction only by way of confusions and misunderstandings. Is there then anything to the worry that legal and constitutional theorists like Alexander and Fallon have expressed about combining multiple kinds of considerations, including some normative ones, in constitutional interpretation?

A. Found or Made?

We are not entirely sure. But we believe that the following version of the problem may amount to the most compelling version of the combinability problem and is hence worth considering. There is a possibility that many constitutional theorists, both originalists and even nonoriginalists, may be thinking (perhaps only implicitly) that any pluralist conception of constitutional interpretation implies or presupposes that there is no domain of preexisting legal facts that constitutional interpreters are supposed to be discovering or delineating. That seems to be an impression given by the following characterization of constitutional interpretation by Justice Breyer, which we quoted once before:

> In constitutional matters, too, language, history, purposes, and consequences all constrain the judge in that they separate better from worse answers even for the most open questions. . . .
>
> . . . .
>
> This may sound complicated, but consider how most practical arguments proceed: Should we invite your cousin to the wedding? Should we relocate the plant, when and where? As is true of any practical argument, including moral arguments, rarely does a single theory provide a determinative answer.[92]

It could seem quite unlikely that there is a *fact of the matter* as to whether a cousin should be invited to one's wedding, where a plant should be located, and—to continue with the kind of questions that Breyer seems to have in mind—where one should take one's vacation, which commuting route to take, which television program to watch, etc. The world is populated with many different kinds of facts, the thinking goes, but the fact that a cousin should be invited to one's wedding, or the fact that she should not be, is not one of them.[93] And if there is no fact of the matter as to what the right

92. BREYER, *supra* note 2, at 84–85; *see supra* text accompanying note 32.

93. Some readers will think this is too quick. Presumably there are cases in which there is a fact about whether a cousin should be invited to one's wedding, including some in which the

answers to such questions are, then it makes sense to think, as Breyer suggests, that there are only better and worse decisions to make, based on extrinsic considerations, to address such questions.[94] No decision about wedding invitations can really be right or wrong in the way that, for example, a scientific or mathematical or moral judgment can be right or wrong in delineating some domain of preexisting facts. Instead, a decision can only be better or worse. And discriminations between better and worse answers can proceed in light of other, "extraneous" facts or considerations that one can take into account in making up one's mind. And if constitutional interpretation is really like decisions about wedding invitations, as Breyer suggests, then the implications seem to be that there are no preexisting constitutional facts and that there can only be better and worse answers rather than right and wrong answers in constitutional interpretation.[95]

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considerations that determine the answer to that question point in different directions and are made of different stuff. That is, in some cases when we struggle over an invitation decision and invoke disparate considerations such as those of reciprocity and forgiveness, cost, treating likes alike, respecting grievances and sensibilities of other family members, and so on, we believe—and believe correctly—that the struggle is to get the fact about what we are to do right, and not merely to make up our minds partly based on considerations that do not fully determine the answer. In such cases (however relatively frequent or infrequent they may be), the plural considerations determine a fact of the matter in essentially the same way that the plural ultimate legal norms that we posited earlier determine legally correct answers to non-ultimate legal questions.

94. Relevant here is the distinction between realism and voluntarism that we took note of in note 33 above.

95. What Daniel Farber, one of the proponents of the practical-reasoning approach to legal interpretation in general, and one of the targets of Alexander's criticisms, says about practical reason lends some credibility to this diagnosis. Farber says:

> Advocates of practical reason .... are most united by what they reject—the primary (or even exclusive) reliance on deduction as a method of analysis. At the level of legal theory, practical reason means a rejection of foundationalism, the view that normative conclusions can be deduced from a single unifying value or principle. At the level of judicial practice, practical reason rejects legal formalism, the view that the proper decision in a case can be deduced from a preexisting set of rules. Both of these rejected techniques rely heavily on deductive logic (i.e., the syllogism) as the primary method of analysis. Both endorse a procedure in which a court first explicitly identifies the applicable abstract rule or principle for a class of situations and then determines whether a particular situation belongs to the class.

Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 539 (1992) (footnotes omitted). The most salient feature of this characterization of the practical-reasoning approach to legal interpretation is the rejection of deductive reasoning. But this is unfortunate and difficult to take seriously. After all, not all of theoretical reasoning is deductive, and deduction is a crucial component of practical, nontheoretical reasoning. When constitutional theorists like Barnett insist that the kind of reasoning involved in figuring out the meanings of the constitutional inscriptions is empirical reasoning, they are rejecting the practical reasoning approach and also not endorsing the view that constitutional interpretation consists solely of deductive reasoning. Barnett, *supra* note 14, at 66 ("It cannot be overstressed that the activity of determining semantic meaning at the time of enactment ... is *empirical*, not normative."). For no empirical scientist, or anyone else, conceives empirical reasoning as purely deductive reasoning. Once we overlook the misguided emphasis on the rejection of deductivism, what we notice is that the proponents of the practical reasoning approach to legal interpretation are supposed to reject the view that legal interpretation has to do with delineating and deploying

The critics of pluralistic nonoriginalism may then be assuming that the appeals to multiple kinds of considerations and factors are indicative of nonoriginalists' assumption that there is no domain of preexisting constitutional facts that the acts of constitutional interpretation are supposed to discover and delineate. And the critics' rejection of pluralism or combinability may be their rejection of that supposed assumption of the nonexistence of preexisting constitutional facts. Originalists' objection is not merely about judges taking into account many kinds of considerations in their acts of constitutional adjudication. It also cannot be charitably interpreted as an objection about judges relying on multiple sets of evidence in their attempts to gain epistemic access to the constitutional law. And it cannot be charitably interpreted as one about the possibility or actuality of there being facts that are constituted by facts and norms, or by facts of different varieties. Those were the lessons of our discussion in the preceding Part. Perhaps then the most charitable interpretation is that what Alexander, Fallon, and like-minded legal theorists are objecting to is the view, supposedly implied by pluralism, that there is no domain of preexisting constitutional facts that acts of constitutional interpretation are meant to discern.

This fourth version of the combinability problem is not a moral–political, epistemological, or metaphysical problem, but is instead a *legal* problem. If it could be made out that the legal, and more specifically constitutional, facts that the acts of constitutional interpretation are meant to discover and delineate consist of the multiplicity of considerations or facts that pluralistic nonoriginalists treat as legitimate inputs into constitutional interpretation, then this fourth version of the objection to pluralistic nonoriginalism would be effectively disarmed. Recall the originalist and nonoriginalist conceptions of the constitutional law from Part I:

(OL) The Constitution or the constitutional law consists solely of the meanings of the inscriptions in the constitutional text.

(NL) The Constitution or the constitutional law consists of multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.

In effect, the fourth version of the combinability problem that we are considering is that the idea that the Constitution or the constitutional law

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preexisting legal standards. Instead, it seems, legal interpretation is supposed to be, at least in part, a creative endeavor.

consists of the different sets of considerations or facts of the sort that (NL) refers to makes little *legal* sense.

As far as we can see, the picture of a pluralistic nonoriginalist conception of constitutional law that we presented in Part II goes a long way toward blunting this worry. Recall the fourth and last observation we made in subpart I(A) above. We pointed out that any kind of fact—semantic, psychological, historical, moral, prudential, etc.—could be legally relevant if they were made so by fundamental legal facts. For example, the fact that a particular regime of criminal punishment calls for cruel and unusual punishment is a (partly) moral fact, and it is made legally relevant by the fundamental legal fact of the American legal system that inflictions of cruel and unusual punishments are constitutionally prohibited. It then makes perfectly good sense in scrutinizing a regime of criminal punishment to delve into its moral properties. Analogously, the fundamental legal facts that partly make up our Constitution may make relevant the various kinds of facts that (NL) enumerates. And if this last possibility can be made out, then the fourth version of the combinability problem would be completely disarmed. Surely, there would be no legal problem in combining the different kinds of facts that (NL) enumerates if the fundamental legal facts themselves call for combining them. In other words, if the ultimate constitutional facts consist of anything like norms (a)–(g) that we outlined in Part II, subpart A, then there should be no legal problem with seeing the constitutional law, from the penultimate constitutional laws on down, as consisting of many different kinds of facts, including some normative considerations.

Let us quickly sum up where we are. According to the fourth and last version of the combinability problem, if there were multiple sets of determinants of the constitutional law, then judges could not be conceived as finding preexisting law, but instead must be conceived as making new law or acting in extralegal ways. But if the Constitution or the constitutional law consisted of a set of fundamental legal facts or norms which make legally relevant a number of different kinds of facts—semantic, psychological, historical, sociological, moral, prudential, etc.—then judges and others could see the activity of constitutional interpretation that takes into account these myriad kinds of nonlegal facts as attempts to discover and delineate preexisting legal facts rather than as attempts to create new legal facts or act extralegally.[96]

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96. Our burden is to explain how preexisting legal facts can be determined by pluralistic ultimate legal facts even in cases where those ultimate legal facts point in different directions. We do not mean to deny that there are also cases, presumably including some nontrivial percentage of the constitutional disputes that reach the U.S. Supreme Court, in which the ultimate legal norms bear indeterminately on the legal question that is presented, thus requiring judges either simply to will one of the non-defeated legal resolutions or to decide on extralegal grounds. We take no position here on the relative frequency of these situations; we aim only to establish that there is no philosophical or legal problem with the fundamental pluralistic nonoriginalist tenet that pluralistic considerations can "combine" to constitute determinate non-ultimate legal facts. In effect, the

Now, this is a conditional conclusion. A fully thorough case for a pluralistic nonoriginalism would substantiate the *antecedent* of the conditional statement at the end of the preceding paragraph—that is, show that the Constitution or the constitutional law actually consists of a set of fundamental legal facts or norms that make legally relevant a number of different kinds of facts that (NL) or a variant enumerates—and thereby entitle us to detach the consequent. Doing so is clearly beyond the scope of a stand-alone paper such as this. In Part II, we merely presented one possible way in which the antecedent could be true, for illustrative purposes. What we will now provide in the balance of this Article is a thumbnail sketch of how nonoriginalists can go about substantiating such an antecedent—in other words, the epistemological means that can be deployed to vindicate something like the view that we sketched in Part II.

B. Wanted: A Non-Metaphysical Vindication

One possible avenue that pluralistic nonoriginalists can take is to argue for some set of norms as the ultimate constitutional norms by relying on or exploiting the orthodox understanding of Hart's theory of the nature of law that we discussed in subpart II(C) above. According to that understanding, the ultimate constitutional norms of our legal system are the ones that are commonly accepted by the officials of our system. We have already thrown a lot of cold water on this way of proceeding.

We are also skeptical of the broad family of approaches, of which this orthodox Hartian approach is a member, that try to vindicate a particular legal thesis about what the constitutional law consists of. Each approach belonging to this family appeals to the metaphysical nature of something, or some noncontingent features of it, to vindicate a particular legal thesis. We have just referred to an approach that appeals to the nature of law, or the nature of legal systems, to vindicate a pluralist nonoriginalist conception of the most fundamental constitutional facts. Actually, nonoriginalists are not the only ones who have opted for approaches belonging to this family. As noted earlier, Larry Solum has appealed to the very same Hartian conception of the nature of law, or of legal systems, to argue for an originalist conception of the fundamental constitutional law.[97] And many originalists have appealed to the nature of other things—communication, written texts, interpretation, authority, etc.—to argue for their originalist legal theses. As

constitutional picture is much like the case of wedding invitations discussed earlier. *See supra* note 93 and accompanying text. Sometimes plural ultimate norms or facts determine non-ultimate facts within a domain, and sometimes they underdetermine non-ultimate facts; the relative frequencies of the actual situations cannot be determined a priori.

97. *See supra* note 46.

one of us has argued at length elsewhere, the existing attempts have been less than successful.[98]

These arguments from the metaphysical nature of things for legal theses about what the constitutional law consists of bear some resemblance to the tradition in moral philosophy of arguing from the metaphysical nature of various things for some ultimate moral principles. For example, Aristotle infers a particular conception of *eudaimonia*, or of human flourishing—actually, many would say, two distinct conceptions—from his conception of the nature of man,[99] and Kant argues for the categorical imperative from his conception of practical reason, or that of rational agency.[100] More specifically, there are arguments for the fundamental principles of particular kinds of practices—e.g., punishment, promise-keeping—by appeals to the nature of those practices.[101]

The approach that John Rawls has taken in *A Theory of Justice* and elsewhere for his two principles of justice exemplifies an alternative tradition in moral philosophy. Instead of appealing to the nature of something to vindicate these two principles of justice, which are meant to be the most fundamental principles of political justice, Rawls argues that, among the competing conceptions of political justice, those two principles mesh best with our *considered judgments*, or the judgments of political justice in which we have the highest degree of confidence.[102] The kind of vindication we ought to seek, Rawls is opining, is not something that we can extract from the nature of anything, but instead something we get by reaching, through reflective processes, which involve needed adjustments at both ends, a point where the fundamental moral principles we accept and our considered moral judgments form a conflict-free and mutually supporting set. This is the famed method of reflective equilibrium. The legal analogue of this mode of argumentation is what we believe is the way to go in our attempts to establish

98. Berman, *supra* note 18.

99. *See* 2 ARISTOTLE, *Nicomachean Ethics*, *in* THE COMPLETE WORKS OF ARISTOTLE I.7.1-097a15–.1098b8, X.7.1177a11–1178a8, at 1734–36, 1860–62 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation); *see also* JOHN M. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE 1–143 (1986); Thomas Nagel, *Aristotle on Eudaimonia*, *in* ESSAYS ON ARISTOTLE'S ETHICS 7 (Amélie Oksenberg Rorty ed., 1980).

100. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed., 1998); *see also* J. DAVID VELLEMAN, *A Brief Introduction to Kantian Ethics*, *in* SELF TO SELF 16 (2006).

101. *See, e.g.*, John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) [hereinafter Rawls, *Two Concepts*], *reprinted in* JOHN RAWLS: COLLECTED PAPERS 20 (Samuel Freeman ed., 1999). As we are about to point out in the text, Rawls's work in general exemplifies an approach to doing moral philosophy that is an alternative to the one that his *Two Concepts* presents.

102. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); *see also* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980), *reprinted in* JOHN RAWLS: COLLECTED PAPERS, *supra* note 101, at 303; John Rawls, *The Independence of Moral Theory*, PROC. & ADDRESSES OF THE AM. PHIL. ASS'N, Nov. 1975, at 5, *reprinted in* JOHN RAWLS: COLLECTED PAPERS, *supra* note 101, at 286; T.M. Scanlon, *Rawls on Justification*, *in* THE CAMBRIDGE COMPANION TO RAWLS 139 (Samuel Freeman ed., 2003).

some set of norms as the ultimate constitutional norms of our legal system and thereby vindicate the crucial antecedent of the conditional conclusion we stated in the preceding subpart.

Some have argued that a vindication or confirmation of our fundamental moral principles must rely on something more solid and more independent of our moral views than our considered moral judgments. In particular, R.M. Hare, one of the other great moral philosophers of the twentieth century, argued that the fundamental moral principle—in his view, the principle of act-utilitarianism—can and should be inferred from the nature of our moral discourse, or, more particularly, from the meanings of our moral terms, and that Rawls's approach of reflective equilibrium seeks to vindicate the fundamental principles of morality by reliance on too unstable or ephemeral a basis.[103] A number of moral philosophers, however, have in turn responded to Hare that in order to argue for some ultimate principle of morality, we must deploy *substantive* moral arguments and not merely conceptual or linguistic intuitions; and further that Hare himself in effect reads much of substantive and controversial moral positions into the meanings of moral terms.[104] Even if a convincing case could be made that a particular ultimate principle of morality is required by the meanings of moral terms, we can always ask: first, why we should not think that our moral language has built into it moral mistakes, just as our talk of "sunrise" and "sunset" incorporates a defective cosmology; and second, relatedly, why we should not proceed to talk slightly differently to dispense with the unwanted implication. These are lessons that are generalizable to any attempts to vindicate some fundamental principle by appealing to the nature of something.[105]

In any case, at the very least, the approach provided by reflective equilibrium presents a genuine alternative to the approach of trying to vindicate an ultimate principle or a set of them by appealing to the nature of something. And it is not only in moral philosophy that this alternative approach is available. Nelson Goodman's deployment of reflective equilibrium to choose among competing conceptions of the rules of

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103. *See generally* R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT (1981); R.M. Hare, *Foundationalism and Coherentism in Ethics*, *in* MORAL KNOWLEDGE? 190 (Walter Sinnott-Armstrong & Mark Timmons eds., 1996).

104. *See generally, e.g.*, Thomas Nagel, *The Foundations of Impartiality*, *in* HARE AND CRITICS: ESSAYS ON MORAL THINKING 101 (Douglas Seanor & N. Fotion eds., 1988); Bernard Williams, *The Structure of Hare's Theory*, *in* HARE AND CRITICS, *supra*, at 185. There is also the criticism that Hare is not actually able to derive act-utilitarianism from the meanings of moral terms. *See generally* Allan Gibbard, *Hare's Analysis of 'Ought' and Its Implications*, *in* HARE AND CRITICS, *supra*, at 57.

105. For example, even if, as Rawls early on argued, the nature of punishment requires that only the guilty get punished, it is open for us to wonder whether we should opt for a slightly different practice—call it, as Rawls does, "telishment," Rawls, *Two Concepts*, *supra* note 101, at 27—that would allow infliction of some penalties on innocent people in some exceptional circumstances.

deductive and inductive inference was nearly contemporaneous with Rawls's first introduction of the method.[106] And we do not see any reason to think that this approach is unavailable or unsuitable for vindicating a nonoriginalist legal thesis, a version of (NL), about what the constitutional law consists of. In fact, in his many seminal writings, Dworkin has been a practitioner and an advocate of the method of reflective equilibrium. Eschewing what he calls "Archimedean epistemology," Dworkin has urged what he calls "integrated" epistemology, which essentially is a reflective-equilibrium epistemology.[107] He has argued that the way to argue for a first-order moral position is to show how it fits into a network of first-order moral positions that are plausible.[108] And, more specifically in legal philosophy, he has long championed a particular form of coherence, which he calls "integrity," as the chief guiding ideal of first-order legal reasoning.[109]

But a note of caution is in order here to prevent any confusion of our position with Dworkin's. What we believe that judges should be striving for is a reflective equilibrium between a set of ultimate legal or constitutional norms on the one hand and our considered constitutional or legal judgments on the other.[110] It follows that we should not be looking for a set of *moral* principles that would mesh with or justify our considered constitutional or legal judgments. This is the move that Dworkin makes in his deployment of the method of reflective equilibrium in his legal and constitutional theorizing, and we believe that it leads him astray. A telltale sign that this is a mistake is that Dworkin has much difficulty accounting for the possibility of legal systems, the laws of which are fundamentally unjust and hence not morally justifiable.[111] We do not think that the nature of law, or anything else, imposes a requirement that the ultimate constitutional norms are those that can justify the norms of our legal system or our legal practices. The actual

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106. *Compare* NELSON GOODMAN, FACT, FICTION, AND FORECAST 62–66 (4th ed. 1983) (passages from lectures originally delivered in 1953), *with* John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177 (1951), *reprinted in* COLLECTED PAPERS, *supra* note 101, at 1.

107. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 82–86 (2011) [hereinafter DWORKIN, HEDGEHOGS]; Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1 (2004), *reprinted in* JUSTICE IN ROBES 140, 160–61 (2006); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 118–19, 128 (1996) [hereinafter Dworkin, *Objectivity and Truth*].

108. *See* DWORKIN, HEDGEHOGS, *supra* note 107, at 191–324.

109. *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 37. *Cf.* Dworkin, *Hard Cases*, *supra* note 37.

110. Similarly, Goodman observes: "An inductive inference, . . . is justified by conformity to general rules, and a general rule by conformity to accepted inductive inferences." GOODMAN, *supra* note 106, at 64. What Goodman is calling "accepted inductive inferences" are what we, following Rawls's terminology, would call "considered inductive judgments." *See* Rawls, *supra* note 106, at 181–83.

111. Hart lodges this objection to Dworkin's position in H.L.A. Hart, *Legal Duty and Obligation*, *in* ESSAYS ON BENTHAM 127, 150 (1982). Dworkin responds in DWORKIN, LAW'S EMPIRE, *supra* note 37, at 111–13; H.L.A. Hart, *Comment*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 35, 41 (Ruth Gavison ed., 1987) [hereinafter ISSUES]; Ronald Dworkin, *Legal Theory and the Problem of Sense*, *in* ISSUES, *supra*, at 9.

ultimate constitutional norms of the American legal system may be capable of providing such a justification. But that would be a contingently fortunate feature of our legal system.[112]

To repeat what we said at the end of the last subpart, if the Constitution or the constitutional law consisted of a set of fundamental legal facts or norms which make legally relevant a number of different kinds of facts—semantic, psychological, historical, sociological, moral, prudential, etc.—then judges and others could see the activity of constitutional interpretation that takes into account these myriad kinds of nonlegal facts as attempts to discover and delineate preexisting legal facts rather than as exercises in creating new legal facts or acting extralegally. What we have argued in this subpart is that the way to substantiate the antecedent of that conditional conclusion is to deploy the epistemological method of reflective equilibrium. Obviously, we are not in a position to carry out the process of reflective equilibrium and thereby spell out the very long and complex statement of the most fundamental constitutional facts of the American legal system. But here, we are not in any worse position than that of originalists. Because originalists have not been able to provide a vindication of (OL), or some version of it, by appealing to the nature of something, they too are in a position of having to try to vindicate it by some alternative means, and the method of reflective equilibrium is the obvious natural way to go. This means that (OL) and (NL) are in quite analogous positions, and that both originalists and nonoriginalists will have to deploy arguments to show that some legal thesis meshes better with our considered constitutional judgments, and more generally with our considered legal judgments, than any competing legal thesis. And without going through the hard and long slog of reflective equilibrium to show that there is no version of (NL) that meshes better with our considered constitutional judgments than any version of (OL), originalists like Alexander are not in a good position to claim that nonoriginalism suffers from any version of the combinability problem.

Lest what we are proposing here sound excessively theoretical or philosophical, or both, let us point out that the epistemological method of

112. An important difference between Dworkin's and our positions may be worth mentioning. Although we, like Dworkin, believe that the ultimate determinants of our constitutional law are the ultimate constitutional norms (and the nonlegal facts that those norms make legally relevant), and not some metaphysical facts, and hence that our first-order constitutional or legal thinking does not bottom out with some metaphysical theorizing, we, unlike Dworkin, think that our first-order constitutional and legal conclusions must mesh or hang together with our conclusions in our metaphysics, epistemology, semantics, psychology, etc. Dworkin's writings from the mid-1990s and on have vigorously argued that first-order normative thinking can proceed without any regard for our conclusions in any of the meta-normative disciplines. *See* DWORKIN, HEDGEHOGS, *supra* note 107; Dworkin, *Objectivity and Truth*, *supra* note 107. We believe his position here is exaggerated and unwarranted, and very much against the regulative epistemic ideal of wide reflective equilibrium that Rawls has endorsed. On this point, see Toh, *Jurisprudential Theories*, *supra* note 42.

reflective equilibrium is the method of reasoning that judges and lawyers instinctively and commonly resort to in their legal deliberations. To give just an example, think of Justice Holmes's famous dissenting opinion in *Lochner v. New York*,[113] in which he said:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.[114]

Here, Holmes is employing the method of reflective equilibrium, and he is asserting the view that our legal system's ultimate constitutional norms may include morally incorrect norms.[115] Justice Scalia has similarly deployed the method of reflective equilibrium in a series of significant recent dissents. For example, in the 2005 case *Roper v. Simmons*,[116] the Supreme Court appealed to a prevailing consensus among advanced foreign countries to disallow an imposition of a death penalty on a minor.[117] Such appeals to legal consensus in foreign countries also occurred in a number of other cases as well.[118] In *Roper* and elsewhere, Scalia has objected to the Court's seemingly inconsistent and opportunistic appeals to foreign laws.[119] Scalia was pointing out that a fundamental constitutional norm that Justice Kennedy's majority opinion posited and appealed to—which Scalia characterized as "the basic premise . . . that American law should conform to the laws of the rest of the world"[120]—does not mesh with the reasoning of many other Supreme Court cases that are unimpeachable.[121] He was in effect arguing that the basic premise of the Court's reasoning does not pass the test of reflective equilibrium. Scalia has similarly objected to the seemingly inconsistent and opportunistic appeals by the Court's majorities to the doctrine of

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113. 198 U.S. 45 (1905).

114. *Id.* at 75 (Holmes, J., dissenting).

115. We can discount Holmes's excesses in advocating the prediction and command theories of law in his less estimable, jurisprudentially self-conscious hours.

116. 543 U.S. 551 (2005).

117. *Id.* at 575–78.

118. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988).

119. *E.g.*, *Roper*, 543 U.S. at 624–28 (Scalia, J., dissenting).

120. *Id.* at 624.

121. *See id.* at 624–28.

precedent,[122] and to the developing moral consensus in our society on various issues (or "emerging awareness" as Justice Kennedy put it in *Lawrence v. Texas*[123]) in order to identify and delineate the contours of unenumerated rights in the Fourteenth Amendment.[124] We find Scalia's complaints and more generally his call for coherence and consistency in the Court's reasoning quite compelling. The Justices of the Supreme Court too often appeal to some fundamental constitutional norms without sufficiently minding how those norms mesh with our considered constitutional judgments, and their appeals consequently all too often take on the appearance of being ad hoc and opportunistic. And the same complaint could be made about Scalia's own proposal, made in *Michael H. v. Gerald D.*, [125] about the level of generality at which the scope of constitutionally recognized liberties should be defined.[126] What more conscientious and able judges should do is formulate the versions of the fundamental constitutional norms that are more disciplined by and consistent with the plethora of constitutional judgments that are considered unproblematic and unimpeachable. Unlike Scalia, we happen to believe that the doctrine of precedent, something close to what could be called "the doctrine of *jus gentium*" (which calls for some deference to prevailing consensus in foreign law),[127] and a norm that calls for updating the content of the Fourteenth Amendment in light of developing societal mores are likely to be constituents of our fundamental constitutional law. But these surmises need to be subjected to the tests of reflective equilibrium. And in any case, judges should be appealing to the versions of these fundamental norms that have good prospects of meshing well with our considered constitutional judgments.

Far from being exotic or excessively theoretical, the epistemological method of reflective equilibrium is very much practiced by judges in their daily work, and its demands and constraints can be observed in their interactions with each other, including Scalia's criticisms of the majority positions in a number of important recent Supreme Court cases. It is this very method that we are proposing as the way to determine whether our Constitution or constitutional law consists merely of the meanings of the

122. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 993–94 (1992) (Scalia, J., concurring in part and dissenting in part) (criticizing the majority's version of stare decisis as a "keep-what-you-want-and-throw-away-the-rest version").

123. 539 U.S. 558, 572 (2003).

124. *See Roper*, 543 U.S. at 616–18 (Scalia, J., dissenting) (questioning the Court's methods in identifying and adopting what they deem to be a moral consensus).

125. 491 U.S. 110 (1989).

126. *Id.* at 127 n.6.

127. *See* JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 28 (2012).

inscriptions in the constitutional text, or also of other facts that pluralistic nonoriginalist views of the Constitution enumerate.

Conclusion

The bottom line is that whether an originalist or nonoriginalist view of what our Constitution or constitutional law consists of is better than others depends on the fundamental constitutional facts of our legal system. And there are no a priori grounds for thinking that a pluralistic nonoriginalist conception of those fundamental constitutional facts is a nonstarter, or incomprehensible as Alexander has declared. As the reader will have gathered from what we have written above, our own bet is with pluralistic nonoriginalism. But our central point has been that there is no shortcut to figuring out which view is better, and that the only way of arbitrating between the two is the long and hard slog of reflective equilibrium. Pluralistic nonoriginalism is in good epistemological and metaphysical shape, contrary to what some legal theorists have argued. The only remaining question is whether it is legally accurate.

Are We All Originalists Now? I Hope Not!

James E. Fleming*

Abstract

In recent years, some have asked: "Are we all originalists now?" My response is: "I hope not!" In this Article, I explain why. But first, I show that there is a trick in the question: Even to pose the question "Are we all originalists now?" suggests that one is presupposing what I shall call "the originalist premise." To answer the question affirmatively certainly shows that one is presupposing it. The originalist premise is the assumption that originalism, rightly conceived, is the best, or indeed the only, conception of fidelity in constitutional interpretation. Put more strongly, it is the assumption that originalism, rightly conceived, has to be the best, or indeed the only, conception of constitutional interpretation. Why so? Because originalism, rightly conceived, just has to be. By definition. In the nature of things—in the nature of the Constitution, in the nature of law, in the nature of interpretation, in the nature of fidelity in constitutional interpretation! I will sketch some of the problematic assumptions underlying this premise (and thus underlying the projects of many scholars who seek to reconstruct originalism or to put forward new originalisms). Worse yet, raising the question "Are we all originalists now?" may presuppose that we all have come around to Justice Antonin Scalia's and Robert Bork's ways of thinking, without conceding that many versions of originalism themselves have

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* Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, and Associate Dean for Research and Intellectual Life, Boston University School of Law. This project has been germinating for a longer period than I care to admit. I presented early versions at the AALS/APSA Conference on Constitutional Law, as the Alpheus T. Mason Lecture in Constitutional Law & Political Thought at Princeton University, at the University of Illinois College of Law, and in the Yale Legal Theory Workshop, and more recent versions in the Michigan State University College of Law Faculty Workshop, the Georgia State University College of Law Faculty Lunch Series, the Boston University School of Law Faculty Workshop, the University of Chicago Constitutional Law Workshop, the University of Wisconsin Discussion Group on Constitutional Law, the University of San Diego Law School Works-in-Progress Conference on Originalism, and finally the University of Texas School of Law Symposium on Constitutional Foundations. I received valuable comments at each of these events. Along the way, I have spun off several publications from the project: *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007); *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669; and *The New Originalist Manifesto*, 28 CONST. COMMENT. 539 (2013) (reviewing LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011)). I also included a portion of the project in SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 91–98 (2007). For the most part, I have resisted the urge to reintegrate these pieces into this larger whole (though I indicate places where I have drawn from them). I will integrate all of the pieces into my book in progress, James E. Fleming, Fidelity to Our Imperfect Constitution (unpublished manuscript) (on file with author). I am indebted to Sot Barber, Abner Greene, Linda McClain, and Ben Zipursky for conversations about this project and to Jack Balkin, Randy Barnett, the late Ronald Dworkin, Larry Solum, and Keith Whittington for exchanges concerning it. I also thank Courtney Gesualdi and Jennifer Ekblaw for assistance.

been moving targets that have moved considerably toward the positions of their critics.

If I hope we are not all originalists now, what do I hope we (at least some of us) are? Much of the best work in constitutional theory today is not originalist in either an old or a new sense; rather, it is what I have called "constructivist." I am interested in developing a constructivist account of the uses of history in constitutional interpretation. A constructivist world would look somewhat like the pre-originalist world (that is, the pre-Borkian world), although it would be far more sophisticated theoretically than that world was. It would treat original meaning as one source of constitutional meaning among several, not the exclusive source, let alone the exclusive legitimate theory. It would use history for what it teaches rather than for what it purportedly decides for us. In a constructivist world, we would understand that history is a jumble of open possibilities, not authoritative, determinate answers. We would understand that we—self-styled originalists no less than the rest of us—always read the past selectively, from the standpoint of the present, in anticipation of the future. We look to the past, not for authoritative answers, but for illumination about our experience and our commitments. Finally, we would understand that it dishonors the past to pretend—in the name of originalism—that it authoritatively decides questions for us, and to pretend that it avoids the burden of making normative arguments about the meaning of our commitments to abstract moral principles and ends. I argue that fidelity in interpreting the Constitution as written requires a philosophic approach to constitutional interpretation. No approach—including no version of originalism—can responsibly avoid philosophic reflection and choice in interpreting the Constitution.

I. Are We All Originalists Now?

In recent years, some have asked: "Are we all originalists now?" My response is: "I hope not!" By contrast, Lawrence Solum replies: "We Are All Originalists Now."[1] The answer to the question depends, as he recognizes, on "what one means by *originalism*"[2] and whether we define it exclusively or inclusively.

In defining originalism, Solum distills an elegant framework with four basic ideas. It is worth quoting in full:

- *The fixation thesis*: The linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified.
- *The public meaning thesis*: Constitutional meaning is fixed by the understanding of the words and phrases and the grammar and syntax

1. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011). Since I cite only to Solum's contribution to the debate in this book, I shall refer to it hereinafter as SOLUM. In this section and the next, I draw from my review of the book, James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539 (2013).

2. SOLUM, *supra* note 1, at 61.

that characterized the linguistic practices of the public and not by the intentions of the framers.

- *The textual constraint thesis*: The original meaning of the text of the Constitution has legal force: the text is law and not a mere symbol.
- *The interpretation-construction distinction*: Constitutional practice includes two distinct activities: (1) constitutional interpretation, which discerns the linguistic meaning of the text, and (2) constitutional construction, which determines the legal effect of the text.[3]

Solum aspires to understand originalism and, for that matter, living constitutionalism "in their best light—in their most sophisticated and defensible versions."[4]

If we define originalism inclusively enough, we might say that we evidently are all originalists now. Indeed, we might just define originalism so broadly that even I would no longer hope that we are not all originalists now! Applying Solum's framework, we would conclude that Jack Balkin, with his self-described living originalist method of text and principle,[5] definitely is an originalist. Ronald Dworkin, with his moral reading of the Constitution,[6] surely also is. Sotirios A. Barber and I, with our philosophic approach to constitutional interpretation[7] (and my own "Constitution-perfecting theory"),[8] are as well. (By "moral reading" and "philosophic approach," I refer to conceptions of the Constitution as embodying abstract moral and political principles—not merely codifying concrete historical rules or practices—and of interpretation of those principles as requiring judgments of political theory about how they are best understood—not merely historical research to discover relatively specific original meanings.) So, too, are reasonable, bounded, and grounded versions of living constitutionalism. All of these theories evidently can accept the four theses quoted above. Under Solum's formulation, originalism clearly is a big tent—charitable, magnanimous, and inclusionary—rather than the dogmatic, scolding, and exclusionary outlook that we see in originalist works like Robert Bork's *The Tempting of America* and Antonin Scalia's *A Matter of Interpretation*.[9]

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3. *Id.* at 4.

4. *Id.* at 5.

5. JACK M. BALKIN, LIVING ORIGINALISM 3–6 (2011) [hereinafter BALKIN, LIVING ORIGINALISM].

6. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

7. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS xiii, 155 (2007).

8. JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 16, 210–11 (2006).

9. *Compare* SOLUM, *supra* note 1, at 1–77 (arguing that "we are all originalists now" by broadly defining originalism), *with* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 136, 143 (Touchstone 1991) (1990) (arguing that "only the approach of

But if we define originalism so inclusively—and we are all now in this big tent—it may not be very useful to say that we are all originalists now. We may obscure our differences more than elucidate common ground. For we would persist in most of our theoretical disagreements—it is just that we would say that the disagreements are among varieties of so-called originalism. And the debates concerning interpretation and construction, thus recast or translated, would go on much as before.

Clearly, affirmative answers to the question "Are we all originalists now?" stem from inclusive conceptions of what comes within originalism and, in particular, the new originalism or new originalisms. For we most definitely are not all old originalists now!

II. The Inclusiveness of New Originalisms

What is the new originalism? Who are the new originalists? And what is new about their originalism?[10] These questions presuppose three prior questions: *What* is the old originalism? *Who* are the old originalists? And *why* have many constitutional scholars and jurists sought to move beyond old originalism to new originalism?

What? The old originalism is an *ism*—a conservative ideology that emerged in reaction to the Warren Court (and early Burger Court). Before Richard Nixon and Robert Bork launched their attacks on the Court, originalism as we now know it did not exist. Constitutional interpretation in light of original understanding[11] did exist, but original understanding was seen as merely one source of constitutional decision making among several—not as a general theory of constitutional interpretation, much less the exclusive legitimate theory. The old originalists conceive original understanding in terms of concrete intentions of the Framers or their original expected applications (as distinguished from their abstract intentions).[12] Accordingly, these originalists argue that fidelity in constitutional interpretation requires following the rules laid down by, or giving effect to the relatively specific original understanding of, the Framers of the Constitution. And, they argue

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original understanding" as he conceives it "is consonant with the design of the American Republic" and describing "new theorists of constitutional law" as espousing views that involve "nothing less than the subversion of the law's foundations"), *and* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–48 (Amy Gutmann ed., 1997) (arguing that only originalists look for "the original meaning of the text" and scathingly criticizing theories of "The Living Constitution" as rejecting the original meaning as an authoritative guide).

10. I have addressed these questions in BARBER & FLEMING, *supra* note 7, at 91–98, and in Fleming, *supra* note 1, at 544–46. I have incorporated some of those analyses in this Part.

11. Here I am using the term "original understanding" generically to include original understanding, intention of the framers, and original public meaning. I am not taking a position on the debates between varieties of originalism concerning these particular formulations.

12. SOLUM, *supra* note 1, at 7–11; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 603 (2004) [hereinafter Whittington, *The New Originalism*].

that these concrete intentions or original expected applications are determinative concerning constitutional doctrine.[13]

Who? The old originalists include, most prominently, Bork and Raoul Berger.[14]

Why? The old originalism is vulnerable to dispositive criticisms. In his book, *Constitutional Interpretation*, Keith Whittington has forthrightly addressed many of these criticisms, for example, that the old originalism is circular, question begging, and axiomatic.[15] Likewise, in the book *Constitutional Originalism: A Debate*, Solum has acknowledged the shortcomings of the old originalism.[16] I would argue that the old originalism suffers from three incorrigible flaws: (1) the moral burden of the old originalism with regard to both rights and powers: its concrete intentionalism entails that *Brown v. Board of Education*[17] was wrongly decided[18] and that most of the modern federal government is unconstitutional;[19] (2) the authoritarianism of the old originalism is a massive insult to the dignity of both the founders and us—it attributes arrogance to the authors of the norms of the Constitution and subservience to the subjects of those norms (to add further insult, its proponents serve it up to us in the name of democracy!); and (3) its concrete intentionalism is untenable as a theory of interpretation of our Constitution, which establishes a charter of abstract aspirational principles and ends and an outline of general powers, not a code of detailed rules.

I shall sketch several available varieties of new originalism. My sketch will be broader and less programmatic than the accounts of "the new originalism" advanced by Whittington and Solum.[20] Many self-styled originalists are at pains to differentiate themselves from old originalists like Berger and to insist that their versions of originalism are not vulnerable to common criticisms of the old originalism. There is an argument that even

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13. SOLUM, *supra* note 1, at 21.

14. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 28 (2d ed. 1997) (stating that his purpose was "to ascertain what the framers sought to accomplish").

15. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 46 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION].

16. SOLUM, *supra* note 1, at 20–21.

17. 347 U.S. 483 (1954).

18. *See, e.g.*, BERGER, *supra* note 14, at 133–54 (criticizing *Brown* as wrongly decided).

19. Even some new originalists take such a narrow view of the scope of the federal government's powers that they imply that much if not most of the modern federal government is unconstitutional. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 273–318 (2004).

20. Like Mitch Berman and Kevin Toh, I am here distinguishing "new originalisms" from "the new originalism." Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. (forthcoming 2013) (manuscript at 2) (on file with author). The new originalism is more programmatic and is associated with Whittington, Solum, and Randy Barnett. *Id.* (manuscript at 9). New originalisms could include broad or abstract originalisms that are not associated with the programs of those scholars.

Scalia is a new originalist. In *Originalism: The Lesser Evil*, Scalia rejects "strong medicine originalism," which he associates with Berger: roughly, originalism that is prepared to swallow the bitter pill of following whatever historical research shows to be the concrete framers' intention, even if, e.g., it entails that *Brown* was wrongly decided.[21] Instead, he embraces "fainted-hearted originalism" (surprising as that label may sound coming from his mouth!): originalism with a dose of evolutionary intent to the Constitution, or a "trace of constitutional perfectionism," e.g., *Brown* was rightly decided.[22] Furthermore, Scalia has supplemented originalism with his understanding that the Constitution includes certain traditions, understood as specific historical practices as distinguished from abstract aspirational principles.[23] Thus, Bork charges that Scalia is a conservative constitutional revisionist, i.e., a new originalist.[24] Scalia also has "adulterate[d]" originalism[25] by making a "pragmatic *exception*" to accommodate some precedents that are inconsistent with his view of the original public meaning.[26] Officially, Scalia accepts original public meaning as opposed to intention of the framers as the authoritative source.[27] In this respect, he comes within what Solum characterizes as the new originalism.[28] But Scalia rejects Solum's interpretation–construction distinction—viewing what Solum conceives as construction as beyond the pale of originalist interpretation.[29] In this respect, he differs importantly from Solum's conception of the new originalism.[30]

Whittington certainly qualifies as a new originalist. Before reading Whittington's article on *The New Originalism*,[31] I had thought that the new, improved originalists would be scholars and jurists who seek to reconstruct originalism to correct the theoretical flaws of the old originalism or at least to bolster it against powerful criticisms. But Whittington, with startling and refreshing frankness, provides a rather different account: He says that the new originalists are conservatives in power, whereas the old originalists were

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

22. *See id.* at 863–64.

23. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (acknowledging that the Fourteenth Amendment protects unenumerated liberties that are "deeply rooted in this Nation's history and tradition"). For a criticism of Scalia's understanding of tradition as "concrete historical practices," as distinguished from Brennan's understanding of tradition as "abstract aspirational principles," see FLEMING, *supra* note 8, at 112–16.

24. *See* BORK, *supra* note 9, at 223, 236–37 (criticizing Scalia's plurality opinion in *Michael H.* as a version of "conservative constitutional revisionism" as distinguished from originalism).

25. Scalia, *supra* note 21.

26. SCALIA, *supra* note 9, at 140.

27. *Id.* at 38.

28. *See supra* note 3 and accompanying text.

29. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13–15, 427 (2012).

30. *See infra* note 44 and accompanying text.

31. Whittington, *The New Originalism*, *supra* note 12.

conservatives in the minority![32] His account of the old originalism is quite similar to mine: It emerged as a conservative reaction against the Warren Court and was mostly negative and critical of Warren Court decisions like *Griswold v. Connecticut*,[33] recognizing a right of privacy, and early Burger Court decisions like *Roe v. Wade*,[34] recognizing the right of a woman to terminate a pregnancy.[35] Now that conservatives are in power and have control of the judiciary, Whittington says, originalists need to move from being largely reactive and critical to developing "a governing philosophy appropriate to guide majority opinions, not just to fill dissents."[36] Enter the new originalism.

As a governing conservative constitutional theory, Whittington suggests, the new originalism "is less likely to emphasize a primary commitment to judicial restraint,"[37] the leading aim of the old originalism.[38] Indeed. First, "there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge."[39] Second, "there is also a loosening of the connection between originalism and judicial deference to legislative majorities."[40] Instead, "[t]he primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism."[41] In sum, Whittington argues, the new originalism "does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less."[42] Now, I have always known this—that originalism is not fundamentally a theory of "judicial restraint" or democratic majoritarianism—but rather a program for upholding the Constitution as originalists conceive it. Still, it's good to hear it proclaimed by a thoughtful originalist!

Solum's account of the old originalism is similar to Whittington's.[43] And their accounts of the new originalism are similar in two respects. Solum's new originalism, like Whittington's, stresses: (1) original public meaning (as contrasted with the old originalists' emphasis on the intention of the Framers or their original expected applications) and (2) the significance of the

32. *Id.* at 604.
33. 381 U.S. 479 (1965).
34. 410 U.S. 113 (1973).
35. Whittington, *The New Originalism*, *supra* note 12, at 601–03.
36. *Id.* at 604.
37. *Id.* at 608.
38. *Id.* at 602.
39. *Id.* at 608.
40. *Id.* at 609.
41. *Id.*
42. *Id.*
43. *See* SOLUM, *supra* note 1, at 5–11 (tracing the history of originalism and explaining the views of "old" originalists).

distinction between interpretation and construction (as contrasted with the old originalists' rejection of construction as illegitimate).[44]

But Solum's new originalism is significantly different. Whittington developed his new originalism to replace the old originalists' negative reaction against the liberal Warren Court with a governing constitutional theory for conservative judges, now that they are in power.[45] Solum, by contrast, developed his new originalism to overcome the theoretical errors and excesses not only of the old originalists but also of Legal Realism and Critical Legal Studies.[46] In fact, he wants to acknowledge the conservative ideology of the old originalists but to distance that from the new originalism, which he views not as an ideology but as a constitutional theory.[47]

New originalists surely also include the "broad originalists," for example, Lawrence Lessig, Akhil Amar, and Bruce Ackerman.[48] These scholars do not necessarily identify with or come within what Whittington and Solum call "the new originalism," but they nonetheless profess to develop or are identified with broad, new originalisms. They are liberals who want to reclaim history from the narrow originalists. They believe that liberals and progressives ignored or neglected history for so long that they practically ceded it to conservatives.[49] The broad originalists undertake the "turn to history" to show that their constitutional theories, aspirations, and ideals are firmly rooted in our constitutional history and practice, and indeed provide a better account of our constitutional text and tradition than do those of the conservative narrow originalists.[50] In general, what is broad about their forms of originalism is that

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44. *Id.* at 22–24, 34–36.

45. *See supra* notes 32, 36–42 and accompanying text.

46. SOLUM, *supra* note 1, at 50–54.

47. *Id.* at 64.

48. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 88, 159–62 (1991) [hereinafter ACKERMAN, FOUNDATIONS] (developing an understanding of interpretation as questing "multigenerational synthesis" or "interpretive synthesis" across the three constitutional regimes or moments of the Founding, Reconstruction, and the New Deal); AKHIL REED AMAR, AMERICA'S CONSTITUTION xi (2005) (contending that readers cannot fully appreciate the Constitution's "meaning and richness" without historical background as context); *see generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*] (developing a conception of fidelity as translation). Ackerman, Amar, and Lessig are sometimes interpreted as developing broad originalism—or "a kinder, gentler originalism"—for liberals. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1774–87 (1997) (criticizing the "[k]inder, [g]entler [o]riginalism[s]" of Ackerman and Lessig); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 212–29 (1996) (analyzing Ackerman and Amar as liberals who have taken the turn to history and relating their work to "liberal originalism"). Amar primarily does constitutional interpretation without writing about approaches to constitutional interpretation, but on occasion he has called for "rethinking originalism." Akhil Reed Amar, *Rethinking Originalism*, SLATE (Sept. 21, 2005), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/rethinking_originalism.html.

49. *See* KALMAN, *supra* note 48, at 132–35, 138–39, 141, 156 (discussing liberal "[a]cademic lawyers . . . ced[ing] the historical battleground to the right" and now trying to reclaim it).

50. *See, e.g.*, *id.* at 212–29 (evaluating Ackerman's and Amar's uses of history).

these theorists and historians conceive original understanding or original meaning (to which they argue fidelity is owed) at a considerably higher level of abstraction than do the narrow originalists like Bork and Scalia (to say nothing of Whittington).[51] At the same time, they typically argue that the quest for fidelity in constitutional interpretation requires that we reject abstract theories like Dworkin's moral reading of the Constitution.[52]

In 1996, Fordham had a major conference on *Fidelity in Constitutional Theory*.[53] In my article for the conference, *Fidelity to Our Imperfect Constitution*, I explored the reasons for broad originalists' resistance to the moral reading.[54] I argued that "broad originalists, like . . . narrow originalists, fundamentally misconceive fidelity."[55] The commitment to fidelity entails, as Dworkin argues, that we should interpret the Constitution so as to make it the best it can be.[56] I also suggested that the "moral reading is a big tent," and that the broad originalists should "reconceive their work as coming within it: in particular, as being in service of the moral reading by providing a firmer grounding for [it] in fit with historical materials than Dworkin has offered."[57] On another occasion, I plan to say more by way of constructive engagement with the broad originalists.

Balkin's abstract "living originalism" certainly counts as a variety of new originalism. Like Solum, he stresses original public meaning and the significance of the distinction between interpretation and construction.[58] Like the broad originalists, he argues that the original public meaning of the Constitution to which fidelity is owed is not only rules but also general standards and abstract principles.[59] And he, like Dworkin and I, rejects efforts by originalists to recast abstract principles as if they were rules (or terms of art) by interpreting them as being exhausted by their original expected applications.[60] In short, he argues that fidelity to original public meaning entails fidelity to our abstract framework and commitments.[61] Elsewhere, I have argued that Balkin's abstract living originalism not only comes within the

51. *See, e.g.*, Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 321 (1992) (arguing for the liberating "power of abstraction" in interpreting the Bill of Rights).

52. *See, e.g.*, Lessig, *Fidelity in Translation*, *supra* note 48, at 1259–60 (arguing that the quest for fidelity requires rejection of Dworkin's theory).

53. Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

54. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1344–53 (1997) [hereinafter Fleming, *Fidelity*].

55. *Id.* at 1338.

56. RONALD DWORKIN, LAW'S EMPIRE 255 (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

57. Fleming, *Fidelity*, *supra* note 54, at 1338.

58. BALKIN, LIVING ORIGINALISM, *supra* note 5, at 4–5, 48–50.

59. *Id.* at 23–34.

60. *Id.* at 42–45.

61. *Id.* at 21–34.

big tent of the moral reading but also has close affinities to Dworkin's moral reading and Barber's and my philosophic approach.[62]

Finally, Whittington even interpreted Dworkin (of all people!) as a new originalist.[63] After all, Dworkin professes fidelity to original meaning, conceived as abstract moral principles rather than particular historical conceptions.[64] Similarly, Amy Gutmann portrayed Dworkin as an abstract originalist in her introduction to *A Matter of Interpretation*, the book publishing Scalia's Tanner Lectures at Princeton together with the commentaries upon them, including Dworkin's.[65] As I have put it, Dworkin has sought to turn the tables on the narrow originalists like Bork and Scalia: he argues that commitment to fidelity (understood as pursuing integrity with the moral reading of the Constitution) entails the very approach that they are at pains to insist it forbids and prohibits the very approach that they imperiously maintain it mandates.[66] But I would resist characterizing Dworkin as a new originalist, for doing so seems to presuppose that anyone who argues that she or he has the best constitutional theory—of what the Constitution is, what is interpretation, and what is fidelity in constitutional interpretation—is claiming thereby to be an originalist. (See my discussion below of "the originalist premise.")

If all of the above are new originalists, new originalism is truly inclusive. It is a "[f]amily of [t]heories,"[67] not one unified view.

III. The Originalist Premise

As I mentioned earlier, some have posed the question: "Are we all originalists now?"[68] If anything would prompt that question, it would be Dworkin and Balkin articulating their theories as forms of originalism (or, at any rate, being interpreted as originalists).[69] For they are exemplars of two *bêtes noires* of originalism as conventionally understood: namely, the moral reading of the Constitution and pragmatic, living constitutionalism,

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62. James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 675–79 [hereinafter Fleming, *Balkinization*].

63. *See* Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201 (2000) [hereinafter Whittington, *Dworkin's "Originalism"*] (arguing that Dworkin is an originalist who believes "the Founders chose abstract principles").

64. DWORKIN, FREEDOM'S LAW, *supra* note 6, at 7–12, 72–76; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997) [hereinafter Dworkin, *The Arduous Virtue*].

65. Amy Gutmann, *Preface* to SCALIA, *supra* note 9, at xi–xii.

66. DWORKIN, FREEDOM'S LAW, *supra* note 6, at 73–76; RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 125–29 (1993) [hereinafter DWORKIN, LIFE'S DOMINION].

67. SOLUM, *supra* note 1, at 35.

68. *See supra* Part I.

69. *See* Whittington, *Dworkin's "Originalism,"* *supra* note 63 (arguing that Dworkin is an abstract originalist). *See generally* BALKIN, LIVING ORIGINALISM, *supra* note 5 (contending that the method of text and principle constitutes a living originalism).

respectively. I suppose that such developments have led to Solum's claim that we are all originalists now.

With all due respect to Solum, given how much these versions of "originalism" differ, it would not mean much to claim that this shows that we are all originalists now. Indeed, we are witnessing the "Balkanization" of originalism (that's what happens when originalism splits into warring camps) along with the "Balkinization" of originalism (that's what happens when even Jack Balkin, hitherto a progressive, pragmatic living constitutionalist, becomes an originalist).[70]

Furthermore, there is a trick in the question "Are we all originalists now?" Even to pose the question suggests that one is presupposing what I shall call "the originalist premise." To answer the question affirmatively certainly shows that one is presupposing it. The originalist premise is the assumption that originalism, rightly conceived, *is* the best, or indeed the only, conception of fidelity in constitutional interpretation. Put more strongly, it is the assumption that originalism, rightly conceived, *has to be* the best—or indeed the only—conception of constitutional interpretation. Why so? Because originalism, rightly conceived, just *has to be*. By definition. In the nature of things—in the nature of the Constitution, in the nature of law, in the nature of interpretation, in the nature of fidelity in constitutional interpretation!

The originalist premise is expressed in its most extreme form by Bork, who asserted that originalism is the only possible approach to constitutional interpretation that is faithful to the historic Constitution and consonant with the constitutional design.[71] He rejects all other approaches, most especially those like Dworkin's, as revisionist.[72] In recent years, the originalist premise has also been manifested in the emerging strain of broad originalism in liberal and progressive constitutional theory. For example, Lessig evidently takes the view that originalism, by definition, is the only method of fidelity.[73] Most strikingly, he made the Borkish assertion that Dworkin is an "infidel,"[74] and he and Cass Sunstein suggested that Dworkin does not even have a method of fidelity.[75] I believe that the originalist premise drives the broad originalists' resistance to Dworkin's moral reading. We also see the originalist premise illustrated more innocuously in the inclusiveness of the new originalism as programmatically developed by Solum. The moment an ostensible

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70. James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007); Fleming, *Balkinization*, *supra* note 62. In this Part, I draw from the former piece.

71. *See* BORK, *supra* note 9, at 143.

72. *See id.* at 187–240.

73. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 85 n.336 (1994) ("There are of course methods of constitutional interpretation that are not methods of fidelity, in the sense that they do not ultimately depend on whether the outcome is traceable to some judgment or commitment of the framers.").

74. *See* Lessig, *Fidelity in Translation*, *supra* note 48, at 1260.

75. Lessig & Sunstein, *supra* note 73, at 11 n.35, 85 n.336.

anti-originalist like Dworkin or I acknowledges that original public meaning is a factor in constitutional interpretation and professes an aspiration to fidelity in constitutional interpretation, she or he is welcomed into the big tent of the new originalism.[76]

What troubles me most is that raising the question "Are we all originalists now?" may presuppose that we all have come around to Scalia's and Bork's ways of thinking without conceding that many versions of originalism themselves are moving targets that have moved considerably toward the positions of their critics. To illustrate, let's have a pop quiz. Read the following passage:

> In short, all that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. It does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing.

Who wrote the passage? Choose from the following:

1. Lawrence Lessig (a broad originalist)
2. Ronald Dworkin (proponent of a moral reading of the Constitution)
3. Robert Bork (an old originalist)
4. Keith Whittington (a new originalist)
5. Jack Balkin (a living originalist)

The correct answer: (3) Robert Bork![77] I bet that at least some readers got the answer wrong. And I bet that some thought that the correct answer might be any of these choices besides Bork. The passage suggests that, whether or not Bork would admit it, he has made spectacular concessions to critics of originalism like Dworkin. For example, notice how abstractly he conceives original understanding (note his reference to principle or value). And notice how open to judgment he acknowledges interpretation to be (it does not sound like interpretation is simply a matter of discovering historical facts that are dispositive, as opposed to elaborating abstract principles or values). Finally, notice how slippery he is in moving from original understanding to original

76. For example, at a recent conference at Fordham University School of Law on "The New Originalism in Constitutional Law," March 1–2, 2013, Solum suggested that, to the extent I take fidelity to the text to operate as a constraint, I am a new originalist.

77. BORK, *supra* note 9, at 162–63.

purpose (after already moving, off stage, from intention of the framers to original understanding of the ratifiers).

The new originalism, as formulated by Solum, is more open about the concessions it has made to critics of the old originalism like Dworkin. In particular, Solum acknowledges that the relevant original public meaning of certain provisions is abstract.[78] And he admits that construction, as distinguished from interpretation, lies beyond originalism[79] and may involve choices of political theory.[80] Balkin's new originalism puts such concessions at the heart of his abstract, living originalism, which I have interpreted to have close affinities to Dworkin's moral reading of the Constitution.[81]

Thus, I ask, are we all moral readers now?

IV. Assumptions Undergirding the Originalist Premise

Next, I want to sketch some problematic assumptions and misconceptions that undergird or drive the originalist premise (which in turn underlie the view that we are all originalists now). First, I shall label these assumptions or misconceptions through formulating them as *inequations* (if that is a word). In the following formulations, I use $\neq$ to mean "is not the same as," or to mean that a commitment to the thing on the left side does not entail a commitment to originalism. Proponents of originalism, and people who are caught in the grip of the originalist premise, commonly make these assumptions or hold these misconceptions. That is, they assume or assert that a commitment to the thing on the left side *does* entail a commitment to originalism.

1. Original meaning $\neq$ originalism
2. Interpretation $\neq$ originalism
3. Fidelity in constitutional interpretation $\neq$ originalism
4. The classical, interpretive justification of judicial review $\neq$ originalism

In my book in progress, *Fidelity to Our Imperfect Constitution*, I plan to ponder fully the reasons for the grip of the originalist premise—and these assumptions or misconceptions—on the imaginations of constitutional theorists and judges. Here I shall briefly explicate these assumptions or misconceptions, illustrating them as manifested in Bork's, Scalia's, and Whittington's work.

First, I shall argue, *original meaning $\neq$ originalism*. Scalia says that the originalists are the ones who care about original meaning, and all those other

78. *See* SOLUM, *supra* note 1, at 22, 24–25 (arguing that original meaning does not definitively answer every constitutional question).

79. *Id.* at 26, 60.

80. *See id.* at 26 (describing different political theories that can underlie originalists' constitutional constructions).

81. Fleming, *Balkinization*, *supra* note 62, at 675–79.

folks—the "nonoriginalists"—are the ones who don't.[82] But, as Dworkin ably and tirelessly pointed out, the disagreement between Scalia and Bork and their critics is not about *whether original meaning should count*—instead, it is about *what should count as original meaning.*[83] For example, should we conceive original meaning quite narrowly and concretely (as Scalia and Bork do)[84]—as relatively specific original meanings, as concrete expected applications, as a deposit of concrete historical practices and detailed rules? Or should we conceive original meaning more broadly and abstractly (as Dworkin and Balkin do)[85]—as relatively abstract commitments, as a charter of abstract aspirational principles? Originalism reflects a particular conception of what should count as original meaning (or a family of such conceptions), and a highly controversial and problematic one at that. Thus, a commitment to honoring original meaning does not necessarily entail a commitment to originalism. In fact, I argue (with Dworkin and Balkin), the best conception of the relevant original meaning is that of abstract aspirational principles.

Second, I shall show, *fidelity in constitutional interpretation ≠ originalism.* Narrow originalists such as Bork and Scalia have asserted a monopoly on concern for fidelity in constitutional interpretation, claiming that fidelity requires following the rules laid down by, or giving effect to the relatively specific original meaning of, the framers and ratifiers of the Constitution.[86] Bork and Scalia say that the originalists are the ones who care about fidelity in constitutional interpretation, and all those other folks—the revisionists and nonoriginalists—don't.[87] The Fordham Symposium on *Fidelity in Constitutional Theory* implicitly challenged the narrow originalists' claim to a monopoly on fidelity, for it featured several competing conceptions of fidelity: (1) Dworkin's understanding of fidelity as pursuing integrity with the moral reading of the Constitution;[88] (2) Ackerman's understanding of fidelity as synthesis of constitutional moments;[89]

82. Scalia, *supra* note 21, at 852–56, 862–64.

83. *See* DWORKIN, FREEDOM'S LAW, *supra* note 6, at 287–305; RONALD DWORKIN, A MATTER OF PRINCIPLE 33–57 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE].

84. *See* BARBER & FLEMING, *supra* note 7, at 79 & n.1, 99–101 (distinguishing narrow from broad originalism and arguing that Bork and Scalia adhere to the former view).

85. *See supra* notes 54–62 and accompanying text.

86. *See* BORK, *supra* note 9, at 143; Scalia, *supra* note 21, at 854, 862–63.

87. *See* BORK, *supra* note 9, at 187–240; SCALIA, *supra* note 9, at 37–47; Scalia, *supra* note 21, at 852–56, 862–64.

88. DWORKIN, FREEDOM'S LAW, *supra* note 6, at 73–76; DWORKIN, LIFE'S DOMINION, *supra* note 66, at 125–29; Dworkin, *The Arduous Virtue*, *supra* note 64, at 1253.

89. *See* ACKERMAN, FOUNDATIONS, *supra* note 48, at 88, 159–62 (developing an understanding of fidelity as questing "multigenerational synthesis" or "interpretive synthesis" across the three constitutional regimes or moments of the Founding, Reconstruction, and the New Deal); Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519–20 (1997) (advancing his conception of fidelity as pursuing intergenerational synthesis).

(3) Lessig's understanding of fidelity as translation across generations;[90] (4) Jack Rakove's understanding of fidelity as keeping faith with the founders' vision;[91] and (5) an early formulation of Balkin's conception that ultimately became his method of text and principle with its argument for fidelity to abstract original public meaning.[92]

Most pointedly, Dworkin sought to turn the tables on the narrow originalists like Bork and Scalia: he argued that commitment to fidelity—understood as pursuing integrity with the moral reading of the Constitution—entails the very approach that they are at pains to insist it forbids and prohibits the very approach that they imperiously maintain it mandates.[93] Ackerman, Lessig, and Balkin have taken a different tack, attempting to beat narrow originalists at their own game: they advance fidelity as synthesis, fidelity as translation, and the method of text and principle as broad or abstract forms of originalism that are superior, as conceptions of originalism, to narrow originalism.[94]

And so, again, originalism reflects a particular conception of fidelity in constitutional interpretation, and a deeply problematic one at that. Thus, a commitment to pursuing fidelity in constitutional interpretation does not require a commitment to originalism. To the contrary, I argue that the best conception of fidelity is that of pursuing integrity with the moral reading of the Constitution (in Dworkin's terms) or of redeeming the promises of the Constitution's abstract commitments (in Balkin's terms).

Third, I shall argue, *interpretation ≠ originalism*. Originalists sometimes claim or assume that interpretation necessarily entails originalism, ranging from naive or crude versions of this claim (e.g., Bork and Scalia)[95] to sophisticated versions of it (e.g., Whittington). I shall develop a critique of

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90. *See* Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1367–68, 1371–76 (1997) (arguing for an understanding of fidelity as "grounded in a practice of translation"); *see also* Lessig, *Fidelity in Translation*, *supra* note 48, at 1263–64 (arguing for a conception of fidelity as translation).

91. *See* Jack N. Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587, 1605–09 (1997) (discussing "fidelity *to* history" and its superiority to originalism, which is a kind of "fidelity *through* history"); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3–22 (1996) (discussing the "perils" of conventional originalism).

92. *See* J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1708–09 (1997) (distinguishing between fidelity to the "true Constitution or the best interpretation of the Constitution [and] its various historical interpretations and manifestations"). Balkin subsequently reworked and incorporated this piece in JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 103–38 (2011), the companion book to BALKIN, LIVING ORIGINALISM, *supra* note 5, at 3–5 (arguing for fidelity to abstract text and principle).

93. DWORKIN, FREEDOM'S LAW, *supra* note 6, at 73–76; DWORKIN, LIFE'S DOMINION, *supra* note 66, at 125–29; Dworkin, *The Arduous Virtue*, *supra* note 64, at 1253.

94. *See supra* notes 89–90, 92.

95. *See, e.g.*, BORK, *supra* note 9, at 251–59 ("All theories of constitutional law not based on the original understanding contain inherent and fatal flaws."); Scalia, *supra* note 21, at 854 ("The principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality.").

Whittington with respect to this assumption.[96] This claim is most famously illustrated in the old, discredited dichotomy of "interpretivism" versus "noninterpretivism."[97] People who now call themselves originalists used this dichotomy to load the dice in favor of interpretivism, saying that they were the ones who believed in "interpreting" the Constitution, while the others advocated "noninterpreting" it (or remaking or changing it).

Whittington's project in his book, *Constitutional Interpretation*, is to reconstruct originalism to attempt to rescue it from criticisms of the old originalism.[98] His general tack is to appear to concede points to critics of originalism. For example, he more forthrightly grapples with arguments Dworkin made about interpretation than practically any other originalist.[99] Unlike Bork and Scalia, he doesn't simply hurl insults about Dworkin being a "noninterpretivist" or, worse yet, a heretic or expatriate who would subvert the Constitution.[100] For example, Whittington appears to concede that Dworkin (and Thomas Grey) were right in saying that "[w]e are all interpretivists" and that the real question was not whether we should interpret or not, but rather, *What* the Constitution is and *how* we should interpret it?[101] Thus, Whittington appears to concede that Dworkin advanced a conception of interpretation that is an alternative to originalism.

What is more, Whittington's project in his companion book, *Constitutional Construction*, is to broaden constitutional discourse to include two types of elaboration of constitutional meaning: not only *interpretation* by courts (the characteristic preoccupation of the old originalists) but also

96. For a fuller version of this critique, see BARBER & FLEMING, *supra* note 7, at 94–97.

97. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980) (distinguishing "interpretivism" and "noninterpretivism"); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703–07 (1975) (distinguishing the "pure interpretive model" from the "noninterpretive" model).

98. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 15, at xi–xii.

99. *See id.* at 182–87 (analyzing Dworkin's normative approach to "understanding the level of generality in the founders' intentions"). *See generally* Whittington, *Dworkin's "Originalism," supra* note 63 (writing an entire article analyzing Dworkin's constitutional theory as an abstract originalism).

100. *See* BORK, *supra* note 9, at 136 ("subversion"); *id.* at 213–14 (alleging revisionism); *id.* at 352 ("heresies"); Scalia, *supra* note 21, at 854 (referring to Dworkin, an American citizen, as an "Oxford Professor (and expatriate American)").

101. Whittington, *The New Originalism*, *supra* note 12, at 606–07 (internal quotation marks omitted) (discussing Thomas Grey's and Dworkin's analyses of interpretation and originalism); *see also* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 15, at 164–65 ("[A]s Dworkin himself has done, we must ask after both the nature of the Constitution and the nature of interpretation in order to discover the best interpretive method for this text."); Whittington, *Dworkin's "Originalism," supra* note 63, at 197–99 ("I do not wish to resurrect the old interpretive/noninterpretive distinction . . . . I contend that Dworkin's discussion of constitutional intentions has not rendered traditional originalism incoherent . . . and that there remain substantial differences in *what* different constitutional theorists are seeking to interpret.").

construction outside the courts by legislatures and executives.[102] He explains his distinction between interpretation and construction as follows:

> Unlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning. Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.[103]

But then, just when it begins to look like Whittington is developing a constitutional theory—of interpretation and construction—that might be safe for people who are not originalists, he makes two key moves.

The first move is to say that what people like Dworkin (and me) call *interpretation* is really *construction*, and therefore is appropriate for legislatures but not for courts.[104] That is, he tries to deflect the force of Dworkin's criticisms of originalism by saying that Dworkin's conception of interpretation more properly should be understood as a theory of construction, which would be appropriate for legislatures, not courts. This is Whittington's more sophisticated version of Bork's and Scalia's polemical assertions that Dworkin is advocating judicial legislation—judges making law, not interpreting it.

Whittington's second move is to say that a commitment to interpretation necessarily entails a commitment to originalism. Indeed, he practically revives a version of the discredited distinction between interpretivism and noninterpretivism. He writes that his "account of originalism largely assumes a prior commitment on the part of constitutional theorists, judges, and the nation to constitutional interpretation."[105] He continues: "If we are to interpret, then I believe we must be originalists."[106] That is, interpretation entails originalism. Whittington adds: "But we may not want to interpret. . . . We may want to engage in a 'text-based social practice,' but that is not the same thing as being committed to interpretive fidelity."[107] In other words, the people who want to do that are not interpreting. Here he echoes the discredited old charge that anyone who is not committed to an originalist conception of interpretive fidelity is a "noninterpretivist" whose real interest is not interpreting the Constitution but changing it.

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102. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–2 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION].

103. *Id.* at 5 (footnote omitted).

104. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 15, at 54, 58, 206–12; Whittington, *The New Originalism*, *supra* note 12, at 611–13.

105. Whittington, *The New Originalism*, *supra* note 12, at 612.

106. *Id.*

107. *Id.* at 612–13.

I want to step back for a moment and offer a hypothesis about what Whittington is doing. My hypothesis is that, in responding to criticisms of the old originalism, Whittington tries to *expand* the realm of constitutional discourse to include constitutional construction *outside the courts*; but he does so in order to justify *narrowing* constitutional interpretation *inside the courts* to originalism. All of this is a rhetorically effective way of seeming to agree with arguments that no originalist could answer, while deflecting those arguments and reinstating positions that no originalist can defend. Whittington sketches a notion of constitutional construction by legislatures and executives and gives historical examples of it, such as the impeachment of Justice Samuel Chase in 1804–1805, which helped establish subsequent understandings of the purpose and limits of federal impeachment power, and the nullification crisis of 1832–1833, which promoted more decentralizing conceptions of federalism.[108] Yet he does not articulate criteria for distinguishing kinds of decisions that are appropriately made by courts through "interpretation" and kinds of decisions that should be left to legislatures and executives through "construction." Nor does he answer the question of why courts should limit themselves to what he calls interpretation as distinguished from what he calls construction. As stated above, he throws out the old originalist arguments for originalism based on "judicial restraint" and "democratic majoritarianism."[109] All that is left is his assumption that interpretation necessarily entails originalism.

Whittington forthrightly criticizes the old originalism for being circular, question begging, and axiomatic.[110] Yet his originalism is vulnerable for the same reasons and, more generally, it does not overcome the flaws of the old originalism. In any case, his work embodies a sophisticated version of the assumption that a commitment to interpretation necessarily—by definition, axiomatically—entails a commitment to originalism. But, contrary to this common originalist assumption, "[t]here is nothing that interpretation just is," as Sunstein has aptly put it.[111] Indeed, I argue, the best conception of interpretation is that of law as integrity, not any variety of originalism.

Fourth, I shall argue, the *classical, interpretive justification of judicial review ≠ originalism*. Originalist scholars and jurists sometimes claim or assume that the classical, interpretive justification of judicial review, put forward in *The Federalist No. 78*[112] and *Marbury v. Madison*,[113] necessarily

108. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 102, at 17, 20.

109. Whittington, *The New Originalism*, *supra* note 12, at 609.

110. *See* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 15, at 46 (describing old originalists as having "begged the question" and having left certain points as "purely axiomatic").

111. CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 19–32 (2009); *see also* Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2870–74 (2007) (arguing that no approach to interpretation follows from the idea of interpretation itself).

112. THE FEDERALIST NO. 78, at 467–69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

113. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

entails originalism. Scalia makes this assumption in his piece, *Originalism: The Lesser Evil*,[114] and in his partial dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[115] In analyzing this assumption, we should distinguish between the following two fundamental interrogatives of constitutional interpretation: *What* is the Constitution? and *Who* may authoritatively interpret it?[116] To elaborate the distinction: The answer to the question, *What* does the Constitution include?—for example, text expressing specific rules only or text embodying abstract moral principles—does not determine the answer to the question, *Who*, as between legislatures and courts, may authoritatively interpret and enforce the Constitution?, whatever it includes.

The classical, interpretive justification for judicial review, put forward in *The Federalist No. 78* and *Marbury v. Madison*, is a famous answer to the *Who* question: Courts are obligated to interpret the higher law of the Constitution and to preserve and enforce it against encroachments by the ordinary law of legislation.[117] This justification is *agnostic* as between the following two competing answers to the *What* question. The first is a legal positivist conception advanced by Bork and Scalia. On this view, the Constitution is basically a code of detailed historical rules. It excludes abstract moral principles.[118] The second answer is Dworkin's idea of a moral reading of the Constitution, and Barber's and my philosophic approach to constitutional interpretation. These theorists believe the Constitution embodies a scheme of abstract moral principles.[119] Thus, the important question becomes, *What* is the Constitution? That is, *What* is the character of our commitments and *What* does the Constitution include? In particular, which of the two foregoing general answers is superior?

Narrow originalists like Bork and Scalia have asserted a monopoly on the classical, interpretive justification of judicial review and on concern for fidelity in constitutional interpretation (recall the two corresponding inequations I formulated above). Again, they offer the foregoing legal

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114. *See* Scalia, *supra* note 21, at 854 (asserting that only originalism is compatible with Chief Justice Marshall's justification for judicial review in *Marbury*).

115. 505 U.S. 833, 984, 996 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (invoking *The Federalist No. 78* as if it supported his originalist view as opposed to the joint opinion's conception of the Constitution as a scheme of abstract aspirational principles whose interpretation requires "reasoned judgment").

116. For a work that conceives the enterprise of constitutional interpretation on the basis of these two fundamental interrogatives—along with a third, *How* ought we interpret the Constitution?—see WALTER F. MURPHY, JAMES E. FLEMING, SOTIRIOS A. BARBER & STEPHEN MACEDO, AMERICAN CONSTITUTIONAL INTERPRETATION 16–20 (4th ed. 2008).

117. *See Marbury*, 5 U.S. at 177–78; THE FEDERALIST NO. 78, *supra* note 112, at 467–69.

118. *See, e.g.*, SCALIA, *supra* note 9, at 134–37 (arguing that the Constitution "abound[s] in concrete and specific dispositions" and does not embody abstract aspirational provisions and principles).

119. DWORKIN, FREEDOM'S LAW, *supra* note 6, at 7; BARBER & FLEMING, *supra* note 7, at 82–84, 165–66.

positivist answer to the question *What* does the Constitution include. The Constitution consists of the text only, which should be understood as a code of detailed historical rules, and it excludes any conception of a scheme of abstract moral principles.[120] For them, the classical, interpretive justification of judicial review requires judges to interpret and enforce the Constitution so understood. And for them, fidelity to the Constitution so understood forbids judicial interpretation and enforcement of abstract moral principles.[121]

Dworkin, Barber, and I have challenged the narrow originalists' pretensions to a monopoly on the classical, interpretive justification of judicial review and their understanding of fidelity in constitutional interpretation. We have sought to reclaim and reconstruct the classical, interpretive justification with our own conceptions of both constitutional meaning and constitutional fidelity.[122] The Constitution includes the text, but words like "liberty," "due process," and "equal protection" refer to abstract moral principles. And so, for us, the classical, interpretive justification of judicial review requires judges to interpret and enforce the Constitution so understood. And fidelity to the Constitution *as written* requires judicial interpretation and enforcement of abstract moral principles including "liberty."

To return to my main point, the classical, interpretive justification of judicial review does not necessarily entail a commitment to originalism. Formally, it is agnostic as among competing conceptions of *what* the Constitution is. That is, this justification simply entails that we should interpret the fundamental law of the Constitution—whatever it is, code of concrete rules or charter of abstract principles—and enforce it against encroachment by the ordinary law of legislation. I argue that the better conception of the Constitution is as a charter of abstract principles.

In this Part, I have been examining assumptions undergirding the originalist premise, the assumption that originalism is the best or only conception of constitutional interpretation. I grant that some originalists—especially the new originalists like Solum—do make normative arguments for originalism rather than simply taking it as axiomatically given. For example, Solum makes rule of law/determinacy arguments, popular sovereignty/democratic legitimacy arguments, and fidelity arguments[123] for originalism (the first two of which are the arguments Whittington evidently

120. *See supra* note 118.

121. *See, e.g.*, BORK, *supra* note 9, at 210–14, 351–55.

122. *See, e.g.*, SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 202–36 (1993) (defending the "classical theory" but on a "moral realis[t]" reading rather than an originalist understanding); DWORKIN, FREEDOM'S LAW, *supra* note 6, at 72–83 (arguing that originalists are not faithful to the "natural reading" of the Bill of Rights as a scheme of abstract principles but instead are "revisionists").

123. SOLUM, *supra* note 1, at 36–44.

disavowed).[124] But I argue elsewhere that the inclusiveness of the new originalism undercuts these normative justifications.[125]

V. Why Do I Hope That We Are Not All Originalists Now?

Richard Posner confessed to a "visceral dislike . . . of academic moralism," a body of literature bringing normative moral and political theory to bear on legal analysis: "A lot of it strikes me as prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, [and] insipid."[126] I won't say anything of this sort about originalism! I have more substantive, and less visceral, reasons for hoping that we are not all originalists now.[127]

First, originalism, old and new, is at bottom authoritarian, an insult to the founders for their arrogance, and an insult to us for our subservience.[128] A regime of purportedly dispositive original meanings is, at best, beside the point in constitutional interpretation and, at worst, an authoritarian regime that is unfit to rule a free and equal people. To add further insult, its proponents (at least those besides Whittington)[129] serve it up to us in the name of democracy![130]

Second, originalism, old and new, makes a virtue of claiming to exile moral and political theory from the province of constitutional interpretation.[131] That is neither possible nor desirable, nor is it appropriate in interpreting our Constitution, which establishes a scheme of abstract aspirational principles and ends, not a code of detailed rules. Interpreting our Constitution with fidelity requires judgments of moral and political theory about how those principles are best understood.

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124. *See supra* text accompanying notes 37–42.

125. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. (forthcoming 2013).

126. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1640 (1998).

127. I have made similar arguments in BARBER & FLEMING, *supra* note 7, at 97–98.

128. Justice Brennan famously stated that originalism is "arrogance cloaked as humility." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986). Brennan is clearly referring to the arrogance of originalists in claiming to be able to determine dispositive original meaning or original intention. We might also interpret the line as attributing arrogance to the founders for presuming in authoritarian fashion to decide our questions for us in the manner that originalists claim they did.

129. *See supra* text accompanying notes 40–42 (discussing Whittington's disavowal of the democratic justification for originalism).

130. *See, e.g.*, SOLUM, *supra* note 1, at 43 ("The connection between democratic legitimacy and original public meaning is so close and the argument for that connection so obvious that very little needs to be said about it.").

131. *See, e.g.*, BORK, *supra* note 9, at 210–14, 351–55 (arguing against recourse to "abstract moral philosophy" in constitutional interpretation); WHITTINGTON, *supra* note 15, at 182–87 (criticizing Dworkin's argument that the constitutional text embodies abstract concepts and that interpreters have to make judgments of moral and political theory about the best understanding of those concepts).

Third, originalism, old and new, misconceives fidelity in constitutional interpretation. Under the best conception of fidelity—fidelity as integrity with the moral reading of the Constitution—we conceive fidelity as *honoring* our aspirational principles—the principles to which we as a people aspire and the principles for which we as a people stand—rather than as *following* our historical practices and concrete original meanings, which surely have failed to realize our aspirations. Ironically, in the name of interpretive fidelity, originalists would enshrine an imperfect constitution that does not deserve our fidelity. The moral reading, because it understands that the quest for fidelity in interpreting our imperfect Constitution exhorts us to interpret it so as to make it the best it can be, offers hope that the Constitution may deserve our fidelity, or at least may be able to earn it.[132]

If I hope we are not all originalists now, what do I hope we (at least some of us) are? Much of the best work in constitutional theory today is not originalist in either an old or a new sense; rather, it is what I have called "constructivist." (Note that I did not say "nonoriginalist." I'm not going to fall into that rhetorical trap set by Scalia and Bork.)[133] This work acknowledges the place of history in constitutional interpretation: it recognizes the limitations of history but also appreciates the uses of history (which are different from conventional originalist uses of history). In prior work, I have developed a constitutional constructivism by analogy to John Rawls's political constructivism, a theory he developed in *Political Liberalism*.[134] Constitutional constructivism conceives constitutional interpretation as a quest, not for the relatively specific original meaning of the constitutional text, but for the best interpretation of our constitutional text, history, and structure, together with our constitutional practice, tradition, and culture. As just sketched, it conceives our Constitution as a scheme of abstract aspirational principles and ends, not a code of detailed rules. And it entails that interpreting our Constitution with fidelity requires judgments of moral and political theory about how those principles and ends are best understood. Constitutional constructivism enables us to see that history helps illuminate the best understanding of our commitments, but it does not make our decisions for us.

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132. I must acknowledge that one avowed originalist, Jack Balkin, is not vulnerable to this criticism. But he is not because his abstract, living originalism is a moral reading of the Constitution. *See* Fleming, *Balkinization*, *supra* note 62, at 675–79.

133. *See supra* notes 86–87 and accompanying text.

134. FLEMING, *supra* note 8, at 4, 6, 61–64, 92–94 (building upon JOHN RAWLS, POLITICAL LIBERALISM 89–129 (expanded ed. 2005)).

A. The Limitations of History in Constitutional Interpretation

What would the use of history look like in a constructivist world? In this subpart, I will speak to the limitations of history[135] and, in the next, to the uses of it. In a constructivist world, we would give due regard to *original meaning* and history in constitutional interpretation without being *originalist.* We would embrace Dworkin's idea that there are two dimensions of best interpretation—fit and justification.[136] Fidelity in constitutional interpretation is not purely a matter of fit with historical materials, but also a matter of justification in political theory. Fit and history do have a role to play in the quest for fidelity to the Constitution, but a limited one. We should acknowledge the place of history in constitutional interpretation—as a resource or factor that comes into play in the dimension of fit—but should keep it in its place. Originalists—narrow and broad, old and new—exaggerate the place of history and give it a greater role than it deserves and than it is capable of playing.

History is, can only be, and should only be a starting point in constitutional interpretation. It has a threshold role, which is often not dispositive. Contrary to originalists like Michael McConnell, fit is not everything.[137] In the dimension of fit, history helps (or should help) screen out "off-the-wall" interpretations or purely utopian interpretations, but often does not lead conclusively to any interpretation, let alone the best interpretation. History usually provides a foothold for competing interpretations or competing theories. It alone cannot resolve the clash among them. Deciding which theory provides the best interpretation is not a historical matter of reading more cases, tracts, or speeches or more scrupulously doing good professional history.

To resolve the clash among competing interpretations or competing theories, we must move beyond the threshold dimension of fit to the dimension of justification. History rarely has anything useful, much less dispositive, to say at that point. Indeed, the best professional historians understand this and know better than to be originalists; unfortunately, some constitutional lawyers and scholars do not. In deciding which interpretation among competing acceptably fitting interpretations is most faithful to the Constitution, we must ask further questions: which interpretation provides the best justification, which makes our constitutional scheme the best it can be, which does it more credit, or which answers better to our best aspirations as a people? These questions are required by the quest for fidelity in the sense of

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135. I develop the arguments of this subpart more fully in Fleming, *Fidelity*, *supra* note 54, at 1348–51.

136. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 83, at 143–45; DWORKIN, LAW'S EMPIRE, *supra* note 56, at 239.

137. *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1273 (1997).

honoring our aspirational principles, not merely *following* our historical practices or the original meaning of the text.

B. The Misconceived Quest for the Original Public Meaning

Some new originalists seem to think that they can overcome the limitations of the old originalism, and of the use of history in constitutional interpretation, by reconceiving their quest: from intention of the Framers or original expected applications to original public meaning.[138] The new originalists may have reconceived the quest of the old originalists, but their new quest for the original public meaning is likewise misconceived. The inspiration for the title of this section is, of course, Paul Brest's classic article, *The Misconceived Quest for the Original Understanding*.[139]

The quest for the original public meaning is misconceived because on most important provisions there will not be a definitive original public meaning that will be useful in resolving our disagreements, much less in resolving hard cases. Let me give a hypothetical example of constitutional amendment and interpretation. Let's imagine that, in the near future, the Supreme Court overturns *Lawrence v. Texas*[140]—which had recognized a right of gays and lesbians to privacy or autonomy[141]—even as our constitutional culture has accepted it and has come not merely to tolerate but indeed to respect gays and lesbians as equal citizens. Let's imagine that We the People then amend the Constitution by adopting the following Twenty-Eighth Amendment: "Well-ordered liberty being necessary to the happiness of a free state, the right to autonomy shall not be infringed."

How would debates about the original public meaning of the Twenty-Eighth Amendment likely proceed? Let's distinguish two quite different understandings, which parallel recognizable disagreements between originalists and moral readers of the Constitution. On the one hand, originalists like Scalia, who want to construe constitutional language specifically, might say that the original public meaning was simply, specifically, and exclusively to reinstate the narrow holding in *Lawrence*. Such originalists might say that the Twenty-Eighth Amendment protects *only* the right of gays and lesbians to engage in "deviate sexual intercourse," as the Texas statute invalidated in *Lawrence* had put it.[142] Or, the right of gays and lesbians to engage in "homosexual sodomy," as Justice White had put it in *Bowers v. Hardwick*,[143] which was overruled in *Lawrence*.[144] On their view,

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138. I develop a fuller version of the arguments of this section in Fleming, *supra* note 1, at 551–56.

139. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

140. 539 U.S. 558 (2003).

141. *Id.* at 574.

142. *Id.* at 563.

143. 478 U.S. 186, 191 (1986).

the Twenty-Eighth Amendment would be no more abstract a commitment to a right to autonomy than that. They would hold this view, not because they made an objective historical inquiry into original public meaning, but because of prior jurisprudential assumptions and commitments about what an original public meaning must be—and about the character of the Constitution, constitutional interpretation, and constitutional amendment. On their view, that evidently abstract language in the Twenty-Eighth Amendment simply has to embody specific meanings.

On the other hand, moral readers, who conceive of the Constitution as a charter of abstract commitments, would likely say that the original public meaning was nothing less than to ratify the right to autonomy that the Supreme Court had developed through the line of cases from *Meyer*[145] and *Pierce*[146] on through *Griswold*,[147] *Roe*,[148] *Casey*,[149] and *Lawrence*.[150] Moreover, they would claim that the original public meaning was to authorize the Supreme Court to go on as it had before in these cases elaborating our basic commitment to a right to autonomy. Indeed, they might go further and claim that the Constitution, properly interpreted, should protect whatever rights of autonomy we and the Supreme Court decide over time are essential to the concept of well-ordered liberty and autonomy. They, too, would take this view, not because they made an objective historical inquiry into original public meaning, but because of prior jurisprudential assumptions and commitments about the character of the Constitution, constitutional interpretation, and constitutional amendment. On their view, that evidently abstract language in the Twenty-Eighth Amendment simply has to embody abstract commitments.

Let's observe that there would be no independent original public meaning—as a matter of history—that either side could resort to in order definitively to resolve their disagreements. Proponents of both understandings of the Twenty-Eighth Amendment would claim that their understandings were more faithful to the original public meaning. There would not be some definitive original public meaning of the words "right to autonomy" out there

144. *Lawrence*, 539 U.S. at 578.

145. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing parents' right to control the upbringing and education of their children).

146. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (recognizing the right of parents and guardians "to direct the upbringing and education of children under their control").

147. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (recognizing a right to marital privacy).

148. Roe v. Wade, 410 U.S. 113, 164–66 (1973) (recognizing the right of a woman to decide whether to terminate a pregnancy under certain circumstances).

149. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (reaffirming the central holding in *Roe* that the Constitution protects the right of a woman to decide whether to terminate a pregnancy).

150. *See* JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 244–67 (2013) (analyzing this line of cases protecting a "rational continuum" of ordered liberty).

in our constitutional culture that would resolve our disputes—any more than there is a core public meaning of a right to autonomy out there in our constitutional culture right now. Furthermore, there is no lawyerly term of art, "right to autonomy," to which we could resort to resolve disagreement over the meaning of the right to autonomy. Those who are learned in the law vehemently disagree among themselves about it—along the lines sketched above—just as citizens generally do. So likewise it is with the Equal Protection Clause[151] and the Due Process Clause.[152] The same goes for the Privileges or Immunities Clause.[153] Ditto the First Amendment's protections of freedom of speech,[154] freedom of the press,[155] and freedom of religion.[156] So it is and ever shall be with significant constitutional provisions.

The debate, under the guise of arguments about original public meaning, is a debate among competing moral readings of the Constitution. Any quest for original public meaning that seeks to deny or avoid the moral reading of the Constitution or a philosophic approach to constitutional interpretation is misconceived. It cannot overcome the limitations of history in constitutional interpretation and the need for a moral reading or philosophic approach.

C. *The Uses of History in Constitutional Interpretation*

So much for the limitations of history, or what history cannot do. Now, what can history do in a constructivist world? What are the uses of history in constitutional interpretation? Here I'll mention a few ideas illustrating what I am calling constructivist uses of history (which differ significantly from conventional originalist uses).

Michael Dorf has provided a rich descriptive account of argument about original meaning as it actually functions in Supreme Court decisions.[157] He shows that such argument generally is not conventionally originalist.[158] His descriptive account richly elaborates certain ways of using history to do fit work—to show that an interpretation under consideration has a footing in our constitutional text, history, or structure[159]—and it nicely accords with the type of fit work called for by normative accounts such as Dworkin's and my own. He develops categories of "ancestral originalism" and "heroic originalism," which are species of an aspirational and hortatory constitutionalism rather than

151. U.S. CONST. amend. XIV, § 1.

152. *Id.*

153. *Id.*

154. U.S. CONST. amend. I.

155. *Id.*

156. *Id.*

157. *See generally*, Dorf, *supra* note 48. I have praised Dorf's account in James E. Fleming, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849 (1997).

158. *See* Dorf, *supra* note 48, at 1811–16 (discussing cases where original meaning, understanding, and history do not necessarily entail originalism).

159. *See id.* at 1796–800, 1805 (describing the textual, historical, and structural considerations in constitutional interpretation).

of originalism as conventionally understood.[160] "Ancestral originalism" underscores the notion that an interpretation should fit our practice, tradition, and culture.[161] "Heroic originalism" shows that an interpretation should be in accord with our deepest aspirations and the best in us as a people.[162] These types of argument about original meaning, and uses of history, give due regard to original meaning without being originalist.

Likewise, Christopher Eisgruber has argued that history should "contribute to constitutional jurisprudence as servant, not rival, to justice."[163] Eisgruber argues that "history matters specially to constitutional adjudication not because (as originalists want us to believe) judges have an obligation to preserve the past, but because historical argument can sometimes help them to represent the people's convictions about justice."[164] For example, in making judgments about justice in interpreting abstract constitutional provisions like the Equal Protection Clause or the Executive Power Clause,[165] judges "cannot simply act on the basis of their own best judgment about justice."[166] Instead, judges should draw upon history to "show that those judgments are plausibly attributable to the American people as a whole."[167] Thus, on his conception of constitutional self-government, judges resort to history, not to obey the "dead hand of the past," but to enable them to discharge their responsibilities as a representative institution speaking on behalf of the people about questions of moral and political principle.[168]

Reva Siegel's work illustrates that history matters, not as it binds our choices—as it were, through "the law of the father"—but as it informs our choices, decisions for which we as a people are responsible.[169] Similarly, Martin Flaherty has suggested that in a "post-originalist" world, we would take an "experiential" rather than an authoritarian approach to the use of history in constitutional interpretation.[170] For example, we would look to "past experience to assess how given constitutional doctrines or mechanisms have succeeded or failed."[171] He shows that such use of history held a central place in the early republic.[172]

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160. *See id.* at 1800–16.

161. *Id.* at 1802–03.

162. *See id.* at 1803–04.

163. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 127 (2001).

164. *Id.* at 110.

165. U.S. CONST. art. II, § 1, cl. 1.

166. EISGRUBER, *supra* note 163, at 126.

167. *Id.*

168. *Id.* at 11, 64.

169. *E.g.*, Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 343 (2001).

170. Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1107–11 (2001).

171. *Id.* at 1092.

172. *See id.* at 1107 ("Call this post-originalist approach to constitutional history 'experiential.' Hamilton much earlier extolled the method, urging, 'Let experience, the least fallible guide of human opinions, be appealed to for an answer to these [constitutional] questions.'").

Finally, Balkin's work, although he characterizes it as a "living originalism," shows how history figures in a moral reading of the Constitution. History—whether evidence of original public meaning or precedent—functions as a resource for making arguments about the best understandings of our constitutional commitments, not as a constraint that makes our decisions for us.[173] Abner Greene's work, although it is avowedly anti-originalist, is similar to Balkin's in showing how history—or fit with original public meaning or precedent—serves as a factor in making arguments about the best understanding of the Constitution as a matter of justice.[174] These examples are illustrative rather than exhaustive of what I call constructivist uses of history as distinguished from conventional originalist uses.

VI. Conclusion: Toward a Philosophic Approach to Fidelity in Constitutional Interpretation

In sum, a constructivist world would look somewhat like the pre-originalist world (that is, the pre-Borkian world), although it would be far more sophisticated theoretically than that world was. It would treat original meaning as one source of constitutional meaning among several, not the exclusive source, let alone the exclusive legitimate theory. It would use history for what it teaches rather than for what it purportedly decides for us. In a constructivist world, we would understand that history is a jumble of open possibilities, not authoritative, determinate answers. We would understand that we—self-styled originalists no less than the rest of us—always read the past selectively, from the standpoint of the present, in anticipation of the future. We look to the past, not for authoritative answers, but for illumination about our experience and our commitments.

Finally, we would understand that it dishonors the past to pretend—in the name of originalism—that it authoritatively decides questions for us, and to pretend that it avoids the burden of making normative arguments about the meaning of our commitments to abstract moral principles and ends. Fidelity in interpreting the Constitution as written requires a philosophic approach to constitutional interpretation. No approach—including no version of originalism—can responsibly avoid philosophic reflection and choice in interpreting the Constitution.

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173. BALKIN, LIVING ORIGINALISM, *supra* note 5, at 258–59.

174. *See* ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 192, 197, 201–06 (2012) (arguing that there is "room for fit" with history as a "factor" in arguments about the best understanding of the Constitution, but that "reasoning about political justice" or "justification" should have "primacy" over fit). I have analyzed Greene's account of "room for fit" and the "primacy of justification" in James E. Fleming, *Fit, Justification, and Fidelity in Constitutional Interpretation*, 93 B.U. L. REV. (forthcoming 2013).

In my book, *Securing Constitutional Democracy*, I gave three reasons for embracing a philosophic approach or moral reading over and against any version of originalism. I shall close this Article by repeating them.

> The first reason is hortatory: [The moral reading] exhorts judges, elected officials, and citizens to reflect on and deliberate about our deepest principles and highest aspirations as a people. It does not conceive the commitment of fidelity to the Constitution as commanding us to follow the authority of the past. [In a word, it rejects the authoritarianism of originalism as inappropriate and unjustifiable in a constitutional democracy.]
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> The second, related reason is critical: [The moral reading] encourages, indeed requires, a reflective, critical attitude toward our history and practices rather than enshrining them. It recognizes that our principles may fit and justify most of our practices or precedents but that they will criticize some of them for failing to live up to our constitutional commitments to principles such as liberty and equality. Put another way, [the moral reading] does not confuse or conflate our principles and traditions with our history, or our aspirational principles with our historical practices. Again, it recognizes that fidelity to the Constitution requires honoring our aspirational principles, not following our historical practices and concrete original understanding. That is, fidelity to the Constitution requires that we disregard or criticize certain aspects of our history and practices in order to be faithful to the principles embodied in the Constitution.
>
> The final reason is justificatory: [The moral reading], because it understands that the quest for fidelity in interpreting our imperfect Constitution exhorts us to interpret it so as to make it the best it can be, gives us hope of interpreting our imperfect Constitution in a manner that may deserve our fidelity, or at least may be able to earn it.[175]

Unlike originalism, it does not enshrine an imperfect constitution that does not deserve our fidelity.

That, in short, is why I hope we are not all originalists now.

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175. FLEMING, *supra* note 8, at 226–27.

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Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment"

B. Jessie Hill*

This Article approaches the law–politics divide from a new angle. Drawing on the insights of literary theory, this Article argues that every act of interpretation, including constitutional interpretation, inevitably draws not only on text but also on context, and that the relevant context extends beyond both the written document and the historical context of its origination. This understanding derives from speech-act theory and from postmodern literary theory. As Paul de Man argues in his seminal essay, The Resistance to Theory, *moreover, the act of interpretation always encompasses a "pragmatic moment" that undermines the effort to attain perfect theoretical coherence. Applying this perspective to constitutional interpretation, this Article argues that neither constitutional theory nor politics, on its own, is capable of fully explaining constitutional interpretation and constitutional change.*

In illustrating this phenomenon, this Article draws on recent scholarship about the recent evolution of constitutional doctrine in two areas—the Fourteenth Amendment and the religion clauses of the First Amendment—to demonstrate the dialectical interplay among text, principle, and pragmatism in constitutional interpretation and constitutional change. Although the insights regarding the sources of constitutional change in these areas are not new, the original contribution of this Article lies in its reconfiguration of the theoretical understanding of how, and why, this change inevitably occurs.

"The legal machine, it turns out, never works exactly as it was programmed to do. It always produces a little more or a little less than the original, theoretical input."[1]

To say that constitutional law, of late, suffers from a bit of a legitimacy problem is like saying the Incredible Hulk has some anger management issues. In the wake of the decision in *National Federation of Independent*

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1. PAUL DE MAN, *Promises* (Social Contract), *in* ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST 246, 271 (1979).

Business v. Sebelius[2] last summer, the Supreme Court's approval rating fell well below 50%, and about three-quarters of Americans polled expressed the view that the Justices decide cases in part based on their personal or political views.[3] Though perhaps more popular than Congress and cockroaches,[4] the Supreme Court's standing with the public appears to have shrunk of late.

Moreover, worries about the Supreme Court's legitimacy occasionally pervade not just popular journalism and legal scholarship, but also the opinions of the Court itself. Facing major decisions with obvious political ramifications, the Justices have sometimes expressed concern about the impact of their decisions on the Court's appearance of impartiality and its claim to apolitical referee status. For example, in *Planned Parenthood v. Casey*,[5] Justices O'Connor, Kennedy, and Souter, apparently hoping to set to rest once and for all both the legal and public debate over the constitutionality of abortion, essentially argued in their joint opinion that they couldn't overrule *Roe v. Wade*[6] because, among other reasons, it would look like they were bowing to political pressure.[7] Chief Justice Roberts's surprising vote to uphold the individual insurance mandate under the Affordable Care Act in *NFIB* may be understood as another version of the same idea: one might suspect that he voted to uphold the individual mandate because he recognized that a five-to-four vote along party lines would,

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2. 132 S. Ct. 2566 (2012).

3. Adam Liptak, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 7, 2012, http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all.

4. *See* Press Release, Public Policy Polling, Congress Less Popular than Cockroaches, Traffic Jams (Jan. 8, 2013), http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf (indicating that voters have a "higher opinion" of cockroaches than Congress).

5. 505 U.S. 833 (1992).

6. 410 U.S. 113 (1973).

7. The plurality opinion stated:

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.
>
> . . . .
>
> . . . Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.
>
> . . . [O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.

Casey, 505 U.S. at 865–67 (plurality opinion).

despite all his insistence that he is a mere umpire calling the balls as he sees 'em,[8] make the Court look like a purely political animal rather than a legitimate one governed by the rule of law.[9] The decision was, in other words, no less political simply because it was clever.

Yet, legitimacy is a strange creature. To use a familiar legal trope, it faces, Janus like,[10] in two directions: inward, insofar as "legal" legitimacy requires that judicial decisions adhere to the professional norm of impartial, consistent, and principled decisionmaking; and outward, insofar as "social" legitimacy requires courts, who, after all, exercise real-world coercive power affecting the lives of individual citizens, to reach results that are broadly acceptable to the public at large.[11] The two types of legitimacy may thus be in tension with one another, such as when principled doctrinal reasoning leads to a result that would provoke substantial public outrage or resistance.[12] At the same time, as the above examples from *Casey* and *NFIB* suggest, there is not always a straight line to be drawn between public opinion and social legitimacy. Sometimes, greater legitimacy is engendered by bucking public opinion. And, to put a somewhat more cynical spin on the issue, "[s]ometimes . . . what is involved in voting against one's seeming druthers may be a calculation that the appearance of being 'principled' is rhetorically and politically effective. It fools people."[13] Indeed, the now-standard script of Supreme Court nomination hearings, in which the nominee compares himself or herself to an umpire or some similar avatar of blind justice, is probably primarily a performance intended to shore up the public's

8. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

9. *See* Tonja Jacobi, *Strategy and Tactics in* NFIB v. Sebelius 6, 15–22 (Nw. L. & Econ. Research Paper No. 12-14, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133045 (arguing that Roberts's "driving concern [in *NFIB*] was for the institutional legitimacy of the Court").

10. Van Orden v. Perry, 545 U.S. 677, 683 (2005); Holder v. Hall, 512 U.S. 874, 956 (1994) (Ginsburg, J., dissenting). Janus is the god of beginnings and endings who, according to Roman mythology, had two faces that pointed in opposite directions. Samuel A. Rumore, Jr., *Some Thoughts for the Beginning of 2001*, 62 ALA. LAW. 8, 8 (2001).

11. For insightful discussions of the distinction between legal and social legitimacy, see generally Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) and Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473 (2007). Also on point is Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

12. *See, e.g.*, Post & Siegel, *supra* note 11, at 1474 (arguing this tension is both significant and unavoidable as well as exaggerated); Sunstein, *supra* note 11, at 157–58 (positing that the Supreme Court avoids provoking public outrage that could ensue from a decision on a controversial topic by refusing to rule on it).

13. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 51–52 (2005). Contra the *NFIB* example, though, Judge Posner argues that such voting against self-interest occurs primarily when the stakes of the decision are low. *Id.* at 50–51.

confidence (and that of the public's democratically elected representatives), rather than a sincere and deeply felt statement of judicial philosophy.

Constitutional scholars have attacked the legitimacy problem, along with the related problem of maintaining the strict divide between law and politics, from various angles. Originalists have long argued that hewing closely to constitutional text is the only approach that ensures fidelity to the document itself and the act of interpretation (as opposed to lawmaking) with which the Justices have been charged.[14] They view such fidelity as automatically both legitimate and legitimating, since it is the only approach that remains true to the text that the Framers adopted.[15] Proponents of "living," or progressive, constitutionalism argue, by contrast, that the Court cannot be accepted as legitimate if its opinions do not take account of changing societal circumstances and values.[16] Popular constitutionalists, for their part, argue that we the people should take the Constitution away from the courts altogether, or that "the people themselves," in contrast to unelected and unaccountable judges, should play a central role in interpreting the Constitution.[17] And some "backlash" theorists claim that far from

14. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989) (arguing that originalism is "more compatible with the nature and purpose of a Constitution in a democratic system" in that it assigns judges the task of determining original meaning and democratically elected officials the task of taking account of changing societal values); *see also* Andrew B. Coan, *Talking Originalism*, 2009 BYU L. REV. 847, 849, 852, 858–59 (2009) (citing RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–59 (1999); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 234 (1988)) ("[T]he original meaning of the Constitution is the only meaning the People have democratically endorsed.").

15. *See* Coan, *supra* note 14.

16. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5–6 (2005) (arguing that "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts").

17. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7–8 (2004) ("[I]t was 'the people themselves'—working through and responding to their agents in the government—who were responsible for seeing that [the Constitution] was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181–82 (1999) ("[Populist constitutional law] treats constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves."); *see also* Larry D. Kramer, Lectures, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 700 (2006) ("[Popular constitutionalism] does not assume that authoritative legal interpretation can take place only in courts, but rather supposes that an equally valid process of interpretation can be undertaken in the political branches and by the community at large."). Professor Barry Friedman gives a brief, helpful listing of sources both promoting and criticizing popular constitutionalism in BARRY FRIEDMAN, THE WILL OF THE PEOPLE 564 n.266 (2009).

performing a settling function, the Supreme Court's intervention in high-stakes political issues only stokes the flames it was intended to squelch.[18]

When push comes to shove, though, virtually all agree that the Supreme Court should have some role in interpreting the Constitution. A principal point of disagreement centers on how this interpretation should proceed—specifically, on the extent to which the function of law can and should be meaningfully distinct from politics. This issue relates to the problem of determining the extent to which social and cultural facts should influence legal decisionmaking. Moreover, lurking within this debate is concern about change in constitutional meaning over time. If legal interpretation is truly principled, it would appear that it must be insulated against the political pressures of the time, and therefore much change in constitutional meaning—especially change that appears to take into account new political and social circumstances—would prove difficult to explain.[19]

Drawing on the insights of literary theory, this Article argues that every act of interpretation, including constitutional interpretation, inevitably draws not only on text but on context, and that the relevant context extends beyond both the written document and the historical context of its origination to contemporary social and cultural facts on the ground. This understanding derives from speech-act theory and from postmodern literary theory.[20] As Paul de Man argues in his seminal essay, *The Resistance to Theory*, the act of interpretation always encompasses a "pragmatic moment" that undermines the effort to attain perfect theoretical coherence.[21] Applying this perspective to constitutional interpretation, this Article argues that neither constitutional theory nor politics, on its own, is capable of fully explaining constitutional interpretation and constitutional change.

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18. *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 388–401 (2007) (discussing backlash theories); David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 741 (2012) (describing the argument that the Court's decisions regarding controversial issues creates a backlash against perceived "outside interference" or "judicial activism" (internal quotation marks omitted)).

19. But not impossible. One could believe that a particular constitutional provision was intended or designed to take changing circumstances into account, and thus allowing constitutional meaning to change would still mean hewing closely to original intent or another principled approach, such as subscribing to the view that the Constitution serves certain enduring values but that the content of those values may evolve over time. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 14 (2011) (arguing that the Framers, by choosing to use general and abstract concepts in the Constitution, meant for future generations to interpret and implement them). Alternately, one could support a change in meaning on the basis that the original interpretation of a constitutional provision was simply incorrect.

20. The term "postmodern literary theory" refers to a body of literary, artistic, and philosophical thought that arose in the second half of the twentieth century as a reaction to modernism and is most closely associated with deconstruction, a philosophy primarily developed by the French theorist Jacques Derrida. Kay Torney Souter, *The Products of the Imagination: Psychoanalytic Theory and Postmodern Literary Criticism*, 60 AM. J. PSYCHOANALYSIS 341, 345 (2000).

21. Paul de Man, *The Resistance to Theory*, 63 YALE FRENCH STUD. 3 (1982), *reprinted in* 33 THEORY AND HISTORY OF LITERATURE: THE RESISTANCE TO THEORY 8 (1986).

In illustrating this phenomenon, this Article draws on examples in two areas—the Fourteenth Amendment and the religion clauses of the First Amendment—to demonstrate the dialectical interplay among text, principle, and pragmatism in constitutional interpretation and constitutional change. Of course, others have already argued that law and politics need not always exist in absolute contrast with one another but may instead stand in a dialectical relationship.[22] The principal contribution of this Article, however, is to propose a new theoretical underpinning for making sense of the relationship between law and culture, as well as the inherent instability of the law–politics divide.

Part I of this Article describes the law–politics divide and reviews some of the important recent scholarship on that subject. The purported distinction between judging, or interpreting the law, and engaging in political decisionmaking lies at the heart of much of the anxiety over judicial legitimacy, as well as of debates over the merits of originalism as compared to living constitutionalism.[23] As this Article will demonstrate, the distinction between the two, while not meaningless, is nonetheless inherently unstable. Part II begins to make this case by reviewing Paul de Man's classic essay *The Resistance to Theory*, which elucidates the process of literary interpretation and applies it in general terms to constitutional interpretation. Part III then puts this theory to work through examples drawn from notable constitutional controversies. Finally, Part IV asks why and how this particular perspective makes any difference to our understanding of constitutional interpretation.

I. Law and Politics

In a *Harvard Law Review* Foreword from a few years ago, Judge Richard Posner argued that, as a constitutional court, the Supreme Court is inherently and inevitably a political court.[24] In so stating, Judge Posner implicitly and explicitly contrasted politics with "law."[25] Though it is supposed to be "tethered to authoritative texts," the argument proceeds,[26] the Supreme Court is instead profoundly political because of certain structural features—particularly, its responsibility to decide emotional, politically polarizing constitutional issues; the open-ended and broad nature of the constitutional text, which fails to impose any meaningful internal constraints on the Justices; and the lack of external constraints on the Justices'

22. *See, e.g.*, Post & Siegel, *supra* note 18, at 376.

23. I use the term "living constitutionalism" here to refer to all nonoriginalist theories of constitutional interpretation, with the recognition that both originalism and nonoriginalism are heterogeneous schools of thought. The point is to distinguish among constitutional theories on this one dimension, rather than to lump all originalist or nonoriginalist constitutional theories together.

24. Posner, *supra* note 13, at 39–54.

25. *Id.* at 45–46.

26. *Id.* at 40.

decisionmaking.[27] For Posner, the political nature of constitutional law is both lamentable and inevitable.[28]

Others have argued that the encroachment of politics on constitutional law is not completely unavoidable, but that the temptation of results-oriented judging is great, and undermines the legitimacy of the law, all the same. Thus, according to this perspective, "constitutional law defines its integrity precisely in terms of its *independence* from political influence. From the internal perspective of the law, the law–politics distinction is constitutive of legality."[29] The most famous proponent of this view is probably Herbert Wechsler,[30] but it continues to resonate in contemporary discourse.[31]

From yet another perspective, originalism may be understood, at least in part, as a response to the problem of law's legitimacy and the need to keep it distinct from politics. Though the proposition is far from being beyond debate, originalists generally contend that their mode of interpretation is more principled because it is tied to the one meaning that was democratically adopted by the people of the United States, and that, unlike nonoriginalists, they are not free to impose their own values on the texts they decode.[32] Thus, for example, Justice Scalia's famous defense of originalism contends that, because the purpose of the Constitution is "precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable," originalism is the best mode of achieving the Constitution's goals.[33] Indeed, Justice Scalia argues that originalism avoids "aggravat[ing] the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[34]

In contrast to these various worrying approaches to the law–politics divide, some scholars have embraced the influence of popular attitudes on law as not only structurally inevitable, but also as a positive influence that should be embraced, at least to some degree, rather than suppressed. Proponents of "democratic constitutionalism," for example, argue that "constitutional meaning bends to the insistence of popular beliefs and yet

27. *Id.* at 39–43.

28. *See id.* at 76.

29. Post & Siegel, *supra* note 18, at 384.

30. *See, e.g.*, Hebert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11–12 (1959) (identifying "the deepest problem of our constitutionalism" as finding "criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will").

31. Regarding the resonance of the view of law as distinct from politics because of its principled nature, see *supra* notes 4–9 and accompanying text.

32. *See, e.g.*, Coan, *supra* note 14, at 852, 857 (acknowledging the defenses of originalism based on democracy and judicial restraint). The criticisms of this assertion are well-known and need not be repeated here. For an overview, see generally *id.*

33. Scalia, *supra* note 14, at 862.

34. *Id.* at 864.

simultaneously retains integrity as law."[35] Professors Robert Post and Reva Siegel argue that the Court cannot avoid public controversy surrounding the sorts of cases it hears, nor can it avoid being influenced by popular understandings of the Constitution; judges, therefore, must acknowledge the conflicting sides in a constitutional debate and "assess the . . . relevant constitutional values," employing "exquisite sensitivity to context."[36] Similarly, Professors Robert Post and Neil Siegel assert that principled legal reasoning should not be understood to be incompatible with the expression of "fundamental social values," which they argue is, itself, one purpose of the law.[37] Thus, professional legal reasoning is and should be "in dialogue with public values."[38] Finally, in a recent book, Professor Barry Friedman argues that the popular will has always influenced judicial understandings, and vice versa.[39] And so far, at least, the sky has not fallen.

This Article is mostly in line with this last line of thought regarding the law–politics divide. It argues that the distinction is neither as important nor as firm as legal-process scholars and originalists seem to suggest. It suggests a different reason for this view, however—one that is based in the nature of language itself, rather than in the structure of our political system or the nature of judging. By the same token, this analysis also suggests that theoretical coherence in the act of interpretation is inevitably undermined by the reality that interpretation must reach beyond the text itself to the messy social and political context in which it exists.

Before moving on to that linguistic explanation, however, it is important to clarify just what is meant by "politics." The term "politics" can have multiple meanings, and the above-described schools of thought regarding the law–politics divide seem to deploy various ones. In some views, "politics" is synonymous with ideology or, what may amount to the same thing, personal predilection. This seems to be the sense in which Judge Posner uses the term.[40] Many originalists also seem most concerned about the influence of politics in that sense of the term. Another meaning of "politics," however, would be public opinion or (to use a more elevated term) public values—with the term "public" perhaps serving as a stand-in for "majority" or "widely shared." This is the sense in which democratic constitutionalists and their ilk appear to understand the term. Finally, one might use the term "politics" to refer simply to political and cultural reality, or pragmatic

35. Post & Siegel, *supra* note 18, at 376.

36. *See id.* at 425–27 (suggesting that judges need not avoid controversy in order to maintain their proper judicial role).

37. Post & Siegel, *supra* note 11, at 1510.

38. *Id.* at 1510–11.

39. FRIEDMAN, *supra* note 17.

40. *See, e.g.*, Posner, *supra* note 13, at 51 (referring to "conventional 'left' and 'right' ideologies"); Richard A. Posner, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1654 (1998) [hereinafter Posner, *Problematics*] (describing political platforms, such as Marxism and Communism, as ideologies).

considerations of the context and impact of judicial decisions. Though this is a less common usage of the term, it also appears to play a role in the democratic constitutionalists' understandings of politics and is often opposed to law in scholarly discourse. It is in this last sense—the most general sense—that I use the term here in arguing that politics inevitably plays a role in interpretation.

II. Resistance to Constitutional Theory

In his seminal essay *The Resistance to Theory*, Paul de Man lays out a metatheoretical argument—a theory about literary theory.[41] In part, the essay is an attempt to understand what, if anything, makes literary theory distinct from other disciplines and practices, such as philosophy, that exert a gravitational pull upon it.[42] This central dilemma, of course, calls to mind the debate over the uniqueness of legal and constitutional theory, which partakes of other disciplines but seeks to remain independent of them.[43] Ultimately, de Man proposes that "[l]iterary theory may now well have become a legitimate concern of philosophy but it cannot be assimilated to it," because literary theory "contains a necessarily pragmatic moment that certainly weakens it as theory but that adds a subversive element of unpredictability and makes it something of a wild card in the serious game of the theoretical disciplines."[44] The subversive unpredictability of literary theory is what de Man calls "resistance," and that resistance comes not only from outside but also from within the theory itself.[45] As explained below, de Man's conclusions apply to, and have significant consequences for, constitutional theory as well.

According to de Man, the rise of literary theory[46] corresponds to the rise of a certain linguistic self-consciousness in the twentieth century—the newfound focus on language and the meaning and function of signification, which was accompanied by the recognition that there is a difference—a kind of play in the joints—between words and the objects or concepts to which they refer.[47] This recognition was accompanied by a growing acceptance of the view that language and meaning are functions of convention rather than of some sort of natural or inevitable mechanism.[48] The conventional view of language, of course, is one of the fundamental postulates of postmodernism; it leads to the conclusion that the relationship between words and the real-

41. de Man, *supra* note 21, at 3.

42. *Id.* at 4–5. So-called continental philosophy has been particularly influential within postmodern literary theory. *Id.* at 7–8.

43. *See, e.g.*, Posner, *Problematics*, *supra* note 40, at 1693–98 (criticizing the view that moral theory should inform legal decisionmaking).

44. de Man, *supra* note 21, at 8.

45. *Id.* at 19.

46. Literary theory is here contrasted with "literary history" and "literary criticism." *Id.* at 8.

47. *Id.* at 8–10.

48. *Id.*

world objects they refer to is both arbitrary and unstable.[49] Yet, according to de Man, it is a view that is not always embraced, and it is one that ideologues, in particular, reject: as de Man puts it,

> [N]o one in his right mind will try to grow grapes by the luminosity of the word "day," but it is very difficult not to conceive the pattern of one's past and future existence as in accordance with temporal and spatial schemes that belong to fictional narratives and not to the world.[50]

In other words, we easily understand in some cases, as with everyday words like "day," that the word and the object to which it refers are distinct; it is much harder, however, to recognize that our most deeply held beliefs and perceptions of the world do not necessarily reflect a fixed and natural reality. Thus, he continues, "[I]deology is precisely the confusion of linguistic with natural reality, of reference with phenomenalism."[51]

De Man contends, however, that it is the function of literary theory to unmask this very tendency to confuse. Literary theory thus defeats ideology, and ideological attempts to discredit literary theory consequently evidence the critics' "fear at having their own ideological mystifications exposed by the tool they are trying to discredit."[52] Yet, at the same time, literary theory itself encounters resistance—a resistance from within, which de Man suggests is an inevitable, constituent element of the theoretical project itself.[53] De Man explains that this "resistance" is a "resistance to the use of language about language," as well as to "language itself or to the possibility that language contains factors or functions that cannot be reduced to intuition."[54]

Central to de Man's argument are a dichotomy and a trichotomy, or *trivium*. The dichotomy is between theory and aesthetics. Theory, of course, means the same thing in the context of literary theory as in constitutional theory: an attempt to construct a closed system with the power to explain substantially all facts or events within a given universe, but which is itself speculative rather than factual.[55] Aesthetics, by contrast, involves attention to pleasurable, beautiful, or other sensory aspects of language—an embrace of the phenomenological effects of language in the real world.[56] An aesthetic approach to poetry, for example, might be one that emphasizes the sounds of

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49. *Id.* at 10.

50. *Id.* at 11.

51. *Id.*

52. *Id.*

53. *Id.* at 12.

54. *Id.* at 12–13.

55. *See* Wlad Godzich, *Foreword* to 33 THEORY AND HISTORY OF LITERATURE: THE RESISTANCE TO THEORY ix, xiii (1986) (defining theory as "a system of concepts that aims to give a global explanation to an area of knowledge" which is "oppose[d] . . . to praxis by virtue of the fact that it is a form of speculative knowledge").

56. *See* de Man, *supra* note 21, at 7–8.

the words and the harmonious effects of particular rhyme and rhythm schemes. An aesthetic reading of the Constitution might involve an appreciation of the elegance of its language—a not wholly ridiculous, but also not apparently useful, undertaking for lawyers to engage in.

At the same time, the concept of aesthetics as deployed by de Man can be understood more broadly, to refer to any focus on the real-world effects of language. This aesthetic approach is opposed to a theoretical reading that understands a text as an instantiation of a particular world view, ideology, or interpretive theory.[57] Such theoretical readings inevitably attempt to assimilate the text to the overarching explanatory system that claims to comprehend it. The aesthetic approach, by contrast, pretends to no such grand ambition.

Related to the theory–aesthetics dichotomy is the classical *trivium* of logic, grammar, and rhetoric, which represented the sum total of language and linguistics in classical thought.[58] Classical linguistics established a hierarchy, in which logic, which is related both to philosophy and mathematics, stood at the top.[59] As de Man explains, this prioritization of logic, as well as its affiliation with mathematics, entails a "continuity between a theory of language, as logic, and the knowledge of the phenomenal world"—a belief that language, as the vehicle of logic, closely reflects the reality of the world around us.[60]

Grammar, in the middle, was the study of language with the aim of understanding how language essentially operationalizes the principles of logic.[61] And rhetoric, the lowest in the hierarchy, was comprised simply of the study of persuasive or figurative language—of literary tropes, which were extensively catalogued in grammatical terms, and their deployment in the service of persuasion.[62] This hierarchy helps to construct a particular relationship between theory and aesthetics, or reality on the ground.[63] There is a correspondence between them, in which theory (logic) is understood to reflect, by virtue of human reason, reality (aesthetics).[64] But theory, as the product of reason, clearly stands above base reality, which lies constantly in need of analysis and interpretation.

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57. *Id.* at 10–11.

58. Christopher Norris, *Law, Deconstruction, and the Resistance to Theory*, 15 J.L. & SOC'Y 166, 177 (1988).

59. *See id.*

60. de Man, *supra* note 21, at 13.

61. Norris, *supra* note 58.

62. *Id.*

63. *See* de Man, *supra* note 21, at 13 (equating, implicitly, the relationship between language, as logic, and knowledge of the phenomenal world, which is accessible through mathematics, with the relationship between theory and aesthetics).

64. *See id.* at 14 ("The continuity between theory and phenomenalism is asserted and preserved by the system itself.").

De Man readopts this classical trio, not as a hierarchy but rather as an exemplar of the inevitable tensions within interpretation.[65] In postmodern literary theory, which rejects the preeminence of logic and the corresponding notion of a natural or inevitable symmetry between language and reality, the hierarchy is at the very least inverted—the rhetorical aspect of language takes precedence over its logical aspect.[66] De Man claims that "reading"—which for him means a close reading that is particularly attentive to the multiple possible meanings of a text—partakes of both grammar and rhetoric and is a privileged site of tension between them.[67] In particular, de Man argues that "the grammatical decoding of a text leaves a residue of indetermination that . . . cannot be[] resolved by grammatical means."[68] The resistance to (literary) theory is thus, in essence, a resistance to reading. The resistance to theory—really, a resistance within theory—is thus a resistance to that which ultimately undermines any attempt to systematize the meaning of the text—it is an attentiveness to the uncertainties, the indeterminacies, and the inconvenient moments within the text itself, which assimilate poorly to grand overarching theories, or resist that assimilation altogether. For de Man, these moments are created by "figural" language, which by its very essence opens up multiple and often self-contradictory meanings, all of which may be technically, or "grammatically," correct.[69] Yet, the "literary" text is not the only kind of text that presents this dilemma—de Man claims that, while more explicit in literature, the figurative dimension of language—the aspect of language that escapes easy grammatical clarification yielding only one possible correct meaning—"can be revealed in any verbal event when it is read textually."[70]

De Man ties his theory of reading to speech-act theory. Like postmodern literary theory, speech-act theory has recognized the essentially conventional nature of language and, thus, of meaning.[71] For de Man,

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65. *Id.* at 13.

66. STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 140 (1991) (describing how postmodern theory emphasizes rhetoric over "any systematic or comprehensive theoretical position").

67. de Man, *supra* note 21, at 15.

68. *Id.*

69. *See id.* at 16 (discussing this problem in the context of interpreting the meaning of the title of Keats's *The Fall of Hyperion* and noting that "[f]aced with the ineluctable necessity to come to a decision, no grammatical or logical analysis can help us out").

70. *Id.* at 17. Thus, "once a reader has become aware of the rhetorical dimensions of a text, he will not be amiss in finding textual instances that are irreducible to grammar or to historically determined meaning." *Id.* at 18.

71. *Id.* at 18–19. As I have explained elsewhere, what I call "meaning" here roughly correlates with "illocutionary force" in the parlance of speech-act theory. *See* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 511–14 (2005). "Illocutionary force" is often defined as the *effect* of language—what language does or what act it performs (asserting, urging, certifying, begging)—rather than what the individual words denote. *See* John Searle, *What is a Speech Act?*, *in* THE COMMUNICATION THEORY READER 263 (Paul Cobley ed., 1996).

speech-act theory is correct to recognize the conventional nature of meaning but is wrong to suggest that it is reducible to convention, especially insofar as it aspires to fix and determine, once and for all, the functioning of language by specifying all of the conventional elements that produce a particular kind of meaning (or "illocutionary force").[72] But speech-act theory can also be read in light of postmodernism's understanding of language as inevitably context-bound and of context as boundless.[73] A speech-act theory that does not fall prey to the attempt to create a totalizing language system that tames and controls all possible meaning is one that recognizes the dependency of language on context—not just the immediate textual context but also the historical and social context in which it is read.[74]

For de Man, postmodern literary theory, in so far as it engages in *reading*, always reads texts in essentially the same way—as both asserting and performing their own indeterminacy.[75] Reading thus dramatizes the failure of language to reach the certainty and the reflectiveness of reality to which it appears to aspire—or, put differently, the ability of language to escape any and every attempt to pin it to a single meaning or reference.[76] As such, these postmodern readings are in fact "theory and not theory at the same time, the universal theory of the impossibility of theory."[77]

Whatever interest de Man's argument holds—hopefully as more than a historical artifact—its application to constitutional theory may not be immediately apparent. In this Article, I certainly hope to steer clear of the classical critical legal theory brand of meaning-debunking, itself definitively debunked by Stanley Fish and others.[78] Rather, I wish to contend that de

72. de Man, *supra* note 21, at 19. De Man refers to classical theorists of speech acts, such as John Searle and J.L. Austin.

73. *See, e.g.*, Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499, 1541–42 (1996) ("Meaning is context-bound, but context is boundless." (quoting JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 123 (1982) (internal quotation marks omitted))); Hill, *supra* note 71, at 514–16 ("Context, however, is itself an extremely unstable device for discerning meaning. Although meaning is dependent on context, it is usually impossible to fully describe or delimit the relevant context . . . .").

74. Hill, *supra* note 71, at 517–22. An originalist might acknowledge the importance of context but argue that meaning should be dependent only on the context in which it was written. There are, however, several difficulties with this view. One is that historical context is virtually impossible to recapture in full; another is that constitutional language must continue to be applied in new, contemporary contexts and speak to contemporary problems. Few, if any, originalists would go so far as to say that constitutional language means only what it could have meant in the context of late eighteenth-century America. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (Scalia, J.) (rejecting as "bordering on the frivolous" the notion that only those arms available at the founding are encompassed by the Second Amendment's protections).

75. de Man, *supra* note 21, at 15–19.

76. *Id.*

77. *Id.* at 19.

78. Norris, *supra* note 58, at 173 (citing Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1796 n.60 (1987)).

Man's argument has several specific implications for the project of constitutional theory.

First, de Man's point that language inevitably tends to take on a life of its own and thereby to resist any attempt at fitting all meaning within a neat, totalizing theory would seem to apply to legal language as well as literary. For this protean quality of language is at least in part a feature of language's inevitable dependence on context and the underlying change within that (social, historical, political) context. The failure of theory to make sense of language is particularly apparent with respect to originalist theories, which are obviously undermined by the understanding that language takes on new meanings in light of changed circumstances. Any theory that claims to assimilate the text entirely to it, de Man suggests, is refusing to really "read" that text.[79]

It is important to recognize, however, that de Man is not here making a general claim that meaning is always indeterminate and unknowable, nor is that a claim I wish to make here. He does argue, however, that the meaning of texts—including legal texts—cannot be specified in any transcendent or permanent way. There is no meaning, whether based on the text alone or on the framers' intent, that can answer questions about how the text should apply in new and unanticipated circumstances.[80] Thus, the ways in which any constitutional theory is constantly questioned and ultimately undermined by the changing social context in which the constitutional text must be read and applied is precisely the "resistance" to and within theory to which de Man refers.

This resistance is, moreover, on the view of postmodern speech-act theorists, inherent in the dependency of all speech acts on context.[81] The context dependency of meaning may seem intuitive, of course, but it also derives from the recognition that language is conventional. Although one might argue that words have definitions that can be found in an objective way—for example by looking in a dictionary, *utterances* (sentences or speech acts) can only have meaning in a particular context. Thus, the phrase "I do" means very little standing on its own, typed on a page; it carries great significance, both legal and cultural, if it is said in the context of a marriage ceremony in which all of the relevant formalities have been met; and it is surely decipherable but carries decidedly less weight if it is spoken in a play, in front of an actor who is dressed as, and to everyone's understanding is merely pretending to be, a justice of the peace.[82] This context dependency is

79. For examples of this phenomenon, see *infra* Part III. "Reading," for de Man, means close reading, with special attention to the multiple meanings and potential for indeterminacy within a text. de Man, *supra* note 21, at 24.

80. *See* DE MAN, *supra* note 1, at 270–71; Norris, *supra* note 58, at 175–76.

81. CULLER, *supra* note 73, at 123–24; Hill, *supra* note 71, at 515.

82. *But see* LEMONY SNICKET, A SERIES OF UNFORTUNATE EVENTS NO. 1: THE BAD BEGINNING 133–44 (1999) (narrating the story of a mischievous count who tries to steal an orphan's fortune by staging a play in which the orphan plays the part of the count's bride-to-be and,

generalizable, of course, and it stretches beyond the example of certain formalities being required in order for a speech act to have legal force.[83]

Yet context is both impossible to specify completely and always changing.[84] As Jonathan Culler puts it, "Meaning is context-bound, but context is boundless."[85] Context is boundless in the sense that it can always be further specified, as any lawyer knows. The exercise of distinguishing disfavorable precedent is often nothing more than the act of highlighting an element of the factual context in the prior case that may have escaped notice or seemed unimportant at the time but that is infused with significance for the later case.[86] And no matter how carefully one tries to delimit the context—to specify the rules under which a certain expression means a certain thing—a new context can always be created that evades the rules one creates.[87] Jonathan Culler gives the example of a sign in an airport informing passengers that all remarks about bombs will be taken seriously: what meaning would we impute, he asks, if a passenger approached an airport worker and asked, "If I were to remark that I had a bomb in my shoe, you would have to take it seriously, wouldn't you?"[88] Could the problem be solved by specifying that remarks about remarks about bombs must be taken seriously? And so on, and so on, in an infinite regress?[89]

Importantly, part of the unmanageable and illimitable context is the cultural and political context, which has particular importance for constitutional interpretation. Thus, the constantly changing context of politics, culture, and facts on the ground—what de Man might call the aesthetic—is inevitably bound up with the act of interpretation, just as it also, equally inevitably, escapes the totalizing attempts of theory. This context is the "pragmatic moment" that is essential to constitutional interpretation but weakens constitutional theory.[90]

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unbeknownst to her, the woman playing the justice of the peace is an actual justice who performs an actual, valid marriage ceremony on stage). I employ the "I do" example in Hill, *supra* note 71, at 512.

83. Sometimes the context even includes that which is *not* written. For example, Akhil Amar notes that Chief Justice John Marshall, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 353–56 (1819), drew on the use of the word "necessary" in other contexts, including outside the Constitution itself, to demonstrate that, if the Framers had meant to give Congress only those powers *explicitly* delegated in the Constitution, it would have said so. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 800 (1999). According to Amar, "Marshall is contrasting the actual wording of the Constitution not merely with what it could have said . . . or with what another clause of the Constitution does say . . . . Rather, he is contrasting the text of the Constitution with what its *predecessor document* said." *Id.*

84. Hill, *supra* note 71, at 515–16.

85. CULLER, *supra* note 73, at 123.

86. Hill, *supra* note 71, at 515–16.

87. *Id.*

88. CULLER, *supra* note 73, at 124–25 (internal quotation marks omitted).

89. *See id.* at 125.

90. Professor Stanley Fish makes a similar point in arguing that the practice of judging and theories of legal interpretation are entirely distinct and, indeed, have nothing to do with one another.

At this point an originalist or textualist might raise an objection to my insistence that the *present*, ever-changing political and cultural context is the context in which the *Constitution* must be interpreted. Originalists, after all, believe that the "original public meaning" of a term is the relevant one.[91] And what are originalism and its cousin textualism, if not themselves dreams of a return to a strict form of reading? This might appear to suggest that the problem posed for interpretation by the ever-changing context of the present is thus solved by an original-public-meaning approach according to originalists.

But this objection misses the mark in several respects. First, the reading that originalists espouse is not a de Manian reading—rather, it is a sort of prelapsarian reading, a perfect reading that itself resembles theory in its attempt to achieve one true and coherent past truth. But any text can only be read in the present, not in the past; the influence of context thus pervades interpretation whether the interpreter wishes it to or not.[92] Indeed, to think that one's reconstruction of a past context is the same as *actually discovering* what an utterance meant to some "original public" bears a striking resemblance to the exercise of trying to grow grapes by the luminosity of the word "day."[93] Or, as Professor Jamal Greene puts it, "At no point in our constitutional history did any democratically responsible institution determine and embody within a text the notion that state and local actors should be bound by Justice Scalia's considered view of the eighteenth-century meaning of the Bill of Rights."[94] While originalists may be partly correct in claiming that the goal of interpretation is to discover the original intent behind an utterance, they deny that there is a difference between this reconstruction of original intent and the actual intent itself.

Moreover, as I have explained elsewhere, the very nature of meaning as convention driven implies that it must also be capable of repetition: an utterance can only function as meaningful if it can be repeated in different

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They are different practices with different goals. *See* Fish, *supra* note 78, at 1785–87 (claiming that judging does not involve adherence to an "underlying set of rules and principles" but should instead strive for pragmatic coherence in decisionmaking).

91. Or at least, this is what the "new originalists" think. *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69 (2011) [hereinafter Barnett, *Interpretation and Construction*] ("[O]riginalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment."); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 627–29 (1999) ("The public meaning of the words of the Constitution . . . could be gleaned from a number of sources, including the records of the convention, but where those intentions differed from the public understanding, it is the public meaning that should prevail."). *See generally* Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 610–11 (2008).

92. *Cf.* J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513, 1518–19 (1999) (describing legal interpretation as a performance in which interpretive choices must be made and audiences persuaded anew each time).

93. *See supra* text accompanying notes 50–51.

94. Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 988 (2012).

contexts and still be comprehensible.[95] Yet each repetition also opens up the possibility of the utterance's meaning being changed:

> If language is conventional, it must function according to a set of learnable, and thus reproducible, rules. The functionality of language depends, in other words, on its ability to be repeated—on the ability of certain speech acts to be replicated in a variety of contexts. This ability to be repeated, or "iterability," also means that any linguistic utterance is capable of being cut off from both its original context and its speaker's intent to be reproduced in a context that may change or undermine its prior meaning. Indeed, no speech act could function at all if this were not the case—that is, if it were not both conventional and iterable. The conventionality and iterability of speech acts ensure that the speech act can be recognized, understood, and reproduced by different speakers and listeners, but they also ensure that language can be used in ways that may not have been originally intended.[96]

The context dependency of language, which gives rise to its iterability, is thus the element that creates the possibility that any purportedly fixed, intentional meaning can always be undermined. In addition, it throws into question the originalist notion of a distinction between "interpretation" and "construction." As Professor Randy Barnett explains it, "*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances."[97] But as Barnett himself acknowledged, meaning must be specified "in context"; words do not have any meaning—and certainly not a fixed meaning—without a context.[98] Even assuming one could agree with originalists that the era of enactment is the relevant historical context, moreover, it must be acknowledged that determining the boundaries of the relevant context is itself an interpretive choice. One must make decisions about whether the context of the word "necessary" in the Necessary and Proper Clause includes only the words of the Clause itself, the entire Constitution (which includes the same word in Article II, Section 3 and the synonym "needful" in Article IV, Section 3), or all contemporary uses of the word.[99] Moreover, one might reasonably question how, precisely, to delineate the historical time period that one can consider in determining "contemporary" uses and whether meaning can really be pinpointed to a particular moment in time. For example, is the *Slaughter-House*[100] Court's interpretation of the Fourteenth Amendment, discussed below, sufficiently

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95. B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 738–39 (2010).

96. *Id.* at 738 (footnote omitted).

97. Barnett, *Interpretation and Construction*, *supra* note 91, at 66.

98. *See id.* at 67–68.

99. Amar, *supra* note 83, at 755–58 (discussing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

100. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

contemporaneous to deserve equal weight with the Amendment's framers' own views? At each turn a choice must be made to enforce linguistic clarity against the inevitable tendency of meaning to multiply once a word is committed to paper. Choices always must be made among possible meanings, as meaning does not exist without context. All interpretation is also construction.

Finally, the very structure of a constitution itself suggests that an attempt merely to construct past meaning is wrongheaded. As de Man argues in an essay on Jean-Jacques Rousseau's *Social Contract*, a social contract "never refers to a situation that exists in the present, but signals toward a hypothetical future . . . . All laws are future-oriented and prospective; their illocutionary mode is that of the *promise*."[101] Those promises are understood to have been made at some past time, but their legitimacy must be verified and accepted in the present, at the moment of the state's application of coercive force.[102] This would seem to be the understanding on which any social contract—and thus any constitution—must be based. Therefore, "'when the Law speaks in the name of the people, it is in the name of the people of today and not of the past'. The definition of this 'people of today' is impossible, however, for the eternal present of the contract can never apply as such to any particular present."[103]

III. Examples

What follows are examples of how the language of the Constitution, read closely, escapes any attempt to fix it, and of how provisional meaning can be reached only by means of considering the broader social and political context. Of course, de Man's point about language, as I have described it, is sufficiently general that it would have to apply to all language and a true demonstration, rather than an illustration, of it would have to be considerably more exhaustive than what I offer here. But given the limitations of time and space, I offer instead two brief examples to show how one might connect de Man's theory to constitutional interpretation and the failures of constitutional theory, particularly originalism.

A. The Fourteenth Amendment's Citizenship Clause

Could there be a clearer example of original intent than the Fourteenth Amendment's intended overruling of *Dred Scott v. Sandford*'s[104] holding that African-Americans are not "citizens" of the United States?[105] Even the conservative *Slaughter-House* Court recognized that this was the inevitable

101. DE MAN, *supra* note 1, at 273; *see also* Norris, *supra* note 58, at 174–76, 180 (discussing the same passage in relation to legal interpretation).

102. *See* DE MAN, *supra* note 1, at 273.

103. *Id.* (internal citation omitted).

104. 60 U.S. (19 How.) 393 (1857).

105. U.S. CONST. amend. XIV; *Scott*, 60 U.S. at 422–23.

import of that provision.[106] Yet the history of the Fourteenth Amendment's Citizenship Clause, from *Dred Scott* to the *Civil Rights Cases*,[107] is a prime example of how language and intent are often in tension, and of how even the clearest of texts may fail to enact its framers' intentions.

Dred Scott, of course, is the original sin of originalism and a founding member of the "anticanon."[108] In that opinion, Chief Justice Taney infamously held that blacks were not "citizens" within the meaning of Article III for purposes of diversity jurisdiction and therefore could not invoke the jurisdiction of the federal court.[109] Taney concluded that Scott was not a citizen—a member of the political community entitled to the "privileges and immunities" possessed by other citizens—not simply because of his status as a slave (which made him "property" rather than a person), but because of his race and ancestry.[110] In reaching this conclusion, Taney began with the following proposition: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing"—namely, the sovereign people, the political community, and the individuals who govern and are governed.[111] As evidence of this proposition, Taney pointed to the intentions of the Framers as contained in the Preamble to the Constitution, noting that:

> It declares that it is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the

106. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1873) (noting the Fourteenth Amendment "declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States").

107. 109 U.S. 3 (1883).

108. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 406–08 (2011) (identifying *Dred Scott* as part of the American anticanon and referring to Chief Justice Taney's originalism as "bad originalism").

109. *Scott*, 60 U.S. at 427. Specifically, Taney formulated the question as follows:

> Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

Id. at 403.

110. *Id.* at 403, 408, 422–23.

111. *Id.* at 404.

> people. It uses them as terms so well understood, that no further description or definition was necessary.[112]

Thus, according to Taney, African-Americans were not a part of the people nor were they citizens, based on an understanding that was not made explicit because it was too clear to explain. Taney further listed, in excruciating detail, all of the reasons why the Framers could not possibly have imagined including African-Americans within this category when they drafted Article III and the Privileges and Immunities Clause of Article IV.[113] Taney applied originalism with a vengeance, privileging original intent over reasonable claims about the meaning of the text on its face.[114]

It was, of course, against this backdrop and that of the subsequent Civil War that the Fourteenth Amendment declared, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[115] No longer could African-Americans be denied national citizenship on the theory embraced by *Dred Scott*, since the Fourteenth Amendment grounded citizenship in the irresistible biological fact of being born in the United States.

Yet, famously, it took only a few years for the Supreme Court to void that language of much of its power by defining the "privileges and immunities" that attached to that citizenship—guaranteed in the Fourteenth Amendment's next clause[116]—as referring only to those rights that individuals possessed by virtue of their relationship to the federal government.[117] Those rights included such relatively insignificant powers as the right to travel to the national capital to petition or conduct business with the federal government; to claim protection of the federal government while on the high seas; and "free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States."[118] To say that the *Slaughter-House* Court literally nullified the meaning of the Citizenship Clause would hardly be an exaggeration, since, as pointed out by the dissent, all of those rights were already protected by the Constitution's Supremacy

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112. *Id.* at 410–11.

113. *Id.* at 406–09, 411–26.

114. *Id.* at 410 ("The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration . . . .").

115. U.S. CONST. amend. XIV, § 1.

116. *Id.* cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

117. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

118. *Id.*

Clause, and thus the Fourteenth Amendment was not even needed to guarantee them.[119]

The *Slaughter-House* Court achieved its feat by means of a clever intratextual argument, which demonstrates just how susceptible the text is to escaping whatever original intentions it may have embodied. The phrase "privileges or immunities" in the Fourteenth Amendment seems intentionally chosen to mirror the "privileges and immunities" language of Article IV. That language, of course, had already been interpreted to refer to "fundamental" rights,[120] so it seemed natural to assume that those were the rights that Congress meant to encompass within national citizenship and extend to America's newest citizens. Yet, the language's verbatim repetition[121] is precisely what opened it up to the opposite reading—a reading that assumed national citizenship, and its attendant privileges and immunities, must be *distinct* from state citizenship.[122] This one textual move, in one fell swoop, emptied the Citizenship Clause of virtually all of its content. Similarly, the Court acknowledged the Fourteenth Amendment's dual citizenship language, which proclaimed "[a]ll persons born or naturalized in the United States" to be "citizens of the United States *and* of the State wherein they reside," and promptly turned it on its head.[123] While it may be true, as the Court asserted, that Congress thereby created a category of national citizenship that was independent of state citizenship and to which all U.S.-born or -naturalized individuals were entitled, the Court again exploited this distinction to minimize the content of national citizenship, rather than to endow it with robust meaning, as the framers had likely intended.[124]

The *Slaughter-House Cases* thus place into bold relief the inherent ability of language to escape its original context and take on new meanings. Even identical language within the same document may not always be interpreted in the same way; the repetition itself can suggest either that the meaning should be understood consistently *or* precisely the opposite—that the use in two different contexts was intended to produce two different and even contrasting meanings. Of course, one possibility is that the historical context of *Slaughter-House* resulted in this arguably unwarranted

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119. *Id.* at 96 (Field, J., dissenting); *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 22–23 (1980).

120. *Slaughter-House*, 83 U.S. at 75–76 (citing Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230)).

121. Well, almost verbatim. Article IV refers to "privileges *and* immunities," U.S. CONST. art. I, § 2 (emphasis added), while the Fourteenth Amendment, since it is phrased as a prohibition, states that no state can deprive a citizen of the "privileges *or* immunities" of citizenship, U.S. CONST. amend. XIV, § 1 (emphasis added).

122. *Slaughter-House*, 83 U.S. at 74–78.

123. *Id.* at 73–74; U.S. CONST. amend. XIV (emphasis added).

124. *Slaughter-House*, 83 U.S. at 74, 79; *see, e.g.*, Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1332 (1952).

interpretation. The waning enthusiasm for Reconstruction even in the North, economic depression, and the labor unrest of the early 1870s no doubt influenced the majority's view of the meaning of the Reconstruction Amendments and of the privileges and immunities to which all U.S. citizens are entitled.[125] Moreover, the immediate factual context of the case—a suit brought not by blacks to vindicate their civil rights but by Southern whites to vindicate economic rights—likely influenced the probusiness Court to cabin the meaning of the Amendment's provisions.[126]

The Court's opinion in *Slaughter-House* thus demonstrates that language possesses an ineluctable capacity to escape both theory and intent, as de Man argued. The terms of the Citizenship Clause of the Fourteenth Amendment were undoubtedly aimed at granting a meaningful equality, accompanied by substantive rights, to African-Americans. Yet, in *Slaughter-House* the language presented itself in a new and frightening context—both in the sense that the suit was brought by white litigants seeking economic equality, and in the sense that the failures and tensions of Reconstruction had become manifest. Indeed, it is, first, the very potential for using the Fourteenth Amendment to protect a broader swath of the population, including whites clamoring for economic protection, which demonstrates this quality of language. While the notion that the rights proclaimed by the Civil War Amendments might extend beyond blacks to all members of society might not have been entirely foreign to the Amendment's framers,[127] its presentation here may well have been unanticipated. The combination of "the free labor ideology of the time,"[128] which led the butchers to present their case in terms of a fundamental right to exercise one's trade, and increasing concern about claims of the have-nots to economic citizenship, might have made the country look very different in 1872 than it had in 1868.

Whether such historical factors completely explain the Court's decision or not, the fact remains that the inherent openness of language, due to its dependency on both context and iterability, make the *Slaughter-House* Court's reading possible. The use of the words "privileges and immunities," which was likely intended to incorporate guarantees of fundamental rights already identified under Article IV, Section 1 against the states, as well as the use of the term "citizenship" to confer both state citizenship and national

125. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 524–31 (1988) (explaining how the depression, labor movement, and electoral realignment of 1874 "strongly affected prevailing attitudes toward Reconstruction"); *see also* FRIEDMAN, *supra* note 16, at 146–49 (noting the almost universally positive reception of the decision in the *Slaughter-House Cases*).

126. FONER, *supra* note 125, at 529–30.

127. *See, e.g.*, ELY, *supra* note 119, at 23–24 ("Abolitionist concerns had broadened over time . . . from a narrow focus on the rights of blacks to a broader occupation with the civil rights and liberties of everyone. The various clauses of the Fourteenth Amendment reflect that development.").

128. Patrick Cronin, *The Historical Origins of the Conflict Between Copyright and the First Amendment*, 35 COLUM. J.L. & ARTS 221, 245 (2012).

citizenship on African-Americans, was instead used to demonstrate that there must be some distinction between national and state citizenship, enabling the majority to minimize the content of the former.[129]

Though this familiar example of constitutional interpretation has often been understood as a willful misreading, it is in the de Manian sense simply an illustration of reading itself.[130] The framers' language escapes not only the original intent of those framers but also any theory of reading. Neither originalism nor any other attempt to fix the meaning of constitutional text is of much use in the face of the malleability of language and its ability to take on new meanings in varying contexts. Or, put differently, it is impossible to accept that any constitutional theory provides definitive answers to interpretive difficulties unless one simply refuses to read. To see certainty anywhere in the constitutional text is simply to refuse to read it.

B. The Meaning of the Religion Clauses

The First Amendment to the Constitution proclaims that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[131] Since the Supreme Court and lower courts began enforcing the religion clauses in the first half of the twentieth century, debates have swirled around issues such as what it means to "establish" religion and when a law can be said to "prohibit" the exercise of religion.[132] The term "establishment of religion," and its changing shape over the decades, has arguably been an important undercurrent in the shifting doctrinal landscape.

The word "religion" is notoriously difficult to define, and the Supreme Court has largely dodged responsibility for attaching a definitive meaning to the term in the constitutional context.[133] But setting aside philosophical debates about what does and does not constitute a belief system that can properly be characterized as a "religion," the term in its constitutional dimension unquestionably has, and has long had, a significant cultural and

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129. *Slaughter-House*, 83 U.S. at 74–78.

130. I emphasize here that this example is merely an illustration, and not a definitive proof, of de Man's theory. A meaningful attempt to demonstrate the truth of the theory on empirical rather than conceptual grounds would require an exhaustive study of constitutional interpretation, certainly one beyond the scope of this Article.

131. U.S. CONST. amend. I.

132. *See, e.g.*, McCreary Cnty., Ky. v. ACLU, 545 U.S. 844, 874–75 (2005) ("The First Amendment contains no textual definition of 'establishment,' and the term is certainly not self-defining . . . . There is no simple answer, for more than one reason."); Everson v. Bd. of Educ., 330 U.S. 1, 15 n.21 (1947) (collecting cases elaborating on the meaning and scope of the religion clauses).

133. *See* Welsh v. United States, 398 U.S. 333, 335 (1970) (avoiding constitutional questions by declining to articulate a definition of religion for purposes of constitutional claims); United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring) (suggesting that the Court construed the term "Supreme Being" in the conscientious objector statute broadly so as to avoid constitutional issues (internal quotation marks omitted)).

political dimension. Regardless of what religion means in a technical sense, the language and practices that appear religious, as opposed to merely cultural, have changed over time and in doing so have reflected cultural and political realities on the ground.

Abington School District v. Schempp[134] is one example. In that challenge to the then-common practice of reading Bible verses, without commentary, in the public schools, one of the principal arguments in the case was that the Bible was not a sectarian document and that the reading of verses did not constitute a form of religious instruction—at most, it was merely "moral" education.[135] Of course, as many commentators have observed, the practice of Bible reading may not have seemed particularly religious, or certainly not sectarian, to many Protestants at the time.[136] The schools, which had, after all, originated as places of Christian learning, retained a sort of pan-Protestant character well into the twentieth century.[137] The practice of reading unadorned verses from the King James Bible was seen as an accommodation of the various Protestant denominations that were represented in the school, but it was of course deeply alienating to Catholics and Jews, in particular, whose numbers were significant and growing.[138] The Bible reading was experienced as a sectarian act by members of those groups, because the Jewish religion does not recognize the New Testament and Catholics use a different version of the Bible—the Douay.[139]

It would be hard to come up with a clearer example of a situation where the changing social context—here, the increased religious diversity in American society—changed the understanding of a particular constitutional concept. The Bible reading could be recognized as a sectarian religious practice, and therefore an unconstitutional establishment of religion, only in a culture where it was no longer accepted as universal. Of course, religious diversity did not suddenly arise in the twentieth century in the United States, and indeed fierce battles were fought over sectarian religious practices in the nineteenth century as well.[140] But until roughly the era of *Schempp* and its predecessor, *Engel v. Vitale*,[141] it would be fair to suggest that, for most

134. 374 U.S. 203 (1963).

135. STEPHEN D. SOLOMON, ELLERY'S PROTEST: HOW ONE YOUNG MAN DEFIED TRADITION & SPARKED THE BATTLE OVER SCHOOL PRAYER 163–66, 185–87 (2007).

136. *See, e.g.*, *id.* at 130–31 (citing RICHARD B. DIERENFIELD, RELIGION IN AMERICAN PUBLIC SCHOOLS 50–51 (1962)) (suggesting that Bible reading was "often part of a broader devotional service, typically short in duration and held at the beginning of the day"); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 309–10 (2001) (observing a growing public secularism, including among Protestants).

137. *See, e.g.*, SOLOMON, *supra* note 135, at 99–101, 108.

138. *Id.* at 113–14; *see also* Jeffries & Ryan, *supra* note 136, at 279.

139. SOLOMON, *supra* note 135, at 63.

140. *Id.* at 115–31; Jeffries & Ryan, *supra* note 136, at 299–305.

141. 370 U.S. 421 (1962).

Americans, Bible reading simply faded into the background political and social culture.[142]

To take an even more contemporary example, consider the constitutional conundrum of so-called "ceremonial deism"—official religious references that are so familiar and deeply rooted in American tradition that they are often considered to be more patriotic than sectarian in nature.[143] Common examples include the national motto "In God We Trust," the words "under God" in the Pledge of Allegiance, and swearing "so help me God" for judicial and other official proceedings.[144] It seems reasonable to think that the only thing standing between invalidation of such practices under *Schempp* and the currently prevailing assumption that such phrases are generally constitutional[145] is the background religious culture against which they are read. As at least one commentator has pointed out, if the name "Allah" were substituted for "God," it would be hard to see these phrases as similarly innocuous, nonsectarian, and nonreligious.[146] If the United States came to be dominated by citizens of nonmonotheistic religions, it seems difficult to imagine that these words would still be read as fundamentally nonreligious, their historical pedigree notwithstanding.

At the same time, the inevitable openness of what constitutes an "establishment of religion" has opened up the term to attacks from the opposite direction, creating the possibility of claims that driving religious speech and practice out of the public square has established a "religion" of secularism.[147] Though still quite tenuous under Establishment Clause doctrine, it is easy to see how this understanding of religion could arise from a context in which a Christian majority experiences the sudden absence of its discourse from the public square, seemingly replaced by an equally comprehensive doctrine.[148] The term "religion" is thus capable of expansion

142. *See, e.g.*, Jeffries & Ryan, *supra* note 136, at 299 (asserting that public education in America was, from the beginning, "religious but nonsectarian").

143. *See, e.g.*, Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2094–95 (1996) (defining ceremonial deism).

144. *See id.* at 2091–92 (giving examples of ceremonial deism).

145. *See, e.g.*, *id.* at 2091–94 (describing numerous Supreme Court opinions in which the Justices have assumed, without deciding, that various types of ceremonial deism were constitutional).

146. *See id.* at 2084–85.

147. *See, e.g.*, McGinley v. Houston, 361 F.3d 1328, 1330–31, 1333 (11th Cir. 2004) (per curiam) (affirming the dismissal of a suit asserting that the Alabama Supreme Court's removal of the Ten Commandments from a state building unconstitutionally established a religion of "nontheistic beliefs[]"); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 519, 524 (9th Cir. 1994) (affirming the dismissal of a suit claiming that evolutionism is a "religious belief system" that public school teachers cannot be required to teach).

148. *Cf.* Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 672–74 (1992) (discussing the "strongly felt perception" that religious viewpoints are systematically marginalized relative to secular ones in American public life and asserting that "many religious people clearly feel excluded and alienated from public life").

to the point where it can mean both belief in a Supreme Being and the absence of all such belief.

This brief illustration of the difficulties associated with defining "religion" and religious "establishment" tracks the theory outlined in Part II in two ways. First, and most basically, it shows that we cannot really make sense of the term "establishment of religion"—at least not as a term with legal force and meaning—without drawing on the broader religious, political, and cultural context. Indeed, "religion" itself is a word that is undeniably infused with cultural significance—it is a fact of cultural and social life. And it seems beyond dispute that, with respect to the religion clauses, the changing cultural context has changed the understanding of those terms. (This is not to say that their meaning is, or ever was, uncontested, of course. It is precisely a feature of meaning's context dependency that meaning is highly unstable.) Second, the possibility of changing meanings undermines the possibility of theoretical coherence. Though an originalist might argue that practices such as ceremonial deism do not constitute "religious" practices or an "establishment of religion" according to the original understanding of those terms, it is exceedingly difficult to see the relevance of that conclusion today, in light of the religious diversity that exists in the United States. To assert that invocations of God would not have been controversial or would not have struck the Framers as religious tells us very little about what is religious or sectarian when the Constitution is read in the contemporary context. Any attempt to explain the acceptability of such religious references in the eighteenth century must be able to acknowledge the radically different religious landscape of today's society and explain why the acceptability of such references in the eighteenth century is relevant today.

IV. Implications

The problem of reading and the concomitant failure of constitutional theory ultimately create a dilemma that reading itself cannot get us out of. What, then, can be done? As stated earlier, this Article is sympathetic to the view that, since the mutual influence and interaction of law and politics is inevitable, the only option is simply to embrace it. The inherent instability of language should make judges suspicious of the value of any constitutional theory but keenly attentive to the need to *read* the text. Though reading does not lead to certainty, it perhaps leads to an interpretive openness that is valuable in making sense of an enduring document in an ever-changing society.

To the extent that this conception of constitutional theory appears to undermine its strength and validity, I would like to suggest that this should not necessarily be a source of anxiety, as it has apparently been for at least some courts and commentators alike.[149] If politics, in the broad sense of public affairs or "facts on the ground," inevitably helps to shape meaning, then there is no reason to bemoan or attempt to avoid this state of affairs. This perspective implies that recognition of the social context in which interpretation occurs is not only *not* illegitimate; it is necessary and desirable, even if it does not always lead judges to reach results that may be considered desirable from the perspective of all observers. Indeed, the theory of meaning presented here clearly eschews the possibility of single, correct legal answers.

This perspective also implies that judges should not be constitutional theorists.[150] They should, above all, be close readers of texts. For this reason, they are trained to read and interpret legal documents. Moreover, though inevitably influenced by their own personal backgrounds and the culture that surrounds them, they are at least somewhat constrained by the text at hand. In no sense does postmodern theory deny the reality of such a constraint. Indeed, judges' ability to independently investigate the case at hand is intentionally limited (especially for appellate judges)—they lack the staff and the wide-ranging subpoena power of legislatures. Their primary tools are access to mounds of precedent and the assistance of recently minted law graduates, themselves purportedly expert readers. It is, thus, both an assertion of judicial supremacy and a limitation on that branch to say, simply, that "it is emphatically the province and duty of the judicial department to say what the law is."[151]

It is true, of course, that this understanding of the judge's role with respect to reading privileges that reading over those of other constitutional actors—democratically elected officials as well as the people themselves. In my understanding here, judges are, like literary critics, a species of expert readers, and they do occupy a special position with respect to the interpretive undertaking. Their readings are influenced by the social and political context that they inhabit, as well as their personal biases. At the same time, they are in some measure constrained by text and precedent and indoctrinated with the view that law must consist of something other than raw preference.

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149. *See supra* text accompanying notes 2–9.

150. Judge Richard Posner makes the argument that judges should not engage in moral theory but instead should be pragmatists in *Problematics*, *supra* note 40, at 1645.

151. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Indeed, the notion that the judiciary's duty is "to say what the law is" seems itself to partake of two possible meanings of the word "say"—one descriptive, one performative. Does the judiciary "say" what the law is as if it is just reading some unseen script that is determinate and fixed, but only revealed upon careful study (like one might "say" the Pledge of Allegiance)? Or does it "say" what the law is by imposing its "say-so"—that is, by declaring or effectuating what the law is (as one might say, or pronounce, the meaning of a particular constitutional provision)?

Though no reader is an ideal or perfect reader—such a creature hardly seems possible—there need not be elitism in simply asserting that judges are uniquely well-trained readers of particular kinds of texts.

Reading is, after all, a skill—just ask any literary critic.

Settled Versus Right: Constitutional Method and the Path of Precedent

Randy J. Kozel*

Constitutional precedents give rise to a jurisprudential tug-of-war. On one side is the value of adhering to precedent and allowing the law to remain settled. On the other side is the value of departing from precedent and allowing the law to improve. In this Article, I contend that negotiating the tension depends on bridging the divide between constitutional precedent and interpretive method.

My aim is to analyze the ways in which theories of precedent are, and are not, derivative of overarching methods of constitutional interpretation. I seek to demonstrate that although certain consequences of deviating from precedent can be studied in isolation, the ultimate choice between overruling and retaining a past decision requires the integration of a broader interpretive method. Moreover, because a single interpretive philosophy may be derived from varying normative baselines, constitutional lawyers must press beyond the threshold election of competing methodological schools to engage with the schools' respective foundations. Whether one's preferred approach is originalism, living constitutionalism, or otherwise, the importance of implementing a given constitutional rule depends on methodological commitments and the normative premises that inform them.

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Introduction

Text is what starts the engine of constitutional law, but precedent is what really makes it hum.[1] Legal briefs and judicial opinions are awash in efforts to marshal, characterize, and distinguish prior decisions. Even novel arguments are consistently framed to suggest that what seems like a break from the past is actually an enhancement of continuity.[2]

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1. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 33–36 (2010) (emphasizing the importance of precedent to constitutional adjudication); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 139 (1991) ("The gloss added to the Constitution in the form of precedents is an integral part of most dialogues among the Justices about the Constitution.").

2. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 362–63 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."); Roper v. Simmons, 543 U.S. 551, 574–75 (2005) (declining to follow a

The pervasiveness of precedent is equaled by the controversy it can engender. In its most robust form, the invocation of precedent can lead a court to issue rulings that run counter to what its decision would otherwise be. It is little wonder that the Supreme Court's approach to precedent—often referred to by the Latinate shorthand, stare decisis[3]—drips with political valence and serves as a flashpoint during the vetting of every would-be Justice.[4]

The prevailing wisdom among Supreme Court Justices and academic commentators alike is that precedent has a critical role to play in shaping the trajectory of constitutional law.[5] Yet disagreement abounds over how to develop a theory of precedent that lends itself to principled application. Within the American legal system, no constitutional precedent is beyond judicial revocability, and the Supreme Court occasionally overrules its past decisions.[6] At other times, however, the existence of an applicable precedent leads the Justices to embrace a constitutional interpretation despite reservations about its soundness.[7] Justice Brandeis famously described the overarching tension as between the law's being "settled" and its being "settled right,"[8] though it is perhaps more illuminating to restate the dichotomy in terms of "settled and wrong" versus "unsettled and right." Some eight decades after Justice Brandeis's diagnosis of the problem, the solution continues to prove elusive. As Randy Barnett recently noted,

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precedent based in part on the view that the precedent was inconsistent with cases that came before and after it); Lawrence v. Texas, 539 U.S. 558, 576 (2003) (asserting in the course of overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), that the "foundations" of *Bowers* had already "sustained serious erosion" from more recent decisions).

3. The complete phrase is "*stare decisis et non quieta movere*—stand by the thing decided and do not disturb the calm." James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

4. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 30 (2010) ("[I]n their confirmation hearings both then-Judge Roberts and then-Judge Alito gave assurances about adherence to stare decisis."); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 156 (2006) ("In the Warren Court era, the political, judicial, and academic left seemed to view constitutional stare decisis as the enemy of progressive (living constitution) constitutionalism. In the Roberts Court era, stare decisis may be the last defense of Warren Court precedents against conservative (originalist) constitutionalism on the ascendancy.").

5. Though it is widely accepted as valid, the doctrine of stare decisis has attracted a handful of prominent opponents in the context of constitutional law. *See infra* section III(A)(1).

6. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 & n.1 (1991) (discussing the Court's record of overruling its constitutional decisions).

7. *E.g.*, Dep't of Revenue v. Davis, 553 U.S. 328, 359–60 (2008) (Scalia, J., concurring in part); Tennessee v. Lane, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting); Dickerson v. United States, 530 U.S. 428, 443 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861 (1992); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 571 (2001).

8. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

"[h]ow and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence."[9]

My initial goal in this Article is to link the conceptual ambiguity that surrounds theories of precedent to their estrangement from interpretive method. Judicial opinions and scholarly commentary have yielded well-theorized accounts of certain consequences of departing from precedent, including the disruption of settled expectations. But even an exhaustive analysis of those effects would be inadequate because they deal only with the importance of leaving the law *settled.* Before determining whether to retain or reject a flawed precedent, there must also be an inquiry into the importance of getting the law *right*—in other words, of replacing one constitutional rule with another.[10] Conducting that latter assessment is enmeshed with the process of selecting a method of constitutional interpretation.

Precedents are neither good nor bad; it is interpretive method that makes them so.[11] The urgency of rectifying a misapplication of the law will look very different as between an originalist who takes her touchstone as the Constitution's original public meaning and a living constitutionalist who accepts the primacy of contemporary understandings and mores. Further, multiple perspectives commonly emerge *within* interpretive schools as the result of varying normative premises. For example, some proponents of originalism defend that approach on consequentialist grounds, while others describe it as reflecting the role of popular sovereignty in legitimating judicial review.[12] Their respective normative premises lead the consequentialist and popular-sovereigntist strands of originalism to adopt divergent views regarding the severity of constitutional errors. The phenomenon is not unique to originalism; it applies across constitutional

9. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 261 (2005).

10. *See, e.g.*, *Casey*, 505 U.S. at 854 (noting the importance of assessing "the respective costs of reaffirming and overruling a prior case"); *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring) ("When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right.*"); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others.").

11. *Cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, act 2, sc. 2 (E.K. Chambers ed., D.C. Heath & Co. 1917) (1603) ("[T]here is nothing either good or bad, but thinking makes it so . . . .").

12. *Compare* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 804–05 (2009) (adopting a consequentialist approach to originalism), *with* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1446–47 (2007) (adopting an approach to originalism based on popular sovereignty).

theories. The perceived benefit of deviating from precedent is always derivative of one's interpretive method and normative priors.[13]

This recognition can be useful in organizing the various ramifications of precedent according to their relationship with interpretive philosophy. Considerations such as the disruptiveness of overruling a settled rule are *independent* of constitutional method. They are amenable to meaningful discussion outside the context of any particular interpretive philosophy, though interpretive philosophy will determine their relevance in the final calculus of whether to overrule. By contrast, the direct harms caused by the ongoing retention of a flawed precedent are *dependent* effects; they generate their content only upon being situated within a broader interpretive framework. If one believes that the First Amendment prohibits discrimination against corporate speakers, one's theory of precedent requires an apparatus for gauging how harmful it would be to retain the contrary rule.[14] So, too, if one believes that the Constitution protects a right of intimate conduct between people of the same gender,[15] that it lacks any right to nontherapeutic abortions,[16] or that it forbids the utilization of race-conscious admissions in higher education.[17] The determinants of precedential durability include the relevant costs of perpetuating an erroneous rule. How those costs are defined depends on methodological and normative commitments.

What, then, of contemporary constitutional practice? The Supreme Court has resisted the adoption of any unified methodology for resolving constitutional disputes.[18] The Court occasionally ascribes controlling significance to the Constitution's original meaning, as in its recent discussion of the Second Amendment's right to bear arms.[19] In other cases original meaning is a nonfactor, leaving room for theoretical, prudential, or doctrinal considerations to move to the forefront.[20] The inconsistency is partly the product of the Court's status as a multiparty institution whose members

13. *See* Lash, *supra* note 12, at 1439 (contending that "an ultimate theory of stare decisis necessarily reflects the normative commitments underlying a particular interpretive approach").

14. *See Citizens United*, 558 U.S. at 365 (overruling Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)).

15. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

16. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992) (reaffirming the "central holding" of Roe v. Wade, 410 U.S. 113 (1973)).

17. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (reconsidering Regents of the Univ. of Ca. v. Bakke, 438 U.S. 265 (1978)).

18. *See, e.g.*, Cass R. Sunstein, Foreword, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 13 (1996) (noting that "[a]s an institution, the Supreme Court has not made an official choice" among competing theories of constitutional interpretation).

19. *See* District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (adopting an interpretation based on "the original understanding of the Second Amendment").

20. *See* STRAUSS, *supra* note 1, at 33 (arguing that "original understandings play a role only occasionally [in Supreme Court cases], and usually they are makeweights, or the Court admits that they are inconclusive").

exhibit varying jurisprudential sympathies. It also reflects the skepticism of some individual Justices toward unified theories of interpretation.[21] These institutional and individual considerations have converged to establish the Court's approach to constitutional interpretation as fundamentally *pluralistic*.

Even if one is initially inclined to accept pluralism as a valid adjudicative approach, I am going to suggest that when viewed in light of the Court's doctrine of stare decisis, pluralism is problematic. Evaluating the severity of a given constitutional mistake requires invoking a particular interpretive method and a corresponding set of normative premises. Without those anchors, the value of constitutional accuracy is left undefined. Rejecting all interpretive theories in favor of pluralism undermines efforts to compare the costs and benefits of precedential continuity because pluralism affords no metric by which to gauge their relative importance.

This Article begins in Part I by introducing the diverse roles of precedent in constitutional discourse. In Parts II and III, I categorize salient implications of precedent-based adjudication based on their degree of connection with interpretive method. Part II describes the independent effects of precedential continuity, which are amenable to preliminary analysis without the overlay of interpretive method. Juxtaposed against these considerations are the dependent effects of continuity, which are discussed in Part III. Drawing on leading movements in constitutional theory, I argue that the dependent effects are necessarily bound up with considerations of interpretive method. In proper operation, the foundational premises that drive one's approach to constitutional interpretation should exert a centripetal force on one's approach to precedent, causing both theories to revolve around the same normative core.

Part IV explores the implications for constitutional adjudication at the U.S. Supreme Court. I hope to illuminate the dissonance between interpretive pluralism and precedent-based adjudication, a dissonance that exposes some vulnerabilities of pluralism as an interpretive approach. Finally, Part V addresses the objection that integrating interpretive method with deference to precedent is intrinsically corrupting of constitutional theory. The Part also considers potential extensions of the Article's analysis beyond the sphere of constitutional precedent.

Before closing this Introduction, I offer three further notes. First, for purposes of what follows, I use the concept of an "interpretive method" to refer to any consistent and overarching strategy for determining the meaning of the U.S. Constitution. For example, two of the most prominent strategies in the modern academic discourse are originalism and living constitutionalism, both of which are discussed in the pages below. At the broadest level, the former is characterized by a desire to effectuate the Constitution's original meaning, while the latter contemplates a leading role

21. *See infra* subpart IV(C).

for contemporary sensibilities and policy judgments in resolving constitutional disputes.[22] The selection of those two schools of interpretation is merely illustrative, and it raises a more general question: whether a judge or constitutional lawyer must make a commitment to *some* interpretive method in order to properly analyze the ramifications of precedent.

Second, I am using the concepts of accuracy, rightness, and error as something like terms of art. I employ them in reference to the interpretations that a jurist would have voted to implement in the absence of contrary precedent. I acknowledge the argument that some revisions of the law that are preferred by subsequent judges may reflect the empowerment of new coalitions with new judicial philosophies more so than the identification of genuine "error."[23] Regardless, circumstances will arise in which a judge believes that existing precedent ought to be revised or replaced. The pivotal question remains unchanged: When should deference to precedent dissuade a decisionmaker from pursuing the result that she would otherwise view as preferable? Indeed, an important part of my project is exploring the path a judge must travel before concluding that a given constitutional ruling is warranted despite the fact that the same ruling would be unjustified if certain precedents were not on the books.

Third, I also acknowledge the argument that constitutional precedent is itself constitutive of law,[24] such that it is not coherent to ask what result would have followed in the absence of controlling precedent. Even under that approach to constitutional law, courts will regularly confront the question of whether to depart from a line of precedent. Answering that question requires a theory of what types of effects are legally salient—a theory, in other words, about the normative objectives of constitutional law. As a result, the arguments I advance about the connection between interpretive method and stare decisis continue to apply.

I. Precedent's Place in Constitutional Discourse

Given the latent nuance in terms like "precedent" and "stare decisis," it is worthwhile to take a moment to describe the diverse functions of precedent in modern constitutional discourse.[25]

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22. *See infra* subpart III(A).

23. For a more general discussion of the potential distinction between legal change and legal progress in the context of transition theory, see Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 239–49 (2003).

24. *Cf.* Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) (contending that binding judicial authority "is not merely evidence of what the law is," but rather "caselaw on point *is* the law").

25. The topic of this Part is the variety of ways in which precedent is deployed in the context of constitutional litigation and adjudication. Judicial precedents also have manifold consequences beyond the courthouse doors for elected officials, administrative agencies, and the public at large. For a thoughtful treatment of those effects, see MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 147–76 (2008).

One function of precedent is *hierarchical control*.[26] A court of superior rank issues an opinion interpreting the Constitution. Thereafter, inferior courts face a binding obligation to treat that interpretation as controlling. The obligation persists even if an inferior-court judge views the precedent as incorrect[27] or reasonably predicts that the superior court itself is no longer likely to follow it.[28] Within American constitutional law, the rule of hierarchical precedent—also called vertical precedent—is indefeasible and absolute.[29] As we shall see, this rigidity differs markedly from the Supreme Court's approach to its own, horizontal precedents.

A court's prior decisions can also exert influence on future adjudicators by means of *persuasion*: Though the later court is not required to follow the opinion in question, it is able to study the opinion's reasoning, thereby benefiting from the analytical work already done by other judges. Likewise, the later court can examine whether its predecessors' empirical assumptions and projections have been borne out over time. Unlike hierarchical control, the persuasive function of precedent does not portray the mere issuance of a precedent as carrying independent significance.[30] Sooner or later, a court that looks to precedent in a persuasive fashion must gauge the soundness of its reasoning. As Justice Scalia has noted, "If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement."[31] The consultation of precedents for persuasive purposes continues to be useful in helping later courts to understand and evaluate competing arguments. Notwithstanding this utility,

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26. I draw the description of lower-court constraint as representing the "hierarchical" use of precedent from Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 819 (1994).

27. *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1008 (2009) ("Lower court judges are frequently subject to mediated constitutional constraints, reflecting their obligations to accept the Supreme Court's interpretation of the Constitution even when they believe the Court has erred.").

28. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

29. *See, e.g.*, Solum, *supra* note 4, at 188 ("When it comes to vertical stare decisis, the conventional notion is that the decisions of higher courts are binding on lower courts. A court of appeals may not decide to overrule a Supreme Court decision because the advantages of the better rule outweigh the costs of changing legal rules."). For a comparative perspective on the bindingness of vertical precedent, see generally Santiago Legarre, *Precedent in Argentine Law*, 57 LOY. L. REV. 781 (2011).

30. *See* Frederick Schauer, Essay, *Authority and Authorities*, 94 VA. L. REV. 1931, 1943 (2008) ("[I]f an agent is genuinely persuaded of some conclusion because she has come to accept the substantive reasons offered for that conclusion by someone else, then authority has nothing to do with it.").

31. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting).

however, the persuasive function of precedent never requires a court to issue a ruling whose substantive merit it doubts.[32]

What initially appears to be a persuasive invocation of precedent often reveals itself as something different: an exercise in *stage setting*. In constitutional disputes, as in other forms of litigation, judges (like the attorneys who litigate before them) utilize precedents as a means of framing and bolstering their arguments. The implication is not necessarily that the reviewing court believes that it *must* follow the precedents. Nor is it that the precedents warrant consideration due solely to the persuasiveness of their reasoning. Instead, the existence of the precedents is used to suggest that the subsequent court's ruling represents an unremarkable application of established principles.[33] Though the prior decisions may not have spoken to the precise question under review, they are depicted as setting the doctrinal stage and suggesting the appropriate result by analogy or modest extension.[34]

Like the persuasive function of precedent, the use of precedent for stage setting is nonconstraining. A court that describes past decisions as consistent with its holding does not necessarily indicate that its ruling would have been different but for the existence of precedent. To the contrary, the court might well agree with the decisions' rationales. Stage setting influences the superstructure of judicial rhetoric and reason giving. It may even supply an element of "lawyerly authenticity."[35] But it does not affect the bottom line by requiring a judge to accept a constitutional interpretation that she disfavors on the merits.

Between the poles of absolute constraint on the one hand and persuasion and stage setting on the other are those functions of precedent that affect the substance of judicial rulings without imposing an inexorable duty to reaffirm existing law. For starters, respect for precedent can promote incrementalism and continuity by acting as a *braking* mechanism that encourages judges to

32. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25 (1994) (noting the differing implications of the persuasive and self-constraining functions of precedent).

33. *See* Schauer, *supra* note 30, at 1951 ("The author of a brief or opinion who uses support to deny genuine novelty is asking the reader to take the supported proposition as being at least slightly more plausible because it has been said before than had it not been.").

34. *Compare* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2590 (2012) ("Our precedents recognize Congress's power to regulate 'class[es] of *activities*,' not classes of *individuals*, apart from any activity in which they are engaged." (citations omitted) (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005))), *with id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm."), *and id.* at 2646 (Scalia, J., dissenting) ("At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants.").

35. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 329 (2005).

be moderate and gradual in their decisionmaking.[36] The underlying theory, which coheres with principles of common law adjudication, is that it is generally preferable for courts to make changes at the margins and exert pressure on the forward trajectory of the law rather than overhauling what was previously settled.[37] Respect for precedent assists in this mission by encouraging judges to seek out plausible bases of distinguishing past decisions instead of abandoning them outright.[38]

The motivation for a court's incrementalism may be the belief, often associated with the political philosophy of Edmund Burke, that caution is prudent because "new departures are likely to have unanticipated adverse consequences."[39] Alternatively, incrementalism may reflect the intuition that change will tend to be less disruptive and controversial when it is achieved gradually over time.[40] In either case, incrementalism differs from persuasion and stage setting through its ability to make a tangible impact on the subsequent court's decision. A judge who is inclined to announce a dramatic legal change but who adopts the incrementalist mindset will be deterred by the prospect of overruling numerous precedents. As a compromise, the judge will articulate the appropriate rule to govern cases like the one at bar without going further by sweeping away multiple decisions or extending the law in revolutionary new ways.[41] A commitment to incrementalism accordingly carries the potential to affect the scope of judicial decisions. Note, however, that incrementalism still permits the reviewing court to reach whatever result it deems appropriate in the case at hand, even if that means overruling an

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36. *See* Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 96 (2003) ("Over a series of decisions, a precedent that is never formally overruled may lose much of its force through incremental judicial decisionmaking.").

37. *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 403 (2011) ("Judges in the United States . . . are embedded within a common law tradition of incremental policymaking through the slow accretion of a body of principles, standards, and rules that we collectively call 'the law.'"); Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944) ("[*S*]*tare decisis* is an old friend of the common lawyer.").

38. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 169 (1999) ("An originalist Court need not seek to overturn the existing corpus of constitutional law overnight, or even over a decade. . . . [M]odification of existing precedent can take place over a series of cases over a period of years without unduly damaging either the judiciary or the structure of constitutional law.").

39. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 402 (2006); *see also* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 426 (2012) ("To a Burkean, historical practice is important in part because of its potential to reflect collective wisdom generated by the judgments of numerous actors over time."); Sunstein, *supra*, at 368 (arguing that "Burkean courts attempt a delegation of power from individual judges to firmly rooted traditions" or to "the judiciary's own past").

40. *Cf.* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (describing the value of "accommodating change to the larger, essentially stable context in which it occurs").

41. *Cf.* Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1237 (2010) ("Each constitutional decision of the Supreme Court . . . invariably shifts constitutional practice in some small way . . . . Most of this change is interstitial, even glacial—the gradual working out of doctrine and principle.").

applicable precedent. The incrementalist mindset is a technique for mediating change, not preventing it.

The role of precedent undergoes a metamorphosis when a court endorses a constitutional decision whose soundness it doubts in an effort to maintain consistency with its past self. In such a case, the court treats precedent as *self-binding*: The litigated dispute would have had a different outcome but for the precedent's existence. The explanation is not that the subsequent court has come to agree with the precedent's reasoning due to its irresistible logic and persuasiveness. What is crucial about the precedent is its issuance at some prior time.[42] That temporal priority converts the precedent into a "fundamental restraint" on the subsequent court's power to effectuate its own understanding of the Constitution's meaning.[43] By contemplating the perpetuation of dubious or suboptimal interpretations, the self-binding function of precedent raises serious challenges grounded in both constitutional structure and the nature of the judicial process.[44] It is that function to which the balance of this Article is directed.[45]

The province in which constitutional precedent provides the most substantial constraint can be defined as the set of cases in which a court deems itself bound to accept a rule that it concludes or suspects is substantively erroneous. The subsequent court may surmise that the applicable precedent was unsound from the beginning,[46] or it may believe the rule has been undermined by the passage of time.[47] Either way, the subsequent court is put in the position of announcing a result that it currently believes to reflect a likely misapplication of the Constitution.

The self-binding function of precedent is complicated by the Supreme Court's characterization of stare decisis as a matter of discretion rather than compulsion.[48] A court's discretionary authority to overrule its own

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42. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) ("If precedent matters, a prior decision now believed erroneous still affects the current decision simply because it is prior.").

43. United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

44. For a discussion of those challenges, see *infra* section III(A)(1) and subpart V(A).

45. As a corollary, the balance of the Article will deal with precedent in its horizontal dimension—which implicates the doctrine of stare decisis in the sense of a court's fidelity to its own past self—rather than its vertical dimension of imposing binding constraints on inferior courts.

46. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (describing *Bowers v. Hardwick* as "not correct when it was decided").

47. *See, e.g.*, Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 71 (1988) ("[A] Justice may conclude that a prior decision was premised on a state of affairs that has changed so much over time that the Justices who reached the prior decision would themselves have reached a different result in light of the changed circumstances.").

48. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (contending that "none of" the Justices understand stare decisis in "absolute terms"); Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command . . . ."); Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("[*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision . . . .").

precedents is not a strict requirement of common law jurisprudence. The classic example of the contrary approach is the U.K. House of Lords, which formerly depicted itself as foreclosed from reconsidering its past decisions.[49] Notwithstanding debates over whether the House of Lords was always faithful to this mandate in practice,[50] it is certainly conceivable that a court could treat its own precedents as utterly binding. Yet the U.S. Supreme Court has chosen a different path. As a matter of horizontal constraint, the Court views its precedents as only presumptively self-binding, not absolutely so. To guide the inquiry into whether a dubious precedent should be retained, the Court has enumerated an array of factors, including reliance expectations, workability, evolving factual contexts, jurisprudential coherence, the nature of the decisional rule contained in the precedent, and the voting margin by which the precedent was issued.[51] All the while, the Justices have been unequivocal in preserving their prerogative to overrule precedents under appropriate circumstances.[52]

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The dynamics of horizontal self-binding lead to the "overwhelming question"[53] posed by any theory of constitutional precedent: When should a court willfully perpetuate a reading of the Constitution that it would reject but for the existence of precedent?

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49. The formal move away from this approach occurred in 1966:

> Their Lordships . . . recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234.

50. *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 127 (2008) ("Before 1966, the House of Lords had distinguished some of its own precedents to the point where they were effectively stripped of authority. What had the House been doing in those instances, if not 'departing from' its previous decisions?" (footnote omitted)); Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 143 (1946) (arguing that the House of Lords "carried the technique of distinguishing to a very high pitch of ingenuity").

51. For a leading formulation of the components of the doctrine of stare decisis, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 412 (2012) (enumerating several of the common factors); Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416–49 (2010) (analyzing the doctrine's components).

52. *See, e.g.*, *Citizens United*, 558 U.S. at 319 (concluding that "*stare decisis* does not compel the continued acceptance" of the applicable precedent).

53. The words, though obviously not the context, are from T.S. Eliot, *The Love Song of J. Alfred Prufrock*, POETRY, June 1915, *reprinted in* CATHOLIC ANTHOLOGY 1914-1915, at 2, 2 (1915). *See also* Jackson, *supra* note 37 ("To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.").

II. Independent Effects of Constitutional Precedent

Certain implications of deferring to precedent are amenable to preliminary scrutiny without regard to interpretive method. Those elements, which I call the *independent* effects of precedent, are examined in the subparts that follow. Subpart A addresses the independent benefits of adhering to precedent for the sake of decisional continuity. Subpart B examines the independent costs of continuity, meaning the detriments that attend the preservation of a flawed decision. Part III then turns to the *dependent* effects of precedent, whose composition is derivative of methodological choices.

A. Independent Benefits of Continuity

1. Expectations and Disruption.—The protection of settled expectations is among the most prevalent justifications for deferring to precedent.[54] When a court issues an opinion, stakeholders modify their behaviors in response.[55] Judicial delineation of the applicable rules affects commercial activities such as the formation of contracts, allocation of investments, and organization of business operations.[56] It influences governmental decisions such as the crafting of legislation designed to foster democratic objectives within lawful bounds.[57] It even affects societal understandings regarding the content of the legal backdrop against which citizens arrange their lives.[58]

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54. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) ("The doctrine [of stare decisis] exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules."); *cf.* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 157 (Touchstone 1991) (1990) ("In constitutional law, as in all law, there is great virtue in stability. Governments need to know their powers, and citizens need to know their rights; expectations about either should not lightly be upset."); Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2024 (2011) ("When the Court considers the work of past Courts, the key concept is *stare decisis* while the key attitude recognizes the importance of *reliance*.").

55. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 239 (2012) (noting that there is an "equitable principle, prominent in judicial decisions stretching back hundreds of years, [that] directs judges to give due weight to the ways in which litigants who come before the Court may have reasonably relied upon prior case law").

56. *See, e.g.*, *Citizens United*, 558 U.S. at 365 (recognizing that "reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions"); Quill Corp. v. North Dakota, 504 U.S. 298, 317 (1992) (noting that the precedent in question "has engendered substantial reliance and has become part of the basic framework of a sizable industry").

57. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 244 (2006) (plurality opinion) ("*Buckley* [*v. Valeo*, 424 U.S. 1 (1976) (per curiam)] has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws.").

58. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (describing the impact of *Miranda v. Arizona*, 384 U.S. 436 (1966), on "our national culture"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (discussing reliance by "people who have ordered their thinking and living around" the rule of *Roe v. Wade*, 410 U.S. 113 (1973).

When the judiciary reverses course and announces a new rule, it introduces a potentially dramatic source of disruption. Commercial structures that seemed ingenious under the old regime become problematic or even prohibited. Hard-fought and extensively researched legislation is invalidated, with the lawmakers sent back to the drawing board for another sapping of public resources. And widespread understandings about the legal backdrop—as well as corresponding assumptions about the stability and reliability of the legal equilibrium—are challenged, sometimes marginally but sometimes substantially.[59]

By retaining a precedent despite its dubious merits, a court can prevent these disturbances from coming to pass.[60] That makes the avoidance of disruption a principal benefit of precedential continuity. Such avoidance is also an *independent* benefit. The unsettling effects of adjudicative change reflect the degree to which stakeholders would be required to adapt their behaviors and understandings to a revised legal order. There remain vast differences of opinion regarding the quantum of evidence required to prove those effects.[61] In addition, there are significant debates about the types of disruptions that should be relevant for purposes of stare decisis. For example, some scholars contend that the potential disruption of societal understandings caused by a judicial overruling—famously invoked in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[62] with respect to abortion rights[63]—is too "inchoate" to serve as a valid component of stare decisis doctrine.[64] Others suggest that a full accounting should include intangible, systemic reactions to legal change.[65] Quite apart from these debates, interpretive method is unnecessary to determine the degree to which adjudicative change would upset expectations and require forward-looking

59. *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. (forthcoming 2013).

60. For an argument that the consequences of deviating from precedent are more aptly described in terms of avoiding forward-looking disruption as opposed to backward-looking reliance, see generally *id.* The distinction is immaterial for present purposes; both formulations are independent of interpretive method.

61. *See Casey*, 505 U.S. at 956 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (describing the majority's assertions relating to precedential reliance as "undeveloped and totally conclusory"); *Quill Corp.*, 504 U.S. at 331–32 (White, J., concurring in part and dissenting in part) (describing the majority's assertions of precedential reliance as unsupported by evidence).

62. 505 U.S. 833 (1992).

63. *See id.* at 856 (citing "two decades" of societal reliance upon "the availability of abortion in the event that contraception should fail").

64. Barnett, *supra* note 9, at 266.

65. *Cf.* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 702 (1999) ("If private investment in contract and property interests is sufficient to demand adherence to arguably erroneous precedent, public investment in governmental structures should produce a similar effect."); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 63 (2001) ("To the extent that a court's general willingness to overrule precedents increases uncertainty about which rules the court will apply, it may also generate more systemic costs—costs that cannot be identified with any particular change, but that are no less real.").

adjustments. Interpretive choices remain crucial to the level of significance that is ultimately ascribed to protecting settled expectations.[66] The extent of disruption, however, does not fluctuate depending on one's theory of constitutional interpretation.

2. Rule of Law.—Intertwined with the avoidance of disruption is the efficacy of stare decisis in promoting the rule of law. The rule of law requires, among other things, that "people in positions of authority" operate within a "constraining framework" of publicly available rules rather than indulging "their own preferences or ideology."[67] It is sometimes described (usefully, I think) in contradistinction to its converse, the rule of individuals.[68] Commitment to the rule of law may be driven by the perceived consequentialist benefits of enhanced stability and order or by the belief that "reciprocity and procedural fairness" in the imposition and enforcement of legal requirements are "valuable for [their] own sake."[69] The Supreme Court has gone so far as to pronounce the doctrine of stare decisis to be an essential feature of a democratic society governed by the rule of law.[70] Whether or not the rule of law really does require a certain degree of respect for precedent, much of the academic literature recognizes that, at very least, deference to precedent can promote the rule of law in important ways.[71]

One way in which adherence to precedent advances the rule of law is by fostering a sense of uniformity, consistency, and reliability. Part of the value is tangible, allowing for better forecasting and more efficient planning. The other part is intangible. In law as in life, the benefits of fidelity to precedent include psychological comfort; predictability simply makes us "feel better."[72]

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66. *Cf. Quill Corp.*, 504 U.S. at 321 (Scalia, J., concurring in part and concurring in the judgment) (noting that reliance on precedent "may not always carry the day").

67. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012).

68. *See, e.g.*, Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 2–3 (1997) (making the contrast).

69. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 274 (2d ed. 2011).

70. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987) (plurality opinion) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is 'a natural evolution from the very nature of our institutions.'" (quoting W.M. Lile, *Some Views on the Rule of Stare Decisis*, 4 VA. L. REV. 95, 97 (1916))); *cf.* Richard Primus, Response, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1227 (2010) ("One aspect of the rule of law is a set of legal norms that are stable enough to enable planning and justify reliance.").

71. *See, e.g.*, Waldron, *supra* note 67, at 31 ("I do not endorse the position . . . that '[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*.' But it might be true the other way around: the justification of stare decisis might depend to a large extent on the rule of law." (footnote omitted) (quoting *Welch*, 483 U.S. at 478–79)).

72. Schauer, *supra* note 42, at 598; *see also id.* ("Predictability thus often has value even when we cannot quantify it."); *cf.* Helvering v. Hallock, 309 U.S. 106, 119 (1940) (describing stare decisis as "rooted in the psychologic need to satisfy reasonable expectations").

That feeling extends to attitudes about the constancy of the legal regime and the stability of the legal order.

The knowledge that a decision will serve as a precedent in future litigation can also promote the rule of law by encouraging judges to view individual cases as reflecting recurring problems that require generalizable, forward-looking solutions.[73] The resulting norm of "generality" reduces the hazards of case-specific or party-specific idiosyncrasy in the adjudication of disputes.[74] Similarly, the infusion of precedent with durability that outlasts the tenure of the issuing judges facilitates both the reality and appearance of decisionmaking that is driven by considerations beyond individual personalities.[75] This ideal of impersonal adjudication resounds in then-Judge Cardozo's caution against allowing the decisions of courts to ebb and flow with the "weekly changes in [their] composition"[76] as well as Alexander Hamilton's famous depiction of precedent as a safeguard against the exercise of "arbitrary discretion."[77]

These rule of law benefits of following precedent arise independently of interpretive method. There are, of course, plausible reasons to be skeptical about the ability of precedent to enhance predictability, generate confidence in the legal regime, contribute to the norm of generality, or reduce the impact of individual idiosyncrasies. Among other things, a critic might contend that the discretionary nature of constitutional stare decisis, which feeds the perception of some commentators that the doctrine strikes "with the randomness of a lightning bolt,"[78] introduces its own layer of unpredictability

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73. *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 11–12 (1994) ("Because today's decision will be taken into account in future cases, the Court must judge not only what is best for today, but also how the current decision will affect the decision of others cases in the future.").

74. Waldron, *supra* note 67, at 19–20. *But cf.* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 416–17 (2001) (noting the argument that "interpreters will reason impartially if they anticipate that the decision may be invoked in future cases whose valence in terms of the decisionmakers' future interests is unpredictable" but responding that "it is hardly clear that durability successfully dampens decisionmakers' self-interest").

75. *See, e.g.*, Caminker, *supra* note 26, at 853 ("Frequent or immediate overrulings, especially when prompted by a change in personnel, cast into doubt courts' commitment to making decisions free from politics and personal whim."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 753 (1988) ("If courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened."). For a comparable argument regarding reliance on precedent within the Office of Legal Counsel, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1497 (2010) ("Because OLC understands and advertises its job as providing legal advice consistent with its best view of the law, its credibility depends on its appearing to conduct itself in that manner. Adhering to precedent—and in particular, *advertising* that it adheres to precedent—can contribute to that appearance.").

76. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921).

77. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (citing Hamilton's language in describing stare decisis as "a basic self-governing principle within the Judicial Branch").

78. Monaghan, *supra* note 75, at 743.

and exacerbates the effects of judicial personality.[79] These are serious claims, but interpretive method makes no difference to their validity. The relevance of method only arises later, when a court weighs the rule of law implications of continuity against the value of rectifying a constitutional mistake or anachronism.

3. Decisional Economy and Resource Conservation.—The costliness of a decision making process depends in part on the number of issues that require determination. By limiting the matters that are open for debate in the course of litigation, the doctrine of stare decisis can enhance adjudicative economy.[80]

These efficiency-enhancing properties are most evident in the context of hierarchical precedent. Given their unconditional obligation to follow the decisions of superior tribunals, inferior federal courts are spared from expending the resources needed to reach their own conclusions. Of course, some of the resources that are saved must be redeployed to sorting through, analogizing from, and distinguishing the array of potentially relevant precedents. Moreover, in cases where the Supreme Court is considering whether to abide by its own precedent, the lingering possibility of overruling may prevent the Court from entirely disregarding the precedent's merits and effects. Nevertheless, efficiency benefits arise even in the horizontal context from the choices of litigants to feature certain arguments and ignore others on the (sensible) theory that many previously decided issues are unlikely to be revisited in the near term.[81]

Within a typology that classifies the benefits of precedential continuity based on their connection with interpretive method, efficiency represents another independent consideration. Judicial efficiency is an established concept relating to the amount of time and energy that is necessary to resolve a case. The doctrinal implications of efficiency considerations—that is, their power to affect the final stare decisis calculus—depend upon methodological choices. Their composition does not.

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79. *See* Waldron, *supra* note 67, at 13 ("[T]he principle of stare decisis seems to introduce its own distinctive uncertainty into the law, particularly insofar as it does not operate as an absolute."). *But see* DUXBURY, *supra* note 50, at 167 ("The activity [of precedent following] can be commended . . . because it eradicates only some judicial discretion; for were it to eradicate all judicial discretion, the doctrine of *stare decisis* would be inappropriate to the common law.").

80. *See, e.g.*, CARDOZO, *supra* note 76, at 149 ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . ."); Fallon, *supra* note 7, at 573 ("The doctrine [of stare decisis] liberates the Justices from what otherwise would be a constitutional obligation to reconsider every potentially disputable issue as if it were being raised for the first time . . . .").

81. *See* Taylor v. Sturgell, 553 U.S. 880, 903–04 (2008) (asserting that "even where *stare decisis* is not dispositive, 'the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others'" (quoting DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 97 (2001))).

B. *Independent Costs of Continuity*

1. Workability.—Judicial decisions that have proved cumbersome in operation are commonly singled out as prime candidates for reconsideration.[82] The retention of such precedents imposes costs on the legal system. When a decision is difficult for subsequent courts to understand and apply, the efficiency of decisionmaking is hindered.[83] Unworkable precedents can also breed uncertainty by reducing the ability of litigants, attorneys, and other stakeholders to plan their behaviors and forecast litigation outcomes.[84]

A precedent's workability is an independent consideration that is determined based on its clarity of exposition and practical operation.[85] Different jurists will evince different tolerances for what degree of clumsiness renders a precedent so unworkable as to warrant revision.[86] They likewise will apply their respective tests differently to concrete sets of facts.[87] But the metrics by which workability is assessed need not be bound up with methodological choices. The question whether a precedent's retention is likely to breed uncertainty and hinder judicial administration can be answered *ex ante*, prior to any methodological election.

2. Jurisprudential Coherence.—The steady accumulation of legal doctrine makes it inevitable that discrete bodies of precedent occasionally

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82. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991))).

83. *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 670 (2000) ("[U]nworkable decisions are by definition uncertain, so their retention should be expected to require ongoing and inefficient expenditures on measures aimed at divining their application and effect."); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1552 (2000) ("The inquiry into 'workability,' as framed by the Court, is essentially a question of whether the Court believes itself able to continue working within a framework established by a prior decision. The unworkability of precedent provides additional incentive for the judiciary to overrule it.").

84. *See* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) ("[Precedent] should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.").

85. *Compare, e.g.*, Arizona v. Gant, 556 U.S. 332, 360 (2009) (Alito, J., dissenting) (finding a precedent to be workable where it provided "a test that would be relatively easy for police officers and judges to apply"), *with* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996) (finding a precedent to be unworkable where it had "created confusion among the lower courts that [had] sought to understand and apply [it]").

86. *Compare* Altria Grp., Inc. v. Good, 555 U.S. 70, 84 (2008) (reaffirming a precedent despite acknowledging its lack of "'theoretical elegance'" (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 529 n.27 (1992) (plurality opinion))), *with id.* at 97 (Thomas, J., dissenting) (concluding that the precedent should be overruled because, *inter alia*, it "has proved unworkable").

87. *Compare* Dickerson v. United States, 530 U.S. 428, 444 (2000) (defending *Miranda*'s workability), *with id.* at 463–64 (Scalia, J., dissenting) (assailing *Miranda*'s workability). *See Montejo*, 556 U.S. at 808 (Stevens, J., dissenting) (criticizing the majority's labeling of a precedent as unworkable).

will come into apparent conflict.[88] One line of cases protects corporations' constitutional right to participate in political referenda campaigns, while another denies them the right to speak in support of political candidates.[89] One line upholds the power of a state to criminalize sexual conduct between people of the same gender, while another suggests a relevant sphere of personal privacy in which governmental influence is severely constrained.[90] The examples are legion, and they will continue to proliferate as overlapping lines of constitutional precedent become more robust and nuanced. The doctrine of stare decisis has taken notice.[91]

If a reviewing court allows two or more competing lines of precedent to coexist, it risks exacting a toll on jurisprudential coherence. Lower courts and stakeholders may find it difficult to determine which doctrinal strand applies to a given course of conduct. The likely results include inefficiencies caused by the need for extensive analysis and uncertainty among stakeholding parties as to how to organize their affairs.[92] Jurisprudential incoherence also threatens systemic impacts by reducing the rationality, both actual and apparent, of the legal order.[93]

Notwithstanding the significance of these effects, interpretive method once again is inapposite to their composition. Competing precedents can be difficult for stakeholders to square regardless of the methodological approaches those precedents embody. As for the systemic costs of incoherence, they arise from dissonance between judicial decisions irrespective of underlying methodological preferences.

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88. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 232 (1995) (O'Connor, J.) ("We cannot adhere to our most recent decision without colliding with an accepted and established doctrine."); Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.").

89. *See* Citizens United v. FEC, 558 U.S. 310, 348 (2010) ("The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them.").

90. *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003) ("The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer* [*v. Evans*, 517 U.S. 620 (1996)].").

91. *See, e.g.*, GERHARDT, *supra* note 25, at 31 (noting the Supreme Court's receptiveness to overruling precedent based on "irreconcilability with subsequent case law"). The appeal to jurisprudential coherence as a justification for departing from precedent is no recent innovation. *See* Jerold H. Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 223 (noting that the Supreme Court often "attempted to buttress its position by showing that the rejection of the overruled case was required, or at least suggested, by other, later decisions basically inconsistent with its earlier ruling").

92. *See, e.g.*, McGinnis & Rappaport, *supra* note 12, at 847 ("Legal incoherence in jurisprudence has negative consequences because individuals have more trouble complying with a set of rules that are incoherent and hard to understand.").

93. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting) ("It damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions.").

3. Rule of Law (Redux).—The previous section discussed the rule of law benefits that can arise from the preservation of settled precedent. There is also a second aspect to the relationship between precedent and the rule of law, one that cuts in the opposite direction.[94] Consciously entrenching erroneous decisions can impair the soundness of the legal regime.[95] Behaviors that should create one set of constitutional ramifications instead yield a very different set. Litigants who would have been victorious if certain precedents were not on the books are forced to endure losses for the sake of continuity.[96] In theory, perhaps those litigants should take solace in knowing that the legal system is stronger for their sacrifice and that a portion of the benefits of living in such a system eventually will trickle down to them, or at least to their descendants.[97] In reality, that prospect seems like cold comfort in the here and now. In any event, using the doctrine of stare decisis to entrench interpretations that depart from the best understanding (however defined) of the Constitution poses a challenge to the democratic nature of the constitutional order.[98] This, too, may represent a rule of law concern, at least if one believes the American rule of law to be bound up with popular sovereignty and democratic pedigree.

Excessive deference to flawed constitutional precedents can also threaten to create systemic concerns for the rule of law. In the worst-case scenario, society is forced to endure pervasive misapplications of its most important document. The ability to agitate for legal changes through reasoned argumentation becomes seriously impaired.[99] The prospects for "growth and reexamination" are gradually "choke[d] off" by reams of ossified precedents.[100] And the nation's constitutional culture suffers as the

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94. *See* Fallon, *supra* note 68, at 5 ("[I]n contemporary constitutional discourse it is by no means anomalous to find competing Rule-of-Law claims arrayed against each other.").

95. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) ("[I]n the unusual circumstance when fidelity to any particular precedent does more to damage [the] constitutional ideal [of the rule of law] than to advance it, we must be more willing to depart from that precedent."); *cf.* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2034 (1996) (arguing that "stare decisis has the potential to import injustice irremediably into the law").

96. *See* Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37, 40 (2013).

97. *Cf.* 1 JOHN HICKS, *The Rehabilitation of Consumers' Surplus*, *in* COLLECTED ESSAYS ON ECONOMIC THEORY: WEALTH AND WELFARE 100, 105 (1981) (suggesting that certain enhancements to productive efficiency that leave some parties worse off can nevertheless create a "strong probability that almost all [inhabitants of the community] would be better off after the lapse of a sufficient length of time").

98. *Cf.* Nelson, *supra* note 65, at 62 (arguing that "the primary reason we want courts to avoid erroneous interpretations of the written law is that we value democracy").

99. *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 8 (2008) ("The procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power. It requires that public institutions sponsor and facilitate reasoned argument in human affairs.").

100. Stone, *supra* note 47, at 69.

polity lapses into resignation due to its perception of constitutional law as defying realistic efforts at improvement.[101]

I am not suggesting that anything like this bleak picture actually obtains in contemporary American practice. My point is simply that it is too facile to describe precedent and the rule of law as engaged in a common and mutually reinforcing enterprise. It may be true that, on balance, the rule of law is better served by having a doctrine of constitutional stare decisis than it would be without one.[102] Yet it does not follow that the retention of erroneous precedents is entirely positive from the standpoint of the rule of law. Finally, and most importantly for present purposes, the rule of law implications of precedent are independent effects of continuity. They maintain the same shape regardless of the interpretive method that one prefers.

4. Justice and Policy.—Fidelity to precedent might entail the entrenchment of a rule that is unjust or undesirable from a policy perspective. Debates about such values can proceed independently of interpretive methodology. Whether an outcome is immoral or otherwise detrimental can be determined prior to any interpretive election; such values have inherent content apart from one's interpretive philosophy. The function of interpretive methodology is to shape the extent to which those, and other, values are appropriate matters for judicial consideration in construing the Constitution's meaning.

III. Building the Bridge to Constitutional Method

The independent effects of precedential continuity are critical to assessing the ramifications of adjudicative change. They reflect the value of allowing the law to remain settled by focusing attention on considerations such as reliance and disruption. And some of them—including the benefit that overruling a flawed precedent can create for jurisprudential coherence and doctrinal workability—begin to capture the potential virtues of breaking with the past.

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101. *See* Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1061 (2010) (describing the argument that "[i]f 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"); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1328 (2006) ("In a normatively divided polity, a system that permanently resolves the Constitution's meaning risks permanently estranging groups in ways that a system enabling a perpetual quest to shape constitutional meaning does not."); *cf.* Fallon, *supra* note 7, at 584 (noting that "[w]ithin our constitutional regime, it is healthy for there to be some degree of ferment and reconsideration" but cautioning that "it would overtax the Court and the country alike to insist . . . that everything always must be up for grabs at once").

102. I tend to believe that this is indeed the case. For a very brief introduction to the issue, see Kozel, *supra* note 96, at 40–44.

But the value of interpretive accuracy also has another dimension: the benefits that would arise directly from the replacement of the flawed rule with the proper one. This dimension of accuracy reflects the proximate consequences of implementing the optimal constitutional interpretation rather than deferring to an erroneous precedent.

A. Interpretive Method and the Dependent Value of Accuracy

The most direct impacts of improving upon a flawed constitutional rule are twofold: the elimination of harms that would otherwise result from the flawed precedent's continued operation, and the generation of affirmative benefits that arise from implementing the superior rule. Neither component can be analyzed in the abstract. The following sections explain that the value of correcting an erroneous decision is a fundamentally *dependent* aspect of abandoning precedent. It requires the integration of interpretive method and underlying normative premises.[103]

It warrants emphasizing that my aim is not to align myself with any particular movement in constitutional theory. Nor is it to propose my own, alternative constitutional methodology. I seek to demonstrate that whatever one's interpretive theory of choice, it will be inextricably linked to the proper treatment of constitutional precedents and questions of stare decisis.

1. The Originalist Perspective.—Begin by considering one of the most impactful methodologies in modern constitutional discourse: originalism. The originalist school posits that the meaning of constitutional terms was "determined at the time the text was written and adopted."[104] Over the past three decades, debate has swirled around the question of which determinants of original meaning should predominate. An early version of originalism emphasized the primacy of the subjective intentions of the Constitution's Framers.[105] The intentionalist position drew criticism based on the claimed artificiality of constructing an aggregated version of the Framers' intentions.[106] There was also the problem of defining who the relevant

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103. I use the concept of "interpretive" method to indicate both the discernment of the Constitution's semantic meaning and the conversion of that meaning into legal doctrine. Some commentators emphasize the distinction between these two tasks, dubbing the former "interpretation" and the latter "construction." *E.g.*, Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 100–03 (2010). The analysis presented in this Article is not affected by one's view of the distinction, so for simplicity I include both concepts under the label of "interpretation." *Cf.* JACK M. BALKIN, LIVING ORIGINALISM 4–5 (2011) (noting the prevalence of this practice as a usage convention).

104. Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEXAS L. REV. 147, 154 (2012); *see also id.* at 154–55 (describing this proposition as the "fixation thesis," and distinguishing it from the "constraint principle," which provides that "original meaning should have binding or constraining force").

105. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–35 (2003).

106. *Id.* at 1135.

"Framers" were: the Philadelphia Convention, state ratifying conventions, or some other segment of the population.[107]

The dominant strand of originalism transformed, eventually moving the analytical focus from the Framers' intentions to the objective public meaning of the Constitution's text.[108] For proponents of this "New Originalism," the interpretive touchstone is the Constitution's language as it would have been understood at the time of ratification.[109] Debates over the intricacies of originalist method continue apace, but the recasting in terms of objective meaning as opposed to subjective intention has emerged as the prevalent (though not exclusive) formulation.[110]

The debates within the originalist school extend beyond identifying the proper referents of original meaning. The deep theoretical justifications for originalism also vary significantly as between the philosophy's adherents. One version of originalism is especially useful in illustrating the relationship between interpretive method and constitutional precedent. That version, which we might call *structural* originalism in light of its connection with the Constitution's nature, text, and design,[111] is often associated with commentators such as Gary Lawson.[112] Professor Lawson justifies his support for originalism by reference to the implicit lesson of *Marbury v. Madison*[113] that judicial review of enacted legislation is authorized only because the Constitution itself is "hierarchically superior to all other claimed sources of law."[114] The same principle, Professor Lawson argues, forecloses deference to judicial precedents that misconstrue the Constitution; a judge who believes that the Constitution's original meaning dictates a certain result may never

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107. *Id.* at 1135–36. What is perhaps the most famous criticism of intentions-based originalism is Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

108. Solum, *supra* note 104, at 153–54.

109. *See id.* (defining New Originalism as based on the theory that "the original meaning of the Constitution is the original *public* meaning of the constitutional text"); *see also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) ("[O]riginalism has itself changed—from original *intention* to original *meaning*.").

110. *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) ("Ever since 1986, when then-Judge Antonin Scalia articulated the distinction between original intent . . . and original meaning . . . modern originalists have moved steadily towards the latter."). *But see, e.g.*, Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 714 (2009) (defending a paramount focus on original intentions).

111. For a concise summary of the relevance of these factors to the structuralist position, see Gary Lawson, *Rebel Without a Clause: The Irrelevance of Article VI to Constitutional Supremacy*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 36–37 (2011).

112. *See generally* Lawson, *supra* note 32; *cf.* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 4 (2007) (accepting the use of constitutional precedent "if, but only if, the precedent is the best available evidence of the right answer to constitutional questions").

113. 5 U.S. (1 Cranch) 137 (1803).

114. Lawson, *supra* note 32, at 26; *see also id.* at 28 ("[T]he case for judicial review of legislative or executive action is precisely coterminous with the case for judicial review of prior judicial action.").

depart from that result for reasons of stare decisis.[115] Along with Professor Lawson, Michael Paulsen has advocated a vision of structural originalism at odds with constitutional stare decisis.[116] In Professor Paulsen's words, deference to erroneous precedents "undermines—even refutes—the premises that are supposed to justify originalism."[117]

For a jurist who follows commentators like Professors Lawson and Paulsen in emphasizing the Constitution's structural superiority to its judicial gloss, flawed precedents must be overruled regardless of the degree of resulting disruption.[118] Once one adopts a method that treats a certain category of precedents as ultra vires and illegitimate, no weighing of countervailing considerations is necessary. The flawed precedents are too harmful to tolerate, and they accordingly must be abandoned. On the rationale of the structural originalists, then, all erroneous precedents are situated identically.

This is true even of highly controversial cases like *Roe v. Wade*,[119] assuming arguendo that, as some Justices and commentators maintain, *Roe* reflects a misapplication of the Constitution. Notwithstanding the leading role played by *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*—which reaffirmed *Roe*'s "essential holding" regarding the constitutional protection of abortion[120]—in stirring certain originalist challenges to stare decisis,[121] for the structural originalist *Roe* is no more problematic than any other constitutional mistake. Every departure from original meaning is equally in need of correction. The fact that *Roe* dealt with issues of abortion and substantive due process is doctrinally inapposite.

2. The Living Constitutionalist Perspective.—Compare the structural originalist position with an interpretive method that supplants original

115. *See id.* at 27–28 ("If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution."); *cf.* THE FEDERALIST NO. 78, *supra* note 77, at 465–66 ("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.").

116. *See, e.g.*, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

117. *Id.* at 289.

118. Randy Barnett has sketched an approach to stare decisis similar to that of Professors Lawson and Paulsen. *See* Barnett, *supra* note 9, at 259 ("Accepting that judicial precedent can trump original meaning puts judges above the Constitution they are supposed to be following, not making."). Professor Barnett's underlying normative premises, however, are distinctive. He emphasizes fidelity to the written Constitution as a means of legitimating its application to those who never expressly consented to it. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 117 (2004) ("Only if lawmakers cannot change the scope of their own powers can the rights of the people be in any way assured. In this way, constitutional legitimacy based on natural rights, rather than popular sovereignty or consent, can ground a commitment to originalism.").

119. 410 U.S. 113 (1973).

120. 505 U.S. 833, 846 (1992).

121. *See, e.g.*, Paulsen, *supra* note 83, at 1539 ("My motivation for writing, revealed in the style of my presentation, is one that openly reflects a desire that *Roe* be overturned.").

meaning with factors such as contemporary understandings, mores, and policy judgments. In modern parlance such approaches are often grouped under the heading of living constitutionalism.[122]

Among the most influential advocates of living constitutionalism is David Strauss, who has articulated a common law approach to constitutional interpretation. The common law constitutionalist's point of departure is "rational traditionalism," which regards past practice as significant for reasons of humility and restraint.[123] This rational traditionalism is paired with a principle of "conventionalism" that promotes "allegiance to the text of the Constitution" not out of any particular fidelity to the text itself,[124] but rather "as a way of avoiding costly and risky disputes and of expressing respect for fellow citizens."[125] Precedent, however, is neither infallible nor obligatory. While there is significant value in tradition and convention, the need remains for evolution toward a constitutional order that is morally sound. The virtues of adhering to the past can thus be overcome by a subsequent court's moral or policy judgments.[126] Whether a flawed precedent should be overruled depends in large part on its substance: The judge must ask how confident she is that a "given practice is wrong" and how severe the practical consequences of that wrongness are likely to be.[127]

For a living constitutionalist like Professor Strauss, a precedent's consistency with the Constitution's original meaning cannot resolve whether the precedent was decided correctly or incorrectly. Moreover, even if one concludes based on a combination of text, tradition, and policy that a given precedent represents a misapplication of the Constitution, it does not necessarily follow that the precedent is so harmful as to warrant overruling.

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122. *Cf.* STRAUSS, *supra* note 1, at 1 ("A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.").

123. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) ("[T]he traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.").

124. *Id.* at 911; *see* David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEXAS L. REV. 1969, 1969 (2013) (arguing that in difficult constitutional disputes, the text of the Constitution "plays a limited role").

125. Strauss, *supra* note 123, at 911.

126. *Id.* at 894; *see also id.* at 902 ("The reason for adhering to judgments made in the past is the counsel of humility and the value of experience. Moral or policy arguments can be sufficiently strong to outweigh those traditionalist concerns to some degree, and to the extent they do, traditionalism must give way."); *cf.* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949) ("Precedents are made or unmade not on logic and history alone. The choices left by the generality of a constitution relate to policy.").

127. *See* Strauss, *supra* note 123, at 895 ("If one is quite confident that a practice is wrong—or if one believes, even with less certainty, that it is terribly wrong—this conception of traditionalism permits the practice to be eroded or even discarded."); *cf.* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 7 (1998) ("The role of the constitutional interpreter is to reconcile our deepest constitutional commitments, revealed by all of our constitutional history, with today's preferences."); *id.* at 63–64 ("When mining our history, we need to look to the actions and positions of constitutional actors ranging well beyond the courts.").

The perseverance of the precedent might be taken as evincing an "accumulated practical wisdom" that strengthens its claim to continued retention.[128] At the same time, even longstanding precedents may become vulnerable based on their troublesome consequences.[129]

The contrast with structural originalism is stark. Because structural originalism treats all decisions that deviate from the Constitution's original meaning as irreparably and dispositively flawed, there is no need for distinguishing among erroneous precedents to decide which should be retained and which should be overruled. From the perspective of living constitutionalism, by comparison, drawing such distinctions is vital. Some erroneous precedents are indeed too harmful to tolerate, but others should endure. The value of constitutional accuracy can vary depending on the nature of a given constitutional mistake. The question becomes whether the substantive "stakes" of perpetuating the error are "high enough" to justify a reversal of course.[130]

To return to the previous section's example, in deciding whether a case like *Roe* should be overruled, the living constitutionalist first needs to assess that case's societal effects. If *Roe*'s effects are deemed to be only mildly or moderately negative, there will be a strong argument for reaffirmance in light of the countervailing costs of change. If, however, *Roe*'s protection of abortion is viewed as severely harmful in substantive terms, the appropriate response might well be an overruling based on considerations of justice or social policy. As an alternative, one might conclude that assessing the aggregate harmfulness of a constitutional right to abortion is a matter that exceeds the bounds of judicial competence. In that event, the need would arise for a supplemental theory, with an independent normative basis, for determining whether the appropriate course is to reaffirm *Roe* or rather to deconstitutionalize abortion rights and leave them to the Legislative and Executive Branches.[131] The resolution of these issues is unavoidable under a living constitutionalist approach that defines the value of constitutional accuracy in terms of sound policy and contemporary mores. The appropriate precedential effect of cases like *Roe* must remain undefined unless and until those issues are addressed.

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128. STRAUSS, *supra* note 1, at 96.

129. *See* Strauss, *supra* note 123, at 895 ("Nearly everyone . . . recognizes that sometimes we must depart from the teachings of the past because we think they are not just or do not serve human needs."); *cf.* Fallon, *supra* note 7, at 584 ("An entrenched precedent that is normatively reprehensible should be viewed as vulnerable in a way that a more attractive practice is not.").

130. Strauss, *supra* note 123, at 897.

131. *See, e.g.*, David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 4 (arguing that "[i]n cases of true moral uncertainty, an issue should be resolved at the level that minimizes the risk that some group of people will be unacceptably subordinated by the decision makers").

3. Synthesis.—Comparing the originalist and living constitutionalist methodologies begins to uncover the problem with posing the abstract query of whether stare decisis supports the retention of a dubious decision. The question is unanswerable until one's theory of precedent is situated within a broader vision of constitutional interpretation. For adherents of structural originalism, the calculus is simple. If a given constitutional precedent is incorrect, it must be overruled—just like every other precedent that deviates from the original meaning of the Constitution's text. The fate of a flawed precedent is less certain on the living constitutionalist account. There must first be an evaluation of the harmfulness likely to attend the precedent's retention, which depends in part on the severity of the individual and social costs it imposes.

While I have made reference to *Roe* as a useful illustration, the same analysis applies across the universe of constitutional precedents. From the standpoint of stare decisis, the structural originalist should discern no difference among erroneous precedents that allow the restriction of corporate political speech,[132] prohibit the criminalization of same-sex intimate conduct,[133] require the evidentiary exclusion of certain statements by criminal suspects,[134] or forbid the use of racial preferences in admission to public universities.[135] Assuming (again, arguendo) that these decisions represent departures from the Constitution's original meaning, considerations of stare decisis are categorically unavailing. The cases must be overruled.

For the living constitutionalist, not all interpretive mistakes are created equal. The decision whether to retain a dubious precedent will be informed by the consequences that arise from the continued operation of the flawed rule. How severe is the social harm posed by withholding protection from corporate speech rights or the right to engage in same-sex intimate conduct? What about the harm posed by requiring the exclusion of criminal defendants' voluntary statements because they were not precipitated by the *Miranda* warnings? Or the harm caused by using racial characteristics in university admissions? The living constitutionalist must engage these issues in order to determine the value of getting the law right.

The fact that living constitutionalism entails a more complex approach to precedent is not necessarily a weakness. Demanding the rectification of every mistaken precedent, as the structural originalist position requires, arguably reflects insufficient regard for the importance of legal stability.[136] It

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132. Citizens United v. FEC, 558 U.S. 310, 319 (2010) (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)).

133. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

134. Dickerson v. United States, 530 U.S. 428, 444; (2000) (reaffirming Miranda v. Arizona, 384 U.S. 436 (1966)).

135. Grutter v. Bollinger, 539 U.S. 306 (2003).

136. *Cf.* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2244 (1997) (arguing with respect to the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), that "[t]he

might follow that the living constitutionalist approach to precedent is superior despite its thorniness in application. Alternatively, one may be persuaded by the structural originalist argument that, practical consequences aside, the Constitution does not permit the privileging of case law over original meaning.[137] In that event, the structural originalist view is justified in treating interpretive accuracy as paramount. The more general point is that whatever the precedent under review, the perceived value of accuracy will vary, often substantially, from one interpretive method to another. Constitutional methodologies and theories of precedent go hand in hand.

B. From Interpretive Method to Normative Premises

No one is born an originalist. Nor is anyone born a living constitutionalist. We arrive at our methodological philosophies through normative choices, explicit or implicit, about the manner in which the Constitution ought to be interpreted.[138] This phenomenon is characteristic across academic disciplines.[139] Constitutional theory is no exception.

The role of normative premises adds another layer to the relationship between precedent and constitutional method. I claimed in the previous subpart that it is impossible to determine the value of rectifying an erroneous constitutional rule without drawing on a specified interpretive method. This subpart contends that while the integration of method is necessary, it is not sufficient. A single philosophy may spring from any number of distinct ideological commitments. Even within a particular school, such as originalism or living constitutionalism, there are vast differences in normative underpinnings that can dramatically alter the perceived gravity of constitutional mistakes.

1. Divergent Strands of Originalism.—As we have seen, some originalists base their interpretive philosophy on considerations of constitutional structure. In their view, the Constitution's status as the "supreme Law of the Land,"[140] which is the lynchpin of judicial review as pioneered in *Marbury*, forecloses deference to flawed constitutional

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Court would be behaving in an extraordinarily irresponsible manner if it overruled a precedent in circumstances in which its decision destroyed trillions of dollars of investments made in reliance on that precedent").

137. *See supra* notes 111–14 and accompanying text.

138. *See* Lash, *supra* note 12, at 1439 (noting the role of "normative theory" in informing one's interpretive philosophy and approach to precedent).

139. *See* Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259, 265–66, 286 (2013) (discussing THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962) and arguing that "just as with scientific choices, no apparent transcendent kind of rule can compel, rather than influence, our choice between [interpretive modalities]").

140. U.S. CONST. art. VI, cl. 2.

precedents.[141] Judges take an oath to support the Constitution and are "bound by the text as law."[142] Erroneous precedents are beyond toleration; they must yield to the Constitution itself.[143]

Structuralist arguments are but one path to originalism.[144] Other commentators champion the originalist approach for reasons that are overtly consequentialist. Prominent among them are John McGinnis and Michael Rappaport, who emphasize the presumptive societal benefits of implementing the Constitution's supermajoritarian dictates.[145] The essence of their position is that fidelity to original meaning is desirable because the Constitution was "enacted in accordance with a supermajoritarian process that generally produces beneficial provisions."[146] Professors McGinnis and Rappaport also cite other consequentialist advantages of originalism in the form of legal clarity, judicial restraint, and the channeling of efforts at revision through the formal amendment process.[147]

The consequentialist strand of originalism makes it necessary to distinguish among erroneous precedents in a way that structural originalism does not contemplate. Implicit in the consequentialist approach is the suggestion that the most harmful constitutional mistakes are those that remain politically divisive and defy supermajoritarian consensus.[148] The

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141. *See supra* section III(A)(1); *see also, e.g.*, Kesavan & Paulsen, *supra* note 105, at 1127 ("This clause, conventionally called the Supremacy Clause, but probably as aptly termed the 'Supreme Law Clause,' establishes the text of the document . . . as that which purports to be authoritative."); Paulsen, *supra* note 116, at 291 (contending that "the argument for judicial review in *Marbury*" is grounded "in the supremacy of the Constitution").

142. Kesavan & Paulsen, *supra* note 105, at 1127–28; *see also* U.S. CONST. art. VI, cl. 3 (stating that "judicial Officers . . . shall be bound by Oath or Affirmation . . . to support this Constitution").

143. *See, e.g.*, Paulsen, *supra* note 116, at 291 ("[C]ourts must apply the correct interpretation of the Constitution, *never* a precedent inconsistent with the correct interpretation. It follows, then, that if *Marbury* is right (and it is), *stare decisis* is unconstitutional.").

144. *See* Lash, *supra* note 12, at 1440 ("Because originalism is an interpretive method and not a normative constitutional theory, different originalists advance different normative grounds for their interpretive approach."); Solum, *supra* note 104, at 1 ("Even today, originalists disagree among themselves about a variety of important questions, including the normative justification for a constitutional practice that adheres to original meaning."); *cf.* Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5, 9–10 (2008) (recognizing normative differences among strands of originalism and discussing their implications for matters of foreign affairs).

145. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010) ("A constitution that is enacted under a strict supermajority process is likely to be desirable because such a process has features appropriate for determining the content of entrenched laws . . . .").

146. McGinnis & Rappaport, *supra* note 12, at 804–05; *see also id.* at 830 ("Strict supermajority rules help to assure that constitutional provisions are supported by a consensus. They also impede the passage of partisan measures because support from both parties is needed for enactment.").

147. *See id.* at 831–34 (discussing the relative benefits of following original meaning and precedent, respectively).

148. *Cf. id.* at 837 (advocating favorable treatment of "entrenched precedents" that "are so strongly supported that they would be enacted by constitutional amendment if they were overturned by the courts").

converse is also true. Thus, irrespective of whether a case like *Brown v. Board of Education*[149] was decided correctly from the perspective of original meaning,[150] its continued retention is unproblematic because its principles enjoy such widespread public support.[151] This rationale illuminates a central difference between consequentialist originalism and its structuralist cousin, the latter of which recognizes no possibility that an erroneous precedent could legitimately be reaffirmed due to its popular acceptance.[152] The juxtaposition of consequentialist and structuralist originalism also illustrates that just as there is no "universal" theory of constitutional precedent, there likewise is no "originalist" theory of constitutional precedent. Before the principles of stare decisis can be applied, there must be a deeper inquiry into the normative premises that support the various formulations of originalism. Some originalists will defer to a particular type of precedent, while others will not.

The crucial role of normative premises can be underscored by introducing a third version of originalism, this one driven by notions of popular sovereignty. Among the ablest proponents of popular-sovereignty originalism is Kurt Lash. Professor Lash defends the centrality of "the right of a political majority to determine policy in a democratic government" and the unique ability of constitutional rules to embody "the will of the people."[153] On the popular-sovereigntist account, the value of rectifying a mistaken precedent depends in large part on the extent of its intrusion into the democratic process.[154] The most troubling situations are those in which the Supreme Court has unjustifiably protected an asserted right, thereby preventing political correction through anything short of constitutional amendment.[155] Other constitutional mistakes are less severe in their intensity because, for example, their flaw is the failure to protect a constitutional right

149. 347 U.S. 483 (1954).

150. Michael McConnell has taken the contrary position, arguing that *Brown* is consistent with principles of originalist interpretation. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995) ("[S]chool segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment.").

151. *See* McGinnis & Rappaport, *supra* note 12, at 837–38 (noting with respect to such cases that "[t]he benefits of following the original meaning are small because there is strong support for the new constitutional rule announced in the precedent").

152. *See supra* notes 111–17 and accompanying text.

153. Lash, *supra* note 12, at 1444–45; *see also id.* at 1445 ("In a constitutional democracy, the laws of the Constitution trump the laws of the mere majority, not because majoritarian laws are illegitimate, but because a variety of factors tend to undermine the link between the will of political actors and the actual majoritarian will of the people." (footnotes omitted)).

154. *Id.* at 1442.

155. *Id.* at 1443. For an alternative view of constitutional precedent that shares a focus on popular sovereignty, see AMAR, *supra* note 55, at 238 (contending that if an unenumerated right is erroneously recognized but later "catches fire and captures the imagination of a wide swathe of citizens, it thereby becomes a proper Ninth Amendment entitlement even though the Court . . . jumped the gun").

rather than the entrenchment of a right that should not exist.[156] In those cases, there is the prospect of majoritarian correction through the ordinary legislative process.[157] The availability of a majoritarian solution weakens the need for judicial overruling as a safeguard of popular sovereignty.[158]

While popular-sovereignty originalism resembles consequentialist originalism at the most basic level by recognizing a legitimate province for the reaffirmance of erroneous precedents, the types of precedents that may be retained will vary between the two approaches in accordance with their respective normative baselines.[159] The broader takeaway is that the normative underpinnings that drive one's acceptance of originalism have a significant effect on one's treatment of constitutional precedent.[160] While there may be common threads among different strands of originalism, their respective approaches to precedent can diverge in meaningful ways.

2. Divergent Strands of Living Constitutionalism.—The necessity of grounding a theory of precedent in an underlying set of normative premises extends beyond originalism. Living constitutionalism faces the same obligation, and for precisely the same reason.

Like originalists, living constitutionalists subscribe to varying belief sets. The strand of living constitutionalism articulated by David Strauss acknowledges that deviations from settled law can be justified for compelling reasons of "fairness and social policy," but it nevertheless places a premium on maintaining continuity over time through the adoption of a common law approach.[161] Other living constitutionalists are less tethered to gradual progression and more receptive to judicial innovations that advance the "constitutional frontier."[162] Common law constitutionalism emphasizes the

156. Lash, *supra* note 12, at 1443.

157. *Id.*

158. *See id.* at 1442 ("[W]here erroneous precedents do not threaten or frustrate majoritarian government, the pragmatic considerations of stare decisis are more applicable.").

159. Professor Lash does leave open the possibility that an exceptional case like *Brown*, "even if originally in error," might warrant retention based on its "de facto supermajoritarian political ratification." *Id.* at 1471.

160. The three strands of originalism I have discussed are, I think, sufficient to prove this point. But they are only the tip of the iceberg in terms of the competing versions of originalism. For one additional example that remains mindful of the interplay between precedent and normative premises, see Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 436 (2006) (contending that "judges should overrule nonoriginalist constitutional precedent unless doing so would gravely harm society's pursuit of the common good").

161. STRAUSS, *supra* note 1, at 38, 45; Strauss, *supra* note 123, at 895–97; *cf.* Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2012 (2012) (reviewing JACK M. BALKIN, LIVING ORIGINALISM (2011) & DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)) (describing Professor Strauss's position that "the common law method itself confers legitimacy on the Court's decisions").

162. *See* Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2012) (arguing that "[s]ome of our most cherished constitutional decisions

virtues of incremental change.[163] The "frontier"-minded approach reflects a different judgment about the utility and propriety of judicial leadership in pursuit of social progress.[164] These distinct normative priorities lead to distinct theories of precedent: A constitutional lawyer who sympathizes with the frontier-minded approach will be more inclined than a common law constitutionalist to perceive bold judicial innovations as justifiable even when they disrupt settled expectations and destabilize the political order.

Just as different strands of originalism can yield differing appraisals of the importance of implementing the Constitution correctly, so, too, can the various versions of living constitutionalism, or of any other interpretive method. To be complete, a theory of constitutional precedent accordingly must account for both interpretive method and the underlying premises that inform it.

3. Alternative Approaches to Precedent.—In examining the interplay between precedent, interpretive method, and normative commitments, I have drawn on the schools of originalism and living constitutionalism. The reason for that focus is the prominence of both philosophies in modern constitutional discourse. Notwithstanding the selection of those two examples, the necessity of examining precedent in methodological and normative context reaches all approaches to constitutional interpretation. To illustrate, consider one final example that does not fit neatly into the camps I have discussed.

Lawrence Solum has sketched a "neoformalist" model in which precedents exert binding force if they embody a formalistic process of reasoning.[165] From the neoformalist perspective, the most durable constitutional mistakes—that is, those most worthy of being preserved on grounds of stare decisis—are ones that result from a deliberative process marked by attention to legal rules as sources of determinate meaning and genuine constraint.[166] The neoformalist approach flows from a basic dedication to the function of law in providing a "public standard for the resolution of disputes."[167] In addition to yielding consequentialist benefits related to stability and the rule of law, the public-standard function is deemed

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have come about precisely because judges decide—consciously—to cast aside their predecessors' outmoded thinking, and place themselves on the constitutional frontier").

163. *See* STRAUSS, *supra* note 1, at 85 (characterizing the Supreme Court's decision in *Brown* as an example of the "evolutionary, common law process" as opposed to "an isolated, pathbreaking act"). *But cf.* Driver, *supra* note 162 ("Living constitutionalism, properly conceived, must create significant leeway for judicial interpretations that deviate from even well-settled precedents.").

164. *See* Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755, 794 (2011).

165. Solum, *supra* note 4, at 186, 194.

166. *See id.* at 192–95.

167. *Id.* at 181; *see also id.* at 182 (noting that formalists "are keen on the plain meaning of legal texts precisely because this methodology provides the best mechanism for making the law accessible").

integral to protecting the rights of individuals to "have their dispute decided in accordance with the existing law."[168]

Embracing the neoformalist model of precedent is conditional upon acceptance of these normative premises. For those who are inclined to elevate other interests above judicial fidelity to public legal standards, the neoformalist theory of precedent will be unpersuasive. It will fail to permit overruling in cases where the value of rectifying a constitutional mistake is at its apex—because, for example, the precedent departs from the Constitution's original meaning in a way that undermines popular sovereignty,[169] or because it violates widely-held beliefs regarding fundamental rights and just treatment.[170] The neoformalist position provides yet another example of how working out a theory of constitutional precedent requires a defined methodological apparatus for assigning value to the consequences of constitutional mistakes.

IV. Constitutional Practice and the Problem of Pluralism

The previous Part contended that the modern doctrine of stare decisis is fundamentally derivative. I claimed that for the doctrine to function, the value of rectifying a mistaken precedent must be situated within an interpretive and normative framework. This Part examines the implications of those preconditions for constitutional practice at the U.S. Supreme Court. I will suggest that the relationship between precedent and interpretive method poses a serious problem for pluralistic approaches to adjudication that resist adherence to any consistent theory of interpretation.

A. The Primacy of Independent Effects

In applying the doctrine of stare decisis, the Supreme Court regularly focuses on certain independent effects of precedential continuity, including the disruption that is likely to result from an overruling and the degree to which a precedent appears inconsistent with other lines of cases.[171] Where the independent costs of overruling are great, the dubious precedent is likely to be retained.[172] Where the independent effects are more equivocal,

168. *Id.* at 184.

169. *See supra* notes 153–60 and accompanying text.

170. *See supra* section III(B)(2).

171. For a discussion of the independent effects of precedential continuity, see *supra* Part II.

172. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (reaffirming *Miranda* on grounds including the fact that the warnings it requires had "become part of our national culture"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (reaffirming *Roe* in part because "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions"); Quill Corp. v. North Dakota, 504 U.S. 298, 317 (1992) (reaffirming Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967), on grounds including the fact that its rule had "engendered substantial reliance and ha[d] become part of the basic framework of a sizeable industry").

overruling becomes palatable.[173] Under either scenario, the dependent value of implementing a particular constitutional interpretation—and, at the same time, replacing an inferior one—plays a limited role.

At first glance, this practice seems puzzling. The conception of stare decisis as incorporating both the value of settlement and the value of accuracy—recall Justice Brandeis's classic dichotomy[174]—renders it inadequate to fixate on the independent effects of precedential continuity without also considering the direct, substantive consequences of perpetuating a constitutional mistake. Surely it would matter to some Justices whether the effect of a flawed precedent was, say, to validate the lawfulness of racial segregation in public accommodations as opposed to limiting the authority of states to impose tax-collection obligations on out-of-state retailers.[175] The importance of getting the law right can look very different from case to case and judge to judge.

Yet there remains within the jurisprudence a notable lack of attention to the substantive ramifications of interpretive accuracy. This phenomenon extends to even the most high-profile applications of stare decisis. In *Casey*, for example, the Court emphasized considerations of reliance and institutional legitimacy as warranting the reaffirmance of *Roe*.[176] Pursuant to the Court's own descriptions of the doctrine of stare decisis, its inquiry also should have included a weighing of those considerations against the substantive value of interpreting the Constitution correctly. On that latter score, the Court said precious little.[177] It made brief reference to the "consequences" of abortion and the possibility that, "depending on one's beliefs," the resulting harms may include the unjust termination of human life.[178] But it went no further, implying that because the costs of renouncing *Roe* were significant, there was no need to dwell on the substantive impacts of retaining the case.

It would be an overstatement to claim that the Court *never* mentions the substantive effects of reaffirming erroneous precedents. To take a recent

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173. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 365 (2010) ("No serious reliance interests are at stake."); Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("[T]here has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding."); Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." (citations omitted)).

174. *See supra* text accompanying note 8.

175. *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896), *with Quill Corp.*, 504 U.S. 298.

176. *Casey*, 505 U.S. at 855–56, 861–69.

177. *See* Strauss, *supra* note 131, at 5 ("[T]he Court did not explain why mere [societal] disagreement, even persistent disagreement, is enough to justify rejecting the position about fetal life endorsed by a democratic majority.").

178. *Casey*, 505 U.S. at 852.

example, in *Citizens United v. FEC*[179] the Court noted that a ban on independent expenditures by corporations in support of political candidates would impoverish the marketplace of ideas[180] and validate the exercise of governmental "censorship to control thought."[181] Other opinions likewise reveal the Justices' view that there is significant value in affording expressive liberties the full protection they are due under the Constitution.[182] These sentiments can be glimpsed in areas such as the Fourth Amendment's prohibition against unlawful searches.[183] The Court has also noted the potential consequences of overprotecting certain rights, as in its recognition that application of the *Miranda* rules could result in the exclusion of voluntary statements and allow "a guilty defendant [to] go free."[184] And in the statutory context, the Court has acknowledged—without passing judgment on—the argument that erroneous precedents are most in need of overruling when they have proven "inconsistent with the sense of justice or with the social welfare."[185]

These statements suggest a role for the substantive value of accuracy within the stare decisis calculus. Still, the Court's treatment of that value tends to be cursory and undeveloped. A tossed-off, abstract reference to the ramifications of a given constitutional mistake—along the lines of "failing to safeguard free speech is bad" or "protecting against unlawful searches is good"—is no substitute for careful scrutiny of its severity. More is needed in order to discharge the Court's self-imposed obligation to consider both the costs of upsetting the law and the importance of interpretive accuracy.

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179. 558 U.S. 310 (2010).

180. *Id.* at 364.

181. *Id.* at 356.

182. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment) ("This Court has not hesitated to overrule decisions offensive to the First Amendment . . . .").

183. *See* Arizona v. Gant, 556 U.S. 332, 349 (2009) ("If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence.").

184. Dickerson v. United States, 530 U.S. 428, 444 (2000); *see also, e.g.*, *Gant*, 556 U.S. at 349 (arguing that "[c]ountless individuals . . . have had their constitutional right to the security of their private effects violated as a result" of a mistaken interpretation of the Fourth Amendment).

185. Patterson v. McClean Credit Union, 491 U.S. 164, 174 (1989) (quoting Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting CARDOZO, *supra* note 76, at 150) (internal quotation marks omitted)). David Shapiro recently offered a theory of constitutional precedent that draws heavily on the *Patterson* language. *See* David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEXAS L. REV. 929, 944 (2008) ("I would ask for a showing sufficient to persuade me that the precedent(s) constitute a significant obstacle to the pursuit of other important, recognized objectives or the vindication of basic rights.").

B. *Institutional Pluralism*

Ours is not an originalist Supreme Court.[186] To be sure, the Court often refers to the Constitution's original meaning in explaining its decisions, and originalism occasionally takes center stage. A recent example comes from *District of Columbia v. Heller*,[187] in which the Court adopted a predominantly originalist focus in determining whether the Second Amendment recognizes an individual right to possess firearms.[188] But at other times, the Court resolves constitutional questions with little or no attention to original meaning.[189] Depending on the case, factors such as text, history, precedent, justice, political philosophy, and government policy might drive the analysis.[190] The Court has not articulated an overarching theory to explain the fluctuating relevance of the various considerations. Though there is a predictable array of modalities of constitutional reasoning, their impact on judicial opinions defies explanation by any single organizing principle.

This state of affairs might be taken to suggest that the Court's constitutional jurisprudence embraces the precepts of *pragmatism*. Some leading advocates of pragmatism describe it as akin to an antitheory, encompassing all potential sources of constitutional meaning without being beholden to rigid rules of decision.[191] The pragmatists' benchmark is the achievement of constitutional outcomes that yield the best "results for society."[192] But as examples like *Heller* indicate, the Court sometimes depicts social policy as subordinate or inapposite in resolving thorny constitutional questions. That practice separates the Court's approach from genuine pragmatism, which acknowledges the potential importance of factors

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186. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) ("[O]riginalism is not, and had perhaps never been, the sole method of constitutional exegesis.").

187. 554 U.S. 570 (2008).

188. *See id.* at 576 ("We turn first to the meaning of the Second Amendment."); *id.* at 605 (describing the determination of "the public understanding of a legal text" as "a critical tool of constitutional interpretation" (emphasis omitted)). *But cf. id.* at 625 (raising the possibility that principles of stare decisis may "foreclose[]" the Court's "adoption of the original understanding of the Second Amendment").

189. *See, e.g.*, STRAUSS, *supra* note 1, at 33 (arguing that "original understandings play a role only occasionally, and usually they are makeweights, or the Court admits that they are inconclusive"); *cf.* Solum, *supra* note 4, at 170 (describing the Court's attitude toward constitutional text as "ambivalent").

190. For influential treatments of the modalities of constitutional argumentation, see, for example, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) and PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

191. *See, e.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) (describing pragmatism as a means of "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy"); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 9 (1998) ("[W]hile in one sense pragmatism is indeed a theory . . . , in an equally valid and more illuminating sense it is an avowal of skepticism about various kinds of theorizing . . . .").

192. Farber, *supra* note 191, at 1353.

like "original intent" but does not allow them to become "decisive."[193] At most, the Court's constitutionalism is intermittently pragmatic, just as it is intermittently originalist and intermittently living constitutionalist.

The best description of the Court's interpretive approach is not pragmatic but *pluralistic*.[194] It is defined by the absence of any consistent methodological commitment, including even a commitment to pragmatic resolution of disputes.[195] The Court emphasizes various interpretive modalities from case to case—and often within the same case—without ever suggesting "that the different methods are reducible to one master method," much less furnishing a passkey for undertaking such a decryption.[196] That is the essence of interpretive pluralism as I use the term here. Recognizing multiple modalities of argument as relevant does not a pluralist make.[197] Rather, pluralism arises from invoking those modalities without reference to an overarching theory of interpretation designed to promote a specified set of normative values.

The prevalence of pluralism owes in part to the Court's composition of different individuals appointed by different presidents and espousing different judicial philosophies.[198] The institutional dynamics of the Court as a multimember body reduce the probability of methodological consensus. To take just one example, Justice Thomas is especially attentive to the Constitution's original public meaning.[199] His colleagues are, to varying degrees, more inclined to reject originalist arguments in light of factors including precedent and social policy. That sort of methodological diversity

193. *Id.*; *cf.* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 8 (2011) ("[M]any pragmatists acknowledge constitutional language only because it serves as a focal point, a convenient device that enables a diverse society to agree on what constitutes fundamental law.").

194. *See, e.g.*, Coan, *supra* note 101, at 1063 (arguing that it is "virtually incontrovertible that contemporary American constitutional practice has a substantially pluralist cast").

195. *See* Sunstein, *supra* note 18, at 14 ("Not only has the Court as a whole refused to choose among [interpretive theories] . . . , but many of the current justices have refused to do so in their individual capacities."); *id.* at 13 ("Even individual Supreme Court Justices can be hard to classify."); Coan, *supra* note 101, at 1063 (contending that the "defining characteristic [of interpretive pluralism] is the recognition of multiple authoritative sources of constitutional meaning").

196. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEXAS L. REV. 1753, 1757 (1994).

197. See, for example, Richard Primus's impressive effort at articulating a theory to explain when original meanings should matter and when they should not: *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008).

198. *Cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 827 (1982) ("[T]he Justices are not promoted from lower courts by a method that rewards conformity with prevailing norms; to the contrary, Presidents often appoint particular Justices because they value the new Justices' different perspective on legal affairs.").

199. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) ("The Court's decision today does not comport with the original public understanding of the First Amendment."); *infra* note 222.

makes it less likely that five or more Justices will endorse originalism—or, for that matter, any other unified theory of constitutional interpretation.[200]

C. *Individual Pluralism*

As a practical matter, judicial decisions are not made by the Supreme Court. They are made by the people who comprise it. A second layer of interpretive pluralism emerges from the views of the Court's individual members. The validity of adjudicating constitutional disputes through application of a "grand theory"[201] continues to be a matter of extensive debate. Judge J. Harvie Wilkinson recently authored a notable book that criticizes leading constitutional theories as "competing schools of liberal and conservative judicial activism,"[202] while Judge Richard Posner likewise has expressed dissatisfaction with constitutional theory.[203] And commentators like Cass Sunstein advocate the resolution of constitutional disputes through "incompletely theorized agreements" precisely to avoid disagreements over "first principles."[204]

Sympathy for these arguments reaches all the way to the Supreme Court. The experience of John Roberts is a case in point. During his confirmation hearings in 2005, soon-to-be-Chief Justice Roberts disavowed allegiance to any single theory of constitutional law.[205] He explained that rather than drawing on abstract theory, he favors "bottom up" judging.[206] As he elaborated in a response to Senator Orrin Hatch:

> If the phrase in the Constitution says two-thirds of the Senate, everybody's a literalist when they interpret that. Other phrases in the Constitution are broader, [such as] "unreasonable searches and

200. *See* Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 87 n.47 (2003) ("[T]he principle of 'every person for herself' with respect to choosing interpretive practices is now well entrenched.").

201. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 1–4 (1988) (critiquing grand theory).

202. J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 4 (2012). For Judge Wilkinson, the "highest virtues of judging" are found in overcoming theory and being guided instead by "self-denial and restraint." *Id.* at 116.

203. *See generally* Posner, *supra* note 191.

204. Sunstein, *supra* note 18, at 20–21; *see also id.* at 8 ("Courts should try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so.").

205. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) [hereinafter *Roberts Confirmation Hearing*] ("I have said I do not have an overarching judicial philosophy that I bring to every case, and I think that's true."); GERHARDT, *supra* note 25, at 193 ("John Roberts avoided controversy by rejecting fidelity to any particular theory of constitutional interpretation.").

206. *Roberts Confirmation Hearing*, *supra* note 205, at 159; *cf.* GERHARDT, *supra* note 25, at 195 (describing Chief Justice Roberts as "signaling a preference to decide cases incrementally and to infer principles from the records of the cases below").

> seizures." You can look at that wording all day and it's not going to give you much progress in deciding whether a particular search is reasonable or not. You have to begin looking at the cases and the precedents, what the Framers had in mind when they drafted that provision.
>
> So, yes, it does depend on the nature of the case before you[,] I think.[207]

It is worth pausing to note that despite Chief Justice Roberts's protestations, his vision bears some hallmarks of a bona fide theory of constitutional interpretation. The Constitution's specific textual commands must be interpreted literally. But when the Constitution sets forth broad standards, respect for the document requires resort to other interpretive techniques. On these points, the Chief Justice is in accord with theories such as Jack Balkin's "living originalism," which embraces a similar distinction between "determinate rule[s]" and broad standards.[208]

Despite these tendencies in the direction of grand theory, Chief Justice Roberts established himself as a theory skeptic through his attitude toward methodological consistency.[209] The Chief Justice made no pretense of consulting a unified principle to guide the weighing of relevant factors across different types of cases. Constitutional text will control in some cases, history in others, and precedent in still others.[210] Determining which modality should govern is done on a case-by-case basis. Therein lies the true significance of the "bottom up" descriptor: It reflects the Chief Justice's dedication to interpretive pluralism.

The experience of Chief Justice Roberts demonstrates that the Court's pluralism is not solely the product of its multimember composition. It is also the result of individual choice. Nor is the Chief Justice alone in his pluralism. Five years after the Chief's confirmation, Justice Kagan offered her own endorsement of a "case-by-case" approach to interpretive method.[211]

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207. *Roberts Confirmation Hearing*, *supra* note 205, at 158–59.

208. BALKIN, *supra* note 103, at 6 ("If the text states a determinate rule, we must apply the rule because that is what the text offers us. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle."). The affinity is highlighted by a separate statement from the Chief Justice noting that although "the Framers' intent is the guiding principle that should apply," judges must pay attention to whether the Framers "chose to use broader terms." *Roberts Confirmation Hearing*, *supra* note 205, at 182; *see also id.* ("That is an originalist view because you're looking at the original intent as expressed in the words that they chose, and their intent was to use broad language, not to use narrow language.").

209. To be clear, I am not suggesting that the Chief Justice merely played the part of a theory skeptic for purposes of securing confirmation. To the contrary, I assume (and believe) that he candidly described his approach.

210. *Roberts Confirmation Hearing*, *supra* note 205, at 159; *see id.* at 182 ("So the approaches do vary, and I don't have an overarching view.").

211. *See The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 81 (2010) ("I think in general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing.").

For case-by-case Justices, methodological diversity is an individual phenomenon as much as an institutional one.[212] Even if the Court were made up of nine John Robertses or nine Elena Kagans, its interpretive method would remain variable, sometimes proceeding in accordance with philosophies such as originalism or living constitutionalism and sometimes heading off in other directions.

D. Theories of Precedent in Pluralism's Wake

The preceding subparts have sought to establish a pair of related propositions. First, in conducting its analyses of precedent, the Supreme Court commonly fails to engage with the direct, substantive impact of implementing the correct constitutional rule.[213] Second, the interpretive approach of both the Court as an institution and some of its individual members is deeply pluralistic, eschewing any commitment to a consistent constitutional method.[214]

Placing these propositions side by side suggests a solution to the puzzle of why the independent effects of precedent dominate the Court's stare decisis jurisprudence. I have contended that integration of a definitive interpretive method, as informed by an underlying set of normative premises, is necessary to assess the value of rectifying a flawed precedent. If that claim is correct, forsaking interpretive theory in favor of pluralism should foreclose any inquiry into the importance of getting the law right. The interpretive pluralist's natural response would be to focus on independent effects such as reliance expectations and workability, whose content does not depend on the integration of interpretive method. And that is just what the Court tends to do.[215] While this reaction is understandable, it is unsatisfactory. By giving short shrift to the substantive dimensions of constitutional accuracy, the Court subverts its articulated doctrine of stare decisis.

So how is a Supreme Court Justice to proceed when she is confronted by a constitutional precedent that she views as on point but problematic? The most straightforward situation is that involving a Justice who is committed to a defined interpretive philosophy. Such a philosophy furnishes a metric for the Justice to utilize in appraising the severity of constitutional errors. For example, Justice Breyer has advocated a paramount focus on ensuring that fundamental constitutional values are borne out in practice.[216] To him, the severity of a constitutional mistake depends on its pragmatic

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212. *See* Sunstein, *supra* note 18, at 13–14 (noting that many Supreme Court Justices have not, in their individual capacities, adhered to a single theory of constitutional interpretation).

213. *See supra* subpart IV(A).

214. *See supra* subparts IV(B)–(C).

215. See *supra* subpart IV(A).

216. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 75 (2010) ("[T]he Court should regard the Constitution as containing unwavering values that must be applied flexibly to ever-changing circumstances.").

effects. Thus, the primary reason for overruling a case like *Plessy v. Ferguson*[217] was that it "worked incalculable harm" and fell short of promoting equal accommodations, let alone "equal[] respect[]," for people of all races.[218] Justice Breyer also emphasizes the need for a "thumb on the scale in the direction of stability,"[219] suggesting that constitutional mistakes with less dire consequences than *Plessy* often will be innocuous enough to tolerate. Justice Thomas, by comparison, commonly takes the position that erroneous precedents should be reconsidered.[220] His opinions provide some reason to suspect that he views many or most deviations from the Constitution's original public meaning as, at most, only weakly constraining.[221]

A trickier situation is the one exemplified by Justice Scalia's jurisprudence. Justice Scalia is not properly described as a bottom-up judge in the style of Chief Justice Roberts or Justice Kagan. To the contrary, he has taken great care in setting forth an overarching interpretive philosophy of originalism that guides his constitutional decisions.[222] At the same time, Justice Scalia has conceded that he occasionally will depart from original public meaning based on the presumptive benefits of preserving settled law.[223] The result is what he calls a "faint-hearted" version of originalism.[224]

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217. 163 U.S. 537 (1896).

218. BREYER, *supra* note 216, at 150; *see also id.* ("[M]uch of American society had begun to see the *Plessy* decision as legally wrong and the segregated society it helped build as morally wrong."); *id.* at 150–51 ("[I]n *Brown* a unanimous Court overturned an earlier decision that the justices considered legally wrong, out of step with society and the law, and unusually harmful.").

219. *Id.* at 153.

220. *See, e.g.*, McDonald v. City of Chi., 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("[*S*]*tare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means."); Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring) ("I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), is without basis in the Constitution."); Van Orden v. Perry, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring) ("This case would be easy if the Court were willing to . . . return to the original meaning of the [Establishment] Clause.").

221. *Cf.* Vikram David Amar, Morse, *School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637, 647 (2009) (arguing that "Justice Thomas's is an originalism that consumes everything else, including *stare decisis*"); Tom Goldstein & Amy Howe, *But How Will the People Know? Public Opinion As a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 MICH. L. REV. 963, 973–74 (2011) ("[Justice Thomas] now regularly dissents, urging the Court to overrule prior lines of settled precedent. But those dissents are generally solo opinions, with no other member of the Court willing to chart such significant new directions in the law." (footnote omitted)).

222. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–41 (1997); *see id.* at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

223. *See id.* at 140 ("[*S*]*tare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it.").

224. Scalia, *supra* note 186, at 864; *see also* SCALIA, *supra* note 222, at 138–39 ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."); *cf.* BORK, *supra* note 54, at 158 ("[I]t is too late to overrule not only the decision legalizing paper money but also

The faint-hearted approach has drawn criticism from some commentators for lacking a coherent theoretical foundation: Jack Balkin contends that Justice Scalia's approach "undercuts the claim that legitimacy comes from adhering to the original meaning of the text adopted by the [F]ramers,"[225] and Randy Barnett has gone so far as to argue that Justice Scalia is not properly described as an originalist.[226]

As I have suggested with respect to popular-sovereigntist originalism and consequentialist originalism, it is entirely possible for originalist theories to permit the retention of flawed precedents in certain circumstances.[227] The *sine qua non* is the consultation of normative premises that provide a principled basis for assessing the degree of harm threatened by the perpetuation of a given constitutional mistake. The crucial question in evaluating Justice Scalia's treatment of precedent is whether he possesses a defined normative baseline that can explain both (a) his general preference for original meaning and (b) his view that the importance of correcting constitutional mistakes must sometimes yield. If he does act with reference to such a baseline, there is no inherent reason why his precedent-tolerating approach to originalism is untenable.

Finally, we come to those who resist constitutional theory in favor of interpretive pluralism.[228] By disavowing any consistent interpretive method, the pluralists find themselves at odds with the modern doctrine of stare decisis. Without a theory for assessing the substantive dimensions of constitutional errors, they lack the tools to appraise the value of constitutional accuracy in any given case. The problem cannot be cured through bottom-up judging that treats precedent as among an array of relevant factors. Even on an eclectic approach to constitutional adjudication in which multiple considerations are relevant to the treatment of precedent, there must be some theory for determining how the considerations work together and what happens when they diverge.[229]

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those decisions validating certain New Deal and Great Society programs pursuant to the congressional powers over commerce, taxation, and spending."); Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors*, 19 GEO. MASON L. REV. 1029, 1041 (2012) (arguing that "[a]lmost all originalists have decided, on pragmatic grounds, that the Supreme Court's constitutional infidelities must sometimes be allowed to mature into de facto constitutional amendments").

225. BALKIN, *supra* note 103, at 8–9.

226. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 24 (2006) (arguing that "Justice Scalia's faint-hearted commitment to originalism is not really originalism at all").

227. *See supra* section III(B)(1).

228. *See supra* subpart IV(C).

229. *See* Paulsen, *supra* note 116, at 295 ("For any constitutional theory that acknowledges the legitimacy of consideration of multiple and potentially inconsistent sources of constitutional meaning there is an urgent corollary need for coherent and principled rules about what takes priority and when one can repair to less-favored modalities to resolve unclarity."); Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 317 (2010) ("The constitutional pragmatist must choose goals before she can 'do what works' to achieve them, and a

There is admittedly an element of, if not paradox, at least irony in the conclusion that interpretive pluralism is an ill fit with the doctrine of constitutional stare decisis. Strong deference to precedent might be seen as a response to the very existence of methodological diversity, which increases the probability that a given Justice will perceive certain precedents as mistaken simply because she adheres to an interpretive method that differs from that of her predecessors.[230] The doctrine of stare decisis responds by establishing a presumption of deference notwithstanding the proliferation of varying interpretive methods.[231] It thereby reduces the destabilizing effects of methodological diversity among successive waves of Justices.[232] Yet the conflict between interpretive pluralism and constitutional precedent persists. It may be true that deference to precedent is effective at preserving a stable core within judicial systems characterized by methodological diversity. Nevertheless, the fact remains that without reference to interpretive method, a pluralist has no adequate basis for evaluating the costs of constitutional mistakes.

The tension between the doctrine of stare decisis and pluralistic approaches to interpretation does not extend to every manner in which precedent is invoked. Precedent plays a variety of roles beyond institutional self-binding that are left untouched by the failure to integrate constitutional method. For example, the function of precedent as a means of hierarchical control is not affected, nor is the use of precedent for purposes of persuasion.[233] Only when a Justice describes a precedent as genuinely constraining—that is, as affecting the rule of decision in a subsequent case—does the tension arise.

E. Surveying the Potential Solutions

For the interpretive pluralist who wishes to pursue a workable theory of constitutional precedent, at least three potential options are available: uniform integration of interpretive method across cases; integration of interpretive method on a context-dependent basis; and adoption of an absolutist approach to precedent. A fourth option would require the intervention of the Supreme Court as an institution: the Court could respond

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common law constitutionalist must choose normative commitments if she will test tradition against contemporary reason.").

230. *Cf.* Fisch, *supra* note 36, at 100–01 (asserting that "[a] subsequent court's disagreement with a prior precedent is more likely to reflect a disagreement about the prior court's selection of decisional principles than the application of those principles").

231. For exploration of this point, see Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711 (2013).

232. For a comparable suggestion in the context of statutory stare decisis, see *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) ("Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.").

233. *See supra* Part I.

to the challenges created by interpretive pluralism by redesigning the doctrine of stare decisis to exclude the dependent, substantive dimensions of constitutional accuracy. Finally, there is the possibility that any dissonance could be overcome through judicial courtesy and compromise. I discuss each of these options in turn, though my analysis is admittedly tentative and preliminary; a full vetting of these options (and, perhaps, others) must be left for future work.

1. Uniform Integration.—The clearest solution for the pluralist Justice who is grappling with constitutional precedent is to undertake the project of constructing a consistent, overarching theory of constitutional interpretation. With such a theory in place, there would be a ready mechanism for assessing the costs of constitutional mistakes. A Justice who devoted herself to a particular interpretive strategy, guided by defined normative premises, would be well-positioned to fashion an accompanying theory of precedent. Of course, she would also cease to be an interpretive pluralist.

2. Context-Dependent Integration.—Rather than restyling herself as an adherent of one interpretive school or another, our pluralist Justice could articulate a context-dependent set of interpretive methodologies. For instance, originalism might provide the appropriate lens in interpreting the Second Amendment's right to bear arms.[234] In other areas, perhaps including application of the Free Speech Clause, originalism might give way to methodologies such as living constitutionalism or pragmatism.[235] Within each context, the Justice would also articulate a normative justification for her approach, from structuralism or consequentialism in the originalist domains to common law adjudication or judicial innovation in the domains of living constitutionalism.[236]

The context-dependent approach would not result in any uniform methodological election. Within the contours of a given dispute, however, it would yield an effective apparatus for assigning value to the correction of constitutional mistakes. In a category of cases where structural originalism provided the rule of decision, all constitutional errors would be deemed intolerable; the value of accuracy would trump.[237] By comparison, in categories where common law constitutionalism reigned supreme, the relevant costs of retaining a flawed precedent would include considerations of justice and social policy.[238]

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234. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (emphasizing the "original understanding of the Second Amendment").

235. *See* STRAUSS, *supra* note 1, at 52–53 (describing the nonoriginalist complexion of the Court's free speech jurisprudence).

236. *See supra* subpart III(B).

237. *See supra* notes 115–21 and accompanying text.

238. *See supra* notes 129–34 and accompanying text.

The central distinction between the context-dependent approach and pure pluralism is the former's commitment to the consistent utilization of predefined methodologies within particular substantive contexts. By furnishing a set of metrics for gauging the intensity of constitutional mistakes, the context-dependent approach addresses the tension between pluralism and the doctrine of stare decisis. But its success comes at a price—and one that brings the broader vulnerabilities of interpretive pluralism into relief. The context-dependent model contemplates that in some situations, factors such as policy outcomes will be integral to the severity of a constitutional error. In other situations, policy outcomes will be secondary or inapposite. Likewise, a precedent's harmfulness might occasionally be determined by its compatibility with principles of popular sovereignty or supermajoritarian consensus, while in other cases those considerations would have no role to play.

The implications are not different in kind from the implications of interpretive pluralism more generally. After all, pluralism contemplates judicial responsiveness to different indicia of constitutional meaning from case to case and context to context.[239] Yet viewing these consequences through the prism of precedent makes the ramifications of pluralism more vivid. The doctrine of stare decisis seeks to promote and accommodate systemic interests in (among other values) stability, rationality, and the rule of law.[240] Uncertainty about the criteria for evaluating the respective harmfulness of various constitutional mistakes is at odds with those norms. By this I do not mean to suggest that interpretive pluralism is unprincipled. A pluralist judge could be perfectly consistent in her *process* of adjudication, always making sure to consult a defined set of relevant sources before reaching her decision. That approach, it seems to me, might well satisfy the demand for consistency that we properly make upon our judges.[241] Nevertheless, consistent processes are insufficient to give content to the value of getting the law right in a way that is amenable to the application of stare decisis across cases. The doctrine of stare decisis requires something more.

3. Absolutism.—If our hypothetical Supreme Court Justice is not prepared to rethink pluralism as her preferred approach to constitutional

239. *See supra* subparts IV(B)–(C).

240. *See supra* Part II.

241. *Cf.* Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 573 (1999) (declaring that "[f]or a judge or Justice to appeal to inconsistent assumptions [about preferred methods of reasoning] from one case to the next would breed cynicism" because "[t]he ideal of judicial reason, as distinct from power or will, implies an obligation of methodological integrity"); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1767–68 (2010) (contending in the context of statutory interpretation that "[l]itigants bringing like claims expect to have their cases decided under the same legal standards, and methodological flip-flopping undermines the public perception of the Court as a neutral body").

interpretation, she might consider tailoring her view of precedent. The objective would be to avoid any need for assessing the substantive value of replacing incorrect constitutional rules. There are two ways in which that objective might be pursued.

Our Justice might resolve, following the example of the pre-1966 House of Lords,[242] that from this day forward she will cease to vote for the overruling of any constitutional precedent. Instead, she will leave the correction of constitutional errors entirely to the Article V amendment process.[243] The Justice would still need to grapple with issues of precedential scope in determining whether a prior decision was, in fact, controlling. But she would be spared the task of making case-by-case determinations about the comparative value of leaving the law settled versus getting the law right.

Relinquishing the judicial power to overrule is strong medicine. So, too, is the pluralistic Justice's second potential option, which is the converse of the first: The Justice could disavow any discretion to reaffirm a constitutional precedent that she views as incorrect. In effect, constitutional stare decisis would be excised from her jurisprudence. All constitutional questions would be resolved without any effort to maintain continuity with Justices of the past through the preservation of precedent.

4. Doctrinal Redesign.—Both absolute deference and zero deference would represent rather severe responses to the tension between pluralism and the doctrine of stare decisis. That severity is not disqualifying, but it does reduce the appeal and practicality of those options. It is thus worth considering whether the Supreme Court could find a more palatable solution through some other means. Is there an alternative formulation of stare decisis that is, if not perfect, at least a better fit with the second-best world of interpretive pluralism?

The Court might, for example, recast the doctrine of stare decisis as entirely dependent on the disruptive impact of adjudicative change, such that an erroneous precedent would be retained if and only if the disruption likely to accompany its overruling exceeds some predefined threshold. This version of stare decisis could be applied without any integration of interpretive method. Upon concluding that a precedent was mistaken, the Justices would have no need for aligning themselves with interpretive schools like originalism or living constitutionalism. They would simply consider the disruptiveness of reversing course.

In lieu of this disruption-based approach, the Court could address the tension between pluralism and precedent by redesigning the doctrine of stare decisis to focus on other independent effects of precedential continuity, such

242. *See supra* notes 49–50 and accompanying text.

243. U.S. CONST. art. V.

as jurisprudential coherence or workability.[244] The common denominator is disregard for the substantive value of correct interpretation. The direct benefits of replacing a mistaken rule would play no role in the stare decisis analysis. The moment those benefits reentered the fold, the tension between stare decisis and pluralism would return along with them.

The central problem with proposals like these is that the redesigned doctrine of stare decisis would itself be inconsistent with certain interpretive methodologies. For example, a doctrine based exclusively on disruptiveness would imply both that disruptiveness is a legitimate reason for retaining a precedent and that all other considerations are inapposite.[245] Much the same would be true if other independent factors were added to or substituted for disruptiveness. The question is whether a doctrine of stare decisis reconstituted along these lines would fare any better than existing law in dealing with interpretive pluralism. If the answer is yes, the explanation would seem to be that it is more justifiable to ask judges to stipulate to the relevance of independent considerations like disruptiveness—even at the expense of applying their preferred interpretive theories—than to seek agreement about the direct, substantive ramifications of a particular constitutional ruling. Evaluating the soundness of such an explanation is a matter that requires further analysis.

5. Judicial Compromise.—Finally, it is worth considering whether the dissonance between pluralism and stare decisis might be worked out through the mechanism of judicial compromise, without the need for any doctrinal revision. Different Supreme Court Justices may harbor different views as to what makes an erroneous precedent so harmful as to warrant overruling. But they could seek to come together around their common ground—for example, by agreeing that a precedent should be retained, even if they disagree about the reason why. Those Justices could compromise to produce an opinion that is "shallow" enough to be agreeable to all of them.[246] Alternatively, they might agree to join an opinion that reaches the correct result even if they have quibbles over the way in which the issue of stare decisis is handled.

I see the virtues of both approaches, and I suspect that they occur with some regularity in practice. Yet they provide an incomplete solution to the problem of pluralism. Crafting shallow opinions will tend to reduce the institutional pluralism that arises from different Justices' adherence to different methodologies.[247] But it does so at the expense of analytical

244. *See supra* Part II.

245. *See supra* section II(A)(1).

246. *See* Sunstein, *supra* note 18, at 21 (defending the use of shallow decisions that "make it possible for people to agree when agreement is necessary" while "mak[ing] it unnecessary for people to agree when agreement is impossible").

247. *See supra* subpart IV(B).

exposition, which is a trade-off that should give us some pause. Moreover, shallow opinion writing does not solve the problem of individual pluralism. Before she engages the question of whether to compromise, a jurist must determine, in her own mind, what the proper metric is for assessing the value of getting the law right.[248] Until she undertakes that analysis, shallow opinions will merely paper over a missing analytical step.

F. A Dose of Realism?

Might it be that the integration of interpretive method with constitutional precedent is already occurring, *sub rosa*, or perhaps even subconsciously, in the Supreme Court's decisions?

The Justices conceivably may be conducting in-depth examinations of the value of interpretive accuracy based on their respective philosophical predispositions and normative premises, but then refraining from weaving those examinations into their written opinions. This prospect seems unlikely, as there is no apparent explanation for why the Justices would be inclined to obscure that type of analysis from public view while providing elaborate explanations of their other interpretive moves.

An alternative theory is more plausible. It posits that when the Justices confront dubious precedents, they draw on basic, vaguely formed intuitions regarding the relative severity of constitutional mistakes. When a Justice declares that she is willing to stand by a precedent for the sake of stare decisis, she is implying that the costs of perpetuating the constitutional mistake are below some internal threshold, even if she does not have a developed theory of interpretation in mind.

It is impossible to know how often this latter scenario reflects the Court's actual practice, and we can stipulate to its potential occurrence without meaningfully affecting the analysis presented in this Article. For a Justice whose instincts suggest that a given type of constitutional error is especially harmful, a principled theory of precedent requires unpacking that intuition to test its consistency with the Justice's broader interpretive approach. As we have seen, some approaches to assessing constitutional mistakes are, while superficially plausible, irreconcilable with certain interpretive methods.[249]

The Justice who views one constitutional mistake as more harmful than another must explain which normative premises justify her view and whether those premises are consistent with her interpretive method. In the event of an inconsistency, it is incumbent upon the Justice either to overcome her initial intuitions of harmfulness or to adjust her broader theory of constitutional

248. *See supra* subpart IV(D).

249. *See supra* Part III.

interpretation to take them into account.[250] In light of the Court's laudable commitment to reason giving,[251] the appropriate forum for that deliberative process is a written opinion, not the Justice's own mind.[252]

This Article's prescriptions accordingly remain applicable even if one believes that the Justices already engage in rudimentary and implicit analyses of the severity of constitutional mistakes. Neither *rudimentary* nor *implicit* is sufficient.

V. Objections and Analogies

So far I have contended that theories of precedent require the integration of particular interpretive methodologies as informed by underlying normative premises. The following subparts consider two potential reactions to my argument, one in the spirit of objection and one in the spirit of analogy. The objection is that the benefits of integrating precedent and interpretive method are rendered illusory by the tendency of stare decisis to corrupt any interpretive strategy to which it is joined. The analogy suggests that the relationship between precedent and interpretive method extends beyond the realm of constitutional law.

A. Intrinsic Corruption

Aspiration toward interpretive accuracy arguably sits in tension with the doctrine of stare decisis, which can lead to the perpetuation of constitutional rulings that would be rejected in the absence of applicable precedent. Some commentators have seized upon this tension to argue that deference to precedent undermines the purity of any constitutional theory. The most well-known critique is that of Justice Scalia, who has called stare decisis a "compromise of all philosophies of interpretation."[253] Michael Paulsen echoes that conclusion in contending that deference to erroneous decisions is "intrinsically corrupting" of constitutional theory because it "accords

250. *Cf.* Strang, *supra* note 160, at 1730 ("[P]recedent plays such a central role in our legal practice that all plausible interpretative methodologies must account for the role of precedent in their theories.").

251. *See, e.g.*, Breyer, *supra* note 54, at 2016 ("[A] good opinion contains the true reasons that led to the judge's decision. The decision must be reasoned. It must be principled. It must be transparent.").

252. *Cf.* Gerhardt, *supra* note 1, at 143 ("There can be no meaningful exchange of ideas among the Justices on the question of continued adherence to precedent unless they each disclose their reasons for the positions they have taken and the values they believe should continue to guide the Court's decisionmaking on the particular issue under reconsideration.").

253. SCALIA, *supra* note 222, at 139; *see also id.* ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."). For a recent reaffirmation, see SCALIA & GARNER, *supra* note 51, at 414 ("[Stare decisis] is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity.").

decision-altering force to precedents that would otherwise be thought wrong."[254]

Despite its capacious formulation, the intrinsic-corruption thesis is ultimately an adjunct of structural originalism[255] that does not necessarily apply to other methodologies. Even when legal change is desirable, it is by nature disruptive. The world in which a given precedent exists is different from the world in the absence of any such precedent. The issuance of a judicial opinion carries meaningful consequences for the way in which individuals organize their affairs, legislators craft laws, and society at large understands the content and nature of the legal backdrop.[256] It is possible to conclude, following the structural originalists, that those consequences should be irrelevant to the task of constitutional interpretation.[257] It is also plausible to argue that the ramifications of a precedent's issuance are germane to the propriety of its retention. Interpretive philosophies that permit deference to precedent in order to mediate the costs of legal change are subject to reasonable dispute regarding their functionality and their fidelity to the Constitution, but they are not corrupted by their acceptance of stare decisis.[258]

In staking out the contrary view, Professor Paulsen acknowledges the argument that precedent might legitimately be deployed as one component of an overarching constitutional theory.[259] He remains unconvinced, criticizing such theories as implying that judicial pronouncements can alter the Constitution's meaning.[260] Professor Paulsen's criticism is elegant and thought-provoking, but I submit that it is ultimately unpersuasive in two respects. First, as suggested in the previous paragraph, there is no innate reason why a theory of constitutional interpretation must disregard the effects of deviating from precedents that are already on the books. A constitutional theory that is driven by factors such as policy considerations or welfare maximization can easily accommodate the view that, for example, the original public meaning of the Constitution's text should govern *unless* the negative effects of breaking continuity exceed some threshold. Those types of approaches provide ample room for principles of stare decisis to operate.

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254. Paulsen, *supra* note 116, at 290–91; *see also* Lawson, *supra* note 32, at 32 (describing deference to erroneous constitutional precedents as inconsistent with "any theory of interpretation that prescribes objective right answers to constitutional questions" (footnote omitted)).

255. *See supra* section III(A)(1).

256. *See* Kozel, *supra* note 59.

257. *See supra* section III(A)(1).

258. *Cf.* Caminker, *supra* note 26, at 859 ("[A] court may appropriately interpret a particular constitutional provision to take into account the institutional values that commend embracing the same interpretation offered previously by (the same or) a superior court.").

259. Paulsen, *supra* note 116, at 292.

260. *See id.* at 294–95 (challenging the argument that "judges have the power to invest the Constitution with meaning simply by virtue of their decisions and opinions").

Second, even someone who views original meaning as the paramount source of constitutional law might accept deference to precedent as a legitimate part of the judicial process through which that meaning is brought to bear. When the Supreme Court confronts a precedent it currently views as erroneous, it is dragged into conflict with its past self. The institutional question is which instantiation of the Court—the prior one or the current one—should win out in issuing the decree of the "judicial department" created under Article III.[261] A Justice or constitutional lawyer might plausibly conclude that fidelity to the Constitution is not impaired by resolving such disputes with a presumption in favor of the predecessor Court, any more than fidelity to the Constitution requires lower courts to ignore Supreme Court decisions they view as erroneous. The debate is not about the proper source of constitutional meaning but "the institutional mechanism" through which disputes over that meaning "are to be settled."[262] A presumption in favor of the current Court's interpretation represents an internally coherent approach to constitutional adjudication. So, too, does the opposite presumption in favor of precedent.

The force of the intrinsic-corruption thesis turns out to be coextensive with structural originalism, which draws on the Constitution's status as supreme law in renouncing departures from original meaning.[263] Given the theory's premises, it would be discordant for a structural originalist to contemplate the privileging of judicial precedent over original meaning. For those who claim no allegiance to structural originalism—including originalists who base their interpretive approach on other normative premises[264]—precedent remains a potentially legitimate component of constitutional method. Correct or incorrect, their theories are not necessarily corrupt.

B. Statutory and Common Law Precedents

Stare decisis applies to more than constitutional cases. The Supreme Court has stamped its statutory decisions with a degree of durability beyond that which is accorded to constitutional rulings.[265] The divergence is

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261. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) (noting that Article III creates "not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court'").

262. *See* Solum, *supra* note 4, at 196 ("Once we are operating within the realm of formalist precedents, the question is not 'Are we respecting the authority of the Constitution?' but is instead, 'What is the institutional mechanism by which disputes about the meaning of the Constitution are to be settled?'"); *see also* Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 144 (2010) ("Originalists qua originalists have no position on the allocation of legal authority in any particular legal system."); Caminker, *supra* note 26, at 858 ("The entire federal judiciary could just as plausibly be the appropriate autonomous interpretive unit.").

263. *See supra* section III(A)(1).

264. *See supra* section III(B)(1).

265. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation . . . .").

commonly explained by a pair of institutional assumptions: The challenges inherent in the Article V amendment process warrant a more active role for the judiciary in reconsidering constitutional precedents; and Congress's failure to amend a statute in response to a judicial construction is a form of implicit acquiescence.[266] Both claims are susceptible to challenge. There are credible explanations other than acquiescence—from the limited capacity of the legislative agenda to the touchy politics of removing an entitlement that was previously endorsed by the judiciary—that might explain the legislature's failure to amend a statute.[267] Nor is it obvious why, if inaction really were tantamount to approval, acquiescence by the *sitting* Congress should be sufficient to ratify the judicial interpretation of a statute that was passed by an *earlier* Congress.[268] Further, the unique status of the Constitution as a "framework for government" arguably counsels in favor of greater, not lesser, solicitude for continuity in the constitutional realm, suggesting that the difficulty of formal amendment is a virtue to be preserved as opposed to a miscalculation that warrants a doctrinal end around.[269]

Putting aside the debatable wisdom of according enhanced deference to statutory precedents,[270] the question of immediate concern is how such deference should be understood within the analytical framework I have tried to develop. In particular, given the proliferation of competing schools of statutory interpretation such as textualism and purposivism,[271] it might be thought to follow that the integration of interpretive method and precedent is equally necessary in the statutory context as in the constitutional context.

There are recognized exceptions for statutes that imply a delegation of lawmaking authority. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("*Stare decisis* is not as significant in this case . . . because the issue before us is the scope of the Sherman Act. From the beginning the Court has treated the Sherman Act as a common law statute." (citation omitted)).

266. *See Patterson*, 491 U.S. at 172–73 (observing that in the context of statutory interpretation, "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done"); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–24 (2005) (summarizing the conventional arguments in favor of strong statutory stare decisis).

267. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1403–08 (1988) (challenging the argument regarding legislative acquiescence).

268. Barrett, *supra* note 266, at 336–37; Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 193–95 (1989).

269. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 431 (1988) ("Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules. The reasons for making amendment hard apply as well to overrulings."); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180 (2006) ("One purpose of having a written constitution is to create a stable framework for government. . . . Overruling [bedrock] doctrines would create just the kind of uncertainty and instability that constitutions (even more than other laws) are designed to avoid . . . .").

270. For further analysis, see generally Eskridge, *supra* note 267.

271. *See, e.g.*, Gluck, *supra* note 241, at 1762–64 (contrasting textualist and purposivist approaches to statutory interpretation).

The existence of varying philosophies for interpreting statutes does not end the inquiry. In constitutional cases, the need for integrating interpretive method arises from the existence of multiple superficially plausible[272] approaches for defining the nature of substantive harm that results from a mistaken interpretation. Depending on one's philosophy, the relevant impact of retaining an erroneous rule might be characterized in terms of social welfare, justice, popular sovereignty, or beyond.[273] Without an integration of interpretive method, there is no metric for assessing the value of replacing an incorrect rule with a correct one.

Whether the integration of interpretive method is also a precondition to the application of stare decisis in the statutory context depends on whether there is similar room for debate in defining the ramifications of misconstrued statutes. Are there a variety of plausible metrics for assessing the value of a correct statutory interpretation? If so, the integration of interpretive method is required in order to facilitate the application of stare decisis. For example, it may be that the severity of a statutory mistake should be viewed in terms of the extent to which the judicial construction deviated from the legislature's intentions. Or perhaps the importance of correcting a statutory error should turn on whether the judicial construction has proven "inconsistent with the sense of justice or with the social welfare."[274] Assuming that these (or other) approaches to valuing statutory accuracy can be plausibly maintained, the integration of interpretive method would be necessary to facilitate the principled treatment of precedent. That assumption appears sound as a preliminary matter, but it would require further scrutiny before the requirement of integrating a particular interpretive philosophy could be convincingly established.

Much the same is true of the application of this Article's analysis to the treatment of precedent in common law cases. Common law adjudication can lead to the formation of "established doctrines and principles."[275] When the question inevitably arises as to whether a court should break from such a doctrine or principle, there must be some theory for evaluating how harmful it would be to let matters stand. That brings us once again to the issue of how to infuse the concept of harm with legal salience. Is it about economic inefficiency, moral injustice, dubious public policy, or other considerations? The answer to that question, which depends on one's normative theory of what the common law is driving at, will inform the choice between retaining and overturning flawed precedents.

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272. As noted earlier, debating about which of these approaches is best is not the type of project I am undertaking here.

273. *See supra* Part III.

274. Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989) (quoting Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting CARDOZO, *supra* note 76, at 150) (internal quotation marks omitted)).

275. Waldron, *supra* note 67, at 7.

Conclusion

Contending that a theory of precedent compels a particular result of its own volition runs into a problem of infinite regress, calling to mind Stephen Hawking's anecdote about "turtles all the way down."[276] Certain factors that are relevant to the choice between retaining and overruling a flawed precedent are amenable to preliminary scrutiny in isolation from interpretive method.[277] But the doctrine of stare decisis is founded on the premise that the value of leaving the law settled must ultimately be weighed against the value of getting the law right.[278] Negotiating that tension, I have argued, requires the integration of interpretive methodology as informed by underlying normative premises. In the absence of such integration, there is no suitable mechanism for defining the value of constitutional accuracy across cases.

276. STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 1 (1988).

277. *See supra* Part II.

278. *See supra* note 10 and accompanying text.

Administrative Constitutionalism

Gillian E. Metzger*

The U.S. Food and Drug Administration adopts a rule requiring tobacco companies to include graphic images warning of the health risks associated with smoking, defending the rule at length against the claim it violates the First and Fifth Amendments.[1] The Department of Education and the Department of Justice (DOJ) jointly issue guidance explaining how elementary and secondary schools can voluntarily consider race consistently with governing constitutional law.[2] The Office of Legal Counsel (OLC) in DOJ issues a memorandum to the Attorney General concluding that the President had constitutional authority to commit U.S. forces as part of the NATO military campaign in Libya and did not need prior congressional approval.[3]

These are three recent examples of "administrative constitutionalism," in that they involve actions by federal administrative agencies to interpret and implement the U.S. Constitution.[4] Indeed, despite their contentious subject matter,[5] all three are relatively straightforward instances of administrative constitutionalism: the claims at issue involve well-established constitutional requirements, and the agencies expressly engaged with these requirements, relying heavily on Supreme Court constitutional jurisprudence

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1. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,694–702 (June 22, 2011) (codified at 21 C.F.R. pt. 1141).

2. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2012), http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html.

3. Authority to Use Military Force in Libya, 35 Op. O.L.C. (Apr. 1, 2011), http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf.

4. *See* Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (defining administrative constitutionalism as "regulatory agencies' interpretation and implementation of constitutional law").

5. The D.C. Circuit recently held that the FDA's rule violates the First Amendment. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012). The use of race in educational contexts has provoked numerous Supreme Court decisions, with yet another case to be decided this term, Fisher v. University of Texas, 132 S. Ct. 1536 (2012) (decision granting certiorari). Although dispute over the lawfulness of President Obama's initiation of the use of force in Libya largely ceased when the Libyan government was overturned, debate over the proper constitutional scope of the President's Commander in Chief power and Congress's role with respect to military actions is long lasting and deep. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 945–50 (2008).

in doing so.[6] Such instances of administrative constitutionalism are a frequent occurrence,[7] reflecting the reality that most governing occurs at the administrative level and thus that is where constitutional issues often arise.

But administrative constitutionalism potentially has a much wider ambit. What about the Department of Housing and Urban Development's (HUD) recent final rule prohibiting both public and private housing practices that have a disparate impact on racial groups or perpetuate segregated housing patterns?[8] HUD based its rule simply on the Fair Housing Act (FHA) and did not discuss any constitutional issues the rule might raise.[9] Yet, plainly, HUD's rule could be seen as part of an effort to pursue the constitutional goal of equal protection by expanding housing opportunities for racial minorities and addressing continuing effects of past housing discrimination.[10] Does the lack of express engagement with these constitutional issues in the rule itself preclude viewing it as a form of administrative constitutionalism? Should it matter if HUD officials were internally debating and considering possible constitutional dimensions of the proposed rule?[11]

Or what about the actions by administrative officials over the years to support and expand Social Security? President Franklin Roosevelt included "the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment" in the Second Bill of Rights he proposed in his 1944 State of the Union address.[12] The very need to include such a right to economic and income security in a Second Bill of Rights

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6. *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. at 6–9 (defending Obama's decision to intervene in Libya on the basis of past constitutional jurisprudence and statutory guidance); Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,694–702 (justifying the FDA rule requiring warnings on cigarette packages on the grounds that it is permissible according to the relevant Supreme Court precedents); U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 2 (discussing the requirements of past precedent, including *Brown v. Board of Education* and *Grutter v. Bollinger*, in the context of using race to achieve diversity in elementary and secondary schools).

7. *See* Lee, *supra* note 4, at 804 & n.12 (enumerating several examples of administrative constitutionalism and suggesting that the phenomenon is neither new nor infrequent).

8. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,479–80 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

9. *See, e.g.*, *id.* at 11,460–61, 11,465–67 (describing reasons for adopting the rule and justifying its interpretation of the FHA as encompassing disparate-effects claims in response to comments).

10. *See* Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1193–94 (2011) (describing a range of efforts being pursued to affirmatively further minority access to housing). The federal government's authority to force consideration of racial impact and to apply a disparate-impact standard other than to remedy identified racial discrimination is contested. Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1342–43 (2010).

11. *See* Lee, *supra* note 4, at 827–44 (discussing the Federal Communications Commission's (FCC) promulgation of rules requiring broadcast licensees and common carriers to adopt equal employment programs as instances of administrative constitutionalism, notwithstanding that these rules were justified on a statutory basis and the FCC did not discuss constitutional equal protection).

12. President Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944), *available at* http://www.fdrlibrary.marist.edu/archives/pdfs/state_union.pdf.

indicates its exclusion from the first, and the U.S. Constitution is notoriously bare of most affirmative rights.[13] But Social Security has become over time a core pillar of the relationship between the federal government and its citizens.[14] It is now "constitutional" in the sense of being part of "the basic rules of political participation and citizenship, fundamental institutions and frameworks for governance, and foundational normative precepts for state practice as well as private behaviors."[15] Insofar as administrative processes played a central role in the transformation of Social Security and other statutory regimes into basic features of the nation's political life, should we understand these processes as instances of administrative constitutionalism notwithstanding that they go beyond the requirements of the Constitution itself?[16]

Finally, what about the statutes and legal requirements that create and govern the modern administrative state? The Constitution identifies institutions at the apex of government—Congress, the President, the Supreme Court—and leaves the task of constructing the rest to the legislative process.[17] As a result, the agencies that make up the federal government we know today, such as the Defense, State, and Treasury Departments or the Environmental Protection Agency and the Food and Drug Administration, owe their existence to statutes.[18] The rules governing how these agencies

13. *See* Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1393 (1984) (asserting that "the rights actually recognized in contemporary constitutional law are almost all negative ones" and noting that, in the United States, positive rights are largely recognized through statutes).

14. *See* William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461, 468 (1996) (stating that the majority of Americans "consider Social Security to be one of the government's 'very most important' programs").

15. *See* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 83 (2010) (advancing this characterization of what it means for a measure to be constitutional and discussing Social Security's normative entrenchment); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 412, 424 (2007) (arguing that "[m]any of our most important individual rights" and basic institutions of government "stem from statutes rather than the Constitution" and including Social Security as one example).

16. *See* ESKRIDGE & FEREJOHN, *supra* note 15, at 2–9, 12–18, 31–34, 171–92 (characterizing the process by which the "small 'c'" constitution emerges from statutory entrenchment, administrative actions, and public deliberation as "administrative constitutionalism" and describing how this process played out with respect to Social Security).

17. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 30 (2012) [hereinafter MASHAW, CREATING] ("The American Constitution of 1787 left a hole where administration might have been."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 576–77 (1984) ("The Constitution names and ascribes functions only to the Congress, President and Supreme Court, sitting in uneasy relation at the apex of the governmental structure . . . .").

18. The War, State, and Treasury Departments were created by the first Congress in 1789, with the Navy Department following soon after in 1798. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 65 (establishing the Treasury Department); Act of Sept. 15, 1789, ch. 14, 1 Stat. 68, 68 (establishing the State Department); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 49–50 (establishing the War Department); Act of Apr. 30, 1798, ch. 35, 1 Stat. 553, 553 (establishing the Navy Department). The War and Navy Departments were consolidated in 1947, and named the Department of Defense in 1949. *See* National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, 499–500; Act of

operate come from several sources, two central ones being the Administrative Procedure Act (APA) and judicial doctrines that substantially amplify its terms.[19] Should this legal apparatus be considered part of administrative constitutionalism, even though it is developed by Congress and judges and framed as nonconstitutional law?[20] Does administrative constitutionalism also extend to our basic normative conceptions about what counts as proper public administration?[21] What about those administrative features, such as procedures providing opportunities for an individualized hearing or internal complaint and remedial mechanisms, that the courts have held satisfy due process and other constitutional demands?[22]

All of these examples have recently been offered as instances of administrative constitutionalism. All represent important dimensions of American constitutional development and reflect the central role that the modern administrative state plays in our constitutional system today. Although administrative constitutionalism could be viewed as including just the application of established constitutional requirements by administrative agencies, I believe such an account would be too narrow. In practice, administrative constitutionalism also encompasses the elaboration of new constitutional understandings by administrative actors, as well as the construction (or "constitution") of the administrative state through structural and substantive measures.[23]

Aug. 10, 1949, Pub. L. No. 81-216, ch. 412, sec. 12(a), 63 Stat. 578, 591 (changing the name of the department from the National Military Establishment to the Department of Defense). President Richard Nixon created the Environmental Protection Agency by executive action. Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted in* 5 U.S.C. app. at 643 (2006), *and in* 84 Stat. 2086 (1971). The Food and Drug Administration traces its origins to chemical analyses performed by the Department of Agriculture, but in modern form began with the 1906 Pure Food and Drug Act. *History*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/ WhatWeDo/History/ default.htm (last updated Mar. 1, 2013); Pure Food and Drugs Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

19. *See* Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–302 (2012) [hereinafter Metzger, *Embracing*] (discussing the judicial refinement of a doctrinal framework of administrative law through the APA and case law).

20. *See* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 490–97 (2010) [hereinafter Metzger, *Ordinary Administrative Law*] (arguing that constitutional concerns have animated judicial decisionmaking and the development of administrative law doctrines).

21. *See* ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM 27–28, 30 (2007) (defining administrative constitutionalism as a legal culture characterized by two contrasting ideals: the rational–instrumental, guided by the principle of objectivity, and the deliberative–constitutive, which relies on the judgment of individual administrators to maintain the integrity of administrative systems).

22. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 487–90 (describing the features of administrative law that connect administrative law with constitutional norms through either direct compliance with constitutional mandates or avoidance of violating recognized constitutional provisions).

23. As described in Part I, different scholars have offered different accounts of administrative constitutionalism, with some focusing on agency engagement with established constitutional requirements, others emphasizing broader norm deliberation and creation, and still others including Congress and the courts as part of the administrative constitutionalism process, as well as agencies.

Yet recognizing the divergences among these examples of administrative constitutionalism suggests a need for some exegesis of its different dimensions. Such an exegesis is particularly timely now, as administrative constitutionalism is increasingly becoming a subject of study.[24] This attention to administrative constitutionalism is overdue, as it represents a main mechanism by which constitutional meaning is elaborated and implemented today. Given the dominance of the modern administrative state, a full picture of contemporary constitutionalism in the United States must include administrative constitutionalism—the constitutional understandings and interpretations developed by agencies as well as those that structure the administrative state itself.

Identifying administrative constitutionalism's various forms highlights the central challenges confronting it as a form of constitutional interpretation. Many of these challenges derive from core separation of powers precepts and constitutional principles of democratic accountability. Administrative agencies occupy an ambiguous constitutional space; they are barely mentioned in the Constitution itself and owe their existence to statutory delegations of authority from Congress.[25] They lack direct electoral accountability, with the resultant democratic legitimacy concerns often countered by emphasis on political oversight through the President and Congress and public participation in administrative decisionmaking.[26] What justifies administrative efforts to move the nation beyond recognized constitutional requirements to develop new constitutional understandings, especially if doing so means pushing at the limits of agencies' delegated authority and acting in ways not initiated by political leaders? A similar issue of institutional overstepping arises when administrative constitutionalism takes the form of judicial efforts to address constitutional concerns raised by the modern administrative state through the medium of ordinary administrative law.[27]

My own view is that administrative constitutionalism's virtues outweigh these concerns with unauthorized administrative or judicial action. In fact,

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I mean here to offer a capacious definition that can accommodate the variety of approaches described below.

24. *See infra* subpart I(A).

25. *See infra* text accompanying notes 103–07.

26. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–503 (2003) (detailing different political accountability models and critiquing emphasis on presidential accountability); *see also* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1550–54 (1992) (emphasizing public participation in bureaucratic decisionmaking as well as review by Congress and the President as responses to the accountability concerns of the administrative state).

27. *See, e.g.*, Seidenfeld, *supra* note 26, at 1543–46 (arguing that the judiciary lacks the capacity to distill common public values and that the courts have no authority to require Congress to change its procedures); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13–24 (1985) (detailing the separation of powers and federalism problems raised by federal common law).

because of these virtues, administrative constitutionalism can represent a particularly legitimate form of constitutional development. But the accountability challenges it poses are real, particularly given the frequent difficulty involved in identifying instances of administrative constitutionalism in action. Agencies' constitutional engagement is always embedded.[28] It occurs in the context of implementing programs and enforcing statutes, and often agencies do not expressly engage with the constitutional dimensions of their actions—indeed, these dimensions may only become apparent over time. Similarly, courts are rarely open about the constitutional or law-creative aspects of their development of administrative law.[29] Given administrative constitutionalism's attenuated democratic accountability, greater transparency about this method of constitutional development is essential for its legitimacy—even though greater transparency will also likely chill some agency constitutional engagement.

Administrative constitutionalism does not stand alone in crossing the ordinary law–constitutional law divide. Recent constitutional scholarship has highlighted the constitutional role played by ordinary law and the central importance to our constitutional system of political efforts to construct constitutional meaning.[30] Assessing administrative constitutionalism thus may hold implications for the constitutional enterprise writ large. Yet drawing these lessons requires attention to the ways in which agencies differ from other government institutions. As I argue below, one potentially fruitful approach to increasing administrative constitutionalism's transparency is to encourage more overt administrative engagement with constitutional concerns through the mechanisms of ordinary administrative law. Similar exploitation of the ordinary law–constitutional law overlap could occur in other contexts, for example by courts according entrenched statutory norms more of a constitutional status. Doing so has the advantage of linking judicial constitutionalism with its legislative and administrative versions. Yet collapsing the ordinary law–constitutional law divide more would pose much more of a threat to our constitutional system and to the very practices of legislative and administrative constitutionalism it intends to support.

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28. *See infra* text accompanying note 83; *see also* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484, 507–08 (describing the linkage and reciprocal relationship between constitutional law and ordinary administrative law).

29. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 534 ("Not only has the Court not overtly developed ordinary administrative law into a tool for constitutional enforcement, it has largely failed to identify the constitutional concerns underlying its development of ordinary administrative law doctrines.").

30. For descriptions of constitutional construction, see JACK M. BALKIN, LIVING ORIGINALISM 3–6, 69–73 (2011) and Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120–25 (2010) [hereinafter Whittington, *Constructing*], and see generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWER AND CONSTITUTIONAL MEANING (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION].

I. The Many Varieties of Administrative Constitutionalism

Administrative constitutionalism is coming into its own. In recent years, a number of scholars have focused on the interplay between administrative actors, and the national administrative state more broadly, and constitutionalism.[31] The attention to administrative constitutionalism is a natural offshoot of current trends in constitutional scholarship—in particular, the emphasis on popular constitutionalism, the historical evolution of constitutional understandings, and the role that measures outside the Constitution play in constructing basic constitutional requirements.[32] Given the post-New Deal dominance of administrative government,[33] the administrative realm is inevitability an important element in these efforts to expand national constitutional horizons. Administrative constitutionalism is equally a logical result of developments in administrative law scholarship, which is increasingly focused on questions of institutional design and internal agency structure.[34] This focus leads to greater attention to what actually goes on in agencies and how internal agency dynamics connect to broader constitutional issues about the shape of the federal government.[35] Politics and real-life events are a third potent factor behind administrative constitutionalism's rise. The birth of the national security state, marked by expanded presidential power and limited congressional or judicial oversight,

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31. *See* scholarship cited *infra* subpart I(A).

32. *See* Lee, *supra* note 4, at 806–10 (situating administrative constitutionalism in the context of popular constitutionalism and departmentalism). The literature on these developments in constitutional scholarship is vast. For a brief discussion and typology of popular constitutionalism, and citations to the literature, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–64 (2010). For recent leading accounts of constitutional change, see generally BALKIN, *supra* note 30; ESKRIDGE & FEREJOHN, *supra* note 15; DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Young, *supra* note 15, at 448–61; and see also Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011 (2012) (reviewing JACK M. BALKIN, LIVING ORIGINALISM (2011) and DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)).

33. *See* STRAUSS, *supra* note 32, at 122 (stating that "[t]he New Deal is famous for having greatly increased the number of . . . agencies" that combined "executive, legislative, and judicial functions"); Seidenfeld, *supra* note 26, at 1518 (noting that the New Deal encouraged Congress to recognize the expertise of agencies and to turn the "expert agenc[ies] loose to regulate").

34. *See* Metzger, *Embracing*, *supra* note 19, at 1363–64 (noting the focus on administrative structure and agency design in recent administrative law scholarship); *see generally* Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 333–57 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (surveying public-choice literature on agency design).

35. *See, e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2316–25 (2006) (describing the need to promote greater internal separation of powers in the face of increasing congressional abdication of policy to the executive branch); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1038–41 (2011) (describing how power is allocated within agencies and the constitutional constraints on that power); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 427–37 (2009) [hereinafter Metzger, *Interdependent*] (describing examples of administrative structures that serve an internal separation of powers function and their constitutional implications).

has highlighted the crucial importance of executive branch constitutionalism.[36] In what follows, after describing several recent accounts of administrative constitutionalism and the interplay of administrative and constitutional law, I underscore a core precept that these diverse approaches all share: a commitment to the constitutional character of ordinary law.

A. Alternative Accounts of Administrative Constitutionalism

One prominent analysis of administrative constitutionalism is Sophia Lee's history of the Federal Communication Commission (FCC)'s equal employment rules. Drawing on internal agency records, Lee paints a detailed picture of efforts by FCC attorneys and other administrative officials to use the FCC's licensing and common-carrier oversight as vehicles to further equal protection goals.[37] As Lee describes, these efforts—which included the argument that the FCC was constitutionally required to deny licenses to discriminatory broadcasters and carriers and impose affirmative obligations to develop equal opportunity employment programs on those regulated—went beyond judicial understandings of state action and equal protection.[38] From this history, Lee concludes that administrative constitutionalism often involves "[a]dministrators creatively extend[ing] or narrow[ing] court doctrine in the absence of clear, judicially defined rules" and sometimes selectively ignoring or resisting unfavorable decisions.[39] Of particular note is the way that administrative officials toggled between constitutional and statutory bases for the equal employment rules, ultimately publicly justifying the rules solely on the grounds of the FCC's statutory obligation to regulate in the public interest.[40] Depictions of administrative attention to constitutional issues also surface in scholarship on OLC, which is not surprising given that one of OLC's responsibilities is to assess the

36. *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 87–95 (2010) (providing a historical account of executive constitutionalism as practiced by the Office of Legal Counsel and the White House Counsel and arguing that these two offices increasingly serve "to give their constitutional imprimatur to presidential power grabs"); Katyal, *supra* note 35, at 2316–19 (acknowledging the expansion of the modern executive branch post 9-11 and proposing a set of modest internal checks on presidential power, particularly in the foreign policy arena); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1691–93 (2011) [hereinafter Morrison, *Alarmism*] (book review) (responding to Ackerman's "oversimplified account" of executive constitutionalism and suggesting an approach that places greater weight on institutional details and how the executive branch works); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1403–05, 1408–16 (2012) (book review) (arguing that "an increase in presidential power is not itself an increase in presidential defiance of law or presidential lawlessness" and rejecting an account of law as at odds with politics).

37. Lee, *supra* note 4, at 810–36; *see also* Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327, 334–36 (2008) (noting the role that administrative advocacy played in the NAACP's efforts to pursue its civil rights constitutional agenda).

38. *Id.* at 812–16.

39. *Id.* at 801–02.

40. *Id.* at 813–14, 827–36.

constitutionality of proposed Executive branch action.[41] Other scholars have traced the role that administrative practices played in the development of modern constitutional doctrines.[42]

The phenomenon of administrative constitutionalism also lies at the heart of William Eskridge and John Ferejohn's book, *A Republic of Statutes*. They argue that "America enjoys a constitution of statutes supplementing and often supplanting its written Constitution as to the most fundamental features of governance."[43] These statutes not only fill in constitutional gaps, but often transform how the Constitution is understood. A central claim of Eskridge and Ferejohn's account is that the governance structures and norms created by these statutes become entrenched over time through legislative and administrative deliberation.[44] And they identify administrative constitutionalism as the process by which this entrenchment occurs.[45] On their view, administrative constitutionalism includes not just interpreting the Constitution, but also "aggressive agency application of superstatutes to carry out their purposes in a manner that is workable, coherent, and consistent with the nation's other normative commitments."[46]

In Eskridge and Ferejohn's account of administrative constitutionalism, as in Lee's, agency officials are norm entrepreneurs, advancing new

41. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218–19, 1226–32 (2006) [hereinafter Morrison, *Avoidance*] (describing instances of the invocation of the constitutional avoidance canon at OLC); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682–83, 704–17 (2005) (describing OLC and the Solicitor General's office as "the principal constitutional interpreters for the executive branch" and providing details on constitutional interpretation in both). Lee's account is more unusual in showcasing constitutional reasoning by officials in agencies outside of OLC, a theme that is increasingly emerging in scholarship on executive branch lawyering. *See* David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 22–24 (2012) (expanding the analytical scope of the executive branch's legal operations from OLC and the White House Counsel's office (WHC) to broader "civil service legalism"); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. (forthcoming 2013) (manuscript at 11–12, 11 n.37) (on file with author) (emphasizing that legal interpretation and the formulation of policy are largely the work of thousands of government agency lawyers who play a significant role alongside other actors such as DOJ, WHC, and OLC).

42. *See* Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 574–77 (2007) (tracing the development of the Fourth Amendment idea of communications privacy to early decisions and practices within the Post Office); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 15–20 (2000) (discussing how judicial views of administrative expertise and administrative censorship underlay development of First Amendment doctrine).

43. ESKRIDGE & FEREJOHN, *supra* note 15, at 12–13.

44. *Id.* at 7–8; *see also* Glen Staszewski, *Constitutional Dialogue in a Republic of Statutes*, 2010 MICH. ST. L. REV. 837, 867–70 (2010) (modeling Eskridge and Ferejohn's account of administrative constitutionalism).

45. ESKRIDGE & FEREJOHN, *supra* note 15, at 33 ("[A]dministrative constitutionalism is the process by which legislative and executive officials . . . advance new fundamental principles and policies.").

46. *Id.* at 24, 33.

understandings of individual rights and the government's role.[47] Moreover, these new understandings often involve administrative officials offering creative interpretations of existing constitutional law and drawing on statutory and regulatory measures as well as the Constitution. By contrast to judicial constitutionalism, which they view as fundamentally "rule oriented, definitive, and principled," Eskridge and Ferejohn describe administrative constitutionalism as "explicitly policy oriented, experimental, and practical."[48] Indeed, they present the traditional, or "Large 'C'" Constitution as often operating mostly on the sidelines, with much of the focus instead on these political enactments that they describe as the "small 'c'" constitution.[49] Although they emphasize actions by agency officials, their picture of administrative constitutionalism is a capacious one and includes actors outside the agency in a dynamic, interactive, and deliberative process of constitutional development.[50] Thus, social movements and legislative enactments prompt agency actions that in turn "are subject to public critique as well as veto by courts, legislatures, and other Executive Branch officials."[51]

Sometimes, however, the process of deliberation and entrenchment that Eskridge and Ferejohn describe fails to occur. Anjali Dalal contends that such failure is evident in the national surveillance context, where initial administrative efforts to rein in the FBI's intelligence-gathering abuses under Herbert Hoover soon eroded and the current governing guidelines sanction much of the activities that were at first condemned.[52] Dalal argues that the history of national surveillance offers a cautionary tale about the potential negative effects of administrative constitutionalism, contending that the combination of a powerful national security mandate and bureaucratic resistance to oversight led to administrative narrowing of civil rights

47. *Id.* at 33; *see also* Lee, *supra* note 4, at 800–02 (highlighting the important—and independent—role agency administrators played in interpreting the Constitution to support equal employment rulemaking).

48. ESKRIDGE & FEREJOHN, *supra* note 15, at 33.

49. *See id.* at 18 ("Without denigrating the importance of the Large 'C' Constitution, which establishes the basic structure of our government and remains a potential path toward entrenched commitments, we maintain that the small 'c' constitution of statutes is a better way to develop and express our foundational institutions and norms.").

50. *See id.* at 1–2, 23 (characterizing small "c" constitutionalism as the result of robust deliberation and public discourse).

51. *Id.* at 33, 58–59. Eskridge and Ferejohn's terminology is a little unclear; at times they appear to use administrative constitutionalism to refer to specifically agency norm development, at others to refer to a broad process including legislative, judicial, and public input. *Compare id.* at 16 (distinguishing "legislative and administrative constitutionalism"), *with id.* at 31 ("[a]s a general matter, administrative constitutionalism is both the primary means by which social movements interact with the state and the primary means by which governmental actors *deliberate* about how to respond to social movement demands or needs."), *and id.* at 33 ("What we are calling administrative constitutionalism is the process by which legislative and executive officials . . . advance new fundamental principles and policies.").

52. Anjali Dalal, Administrative Constitutionalism and the Re-Entrenchment of Surveillance Culture 14 (unpublished manuscript) (on file with author).

protections and entrenchment of these administrative views with little opportunity for public deliberation.[53] Others have cited recent events, such as OLC's initial sanctioning of waterboarding and other forms of so-called "enhanced interrogation" during the George W. Bush Administration or its conclusion, during the Obama Administration, that the President had the unilateral authority to initiate the military operation in Libya, as grounds for skepticism about administrative constitutionalism's ability to serve as a meaningful constraint on governmental power.[54] National security is not unique in this respect. Administrative constitutionalism can involve narrow as well as expansive understandings of constitutional rights, and on many occasions agencies have rejected a norm-entrepreneurial role.[55] The FCC's prohibition on fleeting expletives and the FDA's tobacco packaging rule are two recent administrative measures attacked as insufficiently attentive to constitutional rights,[56] and the full story of federal civil rights enforcement involves many instances in which agencies resisted assuming a more aggressive role.[57]

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53. *Id.* at 27–29 (identifying the current "surveillance culture [as] the product of an FBI motivated by a powerful mandate and protected by the medieval structure of bureaucracy," with path dependency and historical practice serving to entrench the resultant administratively developed norms despite a lack of broader deliberation).

54. *See* ACKERMAN, *supra* note 36, at 87–116 (discussing presidential claims to greater power under the Constitution, focusing in part on OLC and the "torture memos" episode); Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SEC. J.F. 1, 18 (2011), http://harvardnsj.org/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion/ (arguing that OLC is not an "impartial, objective, independent arbiter of the Constitution," but rather an advocate for the President and his policies); Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT'L SECURITY L. & POL'Y 507, 515 (2012) (observing that the "process of securing legal analysis [from OLC] after September 11 was anything but balanced, dispassionate, and multivocal"). For a more optimistic view, arguing that executive constitutionalism is not so fundamentally compromised as to demand drastic institutional overhaul, see Morrison, *Alarmism*, *supra* note 36, at 1692–93.

55. Eskridge and Ferejohn themselves acknowledge that "administrative constitutionalism often goes off track" and detail several examples. ESKRIDGE & FEREJOHN, *supra* note 15, at 305, 314–15, 350–58 (identifying the development of the U.S. monetary system and antihomosexual constitutionalism as instances of "administrative constitutionalism gone wrong"); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 508–10 (2009) (noting the FCC's narrowing of its protection for the broadcast of expletives); Lee, *supra* note 4, at 855 (describing the Federal Power Commission's lack of interest in advancing broad constitutional arguments for the agency's power to combat discrimination).

56. *Fox Television Stations, Inc.*, 556 U.S. at 553–56 (Breyer, J., dissenting) (contending that the FCC's explanation for the change in its view of the constitutionality of its "fleeting expletive[s]" policy is inadequate in light of First Amendment censorship concerns); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1219, 1222 (D.C. Cir. 2012) (holding that the FDA failed to meet its burden so as to justify restricting commercial speech by not providing a "shred of evidence" showing why graphic warnings on cigarette packages would advance the FDA's interest in reducing the number of smokers).

57. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 739–40 (1984) (dismissing for lack of standing a suit alleging the IRS did not adopt sufficient standards to deny tax-exempt status to private schools that racially discriminated); Adams v. Richardson, 356 F. Supp. 92, 95 (D.D.C. 1973) (finding that out of 113 school districts who reneged on their desegregation plans or were otherwise out of

Another notable feature of Eskridge and Ferejohn's account is that administrative constitutionalism involves not simply promulgation of specific constitutional norms, but also construction of the institutional and administrative apparatus within which such constitutional development takes place. Several of their examples of administrative constitutionalism, such as the development of a national monetary constitution that includes an independent central bank and national currency,[58] are stories of institutional development and entrenchment. Indeed, they note that "[t]he biggest change in the Constitutional structure has been the creation of the modern administrative state," with the result that the "framework for understanding most national lawmaking . . . is no longer Article I, Section 7[] of the Constitution, but is instead the Administrative Procedure Act of 1946."[59] Karen Tani's account of the development of rights language within the federal social welfare bureaucracy in the 1930s and 1940s is another example of such state-creating administrative constitutionalism. Tani argues that the New Deal federal welfare administrators used rights language as an administrative tool to influence on-the-ground administration and helped national authority enter spheres previously left for state and local control.[60]

This creation or "constituting" of the administrative state is more centrally the focus of administrative law scholars' accounts of administrative constitutionalism. Jerry Mashaw's recent excavation of early U.S. administrative practice demonstrates how "over time . . . legislation, administrative practice, and judicial precedent" led to "a set of constitutional conventions concerning the place of administration in American government."[61] Although referencing the "administrative constitution" rather than administrative constitutionalism, Mashaw similarly highlights how the constitutional understandings underlying the national administrative state emerged from actions by agency officials and agency-developed structures and practices.[62] The basic doctrines governing judicial review of administrative action are yet another manifestation of administrative constitutionalism, though the main progenitors here are judges rather than agency officials.[63] As I have argued elsewhere, these administrative law doctrines were developed by judges to address constitutional concerns raised by broad administrative delegations and the attendant risk of arbitrary and

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compliance with Title VI in 1970–1971, the Department of Health, Education, and Welfare failed to take enforcement action against 74 of them).

58. ESKRIDGE & FEREJOHN, *supra* note 15, at 313–48.

59. *Id.* at 10–11; *see also* BALKIN, *supra* note 30, at 5 (describing the creation of key federal departments, the Administrative Procedure Act, the Federal Reserve Act, and other measures as "state-building constructions" (internal quotation marks omitted)).

60. Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 320–23 (2012).

61. MASHAW, CREATING, *supra* note 17, at 285.

62. *Id.* at 7–10, 309–12.

63. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484–85.

unaccountable administrative decisionmaking.[64] In turn, this constitutionally inspired administrative law has a profound effect on how agencies operate and frames our understandings of appropriate agency action.[65]

A fourth approach to administrative constitutionalism focuses even more directly on the constitutional significance that courts assign to administrative mechanisms and administrative decisionmaking. Institutional features such as administrative hearings or review procedures are sometimes constitutionally required, or are at least sufficient to satisfy constitutional demands.[66] A prominent recent example is *Boumediene v. Bush*,[67] where the Court suggested that more expansive administrative procedures could serve as an adequate substitute for judicial habeas review.[68] But the potential constitutional significance of administrative details extends more broadly. Eric Berger has recently emphasized the importance of judicial deference to administrative discretion in individual rights cases, arguing that the Supreme Court takes an inconsistent approach in deciding when deference is appropriate.[69] According to Berger, the Court should pay greater heed to the extent to which the administrative action at issue adheres with administrative law norms in assessing the action's constitutionality.[70] On this view, agencies' political accountability, expertise, use of formal procedures, and reasoned deliberations are all factors for courts to consider in deciding whether to accord deference to agency determinations in constitutional as well as administrative challenges.[71]

B. Administrative Constitutionalism's Common Elements

All of these examples of administrative constitutionalism involve some relationship between administrative decisionmaking and constitutional interpretation. But the nature of this relationship, and even what counts as the Constitution, varies tremendously.

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64. *Id.* at 491.

65. *See* Emily S. Bremer, *The Unwritten Administrative Constitution*, FLA. L. REV. (forthcoming 2013) (manuscript at 32–35), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2143161## (highlighting administrative common law's role in defining the function of administrative agencies); Metzger, *Embracing*, *supra* note 19, at 1339 ("Requiring agencies to offer contemporaneous explanations and justifications for their decisions creates internal checks on arbitrary agency action, encouraging agencies to take evidence and expertise into account and fostering internal deliberation."); Metzger, *Ordinary Administrative Law*, *supra* note 20, at 491–92 (explaining that constitutionally inspired constraints on agency action lead to better documented and more "technocratic" decisionmaking).

66. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 487–90 (discussing procedural due process, First Amendment licensing, and *Bivens* actions as examples).

67. 553 U.S. 723 (2008).

68. *Id.* at 766–67, 783–87.

69. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2032–33, 2038–54 (2011).

70. *Id.* at 2036–37.

71. *Id.* at 2058–74.

One central factor concerns who is interpreting the Constitution or developing new constitutional understandings. Here the accounts of administrative constitutionalism fall largely into two camps. In one, administrative agencies or agency officials are the constitutional interpreters, at least in the first instance. In the other, this role is played by the courts, and what brings their decisions within the administrative constitutionalism fold is that the courts either incorporate administrative decisionmaking in their judicial constitutional determinations or construct the doctrinal framework that forms an important part of the world in which agencies operate.[72] A second variable is what counts as constitutional. Some accounts focus on the formal U.S. Constitution, including the familiar tools (text, structure, history, precedent, practical effects, values) used in its interpretation.[73] Others adopt a more capacious account that extends the constitutional label to a wide array of measures—particularly statutes, but also administrative actions and state laws—that, like the Constitution, are entrenched, provide basic rights to individuals, and constitute the government.[74] A third difference is whether administrative constitutionalism serves to develop the meaning of a discrete constitutional provision or requirement that governs an agency's actions, or instead operates to develop the constitutional foundations and structures of the administrative state.

Given this variation, identifying all of these different approaches as versions of administrative constitutionalism might seem to expand the category so far as to denude it of meaning. Each involves a connection between constitutional interpretation and administrative action, but if that is the sole definitional criterion then little may fall outside of administrative constitutionalism's purview. For example, distinguishing administrative constitutionalism from judicial assessment of the constitutionality of the administrative state would become difficult. Similarly, once the field of the constitutional expands to include measures such as statutes or administrative regulations, the line between administrative constitutionalism and ordinary administrative decisions or policymaking begins to collapse.

One response would be to exclude certain of these approaches from the realm of administrative constitutionalism, in particular by defining administrative constitutionalism as simply encompassing instances of

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72. Eskridge and Ferejohn's account often gives primacy of place to legislative actors, which would represent a third category. This category predominates in many accounts of constitutionalism outside the courts. *See, e.g.*, WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 225. But Eskridge and Ferejohn overwhelmingly treat administrative and legislative constitutionalism in tandem, ESKRIDGE & FEREJOHN, *supra* note 15, at 33–34, and the administrative–judicial contrast is much more pronounced in scholarship on administrative constitutionalism.

73. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 7 (1982) (listing modes of constitutional argument).

74. *See* Young, *supra* note 15, at 412 (describing these three functions as core aspects of a constitution).

interpretation of the U.S. Constitution by agencies and agency officials. These instances of agency constitutional interpretation represent the core of administrative constitutionalism and are easiest to distinguish from judicial constitutionalism on the one hand and ordinary administrative decisionmaking on the other. But limiting the field of administrative constitutionalism in this fashion would achieve greater clarity at the cost of unjustifiably narrowing administrative constitutionalism's scope. Such an approach would exclude not only judicial development of doctrines to govern administrative decisionmaking, but also congressional enactment of statutes that structure administrative governance and transform the relationship of citizen and state. Yet these doctrines and statutes fundamentally affect the form and substance of agency constitutional interpretation. Awareness that their actions will be judicially reviewed affects the decisions agencies make, and do not make, as well as the rationales and justifications they provide in support.[75] Agencies thus engage in their efforts at constitutional development with a close eye to judicial constitutional views and how agencies' efforts are likely to play in the courts.[76] Indeed, this relationship is reciprocal, as administrative schemes also inform judicial understandings of constitutional requirements.[77] Further, as Eskridge and Ferejohn argue, our contemporary constitutional landscape has been transformed by statutes, and the norms embodied in such superstatutes permeate our understanding of even traditional constitutional commitments.[78] Moreover, given agencies' primary roles as statutory implementers, these enactments—and the administrative and interpretive frameworks that develop around them—are similarly central to agencies' constitutional reasoning.

In short, excluding either judicially developed administrative doctrines or entrenched statutory enactments leads to a necessarily partial view of administrative constitutionalism. Equally important, despite all their divergences these different accounts of administrative constitutionalism share one core conceptual precept: an insistence on the potential constitutional character of ordinary law and law implementation. To be sure, differences exist even here. Some accounts preserve a distinction between constitutional and ordinary law and seek primarily to relocate where this constitutional–ordinary law divide is understood to fall—with Eskridge and Ferejohn's development of the idea of the small "c" constitution being a prime example.[79] Others, like Ernest Young, reject the effort to reconceive

75. The literature on the impact of judicial review on administrative decisionmaking abounds. For a survey, see PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1006–13, 1042–47 (11th ed. 2011).

76. *See* Lee, *supra* note 4, at 801–02, 815–16, 870–72, 875–80 (describing incidents where an administrative agency selectively ignored or resisted unfavorable judicial precedent).

77. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 507.

78. ESKRIDGE & FEREJOHN, *supra* note 15, at 6–9.

79. Eskridge and Ferejohn are more complicated on this question than this description suggests because they differentiate themselves from scholars such as Bruce Ackerman, who argues that some

ordinary law as constitutional law, insisting that "[t]he fact that ordinary laws perform [constitutional] functions . . . does not make them any less ordinary."[80] Still others, such as myself, acknowledge the distinction between constitutional and ordinary law but resist the notion that constitutional law has firm or identifiable edges, particularly in the administrative sphere.[81]

Nonetheless, this conceptual commitment to seeing constitutional law in ordinary law contexts is what leads administrative constitutionalism scholars to look at some administrative actions or administrative law doctrines in constitutional terms. Nor is this shared commitment accidental. Instead, embeddedness in ordinary law is a necessary attribute of administrative constitutionalism. Given the Constitution's silence on administration and the fact that agencies only exist and function as a result of ordinary law delegations of authority, agency officials' constitutional engagement and development necessarily occurs in ordinary law contexts, as they seek to implement a statutory regime or presidential policy.[82]

Administrative constitutionalism's emphasis on the constitutional dimensions of seemingly ordinary implementation and policymaking, combined with its frequent creative character, is also what links administrative constitutionalism to the wider category of constitutional construction. According to Keith Whittington, "[t]he process of constitutional construction is concerned with fleshing out constitutional principles, practices[,] and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution."[83] Whereas Whittington describes constitutional interpretation as a more text-based endeavor to discerning constitutional meaning, he

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major political developments represent constitutional moments and serve to alter the Constitution itself. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266–94 (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 6–31 (1998). By contrast, Eskridge and Ferejohn state that they "do not see the legal cogency or the political wisdom of routinely converting landmark legislation into Constitutional obligation," and insist that it should remain subject to repeal though ordinary law mechanisms. ESKRIDGE & FEREJOHN, *supra* note 15, at 64. On the other hand, they also suggest that small "c" constitutional measures should get special treatment in other respects, for example by being construed liberally. *See id.* at 465–68; *see also* Young, *supra* note 15, at 452 (noting this aspect of their approach).

80. Young, *supra* note 15, at 414, 454.

81. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 512–19. Recently, Richard Primus has argued for erasing the constitutional–ordinary divide further, contending that "we should think of [constitutionality] . . . as a bundle of sticks that can be separated from one another, or that can be recombined in varying configurations." Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. (forthcoming 2013) (manuscript at 3–4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220995. On his view, "[n]o single attribute of constitutionality characterizes every rule that mainstream American practice calls 'constitutional'" and "no attribute associated with constitutionality . . . is either necessary or sufficient for a rule's exhibiting any other characteristic of constitutional rules." *Id.* at 4.

82. *See* ESKRIDGE & FEREJOHN, *supra* note 15, at 17–18, 24, 166–67 (describing administrators as engaged in a process of developing and entrenching new constitutional understandings).

83. Whittington, *Constructing*, *supra* note 30, at 120.

portrays constitutional construction as involving an appeal to "[s]omething external to the text—whether political principle, social interest, or partisan considerations," and occurring primarily in political contexts.[84] Jack Balkin similarly contrasts constitutional construction, which he defines as "implementing and applying the Constitution" to "build out the American state over time," with more narrow efforts at ascertaining linguistic meaning.[85] Although identifying "acts . . . by executive officials and legislatures, both at national and local levels," as the prime source of this state-building process, Balkin underscores that constitutional construction is an activity engaged in by courts as well.[86] "All three branches of government build institutions and create laws and doctrines that serve constitutional purposes, that perform constitutional functions, or that reconfigure the relationships among the branches of the federal government, the states, and civil society."[87] Scholars of popular constitutionalism similarly have underscored that it transforms "many things we are used to thinking of as questions of ordinary law or policy . . . [into] constitutional questions."[88]

Much constitutional construction thus occurs, like administrative constitutionalism, outside the traditionally identified confines of constitutional law. It involves enactments like statutes and regulations, or the development of new institutional practices and norms, frequently through political struggles.[89] Even constitutional construction's judicial manifestations often venture into less identifiably constitutional lands, with courts implementing the Constitution through rules of statutory interpretation, the details of governmental procedures, and other judicially created requirements.[90] Whether constitutional construction and constitutional interpreta-

84. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 6.

85. BALKIN, *supra* note 30, at 4–5. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2010), for a clear and more precise discussion of the difference between interpretation and construction.

86. BALKIN, *supra* note 30, at 17.

87. *Id.* at 5.

88. David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069, 1074 (2006); *see also* Pozen, *supra* note 32, at 2059 ("Presidential rhetoric about the proper role of judges, newspaper editorials blasting the latest Supreme Court decision, street protests about social conditions—each of these acts may be of constitutional dimension.").

89. *See generally* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30 (analyzing the impeachments of President Andrew Johnson and Associate Justice Samuel Chase, the nullification crisis, and the Watergate crisis as instances of constitutional construction).

90. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5–7, 37–41 (2001) (citing examples of overenforcement—the requirement of *Miranda* warnings—and underenforcement—the "some evidence" standard of due process—of the Constitution's meaning as proper implementations of the Constitution); Mitchell N. Berman, *Constitutional Decisional Rules*, 90 VA. L. REV. 1, 9, 88–100 (2004) (discussing the legitimacy of "constitutional decision rules" and what criteria should be used in creating them); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3, 19–23 (1975) ("[A] surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional

tion are truly distinct enterprises is a matter of debate,[91] but the more important point is recognition of the creative and ordinary law character of some efforts to develop constitutional meaning: "The political branches build out the Constitution through everyday politics. . . . This means that in practice it is useless to try to draw clear boundaries between activities that in hindsight we would label constitutional construction and ordinary political activity."[92] Administrative constitutionalism represents a similar effort, and indeed stands as a prime example of constitutional construction.

A second motif that runs through many of these accounts of administrative constitutionalism is lack of transparency. In some instances, the constitutional dimensions of agency decisionmaking are clearly apparent—as, for example, in the recent tobacco rule, DOJ's educational guidance, or OLC's Libya Memorandum.[93] Often, however, public acknowledgement of these constitutional aspects is limited, with the agency presenting its action in less contentious statutory or regulatory terms. As Lee notes, "the Constitution's influence often occurred behind the scenes in inter-agency comments and intra-agency memoranda."[94] Constitutional justifications and arguments raised during internal executive branch discussion were often omitted from publicly released documents.[95] A similar lack of transparency is evident in the judicial doctrines and decisions that contribute to administrative constitutionalism, which rarely acknowledge—and sometimes expressly deny—their constitutional underpinnings.[96]

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provisions . . . ."). Also see Metzger, *Ordinary Administrative Law*, *supra* note 20, at 505–12, for another example—administrative law—which I have argued is a form of judicially created constitutional common law.

91. *Compare* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 5–9 (describing constitutional interpretation and construction as distinct activities), *and* Solum, *supra* note 85, at 95 (arguing that "[t]he interpretation-construction distinction. . . . is both real and fundamental"), *with* BALKIN, *supra* note 30, at 4–5 (distinguishing ascertainment of the meaning of constitutional language and constitutional construction as two different forms of constitutional interpretation), *and* FALLON, *supra* note 90, at 5–7 (describing specification of constitutional meaning and crafting of constitutional doctrine as linked aspects of constitutional implementation). My own view, which will have to await further elaboration elsewhere, is that in contexts of actual constitutional challenges, determining the linguistic meaning of constitutional text often involves consideration of factors frequently identified with construction, such as norms, existing doctrine, and practical implications. Put somewhat differently, on constitutional questions that matter and are the subject of debate, interpretation and construction are rarely easily distinguishable. *Cf.* Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1029–30, 1071–83 (2010) (arguing that identifying "interpretation" as a distinct activity keyed to the constitutional text represents an effort to push originalism by definition).

92. BALKIN, *supra* note 30, at 298.

93. *See supra* notes 1–3 and accompanying text.

94. Lee, *supra* note 4, at 883.

95. *See, e.g.*, *id.* at 824–33 (discussing constitutional arguments to adopt equal employment policies made in an FCC 1963 memo that were omitted in its 1968 order and proposed rulemaking).

96. *See* Berger, *supra* note 69, at 2038–47 (referencing multiple cases with constitutional underpinnings where the Supreme Court deferred to administrative agencies and other governmental actors); Metzger, *Embracing*, *supra* note 19, at 1316–17 (discussing the reluctance of the courts to recognize their reliance on administrative common law); Metzger, *Ordinary*

Eskridge and Ferejohn at first appear an exception here, given their emphasis on public deliberation as critical for entrenchment and the process of administrative constitutionalism.[97] But the public engagement they detail often appears centered on statutory implementation and policy questions, rather than being framed in expressly constitutional terms. In fact, more explicit constitutional engagement may be especially difficult under their approach because the small "c" constitutional aspect of administrative actions does not become apparent until after the fact, once the new understandings the agency helped create become entrenched.[98] Balkin makes this point expressly about constitutional construction writ large: "Potentially almost all political and governmental activity could be constitutional construction. Often we may only know what counts later on when institutions become settled and practices and precedents become established."[99]

II. Administrative Constitutionalism's Legitimacy

The growing scholarship on administrative constitutionalism thus offers a rich and varied account of it as a core component of our nation's constitutional practice. Rarer is sustained engagement with administrative constitutionalism's normative dimensions.[100] To some extent, this may reflect the view that administrative constitutionalism is inevitable.[101] From this perspective, validating administrative constitutionalism as legitimate seems perhaps beside the point, with the prime challenge being instead the descriptive task of demonstrating administrative constitutionalism's ubiquity. This descriptive task seems all the more important given the surprising absence of administrative constitutionalism from most prior writing on constitutionalism outside the courts, in particular popular constitutionalism and departmentalism.[102] Another contributing factor may be the diverse

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Administrative Law, *supra* note 20, at 506 ("[T]he Court rarely discusses the constitutional underpinnings of ordinary administrative law doctrines in any detail, and today often makes no reference whatsoever to the constitutional dimensions of its administrative law decisions.").

97. ESKRIDGE & FEREJOHN, *supra* note 15, at 7, 16–17, 23.

98. *See id.* at 7, 33, 107–11 (arguing that "entrenching deliberation occurs over a long period of time, and the norm does not stick in our public culture until former opponents agree that the norm is a good one").

99. BALKIN, *supra* note 30, at 298–99; *see also* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 15 ("Few political movements achieve 'overnight success,' and a low-level conflict over constitutional meaning may persist for years before culminating in a decisive construction.").

100. *See* Lee, *supra* note 4, at 886 (acknowledging the dearth of knowledge with respect to the "principles and forces" that guide administrative constitutionalism).

101. ESKRIDGE & FEREJOHN, *supra* note 15, at 303; *see also* Lee, *supra* note 4, at 804 ("[A]dministrative constitutionalism is likely a recurring aspect of the modern American state.").

102. *See* ESKRIDGE & FEREJOHN, *supra* note 15, at 34 (criticizing popular constitutionalism for omitting administrative agencies from its theories); Lee, *supra* note 4, at 807–09 (remarking that both popular constitutionalists and departmentalists have failed to consider administrative constitutional interpretation).

character of the forms of constitutional interpretation placed within administrative constitutionalism's tent, which may make global normative assessments seem of doubtful value.

Documenting the phenomenon of administrative constitutionalism is extremely important, in particular careful empirical study of the mechanisms by which administrative constitutionalism occurs and its effects on constitutional understandings. But so too is grappling with its normative dimensions. Indeed, these two tasks are linked, in that one reason for the dearth of attention to administrative efforts at constitutional development is likely unease about the legitimacy of the endeavor. Moreover, recognizing the inevitability of administrative constitutionalism leaves open the central questions of how government and society should respond. Should other parts of government—Congress, the President, and the courts, as well as state and local governments—embrace and encourage administrative constitutional engagement? Or should they instead adopt a resistant stance, one that does not deny administrative constitutionalism's occurrence but seeks to limit its ambit and effect? The very breadth of administrative constitutionalism forestalls easy answers but also allows for a more comprehensive assessment. As I argue below, such an assessment reveals that administrative constitutionalism offers important benefits to the project of constitutional interpretation and implementation, and thus the proper response should be encouragement rather than resistance.

A. The Normative Challenge of Administrative Constitutionalism

A central normative challenge posed by administrative constitutionalism derives from a core precept of our administrative order: the principle that an administrative agency has no inherent or independent authority to act, but instead can exercise only the authority delegated to it by Congress.[103] This principle follows from the Constitution's vesting of legislative authority in Congress: "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."[104] On the same logic, it also follows that an agency can exercise authority delegated to it by the President, provided the authority involved is one that the

103. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). For a discussion of this basic precept, see generally Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004). For criticism of administrative law's emphasis on delegation as essential to legitimacy, see William H. Simon, *Democracy and Organization: The Further Reformation of American Administrative Law* 7–11 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 12-322, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175121.

104. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

Constitution vests in the President—a point made clear by *Youngstown Sheet & Tube Co. v. Sawyer*,[105] the famous *Steel Seizure* case, in which the Supreme Court considered whether the Secretary of Commerce's seizure of the nation's steel mills based on President Truman's executive order was justified either by an act of Congress or "[t]he President's power . . . from the Constitution itself."[106] But it is understood that agencies enjoy no authority separate from that delegated to them.[107]

From this principle, it follows that agencies are bound to implement and enforce congressional will, and a court will set aside an agency decision as outside of statutory authority and arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider."[108] To be sure, Congress lacks power to authorize agencies to violate the Constitution, and thus, the fact that Congress has instructed an agency to act in an unconstitutional way does not allow it to do so. But instances in which Congress directs agencies to act in unconstitutional ways are rare.[109] More common is the situation in which an agency has a choice of approaches, one or more of which might appear constitutionally troubling or at odds with important constitutional values.[110] The question is thus whether an agency itself can assert a constitutional prohibition as grounds for failing to adhere to congressional wishes or instead should leave enforcing constitutional requirements to the courts.

The concern is that administrative constitutionalism inverts the proper constitutional relationship between agencies and Congress, in the process granting agencies powers they cannot constitutionally possess. As Jerry Mashaw has put it, agencies are constitutionally required to be "'faithful agents' of the legislature . . . . Obviously, administrators who fail to pursue implementation any time a constitutional issue looms on their horizon could not possibly carry out their legislative mandates effectively."[111] Even if an agency instead simply takes constitutional concerns into account in determining how to act (as opposed to whether), doing so "may change the

105. 343 U.S. 579 (1952).

106. *Id.* at 582, 585.

107. Debates surrounding the scope of agency authority center on discerning the extent of an agency's delegated authority and the proper scope of *Chevron* deference, not on assessing whether agencies possess any inherent power. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (tying applicability of *Chevron* deference to whether Congress delegated authority to issue rules with the force of law to the agency).

108. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (requiring the court to determine that an agency decision was "based on a consideration of the relevant factors").

109. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 523.

110. *See id.* (arguing that the more usual context will be those where agency regulation may be less effective because of constitutional considerations).

111. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505, 508 (2005) [hereinafter Mashaw, *Norms*].

shape of federal regulation and perhaps make it somewhat less effective in achieving congressional regulatory goals."[112] Or, as Lee recounts, administrative constitutionalism may lead an agency to assert constitutional demands that go beyond what the courts have required or Congress has sanctioned.[113] The net effect, in these instances, is that the agency "would set itself up operationally as the arbiter of the constitutionality of congressional action. . . . Constitutionally timid administration . . . compromises faithful agency . . . ."[114] In some cases, the courts have emphasized the impropriety of having agencies consider constitutional challenges in excusing plaintiffs from the requirement that they exhaust administrative remedies before filing suit.[115] Yet as even Mashaw acknowledges, an agency's obligation to follow congressional mandates does not mean that it can ignore constitutional norms. Instead, it also needs to be a "constitutionally 'sensitive' faithful agent, interpreting statutes within the overall context of the legal order."[116]

Two additional criticisms of administrative constitutionalism are that it encourages agency self-aggrandizement and "potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command."[117] The self-aggrandizement argument rests on the claim that agencies will read constitutional constraints on their actions narrowly, to preserve their own flexibility and power.[118] Thus, some argue that agency constitutional assertions are particularly troubling when the assertion is that Congress has violated separation of powers by trenching on the President's Article II prerogatives, given the executive branch's self-interest in making such a claim.[119] But the claim is also made more broadly, as casting doubt on

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112. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 523.

113. *See* Lee, *supra* note 4, at 816 (describing "FCC attorneys' constitutional theories" that "creatively expanded Supreme Court doctrine" by ignoring limiting language and by "relying on loosely relevant precedent").

114. Mashaw, *Norms*, *supra* note 111, at 508.

115. *See* McCarthy v. Madigan, 503 U.S. 140, 147–48 (1992) (noting the constitutionality exception to exhaustion); *see also* 2 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 15.5 (5th ed. 2010) (discussing inconsistent case law on whether presence of a constitutional claim precludes exhaustion requirements). California has gone further, adopting a constitutional provision that prohibits state agencies from refusing to enforce a statute on the grounds that the statute is unconstitutional absent a determination to that effect by an appellate court. CAL. CONST. art. III, § 3.5; *see also* Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 473–74 (Cal. 2004) (applying the same rule to local public officials).

116. Mashaw, *Norms*, *supra* note 111, at 508.

117. *Id.*; *see* Pillard, *supra* note 41, at 717 (noting the aggrandizement concern).

118. This claim represents an instance of what Daryl Levinson has called empire-building arguments. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917 (2005) (describing "empire-building" as "government behavior . . . driven by self-aggrandizing motives").

119. *Compare* H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1317 (2006) (criticizing the executive branch assertion of the constitutional avoidance canon on Article II grounds as an instance of "loaded dice"), *with* Morrison, *Avoidance*, *supra* note 41, at 1229–37 (denying that self-protective executive branch assertions of the canon are inherently problematic, yet acknowledging they should trigger "special scrutiny"), *and* Presidential Authority

agencies' reliability as fair discerners of constitutional limits even when the scope of executive power is not specifically in play.[120] The concern that administrative constitutionalism will usurp the role of the courts is closely related to the concern with constitutional evasion. But the concern here is also one of constitutional overenforcement and judicial displacement: that agencies will pretermit the courts from ruling that a putative constitutional claim lacks merit by choosing a course of action that avoids the potential constitutional concern.[121] To some extent, this criticism again reflects the possibility that agencies will illegitimately invoke constitutional arguments to deviate from congressional instructions. But it also embodies the belief that determinations of constitutional meaning are a particular responsibility of the courts.[122]

These challenges to administrative constitutionalism might appear less pressing in the small "c" constitutional contexts that Eskridge and Ferejohn elaborate, where agencies' constitutional role stems from their aggressive application and implementation of statutory measures. After all, here agencies seem to be simply carrying out the responsibilities Congress has entrusted to them, rather than compromising these responsibilities by considering external factors. Yet the same issue of agencies deviating from their delegated authority arises here, insofar as administrative officials push their statutory mandates beyond the lines that Congress intended. Even Eskridge and Ferejohn acknowledge some of the potential pitfalls of administrative constitutionalism, noting that "administrators may be easily derailed from their statutory mission by agency capture . . . . [by] vigorously enforc[ing] a regulatory regime's least productive or its seriously mistaken directives. . . . [or by] tunnel vision."[123] Although they emphasize the availability of the courts as a check on such abuses,[124] the deference that typifies many administrative law doctrines under which agency policymaking and implementation is reviewed, as opposed to the independent scrutiny generally applied to constitutional claims, may limit the effectiveness of this judicial constraint.

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to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200–01 (1994), http://www.justice.gov/olc/nonexcut.htm (arguing that the President should construe statutes to be constitutional and "has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency").

120. *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–57 (2008) [hereinafter Merrill, *Institutional Choice*] (arguing that agencies are often focused on specific federal regulatory schemes, lack knowledge of constitutional federalism principles, and may be biased in favor of exclusive federal regulation).

121. Mashaw, *Norms*, *supra* note 111, at 508.

122. Morrison, *Avoidance*, *supra* note 41, at 1223. For a more sustained defense of the importance of judicial resolution of constitutional questions and judicial supremacy, see generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

123. ESKRIDGE & FEREJOHN, *supra* note 15, at 305–06 (emphasis omitted).

124. *Id.* at 307–08.

In short, the concern is that agencies' role as norm entrepreneurs fits uneasily with a constitutional system that vests legislative power in Congress and judicial power in the courts.[125] Nor is this concern addressed by the Constitution's grant of executive power to the President and agencies' location within the executive branch. Leaving aside whether independent norm generation falls within the President's duty to "take Care that the Laws be faithfully executed,"[126] agencies are not the President, and presidential oversight of specific agency decisions is often limited.[127] The challenge to administrative constitutionalism's legitimacy thus bears a close connection to the charge that the modern administrative state as a whole is at odds with basic features of the Constitution. Those raising this claim note in particular that the Constitution vests the legislative power in Congress, a democratically accountable branch, whereas the modern administrative state is premised on broad delegations of authority that are legislative in all but name and are exercised by unelected administrative officials subject to, at best, quite attenuated accountability.[128] The resultant conflict with constitutional structure appears only more acute if administrative officials are engaged in a process of building out the nation's foundational commitments in ways not foreseen or required by the constitutional branches of government.

In addition to these constitutional criticisms based on separation of powers and constitutional democratic accountability principles, administrative constitutionalism is open to attack on pragmatic grounds. Administrative officials are not selected for their competency with constitutional doctrine or their awareness of constitutional principle.[129] No reason exists, therefore, to assume that they will be particularly sensitive to

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125. Dalal criticizes administrative constitutionalism on different but related grounds, contending that agencies are too insular and unaccountable to serve as primary norm entrepreneurs absent congressional oversight, judicial review, or substantial internal checks, which in the national security context are often lacking. *See* Dalal, *supra* note 52, at 29–40.

126. U.S. CONST. art. II, § 3.

127. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–74, 2306–09 (2001) (describing obstacles to close presidential control and detailing expansion of oversight as well as continuing limits under President Clinton).

128. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 155–58 (1993) (arguing that delegation in the modern administrative state goes against the structure of the Constitution and the intent of the Framers because it involves transferring legislative authority to an entity other than Congress); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994) (detailing the demise of the nondelegation doctrine and the Court's willingness to allow broad delegation to administrative agencies due to the complexity of the modern state).

129. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1172–75 (2008) (contrasting agencies' expertise in statutory schemes and industry knowledge with agencies' imperfect understanding of constitutional law, which often leads to a disregard of constitutional principles); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 779–87 (2004) (emphasizing agencies' general lack of expertise and competency on constitutional questions).

the constitutional aspects of their decisions.[130] Indeed, given that individuals are often drawn to working at federal agencies because of a shared commitment to their underlying missions, agency officials might be thought particularly likely to privilege programmatic needs over constitutional concerns.[131] This criticism of administrative constitutionalism is geared primarily at its traditional, or what Eskridge and Ferejohn would call Large "C," variant, where agency officials assess the Constitution's import for their activities.[132] It is less relevant to small "c" situations where the constitutional basis of administrative actions comes from the statutes and policy choices they are charged with implementing, and with respect to which they are presumed to have great expertise. But such implementation decisions and policy choices are also the contexts in which agencies are most likely to receive deference from courts, thus raising again the concern that agencies exercise broad and unchecked power that allows them to set the terms of their own authority.[133]

Finally, administrative constitutionalism in its judicial guise is also subject to criticism. On the one hand, judicial development of administrative law doctrines represents a form of federal common law, one largely untethered from statutory text and not constitutionally required, albeit responsive to underlying constitutional values.[134] It therefore runs into criticism as unauthorized judicial lawmaking, criticism lodged at federal common law generally.[135] A similar complaint could be raised against judicial use of ordinary administrative law to encourage greater administrative constitutional engagement, on the grounds that doing so represents an unwarranted intrusion on the executive branch. Yet such judicial encouragement of administrative constitutionalism could also be attacked from the opposite angle, on the grounds that the courts are foregoing

130. *See* Merrill, *Institutional Choice*, *supra* note 120, at 755–56 (noting "[o]n constitutional variables . . . agencies clearly fall short" and "know little about constitutional law"); *see also* Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 571–77 (2003) (describing and critiquing this argument as a defense of DOJ control of federal government litigation). I have argued that administrative officials may be more sensitive to federalism and state interests than is generally assumed, given their frequent dependence on, and connection to, state regulators. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2072–76 (2008) [hereinafter Metzger, *New Federalism*].

131. *See* Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 104–05 (2009) (explaining that "[a]n agency has a specialized mission" that the agency staff is committed to and that this creates "a significant concern about agencies going too far in pursuit of statutory goals").

132. *See* ESKRIDGE & FEREJOHN, *supra* note 15, at 8–9 (describing administrative reliance on the Large "C" Constitution).

133. City of Arlington, Tex. v. FCC, Nos. 11–1545 & 11–1547, slip op. at 16–17 (May 20, 2013) (holding that a court must defer to an agency's interpretation of an ambiguous statutory provision concerning the scope of the agency's authority).

134. Metzger, *Embracing*, *supra* note 19, at 1295.

135. *Id.* at 1342–43.

their institutional responsibility to establish and enforce constitutional limits on government.[136]

B. Administrative Constitutionalism's Virtues

Such is the central normative critique of administrative constitutionalism. But is it persuasive? My own view is that administrative constitutionalism is more likely to advance congressional purposes than undercut them, and the same is true about its effect on constitutional structure and values. In the end, this question of administrative constitutionalism's effects is an empirical one, which is why the increasing study of specific instances of administrative constitutionalism is particularly valuable. My focus here, however, is on offering a defense of administrative constitutionalism largely based on its hypothetical effects, as well as its concordance with constitutional principle and structure.

One initial point worth emphasizing is that agencies' virtues and vices as constitutional interpreters need to be assessed in comparative perspective, more specifically, in comparison to courts. The real question is not simply whether agencies will pursue constitutional concerns at the expense of statutory goals or congressional constitutional choices, but rather whether agencies will do so more than courts will. Equally important, agencies' performance should not be assessed in isolation because agencies do not act in isolation; instead, they operate in a web of "control relationships"[137] that includes oversight by Congress, the President, and the courts. Courts also do not operate alone, being subject both to political and agency input in specific cases[138] and political and popular influence more indirectly. But these relationships are more attenuated, and courts act more autonomously compared to agencies. At a systemic level, therefore, the question is what overall mix of administrative, judicial, and other forms of constitutionalism is the right one.[139]

Framed in comparative perspective, administrative agencies have several advantages. To begin with, agencies approach constitutional questions and normative issues from a background of expertise in the statutory schemes they implement and the areas they regulate.[140] As a result, they are likely to be better at integrating constitutional concerns with the

136. *See* Mashaw, *Norms*, *supra* note 111, at 508 (arguing that when agencies avoid constitutional questions, it prevents courts from exercising their constitutional duty to adjudicate those questions).

137. Strauss, *supra* note 17, at 579.

138. *See, e.g.*, *Chevron*, 467 U.S. at 844 (stating that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

139. I thank David Pozen for this point.

140. *See, e.g.*, *Chevron*, 467 U.S. at 865–66 (noting that "[j]udges are not experts in the field," whereas agencies are, and that agencies are in a better position to balance conflicting policy interests).

least disruption to these schemes and regulatory priorities. As I have noted elsewhere, "[c]ourts may have greater understanding and appreciation of constitutional values and principles in general, but they are less competent [at] balancing constitutional and policy concerns at a more granular level."[141] Moreover, this same expertise means that agencies have a better grasp of the effect of certain actions, and thus of their constitutional significance, than courts do—and greater ability to investigate and assess the factual bases that underlie constitutional claims.[142] The history of the response to pregnancy discrimination by lawyers at the Equal Employment Opportunity Commission and the Supreme Court is a case in point. As Eskridge and Ferejohn detail, the EEOC lawyers' appreciation of the impact of pregnancy discrimination on women's careers, as well as their understanding of Title VII as aimed at protecting women's employment and of pregnancy as inseparable from sex for equal protection purposes, led to the inclusion of pregnancy discrimination as presumptively sex discrimination in the EEOC's guidelines.[143] By contrast, the Court famously viewed pregnancy discrimination as simply a distinction drawn between pregnant and nonpregnant persons and not sex discrimination in violation of equal protection or Title VII[144]—a view that Congress expressly rejected shortly thereafter by enacting the Pregnancy Discrimination Act.[145]

The pregnancy discrimination saga is useful in another important respect, in that it resists the assumption that agencies are deviating from their role as Congress's faithful agents in taking constitutional concerns and values into account. No doubt, there are occasions where injection of particular constitutional concerns may be hard to square with a given statutory regime. But it also seems plausible that in many contexts Congress would be willing to trade more vigorous enforcement for greater administrative attention to constitutional concerns, especially if the agency believes judicial trimming or invalidation of the statute on constitutional grounds might otherwise occur. This is, in fact, an assumption often invoked to justify judicial application of the constitutional avoidance canon.[146] Some scholars disagree, arguing that "Congress would very likely prefer the Executive Branch to enforce its legislation according to its best understanding of Congress's intent, and then to let the courts sort out the

141. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 533.

142. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 96 (2008).

143. ESKRIDGE & FEREJOHN, *supra* note 15, at 30–32.

144. *E.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 137–38 (1976); Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

145. ESKRIDGE & FEREJOHN, *supra* note 15, at 47–48, 56.

146. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 523.

constitutional issues as needed."[147] But even this more skeptical approach would still leave room for administrative constitutionalism if the agency believed that Congress did in fact intend it to take the relevant constitutional concerns at stake seriously. And the fact that agencies are often deeply engaged in development and enactment of legislation may give them greater knowledge of Congress's approach to the constitutional matters involved.[148]

Equally important, administrative constitutionalism accords with, and indeed fosters, our constitutional structure. The reality is that most governance today occurs at the administrative level. Agencies often operate under broad delegations of authority that grant them substantial policymaking and enforcement discretion.[149] Despite ongoing claims that this arrangement is unconstitutional, it has become a hard-and-fast feature of the nation's constitutional landscape.[150] Rather than representing yet another manifestation of this illegitimate transfer of authority to unaccountable administrative hands, administrative constitutionalism stands as a necessary corollary of the reality of administrative government:

> As those primarily responsible for setting governmental policy, agencies should have an obligation to take constitutional norms and requirements seriously in their decisionmaking. Such an obligation can be inferred simply from the structure of our constitutional order, under which the Constitution governs all exercises of governmental authority and all government officials have an independent duty to support it. It could also be seen as a condition of delegation. . . . [I]f Congress has an independent . . . obligation to take constitutional norms and values into account, . . . then the constitutional price of delegation should be that congressional delegates face this obligation too.[151]

147. Morrison, *Avoidance*, *supra* note 41, at 1222; *see also* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 92–93 (making this criticism of the constitutional avoidance canon generally).

148. KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 149–51 (2013); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 346–51 (1990).

149. *See* Metzger, *Embracing*, *supra* note 19, at 1322–23 (emphasizing the impediments to congressional action that lead to broad delegations); *cf.* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 386 (noting the limitations on Congress's ability to specify answers to questions created by a given statutory scheme in advance). *But see* Daniel B. Rodriguez & Barry R. Weingast, Is Administrative Law Inevitable? 29 (Mar. 9, 2009) (unpublished manuscript), http://escholarship.org/uc/item/6mx3s46p (arguing that Congress frequently imposes detailed procedural constraints on agencies). *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695–97 (1975) (offering different accounts of why Congress delegates).

150. *See* SCHOENBROD, *supra* note 128, at 158 (acknowledging that broad delegation of lawmaking power to agencies has become entrenched in both jurisprudence and scholarship despite strong historical and structural arguments that such delegation is unconstitutional).

151. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 522 (footnote omitted).

Put simply, in an administrative world administrative agencies must become a locus for independent constitutional enforcement to do justice to the principle of constitutionally constrained government.

Of course, the argument that administrative constitutionalism serves the goal of constitutionally constrained government is precisely what the agency-aggrandizement critique denies. Yet this critique rests on debatable assumptions. One such assumption is that agencies will seek to maximize their power, or that their deep engagement and commitment to particular statutory regimes—sometimes called administrative "tunnel vision"—will make them reluctant to give much weight to constitutional concerns that could seriously impede their regulatory efforts.[152] To be sure, the risk that agencies will undercount constitutional constraints is a real one, and accounts of administrative constitutionalism detail examples of when it has occurred.[153] But these accounts also describe instances in which agencies have read constitutional constraints on their powers broadly and not sought to maximize their authority.[154] Agencies are complicated organizations and they may not be inclined to downplay constitutional constraints in any consistent fashion, particularly if agency personnel view such constraints as advancing important policy goals.[155]

Perhaps more importantly, the aggrandizement critique ignores that agencies act subject to judicial supervision. While judicial review may be lacking in some contexts, such as national security,[156] it is hardly the norm. Far more common is for agency actions to be subject to judicial review—and where judicial review is available administrative constitutionalism should not

152. Merrill, *Institutional Choice*, *supra* note 120, at 755–56; *cf.* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 526 (noting that administrative constitutionalism only requires that agencies take seriously the constitutional concerns involved, not that these concerns necessarily trump other factors).

153. *See* Dalal, *supra* note 52, at 14–23 (describing how free speech constraints have been loosened in allowing the unregulated expansion of the FBI's mission, the FBI's use of questionable methods, and the FBI's use of an intelligence-gathering process "cloaked in secrecy"); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1567–73 (2007) (detailing flaws in OLC's Torture Memo, including its assessment of the President's commander in chief power).

154. *See* Lee, *supra* note 4, at 813–17, 824–27 (describing efforts by FCC and other executive branch attorneys to read equal protection requirements more broadly than existing doctrine required); Metzger, *New Federalism*, *supra* note 130, at 2078–79 (noting that agencies have often denied that their decisions preempt state law and arguing that public choice accounts of agencies seeking to maximize their power are too simplistic).

155. *See, e.g.*, ESKRIDGE & FEREJOHN, *supra* note 15, at 31–33 (detailing support for broad equal protection readings from EEOC attorneys seeking to advance women's equality); Lee, *supra* note 4, at 813–17, 827–28 (describing different arguments for broad equal protection readings offered by the FCC attorneys and the FCC Commissioners).

156. *See* Dalal, *supra* note 52, at 35–39 (examining the lack of meaningful judicial intervention in cases dealing with national security issues because of limited judicially enforceable rights, standing hurdles, and the growth of the executive privilege); Pillard, *supra* note 41, at 692 (highlighting the courts' deferential approach to cases involving foreign policy, national security, the military, and immigration).

affect courts' ability to enforce judicial constitutional requirements directly, by invalidating administrative actions that run afoul of constitutional commands.[157] Moreover, where judicial review is not available, and thus the aggrandizement risk is at its greatest, administrative constitutionalism is all the more important as it will represent the main means for ensuring that constitutional constraints are enforced.[158]

As a result, administrative constitutionalism also does not undermine the courts' constitutional role. As Trevor Morrison has argued, in those administrative contexts where judicial review is lacking or limited, encroachment on the courts is not a realistic possibility.[159] And again, where judicial review is available, administrative constitutionalism should not impede the courts' ability to enforce constitutional requirements directly against agencies when agencies violate these requirements.[160] True, judicial review could be forestalled if agencies forego certain actions out of constitutional concerns. Yet such agency forbearance would seem if anything a prime benefit of administrative constitutionalism, and in any event the preclusion of judicial review in nonenforcement contexts is not unique to administrative constitutionalism.[161] Mashaw cautions that administrative constitutionalism may also limit the occasions of indirect judicial enforcement through constitutional avoidance and other constitutional canons because agencies themselves might forego constitutionally dubious assertions of authority.[162] But it is hard to see such indirect enforcement as a necessary part of the Court's constitutional role, especially if the net effect remains that constitutionally questionable conduct is avoided. In any event, administrative constitutionalism may serve to expand other forms of indirect judicial constitutional enforcement, as for example if courts used their

157. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) (noting the availability of a direct constitutional challenge); Metzger, *Ordinary Administrative Law*, *supra* note 20, at 526 (noting that courts may invalidate administrative actions as unconstitutional). The availability of judicial review may have an indirect policing effect as well, by making agencies unwilling to run too close to the constitutional line for fear of reversal. For the classic account of agency fear of reversal and timidity in the face of judicial review, see JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 225–26 (1990).

158. *See* Johnsen, *supra* note 153, at 1564 (emphasizing the limits of ex post external constraints on the executive branch and thus the need for effective internal constraints).

159. Morrison, *Avoidance*, *supra* note 41, at 1222.

160. Dalal suggests that over time administrative constitutionalism can have a corrosive effect on the scope of constitutional protections when agencies narrow their understanding of constitutional rights, but, as she acknowledges, the national-security context she analyzes is also one of limited judicial receptivity to constitutional challenges. Dalal, *supra* note 52, at 35–39. It is difficult to know whether the administrative and judicial resistance to the Fourth Amendment rights at issue are endogenous or exogenous phenomena; it seems at least as possible that lack of judicial receptivity emboldened agencies' narrowing approaches as vice versa. *Id.* at 40 (asserting that lack of oversight by other branches of the government, including the judiciary, "allowed for the insular agency decision-making and the norm entrenchment that followed").

161. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (holding that executive branch nonenforcement decisions are presumptively unreviewable).

162. Mashaw, *Norms*, *supra* note 111, at 508.

ordinary administrative law review to ensure that agencies take constitutional concerns seriously in their decisionmaking.[163]

What administrative constitutionalism does reject is judicial constitutional exclusivity, under which judicial determinations represent the sole and definitive expositors of constitutional meaning. Instead, it is premised on a principle of pluralistic constitutional interpretation, wherein judicial decisions may impose constitutional floors but not constitutional ceilings, and other governmental actors have a role to play in constitutional development.[164] It also rejects the notion that the Constitution has hard-and-fast edges, such that what is constitutionally required is discernible, determinate, and unchanging. Under administrative constitutionalism, the focus is on applying constitutional norms and values in contexts of specific policymaking and law implementation—often quite creatively and expansively. Not only does the meaning of the Constitution evolve, but so does the scope of what is viewed as constitutional.

Yet to my mind, these are strengths of administrative constitutionalism, not weaknesses. Its institutionally pluralistic approach is a trait shared by any number of other accounts of constitutional interpretation and supported by constitutional text and historical practice.[165] Given that courts remain able to ensure agencies adhere to constitutional requirements, the complaint that administrative constitutionalism illegitimately interferes with judicial constitutional prerogatives is particularly weak. Assessing the import of constitutional values or framework principles in specific contexts is a central feature of political constitutional analysis, as is the ongoing elaboration of

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163. This dynamic is evident in several recent decisions where the Supreme Court appeared to scrutinize administrative decisions more rigorously because of their federalism implications. *See* Metzger, *New Federalism*, *supra* note 130, at 2048–69, 2109 (arguing that these recent cases indicate that the Court may "[be using] administrative law as a vehicle for addressing federalism concerns"). *But see* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 500–02 (noting that courts rarely expressly acknowledge using ordinary administrative law to encourage administrative attention to constitutional concerns).

164. *Cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226–27 (1978) (arguing that "judicially underenforced constitutional norms should be regarded as legally valid to their conceptual limits" rather than being only valid to the extent they are enforced by the courts, and that "public officials have an obligation in some cases to regulate their behavior by standards more severe than those imposed by the federal judiciary").

165. *See, e.g.*, BALKIN, *supra* note 30, at 17 ("Much of the most important constitutional work does not come from courts. It comes from acts of constitutional construction by executive officials and legislatures."); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1966–71 (2003) (emphasizing the institutional differences between congressional and judicial constitutional interpretation); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848 (2002) ("The courts are not the exclusive interpreters of the Constitution, and often are not its ultimate or most authoritative interpreters either. . . . The authority to interpret the Constitution is shared by multiple institutions and actors within our political system, and tends to flow among them over time.").

constitutional meaning.[166] The courts cannot legitimately claim a monopoly on these activities. In like vein, judicial law creation, especially in response to perceived constitutional concerns, is a frequent occurrence, and courts do not illegitimately intrude on the political branches by pursuing this path with respect to review of agency action.[167] Indeed, given agency expertise and the greater ease with which agencies can respond to judicial reversals than Congress, judicial encouragement of administrative constitutionalism may well prove less restrictive of political choices than direct constitutional review.[168]

A last virtue of administrative constitutionalism is the feature on which Eskridge and Ferejohn place prime emphasis: the opportunities it provides for political and public engagement with constitutional meaning.[169] Here the contrast with courts is particularly stark. To be sure, federal courts are more connected to popular sentiment and majority views than suggested by the iconic image of federal judges from the civil rights era as lone defenders of constitutional principle.[170] But the courts' relationship to public debate and politics is often attenuated and episodic.[171] Agencies, by contrast, are constantly engaging with the public: with stakeholders and other parties affected by administrative action, social movement groups, business and industry associations, unions, and political representatives at all levels.[172] They are in constant interaction with any number of executive branch entities—such as the Office of Information and Regulatory Affairs, which

166. For descriptions and defenses of "living constitutionalism," see sources cited *supra* note 32. For a critique of the weight ascribed to free-floating values and general principles in judicial constitutional analysis, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009), in which Professor Manning writes, "When judges enforce freestanding 'federalism,' they ignore the resultant bargains and tradeoffs that made their way into the [text of the Constitution]."

167. *See* Metzger, *Embracing*, *supra* note 19, at 1297, 1343–48 (arguing that "administrative common law represents a legitimate instance of judicial lawmaking").

168. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 531–33.

169. ESKRIDGE & FEREJOHN, *supra* note 15, at 12–18, 27.

170. *See* BALKIN, *supra* note 30, at 19. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009). For a traditional image of the courts, see generally J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 134 (Illini Books 1971) (1961).

171. *See* Christopher L. Eisgruber, *Dimensions of Democracy*, 71 FORDHAM L. REV. 1723, 1733 (2003) (noting that judges "serve long terms that may attenuate their connection to public opinion and popular judgments about justice").

172. This is not to suggest that administrative interactions are evenhanded, or that the public broadly is engaged in agency decisionmaking. Recent scholarship has highlighted problems on both scores. *See* Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1345–47 (2011) (criticizing agencies for discounting mass public comments on matters of broad public policy in rulemaking proceedings); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 103–04, 151 (2011) (finding empirical evidence that "at least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest").

undertakes central regulatory review, OLC, other agencies and expert bodies, or inspectors general.[173] Agencies are also subject to legally enforceable requirements of reasoned decisionmaking and responsiveness, and must demonstrate the basis for their decisions and how these decisions conform to governing law.[174] Of course, these features do not guarantee that agencies actually serve as sites for broad public constitutional engagement. Agencies might instead simply advance the policy priorities of political supervisors, the interests of well-connected groups, or their own parochial concerns. Yet these features at least offer a potential opportunity for greater popular involvement in the construction of constitutional meaning.

III. Revisiting the Ordinary Law–Constitutional Law Divide

Administrative constitutionalism is thus not simply inevitable, it also offers several potential benefits as a means of constitutional interpretation and development. Put differently, it is a feature and not a bug of our constitutional practice. The histories of administrative constitutionalism help document its central role in constitutional implementation and constitutional development. Equally important, however, these accounts offer evidence on whether the potential benefits from administrative constitutionalism play out in practice.

Here, a cautionary tale emerges. The two common themes of administrative constitutionalism—its embeddedness in ordinary law contexts and the frequent lack of transparency that surrounds it—create an identification challenge. Distinguishing administrative constitutionalism from ordinary administrative policymaking can be difficult. This identification challenge is not unique to administrative constitutionalism but instead exists generally with respect to constitutional construction, which often involves the gradual development of new constitutional understandings through the guise of ordinary political debates and legal enactments.[175] Defenders of constitutional construction have resisted viewing the identification challenge as a problem, arguing that drawing a clear line between constitutional construction and ordinary politics only matters "if something important turns on being able to mark that boundary with

173. *See* Metzger, *Interdependent*, *supra* note 35, at 427–32 (explaining the significance of these internal checks within the executive branch).

174. *See* STRAUSS ET AL., *supra* note 75, at 926–38, 976–1010 (discussing the reasoned decisionmaking requirements applied to agency actions).

175. *See supra* text accompanying notes 83–92; *see also* Pozen, *supra* note 32, at 2060 ("This willingness to expand the horizons of the constitutional raises an *identification problem*: How do we distinguish genuine popular constitutionalism from simulacra or impostors thereof, 'judgment[s] about constitutional meaning' from 'policy-driven, constitution-blind' acts of opportunism or reform?"); Young, *supra* note 15, at 448–55 (identifying this line-drawing difficulty as the rule-of-recognition problem).

precision."[176] But they maintain nothing does, because the constitutional character of certain ordinary law measures does not change their formal legal status; they remain ordinary law and subject to repeal by new legislation in the unlikely event that sufficient support for such a repeal exists.[177]

Yet the difficulty of distinguishing between the ordinary and the constitutional seems likely to be more acute with respect to administrative constitutionalism than other instances of constitutional construction. As named constitutional actors, Congress, the President, and the Supreme Court may have more occasion to engage in overt disputes over constitutional principle or to develop their constitutional understandings expressly—for example, in order to gain interbranch acknowledgement or to counter another branch's constitutional claims.[178] Agencies, however, occupy a more constitutionally ambiguous space, and their actions are always embedded in statutory and regulatory regimes. Agencies also are subject to multiple relationships of oversight and control, and their incentives may be more towards hiding the constitutional dimensions of their actions so as to avoid provoking resistance to their proposed courses of action.

In addition, the identification challenge poses particular problems for administrative constitutionalism's legitimacy. If agency efforts at constitutional development were clearly evident as distinct from ordinary policymaking and as meriting closer scrutiny by external actors, then the potential danger of unauthorized administrative actions might be lessened. By contrast, when administrative constitutionalism occurs in secret and is hard to discern, legal and political oversight of the process may be stymied. Perhaps the President will have greater awareness of the constitutional basis of an agency's decisionmaking, given the likelihood of broader executive branch interactions, but that simply enhances the danger of one-sided constitutional assertions—and revives the concern that administrative constitutionalism will operate to the detriment of Congress. And, if agencies engage with constitutional concerns clandestinely, there will be scant

176. Young, *supra* note 15, at 454, *see also* BALKIN, *supra* note 30, at 300 ("In sum, it is best not to worry too much about where constitutional construction leaves off and merely ordinary politics begins. The key point, instead, is to recognize how practices within the constitutional scheme can subtly adjust the scheme itself in addition to the formal processes of constitutional amendment.").

177. BALKIN, *supra* note 30, at 311–12; Young, *supra* note 15, at 454; *see also* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 15 (stating that arguments concerning constitutional construction "never leave the realm of politics" and that even accepted constructions "are subject to future political struggle").

178. *Cf.* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 30, at 5–6 (juxtaposing the concepts of constitutional interpretation and constitutional construction and arguing that the latter is "essentially [a] political task, regardless of the particular institution exercising that function, to construct a determinate constitutional meaning to guide government practice"). *But cf.* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438–47 (2012) (demonstrating how the "Madisonian conception" of interbranch competition fails to account for Congress's failure to systemically defend legislative authority against executive encroachment).

occasion for broad public constitutional deliberation. Lack of transparency with respect to judicial contributions to administrative constitutionalism is similarly problematic. By not highlighting the common law character of administrative law, courts curtail assessment of judicial choices by the political branches and undermine the public's ability to hold courts to the rule of law.[179]

But transparency comes at a price. Administrative constitutionalism may well flourish best in the shade. The flip side of greater public engagement is greater opportunity for political or judicial veto of administrative efforts at constitutional development. And fears of such vetoes may lead agencies to forego administrative constitutionalism altogether, particularly administrative efforts to expand upon existing judicial constitutional understandings. The recent HUD rule outlining the disparate impact standard and methodology applicable to FHA claims is a case in point. HUD has long claimed that the FHA encompasses disparate impact claims, and describes its new rule as simply codifying that view and providing clarity by specifying a proof standard under which such claims should be assessed.[180] On the other hand, both the availability of disparate impact claims under the FHA and application of a disparate impact standard to governmental actions like enactment of land use rules and ordinances implicate highly contentious constitutional debates. In *Ricci v. DeStefano*,[181] the Supreme Court left open the question of whether imposition of a disparate impact standard with respect to race violates equal protection, as a form of government-required race-based decisionmaking.[182] A separate question is whether application of a disparate impact standard to state and local governments exceeds Congress's power under Section Five of the Fourteenth Amendment to enforce the Constitution's equal protection guarantee.[183] More broadly, the rule implicates the question of what kinds of protections are needed to root out racial segregation in housing and its continued effects.[184] Even though the dispute over disparate impact in the

179. Metzger, *Embracing*, *supra* note 19, at 1356.

180. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460–61 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) (noting that in adopting the final rule it was "formaliz[ing] its long-held recognition of discriminatory effects liability under the [FHA]" and implementing a burden-shifting test to ensure consistent application of the rule).

181. 557 U.S. 557 (2009).

182. *Id.* at 584, 593; *see also id.* at 594–95 (Scalia, J., concurring) (discussing the claimed constitutional violation); Primus, *supra* note 10, at 1354–62 (detailing the constitutional dimensions of *Ricci*).

183. *See, e.g.*, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495 (2003) (noting that one "issue was whether federal statutes prohibiting facially neutral practices with racially disparate impacts were valid . . . as means of enforcing equal protection under Section 5 of the Fourteenth Amendment").

184. *See generally* Johnson, *supra* note 10 (broadly discussing the problem of racial segregation in housing and proposed strategies to achieve greater integration).

FHA context has focused on statutory authority,[185] it is hard to imagine that these constitutional issues were not raised in internal discussions at HUD or within the executive branch generally. Yet had HUD publicly engaged these constitutional questions it would have immediately situated the rule in the midst of a contentious constitutional debate—and, given the Supreme Court's current hostility to race-based action, increased the chances the Court might invalidate the rule.

The challenge thus is that the very means needed to ensure administrative constitutionalism's legitimacy—greater transparency—is simultaneously what may deter administrative constitutionalism from occurring. One potential response is to embrace the ordinary law–constitutional law interplay more robustly, and use ordinary administrative law scrutiny to encourage agencies to engage with relevant constitutional issues.[186] Doing so not only helps ensure agencies take constitutional issues seriously, it also gives them an incentive to be more overt about their constitutional deliberations, for fear that if they did not publicly engage with significant constitutional aspects of their decisions courts might remand for further consideration. Perhaps as important, having courts address administrative constitutionalism through ordinary administrative law helps frame their review in more deferential terms and with recognition of agency expertise, which might lead to greater judicial–administrative dialogue on the constitutional issues involved.[187] To be sure, in some cases agencies themselves may not be aware of their actions' potential constitutional significance because their constitutional character may only become apparent over time. Hence, using ordinary administrative law to encourage agency engagement with and transparency about constitutional concerns will not end the identification challenge. And courts might well still invalidate agency actions on straightforward constitutional grounds. Yet this approach may offer some counter to administrative inclinations to shield the full dimensions of their actions while inviting greater judicial acknowledgement of the overlapping character of ordinary and constitutional law.

Arguably, a similar approach should be taken to judicial review more broadly and not limited to the administrative context. According to Young, for example, the constitutional role of ordinary law suggests that courts

185. The Supreme Court recently sought the views of the Solicitor General on the question of whether the FHA embodies a discriminatory impact standard. Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 133 S. Ct. 569 (2012). The term before it had granted certiorari on a case presenting the same question, but the case was dismissed on the parties' request. Magner v. Gallagher, 132 S. Ct. 1306 (2012).

186. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484–86. Congress and the President could similarly require greater public administrative engagement with constitutional concerns. *See, e.g.*, Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 570–72 (2012) (suggesting mechanisms to ensure better administrative attention to federalism impacts from preemption).

187. Metzger, *Ordinary Administrative Law*, *supra* note 20, at 484–86.

should avoid drawing a clear doctrinal line between the two.[188] Thus, not only should courts address constitutional concerns through ordinary law measures such as canons of statutory interpretation, but in addition courts should resist according deference to agency views of statutes that perform constitutive functions—just as courts do not defer to administrative interpretations of the Constitution.[189] Eskridge and Ferejohn reach a similar conclusion about the benefits of addressing Large "C" constitutional concerns through more ordinary law means like canons of statutory interpretation, which can reinforce the need for constitutional deliberation.[190] But they contend that the deference relationship should be reversed, in that the courts should treat measures that have become entrenched through legislative and administrative constitutionalism as precedents that should guide judicial constitutional deliberation.[191]

I am more ambivalent about collapsing doctrinal distinctions between ordinary and constitutional law so broadly. Such an approach has the attraction of having doctrine map actual constitutional practice, as well as the benefit of allowing constitutional law to develop in a more democratically legitimate and dialogic fashion. But there are also good reasons to resist erasing the doctrinal distinction between constitutional and ordinary law across the board. To begin with, courts do not stand in the same relationship to Congress and the President as they do to agencies. Judicial review of the basis for administrative decisionmaking is far more robust, rooted both in core administrative statutes and in constitutionally informed administrative law doctrines.[192] Such scrutiny is less justifiable with respect to decisions by constitutionally coequal and more politically accountable branches. All the more so given that the rationale of the courts using ordinary administrative law to encourage transparency about administrative constitutionalism is the

188. *See* Young, *supra* note 15, at 452 (suggesting that there should not be a dichotomy "between 'the higher lawmaking' entailed in the Constitution and 'ordinary lawmaking' entailed in statutes").

189. *Id.* at 467–70. Professor Young argues:

> [F]irst, . . . where a statutory scheme plays a constitutive role in the constitutional structure, courts should not hesitate to employ normative canons of statutory construction that reflect the constitutional values underlying the relevant aspect of the structure. Second, courts should be reluctant to accord . . . deference to statutory interpretations by administrative agencies where the statute in question plays a constitutive role.

Id. at 467.

190. ESKRIDGE & FEREJOHN, *supra* note 15, at 24.

191. *Id.* at 434–36, 445–47 ("[L]egislative and administrative constitutionalism does play *and* ought to play a critical role in the operation of judicial Constitutionalism.").

192. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 490 (explaining how an administrative statute's—the APA's—prohibition on arbitrary and capricious agency action provides a basis for judicial scrutiny of agency decisions); *see also id.* at 496 (explaining the Supreme Court's strong presumption that Congress intended judicial review of administrative decisionmaking and how that presumption is rooted in constitutional due process and separation of powers).

need to foster greater oversight of agency constitutional moves by these branches.

Moreover, collapsing the ordinary law–constitutional law divide could undercut core precepts of our constitutional system. Expansion of the constitutional into ordinary law can lead to greater judicial assertion of authority that operates to limit the political branches' ability to "build out" the Constitution.[193] One recent example comes from *NFIB v. Sebelius*,[194] where four Justices would have invalidated the massive healthcare reform statute in toto, based in part on constitutionally inspired rules of statutory construction.[195] To be sure, these rules can also come to a statute's defense; Chief Justice Roberts invoked the canon of constitutional avoidance in holding that the requirement that individuals purchase health insurance or pay a penalty could be sustained as a tax.[196] Still, the very different approaches evident in *NFIB* suggest that scholars' concerns about these rules as surreptitiously expanding the judicial role have some merit. Although addressing constitutional concerns through ordinary law measures theoretically leaves the political branches more room to respond, in practice the effect can be quite draconian.[197] This practical reality marks another reason to distinguish between administrative constitutionalism and other erasures of the ordinary law–constitutional law divide, as administrative agencies are better situated to respond to ordinary law reversals than Congress is.[198] It also suggests reason to worry about the impact of applying approaches like the constitutional avoidance canon to protect central statutory commitments in addition to Large "C" constitutional concerns.

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193. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 635–40 (1992) (noting the unacknowledged countermajoritarian effects of this kind of back-door constitutionalization); *see also* Schauer, *supra* note 147, at 92–96 (emphasizing the constraints on the political branches from the canon of constitutional avoidance).

194. 132 S. Ct. 2566 (2012).

195. *Id.* at 2642, 2650–56, 2668 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (interpreting the individual mandate to not be a tax and arguing that the only proper response was to invalidate the Affordable Care Act in toto, rather than sever those parts that were unconstitutional); *see* Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS (Nathaniel Persily et al. eds., forthcoming 2013) (manuscript 1–3) (on file with author) (noting the interaction of statutory construction and constitutional implementation in the decision and the impact of different statutory construction approaches to constitutional principles).

196. *NFIB*, 132 S. Ct. at 2593–600. Interestingly, the Chief Justice took a narrower approach to the canon than is currently the norm, concluding that the measure otherwise actually would be unconstitutional, suggesting his approach was more straightforwardly constitutional and less a blending of constitutional and ordinary law approaches. *Id.* at 2600–01.

197. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 425 (2010) (explaining how clear statement rules, by placing an emphasis on additional clarity, can effectively impose a judicial tax on the legislative branch, if that branch wishes to pass legislation to "achieve a constitutionally disfavored result").

198. *See* Metzger, *Ordinary Administrative Law*, *supra* note 20, at 532–33 (citing less burdensome procedural requirements and unity of purpose among agency personnel as reasons agencies better respond to judicial reversal).

At the same time, collapsing the ordinary–constitutional distinction also may threaten judicial constitutionalism. Deference to legislative and administrative constitutionalism risks undermining the judiciary's ability to stand as an independent constitutional interpreter. It may lead both the political branches and the courts to view the constitutional content of existing decisions narrowly, resulting in an erosion of constitutional protections. As David Franklin has put it, "there are advantages to marking out the realm of constitutional decision-making as something distinct from the background noise of political bargaining. . . . After all, if everything is constitutional politics, then everything is ordinary politics."[199] Alternatively, the desire to identify some constitutional core that transcends politics may lend support to adopting narrow approaches to constitutional interpretive methodology, such as putting primacy on the original expected meaning of the Constitution's terms, to counterbalance recognition of constitutional change.[200]

Hence, we should be cautious about extending the doctrinal and normative implications of administrative constitutionalism to constitutional construction more generally. Preserving adequate room for constitutional implementation by all the branches may require tolerating some inconsistency between lived constitutional practice and constitutional doctrine. Ordinary law may function as constitutional law and constitutional law may at times be indistinguishable from ordinary law, but perhaps this reality is not one that the courts should broadly acknowledge.

199. Franklin, *supra* note 88, at 1074–75.

200. *See* BALKIN, *supra* note 30, at 3–7 (arguing that fidelity to the Constitution requires "fidelity to the original meaning of the Constitution, and in particular, to the rules, standards, and principles stated by the Constitution's text," but not original expected applications); Whittington, *Constructing*, *supra* note 30, at 120–22, 133–35 (defining interpretation as a process that attempts to "divine the meaning of the text" and is intended to be enduring, and emphasizing how an originalist approach to constitutional interpretation accords with recognition of constitutional construction).

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Collective Action Federalism and Its Discontents

Neil S. Siegel*

An increasing number of scholars argue that the Commerce Clause is best read in light of the collective action problems that the nation faced under the Articles of Confederation. The work of these "collective action theorists" is reflected in Justice Ginsburg's opinion in National Federation of Independent Business v. Sebelius. *Writing for four Justices, she stressed the "collective-action impasse" at the state level to which the Affordable Care Act responds.*

In its purest form, a collective action approach maintains that the existence of a significant problem of collective action facing two or more states is both necessary and sufficient for Congress to address the problem by relying on the Commerce Clause. Unlike nationalist defenders of unlimited federal commerce power, a collective action approach does not ask whether the regulated conduct substantially affects interstate commerce in the aggregate. Unlike federalist defenders of limited federal commerce power, a collective action approach does not focus on the distinction between economic and noneconomic conduct, or between regulating and requiring commerce.

Accordingly, nationalists may agree that a collective action problem is sufficient for Congress to invoke the Commerce Clause, but they will disagree that it is necessary. By contrast, federalists may agree that a collective action problem is necessary for Congress to invoke the Commerce Clause, but they will disagree that it is sufficient.

This Essay anticipates such criticism. Regarding the nationalist critique of a collective action approach, I argue that the nationalist "substantial effects" test imposes no judicially enforceable limits on the scope of the Commerce Clause. I also argue that nationalists may define multistate collective action problems too narrowly. In addition to races to the bottom, collective action problems include interstate externalities that do not cause races to the bottom.

Broadening the definition of multistate collective action problems to include interstate externalities gives rise to the federalist objection that every subject Congress might want to address can plausibly be described as a collective action problem. Federalists may further object that the Commerce Clause is limited to "Commerce." In response, I argue that "Commerce" is best understood broadly to encompass many social interactions outside markets, as

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Professors Jack Balkin and Akhil Amar have urged. I also argue that a collective action approach need not validate unlimited federal commerce power. Specifically, I identify three ways of limiting the kinds of interstate externalities that justify use of the Commerce Clause.

Introduction

In the 1780s, the young nation faced serious problems, and the Articles of Confederation prevented it from addressing them effectively. Most significantly, the states made a habit of discriminating against commerce from other states and refusing to contribute their fair share of money and troops to the national treasury and military.[1] The nation could not solve these problems for three primary reasons: they transcended the boundaries of any one state; the states faced substantial impediments to collective action; and the federal government lacked constitutional authority to act effectively when the states were unable to act collectively.[2]

The Constitutional Convention of 1787 responded to these failures of governance. Echoing Resolution VI of the Virginia Plan, the Convention instructed the midsummer Committee of Detail that Congress would be empowered to legislate in, among other things, "those Cases to which the States are separately incompetent."[3] The Committee of Detail "changed the indefinite language of Resolution VI into an enumeration . . . closely resembling Article I, Section 8" as adopted,[4] including its authorizations of federal power to regulate interstate commerce, tax, and raise and support a military.[5]

An increasing number of legal scholars have drawn from this history in offering structural accounts of the scope of the Commerce Clause. Specifically, "collective action theorists," as I shall call these scholars, have argued that the commerce power is best read in light of the collective action problems that the nation faced under the Articles of Confederation, when Congress lacked the power to regulate interstate commerce. Included in their

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1. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–28, 47–48, 102–08, 167–68, 188–89 (1996) (cataloguing the problems with the Articles of Confederation); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 44–46, 106–08 (2005) (same); Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 616–23 (1999) (same).

2. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 121–24 (2010) (using the logic of collective action to explain the failures of the Articles of Confederation).

3. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–32 (Max Farrand ed., rev. ed. 1966).

4. Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1340 (1934).

5. U.S. CONST. art. I, § 8, cls. 1, 3, 11–16.

ranks are Akhil Amar, Jack Balkin, Robert Cooter, Andy Koppelman, Donald Regan, and myself.[6]

The work of these collective action theorists appears to be reflected in Justice Ginsburg's opinion in *National Federation of Independent Business v. Sebelius* (*NFIB*).[7] In one of the most important opinions of her tenure, Ginsburg stressed the "collective-action impasse"[8] at the state level to which the Patient Protection and Affordable Care Act (ACA)[9] responds. Ginsburg insisted that "States cannot resolve the problem of the uninsured on their own,"[10] and Justices Breyer, Sotomayor, and Kagan joined this part of her opinion.[11]

This is a significant, if underappreciated, development. Ginsburg did not argue merely that Congress could have rationally concluded that the conduct of the uninsured, as a general class, substantially affects interstate commerce. In addition, she argued that the scope and nature of the problem rendered the federal government better situated than the states to solve it.[12] To be sure, Ginsburg did not reject the substantial effects test in favor of an alternative that would make the existence or nonexistence of a multistate collective problem dispositive of the Commerce Clause inquiry.[13] But she did place special emphasis on the collective action problems that the ACA's

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6. *See* AMAR, *supra* note 1, at 107–08; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1 (2010); Cooter & Siegel, *supra* note 2, at 115–16; Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 554–57 (1995); Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. 29, 30 (2012); *see also* ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 42–43, 71, 155 n.7 (2013) (drawing from works by collective action theorists in arguing that the ACA's minimum coverage provision is valid Commerce Clause legislation).

7. 132 S. Ct. 2566 (2012).

8. *Id.* at 2612 (Ginsburg, J., dissenting in part) ("Congress'[s] intervention was needed to overcome this collective-action impasse.").

9. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

10. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2612 (Ginsburg, J., dissenting in part).

11. *Id.* at 2609.

12. *See id.* Justice Ginsburg explained why states expose themselves to economic risk by passing health care reforms on their own:

> States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors." [Helvering v. Davis, 301 U.S. 619, 644 (1937).] See also Brief for Health Care for All, Inc., et al. as [Amici Curiae in Support of Petitioners Urging Reversal on the Minimum Coverage Provision Issue at 4, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398)] ("[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care."). Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured.

Id. at 2612.

13. *See id.* at 2616.

minimum coverage provision can reasonably be understood to ameliorate[14]—both alone and in combination with the ACA provisions that prohibit insurance companies from denying people coverage based on preexisting conditions, canceling coverage absent fraud, charging higher premiums based on medical history, and imposing lifetime limits on benefits.[15]

Ginsburg's opinion suggests that four Justices deem the logic of collective action constitutionally pertinent to the scope of Congress's commerce power. Depending on changes in the Court's composition in the years ahead, this plurality may become a majority. Accordingly, it is especially important at this time to understand and critically evaluate the work of collective action theorists.

In its purest form, a collective action approach to the Commerce Clause maintains that the existence of a significant problem of collective action facing two or more states is both necessary and sufficient for Congress to address the problem by relying on the commerce power. In the context of judicial review, a collective action approach asks whether Congress had a rational, or a reasonable, or some other more demanding basis to conclude that such a collective action problem exists.[16] A collective action approach focuses on the distinction between problems whose solutions require individual (that is, separate) action by states, and problems whose solutions require collective action by states.

Unlike nationalist defenders of robust federal commerce power (nationalists), a collective action approach does not ask whether the regulated subject matter substantially affects interstate commerce in the aggregate.[17] Unlike federalist defenders of limited federal commerce power (federalists), a collective action approach does not focus on the formal distinction between economic and noneconomic conduct, or on the formal distinction between regulating and requiring commerce.[18] Accordingly, nationalists may be willing to agree that a collective action problem is sufficient for Congress to invoke the Commerce Clause, but they will disagree that it is necessary. By

14. *Id.* at 2613–14. The ACA requires, among many other things, that most lawful permanent residents of the United States either maintain a minimum level of health insurance coverage (the minimum-coverage provision) or else pay a certain amount of money each year (the shared-responsibility payment). Patient Protection and Affordable Care Act ch. 48, 124 Stat. at 244–50.

15. 42 U.S.C. §§ 300gg, 300gg-1(a), 300gg-5, 300gg-11, 300gg-12 (Supp. V 2012).

16. The question of what the Commerce Clause means is separate from the question of how deferential courts should be in deciding whether Congress has acted consistently with its meaning. *See, e.g.*, Jack M. Balkin, *Fidelity to Text and Principle*, *in* THE CONSTITUTION IN 2020 11, 20 (Jack M. Balkin & Reva B. Siegel eds., 2009) (distinguishing "the question of what the Constitution means and how to be faithful to it" from the question of "how a person in a particular institutional setting—like an unelected judge with life tenure—should interpret the Constitution and implement it through doctrinal constructions and applications").

17. *See, e.g.*, Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 601 (2011) (describing the nationalist position).

18. *See, e.g.*, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 604–05 (2010) (endorsing both formal distinctions identified in the text).

contrast, federalists may be willing to agree that a collective action problem is necessary for Congress to invoke the Commerce Clause, but they will disagree that it is sufficient.[19]

I anticipate such criticism by nationalists and federalists alike in this Essay, which is part of a larger effort to provide a structural theory of the expanse and limits of congressional power and state power in Article I, Section 8 and certain other parts of the Constitution.[20] Regarding the nationalist critique of a collective action approach, I argue that the primary nationalist alternative—the substantial effects test as applied for decades before the Court's 1995 decision in *United States v. Lopez*[21]—imposes no judicially enforceable limits on the scope of the Commerce Clause. No member of the late Rehnquist or early Roberts Courts has been prepared to embrace this implication, and contemporary American constitutional culture appears to reject it. I also argue that nationalists may define a multistate collective action problem too narrowly, which may cause them to conclude that a collective action approach would excessively limit the scope of the commerce power.

By a "collective action problem," collective action theorists typically mean a situation in which individually rational action by states leads to collectively irrational results.[22] This could arise with a race to the bottom (or top) among the states. In such a situation, states share the same basic objective but have incentives to act in ways that make it difficult to achieve the objective.[23] Collective action problems, however, are not limited to races among the states. A collective action problem may also arise in cases of interstate spillovers that do not involve races among the states.[24] When states impose external costs on sister states, a solution to the problem will require collective action by the affected states, which they often will not be able to accomplish on their own.[25]

Broadening the definition of a multistate collective action problem to include interstate externalities invites the federalist objection that every subject Congress might want to address can plausibly be described as requiring collective action by the states. (This is not the only federalist

19. It is, of course, oversimplified to divide the universe of constitutional interpreters into "nationalists," "federalists," and "collective action theorists." Many constitutional interpreters do not fall cleanly into one category or another. Nonetheless, these stylized categories reflect reality at least roughly, and they render the analysis that follows analytically more tractable.

20. I call this theory "the Collective Action Constitution." For relevant writing, see generally Cooter & Siegel, *supra* note 2; Siegel, *supra* note 6; and Siegel, *supra* note 17. For additional work I have done on this subject, see my articles cited *infra* notes 75, 124, 133, and 155.

21. 514 U.S. 549 (1995).

22. Cooter & Siegel, *supra* note 2, at 117.

23. Siegel, *supra* note 6, at 46.

24. *See id.* at 46–47 (discussing spillovers such as pollution across state lines and the cross-state economic effects of racial discrimination).

25. *See id.* (arguing that collective action may be required in cases of pollution and racial discrimination).

objection; another, which I will address, is that the Commerce Clause contains the word "Commerce.") If every problem Congress might want to address can reasonably be portrayed as a collective action problem, then a collective action approach—like the pre-1995 substantial effects test—imposes no judicially enforceable limits on the Commerce Clause.

A collective action approach, however, need not justify unlimited federal commerce power. In the context of judicial review, resources are available to limit the kinds of interstate externalities that justify use of the Commerce Clause. As I argue below, courts should deem psychological externalities inadmissible in commerce power cases. When Congress uses the Commerce Clause—unlike when it uses the spending power—it need not be willing to pay to vindicate the psychological concerns of people in one state about the well-being of people in other states. Moreover, judicial review should turn not just on the existence of an interstate externality, but also on its significance and on the extent to which the federal law at issue meaningfully addresses it. Finally, courts should impose a reasonableness inquiry in the context of judicial review, in contrast to genuine rational basis review.

So implemented, a collective action approach offers a multigenerational synthesis of the U.S. Supreme Court's Commerce Clause jurisprudence from 1937 through the end of the Rehnquist Court, justifying federal commerce power that is very broad but not limitless. For example, the approach reconciles the validations of Commerce Clause authority in *Wickard v. Filburn*[26] and *Gonzales v. Raich*[27] with the invalidations of Commerce Clause authority in *Lopez* and *United States v. Morrison*.[28] Moreover, the rejection of Commerce Clause authority for the minimum coverage provision by five Justices in *NFIB*, while warranting criticism from a collective action perspective, is ultimately reconcilable with the post-New Deal synthesis.

Part I addresses the nationalist critique of a collective action approach to the Commerce Clause—namely, that it excessively limits federal power. Part II addresses two primary objections of federalists—namely, that any approach to the Commerce Clause must attribute meaning to the word "Commerce," and that a collective action approach justifies unlimited federal commerce power. A brief Conclusion summarizes the argument.

I. The Nationalist Critique

Nationalists are likely to view a collective action approach as working much better as a principle of inclusion than as a principle of exclusion. As Professor Michael Dorf has conveyed, "It's hard to conceive of a genuine collective action problem for the States that wouldn't give rise to regulatory

26. 317 U.S. 111 (1942).
27. 545 U.S. 1 (2005).
28. 529 U.S. 598 (2000).

authority for Congress under the Commerce Clause."[29] At the same time, Professor Dorf has resisted my past characterizations[30] of *Heart of Atlanta Motel, Inc. v. United States*[31] and *Katzenbach v. McClung*[32] as collective action cases:

> The Southern states were not trying to mandate civil rights but couldn't because of a race to the bottom or spillover effects; quite the contrary. The 1964 Civil Rights Act was a matter of the dominant national opinion on civil rights simply displacing dissenting regional and state opinion on the matter. It's possible to spin the cases as addressing collective action problems (as you do), but to my mind doing so robs the notion of a collective action problem among the States of its explanatory force.[33]

For Professor Dorf it is preferable "simply to say, as the Court more or less said in these cases, that the Commerce Clause reaches instances of activity (or inactivity) having substantial effects on interstate markets, whether or not national regulation of such activities (or inactivities) is needed to solve a collective action problem."[34]

Dean Erwin Chemerinsky has voiced similar concerns. He has distinguished between the argument that a collective action problem is sufficient to rely on the Commerce Clause and the argument that such a problem is necessary. He deems the former claim an "insight [that] is tremendously valuable."[35] He is "very skeptical" about the latter claim.[36] He prefers the substantial effects test and deems a collective action analysis unnecessary when the substantial effects test is satisfied.[37] Judging from exchanges with other defenders of robust federal power, the reactions of Professor Dorf and Dean Chemerinsky are typical.

Two responses to the nationalist critique seem appropriate. First, the preferred alternative among nationalists—the substantial effects test[38] as applied before *Lopez*—imposes no judicially enforceable limits on the Commerce Clause. The pre-*Lopez* version of the substantial effects test

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29. E-mail from Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Univ. Law Sch., to author (May 21, 2011, 9:23 AM) (on file with author).

30. Siegel, *supra* note 6, at 46–47.

31. 379 U.S. 241 (1964).

32. 379 U.S. 294 (1964).

33. Dorf, *supra* note 29 (emphasis omitted).

34. *Id.*

35. E-mail from Erwin Chemerinsky, Dean and Distinguished Professor of Law, Univ. of Cal., Irvine Sch. of Law, to author (Aug. 2, 2011, 10:49 PM) (on file with author).

36. *Id.*

37. *See id.* (arguing that the substantial effects test is satisfied by the ACA's minimum coverage provision and questioning the necessity or utility of further justifying the provision using a collective action analysis).

38. The court often dropped the "substantiality" requirement. *See, e.g.*, Perez v. United States, 402 U.S. 146, 150 (1971) ("The Commerce Clause reaches .... those activities affecting commerce.").

asked whether Congress rationally could have concluded that the regulated conduct—whether economic or noneconomic in nature—affects interstate commerce in the aggregate.[39] No possible or actual federal law would fail this test, even if one includes a "substantiality" requirement.

In *Lopez*, for example, Justice Breyer was most persuasive in showing how Congress reasonably could have concluded that the possession of guns in school zones, in the aggregate, substantially affects interstate commerce.[40] If one extends the time horizon, there is a demonstrable relationship between school violence and student academic performance, and between student academic performance and national economic performance.[41] Justice Breyer was so persuasive that Chief Justice Rehnquist, in his majority opinion, did not try to rebut these effects. Instead, he changed the subject, pausing to consider the implication of Justice Breyer's argument, which was that the Commerce Clause was unlimited.[42]

By contrast, Justice Breyer was least persuasive in explaining how his analysis was compatible with judicially enforceable limits on the commerce power.[43] Like Solicitor General Drew Days at oral argument,[44] Justice Breyer was unable or unwilling to name a single potential federal law that would be beyond the scope of the Commerce Clause if the Gun Free School Zones Act were upheld.[45] It is hard to think of conduct that, taken cumulatively, does not substantially affect interstate commerce.

Nationalists may view this aspect of the substantial effects test as a virtue, not a vulnerability. Instead of advocating judicially enforceable limits on the Commerce Clause, they tend to stress the political safeguards of federalism.[46] Nationalists are right to stress them. Political constraints, not

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39. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 323–24 (1981) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.").

40. *See* United States v. Lopez, 514 U.S. 549, 618–24 (1995) (Breyer, J., dissenting) (analyzing the effect of guns in and around schools on education and commerce).

41. *Id.*

42. *See id.* at 564–65 (majority opinion) (stating that under the Government's position, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate").

43. *See id.* at 624 (Breyer, J., dissenting) (arguing that the "special way in which guns and education are incompatible" and the impact of education on economic well-being made *Lopez* the "rare case" where noncommercial conduct has "so significant an impact upon commerce" that it is regulable under the Commerce Clause).

44. For a discussion of the Solicitor General's performance at oral argument in *Lopez*, see Siegel, *supra* note 17, at 591, 593–94.

45. Justice Breyer's performance is the more revealing of the two. Unlike the Solicitor General, a Justice has no institutional responsibility to defend the constitutionality of almost all federal laws.

46. The seminal article is Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), in which Professor Wechsler suggests that "the national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states." *Id.* at 558; *see also, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE

judicially enforceable limits, explain why no Justice worries about much of what the Court's longstanding doctrine allows, including a minimum wage of $1,000 an hour and a prohibition on buying unhealthy foods. To be sure, one might draw a different lesson from such examples—namely, that the political process tends to protect against congressional actions that will be unpopular with large segments of the American public, not that the political process protects federalism. But by protecting against such federal laws, the political process does help to protect federalism, at least to some extent—even if this protection is not attributable to the role of the states in the national political process, and even if Congress is not otherwise motivated to protect federalism.

Regardless, no Justice appointed over the past three decades has accepted that the political safeguards of federalism are the only safeguards available. To reiterate, Justice Breyer devoted great energy to denying this implication of his position in *Lopez*.[47] Every present Justice appears to believe in a national government of limited, enumerated powers, and none insists that the federal judiciary has no role in preserving these limits.[48]

I do not know why every current Justice seems to reject the nonjusticiability approach of *Garcia v. San Antonio Metropolitan Transit Authority*.[49] I have an intuition, however, after observing and participating in the fight over health care reform over the past few years. No one involved in the debate thought it persuasive to argue that the ACA's minimum coverage provision is within the scope of the Commerce Clause just because any possible federal law is within the scope of the commerce power as far as judicial review is concerned. No one thought it unimportant to have an answer to the "*Lopez* question." Perhaps this is just a function of having a Court with a federalist majority, but I am not so sure. Given the extent to which hypotheticals involving congressional mandates to buy broccoli or American cars resonated in the public imagination,[50] it may not be tenable in

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NATIONAL POLITICAL PROCESS 2 (1980) (arguing that "state interests are forcefully represented in the national political process"); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (arguing that American federalism has been protected not by "the formal constitutional structures highlighted in Wechsler's original analysis," but "by a complex system of informal political institutions (of which political parties have historically been the most important)—institutions that were not part of the original design, but have nevertheless served to fulfill its objectives"); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 360 (noting that the judicial focus in vindicating federalism is now "on the nature of the political process responsible for making the federalism-related decisions").

47. *See Lopez*, 514 U.S. at 624–25 (Breyer, J., dissenting) (arguing that his position would not "expand the scope" of the Commerce Clause).

48. *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2366 (2011) (unanimous opinion) (stating that "action that exceeds the National Government's enumerated powers undermines the sovereign interests of States" and that such "unconstitutional action can cause concomitant injury").

49. 469 U.S. 528 (1985).

50. *See, e.g.*, James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 13, 2012, http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-

contemporary American constitutional culture to advocate abandoning all judicially enforceable limits on the Commerce Clause. A collective action approach identifies a functional limit on federal commerce power, one that seeks to authorize and limit the federal government to regulate what it regulates best.[51]

A second response to the nationalist critique is warranted. Nationalists may entertain too restricted an understanding of what qualifies as a collective action problem involving multiple states. No doubt such problems include races to the bottom (or top) among the states, such as the historic problems of "unfair competition" caused by the absence of laws in certain states banning child labor or requiring minimum wages and maximum hours.[52] In a race to the bottom, all (or most) of the states share the same objective (such as national defense or a national free market), but they must overcome a collective action problem in order to achieve the objective.[53] A collective action approach plainly justifies use of the Commerce Clause to target such problems.

But a collective action rationale is not limited to races among the states. Collective action problems also include situations in which states pursue different objectives in ways that cause significant spillover effects in other states. *Heart of Atlanta* and *McClung* were such cases. Of course the Southern states were interested in promoting racial discrimination, not discouraging it. But the collective action problem caused by racial discrimination was not the fact that Southern states wanted to abandon discrimination but were unable to do so individually. Rather, the collective action problem lay in the fact that Southern states, by practicing racial discrimination, created a significant burden on commerce with those states that did not practice racial discrimination.[54] In other words, Professor Dorf focuses on the wrong states in the quotation above.[55] Southern states were not impeded from combating racial discrimination because of the conduct of non-Southern states. On the contrary, racial discrimination by Southern states imposed negative externalities on non-Southern states.

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the-health-care-debate.html (discussing the use of hypotheticals involving broccoli and American cars in public discourse over health care reform).

51. *See generally* Cooter & Siegel, *supra* note 2 (developing the theory of collective action federalism).

52. *See, e.g.*, *id.* at 160–62 (discussing *United States v. Darby*, 312 U.S. 100 (1941)).

53. If unanimity were required, then there would typically be insuperable impediments to collective action by the states. For example, a distinct minority of states (or just Rhode Island) would have defeated any effort to abandon the Articles of Confederation in favor of a more powerful central government. *See* U.S. CONST. art. VII (providing that ratification of the Constitution by nine out of thirteen states would suffice).

54. *See, e.g.*, Balkin, *supra* note 6, at 37 ("Businesses in states that do not permit discrimination may alter their employment and production policies in order to cater to consumers and clients in jurisdictions that permit (or even expect) discrimination.").

55. *See supra* text accompanying note 29.

In promoting an apartheid social order, Southern states made it substantially more difficult for African-Americans and other racial minorities to travel interstate for purposes of business, education, and tourism. The State of California so argued in its amicus brief in *Heart of Atlanta*:

> California industry is a prime recipient of government contracts, which can necessitate travel to the nation's capital or defense installations in other states. Californians serve in the armed forces of our nation, which frequently requires them to travel through and reside in sister states during their period of service. Citizens of California, in the course of their business and employment, must utilize places of public accommodation throughout the United States.
>
> Of no less significance to our national well-being is interstate travel for educational and recreational purposes, including visitation of our great national shrines located in other states.[56]

The *Green Book*, which helped African-Americans to find accommodations while on the road in the Jim Crow South, has come to symbolize the impediments to interstate travel that Southern states imposed.[57]

Moreover, Jim Crow practices in the South led to the Great Migration of African-Americans to Northern cities, with all of the social problems associated with an influx of cheap labor.[58] "Immigration from discriminating states will put pressure on housing, wages, and working conditions in more egalitarian states, especially if the new immigrants are used to working at lower wages and under inferior working conditions."[59] These external effects of Southern racism were demonstrable, not merely plausible or hypothetical. Internalization of these interstate externalities required collective action by the states, which only Congress could provide.

Accordingly, a collective action approach to the Commerce Clause justifies federal commerce power over discrimination affecting interstate commerce. And the problem of discrimination affecting commerce illustrates a more general point. Properly understood, a collective action approach authorizes substantially broader federal commerce power than nationalists may presuppose.

To be sure, a collective action defense of the Civil Rights Act of 1964 does not adequately reflect our moral and constitutional intuitions about why the federal government may dismantle a regime of public and private racial discrimination. Of course our primary objection to racial discrimination, like our main objection to sex discrimination, sounds not in interference with commerce, but in human equality and liberty. But underscoring the equality

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56. Brief of the State of California as Amicus Curiae at 5–6, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (No. 515), 1964 WL 81384, at *5–6 (footnotes omitted).

57. *See, e.g.*, Celia McGee, *The Open Road Wasn't Quite Open to All*, N.Y. TIMES, Aug. 22, 2010, http://www.nytimes.com/2010/08/23/books/23green.html.

58. Balkin, *supra* note 6, at 37.

59. *Id.*

and liberty values compromised by various forms of discrimination is just a way of suggesting (without demonstrating) that the Court has erred in disabling Congress from ever regulating private conduct under Section Five of the Fourteenth Amendment.[60] It is just a way of suggesting, for example, that *United States v. Morrison* should have been an easy win for the federal government under Section Five.[61] The structural logic of the enforcement clauses of the Civil War Amendments[62] does not commend inquiry into the existence or nonexistence of multistate collective action problems.[63] On the contrary, the enforcement clauses of the Civil War Amendments give Congress authority to regulate the internal policy choices of state governments concerning certain subject matters regardless of collective action problems facing the states.[64] From a structural perspective, such federal power is central to the meaning of the Civil War and the purposes of Reconstruction.

Of course, stressing how discrimination diminishes equality and liberty is not an argument in favor of the pre-*Lopez* substantial effects test in Commerce Clause litigation. The substantial effects test is equally oblivious to the profound interest people have in being free from various forms of discrimination, public and private.

II. The Federalist Critique

Reassuring nationalists that a collective action approach would not severely limit the commerce power may encourage federalists to scream "gotcha!" for at least two reasons. First, federalists may observe that

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60. *See* United States v. Morrison, 529 U.S. 598, 619–27 (2000) (prohibiting Congress from using its Section Five power to regulate private action); The Civil Rights Cases, 109 U.S. 3, 46 (1883) (Harlan, J., dissenting) ("The assumption that [the Fourteenth Amendment] consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions[] is unauthorized by its language. The first clause . . . is of a distinctly affirmative character."). Justice Harlan wrote that "[t]he citizenship thus acquired" by African-Americans, "in virtue of an affirmative grant from the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character." *Id.* This was "because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce . . . *all* of the provisions—affirmative and prohibitive, of the [A]mendment." *Id.*

61. *Morrison*, 529 U.S. at 619–27 (holding that § 13981 of the Violence Against Women Act of 1994, which provided a private civil damages remedy for victims of gender-motivated violence, was beyond the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment).

62. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

63. This observation, however, hardly suffices to refute the "state action" requirement imposed on Section Five legislation by the *Civil Rights Cases* and *Morrison*. One way to demonstrate the impropriety of this requirement is to follow Justice Harlan's lead, *see supra* note 60, by focusing on the affirmative character of the Citizenship Clause of Section One.

64. *See* U.S. CONST. amend. XIII, § 2 (authorizing Congress to enforce the constitutional prohibition on slavery and involuntary servitude within the United States); *id.* amend. XIV, § 5 (authorizing Congress to enforce Section One's Citizenship Clause and guarantees of due process and equal protection); *id.* amend. XV, § 2 (authorizing Congress to enforce the constitutional prohibition on racial discrimination in voting by states or the federal government).

interstate externalities are pervasive, so that any problem can be characterized as requiring collective action by two or more states—and therefore as justifying use of the Commerce Clause. But if that is right, federalists may urge, then federal commerce power is limitless under a collective action approach, just as it is under the version of the substantial effects test that nationalists embrace.

Turning to judicial review in particular, federalists may underscore certain considerations that may seem to render this conclusion inescapable. One is the tradition of judicial deference to acts of Congress.[65] Another is the empirical uncertainty surrounding the significance of many interstate externalities and the adequacy of Congress's response to them.[66] If courts ask merely whether Congress had a rational basis to believe that federal regulation would ameliorate a multistate collective action problem, federalists might think, then deferential courts will always uphold federal legislation.

Federalists may be inclined to scream "gotcha!" for a second reason. In their view, the Commerce Clause does not justify federal power to solve any and all collective action problems. Rather, this provision includes the word "Commerce," which limits the kinds of problems "among the several States"[67] that Congress may use the commerce power to address—namely, those problems that are "commercial" or "economic" in nature. Moreover, some (though not all) federalists may insist that the Commerce Clause includes the word "regulate,"[68] which further limits the kinds of problems that Congress may use the Clause to address—namely, those problems that involve preexisting "activity."[69] The joint dissent in *NFIB* appeared to voice these objections to a collective action approach.[70] In response to Justice Ginsburg's portrayal of the ACA as meaningfully addressing problems that

65. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (Roberts, C.J.) ("Our permissive reading of these [enumerated] powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders."); Salazar v. Buono, 130 S. Ct. 1803, 1820 (2010) ("Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality."); *see also* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 808 (1995) ("[T]he Supreme Court's past record is one of . . . general deference to national [laws].").

66. *Cf.* Cooter & Siegel, *supra* note 2, at 182 ("In order to establish the existence of a collective action problem among the states, does Congress need a plausible rationale, some evidence, or substantial evidence?").

67. U.S. CONST. art. I, § 8, cl. 3.

68. *Id.*

69. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2586 (Roberts, C.J.) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.").

70. *Id.* at 2648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[T]he decision to forgo participation in an interstate market is not itself commercial activity . . . . [I]f every person comes within the Commerce Clause power . . . by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.").

the states cannot solve on their own, the dissent wrote that "Article I contains no whatever-it-takes-to-solve-a-national-problem power."[71]

To my mind, the first criticism poses the most significant challenge to collective action approaches to the Commerce Clause. Although one can define collective action problems broadly or narrowly,[72] there is an entrenched presumption of constitutionality in enumerated powers litigation, one that goes back at least as far as *McCulloch v. Maryland*.[73] This presumption has particular force on empirical questions in light of Congress's superior fact-finding ability and democratic legitimacy to resolve empirical uncertainties.[74] As long as the Court continues to respect the presumption of constitutionality,[75] there will likely be greater cause for concern that collective action theory will remove judicially enforceable limits on the commerce power than that it will unduly limit the Commerce Clause. This may help to explain why a collective action approach has been embraced more by those who defend broad federal commerce power than by those who oppose it, and why it has been criticized more by those who oppose broad federal commerce power than by those who defend it. I will consider each criticism in turn, although I will do so in reverse order for purposes of analytical clarity. That is, I will first address the meaning of the word "Commerce" in the Commerce Clause, and I will then address the meaning of the phrase "among the several States."[76]

A. First Objection: The Commerce Clause Says "Commerce"

The first federalist criticism of a collective action approach to the Commerce Clause is that just because a problem is "among the several

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71. *Id.* at 2650. My friend Randy Barnett has voiced a similar objection:

> Unless they voluntarily choose to engage in activity that is within Congress's power to regulate or prohibit, the American people retain their sovereign power to refrain from entering into contracts with private parties, even when commandeering them to do so may be convenient to the regulation of commerce among the several states.

Barnett, *supra* note 18, at 634.

72. For a discussion, see Cooter & Siegel, *supra* note 2, at 152–55, in which the authors suggest that the choice between broad and narrow definitions of interstate externalities may follow "predictable political lines."

73. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). For a good discussion of the presumption, see generally Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 FORDHAM L. REV. 1715, 1729–31 (2013).

74. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting) ("[L]egislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact.").

75. A majority of the Court respected the presumption to a significant extent in *NFIB*. For a discussion, see Neil S. Siegel, *More Law than Politics: The Chief, the "Mandate," Legality, and Statesmanship*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 192–214 (Nathaniel Persily et al. eds., 2013).

76. U.S. CONST. art. I, § 8, cl. 3.

States" does not make it "Commerce."[77] The objection, in other words, is that the commerce power does not authorize Congress to address all multistate collective action problems. Rather, it empowers Congress to ameliorate just those problems that involve "Commerce," a term that the *Lopez* and *Morrison* Courts properly viewed as limited to "commercial" or "economic" interactions.[78]

Federalists are right to point out that any plausible interpretation of the constitutional text must offer an account of the word "Commerce" in the Commerce Clause.[79] A collective action approach is primarily a structural approach. Structural approaches do not contradict the constitutional text. Rather, they give meaning to the text by explaining how various parts of the Constitution work, or should work, in practice.[80]

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77. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2650 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[The Constitution] enumerates not federally soluble *problems*, but federally available *powers*. . . . Article I contains no whatever-it-takes-to-solve-a-national-problem power.").

78. United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. . . . It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of . . . a commercial transaction . . . ." (footnote omitted)); United States v. Morrison, 529 U.S. 598, 611 (2000) ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity . . . , the activity in question has been some sort of economic endeavor." (citing *Lopez*, 514 U.S. at 559–60)).

79. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 116 (2001) ("In none of the sixty-three appearances of the term 'commerce' in *The Federalist Papers* is it ever used to unambiguously refer to any activity beyond trade or exchange.").

80. Consider, for example, the theory of collective action federalism that I have articulated with Professor Cooter. Cooter & Siegel, *supra* note 2. Although the theory is consistent with the constitutional text, the theory is, first and foremost, neither textualist nor originalist nor consequentialist. It is, rather, primarily an account of an important part of the American constitutional structure. The theory seeks to interpret most of the clauses of Article I, Section 8 by drawing inferences from the relevant structures and relationships that the Constitution establishes—namely, a federal system that presupposes the continued existence of the states and that endows the federal government with authority to solve problems that the states cannot address effectively on their own. Using modern economics, collective action federalism pursues a consequentialist inquiry to identify the logic of such problems and to explain how federalism can ameliorate them.

Resolution VI of the Virginia Plan, *see supra* note 3 and accompanying text, and the recorded statements of influential Framers matter to the theory because such materials provide important evidence of the federalist structure that was planned; they offer illuminating evidence of how an important component of the constitutional machine was supposed to function in practice. *The Federalist Papers*, for example, are relevant to our structural account even though they had little impact on the ratification debate.

It might have turned out that this original plan for the proper interpretation of Section 8 ceased to make sense over time. But that is not what happened regarding the distinction between individual and collective action by states; it continues to make good sense of this part of the American constitutional structure today, as modern economics helps to confirm. Consequences matter to collective action federalism not because its structural account is instrumentalist all the way down, but because structural accounts are always in part consequentialist, regardless of how they are presented.

Federalists err, however, if they believe that collective action approaches read the word "Commerce" out of the Commerce Clause. Collective action theorists offer persuasive evidence that the Court's "commercial" or "economic" interpretation of the word "Commerce" is not the best available interpretation. For example, Professor Jack Balkin, who endorses a collective action approach to the commerce power, has disputed the Court's "commercial" interpretation of the term "Commerce."[81] "In the eighteenth century," he argues, "'commerce' did not have such narrowly economic connotations. Instead, 'commerce' meant 'intercourse' and it had a strongly social connotation. 'Commerce' was interaction and exchange between persons or peoples."[82]

Similarly, Professor Akhil Amar writes that the term "commerce" originally applied to more than economic interactions: it "also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets."[83] Amar further argues that this broader reading of "Commerce" is structurally most sound:

> [It] would seem to make better sense of the [F]ramers' general goals by enabling Congress to regulate *all* interactions (and altercations) with foreign nations and Indian tribes—interactions that, if improperly handled by a single state acting on its own, might lead to needless wars or otherwise compromise the interests of sister states.[84]

In accord with the views of Balkin and Amar, the Marshall Court in *Gibbons v. Ogden*[85] defined "Commerce" broadly as "intercourse," and thus as including navigation.[86]

My work with Professor Cooter has been agnostic about whether the Court and supportive commentators[87] or Professors Balkin and Amar have

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81. *See, e.g.*, Balkin, *supra* note 6, at 15–18.

82. *Id.* at 1; *see also* JACK M. BALKIN, LIVING ORIGINALISM 138–82 (2011) (defining "commerce" as "intercourse").

83. AMAR, *supra* note 1, at 107.

84. *Id.*

85. 22 U.S. (9 Wheat.) 1 (1824).

86. *Id.* at 189–90. Marshall reasoned:

> Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Id.

87. *See, e.g.*, Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. ILL. L. REV. 623, 649 (concluding that "[c]ommerce can mean a good deal more than trade—and the fact that it includes navigation is important evidence that it did—while meaning a good deal less than interaction").

the better of this argument.[88] In solo work, I have applied both the Court's economic interpretation as a requirement of governing law, and a collective action approach as an interpretation and justification of pre-*NFIB* law.[89] I have done so in order to establish that the ACA's minimum coverage provision is within the scope of the Commerce Clause even if one accepts the Court's "economic" definition of "Commerce."[90] I am persuaded, however, that the Balkin–Amar interpretation of "Commerce," while very broad, is also likely correct.

For example, a quick Google search of "commerce definition" produces this initial set of definitions of the word "commerce":

> Noun
>
> 1. The activity of buying and selling, esp. on a large scale.
> 2. Social dealings between people.[91]

The first hit below these two definitions produces three definitions from the Merriam-Webster Online Dictionary:

> Definition of COMMERCE
>
> 1: social intercourse : interchange of ideas, opinions, or sentiments
>
> 2: the exchange or buying and selling of commodities on a large scale involving transportation from place to place
>
> 3: sexual intercourse[92]

Such definitions, and definitions like them in the Oxford English Dictionary, [93] suggest that conceiving of "commerce" broadly—as encompassing social intercourse—is no great leap beyond the constitutional text. And, of course, the sexual connotation of "intercourse" endures, which may explain why my less seasoned students giggle when I teach *Gibbons*.

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88. *See generally* Cooter & Siegel, *supra* note 2 (focusing on the distinction between individual and collective action by states, not on the distinction between economic and noneconomic conduct).

89. *See, e.g.*, Siegel, *supra* note 17, at 594 (discussing four constitutional limits on the scope of the Commerce Clause, including a discussion of collective action limits and limits preventing congressional regulation of noneconomic conduct).

90. *See id.* (concluding that the ACA's minimum coverage provision respects several actual or potential constitutional limits on the scope of the Commerce Clause); Siegel, *supra* note 6, at 34 (concluding that the minimum coverage provision is constitutional because it addresses economic problems of collective action facing the states).

91. Commerce Definition, GOOGLE SEARCH, http://www.google.com (search for "commerce definition").

92. *Commerce*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/commerce.

93. *See* 3 THE OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989) (defining "commerce" as, *inter alia*, (1) "Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise"; (2) "Intercourse in the affairs of life; dealings"; (3) "Intercourse of the sexes"; (4) "Interchange (esp. of letters, ideas, etc.)"; and (5) "Communication, means of free intercourse").

True, the primary conception of "commerce" today focuses on market interactions. Consider, for example, the regulatory jurisdiction of the Department of Commerce.[94] Even so, a change in principal meaning over time is no reason for courts to invalidate acts of Congress that meet the broader definition of "Commerce" but not the narrower one. The primary meanings today of other terms of art in the Constitution—such as "Militia,"[95] "Magazines,"[96] "Misdemeanors,"[97] "Republican,"[98] "domestic Violence,"[99] and "Reside"[100]—are also different from what they were at the time of the founding. Their original meanings, however, continue to control interpretation of the Constitution.[101]

Federalists on and off the Court will reject the Balkin–Amar interpretation of "Commerce." In addition to disputing the historical evidence, they may fear that the commerce power is limitless absent a narrow definition of "Commerce." But such fears are overstated. The effect of the Balkin–Amar conception of commerce is not to remove all limits on the commerce power. The effect, rather, is to move constitutional analysis away from the formal question of whether Congress is regulating a *commercial* problem to the functional question of whether Congress is regulating an *interstate* problem—that is, to whether commerce is "among the several States." This analytical move requires an analysis of collective action, which is a structurally more sensible place to look for limits on the Commerce Clause.

Even as federalists reject the Balkin–Amar interpretation of "Commerce," collective action reasoning may be informing their

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94. *See* 15 U.S.C. § 1512 (2006) ("It shall be the province and duty of [the Department of Commerce] to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States . . . .").

95. U.S. CONST. art. I, § 8, cl. 15 ("The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . .").

96. *Id.* cl. 17 ("The Congress shall have Power . . . To exercise . . . Authority . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."). This provision obviously does not refer to reading material.

97. *Id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). *See* AMAR, *supra* note 1, at 222 (observing that "'Misdemeanor' in Article II was best read to mean misbehavior in a general sense as opposed to a certain kind of technical criminality").

98. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."). This provision obviously does not refer to one of the two major political parties in the United States in modern times.

99. *Id.* ("The United States . . . shall protect each of [the States] . . . against domestic Violence."). This provision obviously does not refer to spousal abuse.

100. *Id.* amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."). Today, "reside" is often used in distinction from "domicile."

101. *See* BALKIN, *supra* note 82, at 37 (discussing the examples of "domestic Violence" and "Republican").

determinations of whether the conduct that Congress seeks to regulate is economic in nature. In other words, federalist Justices appear to answer the question of whether the conduct targeted by Congress is "economic" in nature by bundling in collective action logic. It is not always obvious how to identify what the regulated conduct is, nor is it always obvious how to decide whether that conduct is economic. Why, for instance, is personal use of marijuana for medicinal purposes pursuant to state law "economic activity"?[102] Why is growing wheat on one's own land to feed one's family and livestock "economic activity"?[103] The Court upheld federal regulation of both under the Commerce Clause, ostensibly on the ground that they were part of a larger class of economic activity.

Writing for a Court that included Justice Kennedy, in *Gonzales v. Raich* (the case about federal power to regulate medical marijuana use), Justice Stevens relied upon *Wickard v. Filburn* (the case about federal power to impose a wheat quota). Stevens read *Wickard* as "establish[ing] that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[104] The Court's reasoning seemed to turn not on the inherently economic character of the general class of conduct subject to federal regulation, but on its *interstate* character. Specifically, the Court seemed concerned about the collective action problems that would impede separate state regulation of the interstate wheat and marijuana markets.[105] The Court's ostensibly formal conclusion about the nature of the regulated conduct may have resulted from an implicit collective action inquiry into the interstate scope of the problem. If this interpretation is correct, then a collective action approach may be informing the reasoning of those who think they reject it. A straightforward analysis of collective action problems would seem to be more transparent.

Of course, even if federalists were right that a collective action approach was incapable of sufficiently limiting federal power or making sense of the word "Commerce" in the text, they would still need to defend their own

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102. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the Commerce Clause allows Congress to regulate the personal possession and use of marijuana for medicinal purposes pursuant to state law authorizing such possession and use).

103. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the Commerce Clause allows Congress to regulate wheat grown for personal consumption or use).

104. *Raich*, 545 U.S. at 18.

105. *See, e.g.*, *id.* at 19. The Court alluded to a collective action problem:

> [O]ne concern prompting inclusion of wheat grown for home consumption in [the regulation reviewed in *Wickard*] was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market.

Id. (citation omitted).

preferred constitutional limits against charges of arbitrariness. As I have written elsewhere, whether or not the distinction between economic and noneconomic conduct explains when Congress is regulating "Commerce," it does not explain when that commerce is "among the several States."[106] Federalists in essence assume that the regulated conduct is interstate in scope if it is commerce and intrastate in scope if it is not commerce. That seems hard to defend formally or functionally. Formally, the text suggests an *Interstate* Commerce Clause, not an *Any* Commerce Clause. Functionally, the federal government is not necessarily better than the states at regulating economic problems, and the states are not necessarily better than the federal government at regulating noneconomic problems. This is because economic matters may not implicate collective action problems for the states, and noneconomic matters may implicate collective action problems for the states.[107]

What about the Court's most recent Commerce Clause case, *NFIB v. Sebelius*? The distinction five Justices drew between regulating and requiring commerce is even more difficult to defend as an independent limit on Congress.[108] I have elsewhere examined the problems with this distinction from the standpoints of constitutional text, structure, history, precedent, and consequences.[109] Here I will observe only that the distinction between prohibiting (or allowing) a purchase on the one hand, and requiring a purchase on the other—between regulating commerce and compelling commerce—has nothing to do with whether the regulated conduct is interstate or intrastate in scope. If states may mandate private action when a commercial problem is *intrastate* in scope, then the federal government should be able to mandate private action when a commercial problem is *interstate* in scope. Collective action theorists will therefore be inclined to reject the conclusion of five Justices in *NFIB* that the minimum coverage provision is beyond the scope of the Commerce Clause.[110]

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106. Cooter & Siegel, *supra* note 2, at 184 ("However adequate it may (or may not) be for purposes of defining 'Commerce' in Clause 3, the distinction between economic and noneconomic activity seems mostly irrelevant to the problems of federalism; it does not explain when an activity exists 'among the several States' and when it exists within a state."); Siegel, *supra* note 6, at 48 ("Even if the economic–noneconomic categorization can suffice as a rough definition of 'Commerce,' it cannot define when such commerce is 'among the several States' and when it is internal to one state.").

107. This point is stressed in Cooter & Siegel, *supra* note 2, at 164.

108. I offer no view here of whether this conclusion of five Justices is "holding" or "dicta." The answer, it seems to me, turns on whether Chief Justice Roberts was entitled to apply the "classical" canon of constitutional avoidance instead of the "modern" canon. For a discussion, see Siegel, *supra* note 75, at 198–200.

109. *See* Siegel, *supra* note 6, at 41–54.

110. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.) ("The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now."); *id.* at 2649 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[I]t must be *activity* affecting commerce that is regulated, and not merely the failure to

That being said, the conclusion of these five Justices can be reconciled with a collective action approach. A constitutional ban on using the commerce power to impose a purchase mandate rests on a narrow interpretation of the term "regulate" in the Commerce Clause. Such a ban does not rest on an interpretation of the phrase "among the several States," which is the language that collective action theory is best equipped to construe. Accordingly, more than collective action logic is needed to persuasively reject the view that a purchase mandate is beyond the scope of the commerce power, just as more than collective action logic is needed to define the word "Commerce" in the Commerce Clause.[111] To reject the conclusion of five Justices in *NFIB*, what is most needed is the straightforward observation that the term "regulation" has long been understood broadly in American constitutional law. It has been understood to encompass prohibitions, permissions, *and requirements*.[112]

B. Second Objection: The Commerce Clause Has Limits

The upshot of the analysis so far is that the words "Commerce" and "regulate" in the Commerce Clause should be interpreted broadly. There is, however, a potential problem with having the expanse and limits of the commerce power turn on an analysis of collective action problems "among the several states." In economics, an externality is an interdependence in the utility or production functions of different actors.[113] Thus, an "interstate externality" is an interdependence in the utility or production functions of

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engage in commerce. . . . Our test's premise . . . rests upon the Constitution's requirement that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything.").

111. Similarly, more than collective action logic is needed to persuasively reject the Court's anticommandeering principle, another independent limit on the commerce power that the Court has imposed even when the federal law at issue was obviously directed at solving serious, multistate collective action problems. *See* New York v. United States, 505 U.S. 144, 175–76 (1992) (invalidating provisions of a 1985 federal law that required states either to take title to low-level radioactive waste produced within their borders or else to pass certain regulations governing disposal of the waste, on the ground that both options involved unconstitutional commandeering of the states' legislative and administrative apparatuses). *New York* and *Printz v. United States*, 521 U.S. 898 (1997), which also enforced the anticommandeering principle, are nonetheless reconcilable with collective action approaches to the Commerce Clause because such approaches do not reject all other independent limits on congressional power.

112. *See, e.g.*, Seven-Sky v. Holder, 661 F.3d 1, 16 (D.C. Cir. 2011). Judge Silberman wrote:

> At the time the Constitution was fashioned, to "regulate" meant, as it does now, "[t]o adjust by rule or method," as well as "[t]o *direct*." To "direct," in turn, included "[t]o prescribe certain measure[s]; to mark out a certain course," and "[t]o order; to command." In other words, to "regulate" can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation to an interstate market. Nor was the term "commerce" limited to only *existing* commerce.

Id. (footnotes omitted).

113. *See, e.g.*, Cooter & Siegel, *supra* note 2, at 153 n.143 ("An interstate externality refers to interdependence in the utility functions of individuals in at least two states.").

actors in different states.[114] This interdependence may take one of two basic forms. First, it may involve the imposition of material costs or benefits without paying for them (material externalities).[115] An example is pollution in State A that migrates and harms the physical health of residents of State B. Second, this interdependence may involve the imposition of psychological costs or benefits without paying for them (psychological externalities).[116] An example is pollution in State A that stays put but causes residents of State B to object on moral grounds that private industry in State A is harming the health of residents of State A.

Interstate externalities in this technical sense are pervasive, particularly if one broadens the time horizon. In *Lopez*, to reiterate, Justice Breyer was right that guns in schools impact violence in schools, and that violence in schools eventually impacts national economic performance, so that the ways in which states regulate (or do not regulate) guns in schools (eventually) have external effects in other states.[117] Accordingly, an approach to the Commerce Clause that turns exclusively on the existence of any sort of interstate externality risks blowing up the idea of a national government of limited, enumerated powers.[118]

To avoid this consequence, a collective action approach has two primary options. First, it can enforce collective action limits *indirectly* through legal doctrine that employs a conceptually imperfect but relatively determinate proxy for multistate collective action problems.[119] I will call this the "indirect approach." Alternatively, a collective action approach can enforce collective action limits *directly* by limiting the kinds of interstate externalities that justify Commerce Clause legislation. I will call this the "direct approach."

1. The Indirect Approach.—One could commend a proxy approach to the Commerce Clause. Indeed, one could attempt to justify the contemporary Court's distinction between "economic" and "noneconomic" conduct in just this way.[120] The Court's economic–noneconomic distinction may be de-

114. *Id.*

115. *Id.* at 152, 153 n.143, 172–73.

116. *Id.* at 152–53.

117. *See supra* note 41 and accompanying text.

118. I also referenced Justice Breyer's *Lopez* dissent in critiquing the substantial effects test, but this does not imply that the substantial effects test is the same as a test that turns on interstate externalities. While substantial effects on interstate commerce are potential evidence of interstate spillover effects, the two kinds of effects are conceptually distinct. Externalities are limited to effects that are external to the market. They are external to the market because they are unpriced. The Court's current doctrine is thus overinclusive.

119. *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (distinguishing questions of constitutional meaning from the formulation of implementing doctrines).

120. *Cf.* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 159 (2001) ("[T]he Court's attention to where the causal

fended as roughly correlated with the existence or nonexistence of collective action problems involving multiple states, even if some (or much) economic conduct does not cause collective action problems involving multiple states, and even if some (or much) noneconomic conduct does cause such problems.[121]

I am skeptical of such an approach for two reasons. First, as noted in the previous section, the question of whether something is "Commerce" may not have much to do with whether it is "among the several States." This is because economic conduct does not characteristically cause collective action problems for the states, and noneconomic conduct is not characteristically free of collective action problems. Accordingly, Congress is not generally better than the states at regulating "economic" problems, and the states are not generally better than Congress at regulating "noneconomic" problems.

Second, the costs of a relatively poor proxy may be particularly high in this setting because the Commerce Clause licenses federal coercion of individuals. To the extent that constitutional federalism distributes regulatory power vertically in part to prevent unjustified federal interference with individual liberty (a point of emphasis among opponents of the ACA),[122] it follows that the costs of commerce power regulations that do not solve multistate collective action problems may be particularly high. To illustrate the potential coerciveness of commerce power regulations, the Commerce Clause may usefully be contrasted with the Taxing Clause.[123]

Professor Cooter and I have developed an effects theory of the tax power, according to which there is a substantive, anticoercion limit on the scope of the Taxing Clause.[124] Whereas taxes characteristically dampen the conduct subject to the exaction, penalties characteristically prevent the conduct.[125] It is just because taxes dampen conduct without preventing it that taxes raise revenue. If the exaction is relatively modest in amount and thus is a tax, many individuals subject to it reasonably can opt out of federal regulation by paying the tax. By contrast, if the exaction is very high in amount and thus is a penalty, almost everyone subject to it has no reasonable choice but to engage in the congressionally favored conduct. The exaction may be as coercive as congressional use of the Commerce Clause.[126] The

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chain *starts*—i.e., with whether the regulated activity is itself 'commercial' or 'non-commercial'—seems to stem from the Court's reluctance to attempt to draw lines at any later point in the chain of economic interactions.").

121. Cooter & Siegel, *supra* note 2, at 164.

122. *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.").

123. U.S. CONST. art. I, § 8, cl. 1.

124. *See generally* Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

125. *Id.* at 1229–30.

126. For greater specification of what it means for a federal exaction to be relatively modest or very high in amount, see generally *id.* The key distinction is between dampening conduct and

Court's tax power analysis in *NFIB* tracks the effects theory almost exactly.[127]

Professor Cooter and I have written elsewhere that the tax–penalty distinction helps to preserve limits on the Commerce Clause.[128] The distinction stops Congress from taking a regulation backed by a penalty that is beyond the scope of the commerce power, relabeling the penalty a tax, and imposing it under the Taxing Clause. I have just shown something else—that the tax–penalty distinction helps to preserve limits on the Taxing Clause itself. Congress must always respect the particular constitutional constraints on use of a given enumerated power, not all of which concern the existence or absence of a collective action problem.[129] The tax–penalty distinction ensures that Congress uses the tax power only in ways that are consistent with revenue raising. Congress need not intend to raise revenue as a primary objective in order to rely on the tax power—from the very beginning, Congress has used the tax power for both revenue-raising and regulatory purposes.[130] But congressional exercise of this power must result in revenue raising.[131] The tax–penalty distinction guarantees that it will.[132]

In contrast to the Taxing Clause, there is no substantive anticoercion limit on the scope of the commerce power.[133] Not only may Congress require people to pay very large sums of money for violating valid Commerce Clause regulations, but it may also prosecute violators criminally.[134] Accordingly, the harm to the constitutional structure is likely to be greater when the judiciary allows Congress to regulate intrastate commerce than when it allows Congress to tax for intrastate regulatory purposes. Instead of using a relatively unreliable proxy for problems that are

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preventing conduct. To make this determination, we counsel looking primarily to the material characteristics of the exaction: whether it is high relative to the benefit of almost everyone from engaging in the assessed conduct, and whether the amount one must pay increases with intentionality and repetition. Secondarily, we advise looking to the expressive form of the exaction. *See generally id.*

127. *See* Neal Kumar Katyal, *Foreword: Academic Influence on the Court*, 98 VA. L. REV. 1189, 1190–91 (2012).

128. *See generally* Cooter & Siegel, *supra* note 124.

129. In other words, Section 8 as a whole gives Congress the tools it requires to solve all multistate collective action problems. But each enumerated power in Section 8 does not give Congress the power to address every conceivable collective action problem facing the states.

130. *See* Cooter & Siegel, *supra* note 124, at 1204–10 (providing examples from different eras of American history).

131. *See id.* at 1224.

132. *See supra* text accompanying notes 124–27.

133. There is also an anticoercion limit on the scope of the spending power, which I explore elsewhere. *See generally* Robert D. Cooter & Neil S. Siegel, Not the Power to Destroy or Dragoon: Unity in Taxing and Spending Under the General Welfare Clause (May 2013) (unpublished manuscript) (on file with author).

134. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 9 (2005) (upholding a criminal provision of the Controlled Substances Act under the Commerce Clause).

interstate in scope, a collective action approach should find ways to limit the kinds of interstate externalities that justify Commerce Clause legislation.

2. The Direct Approach.—There is no neutral or objective way to limit the kinds of interstate externalities that are admissible in a collective action analysis of the Commerce Clause. For example, people disagree in ideologically predictable ways about whether interstate public goods are few or many in number.[135] They also disagree about whether interstate markets are largely self-regulating.[136] Even so, resources are available that have the potential to attract broad support. I will note three of them.

First, courts should rule out psychological externalities as justifying use of the commerce power.[137] To be sure, psychological externalities can be real and pervasive in a country in which most citizens self-identify as Americans, particularly after a natural disaster, terrorist attack, or other cataclysmic event.[138] Americans care about whether other Americans live or die, have clean air and water, have access to food and shelter, etc. On the more meddlesome side, Americans may also care about what other Americans read, watch, and do in their free time. Professor Amartya Sen used as an example the preferences of two people, one a "prude" and one not, regarding whether the other should read a book that the prude deems obscene and the non-prude deems good literature.[139] It is apt to describe such psychological externalities as busybody preferences.

Regardless of whether particular psychological externalities are normatively attractive, allowing them to justify federal power risks vindicating the federalist objection that a collective action approach confers unlimited congressional authority. Professor Sen's point was that negative psychological externalities pose a threat to individualism in economic theory by making Pareto improvements impossible.[140] In the face of such externalities, every deviation from the status quo that would make one party better off would necessarily make some other party worse off.[141] Similarly,

135. Cooter & Siegel, *supra* note 2, at 152.

136. For a discussion, see *id.* at 152–53.

137. Balkin, *supra* note 6, at 44; *see also* Cooter & Siegel, *supra* note 2, at 153–54 (reserving judgment on this question).

138. *See, e.g.*, Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 404–06 (2005) (recounting instances in American history where public support for humanitarian relief initiatives was used in arguments countering constitutional objections to the proposed measures).

139. Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152, 155 (1970). The book that Professor Sen used in his example is *Lady Chatterly's Lover* by D.H. Lawrence. *Id.*

140. Specifically, Professor Sen demonstrated that preferences about other people's preferences (second-order preferences) undermine the utility of Pareto efficiency as a normative criterion. *See id.* at 157 n.6 ("The difficulties of *achieving* Pareto optimality in the presence of externalities are well known. What is at issue here is the *acceptability* of Pareto optimality as an objective in the context of liberal values, given certain types of externalities.").

141. *See* Cooter & Siegel, *supra* note 2, at 153 & n.144.

psychological externalities pose a threat to state regulatory autonomy in constitutional theory by potentially justifying unlimited federal power.

The tradition of cost–benefit analysis in economics neither categorically excludes nor categorically includes psychological externalities. Rather, economists have tended to handle the issue of psychological externalities by crediting such externalities only if there is a demonstrated willingness to pay to vindicate one's moral concerns. Cheap talk does not suffice.[142] This intellectual tradition can be deployed to help justify the contemporary Court's deference to Congress regarding whether particular federal expenditures promote the general welfare,[143] but it does not justify admitting psychological externalities into a collective action analysis of the Commerce Clause.

In conditional spending cases, Congress conditions federal funds to the states or private entities on the agreement by recipients to act in ways that Congress cannot simply require. In *South Dakota v. Dole*,[144] for example, the Court upheld a federal law that conditioned five percent of federal highway funds on the agreement by recipient states to impose a 21-year-old drinking age.[145] By using the conditional spending power in this and other ways, Congress may be able to achieve regulatory objectives that it may not otherwise be able to achieve.[146] The *Dole* Court, for instance, assumed for purposes of analysis that the Twenty-First Amendment would prohibit Congress from imposing a national drinking age directly.[147]

Significantly, however, Congress's efforts to achieve regulatory objectives through use of the conditional spending power are not cost free. On the contrary, Congress is paying to vindicate whatever regulatory concerns it has.[148] Accordingly, psychological externalities may be available to justify much conditional spending. If psychological externalities are admissible, then the highway deaths on intrastate roads caused when young adults drink and drive may impact the general welfare. If only material

142. For a discussion, see *id.* at 153.

143. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987) ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam))).

144. 483 U.S. 203 (1987).

145. *Id.* at 211–12. The *Dole* Court identified four constitutional limits on conditional federal spending: (1) the spending must be for the general welfare; (2) the condition must be clearly stated; (3) the condition must be related to the purpose(s) of the federal spending program; and (4) the condition must not violate an independent constitutional limit. *Id.* at 207–08.

146. *Id.* at 207 ("Thus, objectives not thought to be within Article I's 'enumerated legislative fields[]' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (citation omitted)).

147. *Id.* at 206.

148. *See* Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 883 n.34 (2008) (arguing that while the Spending Clause "might allow Congress to enact legislation that would go beyond the limits of its other main sources of authority," still "Congress must literally pay a price, both in treasury dollars and political capital, for such expansions").

externalities are admissible, then the problem of highway deaths on intrastate roads is more likely to be local in nature.

The propriety of taking psychological externalities into account when Congress is willing to pay is one way to understand the longstanding judicial practice of deferring completely to congressional determinations of whether particular federal expenditures promote the "general Welfare."[149] In principle, welfare is "general" (in the language of the General Welfare Clause) when and only when commerce is "among the several States" (in the language of the Commerce Clause).[150] Specifically, welfare is "general" or "among the several States" when the federal government can obtain it and the separate states cannot—that is, when spillovers pose a collective action problem for the states. Both bits of constitutional language reference a problem of collective action involving at least two states.

In practice, however, Congress's need to pay to advance the general welfare only in conditional spending power cases may justify a less demanding judicial inquiry into the interstate scope of the regulatory problem. The need for Congress to pay helps to ensure that it is not engaging in cheap talk and thus sensibly limits its use of the Spending Clause.[151] Allowing Congress to spend based on psychological externalities, whose existence and scope may change over time, also helps to make sense of Justice Cardozo's statement for the Court that the concept of the general welfare is not "static."[152] "Needs that were narrow or parochial a century ago," he wrote, "may be interwoven in our day with the well-being of the Nation."[153]

To be sure, when Congress demonstrates its willingness to pay, it is not the same as when an individual demonstrates such willingness. Not only is Congress spending other people's money, but it can also raise taxes to support more spending, and it can deficit spend. Even so, Congress's ability to keep spending is limited; it is not cost free for Congress to work its will through the spending power. Indeed, anticommandeering doctrine perceives a constitutionally significant difference between simply requiring states to regulate on Congress's behalf and offering states money if they agree to

149. U.S. CONST. art. I, § 8, cl. 1.

150. For a discussion, see Cooter & Siegel, *supra* note 2, at 119.

151. The *Dole* Court, at the end of its opinion, mentioned that a "financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). But the Court upheld the drinking-age condition on the ground that Congress was offering only "relatively mild encouragement to the States." *Id.* Twenty-five years later, in *NFIB*, the Court held for the first time that a condition attached to a federal funding program was unconstitutionally coercive, with the Justices fracturing three ways on whether or why the condition was coercive. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608, 2641–42, 2662–66 (2012). For a theory of coercion in conditional spending cases that seeks to bring some clarity to this newly important constitutional question, see generally Cooter & Siegel, *supra* note 133.

152. Helvering v. Davis, 301 U.S. 619, 641 (1937).

153. *Id.*

regulate on Congress's behalf.[154] Only the latter alternative requires Congress to internalize at least some of the costs of its regulatory objectives.[155] This cost-internalization rationale for the anticommandeering principle is stronger than the Court's strained analysis of political accountability.[156]

The Commerce Clause is different from the conditional spending power on the key question of whether Congress has demonstrated a willingness to pay. When resting on the Commerce Clause, Congress need not demonstrate any willingness to pay to vindicate the psychological concerns of people in one state for the welfare of people in other states.[157] Congress need simply impose the requirement. Limiting a collective action analysis to material externalities avoids the unboundedness of an inquiry into nonmaterial externalities—into preferences about other people's preferences—when there is no requirement to pay.

In addition to ruling out psychological externalities as justifying use of the commerce power, there is a second way to limit the kinds of interstate externalities that count in a collective action analysis of the Commerce Clause. Judicial review should turn not just on the *existence* of an interstate externality, but also on its *significance* and on the extent to which the federal law at issue *meaningfully addresses* it. Consider, for example, the regulated conduct in *Lopez*—firearm possession in a school zone.[158] The way that one state regulates this problem does not appear to undermine how other states regulate this problem, and the external effect of guns in schools on national productivity is attenuated and long-term. The externality seems relatively

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154. *See, e.g.*, New York v. United States, 505 U.S. 144, 166 (1992) ("Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.").

155. *See* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1644 (2006). In this article, I identify a cost-internalization rationale for the anticommandeering principle:

> Anticommandeering doctrine vindicates federalism values . . . to the extent that it forces the federal government to internalize more of the financial and accountability costs associated with regulating. As law and economics posits, actors that do not internalize the full costs of their behavior tend to engage in too much of the behavior.

Id. (footnote omitted).

156. *See id.* at 1632. I question the Court's accountability rationale for anticommandeering doctrine:

> Even after factoring in search costs and rational ignorance, it seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front.

Id.

157. *Cf.* Cooter & Siegel, *supra* note 2, at 153–54 (asking whether "the standard of 'willingness to pay' [could] achieve the same success in constitutional law [as in cost–benefit analysis] by limiting the feelings that count as interstate externalities").

158. United States v. Lopez, 514 U.S. 549, 551 (1995).

insignificant. Moreover, in light of the forty-plus state criminal laws already on the books, the Gun-Free School Zones Act (GFSZA)[159] did not appear to meaningfully address the problem.[160] Justice Kennedy was almost certainly right that the regulatory power of the states was "sufficient" to address it.[161] For the most part, the GFSZA seemed to be symbolic grandstanding by the federal government.

Third, courts should impose a reasonableness inquiry in the context of judicial review, in contrast to genuine rational basis review. Questions of significance and meaningfulness are matters of judgment. Reasonable people will often disagree about them. When reasonable people could differ about the significance of a multistate collective action problem and about the adequacy of Congress's response, courts should uphold federal legislation in light of the aforementioned presumption of constitutionality and the tradition of judicial deference to Congress in federalism cases.[162]

A reasonableness inquiry, however, is not the same thing as genuine rational basis review. Under a rational basis test, even *Lopez* may be justifiable on collective action grounds. By contrast, a reasonableness inquiry should require both a plausible theoretical rationale that a significant, multistate collective action problem exists, and some empirical evidence to support that rationale.[163] The stronger the theoretical rationale, the less evidence should be required. And the less plausible the theoretical rationale, the more evidence should be required.

For example, contrast the GFSZA with the ban on racial discrimination in public accommodations imposed by the Civil Rights Act of 1964.[164] As explained in Part I, it was at least reasonable to view the Civil Rights Act of 1964 as meaningfully addressing significant collective action problems involving multiple states in light of the various ways in which Jim Crow laws and policies in the South impeded the interstate travel of African-Americans to Southern states on a temporary basis; distorted the allocation of labor and capital from other parts of the nation; and encouraged the Great Migration of African-Americans in the South to cities in the North.[165] By maintaining racial segregation, Southern states were imposing significant, material costs on the rest of the nation.

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159. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (codified as amended at 18 U.S.C. § 922(q) (2006)).

160. *See, e.g.*, *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.").

161. *Id.*

162. *See supra* notes 73–75 and accompanying text.

163. In constitutional litigation, the federal government should be permitted to supplement the record compiled by Congress, particularly for statutes enacted before judicial imposition of evidentiary demands.

164. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Court held that the Commerce Clause justified provisions of the Civil Rights Act of 1964 that prohibited racial discrimination by hotels and restaurants.

165. *See supra* notes 54–59 and accompanying text.

Key provisions of the Affordable Care Act are also reasonably viewed as meaningfully contributing to the solution of significant collective action problems in light of the mobility or immobility of various participants in health care and health insurance markets, including insurers, hospitals, employers, healthy individuals, and unhealthy individuals.[166] For example, the minimum coverage provision is reasonably viewed as combating cost shifting from the uninsured to other participants in health care markets.[167] This cost shifting is likely interstate in scope because of the presence of "insurance companies in multiple states and the phenomenon of cross-state hospital use."[168] Consider as well the ACA provisions that prohibit insurance companies from denying people coverage based on preexisting conditions and discriminating against them based on their medical histories.[169] These provisions very likely solve collective action problems for the states by facilitating labor mobility, discouraging the flight of insurance companies from states that guarantee access to states that do not, and discouraging states from free riding on the more generous health care systems of other states.[170]

In sum, the foregoing federalist objection to a collective action account of the Commerce Clause warrants serious consideration. The objection appropriately instructs collective action theorists either to defend a good proxy to a collective action analysis, or to limit the universe of interstate externalities that count as multistate collective action problems justifying federal commerce power. Fortunately, resources are available to accomplish the latter task in the context of judicial review. The decisive question in Commerce Clause cases should be whether Congress had a reasonable basis to believe that it was meaningfully addressing a significant, material interstate externality. To support an affirmative answer, a reviewing court could require Congress to proffer both a theoretical rationale and empirical evidence.

To be sure, these resources are not fully determinate; they require contestable judgment calls. But the same is true of any approach to the commerce power that places at least some limits on federal power. Chief Justice Rehnquist thus conceded in *Lopez* that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty."[171] Echoing Chief Justice Marshall, however, he added that "so long as Congress'[s] authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted

166. For a more detailed collective action analysis of the ACA, see generally Siegel, *supra* note 6.

167. *Id.* at 38–39.

168. *Id.* at 33.

169. *See supra* note 15.

170. *See generally* Siegel, *supra* note 6.

171. United States v. Lopez, 514 U.S. 549, 566 (1995).

as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender legal uncertainty."[172]

Conclusion

Nationalists and federalists alike may be inclined to reject collective action approaches to the Commerce Clause. Collective action theory seeks a path between a regime of no judicially enforceable limits on the commerce power and a regime of structurally arbitrary limits on the commerce power. If one does not believe in judicial review of federalism questions, then one should reject collective action approaches, or else should understand them as directed at conscientious legislators, presidents, and citizens. If one does believe in judicial review of federalism questions, and if one believes that only relatively clear rules can meaningfully limit federal power, then one should also reject collective action theory.

I have argued, however, that nationalists and federalists have more reason to accept collective action theory than they may think. A collective action approach justifies substantially more federal power than nationalists may fear, particularly in light of material interstate externalities and the presumption of constitutionality in the context of judicial review. A collective action approach would also impose some structurally sensible limits on the Commerce Clause, thereby speaking to the constitutional commitments of federalists. Collective action approaches largely legitimate—and integrate different decades of—the constitutional regime in which Americans have been living since 1937. Both nationalists and federalists have played major roles in the construction of this regime.

172. *Id.* (internal quotation marks omitted). Rehnquist then quoted *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

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We the People, They the People, and the Puzzle of Democratic Constitutionalism

David A. Strauss*

I. The Illusion of "We the People"

The Constitution, of course, announces that it has been "ordain[ed] and establish[ed]" by "We the People."[1] The idea that the Constitution is somehow the work of "the people"—that it has a meaningful democratic pedigree—is very appealing. But in what sense is the Constitution we live under today the product of "we the people"?

There are several issues. One is that the individuals responsible for the original Constitution may not have been so representative of the people even of their time.[2] Then there is the familiar problem that, even assuming the text was the work of the people at some point, those people (leaving aside the most recent amendments) have not been around for a while. But we are still bound by their handiwork in some ways—which means we are talking about *they* the people, not we the people, and that does not sound very democratic.[3] A third question concerns the ways in which we have departed from what the ratifying and amending generations wanted to do. That means we are arguably acting inconsistently with what we the people ordained and established. But maybe those departures make the Constitution more democratic; I will suggest that, potentially at least, they do. Finally, there is the question why it matters whether the Constitution is democratic. Or—maybe this is another way of asking the same question—what sense of "democratic" would make it a good thing for the Constitution to be democratic.

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1. U.S. CONST. pmbl.

2. *See, e.g.*, Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1498 n.44, 1499–1500 & n.48 (1985) (estimating that, because only property-holding adult white males were enfranchised, and not all of them supported ratification, only 2.5% of the population of the United States at the time voted in favor of ratifying the Constitution).

3. Of course, the Constitution can be amended, *see* U.S. CONST. art. V, but a proposed amendment can be blocked even by a small minority—just over one-third of either House of Congress (unless two-thirds of the states call for a convention), or just over one-fourth of the states.

I will try to answer these questions for a system of common law constitutionalism. I believe that is our system; but even if it is not, or to the extent it is not, I think we can make headway with these questions by considering them in connection with such a system. The idea of common law constitutionalism is that we resolve controversial questions of constitutional law not by examining the text of the Constitution but on the basis of precedents, both judicial and non-judicial, combined with judgments of fairness and good policy—just as common law judges decide questions on those bases.[4] For controversial constitutional issues, the text plays a limited role.

Any frequently litigated constitutional provision will serve as an example. The modal Supreme Court opinion quotes the language of the provision, but then, without any further attention to the language, says something like "We have interpreted this provision to mean . . . ." Then there follows an extended discussion of the precedents.[5] If there is any room to maneuver, the Court shapes the law established by the precedents according to its ideas about what is fair or what makes sense.[6] For lower courts, the emphasis on precedent is, if anything, even greater, because they are bound by the decisions of the Supreme Court and often of their circuit. Also, just as the common law was not concerned with judicial precedents alone—legislation, custom, and even general trends in society were all part of what common law judges considered[7]—so too common law constitutionalism is concerned with non-judicial, as well as judicial, precedent.[8]

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4. For a description and defense of common law constitutionalism, see generally DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

5. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1215–19 (2011) (quoting the text of the Free Speech Clause of the First Amendment but then discussing numerous precedents without any further reference to the text).

6. *See id.* at 1220 (asserting that "hurtful speech on public issues" must be protected "to ensure that we do not stifle public debate").

7. *See* BENJAMIN N. CARDOZO, *Adherence to Precedent: The Subconscious Element in the Judicial Process*, *in* THE NATURE OF THE JUDICIAL PROCESS 142 (1921). Judge Cardozo noted that:

> [W]hen the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have [the judge] declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct.

Id. at 142–43.

8. For an example of an argument based primarily on non-judicial precedent, see the opinions of the Office of Legal Counsel of the United States Department of Justice concluding that the President may make appointments under the Recess Appointments Clause during an intrasession recess of Congress. The most recent opinion, citing others, is Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. at 5–9 (Jan. 6, 2012), http://justice.gov/olc/2012/pro-forma-sessions-opinion.pdf. This position was disapproved by the District of Columbia Circuit in Noel Canning v. NLRB, 705 F.3d 490, 499–507 (D.C. Cir. 2013). *Contra*, Evans v. Stephens, 387 F.3d 1220, 1224–26 (11th Cir. 2004) (holding

To be clear, the claim about common law constitutionalism is not that the text of the Constitution plays no role. It is a fixed point of our constitutional system that the text cannot be ignored.[9] No one can claim that the Constitution requires or forbids something without citing a provision of the Constitution that supports the claim. It is also not acceptable to say that some provision of the Constitution is obsolete and so should be disregarded (in the way that a precedent might be outdated and should be overruled). Beyond that role, there are ways in which the text is very important, but in noncontroversial areas: the text can settle things that need to be settled, one way or another. It is important that we know when a President's term of office ends, for example. It could be very disruptive if we had to resolve that question on a case-by-case basis.

Fixed aspects of the Constitution—provisions that are clear and not subject to serious dispute—raise their own interesting issues about democracy. You could certainly ask, to take a prominent example, in what sense the continued existence of the Senate is democratic.[10] But at least as far as the courts are concerned, questions about the democratic nature of constitutionalism usually arise when there is a dispute about what the Constitution requires—instances in which, for example, the courts have struck down laws that have significant popular support.[11] The problem seems to be particularly acute for common law constitutionalism, because the common law, as it developed in England and the United States, was, generally speaking, subordinate to legislation. It could be objected that using a common law approach to constitutional law presents special problems of democratic legitimacy because—in contrast to the familiar uses of the common law—common law constitutionalism allows common law judging to override the work of elected legislatures.[12]

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that the recess of the Senate, within the meaning of the Recess Appointments Clause, includes an intrasession recess).

9. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) ("The text of the Constitution is authoritative, but many of its provisions are treated as inherently open-textured."); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) ("Arguments from text play a universally accepted role in constitutional debate.").

10. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 49–62 (2006) (noting the disproportionate power of small states in the Senate and concluding that "there is simply no defense for this other than the fact that equal representation of the states was thought necessary in 1787 to create a Constitution that would be ratified by the small states," and that the current division of power in the Senate "has literally nothing to do with measuring national majority sentiment").

11. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (invalidating part of the Bipartisan Campaign Reform Act on First Amendment grounds); United States v. Morrison, 529 U.S. 598, 602, 605 (2000) (striking down the federal civil remedies portion of the Violence Against Women Act); *see also* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 105 ("Judged in any number of ways, *Citizens United* appears to be the most countermajoritarian act of the Court in many decades.").

12. For an objection along these lines, see, for example, JACK M. BALKIN, LIVING ORIGINALISM 54 (2011) (asserting that common law constitutionalism "offers no account of why judicial

I think this particular objection is based on an illusion, although that is not to deny that one can raise questions about whether common law constitutionalism is sufficiently democratic. The illusion derives from the allure of "we the people." If constitutionalism includes judicial review—if judges who are not politically accountable can refuse to enforce laws enacted by elected representatives—then there is an issue about whether constitutionalism is undemocratic.[13] That issue arises because judges, who are less accountable to the electorate, are undoing the work of representatives, who are more accountable.[14] The issue about democracy is an artifact of judicial review, not of a common law approach to the Constitution. Why does it matter whether the unelected judges are enforcing commands put into place by the people who drafted the Constitution a century or more ago, or applying precedent, or for that matter just enforcing their own policy preferences? Unelected judges are thwarting elected officials. That raises the question about democracy.

The illusion is that a common law approach to the Constitution is more undemocratic than enforcing the text of the Constitution because the text of the Constitution is the product of we the people and therefore has a democratic pedigree.[15] So when the courts enforce it, they are just enforcing the will of the people; they are not acting undemocratically. This kind of argument is familiar from Hamilton's *Federalist No. 78*. Hamilton rejected the "imagination" that giving courts the power to strike down statutes "would imply a superiority of the judiciary to the legislative power."[16] Rather, Hamilton said, the power of judicial review was just a way of vindicating the principle that "the representatives of the people" cannot be "superior to the people themselves."[17] The courts "were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."[18] Giving this power to the courts does not "by any means suppose a superiority of the judicial to the legislative power."[19] Rather, Hamilton concluded that it "only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people,

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decisionmaking . . . has any connection to popular sovereignty" because "[j]udges are professional elites, and the precedents of previous judges are the decisions of past elites").

13. This is, of course, a persistent theme, but probably the best known discussion is ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962).

14. *Id.* at 16–17.

15. *See, e.g.*, BALKIN, *supra* note 12 (asserting that judges who use a common law approach to the Constitution "are not engaged in constitutional construction that implements a written plan adopted by We the People; rather they are creating the Constitution through familiar common law methods").

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

17. *Id.* at 466.

18. *Id.*

19. *Id.*

declared in the Constitution, the judges ought to be governed by the latter rather than the former."[20]

If we were dealing with a recently adopted constitutional provision—one adopted by we the people, not they the people—then this argument would be plausible. The will of the people, expressed in a recent amendment, should prevail over the will of the legislature. Of course matters are not so simple, even with respect to recently adopted provisions. No one doubts that the Constitution prevails over ordinary statutes; the questions are always about the proper interpretation of the Constitution. But the main point is that the written Constitution we actually have, including the amendments that give rise to the most litigation, was, as I said, adopted by a long-dead generation. Hamilton's people, at this point in history, are they the people, not we the people. So it is not clear why judicial review that is based on the text is more democratic than judicial review based on precedent.

II. How Common Law Constitutionalism Can Be Democratic

Assuming, though, that judicial review is to some degree undemocratic, we should still care about how undemocratic it is. It might still be a good thing for judicial enforcement of the Constitution to be able to claim some form of democratic legitimacy—of responsiveness to we the people. But what might democracy mean in this context?

Even if democracy just means some version of majority rule, there are difficult problems, of course. We have to decide how the views of the majority will be determined. If there is a system of representation, how are the representatives chosen—are they elected from districts or at large from the nation? If they are elected from districts, how are those districts identified? What are the representatives' terms of office? There are also questions about how citizens' votes are aggregated. Does the system use proportional representation, or "first past the post" voting, or a requirement of a majority vote, with a runoff if necessary? What roles do political parties play, in and outside the representative assembly? How is the agenda set in the representative assemblies? Are the assemblies unicameral or bicameral? Is the executive separate from the legislature? And then there are crucial questions about the process surrounding the voting: questions about, for example, the scope of free speech and regulation of the means of influencing votes, such as financial contributions and expenditures.

The multiplicity of these questions, and the difficulty of answering them, show that it is not obvious what constitutes a truly democratic system of government. That alone should cause us to hesitate about contrasting "democratic" elected government with "undemocratic" judicial review. Having said that, however, in a system with something like judicial review, there will be elements that are avowedly undemocratic in the sense that they

20. *Id.*

are not subject to the usual majoritarian processes. Judges are insulated from popular opinion: federal judges, at least, are appointed, not elected, and they "hold their Offices during good Behavior."[21] Conventional understandings, not spelled out in the Constitution, would condemn a judge who viewed herself simply as an agent of popular will.

Still, though, rather than describing judicial review as "counter-majoritarian"[22]—as if it were the antithesis of democratic government—it might be better to say that there is a continuum. Life-tenured judges are different from elected representatives, of course, but if you think about a representative who has a safe seat, and whose chances of losing an election are therefore minimal, or a representative who does not plan to run for reelection, the differences with judges—as far as democratic credentials are concerned—are not so stark. Perhaps more important, all representatives are insulated to a degree; some of them (such as United States Senators) serve relatively long terms of office,[23] and there is no understanding that representatives must respond to every twist and turn of constituent opinion.[24] That suggests that a good constitutional order has elements that are highly responsive to popular opinion and elements that are designed to be less responsive.[25] In that sense, any plausible constitutional system is, to some degree, undemocratic.

When courts override the elected branches in the name of the Constitution—whether they use a common law approach or something else—they are doing something undemocratic in this sense. But because any plausible constitutional order has some undemocratic elements, that alone does not call judicial review into question. The important questions about constitutional interpretation and judicial review concern the nature and extent

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21. U.S. CONST. art. III, § 1.

22. *See* BICKEL, *supra* note 13 (discussing the "root difficulty" of judicial review's "counter-majoritarian" nature).

23. *See* LEVINSON, *supra* note 10, at 50 ("I suspect that the country has probably been reasonably well served by the six-year term. It encourages taking a more long-term view than do members of the House, who are constantly aware that they will face a new election literally within twenty-two months of taking their oaths of office."); William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEXAS L. REV. 1273, 1281 (2009) (noting that "the Senate, with long terms and statewide districts, is expected to be a 'select and stable' body").

24. *See* Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 214 (2009) (remarking that "[n]o one expects there to be an exact correspondence" between the laws of a nation and the preferences of the citizens governed by them because citizens' preferences are not coherent at "the individual [and] collective levels," may not correspond to their "true interests," and might be trumped by "more important principles" such as minority rights).

25. *See* Eskridge & Ferejohn, *supra* note 23 (arguing that "each part of the lawmaking process plays a different deliberative role," with the House of Representatives being "most responsive to popular attitudes and demands" and the Senate "apply[ing] longer term considerations of 'reason and justice' to measures urgently sought by the House"); *cf.* James E. Fleming, *Toward a More Democratic Congress?*, 89 B.U. L. REV. 629, 640 (2009) (concluding "attempts to make Congress more democratic" would not fix the institution's problems).

of these undemocratic elements. What is the role of these (relatively) undemocratic institutions? Should the courts intervene only on behalf of certain minorities? On behalf of some supposedly enduring national values or traditions? On behalf of principles supposedly encoded in the text of the Constitution? The interventions will, in a sense, be undemocratic, but that is not necessarily a problem. In fact, it may be a good thing.

I do not think we should stop there, though. There should be some way to show that constitutionalism, including judicial review, is democratic. That is, there should be some account of how the Constitution that is enforced against majoritarian institutions is the work of we the people. But the account should be a realistic one that does not pretend we are the same people we were 220 or 150 years ago.

Before I try to give such an account, it is worth addressing a theory that seems to solve this whole problem neatly. The theory is usually called dualist democracy.[26] The idea is that the Constitution is actually a product of a democratic process that is superior to ordinary day-to-day majoritarian processes.[27] The ordinary processes are more heavily influenced by interest groups or elites—not truly by the people, who are engaged more with their own lives and not so much with the business of government.[28] But from time to time, according to this theory, the people are mobilized, and that enables a superior democratic sensibility to prevail.[29] The Constitution, on this view, is

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26. The best-known contemporary statements are in 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7 (1991) [hereinafter ACKERMAN, FOUNDATIONS], which differentiates between rare decisions made by the people—"higher lawmaking"—and decisions made more frequently by the government—"normal lawmaking"—and 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 5 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS], which describes higher lawmaking as taking place under a "heightened sense of democratic legitimacy" and normal lawmaking as the "countless decisions made in the absence of mobilized and politically self-conscious majority sentiment." See also the discussion of the dualist nature of constitutional democracy in JOHN RAWLS, POLITICAL LIBERALISM 231–33 (expanded ed. 2005), which traces the central idea to John Locke's *Two Treatises of Government*, and refers to "Locke's distinction . . . between the people's constituent power to establish a new regime and the ordinary power of officers of government and the electorate exercised in day-to-day politics."

27. *See* ACKERMAN, FOUNDATIONS, *supra* note 26, at 6 (arguing that the Constitution "accords to decisions made by the People" only when an "extraordinary number" of citizens take a proposal seriously, opponents of the decision have "a fair opportunity to organize," and a majority of Americans "support [the] initiative as its merits are discussed, time and again, in the deliberative fora provided for 'higher lawmaking'"). For a somewhat similar account, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–59 (1999). *See, e.g.*, *id.* at 151 ("The formation of the Constitution depended on popular deliberation, and it was drafted and ratified on the basis of the persuasion of the whole, not the assertion of a part.").

28. *See* ACKERMAN, FOUNDATIONS, *supra* note 26, at 243–51 (identifying bureaucrats, public and private interest groups, the mass media, and political parties as the primary vehicles of normal politics).

29. *See id.* at 266–67 (describing a period of "mobilized popular deliberation" in which a "movement's transformative proposals are tested time and again within the higher lawmaking system").

the product of these periods.[30] Judges should treat as the Constitution the decisions that are the product of these heightened periods of popular political engagement, the so-called constitutional moments.[31]

In American history, the framing of the written Constitution was one such constitutional moment, but it was not the only one. The other usual candidates are the period after the Civil War and the New Deal.[32] We need some criterion to determine when constitutional moments have occurred, and we need a way of identifying the decisions that are going to be attributed to these periods of heightened engagement. Then those decisions, being truly the decisions of we the people, can, according to the theory of dualist democracy, be enforced during normal times, against the less fully democratic decisions of the interest groups and the elites.[33]

This theory solves the problem of the supposedly undemocratic nature of judicial review by echoing Hamilton's discussion in *Federalist No. 78*.[34] When judges enforce the Constitution, they are vindicating, not defeating, the true will of the people. That is because the true will of the people is expressed in the decisions made during constitutional moments, not in the day-to-day product of the political system. Judges invalidate the latter when it is inconsistent with the former.

I do not think this theory works, for several reasons. There is the problem of identifying the periods of superior democratic engagement. It is not obvious that things like, for example, higher voting turnout or greater participation in political organizations should be enough to establish greater democratic legitimacy in the sense we need. The theory would have to identify, with specificity, the problems that afflict normal majoritarian processes and then show how those problems are overcome when certain conditions are present. That kind of demonstration presents serious normative and empirical difficulties—normative issues about what kind of citizen participation brings about the superior democratic deliberations and empirical issues about the circumstances that will produce that kind of

30. *See id.* at 267 (describing the final phase of higher lawmaking, legal codification, in which "the Supreme Court begins the task of translating constitutional politics into constitutional law, supplying the cogent doctrinal principles that will guide normal politics for many years to come").

31. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984) ("Although constitutional politics is the highest kind of politics, it should be permitted to dominate the nation's life only during rare periods of heightened political consciousness. During the long periods between these *constitutional moments*, a second form of activity—I shall call it normal politics—prevails." (emphasis added)).

32. *See, e.g.*, ACKERMAN, FOUNDATIONS, *supra* note 26, at 58 (identifying the "three great turning points of constitutional history" as the Founding, Reconstruction, and the New Deal).

33. *See id.* at 6–7 (outlining "the basic idea" of a dualist democracy as one where normal lawmaking occasionally cedes to higher lawmaking by which a mobilized populace signals to their government "new marching orders," finally "culminat[ing] in the proclamation of higher law in the name of We the People").

34. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 16, at 466 (asserting that "the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority").

participation. The circumstances that cause people to get highly engaged in politics might not be conducive to higher quality decision making.[35] In fact, the opposite might be true: periods of crisis might precipitate a lot of political engagement but also bring out the worst in people.

But even if it were possible to identify constitutional moments in the past when the authentic will of the people was expressed, dualist democracy would still not make judicial review democratic.[36] For one thing, unless the constitutional moments were in the recent past, it is still they the people, not we the people. The youngest person who voted for Franklin Roosevelt in 1936 is 98 years old today.[37] Being ruled by the decisions of the New Deal generation is not particularly democratic.

And even apart from that difficulty—and again assuming we have identified genuine constitutional moments—there is the problem of figuring out what decisions were made by "the people" during those periods. That problem is hard enough when the constitutional moment produces a full-blown written Constitution, together with extensive records of drafting and ratification debates. Even when we have those materials, there is often no consensus on what the people decided during the constitutional moment: we have the familiar debates about the original understandings. When the process is not that explicit—when no canonical text emerges from the constitutional moment—we have to determine what decisions to attribute to a people who were no doubt divided on many issues, had multifarious concerns, and probably did not realize that they were engaged in a form of constitution making. That determination will not be easy. It will have to be made by someone—a judge, for example. And that just reproduces the same problem about the democratic basis of judicial review.[38]

Finally, dualist democracy is, I think, not an accurate description of our system. Many major constitutional developments did not emerge all at once as the product of something that could plausibly be described as a unified set of decisions by a politically engaged population. Those developments came about over time, often in fits and starts. It is not possible, for example, to identify a two- or three- or five- or even ten-year period in which racial equality emerged as a governing principle in American constitutional law;

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35. *See, e.g.*, Jon Elster, *The Optimal Design of a Constituent Assembly*, *in* COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 148, 149 (Hélène Landemore & Jon Elster eds., 2012) ("Actual constitution making is often a messy business, triggered by crises of one kind or another and rarely governed by the 'calm, sedate medium of reason.'").

36. *See, e.g.*, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 765 (1992) (book review) (arguing that a proponent of dualist democracy "cannot make a principled choice between the disinterested voice of a People long since dead and the voice of today's living stand-ins").

37. Interview by Ray Suarez with Elzena Johnson, Delegate to the 2012 Democratic Nat'l Convention, in Charlotte, N.C. (Sept. 6, 2012), *available at* http://www.pbs.org/newshour/bb/politics/july-dec12/elzena_09-06.html.

38. *See, e.g.*, Klarman, *supra* note 36, at 770 ("Even having established that a constitutional moment had occurred, courts . . . would still need to ascertain its content.").

there were important antecedents to the 1954 decision in *Brown v. Board of Education*[39] (including the post-Civil War period, of course, as well as events in the twentieth century), and the Civil Rights Act of 1964 hardly marked the end of the process.[40] The same is true of freedom of speech,[41] women's equality,[42] the growth of the administrative state,[43] the expansion of federal power over the national economy,[44] and the emergence of presidential dominance in national security affairs.[45] It is not realistic to attribute these developments to a single decisive act (or a closely related set of decisive acts) by the electorate. These constitutional developments were the product of a much more evolutionary process.

Is there, then, a meaningful way in which a constitution that is enforced against majoritarian decisions can be called democratic? As I said, I will consider a common law constitutional system, although I think the argument has application beyond that. For the sake of exposition, I will consider a simple model that seems relatively undemocratic: constitutional principles are developed through judicial precedent alone and then used, by federal judges, to invalidate laws enacted by Congress and state legislatures. I should emphasize that this is not the whole of common law constitutionalism. Other actors besides judges—legislators, executive branch officials, and citizens—rely on precedent too. And judges (as well as these other actors) invoke non-judicial precedent, not just the work of judges. But common law constitutionalism is at its most undemocratic when judges rely on judicial precedent alone. So if that kind of system is sufficiently democratic, it follows *a fortiori* that common law constitutionalism as a whole is adequately democratic.

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39. 347 U.S. 483 (1954).

40. *See* STRAUSS, *supra* note 4, at 85–92 (discussing how earlier events influenced the Court's decision in *Brown*); *see generally* Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1 (2009) (describing events and landmark Supreme Court cases concerning racial equality from the mid-1800s to present).

41. *See* David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (attributing the current state of free speech law to an evolution arising from "judicial decisions and extrajudicial developments").

42. *See, e.g.*, Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (grounding ratification of the Nineteenth Amendment in a history that began with the drafting of the Fourteenth Amendment).

43. *See generally* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920 (1982) (describing the creation and growth of federal administrative agencies).

44. *See, e.g.*, Larry Kramer, *What's a Constitution For Anyway? Of History and Theory, Bruce Ackerman and The New Deal*, 46 CASE W. RES. L. REV. 885, 921 (1996) ("The New Deal called for a significant expansion of federal authority, to be sure, but from a constitutional perspective, the increase was quantitative rather than qualitative.").

45. For a comprehensive discussion, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

There are at least three ways in which such a judge-centric system, contrary to appearances, is democratic.[46] The first—probably the most obvious—is that although federal judges do not run for office and cannot easily be turned out of office, they are embedded in a democratic system. They are selected and confirmed by elected officials. Judicial appointments can, of course, be used to try to entrench the views of a governing coalition for some time after the coalition has lost power.[47] But at least at the time of their appointment, most judges will have views that are roughly in line with popular sentiment.[48] In their general outlook and sensibilities, they are likely to be mainstream figures[49] (which may be good or bad, but is more democratic than the conventional view of judges as "countermajoritarian" actors would suggest). And even the views of a defunct coalition will probably still have many adherents.

Also, the judiciary is a multi-member institution; that reduces the chance that any outliers with truly idiosyncratic views who slip through the majoritarian appointment process will have a lot of influence. And judges do not serve forever. They will at least be within a generation or two of the people who are immediately affected by their decisions—which is more than can be said about the people who drafted and ratified most of the written Constitution or participated in the leading candidates for constitutional moments.

Second, precedent reflects popular sentiment to a degree. That is easy to see if we consider non-judicial "precedent" that includes developments in the society as a whole. For example, the decisions interpreting the Constitution to forbid many forms of discrimination against women could, on a common law view, legitimately derive support from trends in the larger society that pointed toward women's equality—changes in nonconstitutional law, and changes in the economy and the society as well. But even strictly judicial precedent will have a more difficult time surviving if it is too far out of touch with popular sentiment. Elected officials will resist precedents that are highly unpopular—that is, even if the officials obey specific orders from the courts, they may refuse to recognize some decisions as proper interpretations of the Constitution unless they are specifically ordered to do

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46. Many others have suggested, in various ways, that judicial review is less countermajoritarian than it appears. See, for example, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 229–40 (2009); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006); and Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113 (2012).

47. *See, e.g.*, Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, 138–61 (Ronald Kahn & Ken I. Kirsh eds., 2006).

48. *See id.* at 142–43 ("[J]udges . . . tend to represent the political agenda that was most salient at the time of their appointment.").

49. *See* Lain, *supra* note 46, at 164 ("Like the rest of us, Supreme Court Justices are a product of their time.").

so.[50] In addition, unpopular precedents will come under pressure from new judicial appointees, including judges on lower courts who will implement them grudgingly. Citizens may also resist them, if they have the opportunity. All of these forces will tend to keep precedent from drifting too far from public opinion.

Finally, judicial review itself will become vulnerable if the courts deviate from public opinion too much and too often. In a generally democratic system, institutions that are unacceptable to large numbers of people will have trouble surviving in fact, if not in name. The long-term general acceptance of judicial review—which, if I am right, operates by means of a common law-like approach—is a sign that that approach is, at least, not too objectionable to too many people. Of course, none of these things demonstrates that a majority of the people always supports judicial review, or common law constitutionalism, no matter what the courts do. But majority support is not the point; if it were, judges would be elected the way legislators and chief executives are. The point is just that there is a meaningful sense in which common law constitutionalism is democratic.

This last point applies not just to judicial review but to other aspects of the system—arguably undemocratic elements, like the Senate,[51] or elements that are hard to classify as democratic or not, such as the requirement that presidential elections be held every four years instead of at some other interval.[52] If the system as a whole is broadly responsive to popular sentiment, then particular elements of the system will not be able to survive if they encounter massive popular disapproval. Obviously this does not mean they are ideally democratic, on the assumption that we know what "ideally democratic" means. But it does put a floor under them; it limits how undemocratic these institutions can become.

Of course, it is still true that the system can be improved. The improvements might be done in the name of some specific normative view about what a well-functioning democracy looks like. So one might argue for the popular election of the President, for example, in preference to the Electoral College. In the case of judicial review, the argument would be that the best conception of democracy requires that the courts defer more to certain legislative and executive decisions than to others. This kind of argument prevailed in the mid-1930s, when the Court abandoned economic due process and began following the approach to the Constitution described

50. *See, e.g.*, BICKEL, *supra* note 13, at 258–64 (describing reactions of Presidents Jackson, Lincoln, and Franklin Roosevelt to decisions they disapproved).

51. *See* LEVINSON, *supra* note 10 (criticizing the "[i]llegitimate Senate" for its system of unequal representation and the resultant redistribution of resources from large states to small states).

52. *See id.* at 116–18 (suggesting that the rigidity of the President's term of office may be undemocratic in light of the inability of fixed terms to guarantee good policy or serve as a measure of political stability).

in the *Carolene Products* footnote.[53] The claim, at the time, was that the appropriate judicial role in a democracy is the one described in the footnote; by implication, the approach the Court had been taking before was insufficiently democratic. To some extent, this revision in the role of the courts was probably prompted by elite opinion, but the Supreme Court, at least, also responded to some of the democratic forces I described.[54] It came under pressure from popular opinion, and its membership changed; the new appointees were chosen by a popular president who wanted to recast the Court's role.

There is no single theory of democracy that is obviously right, and, for that reason, among others, no single way of establishing, beyond dispute, the democratic credentials of judicial review and common law constitutionalism. But those credentials exist. The Constitution that is in the National Archives was the work of they the people. But the Constitution we actually have—an evolutionary one, not one that is under glass—actually is, in important ways, the work of we the people.

53. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (proposing a heightened standard of judicial review, among other things, for legislation aimed at "discrete and insular minorities").

54. For a historical discussion of the significant events preceding *Carolene Products* and the impact of these events on the Court's jurisprudence, see FRIEDMAN, *supra* note 46.

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Constitution-Making: An Introduction

Mark Tushnet*

Alexander Hamilton's observation that the people of the thirteen colonies were the first to be given the opportunity to define their constitution "from reflection and choice" rather than "accident and force"[1] may have been accurate, but that opportunity now extends to people everywhere. The precise issues that constitution makers confront vary widely and depend on the specific historical circumstances under which they operate. Generalizations are difficult, perhaps impossible, to come by. Yet, we can identify some issues about constitutional design that arise repeatedly. Focusing on some of those issues, this Essay examines some of the more important conceptual and practical issues associated with modern constitution-making. Part I asks: Why make a constitution? Part II examines the definition of the people for and perhaps by whom the constitution is being made, and Part III turns to questions about the inclusiveness of the constitution-making process. Part IV takes up questions about the scope and comprehensiveness of the constitution.[2] The conceptual and practical role played by the "constituent power" in constitution-making is a pervasive theme.

I. Why Make a Constitution?

Why make a constitution? Consider first a "new" nation, perhaps one that has successfully struggled to secede from another, or one that emerges from deep intranational conflict. Such a nation might "need" a constitution for several reasons. The primary one is that in the modern world a constitution is probably regarded by the international community as a prerequisite to statehood,[3] perhaps not as a matter of formal international law[4] but as a matter of practical reality. Second, and perhaps only the

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1. THE FEDERALIST NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. The Essay touches on some issues about the content of modern constitutions, when such issues intersect with the topics of primary concern, but does not explore questions of content in detail.

3. *See* David Landau, *The Importance of Constitution-Making*, 89 DENV. U. L. REV. 611, 614 (2012) (observing that, in the modern era, almost all new states have sought to implement constitutions quickly).

4. Formal international law may require not much more than effective control over a territory and, perhaps, some democratic means of governance, which need not, however, be instantiated by a constitution. *See* Pan American Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49

obverse of the preceding point, domestic actors may treat the existence of a constitution as establishing or symbolizing the nation's existence as a state.[5] Third, constitutions are convenient ways of laying out the formal contours of the mechanisms for exercising public power.[6] Finally, in nations with heterogeneous populations—an increasingly large proportion of the world's nations—a constitution can serve as an expression, perhaps the only one available, of national unity.[7]

Constitutions as maps of power may be somewhat inaccurate. The realities of power may not be fully reflected in a constitution. For example, a nation's constitution might adopt a presidentialist form of government, yet the formal powers conferred on the president might not correspond to the practical power that the charismatic leader for which it was written actually has.[8] The inaccuracies can be even greater, as when constitutions purport to place limits on the exercise of public or private power in settings where that power is in practice unlimited. Standard usage is to describe constitutions where the inaccuracies are quite large as "sham" constitutions, with the so-called Stalin Constitution for the Soviet Union as the primary example.[9] Yet, the category of sham constitutions is inevitably imperfect. Practice in almost every nation will fail to correspond with some aspects of each nation's formal constitution, at least from some perspective, and so we need a metric for determining when the shortfall is great enough to make the constitution a sham. That metric is again almost inevitably going to be a matter of

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Stat. 3097, 3100 ("The state as a person of international law should possess the following qualifications: *a*) a permanent population; *b*) a defined territory; *c*) government; and *d*) capacity to enter into relations with the other states."); *see also* JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE (forthcoming 2013) (manuscript at 6), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186496 (noting that the emergence of a new state depends chiefly on international acceptance of its existence rather than formal recognition by international law).

5. *See, e.g.*, U.S. CONST. pmbl. (stating explicitly that "the People" established the Constitution "to form a more perfect Union").

6. *See* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 87–88 (1999) (discussing how constitutions serve to coordinate basic societal functions).

7. *See* John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, *in* LAW AND DISORDER IN THE POSTCOLONY 1, 32 (John L. Comaroff & Jean Comaroff eds., 2006) ("[T]he flight into constitutionalism . . . embraces heterogeneity within the language of universal rights—thus dissolving groups of people with distinctive identities into aggregates of person [sic] who may . . . enact their difference under the sovereignty of a shared Bill of Rights." (emphasis omitted)). I thank Dennis Davis for this reference. *See also infra* text accompanying note 20 (discussing the *demos* of a heterogeneous nation).

8. *See* Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77, 79 (1997) (observing that a charismatic executive is likely to win battles with the judiciary in cases of legal uncertainty); William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193, 209–33 (2012) (providing examples of charismatic leaders who were able to circumvent constitutions or push through authoritarian constitutions).

9. *See, e.g.*, Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEXAS L. REV. 1763, 1812 n.228 (2004) (referring to constitutions that do not resemble realities, "perhaps best exemplified by the old Soviet Constitution," as "sham constitution[s]").

controversy: How much weight should it give to shortfalls with respect to rights as against shortfalls with respect to government structure, for example? Further, consider a nation where the shortfalls are unquestionably large. That nation's constitution might not be a sham if power holders treat the constitution as aspirational, setting goals that they (sincerely) hope to achieve by pursuing the policies, concededly inconsistent with the formal constitution, they have adopted.

Constitution-making can occur in nations with established constitutions as well. Here we need to distinguish between amendments, which are routine,[10] and the replacement in full of a constitution already in force.[11] Replacements can occur when the existing constitution has become outdated to the point where "merely" amending it would take a great deal of effort, particularly when specific desirable amendments might interact with existing arrangements in ways that require deliberate "reflection and choice." Or, replacements can occur when those holding power under the existing constitution have become substantially discredited for reasons that critics associate with the constitution in place.[12] These latter replacements might be described as involving constitution-making in crisis conditions and so might be thought to resemble some postconflict constitution-making processes. But, as I will argue, there are sometimes important differences between postconflict and "discredited system" constitution-making.

II. The Foundation of Constitution-Making: The Constituent Power

In recent years the idea, originally articulated in the era of the French Revolution, that constitutions ultimately rest on a "constituent power" has become increasingly prominent in theorizing about constitutional fundamentals.[13] Roughly speaking, the constituent power is the body of the

10. Amendments are routine at least conceptually, though the rules for placing amendments in the constitution may vary in their stringency. Stringent amendment rules, of course, reduce the rate at which amendments are successfully added to an existing constitution.

11. The line between amendments and replacements is blurred in nations whose courts are committed to the doctrine that some amendments are substantively unconstitutional and in nations whose courts enforce a distinction, written into an existing constitution, between constitutional amendments and constitutional replacements. For additional discussion, see *infra* subpart IV(B).

12. *See* Catherine Dupré & Jiunn-rong Yeh, *Constitutions and Legitimacy over Time*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 45, 52–53 (Mark Tushnet et al. eds., 2013) (discussing how a country might prefer to replace an old constitution that deals with past wrongs as a means of breaking with the past regime).

13. *See, e.g.*, Damian Chalmers, *Constituent Power and the Pluralist Ethic*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 291, 293–98 (Martin Loughlin & Neil Walker eds., 2007) (discussing the origins of the concept of "constituent power" and its role in constitution settlement).

people from whom the constitution's authority emanates.[14] That rough statement conceals many complexities, though.[15]

One paradoxical way of identifying the core difficulty is this: The constituent power sometimes is called into being by the very process of constitution-making that presupposes the existence of the constituent power. Sometimes this is expressed in the proposition that constitution-making presupposes a *demos*—a people—for whom the constitution is to be a constitution.[16] This appears not to be universally true, though. The United States may be an example of a nation that was created by the very act of constitution-making—whether that act occurred with the adoption of the Declaration of Independence, the Articles of Confederation, or the U.S. Constitution.[17] And, more generally, sometimes constitution-making involves nation *building*, the creation of a single nation unifying previously diverse entities. Perhaps the creation of the Federation of Malaysia out of various distinct Malay states each under British control is an example.[18] Constitutions created for the purpose of unifying a heterogeneous nation might be understood as vehicles for the creation of a *demos*.[19]

Normative and practical difficulties arise even when there is a preexisting *demos* that can exercise the constituent power. Consider first postconflict constitution-making, where the conflict has involved deep ethnic or religious divisions. The question of who constitutes the nation is likely to be at issue in the constitution-making process. This can have intensely practical aspects. Those participating in the process will have to decide from what territory the constitution drafters will be drawn. Drawing the boundaries in one or another way will sometimes explicitly and almost always implicitly determine who the *demos* is in a setting where the parties

14. *Id.* at 293.

15. I discuss one such complexity—whether the constituent power can be regulated by law—below in connection with the question of whether existing mechanisms for replacing a constitution are legally binding and with the question of including purportedly unamendable provisions in a constitution. *See infra* text accompanying notes 29–33 and subpart IV(B).

16. *See* Chalmers, *supra* note 13, at 293 (noting that the idea of constituent power "suggests a collective subject—be it a Nation, *demos*, public or people—which has some originary power to give birth to the constitutional settlement and which stands transcendental and normatively pre-eminent over it"). This is an important theme in contemporary discussions of whether it is possible to write a constitution for Europe in the (claimed) absence of a European people. *See, e.g.*, J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision*, 1 EUR. L.J. 219, 228–31 (1995).

17. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462–87 (1994) (examining the relationship between the Constitution and the Declaration of Independence, the Articles of Confederation, and various state constitutions with respect to the legality of the founding of the nation).

18. For the constitutional background, see generally ANDREW HARDING, THE CONSTITUTION OF MALAYSIA: A CONTEXTUAL ANALYSIS 30–45 (2012).

19. Jürgen Habermas has developed this idea in the course of his treatment of the idea of "constitutional patriotism" as a means of bringing the peoples of Europe together in a constitutionalized European Union. For a discussion, see Justine Lacroix, *For a European Constitutional Patriotism*, 50 POL. STUD. 944 (2002).

implicated in the conflict all contend that they were part of all of the relevant *demos*. An example might be the creation and subsequent separation of India and Pakistan.[20] Or, consider that conflicts produce diasporas—people who once were unquestionably part of the *demos*, and so would have been included in the constituent power, but who left the territory in part because of the conflict. Should those members of the diaspora who want to participate in the constitution-making process be allowed to do so?[21]

Further, the constitution-making body cannot actually be the people as a whole. For purely practical reasons, that body can be at most representative of the people. Its members may claim to speak in the aggregate for the people, but shortfalls are inevitable. This is especially so where the constitution-making body is composed in substantial part of representatives of political groupings or "parties"[22]—the scare quotes because the groupings need not have all or indeed any of the organizational trappings usually associated with political parties. Some groupings may be left out of the constitution-making process for seemingly practical reasons. They might be too small to warrant a seat at a table already crowded with representatives of larger ones or might lack the organizational capacity to participate meaningfully in the body's work.[23] Yet, these small groupings might be socially or normatively significant, as with indigenous peoples in many

20. *See* Am. Political Sci. Ass'n, *Notes from the Editors*, 106 AM. POL. SCI. REV., no. 4, Nov. 2012, at iii, v (describing the "boundary problem" that one cannot democratically decide how to demarcate the relevant *demos* and citing the partition of India as an example of a violent contest over such a border determination). Although the case is not exactly analogous, the expulsion of Singapore from the Federation of Malaysia, and Singaporean leader Lee Kuan Yew's reported comment that the expulsion "anguish[ing]," suggests the stakes of the boundary-drawing question. *See* EDWIN LEE, SINGAPORE: THE UNEXPECTED NATION 598 (2008).

21. Improvements in international communications make it easier today than earlier to include the diaspora in these processes.

22. *See* MARTIN VAN VLIET ET AL., CONSTITUTIONAL REFORM PROCESSES AND POLITICAL PARTIES 14–21 (2012) (discussing the role and challenges of political parties in constitution-making processes); Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1056–58 (2008) (explaining that power-sharing agreements between parties may ensure that those outside the parties' networks have "little to no chance of having any significant political power" and "participatory constitution making may only provide challengers with limited opportunities for political inclusion").

23. *See* Yash Ghai & Guido Galli, *Constitution-Building Processes and Democratization: Lessons Learned*, *in* DEMOCRACY, CONFLICT AND HUMAN SECURITY 232, 242–43 (Int'l IDEA ed., 2006) (explaining that some groups in the constitution-building process are at a disadvantage to other groups that have more funding or are better organized). Historically, of course, even large groups have been omitted from constitution-making—most notably women. Jon Elster, *Ways of Constitution-Making*, *in* DEMOCRACY'S VICTORY AND CRISIS 123, 129 (Axel Hadenius ed., 1997). This Essay concerns modern constitution-making processes, though, and today such omissions are rare, though underrepresentation is not. *See* VIVIEN HART, U.S. INST. OF PEACE, SPECIAL REPORT: DEMOCRATIC CONSTITUTION MAKING 11 (2003), *available at* http://dspace.cigilibrary.org/jspui/bitstream/123456789/4581/1/Democratic%20Constitution%20Making.pdf?1 ("Participatory processes have worked to overcome . . . racial and ethnic exclusions and have been notable . . . for the very visible inclusion of women."); Ghai & Galli, *supra* (cataloging some successful modern constitutions that were created without meaningful public participation).

nations.[24] Even those who might claim to speak for the smaller groupings, such as representatives from NGOs, sometimes have a problematic relation to those groups.[25]

For these reasons it is perhaps misleading to think that the constituent power is an actual aggregate entity in the real world. Rather, it should be understood as a concept that helps explain the normative basis for a constitution's claim to authority. But, the difficulties and shortfalls I have sketched raise questions about the nature of that claim to authority. The claim, I believe, should be understood not as implicating something akin to sociological legitimacy, or the facts about whether or to what degree people actually believe themselves to be obliged to submit to authority, but rather in purely conceptual terms. The practical payoff, then, might be small, though I believe that using the idea of the constituent power does sometimes support clearer thinking about some practical problems.

A nation with a constituent power in the relevant sense must get the constitution-making process started somehow. Today some constitution-making processes are assisted by elements of the international community, either international organizations such as the United Nations or individual nations.[26] That assistance is provided when there is some need.[27] Ordinarily that need arises from within the nation.[28] So, processes with international assistance—or even prodding—ordinarily get started from within.

They do so, in general, in two settings. The constitution in place may provide mechanisms for its own replacement, and the constitution makers may use those mechanisms.[29] But, to the extent that the constitution makers

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24. *See, e.g.*, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Report on the Situation of Indigenous Peoples in Nepal*, ¶¶ 16, 52–58, U.N. Doc. A/HRC/12/34/Add.3 (July 20, 2009) (by James Anaya) (discussing the significance and challenges of indigenous peoples in Nepal and calling on Nepal to improve the representation and participation of indigenous peoples in its constitution-making process).

25. *See, e.g.*, Davidson C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEXAS L. REV. 1657, 1674–75 (2009) (describing how civil society groups, including women's, youth, environmental, and religious groups, participating in Burma's democratic constitution movement banded together with political groups to form "umbrella groups," whose ability "to speak for their members is complicated and often obscure").

26. *See* Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1479–80 (2008) ("In many situations, external forces—nations such as the United States, which are important sources of external capital, and organizations such as the United Nations—think it important that a new domestic constitution have input from external advice givers."). For a skeptical discussion of the role of the international community in constitution-making, see *id.* at 1487 ("Yet, to the extent that politics is what matters, present and future, I am quite skeptical about the proposition that outsiders will be able to improve on the calculations internal participants already make.").

27. *Id.* at 1480.

28. *Id.*

29. *See, e.g.*, U.S. CONST. art. V (providing procedures for the calling of a second constitutional convention); *see also* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 21 (2006) (offering

are (or see themselves as) representatives of the constituent power, they may believe that they are not *legally* constrained by existing mechanisms. The theory is that those mechanisms are themselves the product of the constituent power, which always has unconstrained power. This is sometimes put in this way: After the constituent power creates a constitution, every action taken within that constitutional framework is an exercise of constituted power.[30] This is clearly so, in this theory, of ordinary legislation, of ordinary constitutional amendments, and even of constitutional replacements made according to the provisions of the constitution. But, the constituent power always retains the power to reconstitute the constitution on its own terms; that is, on terms set at any time by the constituent power as it is.[31] So, for example, it is commonplace to observe that the U.S. Articles of Confederation provided that they could be amended only with the unanimous consent of the states making up the Confederation,[32] but the U.S. Constitution—a replacement of the Articles—provided that it would take effect when nine of the thirteen states ratified it.[33] According to the theory of the constituent power, the example illustrates the constituent power being exercised in 1787–1789 in a manner inconsistent with the constituted power in the Articles, a constituted power that itself was an exercise of the constituent power in 1777–1781. Put another way, the constituent power always has the ability to call itself into being, disregarding restraints created *by itself* in an earlier appearance.

In a second version, constitution-making processes get started without there being a preexisting framework for constitutional revision, which can be described as constitution-making in a vacuum. Twentieth-century experiences of decolonization are good examples: Colonizing powers simply withdrew, sometimes facilitating the constitution-making process but not acting as participants in that process.[34] Some revolutionary transformations are similar in structure. The *ancien regime* has collapsed and its supporters have fled, leaving the field open for a complete constitutional revision. As

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that while Article V makes it "next to impossible" to amend politically controversial provisions, such replacement is still an "abstract possibility").

30. *See* Lars Vinx, *The Incoherence of Strong Popular Sovereignty*, 11 INT'L J. CONST. L. 101, 102, 108 (2013) (describing that a written constitution legitimates ordinary laws enacted in accordance with its authority where the constitution has been created by an act of the people's constituent power).

31. *Id.* at 108. I put to one side the possibility that international law might impose some constraints on the constitution-making process. For a discussion of examples of internally imposed restraints on the constituent power, see Jennifer Widner & Xenophon Contiades, *Constitution-Writing Processes*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW, *supra* note 12, at 57, 67–68. Such international constraints, if they exist, are imposed externally on the constitution makers.

32. ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 1.

33. U.S. CONST. art. VII.

34. *See* DIETMAR ROTHERMUND, THE ROUTLEDGE COMPANION TO DECOLONIZATION 245–50 (2006) (discussing constitution-making during the twentieth-century decolonization of European colonies in Africa and Asia).

my use of the term *ancien regime* suggests, revolutionary France can be taken as an example of this process,[35] and the flight of loyalists from the to-be United States gave the drafting of the U.S. Constitution something of the same flavor.[36]

France and the United States are imperfect examples of constitution-making in a vacuum, and indeed there may be no perfect ones. The reason is that constitution-making does not occur on a desert island to which the constitution makers have just arrived. It occurs in real, historical time under real, historical circumstances. This leads to another tension in constitution-making exercises. The tension is between the power relationships as they exist when a new constitution is created and the power relationships that the new constitution both ratifies to some extent and creates to some extent.

Sometimes the collapse of the *ancien regime* means that its supporters have lost *all* political power. This may be true, for example, in some cases of imposed constitutions, where a conquering power creates a constitution for its now-defeated enemy. Nazis had no role in creating (West) Germany's Basic Law, for example.[37] Still, the complete collapse of preexisting political power is rare. Conservative supporters of the Japanese emperor played some part in the adoption of the postwar Japanese constitution even though it is usually described as a constitution imposed by the occupying forces.[38] Royalists were active participants in the French constituent assembly of 1789–1791,[39] and even in Germany conservative representatives participated in the Basic Law's creation.[40]

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35. JAMES R. ARNOLD, THE AFTERMATH OF THE FRENCH REVOLUTION 28 (2009).

36. *See* JAMES A. HENRETTA ET AL., AMERICA'S HISTORY 187, 189 (7th ed. 2011) (recognizing that after the American Revolution the loyalists fled and that "[a]s Patriots embraced independence in 1776, they envisioned a central government with limited powers").

37. *See* Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443, 445–46 (2000) (relating that four years after the fall of the Third Reich, German leaders undertook to draft a constitution with "human dignity" as a central tenet, in response to the country's Nazi past). Technically, the Basic Law was designed as the "constitution" of a temporarily divided Germany, to be replaced by a national constitution upon reunification. As things happened, reunification was accomplished without fundamental revisions of the Basic Law. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 31–32 (1994).

38. *See* KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 111–37 (Ray A. Moore ed., trans., 1997) (describing the process by which the conservative Japanese government "Japanize[d]" the draft constitution written by the American staff of the Supreme Commander for the Allied Powers).

39. *See, e.g.*, Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 370 (2000) (noting that one delegate, Mounier, argued for a royal veto of whatever constitution the assembly produced). Mounier was part of *Les Monarchiens*, a group at the assembly whose members were "loyal supporters of the monarchy." ERIC THOMPSON, POPULAR SOVEREIGNTY AND THE FRENCH CONSTITUENT ASSEMBLY 1789–1791, at 10–11 (1952).

40. *See* Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1309 (2008) (recounting that the Christian Democratic Union, a political party with some conservative elements, had a large number of seats in the drafting body).

More commonly, elements of the former regime participate directly in constitution-making. This is obviously true when the push for a new constitution comes when the existing constitution is understood to be functioning clumsily and so requires extensive but not revolutionary updating.[41] More dramatic changes can occur only with the agreement, or at least acquiescence, of those empowered by the about-to-be-replaced constitution. Roundtable negotiations have become one important form of constitution drafting.[42] These negotiations bring together representatives of the regime in place with representatives of the forces that all acknowledge will soon take power.[43] Communist parties sat at the negotiating table in central and eastern Europe as their political domination was disappearing,[44] as did the white National Party in South Africa's roundtable negotiations.[45]

The reasons for such participation are clear. Those dominating the existing regime are universally understood to be on their way out, but roundtable negotiations are aimed at smoothing the path to their exit.[46] This means that the constitution being drafted has to gain their agreement.[47] Otherwise they will resist being displaced and violence will break out (or break out again, in some cases).[48] Even more, in many cases participants in the constitution-making process understand that those who formerly held complete political power will retain significant power after the transition. South African whites, represented by the National Party, would have

41. *See* MICHELE BRANDT ET AL., INTERPEACE, CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS 261 (2011) (stating that roundtable discussions with the old regime usually occur in times of crisis, when the old constitution "does not provide a legitimate basis or adequate guidance for a workable constitutional reform process").

42. *See id.* at 261, 263–64 (discussing the importance and role of roundtable negotiations in constitution-making).

43. *See* Laurel E. Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, *in* FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 601, 620–21 (Laurel E. Miller & Louis Aucoin eds., 2010) (discussing the use of roundtables "as a means of bringing together elements of the outgoing regime and new democratic formations").

44. *See* Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, *in* FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 43, at 3, 11 (noting the presence of the Communist Party at roundtable talks in Bulgaria, Hungary, East Germany, and other countries as part of the transition to democratic government).

45. *See* Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid*, *in* FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 43, at 111, 119–21 (discussing the participation of the National Party in various negotiations prior to and during the South African constitution-making process).

46. *See* BRANDT ET AL., *supra* note 41 (describing the roundtable negotiation process as being useful in transitions between regimes because it enables legal continuity); Miller, *supra* note 43, at 622 (noting that roundtables are useful in transitional settings where "the outgoing regime retains enough support or power to remain a relevant player" because of the value of legal continuity and consensus building).

47. *See* Miller, *supra* note 43, at 622 (noting that roundtable cooperation with an outgoing regime that retains some support builds "stability, consensus, and legitimacy").

48. *See* BRANDT ET AL., *supra* note 41, at 263 (stating that in crisis situations roundtable failure could lead to violence).

substantial economic power in an African-dominated government,[49] and Communist parties in central and eastern Europe continued to have members who held on to strong collectivist visions of governance.[50] So, agreement from representatives of the former regime is needed not only to ensure a peaceful transition, but also to ensure that the new constitutional system is stable because everyone, including those representatives, finds it acceptable.

Constitution makers hope that the institutions they are creating will be stable over time.[51] Political stability requires at least acquiescence from nearly all groups that have significant power, whether political, cultural, or economic.[52] That requirement implies that even transformational constitutions project existing power relationships into the future, though they also seek to alter those relationships. Yet, doing so poses risks. The projecting of power relationships may limit the achievement of transformative goals. Excluding representatives of the *ancien regime* from constitution-making processes—as occurred, for example, as a result of the military occupation of the defeated Southern states after the U.S. Civil War[53]—may generate resistance to the new arrangements, resistance that can itself limit the transformative possibilities.

We can bring out the tension that this exposes by overstating it as a paradox: Constitution-making processes will either be unnecessary or ineffective. Those holding power must agree to the new arrangements. But, they will do so only when they are confident that they will not be seriously disadvantaged by those arrangements. They can have that confidence when the new constitution does not change things much.

Clearly this is an overstatement. The postcommunist constitutions and the South African constitution did change things substantially, with the

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49. *See* Patricia Agupusi, *Trajectories of Power Relations in Post-Apartheid South Africa*, 4 OPEN AREA STUD. J. 32, 39 (2011) (stating that whites still hold significant economic power in South Africa and therefore "have a huge influence on policies that affect their interests"); Robert Pear, *South Africa's National Party: Vehicle for Afrikaner Power*, N.Y. TIMES, Sept. 7, 1989, at A14, *available at* http://www.nytimes.com/1989/09/07/world/south-africa-s-national-party-vehicle-for-afrikaner-power.html?pagewanted=all&src=pm (noting the National Party's success at securing economic empowerment for white Afrikaners).

50. *See, e.g.*, RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 151–52 (1996) (noting that in Poland negotiation with the communist government officials led to an agreement guaranteeing the communists seats in parliament and stating that the new presidency "remained in the hands of the communists").

51. This is true even of constitutions expressly understood as transitional because the drafters of such constitutions typically envision, in rough outline, the contours of the regime that a new, permanent constitution will have. This is exemplified by the inclusion in the transitional South African constitution of a set of principles that would have to be incorporated in, or provide the structure for, the permanent constitution. S. AFR. (INTERIM) CONST., 1993, § 71; *id.* sched. 4.

52. I have inserted the qualification "nearly all" because on rare occasions it may be possible to create a constitution over the objection of a protesting minority, whose continuing protests will be met with forcible suppression by the new regime.

53. *See, e.g.*, CARL H. MONEYHON, THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON ARKANSAS 165 (1994) (noting that following the Civil War, Congress refused to seat Arkansas's representatives).

agreement of representatives of the former regimes who knew that their political positions would be significantly different once the new constitutions were in place.[54] Some participants in constitution-making may understand, if only vaguely, that the new arrangements they are creating will start a process of incremental change in power that will build on itself to produce substantial alterations in the distribution of power over time.[55] The intervening period may be long enough, or may be hoped to be long enough, for those benefiting from the existing distribution of power to adjust, leave, or learn how to regain power under the new arrangements.[56] Still, it may be worth considering the possibility that new constitutions themselves do not change anything but only ratify a change in the distribution of power that has already occurred.

Jon Elster provides some support for the tension between effectiveness and irrelevance in his observation that constitution-making often occurs under circumstances unfavorable to careful design.[57] When constitution-making occurs during crisis or, sometimes, after the exhaustion of conflict, constitution makers may find themselves pressed to reach some conclusion within a compressed time period.[58] The felt urgency conduces to quick compromises without substantial attention being paid to how the constitution will operate once adopted.[59] Such constitutions may be ineffective. Where constitution-making occurs in the absence of a crisis, constitution makers

54. *See* LUDWIKOWSKI, *supra* note 50 (describing this process in Poland); Ebrahim & Miller, *supra* note 45, at 121–22, 147 (noting such an occurrence in South Africa).

55. *See, e.g.*, Daniel J. Elazar, *Constitution-Making: The Pre-Eminently Political Act*, *in* CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 3, 6 (Daniel J. Elazar ed., 1990) (noting how the Yugoslav Constitution was revised to reflect changes in power distribution).

56. *See, e.g.*, Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, *in* FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 43, at 350, 356 (observing that the sponsors of Hungary's two original draft presidential constitutions sought to "institutionalize an elaborate, electorally centered transition, in which political power would not be risked for a considerable period—an arrangement that a reformist, partially democratic system of the rule of law was to legitimize"); Ebrahim & Miller, *supra* note 45, at 120 (noting that the division of the South African constitution-making process into two phases "concretized a fundamental compromise between those who sought a swift transition to majority rule and those who sought to preserve some governmental influence and group privileges for the constituencies of the ancien regime").

57. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 394, 396 (1995).

58. *See* BRANDT ET AL., *supra* note 41, at 47 (explaining that factors suggesting urgency include the risk of returning conflict, the risk of a coup, an impending election, or foreign pressure); Elster, *supra* note 57, at 394–95 (discussing the role of time pressure and crisis in effective constitution-making). Sometimes the period may be extended over time, but then primarily because the parties to the negotiation treat the constitution-making process as a continuation of the crisis or conflict.

59. *See* Elster, *supra* note 57, at 394 (suggesting that passion rather than reason is most present when drafting a constitution in a crisis).

may deliberate carefully but, feeling no real pressure, may largely reinscribe in the new constitution the power arrangements of the existing one.[60]

III. The Processes of Constitution-Making: Questions About Inclusiveness

The U.S. Constitution was drafted by an unrepresentative, small group meeting behind closed doors.[61] Such a process would, generally speaking, be unacceptable today. International organizations and NGOs would assert with some plausibility that it would be inconsistent with some soft norms of international law, and it is almost certainly inconsistent with what specialists in constitution-making regard as best practices.[62] Probably more important, except under unusual circumstances, domestic audiences would regard it as an inadequate basis for generating a constitution that will become binding domestic law.[63]

Contemporary constitution-making processes must be inclusive in some general sense. Satisfying that requirement at both the drafting and the adoption stages raises some interesting general questions.

A. Inclusiveness in Drafting

Until recently it would have been obvious that constitution drafting could not directly include wide segments of a nation's people. The only possibility was achieving inclusiveness by ensuring that the drafting body was sufficiently representative of all the relevant constituencies.[64] Iceland's recent constitution-drafting exercise suggests that this might no longer be true in its strongest form. The drafting there was "crowdsourced," with every Icelander having the right—and power—to submit suggestions for constitutional provisions through social media websites utilized by the constitution-revision body.[65] In that sense the drafting process included every Icelander who was interested in participating. One can imagine similar crowdsourced drafting processes even for nations larger than Iceland.[66]

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60. *See id.* at 394–95 ("If people find themselves with all the time they need to find a good solution, no solution at all may emerge.").

61. *See* George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 971–72 (1991) (stating that small committees drafted the Constitution in private to ensure frank discussion).

62. *See* Landau, *supra* note 3, at 619–20 (asserting that some organizations maintain that governments should come to power through democratic means).

63. *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 312 (2010) (recognizing an open-government movement in the United States and asserting that there is less support for secrecy in recent decades).

64. *See* Elster, *supra* note 57, at 373–74 (detailing how the United States, France, and Germany created assemblies to draft new constitutions).

65. *See Icelanders Back First 'Crowdsourced Constitution,'* EURACTIV.COM, Oct. 22, 2012, http://www.euractiv.com/enlargement/icelanders-opens-way-crowdsource-news-515543 (describing how Icelanders submitted feedback through Facebook and Twitter).

66. Ireland provides another recent example. *See* Eoin Carolan, *Ireland's Constitutional Convention Considers Same-Sex Marriage*, INT'L J. CONST. L. BLOG (Apr. 9, 2013), http://www

Existing political groupings and parties will almost certainly affect how crowdsourcing and similar mechanisms of direct public participation in drafting actually operate. For example, parties may prompt their members to submit identical proposals, thereby multiplying the apparent public support for the proposals.[67]

Of course the proposed Icelandic constitution was not "drafted" through crowdsourcing, which simply generated ideas and tapped public sentiment. Someone had to do something with the citizenry's suggestions. Winnowing the outlandish from the strange but plausible, for example, would seem essential to making the process work. And, even were the drafters to start out regarding themselves as no more than charged with selecting the most popular suggestions and placing them in the constitution, they could not maintain that posture permanently. Some suggestions might be completely inconsistent with others. The drafters might submit them in the alternative to the public at the adoption stage.[68] More important, constitutional provisions often interact. Suppose there is overwhelming support for Provision A, quite a bit of support for Provision B, and slightly less support (but still a substantial amount) for Provision C. A constitution that contained A and B might be unworkable in predictable ways,[69] so the constitution's writers might choose to place A and *C* in the constitution.

The crowdsourcing example illustrates a more general point about constitution writing. An inclusive process can generate a wide range of perfectly decent proposals for the constitution, but integrating them into a single document that will serve as the blueprint for an effectively functioning

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.iconnectblog.com/2013/04/irelands-constitutional-convention-considers-same-sex-marriage-2 (describing public submissions to a constitutional convention that is a "hybrid of 'ordinary' citizens and experienced political representatives").

67. I owe the idea of party prompting to Lauren Coyle. The phenomenon known as "astroturfing" in the United States is similar; the term is used to describe communications from the "grass roots" that are actually coordinated by elite organizations. *See, e.g.*, Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 200–01 (2012) ("A 1935 congressional investigation uncovered what we would now term an 'astroturf' campaign, whereby utility companies paid for the sending of over 250,000 telegrams to Washington, written by utility company employees, and often forging the signature of senders.").

68. The referendum on adopting the Icelandic constitution asked voters to express their opinion on six specific options for inclusion in the constitution as well as on the constitution as a whole. *Referendum: Eighty Percent Want National Resources Declared National Property*, ICE. REV. ONLINE (Oct. 21, 2012, 2:20 PM), http://www.icelandreview.com/icelandreview/daily_news/Referendum_Eighty_Percent_Want_Natural_Resources_Declared_National_Property_0_394572.news.aspx. Tom Ginsburg, *Iceland: End of the Constitutional Saga?*, INT'L J. CONST. L. BLOG, (Apr. 6, 2013), http://www.iconnectblog.com/ 2013/04/iceland-end-of-the-constitutional-saga/, describes the Icelandic Parliament's rejection of most of the referendum's results.

69. The best recent example of this kind of unworkability is Israel's short-lived experiment with electing a Prime Minister separately from electing Parliament. Predictably, the Prime Minister lacked support from Parliament because voters chose a "leader" as Prime Minister and voted for narrower parties pursuing sectarian interests when they cast their votes for Parliament. *See* Yüksel Sezgin, *The Implications of the Direct Elections in Israel*, 30 TURKISH Y.B. INT'L REL. 67, 86 (2000).

government requires a fair degree of technical skill.[70] The technicians, almost certainly lawyers and legal academics, sometimes with the assistance of international organizations and NGOs,[71] may regard themselves as faithful servants of the inclusive process. Almost inevitably, though, lawyers' technical concerns will have some effects—predictable and unpredictable—on the meaning of the constitution they write.[72] To the extent that constitutions as written are to be *legal* documents, inclusiveness will be tempered to some degree by the necessary concern for technicality.

Inclusiveness will almost always be tempered by more than that, though. Assume that the drafting body—a constituent assembly—is adequately representative of the nation's constituents. Under modern conditions it will have to function with some substantial degree of openness. The secrecy of the U.S. constitutional convention would no longer be broadly acceptable.[73] As Jon Elster has emphasized, conducting constitution writing in secret has advantages.[74] It allows participants to make unprincipled bargains, tradeoffs that cannot be justified on the basis of any deep view of what the new government should look like or do but are justified only on the shallow but important ground that the tradeoffs are required to get agreement on the constitution overall.[75] Afterwards, the constitution's advocates can invent principled accounts to justify the results (not the tradeoffs), or hope that they will be ignored as part of a larger discussion. And, Elster argues, drafting in public leads participants to posture for public consumption and to stick with their positions longer than is desirable,[76] out of concern for seeming to waffle on important issues.

As a practical matter, drafting can rarely be done in public anyway. Public discussions by drafters might produce agreement on a few items, but many others are likely to be intractable without hard bargaining of the sort that is difficult to do in public.[77] Instead, the drafters will retreat to the back rooms, or to dinner tables, where the important work will be done.[78]

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70. *Cf.* Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 208 (2009) (positing that the drafting phase of constitution-making under a model involving direct consultation with the public or representative groups is "likely to be the least participatory [phase], given the challenges of writing-by-committee, much less writing-by-nation" and remarking that "in some well-known cases, the public is excluded from the drafting process and not consulted at all").

71. *See* Bryan Schwartz, *Lawyers and the Emerging World Constitution*, 1 ASPER REV. INT'L BUS. & TRADE L. 1, 7 (2001) (asserting, in the context of international agreements, that certain governments draw heavily on lawyers at the drafting stage).

72. *See id.* at 10 ("When lawyers draft they sometimes achieve results that are hard to understand because they have tried too hard to anticipate and provide for every possibility.").

73. *See* Pozen, *supra* note 63.

74. Elster, *supra* note 57, at 388.

75. *See id.* at 388–89.

76. *Id.* at 388.

77. *See id.* ("[P]ublic debate drives out any appearance of bargaining . . . .").

78. *See id.* at 395 (arguing that the constitution-drafting process should include some elements of secrecy to avoid grandstanding and rhetorical overbidding).

Whether a combination of seeming openness with openness with respect to some matters and secrecy with respect to others will be acceptable to modern audiences is probably highly dependent on circumstances. Some political cultures may accept the combination, and others may resist it.[79] In the latter case, and sometimes in the former, secrecy may be impossible for another reason: leaks. Again, unlike the conditions in 1789 Philadelphia, today keeping sensitive information under complete control may be close to impossible. A person angry about what has just happened behind closed doors may tweet some information; some participant in the dinner table conversation may strategically disclose it "in confidence" to a journalist; many other variants are possible.[80]

The effects of all this can be put as a chain of contradictions. Contemporary constitution writing must occur in substantial part before an observing public, but effective constitution writing must occur in substantial part behind closed doors. But keeping information behind closed doors is in practice impossible. Probably the best one can hope for is that sometimes things will work out so that there is "enough" openness and "enough" secrecy.[81]

B. Inclusiveness in Adoption

A newly drafted constitution must be adopted. And, again, today adoption generally requires a substantial amount of popular participation.[82] Popular participation can take place at two stages after a new constitution is proposed—through processes that allow the people to propose, and the constitution drafters to adopt, revisions in the initial proposal[83] and through ratification processes.[84]

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79. *Compare* Pozen, *supra* note 63, at 299 ("[I]t is not incompatible with [the United States'] national ethos for the government to conceal many things."), *with Icelanders Back First 'Crowdsourced Constitution,' supra* note 65 (explaining how Icelanders used social media to provide input on a new constitution).

80. For an example of and commentary pertaining to a constitution that was leaked, see Nathan J. Brown, *Constitution of Iraq Draft Bill of Rights: Commentary and Translation*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 21, 2005), http://www.carnegieendowment.org/files/BillofRights.pdf (last updated July 27, 2005). Adrian Vermeule pointed out to me the complexity of the process of strategic leaking: The recipient knows that the leaker is breaching the stated norms for political purposes, which gives the recipient reason to discount the accuracy of the information contained in the leak.

81. For example, leaked information might produce only a minor setback in the progress of the backroom negotiations, perhaps because it deals with something the leaker is more concerned about than are other participants.

82. I omit discussion here of constitution-making processes that either by their own terms require vetting by some other body, typically a constitutional court, or by constitutional-court interpretation requiring such vetting. The use of a vetting body raises interesting questions about whether the constituent power can be controlled by law, which I address briefly below. *See infra* text accompanying notes 130–31.

83. *E.g.*, *Icelanders Back First 'Crowdsourced Constitution,' supra* note 65 (describing Iceland's constitutional-drafting process, which incorporated the social-media-generated feedback of citizens); *see also* Zachary Elkins et al., *The Citizen As Founder: Public Participation in*

Both stages require the dissemination of the proposal, and dissemination cannot be merely mechanical—simply distributing the proposal widely.[85] Rather, the nation's people must have the opportunity to understand the proposal.[86] Technical and political issues can arise in connection with the educational processes necessary for effective dissemination. Particularly in nations with low literacy rates, the mechanisms for dissemination must use channels other than descriptive writing. In the recent past, visual depictions in graphic form ("comic books," disparagingly), and radio and television transmissions were used;[87] today social media are available. Using any of these alternatives raises questions beyond the technical because translating the proposed written constitution into some other form inevitably alters its meaning. Some alterations will be substantively consequential, which means that those charged with the task of translation have the power to redefine some constitutional provisions, sometimes in politically controversial ways. Those who find themselves disadvantaged by the translation may organize to oppose going forward with the constitutional process; they may argue that they do not oppose the constitution as written but rather the constitution as it is being described by the means of dissemination.

Even before the availability of crowdsourcing techniques, sometimes the people were asked to comment on the proposed constitution before they were asked to ratify it. Sometimes quite a substantial number of comments were submitted.[88] One can be skeptical about the value of the comment process. As with other forms of crowdsourcing, popular suggestions may impair the technical integrity of the constitutional draft. More important perhaps, such suggestions run the risk of undoing compromises reached during the drafting process.[89] Further, political groupings or parties that only

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Constitutional Approval, 81 TEMP. L. REV. 361, 365–66 (2008) (identifying "direct consultation" as a method of popular participation in constitutional design).

84. *See* Elkins et al., *supra* note 83, at 364 (referring to ratification as "[t]he modal form of participation in constitutional design").

85. *See* HART, *supra* note 23, at 7 (discussing examples of nations that have "experiment[ed] with new structures and forms of participation . . . to develop an open process").

86. *See* Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C. J. INT'L L. & COM. REG. 263, 277 (1999) ("In a society which has limited experience with successful constitutional governance . . . the drafters must also popularize and educate the people about these concepts, for a people cannot be wedded to something which they do not understand.").

87. *See id.* at 294 (recounting the use of comic books and radio broadcasts to educate Eritreans about their constitution-making process); HART, *supra* note 23, at 8 (discussing South Africa's use of numerous forms of media—including radio, television, and cartoons—to educate and involve the public in the constitution-making process).

88. *See, e.g.*, HART, *supra* note 23, at 7 (stating that South Africans made two million submissions to their country's Constitutional Assembly); Elkins et al., *supra* note 83, at 366 (mentioning a report that 61,000 citizen submissions were made to Brazil's Congress as part of its constitution-making process).

89. *See* Elkins et al., *supra* note 83, at 371–72 (noting that an open process can "make bargaining and the granting of concessions more difficult" and "hinder tough choices and compromise").

grudgingly accepted the constitutional draft may use the comment process as a wedge for reopening matters that others regarded as settled. Popular participation may in this way undermine the very legitimacy that it is supposed to generate.

One response to these difficulties is to defang the comment process by treating it as merely cosmetic. That is, innocuous suggestions may be incorporated in a revised proposal to demonstrate that the comment process was meaningful, but truly significant suggestions, even those with substantial support, may be disregarded. More study of comment processes is needed, but my present view is that these comment processes are more often cosmetic than substantial.

Either in its initial or a possibly revised form, a proposed constitution must then be ratified to become binding law. At this point the distinction between constitution-making via established amendment processes and constitution-making via some other mechanism returns to prominence. Depending on the existing constitution's amendment rules, new constitutions developed as constitutional amendments might not require popular ratification. So, for example, if the amendment rule requires only parliamentary approval by a qualified majority (such as a supermajority, or majorities in successive sessions), a new constitution adopted through the amendment process might not be submitted to the people for ratification. There might be an emerging soft norm of international law that requires popular ratification no matter what domestic mechanism for proposing a new constitution is adopted, though as a soft-law norm the requirement lacks effective enforcement.[90] Popular ratification is almost certainly regarded as "best practice" in constitution-making today.[91]

Ratification is desirable, even if not required, in part to ensure that the new constitution has domestic legitimacy. Typically ratification occurs through a national referendum.[92] Some issues already mentioned recur at the ratification stage, but sometimes in a more focused way.[93] Political parties

90. As an example, the Venice Commission, an advisory component of the Council of Europe, expressed concern about the scope of recent revisions to the Hungarian Constitution, made without popular ratification, but has no power to do more than that. European Comm'n for Democracy Through Law (Venice Comm'n), *Opinion on the New Constitution of Hungary*, ¶¶ 6, 144, Council of Eur., Op. no. 621/2011 (June 20, 2011), *available at* http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx.

91. *See* Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 668 (2006) (arguing, based on a study of constitution-making processes in postconflict environments, that "the more representative and more inclusive constitution building processes resulted in constitutions favoring free and fair elections, greater political equality, more social justice provisions, human rights protections, and stronger accountability mechanisms"); Tushnet, *supra* note 26, at 1491 ("Modern constitution making appears to require some form of popular ratification of a proposed constitution.").

92. Elkins et al., *supra* note 83, at 364.

93. For a case study of the Kenyan process in which this occurred, see Alicia L. Bannon, Note, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824 (2007).

may organize in support of or against ratification, and their campaigns can have all the characteristics of ordinary political campaigns, including severe simplification of complex issues, sometimes to the point of distortion or deception.[94]

The ratification referendum may result in the adoption or defeat of the proposed constitution. Often ratification defeats are described as failures,[95] though the term may be inapt. A defeat may signal that the proposed constitution was not in fact well-suited to the nation as it then was, even though it might be well-designed for a nation that might have been transformed were the constitution to have been adopted. In parallel, a referendum vote in favor of adopting the constitution should not in itself be treated as a success full stop. Whether it is a success will depend on how well the constitution functions once it is in place and operating for a while.

C. *Concluding Thoughts About Inclusiveness*

The practical concerns about drafting and adoption discussed in the preceding sections show that the concept of constituent power discussed in Part I intersects with practical issues of constitution-making. When Abbé Sieyès introduced the idea of constituent power, it served primarily a conceptual end, that of explaining why a constitution created as the French constitution was had a claim to authority: It had authority because it was an act of the constituent power convened in a self-described constituent assembly.[96] Whether the participants in the constituent assembly actually represented real constituencies rather than notional ones was largely irrelevant.[97] Today real representativeness in its creation is the foundation of a constitution's authority. Inclusiveness is the contemporary mechanism for ensuring that a constitution actually is an exercise of the constituent power.

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94. *See, e.g.*, *id.* at 1840–41 (describing the referendum campaign in Kenya, which included misrepresentations of the proposed constitution's provisions by opponents and promises of "patronage and resources" by proponents in return for support).

95. *See, e.g.*, *Kenya: Divided by the Colours of a New Constitution*, IRIN, July 30, 2010, http://www.irinnews.org/Report/90011/KENYA-Divided-by-the-colours-of-a-new-constitution ("An attempt to pass a new constitution in 2005 failed when 57 percent of Kenyans voted against the draft, with 43 percent supporting it.").

96. *See* EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 124–26 (S. E. Finer ed., M. Blondel trans., Praeger 1964) (1789) (using the term "nation" to refer to the constituent power and declaring "[t]he government . . . can only be a product of *positive* law. Every attribute of the *nation* springs from the simple fact that it exists. No act of will on its part can give it greater or lesser rights than those it already enjoys" (second emphasis added)).

97. *Cf.* Elster, *supra* note 57, at 375 ("In France, the constituent assembly decided to ignore the instructions of their constituencies with regard to both the voting procedures and the King's veto.").

IV. The Substance of Constitution-Making: Scope and Comprehensiveness

This Essay focuses on constitution-making processes in general, not on the particular substantive choices by constitution makers. It is not concerned with the choice between having a parliamentary system or a presidential one, for example, or with the precise form given processes for constitutional review of legislation. We can examine some general issues of substance by moving to a higher level of generality, though.

A. Expressing Foundational Principles in a Constitution

Often the hard work in constitution-making involves working out details of government structures because different structures have different and to some degree predictable political consequences. Modern constitutions typically have preambles and other provisions stating general principles.[98] Constitution writers can and sometimes do omit preambles without sacrificing much.[99] Most preambles combine pabulum—in references to general ideas about human rights, for example—with some effort to capture a sense of national identity.[100] Most often, this combination serves some broad expressive or educational purposes, but occasionally more emerges from the preambles and general statements of principle.

Often these provisions are largely precatory, with relatively little legal effect. Legislators can rely on them, arguing that their proposals, if adopted, will advance the general principles or the aims articulated in a preamble.[101] Often they are expressions of the constitution-writers' understanding of national identity.[102] Sometimes, though, preambles and general principles

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98. Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 716 (2010).

99. *See* Sanford Levinson, *Do Constitutions Have a Point? Reflections on "Parchment Barriers" and Preambles*, *in* WHAT SHOULD CONSTITUTIONS DO? 150, 156–57, 177–78 (Ellen Frankel Paul et al. eds., 2011) (exploring the purpose of preambles and concluding that they contribute little towards some functions of constitutions); Orgad, *supra* note 98, at 716 n.6 (noting that states without preambles in their constitutions include Austria, Belgium, Cyprus, Finland, Latvia, Luxembourg, the Netherlands, and Singapore).

100. *See, e.g.*, IR. CONST., 1937, pmbl. (incorporating general ideals with references to national history in its goal "to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations"); *see also* Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN ST. INT'L L. REV. 319, 325 (2010) (listing expressions of national identity in the preambles of the constitutions of Iraq, China, France, Germany, and Ireland).

101. *See, e.g.*, Press Release, Senator Patrick Leahy, Statement on the Constitutionality of the Patient Protection and Affordable Care Act (Mar. 24, 2010), http://www.leahy.senate.gov/press/statement-on-the-constitutionality-of-the-patient-protection-and-affordable-care-act ("Among the six purposes set forth by the Founders was that the Constitution was established to 'promote the general Welfare.' It is hard to imagine an issue more fundamental to the general welfare of all Americans than their health.").

102. *See* Jackson, *supra* note 100.

can have practical and legal force.[103] Occasionally the expressive, practical, or legal effects of statements of general principles and preambles may create unanticipated difficulties for an operating constitution.[104]

Preambles come in many variants. Some, like the U.S. Constitution's, are terse and consist almost entirely of statements of general principle.[105] Preambles consisting primarily of general principles are almost entirely forward-looking. More typically, preambles are both backward and forward-looking.[106] They describe the nation's historical origins and the reasons for adopting this constitution. Postconflict constitutions may refer to the struggle's resolution by the process resulting in the constitution being offered for adoption. Examples include the preambles to the 1937 Irish Constitution and the 1996 South African Constitution. The former refers to "centuries of trial," and the "heroic and unremitting struggle to regain the rightful independence of our Nation."[107] The latter says that "the people of South Africa[] [r]ecognise the injustices of our past [and] [h]onour those who suffered for justice and freedom in our land."[108] Some preambles are long and quite detailed.[109] The longer the preamble, the more likely it is to reflect the kinds of negotiated compromises that pervade constitutional details. The Iraqi preamble, for example, carefully includes as many of the peoples of Iraq as possible, so as to avoid the implication that one group has constitutional priority.[110]

Preambles can conceal as well as reveal important issues. Referring to a nation's "people" may, in specific contexts, signal to insiders and sometimes to others an ethnonationalist understanding, for example. More generally, backward looking statements may come to have exclusionary implications as a nation's population changes.[111] In the twenty-first century, many nations

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103. *See infra* notes 116–17 and accompanying text.

104. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) ("Although [the] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.").

105. *See* U.S. CONST. pmbl. (promoting "Justice," "the general Welfare," and "Liberty" among other principled values).

106. Constitutions written to replace ones that have become outdated may simply pick up the preamble from the existing constitution.

107. IR. CONST., 1937, pmbl.

108. S. AFR. CONST., 1996, pmbl.

109. *See, e.g.*, A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], pmbl., *available at* http://www.kormany.hu/download/e/2a/d0000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf#!DocumentBrowse.

110. *See* pmbl., Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (calling upon "the pains of sectarian oppression inflicted by the autocratic clique and inspired by the tragedies of Iraq's martyrs, Shiite and Sunni, Arabs and Kurds and Turkmen and from all other components of the people").

111. For a discussion focusing on the Irish Constitution of 1937, see Mark Tushnet, *National Identity as a Constitutional Issue: The Case of the Preamble to the Irish Constitution of 1937*, *in* THE CONSTITUTION OF IRELAND: PERSPECTIVES AND PROSPECTS 49 (Eoin Carolan ed., 2012).

are "nations of immigration," with increasingly large portions of their populations drawn from other lands (sometimes recently, sometimes over extended periods of time, as with the Turkish-origin population of Germany).[112] Backward looking statements may impede the development of a national self-understanding that comports with the nation's actual composition and may even serve as the focal point for the creation, or at least intensification, of ethnonationalist politics.

Even forward-looking statements of principle may have similar effects. Consider the terse "whereas" clause that precedes Canada's Charter of Rights and Freedoms: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."[113] The reference to God may come to seem inapt over time. Similarly with the Irish Constitution's preamble, which expressly speaks "[i]n the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred" and invokes principles of "Prudence, Justice and Charity," terms that resonate strongly with the natural law tradition.[114] The weaker the ties of the people of Ireland (including immigrants) to the Roman Catholic Church, the more distance there will be between the preamble and the nation for which it purports to speak. Focusing less on the terms as used in their historical context than on the general principles they articulate can alleviate these difficulties. Notably, the Canadian clause does not say that Canada is founded upon the supremacy of God, but rather on "principles that recognize" that supremacy.[115] An atheist might agree with the founding principles without agreeing that only God's supremacy justifies them.

Preambles and general principles will have legal force when they are embedded in constitutions with provisions for constitutional review in the courts. Sometimes courts will rely on preambles and general principles as the grounds for specific exercises of the power of constitutional review. In France, the Constitutional Council's foundational decision on associations in 1971 referred to the preamble of the 1958 Constitution as stating some of the "fundamental principles recognized by the laws of the Republic" that provided the foundation for the Council's finding a statute

112. *See, e.g.*, PHILIP L. MARTIN, THE UNFINISHED STORY: TURKISH LABOUR MIGRATION TO WESTERN EUROPE 3 (1991) ("Organised Turkish labour emigration began with an agreement of October 1961 between Turkey and the Federal Republic of Germany."); Catherine Dauvergne, *Amorality and Humanitarianism in Immigration Law*, 37 OSGOODE HALL L.J. 597, 616–17 (1999) (naming the United States, Canada, and Australia as examples of "nations of immigrants").

113. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (announcing the principles in a preambulatory fashion, but not labeled as a preamble).

114. IR. CONST., 1937, pmbl.

115. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

unconstitutional.[116] The High Court of Australia invoked the general principle of representative democracy that underlies that nation's structures of governance to infer a principle of freedom of political expression even though the authors of the Australian Constitution deliberately refrained from including in it a comprehensive bill of rights, including a protection for free speech.[117] The U.S. constitutional scholar Charles Black advocated that we use a method of constitutional interpretation calling on judges to make similar structural inferences from general terms and principles.[118]

Constitution writers might sometimes welcome structural constitutional interpretation, for reasons discussed below.[119] Even if constitution writers hope to prevent it, they may find it difficult to express that hope in words that effectively constrain the technique. The authors of India's 1947 Constitution adopted a formulation used in Ireland's Constitution to give constitutional status to social and economic rights. The Irish Constitution protected those rights through "directive principles of social policy," which were to be "the care of the [Parliament] exclusively, and shall not be cognisable by any court."[120] The Indian Constitution changed the descriptive wording slightly, to "directive principles of state policy," and omitted the ban on judicial enforcement.[121] That ban was generally understood as implicit in the constitutional structure through an understanding confirmed by other constitutional provisions; the constitution distinguished between "fundamental rights," contained in Part III, which were enforceable in court, and the directive principles in Part IV, and one could readily infer that they would not be enforceable in that way.[122] Nonetheless, the Supreme Court of India has read into the judicially enforceable right to life many important social and economic rights laid out in the directive principles.[123]

B. Unamendability

Some constitutions single out specific substantive provisions and purport to make them unamendable. The classic expression is the so-called

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116. *See* JOHN BELL, FRENCH CONSTITUTIONAL LAW 272–73 (1992) (discussing the decision on associations).

117. *Australian Capital Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 106, 136–39.

118. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (lecturing on the neglected method of structural interpretation, specific applications of structural inference, and judicial review).

119. *See infra* subpart IV(C).

120. IR. CONST., 1937, art. 45 (capitalization omitted).

121. INDIA CONST. pt. IV (capitalization omitted).

122. *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 14 (2000) (discussing the Directive Principles and Fundamental Rights sections of the Indian Constitution and noting how the government's legislative and constitutional amendment powers became subject to judicial review).

123. The foundational case is *Olga Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. 51, 55 (concluding that the right to life includes a right to livelihood because "no person can live without the means of living").

"eternity" clause of the German Basic Law. That clause, in Article 79, says that amendments "affecting the division of the Federation into [States] . . . or the principles laid down in Articles 1 and 20 shall be inadmissible."[124] Article 1 states, "Human dignity shall be inviolable,"[125] and Article 20 describes Germany as "a democratic and social federal state."[126] Article 20 also backs up these provisions: "All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."[127] Some constitutional courts have followed the Supreme Court of India in articulating a doctrine according to which some constitutional amendments are substantively unconstitutional if they conflict with what that court calls the constitution's "basic structure."[128] Depending on domestic constitutional conditions and traditions, the basic structure can include both broad principles such as federalism and secularism and seemingly narrow provisions such as term limits for the nation's president.[129]

Reconciling the proposition that constitutional provisions can be unconstitutional with the idea that constitutions are exercises of the constituent power is difficult. Suppose that the purportedly unconstitutional amendment is adopted by the amendment rules specified in the existing constitution.[130] The amendment is an exercise of (a form of) the constituent power at the time the amendment occurs. It is unclear as a matter of basic theory why an exercise of the constituent power at an earlier time should prevail over an exercise of the constituent power—of a people constituted differently—at a later time.

The notion of "inadmissibility" might be thought to offer a solution. An amendment seeking to change an unamendable provision could be inadmissible in the sense that its proponents could not lawfully use the existing amendment procedure to get it adopted: Relevant officials might rule

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124. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBll1. I, art. 79, cl. 3.

125. *Id.* art. 1, cl. 1.

126. *Id.* art. 20, cl. 1.

127. *Id.* cl. 4.

128. *See* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 40–42 (2009) (discussing the constitutional basis for India's "basic structure doctrine," which requires that new amendments to the constitution must comport with its basic structure).

129. The Colombian Constitutional Court held that an amendment allowing a president to run for a second term was constitutional but one allowing a further reelection for a third term was unconstitutional. Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10, Gaceta de la Corte Constitucional [G.C.C.]. The Court relied largely on what it described as procedural irregularities in the conduct of the referendum in which a third term was approved, but there were overtones of substantive unconstitutionality in its opinion. *Id.* Note, of course, that the substantive unconstitutionality does preclude the nation's people from choosing as president (in the third election) the person whom they truly believe best represents them (as do all term limit rules, as explained in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837–38 (1995)).

130. The theory of the constituent power raises questions about whether such procedures *must* be followed. Those questions parallel the ones I address in the text.

the amendment out of order or refuse to place it on the ballot, and, were courts called upon and agreed with the officials' judgments about substantive unconstitutionality, the courts would uphold such refusal. Sometimes the idea of an amendment's substantive unconstitutionality is coupled with the acknowledgement that the "amendment" could be adopted as part of a process of replacing the existing constitution with another—at least where the existing constitution itself lays out processes for constitutional replacement.[131]

At this point the theory of constituent power comes in with real bite. Consider here the constitutional theory expressed in the U.S. Declaration of Independence:

> [W]henever any Form of Government becomes destructive . . . , it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . . [I]t is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.[132]

Behind every constitutional structure lies the possibility of revolutionary overthrow—peasants with pitchforks, so to speak. The constituent power can exercise itself through the forms of law, but those forms cannot ultimately constrain the constituent power.[133]

Inadmissible or unconstitutional constitutional amendments press constitutional theory to its limits in revolution. As the authors of the Declaration of Independence agreed, the right to revolution should not be exercised lightly.[134] This consideration points in two directions for the theory of unconstitutional amendments. The doctrine erects legal barriers to the adoption of fundamental changes in a constitution, to its basic structures, and so might be thought to ensure that the constituent power exercise itself in that way only in the most pressing circumstances. Similarly, mechanisms for constitutional replacement, where they exist, typically are more cumbersome

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131. *Cf.* Richard Stacey, *Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process*, 9 INT'L J. CONST. L. 587, 590, 601–03 (2011) (summarizing Carl Schmitt's conceptualization of the distinction between "constituent power" and "constituted powers" and observing that, in light of Schmitt's theory, "it becomes important to determine both whether a representative body holds constituent power and whether the changes it seeks to make amount to amendments, fundamental amendments, or constitutional replacements").

132. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

133. For a general discussion, see CARL SCHMITT, CONSTITUTIONAL THEORY 271–79 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

134. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that "[p]rudence . . . will dictate that Governments long established should not be changed for light and transient causes" but that regime change is appropriate after a "long train of abuses and usurpations").

than those for constitutional amendment.[135] The increased burden of replacing the existing constitution with another one might, again, limit replacements to truly important occasions.

Yet, the doctrine of substantive unconstitutionality might frustrate proponents of fundamental change who in response might resort to the right of revolution, with violence often attending it. Or, the proponents might treat the obstacles to accomplishing their goal as pointless impediments, permissibly ignored. This might be particularly so where the thwarted amendment seems relatively discrete. In the term-limits case, for example, proponents might think that everything else about the constitution was quite acceptable and be puzzled at being required to go through an elaborate process of constitutional replacement at the end of which is a "new" constitution identical, save for the term-limits provision, to the old one. Perhaps constitutional theory should treat an unconstitutional amendment as a pro tanto exercise of the right to revolution through the form of law, a form that allows fundamental change to occur without violence.

C. *Deferring Issues for Future Resolution*

Recent work by Rosalind Dixon and Tom Ginsburg, and by Tsvi Kahana, has highlighted some structural features of substantive constitutional provisions.[136] Constitution writers resolve some core substantive issues but defer others, sometimes equally important ones, to the future.[137] These deferrals come in various forms.

Perhaps the most familiar is the deferral of issues to constitutional courts. The authors of the Constitution of South Africa were personally committed to the abolition of capital punishment but were not in a position politically to include abolition in the constitution.[138] They created a constitutional court and understood that that court would address capital punishment's constitutionality,[139] as it did in the first case it decided.[140] Equality clauses often enumerate specific protected classes accompanied by a catchall provision.[141] The latter licenses later decision makers, primarily

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135. *See* Thomas Ginsburg et al., *The Lifespan of Written Constitutions*, U. CHI. L. SCH. REC., Spring 2009, at 10, 14 ("Even more costly than amendment is total replacement, because there are more issues to bargain over . . . .").

136. *See* Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636, 640–41 (2011) (discussing how the structure of certain "by law" clauses defers important decisions into the future). Some of Dixon's work, and Kahana's, is in progress and not available for formal citation. I discuss it with their permission.

137. *Id.* at 637.

138. Peter Norbert Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287, 298–99 (1996).

139. *Id.* at 298.

140. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 402 para. 5.

141. *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 15(1) (U.K.) ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

courts, to decide whether some nonenumerated class should receive protection equivalent to that given the enumerated ones.[142] Historically, the most important uses of catchall provisions have involved gender.[143] There the catchall has been used because the constitution is old and difficult to amend, as in the United States.[144] Sometimes, though, it occurs because the constitution makers preferred deferring the issue to later resolution by another institution than to resolving it themselves.[145] This appears to be the case with some modern constitutions in connection with sexual orientation.[146]

Sometimes deferrals to the future occur for largely technical reasons. Consider the laws regulating election processes. Constitution makers might be able to specify some basic choices, for example the choice between first-past-the-post plurality rules in individual districts or proportional representation of various sorts. Implementing those choices requires greater detail than is often achievable in the constitution-making process.[147] Yet, the precise contours of electoral laws—and other statutes of similar importance—are typically almost as consequential as the choices embedded in the constitution. In part constitution makers can address these questions by specifying that some topics, such as the electoral rules, will be set by "organic laws" to be adopted by the legislature.[148] Typically the category of organic laws is defined by rules requiring their adoption—and, importantly, amendment or repeal—by a qualified majority of the legislature, sometimes a

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discrimination and, *in particular*, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." (emphasis added)).

142. *See* Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 747–48 (2002) (explaining that a general catchall equality clause "leaves much more discretion for future interpreters and decisionmakers" than a specific gender equality clause).

143. *See, e.g.*, *id.* at 739 ("In the absence of gender-specific constitutional text, the story of constitutionalizing American women's equality is a story of creative interpretation of the Equal Protection Clause and of advocates' bravado.").

144. *See* Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem* 1, 13 (Chi. Pub. Law and Legal Theory, Working Paper No. 346, 2011) (finding that "as constitutions age, they may . . . become more difficult to amend" and that this, coupled with the fact that the "protection of minorities [is] . . . an[] important factor for constitutional designers to consider when adopting various amendment mechanisms," necessitates particular diligence when considering how constitutional rights will be effectuated).

145. *See* Dixon & Ginsburg, *supra* note 136, at 637 (noting that it is "often the case that constitution-makers self-consciously choose *not* to bind their successors").

146. *See* KEES WAALDIJK & MATTEO BONINI-BARALDI, SEXUAL ORIENTATION DISCRIMINATION IN THE EUROPEAN UNION 67–69 (2006) ("[S]exual orientation is only spelled out in the constitution of one Member State . . . . In most other Member States constitutional protection can be derived from more general words in their national constitution.").

147. *See* Dixon & Ginsburg, *supra* note 136, at 641–43 (discussing decision-cost constraints that lead to deferrals).

148. *See* Elster, *supra* note 57, at 367 (discussing the existence in some countries of "a body of 'organic laws'" that apply to certain fundamental aspects of political life, such as elections to the legislature).

supermajority such as two-thirds, sometimes a majority of the body as a whole rather than a majority of a quorum.[149]

Organic laws fall between ordinary legislation and constitutional provisions on a scale of difficulty of adoption, amendment, and repeal. In addition to their utility in dealing with important subjects whose implementation is rife with technical detail, creating the category can be a useful mechanism for getting over some obstacles in the constitution-writing process, and the phenomenon of organic laws is common enough that constitution writers may reasonably believe that they are not avoiding their responsibilities. Still, there are some hidden traps. Less important is the possibility that the constitution writers will place too many laws in that category, perhaps out of a desire to get their work completed. Once adopted, the organic laws may be more resistant to alteration than appropriate for the subject matter.[150] More important, deferring issues to the legislature may simply put off political confrontations that might have been addressed at the constitution-writing stage but that might be destabilizing in the legislature.

Dixon and Ginsburg's study focuses on another form of deferral—provisions that specify that some issues will be resolved "by law" rather than, implicitly, by the constitution itself.[151] Here it is useful to distinguish between federal systems and nonfederal (unitary) ones. Constitutions for federal systems must allocate power between the nation and subnational units. Exercises of the power allocated to the national government will necessarily occur by law in some sense. Put another way, a by-law clause accompanies every allocation of power to the national government. The U.S. Constitution gives Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies."[152] The reference to "[l]aws" might seem to make this a by-law clause, but in reality the Bankruptcy Clause is indistinguishable in this regard from the Commerce Clause, which immediately precedes it and makes no reference to "laws" regulating commerce among the several states.

By-law clauses can have a function, other than deferral of decision to the future, not addressed in detail by Dixon and Ginsburg. Consider a unitary system, in which the national government has all the powers inherent in sovereignty. Saying that the national government shall act "by law" with respect to some subject adds nothing to the power of the government to be created by the constitution and so does not defer any decision at all. A by-

149. *See id.* ("Some countries have a body of 'organic laws' that, although not part of the document referred to as 'the constitution,' require a supermajority for their amendment. In France, the requirement is that of an absolute majority; in Hungary, it is two-thirds.").

150. As a hypothetical, consider a constitutional provision that an organic law will define the nation's bankruptcy laws.

151. *See generally* Dixon & Ginsburg, *supra* note 136 (describing how constitution makers defer decision making by adopting "by law" clauses). Of course, this form is independently interesting only when the reference to "law" is not to organic laws.

152. U.S. CONST. art. I, § 8, cl. 4.

law clause might serve to allocate power between the legislature, which enacts laws, and the executive, which acts by decree, by secondary legislation (the term used in the United Kingdom),[153] or by administrative "rule" (the term used in the United States).[154] I note one difficulty with the use of by-law clauses to allocate power between legislature and executive. Except with respect to prerogative powers, those inherent in the executive function itself, all executive action is ultimately authorized by law. The British terminology is especially useful here because it shows that legislatures enact primary legislation that executives then implement through secondary legislation.[155] A by-law clause might not effectively distinguish between executive action taken pursuant to permissibly delegated authority and action that must be taken pursuant to quite specific laws. Indeed, again putting prerogative power to one side, no statute can be sufficiently detailed to resolve all questions by law, implying that a by-law clause will be subject to some pressure at the edges and perhaps even close to the core.[156] The allocational function of by-law clauses deserves more scholarly study.

In work in progress, Dixon is examining another facet of the alternatives of drafting specificity and generality. Sometimes constitutional specificity arises from one important function of new constitutions, that of repudiating abuses of the past.[157] The South African constitution's detailed provisions laying out the procedures for pretrial detention are an example.[158] Specificity tightly confines future interpreters, while generality licenses them to engage in more wide-ranging interpretation. Relying on evidence from cognitive

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153. *See* Winston Roddick, QC, *Devolution—the United Kingdom and the New Wales*, 23 SUFFOLK TRANSNAT'L L. REV. 477, 480 (2000) ("It is the secondary legislation that makes detailed provisions for the implementation of the primary Acts of Parliament.").

154. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 7 (2d ed. 2012) (characterizing agencies as having the power to issue "legally-binding rules").

155. The U.S. account of executive power, other than that inherent in the executive, as consisting of delegations from the legislature is to the same effect.

156. For an example, see Sujit Choudhry & Kent Roach, *Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability*, 41 OSGOODE HALL L.J. 1, 8–18 (2003) (discussing the Canadian Supreme Court's interpretation of a clause requiring that certain rules be "prescribed by law" (internal quotation marks omitted)).

157. Cass Sunstein has made this use of specificity a normative feature of what he regards as good constitutional design. *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 35–36 (2004) ("[R]ights are a product of concrete historical experiences with wrongs.").

158. S. AFR. CONST., 1996, § 35. Specifically, § 35 provides, in pertinent part:

> (1) Everyone who is arrested for allegedly committing an offence has the right—
>
> . . . .
>
> (d) to be brought before a court as soon as reasonably possible, but not later than—
>
> (i) 48 hours after the arrest; or
>
> (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day . . . .

Id. § 35(1).

science, Dixon argues that future interpreters—specifically, judges—might treat generality as a signal that the constitution writers trusted them to interpret the new constitution correctly and as a result will be inclined to do so in a reciprocal manner, that is, by interpreting it to reflect what the judges understand to be purposes the constitution writers did not, or could not, effectively express in the document itself. The other side of the argument is that specific provisions may be taken to signal mistrust of the future interpreters. A provision that stated that pretrial detention must be limited to a "reasonable" time before a court appearance might be interpreted to require an appearance within 48 hours of arrest, but a court attuned to interests in domestic security might adopt a more flexible standard. Fearing a return to the past they are seeking to repudiate, the constitution writers will attempt to tie interpreters' hands through linguistic specificity. Dixon suggests that this strategy may backfire: Just as interpreters who take generality as a signal of trust and reciprocate, interpreters who interpret specificity as a signal of mistrust may also reciprocate, this time by being quite grudging in their constitutional interpretations.

Dixon's argument is intriguing but rests on what might turn out to be shaky foundations in its application of the findings of cognitive science, particularly in light of the extended time frame in which the supposed reciprocity effects are to occur. Consider first the years shortly after a constitution's adoption. There is likely to be a substantial overlap between the constitution writers and its early interpreters. Memory might do much of the work that Dixon attributes to reciprocity. Reciprocity and its obverse might have some effects because the interpreters engage in ongoing interactions with the constitution writers. Suppose for example that the constitution writers are suspicious about the capacity of judges chosen by the prior regime to interpret the constitution fairly. They might well insert as many specific provisions into the constitution as they can. Knowing of the constitution writers' suspicions, the interpreters may confirm them through grudging interpretation. Yet, here it may be unclear whether we are observing the psychological effects Dixon describes or instead observing the confirmation of the predictive judgment the constitution writers made. Now consider constitutional interpretation over the longer run. The interpreters may invoke what we can call the "What's he to Hecuba?" principle.[159] That is, the constitution writers have passed from the scene. It is unclear why interpreters should now be concerned with reciprocating the trust or mistrust exhibited by the constitution writers.

Dixon suggests that principles of reciprocity can help us understand what she calls optimal constitutional design, that is, design that combines specificity and generality to produce optimal levels of flexibility and rigidity

159. *See* WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, act 2, sc. 2 (E.K. Chambers ed., D.C. Heath & Co. 1917) (1603) ("What's Hecuba to him, or he to Hecuba, That he should weep for her?").

when the constitution's provisions are implemented.[160] That certainly is a desirable feature for constitutions to have, but whether cognitive science provides better guidance than Hamilton's "reflection and choice"[161] seems to me open to question.

Tsvi Kahana has begun work on a project related to Dixon's. Discussing the process by which the Basic Law: Freedom of Occupation was amended in 1994,[162] and evoking John Marshall's opinion in *McCulloch v. Maryland*,[163] Kahana distinguishes between a "majestic" constitution and a more mundane one. A majestic constitution contains truly fundamental provisions of a sort that can inspire loyalty among the nation's citizens; a mundane one is filled with technical detail and has, as Richard Hofstadter said of Abraham Lincoln's Emancipation Proclamation, "all the moral grandeur of a bill of lading."[164] As the reference to *McCulloch* suggests, the distinction between the majestic and the mundane does not map directly onto a distinction between rights-granting and power-conferring constitutional provisions. And, as my earlier mention of the South African provision on pre-arraignment detention suggests, neither does it map directly onto a distinction between the general and the specific, for the South African provision, understood against its historical background, is a majestic one. More work needs to be done here as well, but Kahana's insight about the majestic and the mundane is likely to prove generative.[165]

V. Conclusion

This Essay is replete with generalizations and qualifications. The qualifications are as important as the generalizations. The issues I have identified do not create difficulties in every constitution-making process, and some processes—probably unusually—may go quite smoothly. The issues' structural dynamics are built in, but the dynamics may not always affect constitution-making because specific circumstances keep them suppressed. The idea of the constituent power plays an important part in thinking about

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160. As with many issues of constitutional design, this one is bound up with questions about the amendment formula: Specificity that turns out to be undesirable may be altered pursuant to amendment, but the ease with which that can occur depends on the amendment rule (and similarly with generality).

161. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 1.

162. Basic Law: Freedom of Occupation, 5752–1992, SH No. 1387 p. 114 (Isr.), *repealed and replaced by* Basic Law: Freedom of Occupation, 5754–1994, SH No. 1454 p. 90 (1994) (Isr.).

163. 17 U.S. (4 Wheat.) 316, 407 (1819) (suggesting that a constitution should not have "the prolixity of a legal code").

164. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 131 (25th Anniversary ed. 1973).

165. The distinction might have some bearing, for example, on how we should think about the choice between placing constitutional amendments at the end of the document and integrating them into the document in their appropriate place. For a discussion of James Madison's choice on this question, see Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What If Madison Had Won?*, 15 CONST. COMMENT. 251 (1998).

some but not all of the issues, but that idea sometimes serves a purely conceptual end, clarifying some important questions, yet sometimes seeming to be tied to ideas about the actual participation and consent of a nation's people in constitution-making.

I think it useful to sketch some issues that often arise, though, and not merely because of scholarly interest. Constitution makers face a range of pressures from the specific historical conditions under which they act. Perhaps they can improve their performance merely by being aware of typical issues: What might seem to them unique problems might actually be common ones, and thinking about how other constitution makers have dealt with those problems may help them in their own endeavors. As Oliver Wendell Holmes observed, "When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength."[166] Perhaps this Essay has identified some of the dragons that inhabit the cave of constitution-making.

166. O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

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Property and Change: The Constitutional Conundrum

Laura S. Underkuffler*

I. Introduction

The protection of property is of unquestioned importance in human lives. Property—in the sense of material things—is necessary for human life. We must have food, water, shelter, medicine, and other material resources to survive beyond this moment. Beyond this, property of all kinds—land, chattels, bank accounts, use rights, patents, and so on—is an essential part of human achievement, security, and lifetime satisfaction.

Because of property's importance, and the nature of competing claims, human beings are continually engaged in drawing and redrawing the lines of property ownership and control. Most powerfully, these changes are accomplished in our society by law. Virtually every government action affects the value of private property and the relative wealth of citizens. Banking regulation, agricultural restrictions, food-safety edicts, land-use laws, professional-licensing standards, taxation decisions, and thousands of other daily actions by local, state, and federal government actors depress, enhance, or otherwise affect the value and distribution of property.

For those who own property, the threat of collective action that will affect that property is an emotionally charged issue. In the United States, the most well-known legal battleground for litigating the question of property rights and change is the Takings Clause of the Fifth Amendment to the Constitution.[1] This is odd, in a way, because constitutional constraints on government are only a very small part of the big picture of individual/collective tensions. However, the American preoccupation with constitutional protection of property rights has made this area of law one of tremendous symbolic as well as actual significance.

In view of the importance of takings claims, one would expect sustained involvement by the United States Supreme Court in articulating the governing principles in this area of law. When it comes to the number of cases that the Court has adjudicated, this expectation is borne out. For instance, the Court has issued more than twenty important decisions dealing with the Takings Clause in the past twenty-five years.[2] However, what has emerged from this

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1. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.").

2. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010); Kelo v. City of New London, 545 U.S. 469 (2005); Lingle v. Chevron U.S.A. Inc., 544 U.S.

body of law has long been criticized as largely incoherent.[3] Problems include the use of doctrinal tests that are so vague as to be useless; the establishment of per se categories, in which payment is mandated, that are of uncertain or nonsensical application; the acknowledgment, and then abandonment, of critical, predicate doctrinal issues; and a myriad of other problems.[4] Indeed, in this area of constitutional law, the overall impression—indeed, an impression that the Court has explicitly endorsed—is one of "*essentially* ad hoc, factual" decisionmaking.[5]

Why is this the case? All constitutional adjudication is ad hoc to some degree because it involves the application of broad legal principles to particular factual situations. What is unusual about the Supreme Court's takings approach is its implicit and explicit reluctance to engage in anything but the most superficial forms of the usual methods of doctrinal structure and constitutional interpretation.

The core difficulty, I shall argue, is the collision of the *idea of property* with the *idea of change*. It is the inability of the Court to intellectually reconcile the incompatibility of the ideas of property and change—indeed, to acknowledge the problem of property and change—that lies at the core of its incoherent takings jurisprudence.

Property, as an idea, is the establishment of entitlements. Speech, religion, liberty, and the substance of other rights all have meaning apart from the existence of laws and the protection of laws. Property is different. It is the recognition, and protection, of the individual's rights in land; or rights in chattels; or rights in any identified source of wealth. It is a right to the continuation of the legal status quo. It has no other meaning.

As a result, property's meaning—as an abstract constitutional right—is threatened, profoundly, by the reality of change, the inevitability of change, and the recognition of the often-justified claims of competing public interests. Rather than acknowledge this difficulty, or deal with it openly, the Court has

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528 (2005); Brown v. Legal Found. of Wash., 538 U.S. 216 (2003); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); E. Enters. v. Apfel, 524 U.S. 498 (1998) (plurality opinion); Phillips v. Wash. Legal Found., 524 U.S. 156 (1998); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Yee v. City of Escondido, 503 U.S. 519 (1992); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Bowen v. Gilliard, 483 U.S. 587 (1987); First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304 (1987); Hodel v. Irving, 481 U.S. 704 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).

3. LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 151 & nn.2–3, 152 & nn.4–5, 154 nn.23–32, 155 & n.33 (2003). As one classic textbook states, "[l]egal scholars have struggled for decades to make sense of regulatory takings jurisprudence." JESSE DUKEMINIER ET AL., PROPERTY 1189 (7th ed. 2010).

4. *See infra* text accompanying notes 13–95.

5. *See Tahoe-Sierra*, 535 U.S. at 322 (emphasis added); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

attempted to mask it in various ways. The Court repeats reassuring tropes—such as "property is protection," "property is established interests," or "property is the individual's sphere, bounded and protected"—while allowing the incursions that it allows. Most prominently, in recent years, the Court has attempted to establish an (artificially) concrete idea of property, while simply ignoring—in the takings context—the existence and merit of competing public interests.

Such strategies are presented as "solving" the problem. But, of course, they don't. We are still left with the uncomfortable question of when entitlements, or established interests, or whatever one wishes to call them, can be legitimately ignored—unless *all* existing rights in the legal status quo are believed to be protected and immune from change, a completely impracticable situation.

The question of the existence of law and its subsequent change is not unique to this context. The role of change and the accommodation of change is a consistent and powerful theme in constitutional adjudication. Changes in the text or administrative interpretation of laws, and changes in social and cultural understandings, are common catalysts for Supreme Court decisionmaking. Change challenges the use of precedent, the continuing democratic validity of past democratic decisions, and the veneration of canons and conventions that have gone before.[6] In every case, we must balance the desire for change against our yearning for certainty, the security of the known, an anchor, and concrete understanding. Property presents just one iteration of this problem—although, I shall argue, it presents a particularly sharp and intractable form of it. Whether the Court's response is a viable or desirable one is the subject of this Article.

II. The Most Incoherent Body of Law

To claim that any particular body of Supreme Court jurisprudence is the most incoherent is to set oneself up for challenge. But even if proof of that assertion is impossible, as a practical matter, it is—when it comes to takings law—quite probable.

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6. Examples of these themes can be found throughout the contributions to this symposium. *See, e.g.*, Jack M. Balkin, *Verdi's High C*, 91 TEXAS L. REV. 1687 (2013) (discussing constraints of canonicity, convention, and genre in legal decisionmaking); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711 (2013) (discussing the need for stability, the maintenance of the rule of law, and the protection of expectations in constitutional law); Randy J. Kozel, *Settled Versus Right*, 91 TEXAS L. REV. 1843 (2013) (same); David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEXAS L. REV. 1969 (2013) (discussing the effect of lapse of time and change on the continuing democratic validity of past democratic decisions); Mark Tushnet, *"Law All the Way Down": The Possibility of Constitutional Positivism*, 91 TEXAS L. REV. 1983 (2013) (exploring the idea of limiting court inquiry to past decisions).

The right to the protection of individual property is widely considered to be a bedrock principle of American constitutional law, akin to the protection of freedom of speech, freedom of religion, due process of law, and other constitutional guarantees.[7] Beneath this superficial similarity, however, the constitutional right to the protection of property is an extraordinarily troubled area of law.

When it comes to important individual constitutional rights, there is generally some kind of useful court-created understanding that immediately comes to mind. All questions about that right are far from answered, but there is some kind of meaty doctrinal test or other conception of the right and its limits that provides a useful analytical structure. If the right is freedom of speech, we immediately think of the different categories of protected speech and the government's ability to regulate the time, place, and manner of expression.[8] If the right is freedom of religion, we think of the absolute right to believe, the qualified right to act, and the (perhaps too) detailed rules governing the establishment of religion by government.[9] If the right is equal protection of the law,[10] or due process of law,[11] or the right of the criminally accused to counsel,[12] there are—again—clear substantive limitations that are understood for these rights, even if their application is difficult in particular cases.

When we think of the right to the protection of property, the situation is quite different. The kind of structured approach that is a routine part of the adjudication of other rights has little or no presence in these cases. Tests and principles—to the extent articulated—often seem to be anchored in thin air, with results gyrating wildly.

Consider, for instance, the question of government interference with private land, by all accounts the most crucial and emotionally charged issue. When title to land is taken by government, there is no doubt about the outcome: compensation must be paid to the individual owner.[13] But beyond this certainty, the picture is one of theoretical gaps and unexplained actions.

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7. *See* UNDERKUFFLER, *supra* note 3, at 138 (discussing the assumption that property rights enjoy bedrock status in our constitutional scheme).

8. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (oral and written expression "is subject to reasonable time, place, or manner restrictions").

9. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603–05 (1961) (distinguishing (pure) religious belief from religiously motivated action); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 589–94 (1989) (chronicling the Supreme Court's decisions defining the Establishment Clause).

10. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (setting forth the traditional tiered approach to equal protection cases).

11. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (setting out the three factors courts must consider in identifying "the specific dictates of due process").

12. *See, e.g.*, Gideon v. Wainright, 372 U.S. 335, 343–45 (1963) (establishing the fundamental right to counsel in criminal prosecutions).

13. *See, e.g.*, Backus v. Fort St. Union Depot Co., 169 U.S. 557, 573–76 (1898).

To begin: if rights in land are affected by government action, but title is not taken, we are in the realm of regulatory takings.[14] In such cases, there are two per se or bright-line rules that the Court has articulated. First, if government regulation destroys "all or substantially all" of the economic value of land, the Court has stated that the owner must be compensated.[15]

This might seem to be a straightforward rule, but its terms are anchored in a serious problem. To determine the magnitude of a property owner's loss, one must know what the owner's initial property interest was, so that the loss can be calculated.[16] For instance, the property with which the owner began could be the piece of land that is regulated,[17] the whole of the parcel owned as legally described,[18] all of the landowner's contiguous or close-by holdings,[19] or some other measure. In different cases the Court has endorsed each of these answers, with no attempt to reconcile these radically different approaches. For instance, within a single majority opinion the Court has implied that the property interest at stake was the right to exclude, the right to use, the entire parcel owned, and the narrow strip of land subject to the challenged regulation.[20] Despite the Court's recognition of this crucial problem more than twenty years ago,[21] it has—to date—never explained the reasons for its choices or otherwise attempted to resolve this issue.

The other per se rule articulated by the Court is that a "permanent physical invasion" of private land by government requires the payment of

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14. *See* UNDERKUFFLER, *supra* note 3, at 152–53.

15. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)) ("[A] regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause.").

16. *See Lucas*, 505 U.S. at 1016 n.7.

17. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827–28 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982); Pa. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

18. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002); *Palazzolo*, 533 U.S. at 630.

19. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496–501 (1987).

20. *See* Dolan v. City of Tigard, 512 U.S. 374, 384–85 (1994).

21. In the *Lucas* case, the Court famously recognized this problem and left it unresolved. If "a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Lucas*, 505 U.S. at 1016 n.7. *See also Palazzolo*, 533 U.S. at 631. The Court noted:

> This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole; but we have at times expressed discomfort with the logic of this rule. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.

Id. (citations omitted). However, since the regulation in *Lucas* bound the entire tract, the Court did not reach this question. 505 U.S. at 1016 n.7.

compensation.[22] In announcing this rule, the Court stated that "a permanent physical occupation of [land] . . . is perhaps the most serious form of invasion of an owner's property interests."[23] Indeed, this situation is so serious that the rule applies "without regard to whether the [government] action achieves an important public benefit or has only minimal economic impact on the owner."[24]

The seeming absoluteness of this rule leads to some confusing and difficult questions. What if, for instance, the landowner *gains value* from the challenged invasion? Can suit still be brought? In one case, the answer appeared to be yes;[25] in a later case, the answer appeared to be no.[26] The latter opinion made no reference to the former. There are also obvious problems if we are to believe that public interests, no matter how weighty, can never trump the individual's interests. Surely, there must be *some* situations in which government can permanently, physically invade private land without the payment of potentially ruinous compensation. Indeed, the Court has held that government may *destroy* the value of property, without payment, if there are sufficient public interests;[27] if that is true, it is difficult to understand why a lesser government action—such as a permanent physical invasion—would always trigger compensation.

For all of those cases that do not fit under either per se rule, the doctrinal clarity of takings jurisprudence is not much better. For these cases, the Court has articulated a residual, "too far" test for determining the right to compensation.[28] This test is "the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"[29]

The question, of course, is what too far is. Situations in which the government has gone too far or not too far have been identified by the Court, but there is little in these results that generates consistent principles. One consistently articulated guideline on this point is the threadbare statement that to determine whether government went too far, one must consider "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed

22. *See Loretto*, 458 U.S. at 435–38; Kaiser Aetna v. United States, 444 U.S. 164, 176–80 (1979).

23. *Loretto*, 458 U.S. at 435.

24. *Id.* at 434–35.

25. *See id.* at 434–38 (holding that state-required installation of cable facilities resulted in a compensable taking regardless of the possibility that the installation increased the property's value).

26. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 234–40 (2003) (without economic harm there can be no taking, and thus no right to compensation).

27. *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 277–79 (1928) (law ordering the destruction of cedar trees to preserve others' apple orchards); Mugler v. Kansas, 123 U.S. 623, 663–64 (1887) (law prohibiting the operation of a previously lawful brewery).

28. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

29. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting *Pa. Coal*, 260 U.S. at 415).

expectations."[30] This seems to frame the question in economic terms but tells us little else. It is obvious from the too far test itself that one must consider what the claimant has lost. The question remains: how much is too much? How do we determine—in broad, if not precise terms—when the line is crossed? And, most crucially, is what the claimant has lost the *only* relevant consideration? The Court's answers to these questions are all over the adjudicatory map.[31] The Court's most consistent statement, when pressed, is that the Takings Clause requires "'careful examination and weighing of all the relevant circumstances'" involved and that these cases are "'essentially ad hoc, factual inquiries.'"[32]

To illustrate these problems, let us consider several famous takings cases involving land. We will begin with *Pennsylvania Coal Co. v. Mahon*,[33] decided in 1922. That case, which has been cited by courts and commentators as the source of the idea of "regulatory takings,"[34] dealt with a state statute that forbade the mining of anthracite coal in a way that would cause subsidence of surface structures.[35] As a result of this law, coal companies were required to leave certain coal in the ground to support the structures above.[36]

Coal companies sued, claiming that this law was unconstitutional, as "destroy[ing] previously existing rights of property and contract."[37] Justice Holmes, writing for the majority, set forth a famous balancing test. "Government hardly could go on," he wrote, "if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone."[38]

To decide such cases, Holmes continued, one must consider the "extent of the diminution" of the property owner's interests, as against the public

30. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *Accord* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 315 n.10 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

31. *Compare Lucas*, 505 U.S. at 1008, 1029–32 (examining prohibitions on shoreline building, which likely went too far), *with Palazzolo*, 533 U.S. at 611, 630–32 (examining the prohibition on development of wetlands, which likely did not go too far); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474, 476–77, 499–501 (1987) (holding that a law requiring certain amounts of coal be kept in place beneath structures did not go too far), *with Pa. Coal*, 260 U.S. at 415–16 (holding that a law prohibiting mining that would result in the subsidence of surface structures went too far).

32. *See Tahoe-Sierra*, 535 U.S. at 322 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring) and *Penn Cent.*, 438 U.S. at 124).

33. 260 U.S. 393 (1922).

34. *See* UNDERKUFFLER, *supra* note 3, at 152–53.

35. *See Pa. Coal*, 260 U.S. at 412–13.

36. *See id.* at 412–14.

37. *Id.* at 413.

38. *Id.*

interest represented by government.[39] In this case, the Court held, the public interest was small because the danger of subsidence threatened only particular landowners and not the general public.[40] Public interests were also limited because the homeowners in the case were "short sighted as to acquire only surface rights," and were, thus, the creators of their own misfortune.[41] "On the other hand," Holmes observed, "the extent of the taking is great."[42] For government "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[43] As a result, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[44]

Whatever one might think of the analysis of the competing interests in this case, several things are clear. First, the evaluation of a takings case involves explicit consideration of both the private and public interests at stake. In addition, there are cases in which regulation will be sustained (without compensation), even though it takes private wealth. And finally, when evaluating what the private interest is, we are to focus on the particular physical property affected, and not some broader notion of ownership.

These principles lasted for a while, but not forever. Forty years later, the Court decided what was essentially *Pennsylvania Coal* redux. The Pennsylvania Legislature tried again to deal with the subsidence problem by enacting the Bituminous Mine Subsidence and Land Conservation Act, which authorized the Pennsylvania Department of Environmental Resources (DER) to "implement and enforce a comprehensive program to prevent or minimize subsidence."[45] Subsequently, the DER applied a formula that generally required that fifty percent of coal beneath certain structures be kept in place.[46] Again, this effort was challenged by coal companies that were upset about the loss of coal that it imposed.[47]

The constitutionality of the new law reached the Supreme Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[48] This time, the majority discussed at great length the "devastating effects" that coal mining subsidence can have:

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39. *See id.* at 413–14.

40. *See id.* at 412–14.

41. *See id.* at 415.

42. *Id.* at 414.

43. *Id.*

44. *Id.* at 416.

45. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474, 476 (1987).

46. *See id.* at 476–77 & n.7.

47. *See id.* at 478–79 (coal companies alleged that the Subsidence Act "constitute[s] a taking of their private property without compensation in violation of the Fifth and Fourteenth Amendments" and "impairs their contractual agreements in violation of Article I, [Section Ten], of the Constitution").

48. 480 U.S. 470 (1987).

> It often causes substantial damage to foundations, walls, other structural members, and the integrity of houses and buildings. Subsidence frequently causes sinkholes or troughs in land which make the land difficult or impossible to develop. . . . Subsidence can also cause the loss of groundwater and surface ponds. In short, it presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades.[49]

The Court proceeded to uphold the Act.[50] One would expect the Court, in this situation, to simply say the obvious: that in the intervening forty years, attitudes had changed and environmental awareness had increased such that—in this situation—public interests now outweighed private ones. What is peculiar about the *Keystone* opinion is that the public interests involved, so carefully detailed in the opening pages of the Court's opinion, had little substantive role in the doctrinal analysis that followed. *Pennsylvania Coal* was distinguished on the ground that "the Commonwealth of Pennsylvania has [now] acted to arrest what it perceives to be a significant threat to the common welfare"—a motivation that the Court maintained (quite improbably) was not a part of the prior case.[51] Most crucially, however, the Court changed its focus on the company's loss from the coal left in the ground to the whole of the mining operation.[52] In *Pennsylvania Coal*, the company was required to show that the challenged law "made mining of 'certain coal' commercially impracticable."[53] In *Keystone*, the companies were required to show that the law "ma[de] it impossible for petitioners to profitably engage in their business."[54] Having failed to do this, their takings claims were denied.[55]

In *Penn Central Transportation Co. v. New York City*,[56] another famous case, the Court's doctrinal treatment of the takings question was similarly disjointed. *Penn Central* involved the landmarking of historically significant buildings in New York City and their subsequent protection from alteration.[57] The Court began, again, with a discussion of how "[o]ver the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance."[58] These new laws, the Court observed, were prompted by the "recognition that, in recent years, large numbers of historic structures,

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49. *Id.* at 474–75 (footnote omitted).
50. *See id.* at 506.
51. *Id.* at 484–85.
52. *See id.* at 493–99.
53. *Id.* at 493.
54. *Id.* at 485.
55. *See id.* at 498–99, 506.
56. 438 U.S. 104 (1978).
57. *Id.* at 115–18.
58. *See id.* at 107 (footnote omitted).

landmarks, and areas have been destroyed without adequate consideration" of their value.[59]

The case involved the application of New York City's historic preservation law to Grand Central Terminal.[60] The claimants argued that this law, which precluded the building of a fifty-story-plus office building on the top of the Terminal, was a taking of property without compensation.[61] The Court began its doctrinal analysis with a rejection of the claimants' argument that the air space above the Terminal, or the right to use that airspace, was the property interest whose diminution in value was to be considered.[62] Instead, the property was the "parcel as a whole—here, the city tax block designated as the 'landmark site.'"[63] Under this test, the impact of the regulation was modest. The New York City law, the Court observed, did not interfere in any way with the present uses of the Terminal.[64] The property could be used "precisely as it ha[d] been used for the [prior] 65 years: as a railroad terminal containing office space and concessions."[65] Accordingly, there was no interference "with what must be regarded as Penn Central's primary expectation[s]."[66]

There are hints in the opinion as to what motivated this technical analysis; for instance, when previously discussing the claimants' arguments, the Court observed that some of them "would, of course, invalidate not just New York City's law, but all comparable landmark legislation."[67] However, it is strange that such considerations—as strong as they were—had no doctrinal role in the Court's ultimate decision. The doctrinal impression is that public interests, in cases like these, are important as some kind of background matter. However, the test to be applied is whether the claimant's property has suffered enough impairment—not whether there are compelling public interests.[68]

As a final example, consider *Lucas v. South Carolina Coastal Council*,[69] one of the most well-known in the last twenty years of the Court's takings jurisprudence. In that case, an individual purchased two lots on which he planned to build homes.[70] After this purchase, the legislature of the state of South Carolina passed a law that (by its terms) prohibited building on a broad swath of the state's coastline.[71] The purpose of this law was to protect the

59. *Id.* at 108 (footnote omitted).
60. *See id.* at 115.
61. *See id.* at 116, 122.
62. *See id.* at 130.
63. *Id.* at 130–31.
64. *Id.* at 136.
65. *Id.*
66. *Id.*
67. *Id.* at 131.
68. *See id.* at 136 (discussing, as critical, "the severity of the impact of the law [in question]").
69. 505 U.S. 1003 (1992).
70. *Id.* at 1006–07.
71. *See id.* at 1007–08.

beach/sand dune coastal system from development, which, it was feared, could jeopardize the coastline's stability, "accelerate[] erosion, and endanger[] adjacent property."[72] As a result of this law, development of the landowner's parcels was prohibited.[73]

The landowner (Lucas) challenged this action, claiming that it was a taking of property without compensation.[74] The question, the majority held, was not whether South Carolina's action was justified on some basis; that could be assumed to be true.[75] Rather, it was whether the state had changed the rules of the game to the detriment of the landowner.[76] If it had, the payment of compensation was constitutionally required.[77] The claim that newly recognized environmental damage required new statewide controls was legally irrelevant to that question.[78]

Particularly telling in this case was the Court's treatment of individual and public interests. The Court discussed the interests of Lucas in great detail: how the disputed law brought his plans "to an abrupt end" and impacted him financially.[79] However, and strangely, of the competing interests in this case—for instance, those of owners whose land would be eroded if shoreline building continued—there was no discussion whatsoever.[80] This was despite the fact that Lucas claimed a loss of more than $1.2 million for his two lots[81]—a cost which, if it had to be paid, and if multiplied by thousands of parcels on the South Carolina coast, would make the enforcement of the erosion controls cost prohibitive.

One might argue that this kind of truncated analysis was justified in the *Lucas* case because of the extreme nature of the government's action. The case's posture, after all, was one of a complete prohibition of development.[82] However, prohibitions on building in shoreline areas, wetlands areas, and other areas are a routine part of contemporary understandings of required environmental protection. In addition, the idea that the claimant's loss is

72. *Id.* at 1021 n.10 (quoting S.C. CODE ANN. § 48-39-250 (Supp. 1991)).

73. *See id.* at 1008–09.

74. *See id.* at 1009.

75. *See id.* at 1021–22 (conceding the issue that public interests could be served by enactment of the law).

76. *See id.* at 1009, 1025–29 (stating that "any limitation [that prohibits all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the [owner's] title itself").

77. *See id.* at 1025–29.

78. *See id.*

79. *See id.* at 1008–09.

80. *See id.*

81. *See id.* at 1009.

82. *See id.* at 1008–09.

determinative of the issue has not been limited to cases of this type; it has functioned as the assumed approach in many takings cases.[83]

The idea of ignoring public interests in takings outcomes was, of course, ultimately doomed to failure. In a later case, with the fate of Lake Tahoe in the balance, the Court changed course.[84] Lake Tahoe, the majority wrote, is "uniquely beautiful, . . . a national treasure that must be protected."[85] Although the moratorium that prevented building by the aggrieved shoreline owners caused financial loss, the case—the majority held—must be decided by a "careful examination and weighing of all the relevant circumstances."[86] Furthermore, in this calculation, the landowners' loss was only "one of a number of factors that a court must examine"[87]—another being (presumably) the public's competing interests.

In considering this doctrinal morass, one must remember that land-based claims are not the only ones that raise the specter of the Clause; property, for takings purposes, has been interpreted by the Court far more broadly. For instance, in *Eastern Enterprises v. Apfel*,[88] decided by the Court in 1998, Eastern Enterprises—a former coal operator—objected to a law passed by Congress that attempted to stabilize pension plans established for the benefit of the nation's retired coal miners.[89] Under the law, coal operators were assessed premiums to be paid to the plans on the basis of the prior employment of now-retired miners.[90] Eastern claimed that this law was not expected or agreed to by it; that it imposed obligations based on the past; that it permanently took assets from one party for the benefit of another; and that it was, for all of these reasons, a taking of property without compensation.[91] A plurality of the Court agreed, holding that this social-welfare law substantially interfered with Eastern's property—that is, its "reasonable investment-backed expectations."[92] In another case decided that year, the Court endorsed a similarly expansive notion of property—it being, in that case, the right to

83. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 701, 720–21, 723 (1999) (focusing on whether Del Monte Dunes was "denied all economically viable use of the property"); E. Enters. v. Apfel, 524 U.S. 498, 518, 529 (1998) (plurality opinion) (focusing on "the economic impact of the regulation"); Phillips v. Wash. Legal Found., 524 U.S. 156, 169–70, 172 (1998) (focusing on denial of the claimant's rights to "possession, control, and disposition"); Dolan v. City of Tigard, 512 U.S. 374, 393 (1994) (focusing on the claimant's "loss of her ability to exclude others").

84. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

85. *Id.* at 307 (internal quotation marks omitted).

86. *Id.* at 306, 320, 335 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

87. *Id.* at 336.

88. 524 U.S. 498 (1998).

89. *See id.* at 514, 517.

90. *See id.*

91. *See id.* at 518–19; 533–37.

92. *See id.* at 532.

control a monetary interest created by a government bank regulatory scheme and a legal services program.[93]

The implications of such cases, when rendered, were startling. After these cases, is it true that any law that upsets expectations, imposes liability on the basis of prior relationships, disproportionately benefits some to the detriment of others, or deprives an individual of control of government-created assets might be a taking of property without compensation? As a dissenting Justice in *Eastern Enterprises* warned, "[i]f the Clause applies when the government simply orders A to pay B, why does it not apply . . . to some or to all statutes and rules that 'routinely creat[e] burdens for some that . . . benefit others'?"[94] With the specter of takings claims brought in response to every instance of suffering at the hands of government,[95] the incoherence that has characterized takings cases became all the more critical.

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In summary, the Supreme Court's takings jurisprudence today is strangely devoid of articulated, explored, or principled guidelines for working through these cases. It is also, by and large, strangely devoid of the usual strategies for constitutional interpretation. There is no mention of text, constitutional history, or original intent in these cases. There is no mention of the evolution of the meaning of property and its protection in current popular understanding or in American history and government. There is, indeed, little mention of the purpose of the Clause itself, other than boilerplate recitations that it requires the doing of "justice" to aggrieved individuals.[96]

What lies behind the peculiarly confused and superficial treatment of this area of law? And, within the complex realities of these questions, how should this treatment be altered?

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93. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 159–60 (1998) (holding that "interest earned on client funds held in IOLTA accounts is [the] 'private property' of the client").

94. E. Enters. v. Apfel, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting) (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986)).

95. As an example of the potential magnitude of the problem, see J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997) (making the case that deregulatory policies that reduce the value of property in network industries are "takings" that require compensation).

96. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("[The Takings Clause is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Since *Armstrong*, this language has appeared in virtually every takings opinion issued by the Court. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978). However, beyond this statement, how "justice" or "fairness" should affect the analysis of the case is rarely discussed.

III. Recovering the Judicial Function

The current incoherence in Supreme Court takings jurisprudence is not the province of opinions by particular justices or opinions with particular philosophical perspectives. The failure to set forth workable guidelines, or satisfying explanations for ultimate results, or—on the most basic level—to explore with any rigor the purpose of the Clause, is not simply the province of property protectionists or collective-interest advocates. It is a consistent characteristic of the vast bulk of contemporary takings jurisprudence.

The reasons for these failings in this area of law have long preoccupied scholars. Some have speculated that the nature of takings questions simply requires complex, multi-factor balancing.[97] Others have claimed that the Court is too riven by underlying philosophical differences about property and its principles to articulate coherent tests.[98] Still others argue that the incoherence is rooted in the Court's failure to reflect, in its doctrinal expositions, the varying nature of the government's function in these cases.[99]

There is no doubt that controversies surrounding the right to property are extremely complex, making any consistent or articulated approach to them difficult. The right to property is unique in its potentially myriad substantive forms, from protection of rights to physical objects to those involving intangible interests. In addition, the stakes in these cases are extraordinarily high. The constitutional right to property protection is unique among constitutional rights in its immediate and powerful relevance to the vast majority of citizens, and in its potential ability to bankrupt government. And, of course, as a starting matter, the general terms of the Takings Clause itself yield almost nothing in the way of guidance.

Articulating interpretations of constitutional text under difficult circumstances is, however, one of the Court's foundational tasks. Despite its difficulties, the Takings Clause, like all constitutional guarantees, has an identifiable, core function. It seeks to protect individual property from radical changes in the status quo, without sufficient justification. Granted, this is not easy. What is property? What are radical changes? What is sufficient justification? Clearly, in this field, there will be fewer rules and more standards. But the interpretive difficulties here are not of an entirely different magnitude from those involved in other constitutional tasks. For instance, takings cases are no more inherently divisive or difficult than establishing the

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97. *See, e.g.*, Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988).

98. *See, e.g.*, Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CALIF. L. REV. 1301 (1989); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2004).

99. *See, e.g.*, Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

limits of executive power, or the meaning of the Commerce Clause, or the mandates of national security.

Why, then, does this state of affairs regarding this particular constitutional right exist? I will suggest that it is *rooted in the nature of property itself* and the challenge that change presents.

A. Property's Unique Characteristics

At first blush, the protection of the individual right to property seems much like the protection of the individual right to religion, free speech, due process of law, and other rights. In all of these cases, particular aspects of human experience are identified. Then, limits are placed on government's ability to interfere with them. It does not matter if the experience is free speech, freedom of religion, or the enjoyment of one's property; all are protected against collective interference and possible predation.

Upon deeper inquiry, however, we quickly become aware that property, as the content of a right, is in some ways different from the content of other rights. In particular, property—as an idea—has two unique characteristics:

– it is *rivalrous* in nature; and

– *its meaning*, solely, is the *affordance of protection.*

To explore these characteristics, we will begin with the first: the uniquely rivalrous nature of property. To appreciate this particular characteristic of property, we need only compare it with other protected (constitutional) rights. When we consider the substance of freedom of religion, freedom of speech, due process of law, and other individual rights, each is what could be called a constitutional public good.[100] With goods of this kind, there is no problem of limited or exclusive enjoyment or consumption. As I have noted in another context, "[t]here is no additional cost necessarily entailed, to society or to other individuals, if another person believes freely, or speaks freely, or is afforded the protection of the laws. [In particular,] upon granting one person the right to speak, [or another of these rights,] there is no necessary taking of that same right from another."[101]

The right to the protection of property, on the other hand, is different. Property in physical, finite, nonsharable resources is *inherently rivalrous* in nature. If we recognize and protect property rights in land, conventional chattels, or patents, the core idea is individual control and exclusivity of use. Property involves allocation; as a result, "[t]he extension of property protection to one person necessarily and inevitably denies the same rights to others."[102] Thus, the right to property protection is different from other rights

100. Laura S. Underkuffler, Response, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038–39 (1996).

101. *Id.* at 1039 (emphasis omitted) (footnote omitted).

102. *Id.* (emphasis omitted).

because the subject matter is, by nature, different. It involves—in each of its manifestations—an exclusive claim, with concurrent defeat of rivalrous claims by others.

Property's second difference is also fundamental. Property, and property alone, has *no meaning apart* from the idea of protection.

The nature of property, as an idea, has bedeviled scholars for years.[103] In common parlance, we think of property as things: land, books, patents, money. In fact, as any first-year law student knows, property (in law) is not really things; it is the *rights* in these things that are afforded, by law, to individuals.

Property, therefore, has unusual substance as a constitutional right. Speech, religion, liberty, and so on have intrinsic meaning and existence apart from the existence of laws and the idea of legal protection. Government, protection, and laws could all end tomorrow, and speech, religion, and liberty would continue to exist. Indeed, some cynics would argue, the substance of the right to speak, to practice religion, and to experience liberty might be enjoyed in greater abundance.

Property, however, is different. Its *only substance* is rights—that is, legal rights—and it does not exist, as a coherent idea, apart from the idea of law and legal protection. Its essence is the protection of individuals' interests, and nothing more. It is the recognition and protection of individuals' rights in land; or rights in chattels; or rights in any identified source of wealth. That is all that it is. We can have speech that is not protected; we can have religion that is not protected; but we cannot have nonprotected property. The only existence of or substance to the idea of property is the protection it affords; without this, the idea loses all meaning.

These two characteristics set the right to property apart from other rights. And, as explained below, they have particular ramifications for the idea of its constitutional protection.

B. Constitutional Consequences

The point of individual constitutional rights is to protect identified individual interests from the whims of the majority. We believe, for instance, that freedom of speech and freedom of religion are fundamentally important human interests, and should be infringed by government under only the most restricted circumstances.[104]

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103. *See* UNDERKUFFLER, *supra* note 3, at 11–15 (discussing the various approaches to defining the idea of property taken by scholars).

104. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); Cohen v. California, 403 U.S. 15, 24 (1971) ("[W]e cannot overemphasize that . . . most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression.").

This general posture is workable regarding those rights because government interference with them is relatively unusual and, when it occurs, it can be fairly easily contained. For instance, free speech might conflict, occasionally, with military necessity; free religious exercise might conflict, occasionally, with the mandates of civil or criminal laws; but those instances will be rare absent the complete collapse of our system as we know it. In addition, supremacy of national security in a free speech case might thwart the speech in that case; enforcement of civil or criminal laws in a religion case might harm the interests of religion in that case; but in neither case will the *idea* of freedom of speech nor the *idea* of religious freedom be jeopardized. Drawing a practical and doctrinal line between protected and unprotected speech, or between protected and unprotected religious exercise, might not be simple, but it is possible without threatening the very idea of the right. In short, the times when these rights are trumped will be rare; they will be confined; and the boundaries between the protected substance of the right and areas of collective supremacy can—as an intellectual matter—be delineated. This is true even if individual/government balances change in our understandings of these rights.

The particular characteristics of property, described above, create an entirely different situation. First, because of its inherently rivalrous nature, conflicting claims regarding property are not rare. Rather, conflicts between the property-owning individual and others are immediately stated whenever and wherever rights to property are asserted.

Moreover, because of the ubiquity of such challenges, there is a justified fear that *if* the desires of others are a legitimate concern, the protection of property might be engulfed. When the right itself means—in its essence—the maintenance of the legal status quo, any breach of that guarantee seems to threaten the very idea of the right. The legal status quo is either protected or it is not; there seems to be no intellectually coherent way to readily distinguish the protected from the unprotected substance of this right or for the right—if we permit such interference—to have meaning.

To illustrate this problem, consider what I have called the "politics of property and need."[105] As a practical matter, property rules and government distributions of wealth consider the issue of human need routinely. Welfare laws, progressive income taxes, education subsidies, federal social security and disability laws, federal medical insurance laws, and a host of other state, federal, and local laws are explicitly tied to poverty, age, disability, and other manifestations of human need. Yet, the explicit recognition of human need as important to *setting property rules and entitlements* is a highly controversial, if not anathematic, notion. In designing the rules of property law, "we do not simply throw the individual human needs of claimants into the hopper along

105. Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363 (2010).

with economic productivity, certainty, security, and other considerations."[106] The idea that human need is relevant when considering the protection of property entitlements seems to be a very jarring—indeed, threatening—proposition.

We avoid the juxtaposition of property and need, I believe, because of the threat to property that need presents. We fear that the interjection of needs questions into our thinking about property entitlements will create a slippery slope, and know of no limiting proposition. "Explicit authorization of 'needs' claims . . . . would, in effect, be authorizing the making of raw, unprincipled choices about when otherwise valid property rights *should* or *will* lose."[107] Such decisionmaking seems to be entirely at odds with the idea of the protection of property. If property rights can be cast aside simply because of the ubiquitous needs (and claims) of others, property—as protection—has no meaning.

To summarize, the unique characteristics of property as a right—its rivalrous nature and its meaning as protection—have made the idea of competing interests uniquely difficult to accommodate, intellectually, in this context. This, I believe, lies at the root of the incoherence in the Supreme Court's takings jurisprudence. Rather than acknowledge and deal openly with this problem, the Court has attempted to mask it in various ways. Most prominently, the Court has attempted to establish an (artificially) concrete idea of property and to simply ignore—in the takings context—the existence, and merit, of competing public interests.

As an example of the first part, or "concreteness" strategy, consider the following history. For more than three decades, the Court has advanced an idea of property in its takings jurisprudence that is peculiar at best. This is the idea—as an explicit doctrinal matter, at least—that it is "the several States, [not the United States, that are] possessed of residual authority . . . to define 'property' in the first instance."[108] This idea has appeared in opinion after opinion, stated as an apparent truth, with no discussion of why it is the case, or its historical or theoretical origin.[109]

This idea of state-defined property for constitutional purposes is an effort, I believe, to give property a fixed and determinate meaning. If property is defined by a different (nonfederal) body of law, neutral and detached, then there is an external source that the Court can consult in the determination of its

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106. *Id.* at 369.

107. *Id.* at 370.

108. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980). *Accord* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010); Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001); Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–30 (1992).

109. For instance, in the *Nollan* case, Justice Brennan—although dissenting from the Court's holding of a compensable taking—insisted that "state law is the source of those strands that constitute a property owner's bundle of . . . rights." Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 857 (1987) (Brennan, J., dissenting).

meaning. For instance, property is an estate in land, defined by state law.[110] Property is comprised of "those common, shared understandings . . . derived from a State's legal tradition."[111] There seems to be a logical and comforting assurance about this idea, with its establishment of intellectual boundaries for the idea of property and, therefore, the delineation (in any case) of its impairment.

There is, of course, a latent Achilles' heel in this concrete image of property, made worse by the endorsement of the law of another sovereign. Law changes as circumstances, values, and scientific knowledge change. How is this accommodated by this concrete, objective, *state-defined* idea of property?

Indeed, if we think more deeply about it, this entire enterprise is puzzling. In no other area of constitutional law is the question of the content of the individual right, with its well-nigh dispositive power, left—by explicit doctrinal command—to *state* determination. One cannot imagine the content of constitutionally protected speech, or of religiously protected practice, or of any other right, as a matter of state law. The reason is obvious. If the substance of an individual right is a creature of state law, then the state can presumably interpret it, change it, or eliminate it as it sees fit. And, with federal courts bound by state determinations of the content of the right, there is not much left for the exercise of federal power.

Two years ago, this problem came to a head in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection.*[112] In that case, shoreline owners claimed that a decision by the Florida Supreme Court, interpreting state law, detrimentally changed their littoral rights and took their property without compensation.[113] In the end, the Court's majority evaded this question by deciding that the state-created littoral rights that the claimants sought to protect had never, in fact, existed.[114] However, a plurality of the Justices went farther and proceeded to tackle the larger question. The idea of concrete, state-created property is sound, they argued, because the creations of state law can be sorted into two boxes: "established rights" and "non-established interests."[115] Once a state has established rights, it has created constitutionally cognizable property.[116] And although a state generally enjoys definitional powers, "[i]f a [state] legislature or a [state] court

110. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (referring to the "right of support" as being a "very valuable estate" in land under Pennsylvania law).

111. *Palazzolo*, 533 U.S. at 630.

112. 130 S. Ct. 2592 (2010).

113. *See id.* at 2599–600.

114. *See id.* at 2612–13.

115. *See id.* at 2602 (plurality opinion); *id.* at 2612–13 (majority opinion).

116. *See id.* at 2602 (plurality opinion).

declares that what was once an established right of private property no longer exists, it has taken that property."[117]

This reasoning has a strange circularity to it. According to these Justices, a state has the right to define (and redefine) property, unless it has previously done so. However, how can we tell if it has done so? If states have been given the power to determine the existence and content of property rights, presumably they are the ones to decide the difference between established state rights and non-established state interests.[118]

In Supreme Court cases, state-defined property is only one example of efforts to give the idea of property a concrete, reliable, and intellectually defensible quality. In other Supreme Court cases, for instance, property has been described as the "bundle" of "traditionally" or "commonly" recognized rights to possess, use, transport, sell, donate, exclude, or devise;[119] the "fundamental attribute[s] of ownership";[120] the "ordinary meaning" of "property interest";[121] and the rights enumerated in an executed contract.[122]

These efforts to assign a concrete and articulable meaning to property are not, in themselves, undesirable or wrong; property must, after all, have some established meaning in constitutional and other legal contexts. The problem arises when it is suggested, as the next step, that the idea of state-created (or other) property can *resolve* the takings question. This approach is exemplified by the *Stop the Beach* plurality opinion just described. These Justices made *the idea of property*—with its defined, concrete parameters (as they define them)—determinative of the question of the consequences of change and the need for constitutionally mandated compensation. Under their approach, we look to see if the state has established rights. And, if it has done so, any subsequent change in those rights—by virtue of that a priori establishment—is a taking of that property interest.[123]

The problem, of course, is that no definition of property can do this. Property is, *by definition*, the protection of the status quo; it cannot, of itself,

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117. *Id.* (emphasis omitted).

118. Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203, 208 (2011).

119. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (right to "essential use" of land); Hodel v. Irving, 481 U.S. 704, 716 (1987) (right to devise); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496 (1987) (right to "economically viable use"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("[p]roperty rights in a physical thing" include the rights to possess, use, exclude, and dispose of it); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) ("traditional" rights of possession, exclusion, and other powers of disposition; "to possess and transport . . . , and to donate or devise").

120. Agnis v. City of Tiburon, 447 U.S. 255, 262 (1980).

121. Nollan v. Ca. Coastal Comm'n, 483 U.S. 825, 831 (1987).

122. *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935) (rights under an executed mortgage contract); Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (rights under a contract for sale of land subsurface rights).

123. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010) (plurality opinion).

answer the question of when there is a justified change in that status quo and when there is a need for compensation. It cannot, that is, unless we assume that *all* existing rights in the state-created legal status quo are believed to be constitutionally protected and immune from change, a completely impracticable situation.

The bottom line is that any recognized state (or federal) configuration of rights, which the property initially confers, is, at most, a snapshot of the way that conflicting individual and collective interests are resolved at that moment. As such, it does not—and cannot—of itself answer the questions that arise when that previously established configuration of rights is challenged. It does not accommodate the need for change and it does not tell us if payment should be made for change. Kicking the takings ball into the state (or other) definitional court might establish a baseline understanding of what property—at that moment—is, but it does not yield any neutral or objective answer to the takings question. No conception or definition of property, no matter how concrete, historically established, enlightened, or erudite can—of itself—eliminate the central inquiry. Because of the essential nature of this right, its challengers, and the inevitable need for change, the assertion by these Justices that the idea of property itself can sort out these questions is doomed to incoherence.

Because of this problem, the concreteness strategy generally is used by the Court in tandem with another strategy: simple silence, as a meaningful doctrinal matter, on the role of change and competing collective interests. Indeed, public interests are so often ignored as a doctrinal matter that one is routinely left to guess or attempt to infer whether they have any standing or relevance in the resolution of takings cases. In one recent case, for instance, a concurring Justice opined that they did not; the majority was silent on the question. The Justice pointedly described the value that accrues to the public through wetlands-preservation laws as "profit *to the thief*"—a charge that the majority left unanswered.[124]

The idea that property is of a concrete, state-defined (or other-defined) nature, and that public interests should simply be ignored, might superficially solve the problem of the inherently vulnerable nature of property and the threat that is posed by its asserted social contingency. However, the necessary artificiality of this approach, and its inevitable failures in the real world of property disputes, make it inherently unstable. Those in the property-rights camp know that an approach that silently ignores public interests is simply a waiting game for a case in which public interests are too strong to be ignored, and the approach undone.[125] Those in the public-interest camp know that any

124. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (Scalia, J., concurring).

125. I have argued that this was the reason for the sudden, crucial role of competing public interests in *Palazzolo* and *Tahoe-Sierra*. *See* Underkuffler, *supra* note 98, at 750.

move by the Court to recognize public interests in one case might well disappear in the next announced adjudication.

The core task in the interpretation of individual constitutional rights is the explicit recognition of conflicting private and public interests, and their honestly attempted—if necessarily flawed—reconciliation. In no other area of constitutional law would we condone an approach that suggests, as a doctrinal matter, the ignoring of half of the decisional equation. As stated above, the purpose of the Takings Clause is to protect individual property from radical changes in the status quo without adequate justification. In each contested case, we must therefore ask:

> –What are the values, theoretical and practical, that underlie the protection of the individual's interest in this case?
>
> –What are the values, theoretical and practical, that motivate the public (collective) to institute change?
>
> –Taking what we have found—the reasons for the protection of this property, and the reasons for change—should we require the payment of compensation?

In this process, there must be honest grappling with hard truth. If a claimant will lose substantial value, then we must admit that she will lose substantial value. If the payment of compensation will gut environmental regulation, then we must admit that it will gut environmental regulation. If other landowners or citizens will be affected by what we do, then we must acknowledge that they will be affected by what we do. We must admit that property claims are inherently rivalrous; that someone inevitably will lose in each case; and there is no way to avoid that outcome. And the fact that property is defined or understood in a certain way does not answer these questions.

It has become the distinctive function of the judicial role—through the Constitution's Takings Clause—to reconcile acts of collective change with citizens' desires for maintenance of the legal status quo and property's promise of security. It is because these cases are so difficult, and the stakes in them so high, that the performance of this judicial function in them is so critical.

IV. Conclusion

The accommodation of change is a continuing challenge that we, as human beings, face. On the one hand, we crave the novel, the better, the excitement of something new. On the other hand, we seek security, the guaranteed, the comfort of what is known.

Tensions between these human impulses can be found throughout law. This includes constitutional disputes and constitutional theory. We know, for example, that our political and governmental institutions must reflect the postmodern world in which we find ourselves. Yet we also gravitate toward veneration of precedent, and a national cultural belief in the "special genius"

of the American legal experiment and the group of men who drafted the founding documents at the end of the eighteenth century.

Because of property's particular characteristics, the conflict between the idea of protection and the idea of change in the understanding of this right is the most obvious and the most harsh. Unless all existing entitlements are to remain unchanged forever, we cannot—in interpreting this right—avoid the core issue. In important swaths of American society and law, there *will* be property and there *will* be change. There can be no masking or hiding of this reality. The only question is whether we, through our institutions, will control, explain, and mediate this change in our inevitable adjustment to it.

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