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# The Original Understanding of Constitutional Legitimacy

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## The Original Understanding of Constitutional Legitimacy

Ilan Wurman\*

*This Article argues that three influential schools of originalism, which we might label libertarian, progressive, and conservative, adhere to particular understandings of constitutional legitimacy, which then inform their particular constitutional hermeneutics. The Article demonstrates that as originally understood by the Founders, however, constitutional legitimacy depended on all three conceptions advocated by these schools of thought—that is, the Constitution had to protect natural rights, it had to enable self-government, and it had to be ratified by popular sovereignty. Further, the Article gives considerable treatment—remarkably for the first time in the law review literature—to James Madison’s letter in response to Thomas Jefferson’s famous “dead hand of the past” argument, in which we might find an understudied ground for constitutional obedience: prudence.*

*The discussion on the Founders’ original understanding of constitutional legitimacy provides two principal insights: First, it provides us with a more holistic case for constitutional obedience than modern originalist theories, whose narrower theories of legitimacy may be unpersuasive standing alone. Second, it demonstrates that broader hermeneutics are necessary as an originalist matter or simply because we find the Founders’ understanding more persuasive. The Article will also suggest, in the conclusion, that the more holistic account of constitutional legitimacy might provide a new justification for originalism.*

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#### INTRODUCTION

For the last few decades, many originalists have developed theories of constitutional interpretation around particular notions of constitutional legitimacy. This Article will show that three influential, contemporary originalist constitutional theories—which we may tentatively label libertarian, progressive, and conservative theories—propose or assume a particular notion of constitutional legitimacy. Each theory of legitimacy then seems to require, or at least to inform, a particular method of constitutional interpretation. The Article, however, will conclude that constitutional legitimacy, at least as originally understood by the Founders, was rooted in grounds broader than those offered by modern originalist theories. Broader hermeneutics may therefore be necessary either as an originalist matter or simply because we find the Founders’ understanding of legitimacy more persuasive. The Article will also suggest generally

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that the Founders' broader understanding of constitutional legitimacy may prove more persuasive than the legitimacy theories of modern scholars.

Each originalist theory develops a hermeneutic that stems from its understanding of legitimacy. We may say, as an approximation, that libertarian thinkers support what Randy Barnett has called a "presumption of liberty," stemming from their natural rights theory of the Constitution.<sup>1</sup> Progressive originalists advocate what I shall call the "progressive presumption," which aims to enhance or enable democratic decision making through a judicial activism of sorts.<sup>2</sup> Jack Balkin is the most recent and comprehensive advocate of this view in his book *Living Originalism*,<sup>3</sup> which argues that the open-ended rights provisions of the Constitution were intended to enable future democratic decision making through debates over constitutional construction. Finally, more conservative thinkers support a "presumption of constitutionality," stemming from what they see as their commitment to self-government and judicial restraint.<sup>4</sup>

The vast majority of the originalists surveyed in this Article fall into the third camp. Although there are only a few libertarian and progressive scholars in this field, these few have had a tremendous impact not only on legal scholarship, but also on popular thinking about originalism. They deserve as much attention, therefore, as their more numerous conservative counterparts.

Describing these theories of interpretation in terms of these presumptions will help our analysis.<sup>5</sup> Each theory focuses on some

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1. *See infra* Part I.A.

2. *See infra* Part I.B.

3. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

4. *See infra* Part I.C.

5. Several scholars have tried to characterize the different schools of originalism in other ways. *See, e.g.*, KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 18–34 (1999) (classifying the theories in terms of their emphasis on democracy, rights, natural law, or pragmatism) [hereinafter WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*]; Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 247–62 (2009) (tracing the evolution of originalism from original intention to original meaning, then to original public understanding, and now to new theories of a "hypothetical, reasonable person" understanding); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1134–48 (2003); Keith E. Whittington, *Is Originalism Too Conservative?*, 34 *HARV. J.L. & PUB. POL'Y* 29, 33 (2011) (noting that there are several kinds of originalism— "[l]ibertarian-oriented natural rights theories, pragmatic law-and-economic theories, . . . and

over-arching principle of constitutional legitimacy, which then seems to require a particular understanding of the meaning of the Constitution. These interpretations, however, fail to recognize that the Framers intended, and the ratifying public likely understood, the Constitution to achieve several ends at once and that it may therefore be legitimate for broader reasons.<sup>6</sup>

The libertarian-originalist scholars emphasize that obedience to the Constitution is warranted only if we abandon the idea of consent and replace it with the notion that the Constitution must protect our natural rights. As Barnett argues, we must obey the Constitution only if it is, on the whole, just by *some* conception of justice.<sup>7</sup> The progressive constitutional theorists all depend on some notion of current democratic legitimacy, successive acts of popular sovereignty, or enhancing democracy to justify constitutional obedience.<sup>8</sup> The presumption-of-constitutionality originalists—that is, most originalists—rely on the initial act of popular sovereignty as demanding obedience to the Constitution.<sup>9</sup>

Part I of this Article provides a new account of these theories that allows us better to see how the theorists' particular understandings of constitutional legitimacy lead to particular hermeneutics. Specifically, it will show that (1) each of the following theories demands a certain kind of constitutional legitimacy for the Constitution to have a claim to our obedience; (2) each demands an

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Burkean doctrinal theories"). I am not classifying the theories along these lines, but rather on the constitutional presumptions that tend to flow from them. The authors examined in this Article, moreover, do not all use the term "original meaning" in exactly the same way. They all frequently use it, however, to refer to how the ratifying public understood the text's meaning or to what the Framers intended. Because I believe there is substantial overlap between these understandings of original meaning, I will use "original meaning" loosely to refer to both.

6. Others have criticized constitutional theorists for elevating some principles of the constitutional text at the expense of others. *See, e.g.*, WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 23 ("Ely is not convincing in demonstrating that the Constitution is uniquely concerned with procedural values to the exclusion of various substantive commitments."); *id.* at 29 ("In both theory and practice, the rights approach has been highly selective in its choice of values to elevate to a fundamental position worthy of judicial protection."). I will try to show this more systematically through an examination of how the Framers understood constitutional legitimacy itself.

7. *See infra* Part I.A.

8. *See infra* Part I.B.

9. *See infra* Part I.C. It is worth repeating that this categorization is a generalization. As I will emphasize later, the presumption of constitutionality encompasses a large number of originalists who certainly disagree on important points of constitutional theory.

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“original meaning” interpretation independent of the question of constitutional legitimacy; and yet (3) each seems to require a different interpretive method as a result of its particular understanding of constitutional legitimacy. The ultimate claim is that each of these theories of legitimacy is incomplete, and thus each particular hermeneutic is also incomplete.

Part II gives a short account of how the Founders, and particularly James Madison, understood constitutional legitimacy and the idea of founding. It will show that the Founders understood that the Constitution needed to be legitimate in each of the three conceptions advocated by these different schools—that it must be based on consent of the governed (or popular sovereignty), that it must enable a representative (or republican) form of government, and that it must secure the just ends of government. This Part will then examine Madison’s response to Jefferson’s letter in which the latter famously raised the “dead hand of the past” argument, the claim that the Constitution cannot bind succeeding generations. While Jefferson’s letter is well known and often quoted (especially by progressives), Madison’s direct response to Jefferson in his own letter, as far as I can tell, has never received any considerable treatment in the literature. I believe Madison’s argument provides us with an additional reason for constitutional obedience: although the Constitution may be imperfectly legitimate, prudence may nevertheless justify adherence to the whole.

The principal insights of Part II are these: First, the question of why the Constitution ought to be binding is important to all constitutional theories and to all American citizens who must choose whether or not to obey the Constitution today. While the political and philosophical views of the Founding generation cannot bootstrap themselves into acceptance, surely there is great wisdom to be found in the generation that had to justify breaking away from its previous allegiance and justify an entirely new mode of government. Whether we are ultimately persuaded by them or not, the Founders provide us with a more holistic account of why the Constitution is legitimate than many other theories do. It is my view that the three grounds of legitimacy, along with prudence as a fourth ground, justify constitutional obedience.

Second, if the Constitution can only be legitimate, at least in the Founders’ view, if it satisfies all three conceptions of legitimacy, then hermeneutics broader than those proposed by many current scholars

are necessary as an originalist matter. Determining the proper interpretive method may be a difficult enterprise because of the compromises the Framers made among the competing ends of government, but I will briefly suggest that an original interpretive conventions approach may be a promising way to discern original meaning.

There is another possible insight from this discussion that will require further study. The Article will note in conclusion that the question of why the Constitution should be obeyed and whether originalism is the proper hermeneutic approach are conceptually distinct questions; one could conclude that the Constitution is worthy of obedience but that it requires a non-originalist interpretation. This Article aims to begin the argument that constitutional obedience, rooted in the Founders' grounds for constitutional legitimacy, may provide a new rationale for originalist interpretation. This would extend beyond the rationales rooted in the "writtenness" of the text—rationales to which the libertarian, progressive, and conservative originalists all adhere.

## I. A TALE OF THREE THEORIES

This Part aims to show that (1) each of the following theories demands a certain kind of constitutional legitimacy for the Constitution to have a claim to our obedience; (2) each demands an "original meaning" interpretation, independent from the question of constitutional legitimacy; and yet (3) each requires a different interpretive method as a result of its particular legitimacy theory, even though each claims that its hermeneutic derives solely from the text of the Constitution itself. The next Part will then show how, at least as originally understood by the Founders, the Constitution's legitimacy was rooted in grounds broader than those offered by these originalist theories, and thus interpreting the Constitution as an originalist may require broader hermeneutics.

### *A. Libertarian Originalism*

#### *1. Natural rights*

The "presumption of liberty" theory comes most famously from

Randy Barnett.<sup>10</sup> In his work *Restoring the Lost Constitution: The Presumption of Liberty*, he argues that popular sovereignty is an inadequate basis for constitutional obedience: only a constitution that “contains adequate procedures” to protect natural rights can lay a claim to legitimacy and our obedience.<sup>11</sup> He challenges the validity of several consent-based arguments, such as that we consent to the Constitution when we choose to vote, to reside in the country, not to revolt, and not to amend the Constitution.<sup>12</sup> In short, that the Constitution was ratified by popular assemblies in the late 1780s makes no difference; indeed, it appears that even if the Constitution were formally abolished today and re-ratified with exactly the same text, then, assuming the Constitution was not just by Barnett’s conception, it would not provide any better reason for non-consenting parties to adhere to its commands.

While Barnett’s entire work is an attempt to persuade us that the Constitution would be legitimate—and demand our obedience—if it protected our natural rights, he explicitly acknowledges that the Constitution could also be legitimate based on some other conception of justice. What is certain is that it must be just by some conception.<sup>13</sup> Barnett attempts to get around this somewhat unsatisfying proposition—after all, what if someone doesn’t agree with his conception?—by claiming that his theory does not depend on what conception of justice one holds; rather, “constitutional legitimacy can be seen as a product of procedural assurances that legal commands are not unjust.”<sup>14</sup> He then argues, however, that it is only legitimate to bind non-consenting residents if their natural rights are protected.<sup>15</sup> Thus, it is still unclear why the Constitution ought to be binding on those who do not share his natural-rights view of justice.

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10. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

11. *Id.* at 4; *see also id.* at 11–52.

12. *Id.* at 14–25.

13. *Id.* at 3 (“Although my thesis concerning legitimacy does depend on the claim that ‘justice’ is independent of whatever may happen to be commanded by positive law, it does not depend on acceptance of any particular conception of justice.”).

14. *Id.*

15. *Id.* at 4 (“I contend that if a constitution contains adequate procedures to protect these natural rights, it can be legitimate even if it was not consented to by everyone; and one that lacks adequate procedures to protect natural rights is illegitimate even if it was consented to by a majority.”).



Richard Epstein takes essentially the same view of constitutional legitimacy as Barnett.<sup>16</sup> He begins with abandoning consent (or popular sovereignty) as the justification for obedience to the state. He writes that Locke was acutely aware of the problem of achieving unanimous consent for the formation of civil society out of the state of nature, and thus Locke adopted a view of tacit consent: anyone who does not leave, and who enjoys the protection of the state, tacitly consents to be ruled by the state.<sup>17</sup> This was an error, writes Epstein, because tacit consent “becomes the thin edge of the wedge that grants legislators the lion’s share of the surplus that Lockean institutions wish to keep out of their hands.”<sup>18</sup>

Thus, Epstein argues, to make the Lockean, natural-rights conception of the state viable, we must abandon tacit consent and any possibility of consent as a source of contractual (or constitutional) obligation. That obligation must come instead from a theory of exchange between the sovereign and the individual:

The bulwark of the individual is . . . that whenever any portion of [his property] is taken from him, he must receive from the state . . . some equivalent or greater benefit as part of the same transaction. The categorical command that property shall not be taken without tacit consent [the Lockean theory] must therefore be rewritten to provide that property may be taken upon provision of just compensation.<sup>19</sup>

Epstein then argues that this Lockean conception of natural rights and the end of the state “was dominant at the time when the Constitution was adopted,”<sup>20</sup> and the substantive and procedural protections of the Constitution aimed at the protection of private property.<sup>21</sup> Both Epstein and Barnett, therefore, abandon any notion of consent of the governed as legitimating constitutional obedience; both require that the Constitution protect natural rights (and especially property rights) in order for it to be legitimate and demand our adherence.

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16. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

17. *Id.* at 14.

18. *Id.* at 14–15.

19. *Id.* at 15.

20. *Id.* at 16.

21. *Id.* at 17.

## 2. *Writtleness*

Originalism neither self-evidently nor necessarily follows our acceptance of the constitution's legitimacy. For Barnett, we must adhere to the original meaning because a *written* text requires such a reading.<sup>22</sup> The "writtleness" of the text and its substance are two different things; again, if the substance of the constitutional text did not enable legitimate lawmaking, then the Constitution is not binding.<sup>23</sup> Analogizing to contract law, Barnett argues that writing serves evidentiary, cautionary, channeling, and clarification functions, and that creating a written constitution is valuable for precisely these reasons.<sup>24</sup> The use of the parol evidence rule in contracts also suggests that interpreting written instruments requires adherence to original meaning; otherwise, parties could contradict the explicit provisions of the contract with additional evidence outside of the written contract. That would undermine the four functional purposes served by the writing and would require the difficult enterprise of reading the minds of the parties.<sup>25</sup> The same holds true of constitutions.<sup>26</sup>

Epstein's book is not a justification for originalism, and he dispenses with matters of interpretation rather quickly. "[T]he idea that constitutions must evolve to meet changing circumstances," he writes, "is an invitation to destroy the rule of law. If the next generation can do what it wants, why bother with a constitution to begin with, when it is only an invitation for perpetual revision?"<sup>27</sup> Whether the eminent domain clause—the primary focus of his book *Takings*—was meant to protect markets, autonomy, or both, does not matter; instead, "greater progress will be made by assuming that the clause is designed to do what it says, to ensure that private property is not taken for public use without just compensation."<sup>28</sup> Epstein does not care for the intent of the Framers with respect to

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22. BARNETT, *supra* note 10, at 100–09.

23. *Id.* at 109.

24. *Id.* at 101–02.

25. *Id.* at 102–03.

26. Or at least he argues that the same holds true. It is not entirely clear that constitutions—the fundamental social contract—are the same as normal contracts, or should be treated like normal contracts. Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 522 (2003).

27. EPSTEIN, *supra* note 16, at 24.

28. *Id.* at 26.

specific constitutional provisions, but he is an originalist insofar as he is a textualist who does not accept “perpetual revision” of the Constitution’s text.<sup>29</sup> Thus, both Epstein and Barnett adhere to original meaning based on the writtenness of the text or simply because a constitution would not be a constitution if the text were changeable.

### 3. *The presumption of liberty*

It is from the text itself and its original meaning that both Epstein and Barnett claim to derive their understanding of the Constitution’s substance. Barnett argues that if the text of the various constitutional provisions is properly understood, it points to interpretations that may be described as a presumption of liberty.<sup>30</sup> More specifically, he argues that when properly understood, the Commerce Clause, the Necessary and Proper Clause, the Ninth Amendment, and the Privileges or Immunities Clause of the Fourteenth Amendment all enshrine this presumption.<sup>31</sup> The gist of this hermeneutic is that it “would place the burden on the government to show why its interference with liberty is both necessary and proper rather than . . . imposing a burden on the citizen to show why the exercise of a particular liberty is a ‘fundamental right.’”<sup>32</sup> The textual source for this hermeneutic is the Ninth Amendment’s protection for all liberty interests, not merely fundamental ones, and the constitutional command that all laws passed by Congress shall be both necessary and proper.<sup>33</sup> Barnett

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29. Larry Alexander also describes this as originalist. See Larry Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. MIAMI L. REV. 223, 225 (1986).

30. The clearest statement that indicates that Barnett derives this presumption from the original meaning appears on page 154, where he writes that “[t]he original meaning of these nearly lost clauses [Necessary & Proper, Privileges or Immunities, and the Ninth Amendment] argues strongly against a presumption of constitutionality and in favor of the contrary construction I describe in chapter 10: the Presumption of Liberty.” BARNETT, *supra* note 10, at 154.

31. *Id.* at 5; see also *id.* at 153–55 (Necessary and Proper Clause); *id.* at 191–93 (Privileges or Immunities Clause); *id.* at 225–26 (Ninth Amendment); *id.* at 278–321 (Commerce Clause); *id.* at 259–60 (“Instead of authorizing a search for particular rights, the Ninth Amendment and the Privileges or Immunities Clause can be viewed as establishing a general Presumption of Liberty, which places the burden on the government to establish the necessity and propriety of any infringement on individual freedom.”).

32. *Id.* at 262.

33. *Id.*

does not, at least consciously, impose the presumption of liberty on the text in order to make the Constitution more just; these constitutional clauses, when given this correct original meaning, are also just, and so the Constitution is also legitimate and worthy of our obedience.

Epstein's whole work on takings, our main source for his views on constitutional interpretation, is meant to encourage the judiciary to strike down far more government legislation than it currently does<sup>34</sup> by treating almost any government action that harms property values as a taking.<sup>35</sup> To be sure, Epstein does not care for presumptions. Rather, he writes that the principles he espouses emerge from the constitutional text itself.<sup>36</sup> One could certainly argue, however, that Epstein's approach effectively amounts to a presumption of liberty when it comes to economic regulation, or at least a presumption of liberty with a presumption of compensation if our property rights (and the liberty we are allowed to exercise as a result of those property rights) are taken away.<sup>37</sup> Indeed, Epstein has recently completed a larger work, *The Classical Liberal Constitution*, in which he admits that the constitutional text is in fact vague and we must therefore interpret it with particular background principles.<sup>38</sup> He claims that classical liberalism (which is essentially consistent with modern libertarianism) is indeed the proper choice

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34. EPSTEIN, *supra* note 16, at 30–31 (“In what follows I shall advocate a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had.”).

35. He argues, for example, that Supreme Court decisions refusing to grant compensation to riparians, who are denied access by government action to flowing waters on their lands, were wrongly decided, *id.* at 70–72; that government restrictions on the power to sell private property, condemnation of leasehold interests without the right of renewal, and interference with goodwill all require compensation, *id.* at 74–86; that any interference with contracts requires compensation, *id.* at 90–92; and that all taxes and regulation affecting the possession, use, and disposition of private property are takings, *id.* at 100–01.

36. *Id.* at 30; *cf. id.* at 31 (“[A]t no point does the argument depend upon a belief in judicial activism in cases of economic liberties. Instead I believe that the courses indicated are necessary implications derived from the constitutional text and the underlying theory of the state that it embodies.”).

37. Larry Alexander summarizes Epstein's interpretive theory thus: “In brief, Epstein argues that the takings clause of the Constitution, properly interpreted, proscribes the destruction (= takings) of any right in the bundle of property rights enforceable at common law against private individuals or groups (= property), except insofar as public goods are realizable and overall wealth can be increased (= public use), and then only if all share pro rata in the increase in wealth (= just compensation).” Alexander, *supra* note 29, at 224.

38. RICHARD EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 52–53 (2014).

for interpretation because it was the most significant moral theory at work during the Founding era. He concludes: “In its enduring provisions, our Constitution is most emphatically a classical liberal document. Its successful interpretation on all points dealing with text and its surrounding norms should be read in sync with the tradition of strong property rights, voluntary association, and limited government.”<sup>39</sup> His Lockean theory of legitimacy requires a particular hermeneutic when interpreting the text of the Constitution.

To summarize: (1) both Barnett’s and Epstein’s theories depend not on consent of the governed to legitimate constitutional obedience, but on the concept of natural rights; (2) they both rely on original meaning; and (3) their textual analyses require hermeneutics that are significantly more libertarian, and such hermeneutics derive at least in part from their theories of legitimacy.

### *B. Progressive Originalism*

We now come to the second grouping of constitutional theories. The label “progressive presumption” or the more specific label “presumption of democratic legitimacy” has not been applied to these theories before, and perhaps for good reason. While the great progressive theorists of the last three decades have all tried to justify their constitutional theories by appealing to some notion of democratic legitimacy, one could argue that the progressive versions of democratic legitimacy invariably justify unpopular Supreme Court decisions.

If nothing else, however, characterizing these theories under this presumption conveys how these theorists purport to make the Constitution more democratically legitimate by “enabling” or “enhancing” democracy. That also allows us to see how their particular view of legitimacy seems to require a particular

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39. *Id.* at 53–54. Michael Rappaport describes Epstein’s theory as follows: “He believes that the constitutional language should be given its original meaning, but that the language is often incomplete or vague. Therefore, he argues that the language must be interpreted in accordance with some background principles, and those are classical liberal principles, because the leading political theory at the time of the Constitution was classical liberalism. As a result, [Epstein] is able to argue that the Constitution’s originalism meaning leads largely to classical liberalism.” Michael Rappaport, *Richard Epstein on “Constitutionalism, Originalism, and Libertarianism,”* ORIGINALISM BLOG (Feb. 21, 2013), <http://originalismblog.typepad.com/the-originalism-blog/2013/02/richard-epstein-on-constitutionalism-originalism-and-libertarianismmike-rappaport.html>.

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hermeneutic. This Part will address one prominent progressive, originalist scholar, as well as one non-originalist, progressive thinker who has originalist tendencies.

Jack Balkin, the most recent “progressive presumption” theorist, lays out his theory in his book, *Living Originalism*.<sup>40</sup> He argues that if one properly understands the Framers’ intent and also the language and structure of the Constitution, then an originalist understanding of the Constitution leads to living constitutionalism.<sup>41</sup> To Balkin, a living constitutionalist is the true originalist. Balkin’s fundamental argument is that the Constitution is written in three separate kinds of clauses—rules, standards, and principles. While the constitutional rules are fixed (such as the requirement that the President be at least thirty-five years of age), the Framers left the text’s standards and especially its principles to be fleshed out by future generations.<sup>42</sup> Balkin argues that, as a consequence, the Framers intended the Constitution to enable politics—that is, to enable future generations to put their own glosses on the Constitution—rather than to constrain them to avoid, as Justice Scalia and others have said,<sup>43</sup> the possible rotting of American society and politics.

Balkin thus starts on the same ground as the libertarian-originalists, arguing that we must obey the Constitution as originally understood. He also argues for this proposition on the ground of the text’s writtenness.<sup>44</sup> His explanation is less complicated than Barnett’s, and even seems rather intuitive. He writes that to maintain the framework of the Constitution over time “we must preserve the

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40. BALKIN, *supra* note 3.

41. Though the argument that the Framers may not have intended for their “intent” to guide the future has been made several times. *See, e.g.*, Paul A. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 216 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). *Contra* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 788–93 (2009).

42. BALKIN, *supra* note 3, at 6–7; *see id.* at 24 (“[The] basic job [of constitutions] is not to prevent future decision-making but to enable it.”).

43. *See* Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40–41 (Amy Gutmann ed., 1997).

44. BALKIN, *supra* note 3, at 35–49; *id.* at 35 (“Constitutional interpretation in the United States requires that we look to original meaning because the American Constitution is a written legal text that constitutes a framework for governance.”).

meaning of the words that constitute the framework.”<sup>45</sup> Or, “[t]o stick to the plan and implement it, we must respect its particular choices about freedom and constraint for political actors . . . .”<sup>46</sup> Furthermore, “[i]f we do not attempt to preserve legal meaning over time, then we will not be following the written Constitution as our plan but instead will be following a different plan.”<sup>47</sup> Whether or not this is a rigorous justification for an originalist interpretation, it is clear that Balkin presumes it as a starting ground. He claims to separate the question of how we should interpret the Constitution from whether we should actually obey it and keep it as our plan for government.<sup>48</sup>

Balkin makes the case for fidelity to the Constitution by avoiding the problem of consent-as-legitimacy in a new way. He argues that each generation gives its ongoing consent by debating constitutional *construction*. He writes that over time “Americans try to persuade each other about the best meaning of constitutional text and principle in current circumstances. These debates and political struggles also help generate Americans’ investment in the Constitution as their Constitution, even if they never officially consented to it . . . .”<sup>49</sup> He further argues, “[i]n every generation, We the People of the United States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time.”<sup>50</sup> Thus, consent to the Constitution is an ongoing process that takes the shape of changing constitutional understandings. These constitutional constructions themselves are legitimate, Balkin claims, because of their responsiveness to democratic politics over time: “[T]he initial authority of the text comes from the fact that it was created through successive acts of popular sovereignty . . . . The authority of constitutional constructions, in turn, comes from their direct or long-run

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45. *Id.* at 36.

46. *Id.*

47. *Id.*

48. *See id.* at 38 (“It is important to note that my argument for following original meaning assumes that Americans want to be faithful to the written Constitution as law and that we want to continue to accept it as our framework for governance. . . . Interpreting the text of the Constitution does not automatically require that we accept the written Constitution as a plan of governance.”).

49. *Id.* at 4.

50. *Id.* at 11.

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responsiveness to popular will as expressed through the processes of democratic politics.”<sup>51</sup> In short, the Constitution is premised on democracy and thus any constitutional theory must aim at democratic legitimacy. Balkin argues that his theory provides just such legitimacy because it is the very act of debating constitutional construction that makes the Constitution today “our law.”<sup>52</sup>

We see, therefore, that, like his libertarian-originalist counterparts, Balkin relies on the original meaning of the Constitution, and he begins with a particular understanding of what the Constitution must allow for it to be legitimate: it must allow successive generations to put their own glosses on the constitutional text for it to be democratically legitimate and “our law.” Balkin further claims that his particular interpretation of the Constitution’s clauses flows from the original meaning of the text. Thus, he argues that the Framers intended for us continually to change how we interpret the standards and principles in the text.<sup>53</sup> Of course, such a view runs directly contrary to Barnett’s libertarian-originalist thesis that the Constitution was meant primarily to protect individuals from future decision-making by enshrining their rights—and thus a presumption of liberty—into the constitutional text. Balkin draws the precise opposite conclusion than does Barnett from the open-endedness of the Constitution’s grand rights provisions with respect to the correct constitutional hermeneutic.<sup>54</sup>

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51. *Id.* at 55.

52. *Id.* at 69–73; *see also id.* at 64–73; *id.* at 71 (“The democratic legitimacy of the Constitution depends on the people’s belief that their Constitution and their government belongs to them, so that if they speak and protest and make their views known over time, the constitutional construction of courts and the political branches will eventually respond to their political values and to the issues they care about most.”). Balkin elaborates on this kind of legitimacy toward the end of his book. He insists that watershed cases such as *Brown v. Board of Education* or the sexual equality cases of the 1970s followed on the heels of democratic and social movements, and thus his version of “democratic constitutionalism” is in fact democratically legitimate. *See id.* at 320–25.

53. *Cf. id.* at 25 (“This choice of [vague and abstract] language [of principles] makes little sense if the purpose of constitutionalism is to strongly constrain future decisionmaking.”); *id.* at 29 (“Open-ended rights guarantees . . . are designed to *channel* and *discipline* future political judgment, not forestall it.” (emphasis in original)). *See generally id.* at 21–34.

54. Though Balkin claims that living constitutionalism follows from originalism, he really seems to rely on the two ideas separately. Thus he claims that living constitutionalism is appropriate because the courts are responsive to democratic politics in the long run. This is what makes the Constitution legitimate. He explains that *Brown v. Board of Education* was in fact responsive to existing democratic and social movements, as were the sexual equality cases in the 1970s; even *Heller* was responsive to the guns rights movements of the last two decades.



To summarize: Balkin's constitutional theory (1) requires a constitution that allows for updating the text so that it can be "our law" and thus democratically legitimate; (2) begins with the original meaning of the text based on the Constitution's writtenness; and (3) arrives at a hermeneutic of living originalism that is consistent with his view of the requirements for constitutional legitimacy.

Insofar as Balkin tries to develop a theory that will be democratically legitimate, he follows in the footsteps of at least one great progressive constitutional theorist, John Hart Ely.<sup>55</sup> Ely does not pretend to be originalist, but he did claim to rely on the original meaning of the Constitution when it suited his argument. His hermeneutic seems to depend on his particular ground for legitimacy.

Ely wrote his famous *Democracy and Distrust* in 1980, in which he rejects the possibility of discovering fundamental values to supplement the open-ended texture of the Constitution's clauses.<sup>56</sup> Nevertheless, the text is still open-ended; *something* has to supplement it. Ely argues that the Court could interpret these provisions to provide better *process* for democratic decision making; this would include "clearing the channels of political change on the one hand, and . . . correcting certain kinds of discrimination against minorities on the other," as the Warren Court had done.<sup>57</sup> Such a "representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy."<sup>58</sup>

The crucial problem is that while Ely recognizes both that the constitutional text needs supplementation and that it would be impossible to discover substantive values to provide that supplementation, he somehow believes that his process-oriented view is itself not a value judgment. In other words, he is not really so different from those scholars he disavows for seeking to vindicate

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But he does not once mention *Roe v. Wade* as being legitimated by a long-run responsiveness to democratic politics. *Roe* is justified strictly by his original meaning approach. It thus appears that he is willing to use one or the other approach—originalism or his conception of living constitutionalism—to justify the doctrinal results.

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

56. *Id.* at 43–72.

57. *Id.* at 74.

58. *Id.* at 88.

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substantive values. By choosing to emphasize representation and process, he ignores the very real possibility that the Constitution did mean to protect some kind of substantive rights as well. Ely is far too careful to have missed this criticism, and he addresses it several times in his book. He admits that “our Constitution is too complex a document to lie still for *any* pat characterization.”<sup>59</sup> Yet Ely’s problem is that he does characterize the Constitution as overwhelmingly focused on process and representation, arguing not only from the structure of the text but also from selective writings of the Founders.<sup>60</sup>

An example may better illustrate. Ely acknowledges that our Constitution “has always been substantially concerned with preserving liberty,” but he argues the relevant question is “how that concern has been pursued.”<sup>61</sup> Yet immediately preceding this claim, he suggests that the few genuinely substantive provisions in the Constitution have been unsuccessful. He correctly argues that the substantive value of slavery and prohibition did not survive because of subsequent repeal; but he also argues that two other substantive values—the right to bear arms and the freedom to contract, which “at least arguably were placed beyond the reach of the political process”—were in fact “‘repealed’ by judicial construction.”<sup>62</sup> He concludes: “Maybe in fact our forebears did not intend very seriously to protect those values, but the fact that the Court, in the face of what must be counted at least plausible contrary arguments, so readily read these values out of the Constitution is itself instructive of American expectation of a constitution.”<sup>63</sup>

But Ely’s claims are susceptible to the same criticism as the other theories examined thus far. His theory accounts for the decisions limiting these substantive rights, but that hardly means the original understanding of the Constitution was that these rights should be

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59. *See, e.g., id.* at 101 (emphasis in original); *see also id.* at 92 (“[M]y claim is only that the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values. Any claim that it was exclusively so conceived would be ridiculous . . . . And indeed there are other provisions in the original document that seem almost entirely value-oriented, though my point, of course, is that they are few and far between.”).

60. *See id.* at 88–93.

61. *Id.* at 100.

62. *Id.*

63. *Id.*

read out by the Court. Ely begins with a pre-commitment to representation as a source of constitutional legitimacy. True, Ely is not known for pretending that his proposal for constitutional interpretation derives from the original meaning of the text.<sup>64</sup> Yet even he relies on original meaning when it suits his argument<sup>65</sup>—and this meaning seems to depend on his pre-commitment. He writes, for example, that “[t]he original Constitution’s more pervasive strategy . . . can be loosely styled a strategy of pluralism”; that “the concept of representation . . . had been at the core of our Constitution from the beginning”; that the colonists were mainly concerned with representative fairness; and that “the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values.”<sup>66</sup> To be sure, he hedges: the Constitution was not exclusively concerned with process, he writes.<sup>67</sup> Yet even he admits that “[o]n [his] more expansive days,” he is tempted to claim that his view “represents the ultimate interpretivism” (basically originalism).<sup>68</sup> Ultimately, he seems to settle on the proposition that it really doesn’t matter whether his approach is interpretivist or not.<sup>69</sup>

In sum, Ely arrives at a particular constitutional hermeneutic that hinges on his view of constitutional legitimacy and which, he claims, is largely consistent with the original understanding of the constitutional text.

### C. *Conservative Originalism*

The last group of constitutional thinkers consists of originalists whom we may also deem judicial minimalists. The first originalists were mainly of this stripe, as originalism had its beginnings as a revolt against the perceived judicial overreach of the Warren Court.<sup>70</sup>

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64. The first part of his book, after all, is a refutation that “interpretivism”—which in the language of the day was essentially (though not entirely) equivalent to originalism—is possible. *See id.* at 11–14, 41.

65. For his analysis on the original meaning and purpose of the Constitution, see *id.* at 80–82, 87–88 & footnote, 88–101.

66. *Id.* at 80, 82, 89, 92.

67. *Id.* at 92.

68. *Id.* at 87–88.

69. *Id.* at footnote on 88.

70. *See* Richard H. Fallon Jr., *Are Originalist Constitutional Theories Principles, or Are*

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It is important to stress that the “presumption of constitutionality” is not usually a label applied to originalist thinkers because there is such a wide variety of originalists. Much of the scholarship providing descriptive accounts of originalism focuses on the evolution of originalism from “original intentions” originalism to “original public meaning,” to “original understanding,” and now to a “hypothetical reasonable person” originalism.<sup>71</sup> Nevertheless, this presumption again helps to clarify the pre-commitments of these originalist thinkers.

*1. Popular Sovereignty*

Originalists who adhere to judicial minimalism and this presumption argue that we owe obedience to the Constitution and adherence to its constraints because the people themselves imposed these constraints. As Michael McConnell has written, “The people’s representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves, as reflected directly through text and history, or indirectly through longstanding practice and precedent.”<sup>72</sup> Justice Scalia’s adherence to the original public understanding of the constitutional text evinces a similar commitment to popular sovereignty: it is because the people themselves have imposed certain constraints on the future that those constraints are binding.<sup>73</sup> These are views of popular sovereignty that the previous two schools of thought have rejected.

Keith Whittington gives a comprehensive account of popular sovereignty as a ground for constitutional legitimacy,<sup>74</sup> summarizing his view as follows: “By construing the Constitution in terms of the intent of its creators, originalism both enforces the authoritative

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*They Rationalizations for Conservatism?*, 34 HARV. J.L. PUB. POL’Y 5, 21 (2011) (“[O]riginalism not only promised a more or less principled ground for opposing further liberal innovations, but also provided a potential justification for demands to roll back legal doctrines that had originated either in the Warren Court or ‘the New Deal settlement’ that marked the end of the *Lochner* era.”).

71. See *supra* note 5 for recent literature describing the evolution of originalism.

72. 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, 1291 (1996–1997).

73. See Scalia, *supra* note 43, at 38.

74. See WHITTINGTON, *supra* note 5, at 110–59.

decision of the people acting as sovereign and, equally important, preserves the possibility of similar higher-order decision making by the present and future generations of citizenry.”<sup>75</sup> Whittington, like Barnett and Epstein, rejects the notion of tacit consent,<sup>76</sup> but he claims that “We the People” give real consent each time we amend the Constitution, just as the founding generation gave its real consent when it ratified the Constitution. Whittington writes:

Consensual government does not require the imagination of a current consent; rather, it requires that government receive authorization for its actions. The Constitution provides that authorization. Government action requiring different authorization would require another such expression of consent. The government was set in motion by consent, but it need not demonstrate our continuing consent in order to remain in motion. It is enough that it not change course, or even stop its motion, except by our new consent. The implication is that the founders initiated the Constitution, which remains valid and binding not by virtue of their right to govern over us but by virtue of the “historical accident” that their text is the most recent expression of consent.<sup>77</sup>

Thus, Whittington adopts the view of “democratic dualism,” which maintains that the “people emerge at particular historical moments to deliberate on constitutional issues and to provide binding expressions of their will, which are to serve as fundamental law in the future when the sovereign is absent.”<sup>78</sup> Dualism is the same approach Bruce Ackerman takes to justify adherence to the constitutional text, but Ackerman argues that the New Deal era was a period of higher lawmaking. He interprets the constitutional constructions of that era as the binding will of the people.<sup>79</sup>

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75. *Id.* at 111.

76. *Id.* at 129.

77. *Id.* at 133 (internal citations omitted).

78. *Id.* at 135.

79. This concept is developed in several of Ackerman’s writings, but for a rather comprehensive article, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

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2. *Intentionalism versus writtenness*

For Whittington, as with Balkin and Barnett, popular sovereignty does not necessarily dictate originalism. Whittington also argues that it is the writtenness of the Constitution that requires an adherence to originalism.<sup>80</sup> But, he argues, just because the text is written does not mean it has a claim to our obedience; popular sovereignty justifies that obedience.

Not all originalists believe that originalism follows from the writtenness of the constitutional text.<sup>81</sup> Initially, originalism arguments were often based on intentionalism. Intentionalism holds that the authority of a law always derives from the authority of the lawgiver, and thus the lawgiver's intent is authoritative.<sup>82</sup> Richard Kay has explained: "Legal obligations arise because we recognize law-making authority vested in certain human beings. It is to that exercise of human will in making the relevant law that we refer in statutory construction."<sup>83</sup>

Intentionalism offers a solution to the question of legitimacy—we must obey because the intent of the Framers is authoritative. It also, however, solves the question of interpretation—it is the *intent* of the original lawgivers that matters, and thus we should be originalists. Unlike with the libertarian and progressive theories of legitimacy, which do not require originalism, a good argument can

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80. He makes his case on three grounds: first, the break from Great Britain (which does not have a written constitution) and the decision to fix our rights and principles in a written text reveal that those rights and principles are permanent; second, that a written text needs to be stable in order to allow judicial enforcement; and third, written legal texts all carry the intent of their authors. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 50.

81. I have hardly exhausted all theories of originalism based on language or writtenness. For some additional examples, see Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Lawrence B. Solum, *Semantic Originalism* (2008) (unpublished manuscript 2008), available at <http://papers.ssrn.com/abstract=1120244>.

82. See the discussion on this normative ground for originalism in Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1100–02 (1989).

83. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 232 (1988). Even John Hart Ely seemed to recognize that constitutional law in at least some sense *requires* us to know something about the original intentions of the Framers. See, e.g., ELY, *supra* note 55, at 16 ("Unless we know whether 'natural born' meant born to American parents on the one hand or born to married parents on the other, we don't know what the Ratifiers thought they were ratifying and thus what we should recognize as the constitutional command.").

be made that originalism is required by intentionalism. While Kay argues that discovering the intent of the Ratifiers (or Framers) is no more difficult than any other historical investigation to which thousands of students of history commit themselves every year,<sup>84</sup> this version of originalism has suffered the most serious of attacks.<sup>85</sup>

However, this attribute of intentionalism—that it simultaneously solves the questions of legitimacy and interpretation—survives in some popular sovereignty theories. Even though Whittington relies on the text’s writtenness to justify originalism, many originalists seem to believe that originalism is justified on the basis of popular sovereignty alone.<sup>86</sup> The argument in the context of popular sovereignty is almost identical to the argument in the intentionalism context: If we obey the text because it is the will of the people themselves, then surely we should adhere to their will—that is, their original intentions. The only difference between this version of popular sovereignty and Richard Kay’s intentionalism is the identity of the lawgiver: for Kay it was the Framers, while for most originalists today it is the Ratifiers.

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84. Kay, *supra* note 83, at 252 (“The very breadth of [the] claim [of the impossibility of historical understanding] makes it implausible. It is essentially an attack on the possibility and validity of historical investigation. While some students of history deny the possibility of objectively correct historical conclusions, the contrary view is also widely and firmly held. Indeed, the force of the latter position is strengthened by the fact that history is a well-established discipline to which thousands of sensible people have devoted and continue to devote their energy and intelligence.”).

85. For general criticisms, see Farber, *supra* note 82, at 1102. The most widely cited critique of originalism on this ground—a critique thought to be fatal to the original intent originalists—was Paul Brest’s famous article. Brest, *supra* note 41. He argues that it is impossible to know the intent of the Framers or Ratifiers because it is too difficult to determine each person’s individual “intention-vote,” which can vary at different levels of generality. *Id.* at 209–17.

86. For a discussion of the general popular sovereignty rationales for originalism, see Farber, *supra* note 82, at 1097–1100. He summarizes: “The majoritarian argument for originalism has three premises: that our society’s ‘master norm’ is democracy; that the Constitution gets its legitimacy solely from the majority will as expressed at the time of enactment; and that judicial decisions are less ‘democratic’ than those of the elected branches of government.” *Id.* at 1098. More generally, *some* kind of popular sovereignty argument seems to be the most common justification for originalist interpretation. See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007); Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL’Y 29, 39 (2011). For an argument that popular sovereignty *cannot* be the justification for originalism, but that originalism is justified nonetheless, see Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL’Y, 485 (2008).

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Of course, because this version of originalism requires a commitment to the popular sovereignty justification for constitutional legitimacy, the very necessity of originalism may thus be called into question if we dispute the popular sovereignty basis of the Constitution's legitimacy.<sup>87</sup>

Thus far, this subpart has shown the following: (1) These originalists believe that the Constitution is legitimate because it is based on the consent of the governed in past moments of constitutional decision making—a notion that their libertarian and progressive counterparts reject; and (2) They believe that originalism follows from the very nature of the written text or from intentionalism (whether we seek the intentions of the Framers or of the Ratifiers).

*3. Judicial minimalism and the presumption of constitutionality*

It remains to be shown that these originalists require a hermeneutic of judicial minimalism or a presumption of constitutionality. It is important, upfront, not to overstate the case: Originalism and judicial minimalism do not overlap perfectly. There might be good reasons to be a minimalist without being an originalist, and many originalists are not minimalists. Still, there is a class of judicial minimalists whose hermeneutic—the presumption of constitutionality—seems to derive from their commitment to the popular sovereignty justification for constitutional legitimacy.

The presumption of constitutionality itself came most definitively from Justice Brandeis's opinion in *Ashwander v. Tennessee Valley Authority*, in which he wrote that courts ought to, "in the exercise of their discretion, refuse an injunction unless the alleged invalidity" of

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87. This challenge is all too common in the progressive literature, which argues that we have no duty to obey the decisions of past majorities, and often that the Constitution is not legitimate because different groups—such as minorities and women—were excluded from the ratifying process. See, e.g., Brest, *supra* note 41, at 225 ("Even if the adopters freely consented to the Constitution, however, this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone."). See also *id.* at 230 ("The drafting, adopting, or amending of the Constitution may itself have suffered from defects of democratic process which detract from its moral claims. To take an obvious example, the interests of black Americans were not adequately represented in the adoption of the Constitution of 1787 or the fourteenth amendment."). Note, however, that this is precisely Barnett's position, too. See *supra* note 10 and accompanying text. I will explore how some of the Founders might have responded to these objections in Part II.



a legislative act is clear.<sup>88</sup> Brandeis cited several famous Justices, including Chief Justice John Marshall, for the proposition.<sup>89</sup> Harvard Law professor James Thayer had written forty years earlier, in 1893, that the Supreme Court “can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”<sup>90</sup> This doctrine quickly became the tool of judicial progressives who wished to adopt the dissent’s position in *Lochner v. New York* and give deference to legislative judgments.<sup>91</sup>

Robert Bork appropriated the presumption of constitutionality to originalism in a 1971 article<sup>92</sup> that some claim to be originalism’s intellectual birth.<sup>93</sup> “In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, ‘[A]re we all . . . at the mercy of legislative majorities?’ The correct answer, where the Constitution does not speak, must be ‘yes.’”<sup>94</sup> Bork also expressed this position with his (in)famous characterization of the Ninth Amendment as a provision obscured by an “ink blot.”<sup>95</sup> The bottom line for him (and subsequent judicial conservatives) was that Congress or the states may legislate freely except where the Constitution explicitly reserves a substantive right.<sup>96</sup>

Though Bork is perhaps the most famous expositor of the presumption of constitutionality among judicial conservatives, other

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88. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 354 (1936); *see also* McConnell, *supra* note 72, at 1289.

89. *Ashwander*, 297 U.S. at 354–55.

90. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

91. *Cf.* BARNETT, *supra* note 10, at 228–29. *Lochner v. New York*, 198 U.S. 45 (1905), is the infamous case in which the Supreme Court struck down a New York law limiting the number of hours bakers were permitted to work in a day on the grounds that it infringed on the freedom to contract. Progressives and judicial minimalists attack the decision as being anti-democratic.

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

93. Solum, *supra* note 81, at 13.

94. Bork, *supra* note 92, at 11.

95. BARNETT, *supra* note 10, at 236 (quoting *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings before the Sen. Comm. on the Judiciary*, 100th Cong. 249 (1987) (statement of Robert H. Bork)).

96. Judge Bork used this same inkblot language for the Privileges or Immunities Clause of the Fourteenth Amendment, stating: “That clause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990).

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originalists continue to adopt it as part of their constitutional views. Lino Graglia recently wrote: “[I]n a democracy the view of elected legislators should prevail over the view of unelected judges in cases of doubt,”<sup>97</sup> and “if a judge does not know that the Constitution was understood to preclude a particular policy choice, his conclusion must be that the choice is not constitutionally precluded.”<sup>98</sup> Michael McConnell has implied that the will of the people ought to be entitled to presumptive validity.<sup>99</sup> Whittington also suggests that, at least as a descriptive matter, constitutional construction occurs through the decisions of political actors over time, perhaps (though not necessarily) implying that elected legislators and executives ought to have the power to flesh out textual indeterminacies according to their own preferences.<sup>100</sup> Kurt Lash’s theory of the Ninth Amendment—which, he argues, reflects the Founders’ commitments to federalism and popular sovereignty—would lead to a presumption that state legislative acts that restrict rights are constitutional.<sup>101</sup>

Graglia complains most about the Court’s interpretation of the Fourteenth Amendment. He argues that giving the Court such “unlimited policymaking power” through the words “due process” and “equal protection”<sup>102</sup> deprives the American people “of their most important constitutional right—the right to self-government.”<sup>103</sup> From these arguments we see how the judicial

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97. Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. PUB. POL’Y 73, 75 (2011).

98. *Id.* at 86.

99. McConnell, *supra* note 72, at 1291.

100. See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3–9, 15–19 (1999). It is important to emphasize that it is unclear from Whittington’s descriptive account whether he actually supports some kind of “presumption of constitutionality” as the ideal construction.

101. See, e.g., Kurt T. Lash, *On Federalism, Freedom, and the Founders’ View of Retained Rights*, 60 STAN. L. REV. 969, 972 (2008) (arguing that the Ninth Amendment was meant to give states discretion with respect to “retained rights”); Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 HARV. J.L. & PUB. POL’Y 467, 472 (2008) (“The proper stance of an originalist judge in the face of historical ambiguity, then, is one of humility. If the original meaning of the text remains obscured, then courts lack authority to use the text to interfere with the political process. Put another way, in a case of historical ambiguity, the very legitimacy of judicial review is obscured—as if by an inkblot.”).

102. Graglia, *supra* note 97, at 76–77.

103. *Id.* at 85.

minimalists differ from the libertarian-originalists: the latter want to see more democratically enacted laws struck down as violations of the Fourteenth Amendment and other rights provisions, whereas the former want to see even fewer struck down. And the difference of emphasis derives from different views of constitutional legitimacy: do we prefer our right to self-government, or being secure in our natural rights?

It is worth spelling out how the presumption of constitutionality easily follows from this view of constitutional legitimacy: if the only reason to be bound by the text is that it is clothed with the consent of the people in a past time, then when that past consent is unclear we should be governed by clear expressions of *contemporary* consent. The underlying theory is one of popular sovereignty, where the people govern today except where the people themselves withdrew their power of self-government in the past.<sup>104</sup>

To be sure, many originalists do not follow the steps I have outlined in this section.<sup>105</sup> And even those who would adopt some kind of presumption of constitutionality do so as but one part of their constitutional interpretation, and for many subtle and complex reasons.<sup>106</sup> Nevertheless, the Court still applies a robust presumption of constitutionality when it comes to rational basis inquiries, leading at least one scholar to write that the Court should apply such a presumption to legislative interpretations of the Constitution as well.<sup>107</sup> The theorists described above, moreover, represent a wide

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104. McConnell has argued that this presumption in part reflects a commitment to popular sovereignty. McConnell, *supra* note 72, at 1289–90. Nevertheless, as he demonstrates, such a presumption has many “subtle” justifications, including not only popular sovereignty, but also compromise and accommodation, flexibility and experimentation, institutional differences, and judicial humility more generally. *Id.*

105. For example, Whittington writes that the “new originalists” of the past two decades are “less likely to emphasize a primary commitment to judicial restraint,” and many “are clear that a commitment to originalism is distinct from a commitment to judicial deference and that originalism may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding.” Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 608–09 (2004).

106. Recall, for example, McConnell’s statement that not only text and history, but also longstanding practice and precedent, may restrain current majorities. See McConnell, *supra* note 72 and accompanying text. Judge J. Harvie Wilkinson also seems to be this kind of minimalist. His judicial minimalism does not derive from originalism, but from a strong belief in judicial fallibility and the necessity of judicial humility. See J. HARVIE WILKINSON, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 6–8 (2012).

107. See F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE

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range of old and new originalists. Finally, Barnett sees the presumption of constitutionality as the nemesis of the presumption of liberty.<sup>108</sup>

4. *Alternatives to judicial minimalism*

Still, it is important not to overstate the case. There are many originalists who genuinely wish to interpret the Constitution with a much broader hermeneutic. Some of these originalists, such as McGinnis and Rappaport, go so far as claiming that we no longer need any construction—that the Constitution, when interpreted using original interpretive conventions, will always come up with the most *probable* answer.<sup>109</sup>

There is also a middle position. As McConnell argues, though originalism will give the answer to many constitutional questions, at least in some cases it cannot dictate one correct answer, but rather a range of possible meanings. It is within this range that he claims to be a judicial minimalist.<sup>110</sup> John O. McGinnis shows that as an originalist matter, the Founders were not judicial minimalists and did not adhere to Thayer's presumption of constitutionality. Therefore, the proper role of judicial restraint in an original interpretive conventions approach, which is similar to McConnell's position, may be described as follows:

The first obligation of a justice is to use the rich array of legal methods and mechanisms to clarify the meaning of ambiguous or vague text. A jurist does not simply defer to any plausible meaning of the text, considered in isolation from the rest of the text of the Constitution or clarifying legal methods. Only if these kinds of analyses fail to clarify whether the legislation is based on the correct meaning of the constitution, should the judiciary defer to the legislature.<sup>111</sup>

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DAME L. REV. 1447 (2010).

108. BARNETT, *supra* note 10, at 151–52. He also claims that “no group has been more faithful” than “modern judicial conservatives” to this presumption. *Id.* at 233–35.

109. McGinnis & Rappaport, *supra* note 41, at 772–73

110. Conversation with Michael W. McConnell, Professor, Stanford Law School, in Stanford Law School (2012).

111. John O. McGinnis, *Is Judicial Deference Part of the Originalist Method?* 52 (unpublished manuscript) (on file with author).

Michael Stokes Paulsen adopts a similar approach: “If the meaning of the words of the Constitution supplies a sufficiently determinate legal rule or standard applicable to the case at hand, that rule or standard must prevail over a contrary rule supplied by some other competing source of law.”<sup>112</sup> But if the meaning of the language is indeterminate or under-determinate when applied to a specific case, then typically the “political decisions made by an imperfect representative democracy” can prevail.<sup>113</sup>

There is a vibrant originalist literature over the past few years that rejects judicial minimalism. These constitutional theorists have attempted to distinguish between legitimacy and interpretation; that is, their methods of interpretation do not obviously follow from their commitment to popular sovereignty or to some other theory of legitimacy.<sup>114</sup> Libertarian and progressive theorists, on the other hand, adopt hermeneutics—the presumption of liberty or the progressive presumption—that seem inextricably linked to the theorists’ understandings of legitimacy. Many conservative judicial minimalists, further, also adopt a hermeneutic—the presumption of constitutionality—that appears to flow from their understanding of legitimacy. But many originalists today offer a different approach.

#### *D. Narrow Theories of Constitutional Legitimacy*

What this Part has aimed to show is that each of these schools of originalist constitutional interpretation—the libertarian-originalist school, the progressive school, and the conservative judicial-

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112. Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2057 (2006).

113. *Id.*

114. Gary Lawson identified the problem of conflating legitimacy and interpretation in a famous law review article comparing constitutional interpretation to interpreting a fried chicken recipe. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825 (1997). “Modern theories of constitutional interpretation,” wrote Lawson, “typically make the truth of propositions about constitutional meaning depend, at least to some degree, on the extent to which those propositions [] lead to politically legitimate results.” *Id.* at 1823. He added that this approach to constitutional interpretation is “completely backwards”: “The Constitution’s legitimacy and consistency with modern practice depend on the meaning of the Constitution; the Constitution’s meaning does not generally depend on its legitimacy or on current practice.” *Id.* Lawrence B. Solum also explicitly begins with a semantic and linguistic interpretation of the constitutional text (his “fixation” and “clause meaning” theses), and only then asserts his “fidelity” thesis—that we have good reasons to affirm our fidelity to the Constitution because it leads to good consequences and the “rule of law.” Solum, *supra* note 81.

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minimalist school—focuses on one theory of legitimacy, whether it be securing natural rights, enabling or enhancing democratic decision making, or popular sovereignty. Each then also claims to adhere to the original meaning of the Constitution, but each school’s understanding of that original meaning seems to require a hermeneutic that depends at least in part on its theory of constitutional legitimacy.

The problem therefore becomes evident: The original meaning or proper constitutional hermeneutic as each school understands it may be too narrow. Indeed, it is not at all clear, for example, that the best way to interpret the Constitution is to presume constitutionality except where the Constitution speaks explicitly. Barnett does seem correct that the Framers of the Ninth Amendment must have meant *something* by its inclusion, and that it does, therefore, have some original meaning to which we must adhere.<sup>115</sup> Further, how could the Equal Protection Clause ever speak explicitly, unless we adopt the original-expected-application version of originalism which many originalists no longer espouse?<sup>116</sup> Barnett and Balkin are on to something when both use the open-endedness of the abstract rights provisions to develop their theories—even if they come to different conclusions about what those provisions mean. The point is that the people themselves may not have intended to be so strict with the constitutional text: they might have written into the Constitution more open-ended standards and principles with the expectation that the courts and the people would interpret them differently over time.

To be sure, any of these theorists may respond that their presumptions are simply constructions to be used when semantic meaning cannot resolve a question. In other words, all might claim to be “originalists,” and simply disagree on what construction to use when the original meaning is not clear. Still, these theorists run into the same problem insofar as they claim that their constructions derive from the original meaning of the Constitution or the original intent of the Framers. All of the theorists analyzed in this Article

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115. BARNETT, *supra* note 10, at xii.

116. While many no longer espouse that version of originalism, others still do. See Fallon, *supra* note 70, at 9–11 (describing the different views on “original expected applications” originalism). Also, recall Bork’s view of the Privileges or Immunities Clause. See Bork, *supra* note 92.

explicitly claim that their interpretive methods stem from the original meaning of the Constitution's various provisions.

Even if the theories did not purport to rely on original meaning to determine the proper construction, they would still run into a problem if their constructions derive—as this Article has argued—from particular understandings of constitutional legitimacy that we may not find persuasive for one reason or another. Even if these scholars admit, in other words, that they merely prefer their particular constructions for no other reason than because those constructions are more consistent with their understanding of constitutional legitimacy, we may not personally be persuaded by the natural rights, progressive, or popular sovereignty theories of legitimacy. It is thus unclear why we should adopt these particular constructions rather than the constructions that the founding generation would have used,<sup>117</sup> if we find the Founders' theory of legitimacy more persuasive.

Part II will show that if we agree that the Constitution ought to be interpreted by the original meaning—a point on which Barnett, Bork, and Balkin all ostensibly agree—then we ought to move away from strictly adhering to any of the grand, yet narrow, constitutional theories, and also the presumption of constitutionality which does a disservice to the more open-ended provisions of the constitutional text. More specifically, the next Part will challenge each theory's understanding of constitutional legitimacy by arguing that, at least as the Founders understood constitutional legitimacy, the Constitution would have to be legitimate in each of the three ways these theories have advanced.

## II. THE FOUNDERS ON FOUNDING

The claim in this Part is narrow: that the Founders understood constitutional legitimacy in all three ways described in Part I. Thus, broader constitutional hermeneutics may be necessary as an originalist matter, if we assume that the text of the Constitution was designed to effectuate its purposes and create a legitimate regime. If we assume that the various hermeneutics are merely constructions and not derived from original meaning, then we may still desire a

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117. McGinnis and Rappaport argue that as an originalist matter, the founding generation did have particular interpretive conventions that we could adopt today. Thus, construction as we know it today would be unnecessary. McGinnis & Rappaport, *supra* note 41.

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broader hermeneutic insofar as we find the Founders' understanding of constitutional legitimacy more persuasive than any understanding put forward by the schools described in this Article. Indeed, this Part claims that if we are unpersuaded by the natural rights theory, the progressive theory, or the popular sovereignty theory on their own terms, then perhaps prudence can still justify adherence to the whole. This is what James Madison seems to suggest in his understudied response to Jefferson's "dead hand of the past" argument.

As stated in the introduction, understanding the Founders' own views on constitutional legitimacy provides at least three insights, which will be addressed in this Part: First, the Founders' understanding of legitimacy may offer a superior case for constitutional obedience. Second, it will show that at least as an originalist matter, broader hermeneutics than those currently offered by many originalists may be necessary. It will also demonstrate that because the Founders made compromises among the ends of government and these grounds for legitimacy, it may be difficult to find an appropriate originalist hermeneutic, though an original interpretive conventions approach has promise. Finally, this Part attempts to provide a new justification for originalism that synthesizes these various grounds of legitimacy.

*A. The Declaration of Independence*

What better place to start our search than in the very document through which our Founders declared they had a right to break from their old loyalties? The Declaration of Independence gives us an indication of everything the Constitution must accomplish to be legitimate: it must derive its powers from the consent of the governed; it must secure the just ends of government; and it must create a representative or democratic form of government.<sup>118</sup> The literature too often ignores the connection between the Declaration and the Constitution, and many scholars have historically argued that

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118. I was inspired early in my research by LARRY P. ARNN, *THE FOUNDERS' KEY: THE DIVINE AND NATURAL CONNECTION BETWEEN THE DECLARATION AND THE CONSTITUTION AND WHAT WE RISK BY LOSING IT* (2012). Arnn's book is meant for a popular audience and it only introduces this connection between the principles of the Declaration and the requirements of a Constitution. This Article expands on his work by bringing to bear not just the words of the Declaration itself, but a wide range of the Founders' writings on the subject of founding and constitutional legitimacy.



the Constitution of 1787 was a repudiation of the principles of 1776.<sup>119</sup> Nevertheless, in the Declaration, the Founders felt that they must “declare the causes which impel them to the separation”<sup>120</sup> from the political bands that had previously connected them, and thus it manifestly provides insight into general notions of political legitimacy at the time of the Founding. Indeed, this Part will show that the writing of the Constitution and its purposes at the time of the Framing evoke the same principles at play in the Declaration.<sup>121</sup>

What, in the minds of the author and signers of the Declaration, made such a break from their previous bonds legitimate? The key clause is well known but also often overlooked: all men are created equal, they are endowed with unalienable rights including the right to life, liberty, and the pursuit of happiness, and “[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>122</sup> In this one line the Founders offered the two most crucial bases for constitutional legitimacy: government must derive its power from the consent of the governed—a social contract of sorts—and it must secure our unalienable rights. In one fell swoop—at least if we buy the Founders’ account—we see that perhaps both the libertarian-originalists and the popular-sovereignty conservatives simplify their own grounds for constitutional legitimacy.<sup>123</sup>

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119. For a summary of the progressive literature making this argument, see ALAN GIBSON, INTERPRETING THE FOUNDING: GUIDE TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDATIONS OF THE AMERICAN REPUBLIC 9–11 (2006). Martin Diamond also discusses this argument in his essay on the Federalist. See Martin Diamond, *Democracy and the Federalist: A Reconsideration of the Framers’ Intent*, 53 AM. POL. SCI. REV. 52, 53 (1959).

120. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

121. Madison himself invoked the Declaration of Independence in the *Federalist* when justifying the authority of the Convention to propose a new constitution that would “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.” THE FEDERALIST NO. 40, at 249 (James Madison) (Clinton Rossiter ed., 1961).

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

123. Ely would have a response to my claims, as he himself consulted the Declaration but rejected this kind of comprehensive account of constitutional legitimacy. He argues that the Declaration of Independence was like a legal brief, and “[p]eople writing briefs are likely, and often well advised, to throw in arguments of every hue.” Specifically, “[p]eople writing briefs for revolution are obviously unlikely to have apparent positive law on their side, and are therefore well advised to rely on natural law.” ELY, *supra* note 55, at 49. Ely’s reasoning is unpersuasive, however. First, it is very likely that in justifying a break from positive law obligations, the Founders, as I’ve suggested, had to think long and hard about what gave them the right to do so. It is very possible, and in fact very likely, that they believed they had to appeal to natural rights because that was what was necessary for their act to be legitimate.

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The Declaration does not stop there, however. The government, it implies, must not only derive its powers from the consent of the governed, but it must also continue to rule by self-government. That is, it must constitute a democratic or republican form of government. In the long chain of usurpations and abuses listed—which impelled the separation—Jefferson writes that King George III has refused to pass laws “for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.”<sup>124</sup> Further, the King “has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records,”<sup>125</sup> and he has “dissolved Representative Houses repeatedly.”<sup>126</sup> He has refused to cause other legislatures to be elected, and thus the legislative powers “have returned to the People at large for their exercise.”<sup>127</sup> And more specifically, he has kept standing armies without the people’s consent and has taxed them without their consent.<sup>128</sup> This train of abuses suggests that for a government to be legitimate at all, the people must be permitted to govern themselves in their own legislatures. Legitimate government, then, also requires representative government.<sup>129</sup>

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That, it seems to me, reinforces the conclusion that a constitution must protect natural rights to be legitimate, rather than undermine it as Ely implies. Second, his criticism could be lodged in his own justification for constitutional legitimacy. That is, if we should not take their natural-rights claims seriously, why take their consent-of-the-governed claims seriously? They could have easily thrown in an argument of that “hue” just to see if *that* would stick. Indeed, it is interesting that Ely cites this same clause for his proposition that the Founders were overwhelmingly concerned with consent and representative government, but then *chooses* to ignore the natural rights language in this same clause. *See id.* at 90.

124. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

125. *Id.* at para. 6.

126. *Id.* at para. 7.

127. *Id.* at para. 8.

128. *Id.* at paras. 13, 19.

129. Arnn writes that we also can discover from the Declaration the importance of a separation of powers. *See* ARNN, *supra* note 118, at 32–36. Separation of powers is certainly necessary insofar as a government of divided powers is more likely to enable self-government without infringing on inalienable rights.

*B. Natural Rights and Self-Government*

When the Framers debated the Constitution at the Convention, and when the people debated it in the throes of ratification, these same themes repeated. It could not be doubted that the Constitution had to be republican; it had to “enable” self-government to be legitimate. As James Madison wrote in Federalist 39,

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.<sup>130</sup>

John Adams, in his *Thoughts on Government*, likewise declared that “principles and reasonings . . . will convince any candid mind that there is no good government but what is republican.”<sup>131</sup> As Gordon Wood has written, “For most Americans . . . this was the deeply felt meaning of the Revolution: they had created a new world, a republican world. No one doubted that the new polities would be republics.”<sup>132</sup>

Yet the Framers did not want total self-government. From the first instance at the Convention, they rejected man’s capacity for pure democracy. Two days after the Virginia Plan was proposed in Convention, Mr. Gerry, one of the most Whiggish delegates, said, “The evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended patriots.”<sup>133</sup> Mr. Mason agreed, “admitt[ing] that we had been too

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130. THE FEDERALIST NO. 39 (James Madison), *supra* note 121, at 236.

131. John Adams, *Thoughts on Government*, in THE POLITICAL WRITINGS OF JOHN ADAMS 83, 86 (George A. Peek, Jr., ed., 1954).

132. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, 47 (1998).

133. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand, ed., 1966).

democratic,” though he “was afraid we [should] incautiously run into the opposite extreme.”<sup>134</sup> These are telling statements from two delegates who would come to oppose the Constitution on the ground that it did not adequately safeguard the rights of the people; even the more “democratic” delegates believed the Union could not long survive on the principle of pure democracy. Mr. Randolph, who would also oppose the Constitution, observed that same day that the general object of the Senate “was to provide a cure for the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for [against] this tendency of our Government . . . .”<sup>135</sup>

The solution adopted by the Constitution is now famous. The large sphere over which the federal republic could extend would mitigate the factional spirit of smaller republics by making it more difficult for a faction to possess the opinion of a majority of the people. As Madison wrote in Federalist 10, representation allows for two advantages: First, it will carve out a sphere for virtue because the body of men to which the people delegate authority will “refine and enlarge” the public views.<sup>136</sup> Second, the republic can extend over a larger territory, and thus a single factional impulse will be less likely to actuate the spirit of a majority.<sup>137</sup> But the two principles must go together. Just as a large territory by itself does not protect the rights of the people, neither does representation: Madison believed that the state legislatures that then existed were actuated by a spirit of faction. Though he praised the state legislatures when necessary for his argument,<sup>138</sup> he also recognized their vices.<sup>139</sup> The solution, then, must be to combine the principle of representation with the benefits of the larger extent of territory over which that same principle allows a republican government to rule. In this way the republican principle

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134. *Id.* at 49.

135. *Id.* at 51.

136. THE FEDERALIST NO. 10 (James Madison), *supra* note 121, at 76.

137. *Id.* at 78–79.

138. THE FEDERALIST NO. 55 (James Madison), *supra* note 121, at 341.

139. In Federalist 62 Madison is explicit on this point. He argues for the necessity of a bicameral legislature because “all single and numerous assemblies” have a propensity “to yield to the impulse of sudden and violent passions . . . . Examples on this subject might be cited without number; and from proceedings within the United States . . . .” THE FEDERALIST NO. 62 (James Madison), *supra* note 121, at 377.

can remedy the effect of faction because the diversity of faction would make it rare that any one attained a majority.<sup>140</sup>

Thus republicanism over an extended territory would save self-government. Yet the people's rights still had to be protected even from the temporary passions expressed in *republican* majorities. To do so, the Framers intended to restrain republican institutions with checks and balances,<sup>141</sup> federalism,<sup>142</sup> and separation of powers,<sup>143</sup> as well as by extending the size of the republic itself. These are overwhelmingly process-oriented protections, but the conclusion to draw is not that therefore we should "reinforce" representation through constitutional decisions. The protections were meant to check republican decision making as much as republicanism itself would be a check on faction; these protections were meant to create a certain form of republicanism that remedied the vices of popular government.

The Constitution also included substantive protections, especially for property and contract rights.<sup>144</sup> But the natural rights theory of

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140. Again, none of this is very new. Ely writes about Federalist 51's account of faction, *see* ELY, *supra* note 55, at 80, and Barnett emphasizes Federalist 10 to show how the Founders were deeply troubled by the prospects of majority rule and thus tried to constrain it, *see* BARNETT, *supra* note 10, at 33–39. For an excellent account of The Federalist along these same lines, *see* Diamond, *supra* note 119, at 64–67.

141. *See, e.g.*, THE FEDERALIST NO. 63 (James Madison), *supra* note 121, at 382–83 (arguing that the Senate will protect the people "against their own temporary errors and delusions," and that in moments of temporary passion, "how salutary will be the interference of some temperate and respectable body of citizens" to check such passions "until reason, justice, and truth can regain their authority over the public mind?"). The consensus among the Framers was that the Senate would be the most effective check on the popular passions of the people: Mr. Dickenson argued that a Senate chosen by the state legislatures would protect the states against encroachments from the general government, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 133, at 152–53, but also create a body of virtuous men, *id.* at 150. Mason believed that the Senate would protect both the states, *id.* at 407, and the wealthy, *id.* at 428. Madison agreed that the tendency to refine and enlarge the public views would be amplified in the Senate, which had the "advantage of favoring a select appointment." THE FEDERALIST NO. 62 (James Madison), *supra* note 121, at 375.

142. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison), *supra* note 121, at 320 (arguing that in a federal system such as the one contemplated by the Constitution, "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

143. *See, e.g., id.* at 319 (arguing that a separation of powers will let "ambition . . . counteract ambition.").

144. Barnett already provides a thorough account of the Founders' views on natural rights and the substantive protections they built into the Constitution to protect those natural rights. *See* BARNETT, *supra* note 10, at 54–76. For a historical overview of Lockean scholarship on the Founding, *see* GIBSON, *supra* note 119, at 13–21.

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Barnett and Epstein requires further discussion. While almost all Americans agreed with the abstract concept of natural rights—and the proposition that law contrary to natural law was void—natural rights as such was not a starting point for discussion at the Convention. The Constitution could not be inconsistent with natural rights, but the substantive protections the document afforded were most fundamentally rooted in the positive law of constitutions, international law, and the common law. For our purposes, the point is simply that the libertarian-originalists are right to say that the Founders did believe the Constitution had to protect natural rights; their flaw is that they begin with that premise in order to arrive at the Constitution's meaning.

In sum, from this cursory account, it appears that the libertarian-originalist view of constitutional legitimacy is not how the Founders understood it; it is unlikely that the Founders really would have intended the constitutional provisions to enshrine a presumption of liberty or classical liberalism any more than they would have intended to create the conditions for self-rule. Similarly, the Founders thought the Constitution had to be fundamentally republican to be legitimate, but not purely republican, in the same way that it could not be purely democratic. Thus the progressive theorists who focus on “reinforcing” representation or “enabling” self-government through current debates over constitutional construction incorrectly de-emphasize the importance of substantive rights protections, such as property and contract rights, that were not meant to—but have nevertheless—eroded.

*C. Popular Sovereignty*

The Founders believed that the Constitution needed both to establish a republican form of government and to protect natural rights; but they also believed that to be legitimate, the Constitution *itself* needed to be rooted firmly in the consent of the governed. As we shall see, this notion of popular sovereignty has very different implications than the notions of self-government, representation, or rule by the general will of the people. Because even legislators cannot be trusted not to abuse their power, and thus properly to discharge the people's will, the consent of the governed is necessary at the moment of foundation in order to restrain the powers of the legislators to ensure they act more consonantly with the true interests and will of the people themselves.

The Declaration of Independence was the most definitive declaration of the right of popular, rather than some other kind of, sovereignty.<sup>145</sup> James Otis declared in 1764 that “supreme absolute power is *originally* and *ultimately* in the people; and they never did in fact *freely*, nor can they *rightfully* make an absolute, unlimited renunciation of this divine right.”<sup>146</sup> Samuel Adams declared in 1772 that “[w]hen Men enter into Society, it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions, and previous limitations as form an equitable *original compact*.”<sup>147</sup> Thomas Paine adumbrated the origins of civil society in his 1776 pamphlet *Common Sense*. When the defect in the moral virtue of individuals reveals the necessity of establishing a government, men will create a convention or assembly to deliberate over the form of government. “In this first parliament,” Paine wrote, “every man by natural right will have a seat.”<sup>148</sup>

To take two last examples, Alexander Hamilton wrote in 1775 that “the origin of all civil government, justly established, must be a voluntary compact, between the rulers and the ruled; and must be liable to such limitations, as are necessary for the security of the *absolute rights* of the latter;” for, he asks, “what original title can any man or set of men have, to govern others, except their own consent?”<sup>149</sup> Thomas Tudor Tucker, perhaps the earliest pamphleteer to develop fully the idea of a constitution rooted in consent of the governed as the proper mechanism for restraining the ruled, wrote in 1784: “All authority is derived from the people at large, held only during their pleasure, and exercised only for their benefit,” and therefore “the privileges of the legislative branches ought to be defined by the constitution,” which must itself be “the avowed act of the people at large.”<sup>150</sup> Tucker further stated, “It should be the first

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145. See *supra* text accompanying notes 122–123.

146. James Otis, *The Rights of the British Colonies Asserted and Proved*, in ISAAC KRAMNICK & THEODORE J. LOWI, *AMERICAN POLITICAL THOUGHT* 100, 102 (2009) (1764) (emphasis in original).

147. Samuel Adams, *The Rights of the Colonists*, in KRAMNICK & LOWI, *supra* note 146, at 108, 109 (1772) (emphasis in original).

148. Thomas Paine, *Common Sense*, in KRAMNICK & LOWI, *supra* note 146, at 131, 132 (1776).

149. HAROLD C. SYRETT ET AL., EDs., *THE PAPERS OF ALEXANDER HAMILTON* (1961–79), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch3s5.html>.

150. WOOD, *supra* note 132, at 280–81 (quoting Thomas Tudor Tucker, *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*).

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and fundamental law of the State, and should prescribe the limits of all delegated power. It should be declared to be paramount to all acts of the Legislature, and irrevocable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided.”<sup>151</sup>

In the Federalist Papers, Madison presumed the legitimacy of this sovereignty and its necessity in forming a new government. In Federalist 38 he argued that America “has been sensible of her malady” and “has obtained a regular and unanimous advice from men of her own deliberate choice.”<sup>152</sup> Hamilton also relied on the ultimate legitimacy of popular sovereignty when he declared that “it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitution on accident and force.”<sup>153</sup> Madison reminded us finally that “the people are the only legitimate fountain of power, and it is from them that the constitutional character . . . is derived . . . .”<sup>154</sup>

Ratification, of course, is consonant with this view of popular sovereignty. Madison wrote that ratification appears to be both a federal and a national act: “the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose,” but it is also derived from “the assent and ratification of the several States,” whose powers are in turn derived from “the authority of the people themselves.” Madison ultimately concluded that ratification is more a federal than a national act, but the Constitution will still depend on the authority not of the state governments acting through state legislatures, but “by that of the people themselves.”<sup>155</sup> In his final extended discussion on the ratification provision, Madison argued that the provision “speaks for itself”: “The express authority of the people alone could give due validity to the Constitution.”<sup>156</sup> Hamilton

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151. WOOD, *supra* note 132, at 281.

152. THE FEDERALIST NO. 38 (James Madison), *supra* note 121, at 231.

153. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 121, at 27.

154. THE FEDERALIST NO. 49 (James Madison), *supra* note 121, at 310.

155. THE FEDERALIST NO. 39 (James Madison), *supra* note 121, at 239–40.

156. THE FEDERALIST NO. 43 (James Madison), *supra* note 121, at 275.



suggested, moreover, that ratification by the people is a distinct advantage of the Constitution over the Articles of Confederation, which was ratified by the states.<sup>157</sup>

Madison later added that without the ratification process the Constitution would not be binding, even if it were just and republican. The Constitution requires the assent of the people. The proposed Constitution was “of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.”<sup>158</sup> The Convention bore in mind that the “plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities.”<sup>159</sup> James Wilson agreed with Madison when responding to charges that the Convention exceeded its authority. “I think the late Convention has done nothing beyond their powers,” Wilson argued.<sup>160</sup> The Constitution “is laid before the citizens . . . to be judged by the natural, civil and political rights of men. By their *fiat*, it will become of value and authority; without it, it will never receive the character of authenticity and power.”<sup>161</sup>

Popular sovereignty, or at least popular ratification of fundamental constitutions, was still a relatively new concept when the Constitution was drafted. Between 1776 and 1778, twelve state constitutions were enacted, ten by ordinary legislation and two by special convention. None was submitted to popular ratification.<sup>162</sup> Indeed, the Framers at first attempted to offer justifications for their authority on the basis of the sovereignty of the several states, even though Madison<sup>163</sup> insisted on popular sovereignty early on. It was not until later in their deliberations that “their focus shifted to the legitimating effect of popular ratification and a theory of popular

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157. See THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 121, at 148.

158. THE FEDERALIST NO. 40 (James Madison), *supra* note 121, at 248.

159. *Id.* at 249 (emphasis in original).

160. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 276 (2d. ed. 2005) (quoting James Wilson, Pennsylvania Ratifying Convention (December 4, 1787)).

161. *Id.* (emphasis in original).

162. *Id.* at 48.

163. See *id.* at 50 (Madison arguing that “the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves”).

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sovereignty.”<sup>164</sup> Certainly, not everyone agreed on this principle. On the day the Convention adopted popular ratification, Gerry still argued, “Great confusion . . . would result from a recurrence to the people. They would never agree on any thing.”<sup>165</sup> Mr. Elsworth argued that the people exist in states as a fact, and even if unanimous consent were to be abandoned, ratification by a majority of state legislatures would suit a new compact.<sup>166</sup> Gouverneur Morris quashed such notions. If a confederation of states was to be pursued as Elsworth seemed to desire, it would require unanimous consent of the states pursuant to the compact already existing. “Whereas in case of an appeal to the people of the U.S., the supreme authority, the federal compact may be altered by a *majority of them* . . . .”<sup>167</sup> Madison then drove the point home: a true Constitution, as opposed to a mere treaty or compact, is one founded on the people and not on any pre-existing government body.<sup>168</sup> The Convention then adopted popular ratification as the mode that would legitimize its authority and the authority of the Constitution.

Gordon Wood, in his seminal work on the creation of the American republic, illustrates with myriad examples from the Founding period this new understanding of popular sovereignty requiring an initial social compact restraining even the people’s legislators.<sup>169</sup> Wood explains why this concept was so new and took time to develop: “[S]ince the legislatures, as the legitimate representatives, were the spokesmen for the people in the society, it was difficult, if not impossible, without a new conception of representation to deny them the right to alter or to construe the constitutions as they saw fit when the needs of the society demanded.”<sup>170</sup> Yet just such a new conception of representation was necessary because of the widespread disquietude over the unjust acts of the state legislatures in the Critical Period (1776–87). Americans grew more and more dissatisfied with “the fairest and fullest representative legislatures in the world.”<sup>171</sup>

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164. *Id.*

165. *Id.* at 54.

166. *Id.*

167. *Id.* at 55 (emphasis in original).

168. *Id.* at 56.

169. See WOOD, *supra* note 132, at 268–91.

170. *Id.* at 274.

171. *Id.* at 276.

The important point is that popular sovereignty, as the Founding generation understood it, was not equivalent to direct rule by the people or even representative rule by the people. It was the people's very representatives who were violating the rights of the people. Thus, rule by the general will of the legislature was an inadequate expression of the true will of the whole people. Because the people could not rule themselves properly even through the most representative of governments, to be truly sovereign they had to delimit the power of the government in a contract. That was the only way to maintain their sovereignty.

*D. Prudence and the Problem of Founding*

Part II.B showed that the Founders had a commitment to self-government as well as to natural rights, and they likely intended to write a constitution that would enable democratic majorities to rule but also protect their natural rights. Thus, the Constitution, to be legitimate, would need to make some kind of compromise between the protection of natural rights and republican rule for legitimacy. Part II.C showed that the Founders also believed that, through the initial act of popular sovereignty, the people in the past would explicitly bind the future—including republican majorities—to their will.

But might any of these grounds for legitimacy be flawed? For example, some argue that the initial ratification was defective because portions of the population, such as women and slaves, were excluded from the process.<sup>172</sup> The Constitution also may not have been—and it may not be—sufficiently republican or sufficiently protective of natural rights to satisfy some. Simply put, especially if the Constitution or its ratification was flawed, why does one generation, long dead and gone, have a right to bind another? Many progressives have referred to this difficult problem as Jefferson's "dead hand of the past."<sup>173</sup>

The answer to Jefferson's problem may be more intuitive than one might think: founding a government is extremely difficult and

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172. For a discussion of this argument, see *supra* note 87.

173. See, e.g., BALKIN, *supra* note 3, at 41–44 (explaining the dead hand argument, and how his theory solves it); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 99–104 (2010); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *TEX. L. REV.* 703, 796–97 (2002).

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the exercise should rarely be repeated. This is how James Madison understood the challenge of founding, and it was his answer to Jefferson. Because many scholars continue to invoke Jefferson for the dead-hand proposition, it is only fitting that we explore the views of the Founder who most directly responded to him. This gives us insight into another possible ground for constitutional legitimacy, and is worth exploring for the additional reason that his response has been so understudied in the literature.<sup>174</sup>

Jefferson's formulation of the problem of a perpetual constitution is well known. "The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water," he wrote Madison. "Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government. . . . I set out on this ground, which I suppose to be self evident, 'that the earth belongs in usufruct to the living,' that the dead have neither powers nor rights over it."<sup>175</sup>

Madison's response, in which he argued that past acts of popular sovereignty can bind the living, is less known. He wrote Jefferson in a subsequent letter:

If the earth be the gift of *nature* to the living, their title can extend to the earth in its *natural* state only. The *improvements* made by the dead form a debt against the living, who take the benefit of them. This debt cannot be otherwise discharged than by a proportionate obedience to the will of the Authors of the improvements.<sup>176</sup>

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174. Indeed, I could find only three law review articles that have quoted in the text, and only in passing or without discussion, the relevant portions of Madison's letter to Jefferson, dated February 4, 1790, in which he directly responds to Jefferson's claim that the earth belongs to the living and that we must have constitutional conventions every nineteen years. See Robert Blecker, *If I Implore You and Order You to Set Me Free*, 49 N.Y.L. SCH. L. REV. 561, 570 (2004); Maurice H. Merrill, *Constitutional Interpretation: The Obligation to Respect the Text*, 25 OKLA. L. REV. 530, 551-52 (1972); Bran C. Noonan, *The Fate of New York Public Education Is a Matter of Interpretation: A Story of Competing Methods of Constitutional Interpretation, the Nature of Law, and a Functional Approach to the New York Education Article*, 70 ALB. L. REV. 625, 636-37 (2007). Several others articles have, however, cited to the letter in footnotes, but none has given the text any treatment. I also could not find any that contained an extensive discussion of Federalist 38 in this context.

175. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THE ESSENTIAL JEFFERSON 176, 176 (Jean M. Yarbrough ed., 2006) (emphasis in original).

176. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 176, 177

Madison specifically mentioned repelling conquest, “the evils of which descend through many generations,” as an example of forming a debt against the living.<sup>177</sup> Indeed, why should men sacrifice their lives—or their fortunes or sacred honor for that matter—if posterity did not maintain the just fruits of such sacrifices?

The Constitution was formed on the heels of a bloody revolution, but Madison’s claim regarding conquest extends to constitution-making itself, as we see from his arguments in Federalists 37 and 38. In the former, he wrote of the necessity of “sacrific[ing] theoretical propriety to the force of extraneous considerations.”<sup>178</sup> He further stated:

The history of almost all the great councils and consultations held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies, and adjusting their respective interests, is a history of factions, contentions, and disappointments, and may be classed among the most dark and degrading pictures which display the infirmities and depravities of the human character.<sup>179</sup>

In short, Madison argued that founding is an extremely difficult enterprise. It should not be too-often repeated. In surveying the turbulent history of foundings in Federalist 38, Madison concluded:

If these lessons teach us, on one hand, to admire the improvement made by America on the ancient mode of preparing and establishing regular plans of government, they serve not less, on the other, to admonish us of the hazards and difficulties incident to such experiments, and of the great imprudence of unnecessarily multiplying them.<sup>180</sup>

Prudence, for Madison, justifies ignoring the imperfections of the Constitution. Prudence itself lends support to the proposition that the Constitution is a legitimate document—even if it is imperfectly legitimate with respect to other bases of legitimacy.<sup>181</sup>

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(Marvin Meyers ed., rev. ed. 1981) (emphasis in original).

177. *Id.*

178. THE FEDERALIST NO. 37 (James Madison), *supra* note 121, at 226.

179. *Id.* at 227.

180. THE FEDERALIST NO. 38 (James Madison), *supra* note 121, at 229.

181. For an interesting essay interpreting the role of prudence in Madison’s political thought in Federalist numbers 37–40, see generally Gary Rosen, *James Madison and the Problem of Founding*, 58 REV. POL. 561 (1996).

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Madison's concern for prudence can perhaps be reformulated in terms of another notion that is required for constitutional or political legitimacy: stability. "Stability in government," wrote Madison in Federalist 37, "is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society."<sup>182</sup> While he was discussing the balance of energy and stability provided by the constitutional structure of the new government, his reasoning applies to constitutionalism itself. How legitimate would the Constitution be were it subject to the vicissitudes of temporary passions and opinions, if it were constantly mutable? Indeed, this concern for stability motivated Madison to warn in Federalist 49 against unnecessarily multiplying the "reference of constitutional questions to the decision of the whole society."<sup>183</sup> We do not want the people continuously to change the Constitution precisely because "as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the *requisite stability*."<sup>184</sup> Stability, understood as a prudential requirement in human affairs, is another requirement for constitutional legitimacy.<sup>185</sup>

That is not to say that any constitution must be accepted. Madison noted the improvements made by the American Constitution and earlier wrote that "the convention must have enjoyed, in a very singular degree, an exemption from the pestilential influence of party animosities—the disease most incident to deliberative bodies and most apt to contaminate their proceedings."<sup>186</sup> The Constitution must also be, therefore, on the whole good and just; but it need not necessarily be entirely just. Prudence or stability may justify adherence to the whole.

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182. THE FEDERALIST NO. 37 (James Madison), *supra* note 121, at 223.

183. THE FEDERALIST NO. 49 (James Madison), *supra* note 121, at 312.

184. *Id.* at 311 (emphasis added).

185. Thomas Tudor Tucker made this same observation. Only a constitution rooted in the collective will of the people "would have the most promising chance of stability." WOOD, *supra* note 132, at 281.

186. THE FEDERALIST NO. 37 (James Madison), *supra* note 121, at 227.

Jefferson's letter notwithstanding, we might note that the Declaration of Independence, which Jefferson himself authored, is in fact consistent with Madison's view of stability and prudence. The Declaration states that when "it becomes *necessary* for [a] people to dissolve the political bands which [had previously] connected them, . . . a decent respect to the opinions of mankind requires that they . . . declare the causes which impel them to the separation."<sup>187</sup> The Declaration did not contemplate whimsical dissolution of the existing social order. That order must secure the people's rights to life, liberty, and the pursuit of happiness. It is only when a "Form of Government becomes destructive of these ends," that it is the "Right of the People to alter or to abolish it, and to institute new Government . . ."<sup>188</sup> By the very reasoning and principles of the Declaration, a people, including our generation, does not have an unequivocal right to alter or abolish its government as long as it on the whole secures the rights of the people to life, liberty, and the pursuit of happiness. As long as our Constitution is on the whole just and legitimate, prudence may demand an adherence to the political bands that already unite us.

### III. CONCLUSION, AND A CODA ON ORIGINALISM

What this Article has aimed to show is that each of the three schools of originalism discussed here, all of which rely on a different notion of constitutional legitimacy, has some basis in the Founders' own understanding of legitimacy. The Founders intended the Constitution to be republican, to protect our natural rights, and to be obeyed simply because the people consented initially, and they expected that the act of founding would be extremely difficult if not impossible to repeat. In a way, we do not have to decide between theories of constitutional legitimacy; we can decide, just as the Founders did, that the Constitution is worthy of our obedience because it is mostly legitimate in all three ways, and prudence thus justifies obedience to the whole.

We can also now observe that the three strains of constitutional interpretation are at best incomplete. The Framers did not intend to enable democracy simply through the Constitution's open-ended

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187. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

188. *Id.* at para. 2.

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rights provisions or to constrain it simply through those provisions; thus, both Balkin and his libertarian-originalist counterparts simplify their claims too much. Rather, the Framers wanted to enable democracy, but they wanted to enable it precisely by constraining its excesses. It then becomes clear that the presumption-of-constitutionality originalists may also simplify the political theory of the Constitution. Put differently, perhaps no construction such as a “presumption of liberty” or a “presumption of constitutionality” can reliably be used in determining original meaning because the Framers had to make compromises among the ends of government and the three grounds of legitimacy.

That does not mean originalists should lose hope. There has been tremendous scholarship lately on the “original interpretive conventions” of the Founding generation. The claim of “original interpretive conventions” originalism is that we can reliably interpret the Constitution without resort to any modern construction such as the presumption of liberty or constitutionality. The Founding generation had a way of interpreting legal texts; if we simply follow those conventions, most ambiguity in the constitutional text will disappear. Moreover, there is no need to decide whether a constitutional provision has any definitive meaning. We need only decide in particular cases whether it is more likely than not that the Constitution permits or prohibits the government action at issue. We need only decide what is the more *probable* answer.<sup>189</sup> With these principles in mind, constitutional interpretation from an originalist perspective can take into account all three grounds of constitutional legitimacy and still be a feasible enterprise.

To be sure, interpretation might still “run out.” We might find that there is a range of plausible originalist answers to any given question. What should a judge do then? I suspect I know what a judge *will* do: a more libertarian judge will apply the presumption of liberty; a more conservative one will apply a presumption of constitutionality; and a more progressive one will seek to enhance the democratic process. In one sense the choice will be arbitrary; but in another, any of them might be justified by the Founders’ view of legitimacy. Perhaps that is the best we can do.

Finally, we must end on a note about originalism itself as the correct method of constitutional interpretation. After all, thus far we

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189. See, e.g., Kay, *supra* note 83, at 243–45.



have only shown why the Founders believed the Constitution to be legitimate, and what that implies for the actual meaning of the original Constitution. But originalism as a method of interpretation does not necessarily follow from constitutional obedience. Surely some could argue that while the Constitution ought to be obeyed, originalism is impossible to adopt for any number of reasons. Perhaps we simply do not have sufficient historical data available. Or some could argue that the document itself requires non-originalist interpretation. Whether we ought to obey the Constitution, and whether we ought to interpret it as originalists, are still two distinct questions.

I would like to propose that the questions are not as distinct as most originalist scholars claim.<sup>190</sup> It seems intuitive to argue that if we accept that the Constitution of 1787 is legitimate and worthy of obedience, then we can only truly obey it if we follow its original meaning. What is the Constitution but the meaning of its words? As Balkin wrote, to maintain the framework of the Constitution over time “we must preserve the meaning of the words that constitute the framework.”<sup>191</sup> Or, “[t]o stick to the plan and implement it, we must respect its particular choices about freedom and constraint for political actors . . . .”<sup>192</sup> And finally: “If we do not attempt to preserve legal meaning over time, then we will not be following the written Constitution as our plan but instead will be following a different plan.”<sup>193</sup> It seems that the very meaning of adherence to the Constitution is that we must be originalists.

But if one is not persuaded by Balkin, then any of the other justifications for originalism may still hold. Each of the scholars discussed has separated the question of constitutional legitimacy from that of why we need to be originalists. Now that we have established what I contend is a more persuasive ground for constitutional legitimacy, nothing stops us from adopting Barnett’s contract theory, or Whittington’s and other scholars’ “writtenness” theories.

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190. Recall that many of the recent conservative originalists, such as Lawson and Solum, explicitly separate these questions, and that many other originalists—including the libertarians and progressives—all claim to be separating these questions even if they seem to fail to do so in practice.

191. BALKIN, *supra* note 3, at 35–36.

192. *Id.* at 36.

193. *Id.*

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If these two possibilities still do not satisfy, perhaps one could argue that originalism is the only interpretive method that is legitimate in all four ways discussed in this Article: If the original Constitution struck a proper balance between natural rights and self-government, then an originalist interpretation of the Constitution would be legitimate on these two grounds. That said, perhaps the Court's modern glosses on the Constitution have struck a better balance that is more legitimate. That may be. But the "originalist Constitution" has the added advantage of having been ratified by an initial act of popular sovereignty. Lastly, prudence demands adherence to the originalist Constitution because modern glosses may very well strike a worse balance between natural rights and self-government, and constantly changing glosses may undermine the requisite stability in government.

If one accepts the grounds of legitimacy accepted by the Founders and articulated here, then the legitimacy of the Constitution as originally understood is established. It may very well be that a modern, non-originalist interpretation of the Constitution meets the same (or even different) requirements for legitimacy; but this Article does not speak to *that* Constitution.

