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## The Shape of Citizenship: Extraordinary Common Meaning and Constitutional Legitimacy

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David N. McNeill and Emily Tucker

“Reforming a regime is no less a task than to institute one from the beginning, just as unlearning something is no less a task than learning it from the beginning.”

Aristotle, *Politics* 4.1. 1289a3-5

INTRODUCTION

The United States, it is widely believed, is at a moment of constitutional crisis. At no time since the Civil War era has it seemed more likely that what James Madison called the “experiment entrusted to the hands of the American people”—the experiment in democratic constitutional self-governance—will fail.<sup>1</sup> This article will suggest that one reason for this state of affairs is that the ‘people’ sense that they are no longer active participants in the experiment. The historical etiology of this crisis is complex, and the forces involved are not confined to the US. The most immediately significant of these forces, exploding wealth and income inequality in most advanced economies over the past quarter century, will not be our subject, but its impact on political conditions in the US should be assumed throughout as a background to our argument. Our focus, instead, is on the crisis in the legitimacy of the Federal Judiciary—and the role that current orthodoxies in constitutional interpretation have played in fomenting that crisis.

The immediate critical target of this article is contemporary jurisprudential uses of what is called “public meaning originalism,” specifically, and ‘textualist originalism’ more broadly, as a theory for the interpretation of those clauses in the US Constitution that refer to fundamental rights and freedoms. Our interest in “textualism,” however, is primarily diagnostic. We will claim that—despite its relative unpopularity among most contemporary legal theorists—the application of “public meaning originalism” by the US Supreme Court is perfectly consistent with the dominant legal theoretical approach in the English-speaking world. The extremity of the Court’s recent ‘textualist’ jurisprudence provides an excellent illustration, or reminder, of the dangers of *legal positivist* jurisprudence.<sup>2</sup> In arguing against

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<sup>1</sup> The quotation is from George Washington’s First Inaugural Address, drafted by Madison. GEORGE WASHINGTON, *THE PAPERS OF GEORGE WASHINGTON. PRESIDENTIAL SERIES* 173 (1987).

<sup>2</sup> “On the other hand, we assert that under some conditions the (positivist) conception of law may become dangerous, since in human affairs what men mistakenly accept as real tends, by the very act of their acceptance, to become real.” Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. LAW REV.* 630,

textualist originalism, we will defend a version of the anti-positivist distinction between legal rules and legal principles, most famously associated with the work of Ronald Dworkin. We will argue, however, that this distinction cannot be captured by understanding constitutional principles in terms of moral principles, as Dworkin suggests. Instead, we claim that constitutional principles must be understood as deliberative principles of political association and communal self-determination. The primary subject of this article, then, is the character of fundamental constitutional law; our hope is that the current crises in democratic constitutional legitimacy can help make salient certain aspects of the relation between popular sovereignty and constitutional legitimacy that are harder to discern in less fractured political climates.

In agreement with many theorists of constitutional law, this article distinguishes between the animating principles of a democratic constitutional order and the rules articulating the implementation of that order. It contends, however, that this distinction cannot be captured by referring either to the supposed greater logical generality of principles,<sup>3</sup> or to the idea that constitutional principles are to be grounded (directly or indirectly) in moral theory.<sup>4</sup> Instead, an appeal to the principles expressed, for example, in the First Amendment should be taken up as an appeal to see how (and whether) the text of the amendment can (still, or again) be expressive of a principle animating the shared intention of a people to realize a particular form of self-government. Such a shared intention can only be realized through ongoing democratic deliberation about and inquiry into the possibility of such principles. While this is best understood as an inquiry into the *meaning* of such concept expressions as “freedom of speech” or “equal protection of the law,” the meaning involved is neither the “ordinary public meaning” of these phrases nor the meaning of specialized legal terms of art. Rather, whether one is considering the members of a

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631 (1958). Cf. Gustav RADBRUCH, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDTSCH. JURISTEN-ZTG. 105, 107 (1946).

<sup>3</sup> While breadth and generality are often cited as hallmarks of constitutional principles (see, e.g., the Dobbs’ dissenters reference to the “majestic but open-ended words of the Fourteenth Amendment”), mere generality does not properly distinguish the logical character of concept expressions such as “due process of law” from other general terms such as “vehicle” (as in H. L. A. Hart’s well-known hypothetical about a statute prohibiting ‘vehicles’ in a public park) or “system” (as in the dispute over the interpretation of the “best system of emission reduction” in *West Virginia v EPA*). See *Dobbs v Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2326 (2022). H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. LAW REV. 593, 607 (1958). *West Virginia v EPA*, 142 S. Ct. 2587, 2630–31 (2022).

<sup>4</sup> Dworkin is careful to distinguish his constructivist account of moral principles from the claim that “moral judgments are descriptions of some special metaphysical moral realm,” a view he associates with traditional natural law theories. RONALD DWORKIN, *LAW’S EMPIRE* 81 (1986). Nonetheless, he maintains that “jurisprudential issues are at their core issues of moral principle.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 7 (1978). Moreover, he contends that a general legal theory must be “embedded” in a more general political and moral philosophy, and claims that when a justification of a legal decision is “superior as a matter of political or moral theory,” that means that “it comes closer to capturing the rights that people in fact have.” RONALD DWORKIN, *A MATTER OF PRINCIPLE* 143 (1985). Cf. SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION THE BASIC QUESTIONS* 29, n.42 (2007). JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 27–50 (2015).

“founding generation” or one’s own body politic, questions about fundamental rights and duties call on members of a political community to think about the role the concept expression should play in articulating the fundamental normative orientation of that community. That is, when members of a political community deliberate about, e.g., freedom of speech, they are not primarily deliberating about what the words “freedom of speech” mean in ordinary use, nor what lawyers and judges mean by that expression. Instead, they are deliberating about how and whether, and in what sense, “freedom of speech” can be a shared value defining their political community. This kind of deliberation is ‘extraordinary’ in the sense that it involves putting into question the meaning of a constitutional order. Rather than an application of the principles of a free-standing moral theory to a body of law, it is both an attempt to discern the common aspirations uniting a political community and an attempt to develop and foster such common aspirations.

Contemporary proponents of “common good constitutionalism” are correct when they claim that legal theory has lost sight of the question of the relation between the law and the common good.<sup>5</sup> These Thomistic natural law theorists, however, are mistaken in their contention that we can understand this relation without seeing both constitutional law and the common good as expressions of popular sovereignty. The “common good” is not merely a set of broadly shared interests and any regime whose laws merely protect those individual interests is not a properly political community.<sup>6</sup> The “common good” must be understood as the expression of a constitutive normative orientation of a political community to the political community. That is, the “common good” is constituted in part by people holding a good in common, and a people is constituted by their having such a common good. The activity of a people constituting themselves as a people through determining a common good—their “virtue” as a people—is the ongoing judgment of the just ordering of the constitutional regime.<sup>7</sup> Contemporary constitutional

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<sup>5</sup> See, ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022). Connor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. LAW PUBLIC POLICY 103 (2022).

<sup>6</sup> In this regard, we follow both Aristotle and Rousseau. ARISTOTLE, THE POLITICS 3.9 1280B13-24; JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND, THE FIRST AND SECOND DISCOURSES 162 (2002). Cf. CICERO, ON THE REPUBLIC. I, 39. “A people, however, is not every assemblage of human beings herded together in whatever way, but an assemblage of a multitude united in agreement about right and in the sharing of advantage.”

<sup>7</sup> Aristotle, *Pol.* 1.2 1253a36-9.

theory has lost sight of the essential connection between the idea of law and political rule.<sup>8</sup> For this reason, it has poorly framed its central issue of contention: whether and in what sense law is normative.<sup>9</sup>

This article begins, in Part One, with a consideration of the Roberts Court's recent jurisprudence, focusing on three landmark opinions issued in June of 2022: *Dobbs v Jackson Women's Health Organization*, *Kennedy v. Bremerton School Dist.* and *West Virginia v EPA*. The point of revisiting this recent history will not be—or will not only be—to decry these rulings as anti-democratic and constitutionally ill-founded. The point, rather, will be 1) to see these rulings as consolidations of the Court's newly asserted constitutional authority, and 2) show how contemporary positivist constitutional theory has helped prepare the way for the Court's manipulation of the constitutional order. Legal positivism in its standard form seeks to ground the existence of constitutional law on the authoritative interpretation by legal officials (e.g., the Supreme Court) of authoritative source materials (e.g., the US Constitutional document), while also holding that the practices of those same legal officials are the grounds of both the ultimate standards of correct constitutional interpretation and of the choice of which sources count as authoritative. Very little imagination should be required to see how this account of constitutional legitimacy, which identifies fundamental law with whatever the most authoritative legal officials deem in practice to be fundamental law, could be used to justify unprecedented assertions of political power by the judiciary. The Roberts Court's recent decisions have, we will argue, relieved us of even that meager amount of imaginative work and have underscored the need for an alternative account of fundamental or constitutional law.

Part Two begins to elaborate one such alternative. The account offered here is robustly *anti-positivist* in that it denies the central tenet of legal positivism, the claim that the criteria of legal validity are or can be independent of any assessment of the merits of a legal order. In agreement with traditional natural law theorists, it is argued that the distinction between illegitimate and legitimate expressions of political authority depends on the degree to which a system of authority is directed toward a common good.<sup>10</sup> In disagreement with those theorists, however, this article contends that the common good of a political

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<sup>8</sup> The view of constitutional principles defended here can be understood as an attempt to ground and clarify the sense in which constitutional law is, as Mark Tushnet has it, “political law”. Mark V. Tushnet, *Popular constitutionalism as political law*, 81 CHIC.-KENT LAW REV. 991 (2006). It is also broadly consonant with aspects of Jack Balkin's “Framework Originalism,” without claiming to be either ‘originalist’ or ‘non-originalist’. See Jack M. Balkin, *Framework originalism and the living Constitution*, 103 NORTHWEST. UNIV. LAW REV. 549 (2009). Cf. FLEMING, *supra* note 4 at 20.

<sup>9</sup> For a recent statement of the state of play, see BRIAN H. BIX, THE NORMATIVITY OF LAW, IN THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 585–605 (PATRICIA MINDUS & TORBEN SPAAK EDS., 2021).

<sup>10</sup> THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II q. 90 a.2.

community is determined by the communal deliberative activity of a political community, and that the deliberative determination of a common good is the normative foundation of that community. What defines a political community as a political community is participation by the members of that community in a shared conception of citizenship, and it is this shared conception of citizenship that is the fundamental principle of a political association. The legitimacy of a constitutional legal order and the laws that implement, elaborate and maintain that constitutional order depends on the degree to which they realize a people's practical reasoning about the ethical-political question "How should we, as a people, live?"

Following the accounts given by the principal constitutional thinkers of the founding era, this conception of constitutional legitimacy depends upon distinguishing 1) between the constitutional activity of a people and the government instituted by them, and 2) between the constitutional order of a self-governing people and the constitutional document articulating the extent and limitations of the powers of their government. Perhaps most significantly in the current legal context, this account depends upon resurrecting a forgotten view of certain rights as inalienable, not in the sense that there is a universal trans-political obligation to respect these rights, but rather in the sense that it is impossible for anyone to legitimately authorize their transgression. Insofar as a constitutional legal order derives its legitimate authority from the active association of the members of the political community, it cannot legitimately exercise that authority to deny its citizens the conditions of active membership. Alternatively expressed, the legitimacy of a constitutional legal order is grounded on the real possibility of that legal order functioning as a vehicle for a people reasoning in common about the rights, duties and obligations of citizenship.

Distinguishing between the constitutional activity of a self-governing people and the institutional realization of their self-government will help clear the way for rethinking the traditional jurisprudential distinction between principles and rules. The leading contemporary theorists of principles, Ronald Dworkin and Robert Alexy, treat both rules and principles as certain kinds of propositions, distinguished from one another by their logical form. In contrast, we advocate a return to the original sense of 'principle' as an intelligible origin or source, and constitutional principles as rational expressions of active civic association.<sup>11</sup> Thinking about constitutional principles, on this view, is not limited to attempting to determine how some subset of citizens, alive at the time of the ratification of a provision in our constitutional document, would have defined crucial terms in that provision. Instead, thinking about constitutional principles involves thinking *as a founder* of our constitutional order. Historical inquiries into preeminent constitutional thinkers of our past are important not because their views should be taken

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<sup>11</sup> Aristotle, *NE* 6.2. 1139a35–b5. Cf. *Meta* 5.1. 1013a10–14, 6.1. 1025b22–24.

as determining our legal order, but because their attempts to think through the meaning of our constitutional order can help us take up the same task.

Part Three focuses on the First Amendment of the US Constitution with two aims in mind. First, to further illustrate the account of constitutional law here advocated, it offers a reading of the First Amendment as an attempt to put into words a shared understanding among the ratifiers of the Bill of Rights of what we will call ‘the shape of citizenship’ in our constitutional democracy. Unlike much of US constitutional jurisprudence, which characteristically focuses on individual clauses of the amendment and treats the rights enumerated in the amendment in relative isolation from one another, the argument will focus on the amendment as a whole. It will be claimed that one can understand the amendment, and the Bill of Rights more broadly, as offering what Madison called “an appeal to the sense of the community”<sup>12</sup> and to the common understanding of the political community about the scope and limits of the power of the people as sovereign over its constituent members as subjects. This part will also show how the Court’s recent opinions have radically subverted the last vestiges of this original connection between constitutional rights and the foundational principles of constitutional self-government. In *Dobbs v Jackson*, in particular, the Court asserts an understanding of constitutional rights as merely a particular structural variant of positive law, and in so doing effectively makes the legal order a sovereign power over the people rather than an expression of and vehicle for their common self-determination.

#### PART ONE. ORIGINAL PUBLIC MEANING POSITIVISM AND CONTEMPORARY LEGAL THEORY

Over a period of six days in June of 2022 the Supreme Court issued three opinions which fundamentally changed the role of the court in our constitutional order. As extreme and destabilizing as the Court’s specific holdings in *Dobbs v Jackson Women’s Health Organization*, *Kennedy v. Bremerton School Dist.* and *West Virginia v EPA* are, their significance as holdings ultimately pales in comparison to their significance as a radical assertion of the Court’s unchecked constitutional authority. Based primarily on a tendentious reading of *Washington v Glucksberg*, the majority firmly placed the constitutional institution of judicial review on a foundation of unalloyed legal positivism. In addition to claiming the authority to final interpretation of the constitutional text, the Court now claims to ground both the scope and extent of our enumerated rights and the very existence of our unenumerated rights on “this Nation’s history and tradition” as that history and tradition is understood by the members of the court acting as amateur

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<sup>12</sup> Letter from James Madison to Thomas Jefferson, 17 October 1788, JAMES MADISON, SELECTED WRITINGS OF JAMES MADISON 161 (2006).

historians.<sup>13</sup> As the dissent in *Dobbs* notes, with specific reference to the majority’s cavalier treatment of reliance interests, “the majority’s logic” could be used to legitimate the transfer of an individual’s constitutional rights “to express opinions, or choose whom to marry, or decide how to educate children” to the State “without having to consider a person’s settled understanding that the law makes them hers. That must be wrong.”<sup>14</sup> It is wrong, and the remainder of this article will show how and why it is wrong. That is, it will show why an understanding of constitutional law that severs the meaning of a legal order from the practical reasoning of those subject to that order is inherently illegitimate. The burden of this section of the article will be to show how ‘public meaning originalism,’ the theory of constitutional interpretation espoused by the current Supreme Court, exemplifies that illegitimate, positivistic, approach to fundamental law.

Before turning to that argument, however, it is worth pausing to explain exactly how far the Court’s recent use of *Glucksberg* as a precedent-destroying precedent departs from even that plurality opinion for a deeply divided court.<sup>15</sup> The majority opinion in *Dobbs* asserts, almost exclusively on the basis of *Glucksberg*, that the Fourteenth Amendment protects only those unenumerated rights which are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”<sup>16</sup> This is decidedly not, however, what the controlling opinion in *Glucksberg* maintains. Instead, *Glucksberg* claims that while the Due Process clause “specially protects” rights and liberties that are “deeply rooted in this Nation’s history and tradition,” it *also* holds that the Fourteenth Amendment protects against any government infringement of fundamental liberty interests, “unless the infringement is narrowly tailored to serve a compelling state interest,” citing *Reno v Flores* and *Planned Parenthood of Southeastern Pa. v.*

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<sup>13</sup> See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2450 (2022); See *Dobbs*, 142 S.Ct. at 2325-2326; *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2177-8 (2022); *Brown v. Davenport*, 142 S. Ct. 1510, 1535 (2022).

<sup>14</sup> 142 S. Ct. 2228, 2347 (2022). The dissenters do not specifically refer to the treatment of reliance interests in Justice Kavanagh’s concurrence, but where the majority treatment of reliance interests is dismissive, Justice Kavanagh’s treatment is grotesque. He notes in support of the majority that the Warren court did not consider reliance interests when overturning *Plessy v Ferguson* even though “(a)n entire region of the country relied on *Plessy v. Ferguson*, 163 U. S. 537 (1896), to enforce a system of racial segregation.” It *should* go without saying—but obviously must be said—that Black Americans subjected to “a system of racial segregation” could hardly be said to rely on such a system. Justice Kavanagh deems it fitting to compare women’s reliance on constitutionally protected reproductive rights to the entrenched economic interests of racial oppressors. 142 S. Ct. 2228, 2308.

<sup>15</sup> The majority in *Dobbs* makes much of the fact that *Casey* was a plurality decision of a divided court, while overstating the character of those divisions. The central case it relies upon its account of the incorporation of unenumerated rights was, however, the product of a much more deeply divided court. Justice O’Connor’s concurrence in *Glucksberg* departs the least from the majority, and she concurs only on the grounds that “there is no generalized right to “commit suicide.” She specifically declines to “address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death.” *Washington v. Glucksberg*, 521 U.S. (1997) at 736 (O’CONNOR, J., concurring).

<sup>16</sup> 142 S. Ct. 2228, 2242, 2246 (2022)



*Casey*, in particular.<sup>17</sup> That is, *Glucksberg* claims that certain rights are “so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment” [721-2], not that *only* those rights so rooted in our tradition are so protected.<sup>18</sup>

Both *Dobbs* and *Glucksberg* invoke the admonition in Justice Powell’s plurality opinion in *Moore v East Cleveland* to observe “respect for the teachings of history” in considering Due Process claims. Both pointedly ignore, however, Justice Powell’s precise explication of the phrase “the teachings of history.”<sup>19</sup> Quoting at length from Justice Harlan’s dissent in *Poe v Ullman*, Powell says that the Court’s Due Process jurisprudence demands “having regard to what history teaches are the traditions from which (this Country) developed, *as well as the traditions from which it broke*” (emphasis added). “That tradition,” the opinion continues, “is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.”<sup>20</sup> The Court’s recent construal of the ‘*Glucksberg* test’, however, goes much farther than *Glucksberg* itself in departing from the idea that our history and traditions could be living things.<sup>21</sup>

The first Justice Harlan began his famous dissent to the *The Civil Rights Cases* 109 U.S. 3 (1883) with the claim that the majority had, “by a subtle and ingenious verbal criticism,” sacrificed the “substance and spirit” of the 13<sup>th</sup> and 14<sup>th</sup> amendments. Quoting Edmund Plowden, Harlan affirms that “(i)t is not the words of the law, but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.”<sup>22</sup> Whether or not we can call the legal reasoning of the current Court

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<sup>17</sup> This misreading of *Glucksberg* begins with Antonin Scalia’s dissent in *Lawrence v. Texas* (539 U.S. 558, 588) and is the central disagreement between Kennedy’s majority opinion in *Obergefell v Hodges* ((576 U.S. 644, 671) and Alito’s dissent from that opinion (576 U.S. 644, 737).

<sup>18</sup> *Glucksberg* involved the adjudication of the claim that a statute criminalizing physician assisted suicide is prohibited by the 14<sup>th</sup> amendment. Whether one chooses to frame the asserted right narrowly, as a right “to assistance in committing suicide” (726), or as a specific application of a broader “right to die with dignity” (790), this was a wholly novel constitutional claim. It can be plausibly argued that an examination of the relevant (broadly unified) statutory history in such a case might encourage judicial modesty. It is, in this regard, wholly unlike a decision overturning a 49-year-old precedent in the name of history and tradition.

<sup>19</sup> This point was not lost on Justice Souter. *Washington v. Glucksberg*, 521 U.S. (1997) at 756, n.4 (SOUTER, J., concurring in judgement).

<sup>20</sup> *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting) at 542.

<sup>21</sup> See 142 S. Ct. 2228, 2326 (2022). Compare Justice Frankfurter’s majority opinion in *Nashville, Chattanooga & St. Louis Ry. Co. v. Browning*, 310 U.S. 362 (1940) at 369. “It would be a narrow conception of jurisprudence to confine the notion of “laws” to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law.”

<sup>22</sup> CIVIL RIGHTS CASES, 109 U.S. 3 (1883) at 26 (Harlan, J. dissenting). The quotation is from Plowden’s comment on *Eystone v Studd* (1574) in EDMUND PLOWDEN, THE COMMENTARIES, OR REPORTS OF EDMUND PLOWDEN [1548-1579] 465 (1816).

‘subtle’ or ‘ingenious’, the ‘textualist’ majority has effectively achieved Justice Antonin Scalia’s long quest to sacrifice the spirit of the law to its letter.<sup>23</sup> As Justice Kagan’s dissent in *West Virginia v EPA* notes, the textualism invoked by the conservatives on the court is ad hoc and opportunistic—as of course it must be. Scalia and Garner’s frequently quoted definition of textualism, “textualism, in its purest form, begins and ends with what the text says and fairly implies,” should have made this clear.<sup>24</sup> For to claim that textualism constrains itself to what a legal text *says* and what it *implies*, i.e., what it does not expressly say (Black’s Law Dictionary 822 (9th ed. 2009)), is to constrain it only to what a given judge thinks is fair.<sup>25</sup> What matters in the Court’s textualist originalism is not the text itself, but the claim that the constitutional text does not speak and cannot speak to living Americans, except as authoritatively interpreted by the members of the Court.<sup>26</sup>

A.

Proponents of “Public Meaning Originalism” (PMO) such as the members of the Court’s conservative majority maintain that the only legitimate method of interpreting US constitutional law is one that takes the meaning of specific clauses within the US constitutional document as ‘fixed’ at the time of enactment,<sup>27</sup> and that this fixed meaning is purportedly recovered through empirical inquiries into how a ‘reasonable’ member of the (literate, predominantly male, almost exclusively white) public would have understood the communicative content of the constituent parts of those clauses in a variety of contexts.<sup>28</sup> This account of correct constitutional adjudication is the latest incarnation of what is called ‘textualist’ originalism, and both PMO and ‘textualism’ have been widely criticized within the legal literature as both

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<sup>23</sup> See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW : AN ESSAY* 21 (1997). ANTONIN SCALIA, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 343 (2012). ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 128 (2017). Cf. Richard A. Posner, *The Incoherence of Antonin Scalia*, *THE NEW REPUBLIC*, 2012, <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> (last visited Jul 9, 2022).

<sup>24</sup> SCALIA, *supra* note 23 at 16.

<sup>25</sup> Justice Kavanaugh, apparently offended by Justice Gorsuch’s version of textualist jurisprudence in *Bostock v Clayton County*, cites Scalia and Garner’s “textualist touchstone,” the “fair meaning of the text,” as if the meaning of “fair meaning” were not precisely what is in dispute. 140 S. Ct. 1731, 1827 (2020).

<sup>26</sup> See *Nat. Fed’n of Indep. Bus. v. Dept. of Labor*, Tr. of Oral Arg. 117, “We accept that it’s not our role to decide public health questions, but it is our important job to decide who should decide those questions.” (Gorsuch, J.).

<sup>27</sup> Lawrence B. Solum, *The fixation thesis: the role of historical fact in original meaning*, 91 *NOTRE DAME LAW REV.* 39 (2015).

<sup>28</sup> “(T)he original meaning of the Constitution is the original public meaning of (its) words and phrases as combined by the rules of syntax and grammar,” Lawrence B. Solum & Robert W. Bennett, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM* 1, 77 (1 ed. 2011). According to Keith Whittington, one supposed advantage of ‘new’ originalism over the ‘old’ originalist theories of Robert Bork (and the early, ‘faint-hearted’, Antonin Scalia) is that it does not “reduce the Constitution to a handful of clauses or commitments.” Keith E. Whittington, *The new originalism*, 2 *GEORGET. J. LAW PUBLIC POLICY* 599, 608 (2004). Solum’s account makes clear the limits to which this putatively ‘new’ originalism fares any better than the old on this score.

theoretically incoherent<sup>29</sup> and inconsistent with historical practices of constitutional interpretation in the United States.<sup>30</sup> Despite its dominance on the current Court and in certain sectors of the Federal Judiciary, it still has comparatively few advocates within the (largely politically liberal) legal academy.<sup>31</sup> Moreover, while the concept of constitutional ‘originalism’ has gained broader acceptance within legal scholarship—if only as a kind of rearguard action—it now has so many different otherwise incompatible incarnations as to be largely devoid of any theoretical content.<sup>32</sup> Justice Elena Kagan’s oft cited dictum, “We are all originalists now,” is more a statement of rhetorical positioning in a partisan debate than an assertion of a substantial jurisprudential doctrine.<sup>33</sup>

For the past four decades, originalism in its assorted incarnations has been opposed by various forms of what is called ‘living’ constitutionalism.<sup>34</sup> In David Strauss’s succinct formulation, “(a) ‘living constitution’ is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.”<sup>35</sup> Proponents of living constitutionalism couple this descriptive claim with various normative claims about why it is *good* that the US constitution is a living constitution, one flexible enough to adapt to technological, geopolitical, and economic changes and, most significantly, to social and cultural progress. Explicitly normative versions of living constitutionalism, however, have a difficult time defending these latter claims at the current moment, when there are so many reasons to doubt the

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<sup>29</sup> Among recent statements from otherwise opposed theoretical positions see, e.g., Richard H. Fallon, *THE CHIMERICAL CONCEPT OF ORIGINAL PUBLIC MEANING*, 107 VA. LAW REV. 1421 (2021). Mark Greenberg, *LEGAL INTERPRETATION AND NATURAL LAW*, 89 FORDHAM LAW REV. 109 (2020). VERMEULE, *supra* note 5 at 99–144.

<sup>30</sup> See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>31</sup> Of course, the most plausible accounts of the basis for its popularity on the Supreme Court emphasize partisanship rather than theoretical cogency. See, e.g., Randall Kennedy, *Cynical Realism: Randall Kennedy on the Biases of the Supreme Court*, 43 LONDON REVIEW OF BOOKS, 2021. Michael Joseph Klarman, *THE DEGRADATION OF AMERICAN DEMOCRACY - AND THE COURT*, 134 HARV. LAW REV. 142 (2020). Cf., Richard A. Posner, *The Supreme Court 2004 Term. Foreword: A Political Court*, 119 HARV. LAW REV. 31 (2005). See, also, Whittington, *supra* note 28 at 603–605.

<sup>32</sup> FLEMING, *supra* note 4 at 27–50. James E. Fleming, *THE NEW ORIGINALIST MANIFESTO*, 28 CONST. COMMENT. 539 (2013). VERMEULE, *supra* note 5. Even according to defenders of ‘originalism’, originalist theories bear at most a family resemblance to one another. See, LEE J STRANG, *ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* 9–42 (2019). Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM : THEORIES OF CONSTITUTIONAL INTERPRETATION* .

<sup>33</sup> Elena Kagan, S.Hrg. 111-1044, Jun 28, 29, 30 and Jul 1, 2010, transcript 62.

<sup>34</sup> The current debate in the legal academy is generally traced back to Paul Brest, *The misconceived quest for the original understanding*, 60 BOSTON UNIV. LAW REV. 204–238 (1980). Howard Lee McBain is sometimes credited with coining the phrase “living constitution”—or at least with its first application to the US Constitution. See, e.g. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 693 (1976). But a non-pragmatist, non-positivist conception of the US constitutional order as “a living constitution” goes back at least to the work of Orestes Augustus Brownson. See ORESTES AUGUSTUS BROWNSON, *THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY* (2003).

<sup>35</sup> DAVID A. STRAUSS, *supra* note 30 at 1.

relatively sanguine views of historical progress and ongoing institutional validity that still underwrite most liberal-progressive legal theory. Moreover, these theorists' primary reliance on historical trends and institutions has proved an inadequate bulwark against 'conservative' originalism as it is practiced on the US Supreme Court. For the dominant conservative strategy on the Court now seems to be rule via history, with the conservative justices placing themselves in the newly minted role of historian-ruler. Their response, in effect, to living constitutionalists who claim that history determines the character of fundamental law is to agree with that claim, with the proviso that the members of the Court determine what counts as history.

A third category of constitutional legal theories, at present more influential within the academy than in the courts, is commonly referred to as *non-positivist* legal theory.<sup>36</sup> Unlike either textualist originalism or most varieties of living constitutionalism, non-positivist legal theories claim that judgements about the validity of a legal norm or the legitimacy of a legal order cannot be severed from evaluative judgments concerning how well or poorly a given legal institution fulfills the purpose of law, where the purpose of law is itself understood in normative or evaluative terms. That is, non-positivist legal theories (as the term implies) are united primarily in their rejection of *legal positivism*, the dominant theory of law in the English-speaking world. The account of fundamental law presented here is non-positivist in this sense, without being in any sense a theory of natural law.<sup>37</sup>

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<sup>36</sup> The most influential contemporary Thomistic natural law theorist, John Finnis, objects to classifying natural law theories in the tradition of Thomas Aquinas as 'non-positivist' because "'natural law theory'...is a theory of, amongst other things, *positive law*." JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 437 (Second edition. ed. 2011). Moreover, he claims to accept (with important qualifications) the central contention of legal positivism, that the criteria of legal validity for a legal norm are wholly independent of any evaluative considerations of the norm's merits. "(T)here is a sense of 'the law' and of cognate or correlated terms such as 'legally valid' and 'legal validity' such that they can be applied with full accuracy to monstrously unjust laws." John Finnis, *Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's "Ideal Dimension,"* 59 AM. J. JURISPRUD. NOTRE DAME 85, 88 (2014). Cf. John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURISPRUD. NOTRE DAME 199, 225–227 (2001). A lot of work is done, however, by Finnis' qualification that there "is a sense" in which such laws are 'legally valid', because he also maintains that there is a more significant sense in which such laws are *legally invalid*. The claim that morally iniquitous laws are 'legally valid' depends entirely on the 'discursive context' in which this claim is made. See John Finnis, *Natural Law Theories*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, §4 (Edward N. Zalta ed., Summer 2020 ed. 2020). This makes Finnis' natural law theory robustly non-positivist, whatever 'regrets' he may have about the label. Finnis, *supra* note at 85.

<sup>37</sup> Compare Robert Alexy's claim that the concept of law should be understood as referring to a non-natural kind that is "intrinsically related to natural kinds." ROBERT ALEXY, *LAW'S IDEAL DIMENSION* 20–1 (First edition. ed. 2021). See also Sir Edward Coke's famous identification of the law with "artificial reason" in the *Commentaries*.

B.

Despite extensive scholarship discriminating between gradations of “exclusive” and “inclusive” positivism, and offering putatively novel defenses of legal positivism’s theoretical bona fides,<sup>38</sup> the basic idea is quite old and relatively simple.<sup>39</sup> Legal positivism in all its guises is a kind of conventionalism. In its standard formulation, positivism claims that that a legal order has no existence apart from the authoritative habits of legal officials and the efficacy of legal institutions in enforcing that authority over a subject population. Moreover, the only meaningful questions one can pose about the validity or legitimacy of a given law are questions about whether the *most authoritative* legal authority in a given regime treats it as valid and legitimate. As legal theorists Leslie Green and Thomas Adams put it:

Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs.<sup>40</sup>

Or, as they put it later in the same article with reference to H.L.A. Hart’s version of legal positivism, “Law...has its ultimate basis in the behaviors and attitudes of its officials.”<sup>41</sup>

The persuasive power of contemporary legal positivism for people outside the legal community apparently resides in its assumed stance of scientific objectivity, combined with the fact that most existing and historical legal orders are rife with injustice.<sup>42</sup> Its persuasive power within the legal community, we surmise, resides at least as much in its affirmation of the *status quo* and its assertion that a broad enough consensus among members of that community cannot fail to be legitimate. According to its most authoritative current theorist, Joseph Raz, legal positivism rules out the possibility that our legal

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<sup>38</sup> Dworkin’s claim about Joseph Raz’s work can be applied in general to positivist legal theory of the past half century. “Exclusive positivism, at least in Raz’s version, is Ptolemaic dogma: it deploys artificial conceptions of law and authority whose only point seems to be to keep positivism alive at any cost.” Ronald Dworkin, *Thirty Years On*, 115 HARV. LAW REV. 1655, 1656 (2002).

<sup>39</sup> The broad identification of legal validity with the successful implementation of authoritative interpretations of the law is at least as old as the legal conventionalism espoused by representatives of the ancient Greek “Sophistic enlightenment.” See, e.g., Plato, *Republic* 338e-339a.

<sup>40</sup> Leslie Green & Thomas Adams, *Legal Positivism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed. 2019).

<sup>41</sup> *Id.* “Inclusive positivism” differs from “exclusive positivism” only in that “merit-based considerations may indeed be part of the law, if they are explicitly or implicitly made so by source-based considerations.” *Id.* But, as with other “sourced-based considerations,” these only have legal existence insofar as their recognition is grounded in “the behaviors and attitudes” of legal officials.

<sup>42</sup> H. L. A. HART, THE CONCEPT OF LAW 210 (2nd ed., 1st pbk. ed. ed. 1997). Cf. Leslie Green, *Positivism and the inseparability of law and morals*, 83 N. Y. UNIV. LAW REV. 1950 1035 (2008).

authorities are systematically confused.<sup>43</sup> He does not even broach the possibility that our legal institutions are systemically corrupt.<sup>44</sup> This seems to be a fairly significant theoretical weakness, if for no other reason than the fact that claims of systemic corruption seem to be the only thing that the left and the right have in common, even though their analyses of the character and sources of that corruption are diametrically opposed.

C.

The view presented here takes for granted that our current legal order is in many ways corrupt. Whether or not that corruption is fatal is not a question this article addresses, except indirectly. The question it addresses is rather “*Of what is our legal order a corruption?*” The proposed answer to that question is that our legal order is a corruption of our capacity to determine a “common good” within a political community, and to determine ourselves as individuals in part through our communal determination of a common good. This capacity 1) to reason in common about our rights and obligations in relation to one another and to our political community and 2) to realize ourselves in part through our participation in such a community is, we believe, part of what Aristotle means when he says that we are, ‘by nature’, ‘political’ animals. The “nature” that we realize through our direct or indirect participation in a normative political community (*koinonia*), our capacity to “share reason in common” (*Pol.* 1.2. 1254b22), is a fundamental aspect of our nature as ‘rational animals’ or animals “having speech” (*EN* 1.7. 1098a3-4), while not being exhaustive of that nature. We are, that is, *always* ‘*polis* animals’ but never exclusively *polis* animals. Moreover, an essential part of our participation in a normative political community involves our communal determination of the scope and limits of that participation. Fundamental or constitutional law in its primary sense is, on this view, the expression of such a communal determination that constitutes a normative political community as a political community.

Sharing reason in common, for Aristotle, involves not only shared perceptions of the good and bad, the just and the unjust (*Politics* 1.2. 1253a15-18), it also involves understanding one’s individuality in terms of the kind or ‘species’ one shares with others. This understanding of oneself as exemplifying a kind, for Aristotle and thinkers in the Aristotelian tradition, is essential to practical reasoning. It is only insofar as we can think of ourselves according to some ‘species being’ and see that species or kind *normatively*, that

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<sup>43</sup> As Raz puts it, “Why cannot legal officials and institutions be conceptually confused? One answer is that while they can be occasionally, they cannot be systematically confused. For given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority.” JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN*, 217 (1994). It is hard to overstate how weak an argument this is. It is evident, for example, that one can have a concept of ethical virtue that includes the understanding that much of what is taken to be exemplary of virtue is fundamentally misconceived.

<sup>44</sup> Cf. Fuller, *supra* note 2 at 657–661.

is, as reason-guiding for our actions, that we are capable of agency. For Aristotle, practical reasoning involves thinking together a general premise of the form “this sort of person ought to do this sort of thing” with the particular premise “here and now is that sort of thing and I am that sort of person.”<sup>45</sup> However, practical thinking for Aristotle does not involve logically subsuming a particular proposition under a general or universal proposition.<sup>46</sup> Rather, it involves a perception of oneself and one’s concrete practical situation as exemplifying a shared kind or form of human life, and it is by means of this perception that one understands *both* the normative principle guiding one’s actions and its concrete application to one’s own life. In the context of fundamental law, it is a perception of this kind, a perception of what we call the “shape of citizenship,” that grounds and gives meaning to any expression of one’s rights, obligations and duties.<sup>47</sup>

As should perhaps be evident, but is nonetheless worth emphasizing, this account of the nature of fundamental law, the ‘people’ and citizenship takes these three concepts in their primary or ‘focal’ meaning, to be mutually referential and semantically interdependent.<sup>48</sup> That is, to put it simply, the ultimate validity of fundamental law and the ultimate legitimacy of a constitutional order depend upon the degree to which the law and the constitutional order are the constitutive realization of a self-governing people. A direct implication of this claim is that not every group of individuals who share mutual interests and are mutually subject to coercion by the same institutions are a people. An indirect implication of this claim is that not every group of individuals are capable of constituting a people. Historical and material conditions can be such that any hope of communal determination of a common good is impracticable. For example, one of the few things that all the great ancient and early modern political theorists agree upon is that sufficient levels of material inequality undermine the possibility of both political stability and genuine community.<sup>49</sup> But sufficiently entrenched oppositional group identities, or overriding doctrinal

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<sup>45</sup> DA 434a16–22.

<sup>46</sup> See David N. McNeill, *AKRATIC IGNORANCE AND ENDOXIC INQUIRY*, 72 REV. METAPHYS. 259, 272–273 (2018).

<sup>47</sup> It is important when considering Aristotle’s practical philosophy in general, and the *Politics* in particular, to understand ὁ καθόλου λόγος as a ‘general’ rather than a ‘universal’ account. Otherwise, we cannot make sense of his claim that the laws of any particular regime are such ‘general’ accounts. See *Pol.* 3.15. Cf. *NE* 1107b30–33.

<sup>48</sup> Aristotle’s conception of *pros hen* equivocity (or ‘focal meaning’) should be sharply distinguished from the appropriation of that concept and its assimilation to Max Weber’s conception of *ideal types* by John Finnis and his students. See Finnis, *supra* note 36 at 9–11. Aristotle’s cardinal example of a *pros hen* equivocal is the normative concept of health. He argues that when we say that someone has a healthy complexion, or that they have a healthy diet, we are not attributing some common property to complexions and diets. Instead, we understand these uses of ‘healthy’ with reference to (*pros*) our understanding of what it is for an organism to be healthy. This does not mean, nor could it mean, that we are thinking of some central case that prototypically exemplifies what it is to be a healthy individual (cf. *NE* 1106a35–b5).

<sup>49</sup> Plato, *Republic*, 4.422e–423a. Aristotle, *Pol.* 5.8. 1308b10–40. Hobbes, *Leviathan* XXIX, 19; XXX, 16. Rousseau, *Discours sur L’Economie Politique*, 35.

commitments to the absolute (logical, metaphysical or deontological) priority of individual right can also make the kind of practical thinking necessary for genuine political association inaccessible.<sup>50</sup>

The early modern political theorist whose account of law, citizenship and political association most closely approximates the view presented here is Jean-Jacques Rousseau. Rousseau's account of the 'general will' in *On the Social Contract*, we believe, should be understood as offering an essentially Aristotelian account of the distinction between the kind of practical thinking we can engage in when we are thinking of ourselves in terms of what we share with our political community, and the kind of practical thinking one can engage in when one is thinking of oneself in terms of what distinguishes one as an individual. It is primarily this difference in the kind of practical thinking involved that distinguishes what Rousseau calls the "general will" from what he calls "the will of all."<sup>51</sup> Following Rousseau, we claim that in order to enable the active communal determination of a common good, a constitutional order must include structural principles adapted to the particular historical and material conditions of a nascent or existing political community.<sup>52</sup> In the case of most modern constitutional democracies, these principles will include provisions for the institutional separation of legislative, executive and judicial functions of government. In many cases, they will include explicit constitutional principles of federalism; in all well-functioning constitutional orders they will include accommodations for local structures of governance. Unlike the central constitutional principles of citizenship, these structural constitutional principles need not be the direct expression of the 'general will.' Determination of appropriate structuring principles for a body politic requires both procedural democratic representation of diverse interests and political expertise and statecraft. But the legitimacy of such structural principles depends on the degree to which they enable the central constitutional principles of democratic citizenship.<sup>53</sup>

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<sup>50</sup> Following Rousseau, we claim that primary conceptual locus of rights and laws is a self-governing political community, and that concepts of international law and fundamental human rights are best understood as generally well-founded extensions of these concepts to the international 'community'.

<sup>51</sup> It is also this distinction that ultimately explains his misleading (if rhetorically powerful) claim that the general will cannot be in error.

<sup>52</sup> Rousseau underlines the difficulties presented for genuinely democratic self-governance by the implicit class or partisan biases that can be written into these structural elements, or retroactively attributed to them, by requiring the agency of a "great-souled" or "divine" constitutional legislator. ROUSSEAU, *supra* note 6 at Book II, Chapter VIII.

<sup>53</sup> Cf. Lincoln's claim that the assertion of the principle of "Liberty to all" in the Declaration of Independence "was *the word, 'fitly spoken'* which has proved an 'apple of gold' to us. The *Union*, and the *Constitution*, are the picture of silver, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The picture was made *for* the apple—*not* the apple for the picture." *Fragment on the Constitution and the Union*, ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN Vol. 4, 240 (1998).



D.

We need hardly stress exactly how far ‘Public Meaning Originalism’ is from this account of fundamental or constitutional law. Even were the view of textual interpretation PMO presents not deeply incoherent, and even were the empirical quest to determine a precise historical ‘public meaning’ for a given word or phrase not quixotic at best, the kind of authority it claims to invest in particular clauses of the written constitution presents a kind of *reductio ad absurdum* of textualism more broadly. Unfortunately, the confusion at the heart of textualism (if it can be said to have a heart) is merely the most extreme form of a much wider confusion in US constitutional theory concerning how we should understand the status of the written constitution for the ‘founding generation’ and, more significantly, how we ourselves should understand the relation between the US *constitutional document* and the *constitutional order* it describes.

Americans are used to thinking of the US Constitution in terms of its “founding document.” If we are familiar with controversies in constitutional interpretation, we may also think of the written constitution as supplemented by an “unwritten constitution” of judicial precedents, historical practices, and the common law. However, this is not the way that members of the founding generation thought about the Constitution. The constitutional document was understood as the written expression of the assent of the people, through the ratifying conventions, to a particular constitutional order.<sup>54</sup> And it was that constitutional order, rather than the constitutional document, that was understood as the fundamental law of the United States. In *Federalist* 49, Madison writes that “mere declarations in the written constitution are not sufficient to restrain” the three branches of the federal government to their proper constitutional roles. This is the only use of the phrase “written constitution” in the *Federalist Papers*, and it is used in an extended argument about the insufficiency of “parchment barriers” to stand “against the encroaching spirit of power.”<sup>55</sup> In fact, the *Federalist Papers* throughout treats the constitutional document as a “mere parchment,”<sup>56</sup> “of no more consequence than the paper on which it is written,”<sup>57</sup> unless the constitutional order it describes successfully expresses the power of the people and protects their liberty.<sup>58</sup> Moreover,

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<sup>54</sup> Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW HIST. REV. 321 (2021).

<sup>55</sup> *The Federalist* No. 48 (James Madison)

<sup>56</sup> *The Federalist* No. 73 (James Madison)

<sup>57</sup> *The Federalist* No. 40 (James Madison)

<sup>58</sup> As John Francis Mercer put it during the Constitutional Convention of 1787, “It is a great mistake to suppose that the paper we are to propose will govern the U. States? It is the men whom it will bring into the Govern’t and interest in maintaining it that is to govern them. The paper will only mark out the mode & the form. Men are the substance and must do the business.” United States Constitutional Convention, *Notes of debates in the Federal Convention of 1787*, 455 (1966). Much of the relevant evidence for attributing this view to the ‘Founding generation’ is assembled in Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 UNIV. CHIC. LAW REV. 1127 (1987). Despite this wealth of evidence, Sherry draws the unwarranted conclusion that the members of the constitutional convention changed their mind, and (briefly) saw the written Constitution as popularly enacted positive law, even though the

the *Federalist Papers* takes the proper object of judicial review to be possible conflicts between individual statutes and the constitutional order as a whole. In *Federalist* 78, Hamilton claims that it belongs to the judiciary to ascertain the meaning of the Constitution (“its meaning”), rather than the meaning of particular constitutional provisions or articles.<sup>59</sup> The judges’ duty, Hamilton writes, “must be to declare all acts contrary to the *manifest tenor* of the Constitution void.”<sup>60</sup> Even Justice John Marshall’s opinion in *Marbury vs. Madison*, the Supreme Court case which established the tradition of judicial review in the US and framed that review in terms of interpreting a written Constitution, presents the constitutional order as primary and its written expression as secondary. The Constitution is written, writes Marshall in *Marbury*, so that the principles the people choose to establish for their government “not be mistaken or forgotten.”<sup>61</sup> Marshall’s claim suggests that the text of the constitutional document should be understood as a kind of reminder of the practical reasoning embodied in the formation of the constitutional order.<sup>62</sup> The understanding of such a text, and hence its proper interpretation, requires a kind of reenactment of that practical reasoning.<sup>63</sup>

E.

Textualist scholars formerly acknowledged the necessity of attempting to provide a normative justification for textualist jurisprudence. For, as a leading textualist scholar once put it, “(n)o document is

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phrase “positive law” was never applied to the constitution during those debates. The only textual evidence she cites in support of her claim is the addition of the words “This Constitution” to the supremacy clause. *Id.* at 1149.

<sup>59</sup> “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.” *The Federalist* No. 78 (Alexander Hamilton).

<sup>60</sup> *Id.* Emphasis added.

<sup>61</sup> *Marbury v. Madison*, 5 U.S. 137 (1803). Similarly, despite its popularity among textualists, Marshall’s opinion in *Gibbons* is neither ‘textualist’ nor ‘originalist’ in the sense favored by Justice Scalia and his contemporary followers. It is an opinion which interprets a constitutional provision to have a larger scope of application than might have been expected when enacted. Further, it recommends construing the words of a constitutional provision with reference to “the object” referred to, and in “connexion with purposes for which (the relevant governmental powers) were conferred.” Hence, in the language of contemporary legal theory, its reasoning is ‘purposivist’ rather than ‘textualist’. *Gibbons v. Ogden*, 22 U.S. (1824) 188, 189. The first Supreme Court opinion which can reasonably be described as ‘textualist’ is *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243 (1833), which was in this regard “an anomaly” in US constitutional jurisprudence at the time it was decided. WILLIAM DAVENPORT MERCER, *DIMINISHING THE BILL OF RIGHTS: BARRON V. BALTIMORE AND THE FOUNDATIONS OF AMERICAN LIBERTY* 6 (2017). For further discussion see *infra* n. 171.

<sup>62</sup> Here Marshall was likely drawing on discussions within English common law jurisprudence of the 16<sup>th</sup> and 17<sup>th</sup> century on the relation between written and unwritten law. See DAVID CHAN SMITH, *SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578-1616* 143–153 (2014).

<sup>63</sup> Cf. Plato, *Phaedrus* 275c5-d2.

authoritative because it says so.”<sup>64</sup> In particular, when Justice Scalia’s innumerable caustically worded dissents were the only significant sources textualists could claim in the relevant case law, and the current dominant position of textualism on the High Court was still a distant goal of movement conservatives, textualists felt the need to give some explanation why the ‘dead hand of the past’ should govern the living, that is, why the opinions and beliefs of members of a long dead slave-holding society should provide a “fixed” standard for present day Americans. The approaches they favored involved various amalgams of respect for “Rule of Law” values, putatively Madisonian worries about the “tyranny of the majority”<sup>65</sup> and a putatively Burkean conservatism.<sup>66</sup> Whatever other problems these defenses of textualism may have, it is sufficient for our purposes to note that none of them are free-standing ahistorical defenses of textualism as such. They all depend upon historically indexed prudential judgements about the relation between a given jurisprudential approach, a given legal order, and existing social, political and material conditions.<sup>67</sup>

Some recent scholars have largely abandoned these strategies for normatively defending textualism, and have taken to more directly positivist arguments, at times in forms that can appear to the unpersuaded comically question-begging.<sup>68</sup> This shift has tracked the nascent dominance of textualism on the Supreme Court, but textualist jurisprudence has always essentially depended on positivist legal theory.<sup>69</sup> However

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<sup>64</sup> Michael W. McConnell, *Textualism and the dead hand of the past*, 66 GEORGE WASH. LAW REV. 1127, 1128 (1998).

<sup>65</sup> Madison’s concerns about a majority potentially oppressing a minority focused on local and state communities rather than on the Federal Constitution. Indeed, one of his central arguments in favor of the new Constitution was his contention that a larger republic would make oppressive factionalism less likely. In particular, he contended that in a larger republic “the society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert.” “Vices of the Political System of the United States,” MADISON, *supra* note 13 at 41. Cf. *infra* note 111.

<sup>66</sup> Despite the many conservatives who style themselves as Burkeans, there are problems with any direct translation of Edmund Burke’s thought into contemporary political contexts. Burke was emphatically opposed to thinking about politics in terms of broad transcultural generalizations. His arguments about the importance of tradition in political matters were explicitly oriented to the traditions of 18th century Great Britain, which he thought of as historically and culturally anomalous. He would have been appalled, we imagine, at the idea of a transhistorical theory of ‘Burkean Conservatism’.

<sup>67</sup> This is the central point of Cass Sunstein’s well-known claim that “there is nothing interpretation just is.” Sunstein argues that any theory of constitutional interpretation needs to be judged in the context of an actual historical constitutional regime. The role of judicial review in a given regime is to be determined by practical judgments about the justice of a given constitutional order, the effectiveness of democratic processes, and the quality and integrity of the judiciary in that regime at a particular historical moment. While Sunstein’s argument is an effective response to the claim that textualist originalism is compelled by the nature of interpretation itself, his ‘minimalist perfectionism’ still conceives of democratic deliberation as only playing an instrumental role in achieving the ‘perfection’ of a democratic constitutional order. CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 19–32 (2009).

<sup>68</sup> See, e.g., William Baude, *IS ORIGINALISM OUR LAW?*, 115 COLUMBIA LAW REV. 60.

<sup>69</sup> As McConnell puts it, “Scalia is a textualist because he is a democratic positivist.” McConnell, *supra* note 64 at 1136. See also G. Todd Butler, *A Matter of Positivism: Evaluating the Legal Philosophy of Justice Antonin Scalia under the Framework Set Forth by H.L.A. Hart*, 12 HOLY CROSS J.L. & PUB. POL’y 47 (2008).

confused positivism may be as a theory of fundamental law, as a purely descriptive account, it certainly captures much of the practical thinking that occurs, for better and worse, in trial courts of common law legal systems. To do their jobs well, trial lawyers must concern themselves with the law as applied by legal officials, which means that their primary concern in crafting their legal arguments must be the “behaviour and attitudes” of these officials.<sup>70</sup> Self-conscious legal positivism among judges on the final court of appeal in a constitutional system with a tradition of judicial review, on the contrary, is a dangerous absurdity. Claiming that the law is determined by the behaviors and attitudes of the most authoritative legal officials when you *are* the most authoritative legal officials is certainly question-begging, but not at all comical. It is hardly surprising, then, that since the textualists have gained control of the courts, their traditional instrumental defenses of textualism in terms of the “Rule of Law” virtues of predictability, respect for precedent, or concern with reliance interests, have been cast aside.<sup>71</sup>

F.

Both textualist originalism and most versions of ‘living’ constitutionalism endorse, explicitly or implicitly, legal positivism as a theory of general jurisprudence. The principal error of legal positivism is that it attempts to offer an account of legal validity and constitutional legitimacy that grounds validity and legitimacy on certain facts about the authoritative behaviors and attitudes of legal officials in abstraction from questions about the role the law plays in realizing the constitutional self-governing of a people. More specifically, it denies the relevance of the role the constitutional order plays in citizens’ self-determination as citizens for addressing questions of legal validity and constitutional legitimacy. The people appears in positivist legal theory merely as the set of individuals over whom the authority of the law is enforced. While some legal positivists seek to distinguish the efficacy of a legal order from the brute subjection of a people to coercive police power, this distinction is avowedly superficial.<sup>72</sup> These theorists concede that their conception of legal validity cannot be applied to coercion that *explicitly*

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<sup>70</sup> This fact is the basis for Oliver Wendell Holmes Jr.’s famous claim that a working lawyer’s object of study is “the prediction of the incidence of the public force through the instrumentality of the courts.” Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. LAW REV. 457, 457 (1897). However, as Neil Duxbury has demonstrated, at no point in Holmes’ career was this claim intended as a theory of general jurisprudence, and Holmes’ most famous opinions as a Supreme Court justice are far from examples of ‘legal realism’. Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 ANGLO-AM. LAW REV. 81 (1991).

<sup>71</sup> *Dobbs v. Jackson Women’s Health Organization* 597 U. S. \_\_\_\_ (2022) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (5-6, 48-55).

<sup>72</sup> Not all do so. See, e.g., MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM LAW WITHOUT TRIMMINGS (1999).

disavows legal justification, but they nonetheless contend that legal validity is compatible with any degree of bad faith on the part of either legal officials or the populace.<sup>73</sup>

Legal positivists are fond of describing their conventionalism in terms of a theory of legal decision-making and jurisprudence as a ‘practice.’ As Green and Adams put it, the “ultimate criterion of validity in a legal system is...a social rule that exists only because it is actually *practiced*, that is, used to guide conduct.”<sup>74</sup> The manifest problem with the notion of ‘guidance’ at work in these theories is that it cannot distinguish, and does not seek to distinguish, between genuine participation in a normative or rule-governed practice and mere conscious conformity to representations of “correct” rule-following behavior. That is, it cannot account for the difference between unthinking subjection to a rule that is taken as authoritative for whatever reason, and a norm that meaningfully structures one’s experience. One cannot account for this distinction, we contend, without understanding genuine participation in a rule-governed practice in terms of the kind of deliberative activity which that practice makes possible.<sup>75</sup> In the account of fundamental or constitutional law outlined above, genuine participation in a political community is such a rule-governed practice, and the kind of deliberative activity proper to that practice is the communal determination of a common good. Insofar as legal positivism cannot account for the distinction between genuine rule-following and mere conscious conformity to rules or laws, it cannot in principle distinguish between law as a structure of domination and law as an expression of political self-determination. And this distinction seems of the greatest importance when thinking about, or having any hope of responding to, our current crises.

## PART TWO: THE DUALITY OF LAW, PRACTICAL REASON AND NORMATIVE PRACTICES

One might infer from the foregoing that whatever pessimism this article might evince about our current political, economic and legal orders, it displays an exceedingly optimistic, not to say naïve, view of human beings’ political nature. To explain why that inference would be mistaken will require going into a

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<sup>73</sup> Raz, for example, contends that legal validity requires effective governmental authority, and that effective authority requires that “government *de jure* is acknowledged by a sufficient number of sufficiently powerful people to assure it of control over a certain area.” But he immediately qualifies this already very weak claim by conceding that “it may be unnecessary for the relevant population genuinely to believe that the person having effective authority is a legitimate authority; it is enough if, for whatever reasons, they avow such a belief.” Joseph Raz, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW : ESSAYS ON LAW AND MORALITY* , 51 (2nd Ed. ed. 2009). Similarly, Leslie Green claims that “it is the nature of law to project the self-image of a morally legitimate authority,” but also contends that this ‘self-image’ may be may be “misguided or unjustified,” and the claims in question may be “made in a spirit that is half-hearted or cynical.” Green, *supra* note 42 at 1049.

<sup>74</sup> Green and Adams, *supra* note 40.

<sup>75</sup> David N. McNeill, *The virtue of error: Solved games and ethical deliberation*, 28 *EUR. J. PHILOS.* 639 (2020).

little more depth about normative practices, practical reasoning and what has been called the *duality* of law.

The idea that the law has a dual nature or aspect,<sup>76</sup> or is “Janus faced,”<sup>77</sup> goes back to the very earliest thematic reflections in the European tradition on the nature of the law, as does the recognition that the appellation “lawful” has both a descriptive and a normative use.<sup>78</sup> Most attempts to explain this duality, however, either reduce it to differing stances or perspectives on a body of law, or advert to resources (moral, philosophical or theological) outside the constitutional legal order which function, in effect, as a distinct ‘higher law’. Quite apart from other objections one might raise to these views, they each in different ways fail to account for the phenomena; they explain away rather than explain the apparent duality of law.<sup>79</sup> A more promising approach is suggested by the traditional distinction between the *letter* of the law and its *spirit*, particularly as that distinction is elaborated by Plowden in the passage from his *Commentaries* cited above: “It is not the words of the law, but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.”<sup>80</sup> We want to resuscitate this understanding of the sense and reason of the law as the animating principle of a constitutional order. More precisely, we want to identify that animating principle with a people’s practical reasoning about their common rights, powers and obligations. To do so, however, we will need to reject two currently dominant jurisprudential conceptions of what it means to identify fundamental law with reason.

A.

The first conception of reason we need to reject is the logical formalism advocated by Justice Scalia, who was, as noted above, an avowed opponent of the idea that a constitutional legal order could have a life.<sup>81</sup> In his concurrence to the holding in *Hein v. Freedom From Religion Foundation*, Scalia subverts the

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<sup>76</sup> See ROBERT ALEXY, *The Dual Nature of Law*, 23 *RATIO JURIS* 167 (2010). MATTHIAS KLATT, *Law As Fact and Norm: Georg Jellinek and the Dual Nature of Law* in NICOLETTA BERSIER LADAVAC, CHRISTOPH BEZEMEK & FREDERICK F. SCHAUER, *THE NORMATIVE FORCE OF THE FACTUAL: LEGAL PHILOSOPHY BETWEEN IS AND OUGHT* (2019).

<sup>77</sup> JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 448 (1996). GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 467, 478–79 (Second edition. ed. 2019). Richard Fallon, *Reflections on Dworkin and the Two Faces of Law*, 67 *NOTRE DAME LAW REV.* 553 (1999).

<sup>78</sup> See, e.g., Xenophon, *Memorabilia* 1.2.40–46, Aeschylus, *Prometheus Bound* 149–51, Thucydides, *History* 3.62.3. See also Michael Davis, *Plato’s Minos: The Soul of the Law*, 78 *REV. POLIT.* 343 (2016).

<sup>79</sup> John Finnis, for example, characterizes the claim that “the law has a double life” as merely “metaphorical.” Finnis, *supra* note 36 at 96.

<sup>80</sup> PLOWDEN, *supra* note 22 at 465. While the distinction between the letter and the spirit or the body and the soul of the law is usually traced back to the admonition in 2 Corinthians 3:6 that “the letter kills but the spirit gives life,” Plowden’s account of “the soul of the law” owes more to Aristotle’s principle of *epikeia* or “equity” than it does to Saint Paul. See Georg Behrens, *Equity in the Commentaries of Edmund Plowden*, 20 *J. LEG. HIST.* 25, 55–57 (1999).

<sup>81</sup> SCALIA, *supra* note 23 at 25.

traditional common law identification of the “soul of the law” with reason (in Plowden, Coke and Blackstone) by recasting it as the ‘logical’ application of positive law.<sup>82</sup> In the same concurrence, Scalia brushes aside Oliver Wendell Holmes’ claim that “[t]he life of the law has not been logic: it has been experience,” as a “snappy epigram,” and he does so characteristically by treating the claim in isolation from its context. Holmes’ understanding of experience in *The Common Law* is not, as Scalia implies, a jurist’s ‘experience’ of whether a precedent has or lacks a “logical theoretical underpinning.” It is, as Scalia well knew, the embodiment in the law of “the story of a nation’s development through many centuries” which “cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”<sup>83</sup>

The second conception of reason as the foundation of law we need to reject is John Finnis’s Thomistic conception of ‘practical reasonableness’ as articulated in his influential *Natural Law and Natural Rights* and subsequent works. While Finnis’s conception of reason has an advantage over Scalia’s logical formalism in that it is avowedly *practical*—that is, it is concerned with ethical and political questions—it is not a conception of practical *reasoning*, and much less the common reasoning of a people. Finnis does not see the law as grounded in a people’s deliberations about what unites them as citizens. Instead, he presents a substantive account of the *ends* toward which human beings must conform to be accounted reasonable—the “basic forms of human good” and the “basic requirements of practical reasonableness.”<sup>84</sup> “Reasonableness” is here measured by how closely one’s decisions and actions conform to the ‘dictates of right reason’ and how closely one’s life conforms to the ‘central case’ of the “mature person of practical reasonableness,” the person whose thought and action “*is* the criterion of sound terminology and correct conclusions in ethics (and politics).”<sup>85</sup> It is, on Finnis’s account, the responsibility of such a person to rule, if they have the opportunity to assume power. Their rule is, moreover, *prima facie* legitimate so long as they have the “ability to co-ordinate action for the common good.” As Finnis makes clear, however,

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<sup>82</sup> “The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason.” *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007) at 633 (Scalia, J., concurring). In his dissent in *Rogers v. Tennessee*, Scalia makes a similar move, interpreting Coke’s famous claim in the *Institutes* that “the reason of the law ceasing, the law itself ceases” as a statement about the application of a positive law rather than a rational assessment of the law’s meaning and purpose. 532 U.S. 451 (2001) at 474 (Scalia, J., dissenting). To make this argument, Scalia engages in selective quotation, eliding both Coke’s explicit reference to the fact that a literal application of the relevant positive law would suggest a different result (“And though the law saith, that this was a mortmain, that is, that they held fast their inheritances”), and Coke’s explicit grounding of the “reason” of the law in the “body politic”. 1 *Institutes* 70. Scalia’s tortured reading of Coke’s claim about “the law itself ceas(ing)” as a claim about a positive law’s application to a different case with a different fact pattern is in any case impossible to reconcile with Coke’s frequent application in the *Institutes* of the related legal maxim “cessante causa cessat effectus.”

<sup>83</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1963).

<sup>84</sup> FINNIS, *supra* note 36 at 81–126.

<sup>85</sup> *Id.* at 102.

this conception of the “common good” is to be imposed on a populace without requiring their participation or even their “consent.”<sup>86</sup> The practical reasonableness of a subject populace is only manifested in their “acquiescence” to their ruler’s authority.<sup>87</sup>

These complementary mistakes about reason—the one identifying reason with formal notions of consistency and coherence, the other identifying reason with substantive normative conclusions—are unfortunately not confined to contemporary legal theory; their analogues can be found throughout current theorizing in economics, cognitive science and political theory. We seem at the current historical moment to be in danger of forgetting the obvious truth that any account—that is, any theory or description or explanation or narrative—is grounded in the human activity of reasoning. *Giving* an account is a way human beings think about themselves and the world. The *account* itself is a record and reminder of that way of thinking. Reasoning is something human beings do. It is something we can do well or poorly, in various ways, according to various criteria. To call an account more or less *reasonable* is just to say that the account is the product of (or vehicle for) human beings reasoning more or less well.

This is not in any sense a relativist claim. It is not the claim, for example, that the world itself is a product of human reasoning, or that the truth or falsity of an account is relative to the desires and preferences of individuals or groups. The claim is merely that we must not confuse, for example, the words we use in our reasoning or the criteria we use to assess our reasoning with that reasoning itself. Until relatively recently this claim would have passed for common sense, an obvious truth about the relation between thought and language, but one of great significance for thinking about constitutional law. Consider in this context Madison’s argument in *Federalist 37* that “all new laws,” however well thought out and perspicuously expressed, “are more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.” Central among the reasons Madison gave for the equivocal meaning of new laws was the limitation inherent in human language for complete and adequate expression of our thinking. This was not, in Madison’s view, a limitation that could be overcome by any degree of precision or foresight. Even the word of God, when expressed in human language “is rendered dim and doubtful, by the cloudy medium through which it is communicated.” The meaning of a new law cannot be rendered determinate by any inspection of the text by itself, because the words of the text are in the best case an inadequate “vehicle of ideas.”<sup>88</sup> Instead, as Madison elaborates

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<sup>86</sup> Finnis dismisses as an “ideological myth” the contention that the people ‘rules itself’. *Id.* at 16.

<sup>87</sup> That Finnis identifies himself as such a mature person of practical reasonableness is evident from the fact that he identifies the views presented in *Natural Law and Natural Rights* with the “true, justified morality” and the “true position in legal philosophy.” Finnis, *supra* note 36 at 99, 109.

<sup>88</sup> *The Federalist* No. 37 (James Madison)



elsewhere, the law’s meaning can only be ascertained through it being put into “deliberate” practice;<sup>89</sup> that is, subject to “a course of authoritative expositions sufficiently deliberate, uniform, and settled” to qualify as “evidence of the Public Will” that “necessarily overrul(es) individual opinions”—even his own.<sup>90</sup>

It is important to recognize that in *Federalist 37* Madison is *not* claiming, à la Hart, that the text of a law is “open textured” with a “central core of undisputed meaning” and “a penumbra of uncertainty where the judge must choose between alternatives.”<sup>91</sup> He is not claiming that there are gaps in the legal framework created by vague language which language is to be corrected and made determinate by subsequent judicial opinions.<sup>92</sup> According to Madison, the meaning of the law is to be ascertained by the experiment of putting it into constitutional practice, subject to further deliberation, adjudication and implementation. He can maintain both that the text of a law is equivocal, and that the law’s meaning is something to be discovered through experience, because he does not identify the law with the text itself, but the text as put to deliberate use in the constitutional order.<sup>93</sup> Or, as Hamilton expressed a related point in *Federalist 82*, “Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.”

The conception of reason advocated here is broadly consistent with this Madisonian understanding of the relation between “the reason of the public” and the deliberate practice of a constitutional order. The initial explication of this conception of reason will of necessity be fairly abstract. Rather than attempt to offer a general defense of this conception of reason, it will be explicated through its use in an account of how the legitimacy of a constitutional legal order depends upon that legal order functioning as a vehicle for the common reason of a people.

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<sup>89</sup> William Baude, *Constitutional liquidation*, 71 STANFORD LAW REV. 1, 16–18 (2019).

<sup>90</sup> Letter from James Madison to Charles E. Haynes, 25 February 1831. See, also, *The Federalist* No. 63 (James Madison). “(T)he cool and deliberate sense of the community ought in all governments, and actually will in all free governments ultimately prevail over the views of its rulers.”

<sup>91</sup> HART, *supra* note 42 at 12. Cf. Brian Bix, *H. L. A. Hart and the “Open Texture” of Language*, 10 LAW PHILOS. 51 (1991).

<sup>92</sup> There is no support in Madison’s words for Baude’s contention that in contexts where “first-order interpretive principles make the meaning clear...there is no need to resort to liquidation.” Nor does Madison select out particular new laws that exhibit textual indeterminacy, as Baude suggests. Instead, he clearly states that *all* new laws are more or less equivocal until they have been ‘liquidated’, i.e., made clear, by subsequent practice. Baude, *supra* note 89 at 12–13.

<sup>93</sup> Madison makes this explicit in his reflections on his earlier opposition the establishment of the Bank of the United States “as unauthorized by the Constitution” and his later defense of the Bank as constitutional. He claimed that any putative inconsistency between his earlier and later positions “is apparent only not real.” “(M)y abstract opinion of the text of the Constitution is not changed, and the assent was given in pursuance of my early and unchanged opinion, that in the case of a Constitution, as of a law, a course of authoritative expositions sufficiently deliberate, uniform, and settled, was an evidence of the Public Will necessarily overruling individual opinions.” *Supra* note 90.

B.

Reason is a capacity that is partially realized in a practice. Such a practice has rational content to the extent that it serves as a vehicle for human beings realizing their capacity for reasoning. As noted above, the idea that reasoning about the law is reasoning embodied in a practice is a familiar one in positivist legal theory. But the positivists' account involves a conflation of distinct meanings of practice; they treat practice understood as the habitual, usual or customary as simply equivalent to practice understood as the realization or actualization of an idea, method or theory.<sup>94</sup> It is safe to say, however, that not all repetitive behaviors qualify as deliberate practices in Madison's sense. Consider in this context Oliver Wendell Holmes' assertion that "experience" is the soul of the law along with his claim that it "(i)t is revolting to have no better reason for a rule of law" than its persistence over time.<sup>95</sup> These two claims are perfectly consistent as long as we understand—as Holmes, Madison and Hamilton all did—the distinction between reasoning within the context of a historically embodied practice and "blind imitation of the past."<sup>96</sup> Not only the letter of positive law, but also judicial precedents, legal and political institutions, social conventions and the recorded history of the nation are all ways that a constitutional order is embodied. The life of a constitutional order is the communal deliberative activity that embodied order makes possible.

Not all putative legal orders are apt vehicles for the communal determination of a people's common good, nor is veneration of the past, whether it be blind or strategic, the only obstacle in the way. It is a mistake to assume, with most "living constitutionalists," that a historically changing constitutional order is necessarily a 'living' constitutional order—decay and corruption are also kinds of change—or think that the aspiration toward a more just constitutional order is merely a matter of political will. Martin Luther King characterized legal injustice in the following terms. "An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal."<sup>97</sup> King also claimed that conscientious civil disobedience, intended to "arouse the conscience of the community" against unjust laws, expresses "the highest respect for the law."<sup>98</sup> Any

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<sup>94</sup> That is, legal positivists treat the first, second and third definitions of 'practice' in the *Oxford English Dictionary* as if they were indistinguishable. OED, 3rd Edition 2006, s.v. practice, n.

<sup>95</sup> OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 187 (1920).

<sup>96</sup> "Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?" *Federalist* 14 (James Madison).

<sup>97</sup> MARTIN LUTHER KING, WHY WE CAN'T WAIT 71 (1964).

<sup>98</sup> *Id.* at 72.

theory of law that cannot accommodate both of these fundamental insights into the nature of law, as legal positivism surely cannot, is theoretically indefensible.

To help to clarify our position, we can begin by addressing the legal status of extremely unjust laws, an issue that is standardly used to illustrate the distinction between positivist and non-positivist legal theory. Positivist legal theory maintains that extremely unjust laws can nonetheless be legally valid. The view advocated here contends, to the contrary, that extremely unjust laws fail to be valid and hence, in some sense, cease to qualify as law. The claim that the concept of an ‘unjust law’ is somehow self-contradictory is usually associated in the tradition with Augustine’s comment in *On the Free Choice of the Will* that “‘a law that is not just does not seem to me to be a law.’”<sup>99</sup> But however persuasive one might find the claim that there is a necessary or conceptual connection between the lawful and the just, the notion of an unjust law is not like the concept of a round square; there are good reasons to think that throughout history ‘unjust laws’ have been, as it were, more the rule than the exception.

The contemporary legal philosopher most known for claiming a necessary connection between justice and legal validity is Robert Alexy, who defends a sophisticated and systematically complex version of Gustav Radbruch’s claim that in cases when “equality—the core of justice—is deliberately disavowed in the enactment of positive law,” the putative law has no legal validity.<sup>100</sup> Further, he agrees with Radbruch that even in the absence of the explicit disavowal of equality, ‘intolerable’ injustice renders a statute defective with respect to its validity. In order to explain the latter possibility, defective legal validity, or what Radbruch calls “*unrichtiges Recht*”, Alexy invokes the ‘dual nature of law.’ While we disagree with many aspects of Alexy’s account, we agree with his claim that law has a dual nature, and we agree in essence with Alexy and Radbruch that any law that deliberately disavows the ‘core of justice’—in our account, the common good of a people—loses legal validity. Moreover, we want to claim that *the degree* to which a system of laws ceases to be a vehicle for determination of the common good is *the degree* to which that system ceases to provide normative guidance and shifts toward a system of coerced conformity. Alternatively expressed, once a law becomes sufficiently unjust it becomes, for the individuals subject to its coercive authority, *normative nonsense*, equivalent to the claim that “all slithy toves are legally obliged to gyre and gimble in the wabe.”<sup>101</sup> A putatively legal order which does not function as a framework for a

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<sup>99</sup> *De libero arbitrio*, I, v, 11.

<sup>100</sup> Robert Alexy, ‘A Defence of Radbruch’s Formula,’ in D. Dyzenhaus (ed.), *Recrafting the Rule of Law* (Oxford: Hart, 1999) 15-39.

<sup>101</sup> This claim needs to be distinguished from Alexy’s contention that sufficiently unjust laws give rise to “performative contradictions” when they are enforced. Whatever merits the concept of performative contradiction might have in Jürgen Habermas’s formal pragmatics or Karl-Otto Apel’s ‘discourse ethics’, the concept as

political community to discern and determine a common good is a regime that is accurately described by extreme legal realism. The proper, indeed sole object, of the study of the law in such a regime is accurate predictions concerning the attitudes and behaviors of legal officials in order to curry their favor and avoid their displeasure. If we think of legal orders occupying a place on a continuum between systems of normative guidance and systems of coercive conformity, most putatively legal orders have tended toward the coercive end of the continuum. But, at a certain point, when “law and order” becomes identified with ‘order’ simply, neither law nor order is possible.<sup>102</sup>

C.

The legitimacy of a constitutional order is grounded in the common reason of its citizens and for that very reason there are inherent limitations on the kinds of authoritative orders that can have legal validity, whatever other formal or procedural criteria they may satisfy. This idea is central to early modern social contract theory, no less so in Thomas Hobbes’ *Leviathan* than in Rousseau’s *On the Social Contract*. While the view offered here is obviously not Hobbesian in spirit or detail, Hobbes’ account is particularly illuminating for our purposes because his argument so clearly disavows any reliance on independently derived trans-political moral obligations. Instead, Hobbes focuses narrowly on the prudential reasons each citizen is presumed to have in their own self-preservation. On this basis—and despite his well-known assertion that the power of the sovereign is ‘absolute’—Hobbes can maintain that there are limits set by the nature of sovereignty itself on what the sovereign can do as a legislator (or judge).<sup>103</sup> The sovereign’s laws (and jurisprudence) must be consistent with each citizen’s reasonable expectation that the commonwealth serves the end of its subjects’ mutual self-preservation, because this reasonable

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appropriated by Alexy seems to simply elide the distinction between formal linguistic contradictions, on the one hand, and a ‘contradiction’ between the pragmatic presuppositions of communication and particular propositional claims. A closer analogue is Lon Fuller’s explication of his theory of the “inner morality of law” in his depiction of the various ways a ruler might fail in the attempt to legislate—by framing ‘laws’ that are secret, retroactive, constantly changing, incomprehensible, impossible to comply with or radically inconsistent in their application. Rather than taking these examples as articulating “the morality that makes law possible,” however, they are better understood as exhibiting the necessary connection between constitutional law and the practical reasoning of a people. LON L. FULLER, *THE MORALITY OF LAW* 33-41 (1969)

<sup>102</sup> Cf. Fuller, *supra* note 2 at 644.

<sup>103</sup> See David Dyzenhaus, *Hobbes on the authority of law*, in *HOBBS AND THE LAW* 186 (2012). This is not a contradiction in Hobbes’ account. What Hobbes means by “absolute” is unconditional (*Leviathan* VII, 3), that is, not subject to or dependent upon any external constraints or limitations. Hobbes defines “power” as “the present means, to obtain some future apparent good” (*Leviathan* X, 1) and he contends that the “greatest of humans power is that which is compounded of the powers of most men, united by consent, in one person.” (*Leviathan* X, 3) The sovereign power is undermined, rather than expressed, by a legal order that cannot be reconciled with the united consent of the populace.

expectation is the sole foundation of the commonwealth.<sup>104</sup> That is, on Hobbes' account, the sovereign's authority is grounded in and established solely by the fact that it is reasonable for *each* citizen to judge that it is equally in *every* citizen's reasonable self-interest to obey the sovereign's authority.

Consider in this context Hobbes' contention that certain rights are *inalienable*. This is not an assertion about any sort of obligation that a human being has toward other human beings merely in virtue of their being human, as Chapter 14 of *Leviathan* makes clear. In the "state of nature," that is, in the absence of a common sovereign power over individuals to enforce putative obligations between them, "every man has a right to everything; even to one another's body." The key to understanding Hobbes' account of inalienability is his contention that one does not alienate (that is, renounce or transfer) a right simply by intending to do so, or by reciting certain words. One can only renounce a right to something by successfully *communicating* to the community that one has renounced that right, because it is the community, through the artifice of the sovereign power, that holds one to account for one's renunciation.<sup>105</sup> This act of communication presumes a shared background of common reasoning about, and common commitment to, the foundational purpose of the community, which in Hobbes' account is mutual self-preservation. An individual cannot renounce their right to self-defense because it is "the motive, and end for which this renouncing, and transferring of Right is introduced."<sup>106</sup> That is, one cannot use the vehicle of one's participation in the social contract to alienate those rights by virtue of which one is a party to the contract. Thus, Hobbes claims that "if a man by words, or other signs, seem to despoil himself of the end, for which those signs were intended; he is not to be understood as if he meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted." For similar reasons, he contends that if the Sovereign should seek to grant a liberty "to all or any of his subjects" and that liberty would render the sovereign incapable of providing for their safety, "the grant is

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<sup>104</sup> Susanne Sreedhar rightly emphasizes this aspect of Hobbes' account. Susanne Sreedhar, *Defending the Hobbesian Right of Self-Defense*, 36 *POLIT. THEORY* 781 (2008). Sreedhar, however, thinks that this reasonable expectation of self-preservation does not apply to contracts within the commonwealth, but only to the social contract that institutes the commonwealth. Her primary evidence for the latter claim is Hobbes' contention that professional soldiers undertake contracts that involve risks to one's life. *Ibid.*, 791-2. Her argument, however, does not address Hobbes' account of how soldiers differ from civilians. According to Hobbes, by seeking employment as a soldier, a subject "takes away the excuse of a timorous nature." Therefore, what can be reasonably expected of a soldier differs from what can be reasonably expected of a civilian. Nonetheless, the fact that a soldier has not alienated his right to self-defense by enlisting is evident by the fact that soldiers who become captives in war have the liberty to switch sides in the conflict. *Leviathan XXI*, 22.

<sup>105</sup> This is no less true in the case of "sovereignty by acquisition" than it is in the case of "sovereignty by institution." When one people is subjugated by another people, they are not subjugated by any "natural person" but by the united power of the subjugating people. Fear of the conqueror is fear of this united power, and subjection to the conqueror is subjection to the "artificial person" representing the conquering people. In either case, one does not covenant with the sovereign but with the other individuals whom the sovereign represents.

<sup>106</sup> *Leviathan XIV*, 8.

void” and must be understood as stemming from the sovereign’s ignorance and not as an indication of the sovereign’s will. These parallel claims, concerning how the words or signs of both the subject and the sovereign *must* be understood and *cannot* be understood, do not depend upon viewing these signs as simply or universally unintelligible or self-contradictory.<sup>107</sup> Instead, their unintelligibility is specific, practical and contextual. The contradiction (or “absurdity”) is a contradiction between the putative obligation involved in alienating a right and the practical reasoning that grounds the commonwealth and makes obligatory covenants possible.<sup>108</sup>

There are many ways that the view of constitutional legitimacy we present here differs fundamentally from the view presented in *Leviathan*. We reject *Leviathan*’s account of human motivation, its purely instrumental view of reason, its reductive account of human freedom, its nominalism and its moral relativism. Most significantly, we reject its contention that mutual self-protection is, or can be, the sole ground of all legal obligation. Nonetheless, we think Hobbes’ core insight regarding the inalienability of certain rights should be reclaimed and defended. Stated in the most general terms, a right is *alienable* if it can be transferred to another. The right of ownership in a specific piece of property is the classic example of an alienable right. Transfer of that right (through gift or sale) imposes legal obligations on the individual who has transferred the right of ownership to another. *Inalienable* rights are those rights that cannot be so transferred—not because such rights are attached by god or nature to particular individuals—but because retaining those rights is a necessary condition of being subject to valid legal obligations.

One has legal obligations insofar as one chooses to participate in activities that are governed by laws, and one’s participation in those activities is a prima facie authorization of some mechanism for enforcement of those legal obligations. While one can, of course, incur legal obligations in a political community of which one is not a member, those legal obligations ultimately depend upon agreements made between political communities. The primary locus of one’s legal obligations is the political community to which one belongs, and one can only be subject to valid legal obligations if one can authorize the coercive authority of that community. One cannot alienate those rights or liberties that are essential to one’s participation in one’s political community because it is only as a member of that community that one can incur valid legal obligations to that community. Many of the concept expressions that we use to refer to fundamental rights, such as “freedom of speech,” “freedom of assembly” or “equal protection of the

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<sup>107</sup> Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CALIF. LAW REV. 711, 719–722 (2000).

<sup>108</sup> *Leviathan* XIV, 7.

laws” are best understood as attempts to articulate the necessary conditions of active membership in the political community. One can choose not to exercise many of these rights, but one cannot legitimately be deprived of any of them by the political community because one can be a member of the political community only insofar as one retains these rights. Moreover, the meaning of these concept expressions and the scope of their application must ultimately be determined by the deliberate practices of the political community, making use of the historically embodied constitutional order as a vehicle for reasoning in common about the rights, duties and obligations of citizenship. It is only insofar as citizens can participate in determining the conditions under which they have sufficient liberty for their actions to qualify as genuine authorizations of a framework of legal obligations that such a framework can be an expression of their practical reasoning.

Our most fundamental disagreement with Hobbes arises here, in our divergent accounts of the kinds of rights and liberties that are essential to membership in a political community. While it is true that mutual protection and common defense are ineliminable components of constitutional government, they should not be understood as the sole motivation and purpose of civic association. While a political community may come into being for the sake of mere life, it exists for the sake of a good, distinctively human, life.<sup>109</sup> Moreover, even if one were to concede to Hobbes that legal obligations were *ultimately* grounded in the reasonable expectation that a regime of equal and impartial laws was the best strategy for mutual self-preservation, it would *still* be the case that the validity of those obligations would depend upon the legal order functioning as the continuing constitutive realization of a self-governing people. This is for two distinct but interconnected reasons.

First, as recent experience should remind us, relatively unconstrained political power is inherently corrupting, not only for those individuals who wield the most power, but more importantly for the legal and political institutions through which that power is exerted. Political structures of coercive authority always have been and always will be used for illegitimate ends of personal enrichment and sectarian advantage. This enduring potential for institutional corruption, endemic to political society as such, was the principal motivation for Hamilton’s and Madison’s insistence on the separation of powers<sup>110</sup> and, for Madison, the principal danger to be guarded against in prudent statecraft.<sup>111</sup> It is against this background

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<sup>109</sup> Aristotle, *Pol.* 1.2. 1252b29-30. Cf. *Sens* 436b18-437a3.

<sup>110</sup> The *Federalist* Nos. 47, 48, 51, 66, 71, 73.

<sup>111</sup> As noted above (*supra* note 65), Madison’s primary concern was with the constitutional arrangement that would make the illegitimate usurpation of authority by factional interests less likely. “The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to controul one part of the Society from invading the rights of another, and at the same time

that we must understand the possibility of genuine political community. A genuine political community exists, insofar as it exists, as a struggle against this permanent possibility of corruption. Any system of written laws or institutional safeguards can only stand “against the encroaching spirit of power” as long as those laws and safeguards are instruments of a people’s constitutional self-governance. For this reason, unless a people are actively fighting to realize equality before the law in their *existing* constitutional order, they are not only abandoning any higher aspirations they hope to realize in their political community, they are at best leaving to chance the end of mutual self-preservation. Second, the capacity of a people to reason in common about their rights and obligations is a capacity that must be exercised for it not to be lost. When individual members of the community cannot experience the laws that govern the community as a vehicle through which they themselves participate in making the community, they will inevitably relate to the legal order as something to be manipulated or circumvented in service of personal or partisan self-interest. When and to the degree that the legal order ceases to be a vehicle for a people’s determination of a common good, individuals lose the capacity to make sense of themselves through their relation to the political community.<sup>112</sup> The loss of that capacity is the dissolution of a people.

D.

A sufficiently unjust or inequitable system of coercive authority does not provide normative guidance to the individuals subject to that system, because such a system cannot be a vehicle for their deliberative activity. Rather than enabling the practical reason of those individuals, it is at best a background constraint against which an individual’s prudential reasoning operates. Positivist legal theory misses this basic point because it confuses normative guidance with “constrain(ing) the practical deliberation of its subjects.”<sup>113</sup> But this is to treat a minefield as if it were a map.

The extreme case of unjust institutional authority, of “difference made legal,” is the legally sanctioned enslavement of human beings. A law asserting a right to hold human beings as property is also the

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sufficiently controuled itself, from setting up an interest adverse to that of the whole Society.” “Vices of the Political System of the United States,” MADISON, *supra* note 13 at 41.

<sup>112</sup> Compare Learned Hand on what he calls ‘the spirit of moderation’: “[B]ut this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual.” LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 181 (Special ed. ed. 1989).

<sup>113</sup> “Law’s essential character is prescriptive: It purports to guide action, alter modes of behavior, constrain the practical deliberation of its subjects; generally speaking, the law purports to give us reasons for action.” ANDREI MARMOR, *PHILOSOPHY OF LAW* 1 (2011).



extreme example of what we have called ‘normative nonsense,’ an affront to the very idea of valid legal authority. Legalized enslavement was the great systemic corruption of our original constitutional order, and the ultimate source of the greatest legal absurdities in our constitutional document and history. This is not the place to make, or try to substantiate, the contention that the historical sway of legal positivism over our constitutional jurisprudence owes much to the distortions imposed upon legal reasoning by the attempt to legally justify human enslavement and racial oppression. It is incontestable, however, that positivist legal reasoning was necessary for that putative legal justification. As Lord Mansfield stated in *Somerset v. Steuart*:

The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law.<sup>114</sup>

The most prominent legal positivists of the past century, while quick to denounce the immorality of human enslavement, do not hesitate to affirm its possible legal validity. H. L. A Hart uses the example of “(t)he rights of a master over his slaves” to demonstrate that “rules which confer rights” do not need to be just.<sup>115</sup> Joseph Raz asserts that “(t)he law may...institute slavery without violating the rule of law.”<sup>116</sup> Most contemporary legal theorists, both positivist and anti-positivist, are in broad agreement that objections to *constitutional* injustice, however grave that injustice may be, are evaluative objections that have their basis outside the constitutional legal order, and are grounded either in an independent moral theory of value or in individual “ideology and preferences.”<sup>117</sup> But, as Jeremy Waldron notes after surveying the “disgraceful history” of judicial review in the United States, this leaves us in the position of having to “pray not only that we have the right constitution but that our judges bring to their task the right ideology of personhood, dignity and rights.”<sup>118</sup> There are, however, resources within the tradition of reflections upon the nature of inalienable rights and constitutional self-government that suggest an alternative with more promise. We focus on the institution of slavery both because of its central place in the pathologies of US constitutional history, and because it is the clearest case of a constitutional absurdity.

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<sup>114</sup> (1772) 98 ER 499.

<sup>115</sup> Hart, *supra* note 4 at 606.

<sup>116</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 221 (2nd ed. ed. 2009).

<sup>117</sup> ERWIN CHEMERINSKY, *WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY* 33 (First edition. ed. 2018).

<sup>118</sup> Jeremy Waldron, *Judicial Review of Legislation*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW*, 437 (2012).

Once again, it is useful to begin with Hobbes' *Leviathan* because his argument rests solely on the rational self-interest of the members of the commonwealth in mutual self-preservation. It is a strict consequence of Hobbes' position as articulated in *Leviathan* that the private ownership of human beings cannot be legally justified. This is not in any way an exception to his 'authoritarianism'; it rather follows from it directly. The only 'slavery' Hobbes countenances in *Leviathan* is the *equal* subjection of all subjects to the sovereign.<sup>119</sup> "(N)o man," he writes, "can obey two masters."<sup>120</sup> The institution of legal slavery, if it were possible, would imply divided sovereignty, which Hobbes maintains is the dissolution of the commonwealth. The law must treat all subjects of the commonwealth with equity and reason, otherwise "the controversies of men cannot be determined but by war."<sup>121</sup>

Rousseau, in *On the Social Contract*, presents a more explicit account of the rational incoherence of legally justifying slavery. "(T)he right of slavery is null and void, not only because it is illegitimate, but because it is absurd and meaningless. These words, slavery and right, are contradictory and mutually exclusive." For our purposes, what is most significant about this argument is that it does not rely on Rousseau's own moral objections to slavery. Instead, the focus is on the grotesque absurdity of a putatively legal order which denies the morality of enslaved human beings as bearers of rights, while asserting their obligations as subjects of legal coercion. Rousseau argues that one cannot alienate one's liberty in exchange for one's life precisely because the act of alienation itself implies participation in the social contract. The alienation of one's liberty is legally absurd, because "a convention which stipulates absolute authority on the one side and unlimited obedience on the other is meaningless and contradictory."<sup>122</sup> More fundamentally, it is ethically and politically absurd because it presumes the possibility of a valid legal obligation that deprives one party of the moral capacity of entering into valid relationships of obligation.

This argument, contending that slavery is necessarily legally invalid because it contravenes the necessary conditions of valid legal obligations, played a significant though largely forgotten role in disputes among American abolitionists regarding the legal status of the US constitution. The historical debate among "proslavery constitutionalists" and "antislavery constitutionalists"—that is, between figures such as

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<sup>119</sup> *Leviathan* XX, 10.

<sup>120</sup> While Hobbes does not make this consequence of his views explicit, he comes very close. The best contemporary account is Daniel Luban, *Hobbesian Slavery*, 46 *POLIT. THEORY* 726 (2018). One is not forced to conclude with Luban that Hobbes was "reluctant to follow his premises to their furthest conclusions" (728). A more plausible hypothesis is that Hobbes was understandably reticent about underlining those conclusions, given the very real dangers involved in making those conclusions public.

<sup>121</sup> *Leviathan* XV, 23.

<sup>122</sup> *SC*. Book I: Chapter IV 159

William Lloyd Garrison, Charles L. Remond and Wendell Phillips, who held that the US Constitution was a fundamentally “pro-slavery compact,” and figures such as Lysander Spooner, Thomas Cole and (after 1850) Frederick Douglass, who maintained to the contrary that the Constitution was a “liberty document”—was and is usually framed as a debate about whether the Framers’ intent and the institutional practice of state and federal courts determine the meaning of the Constitution or whether attention to the principles of liberty and equality expressed in the founding documents determine that meaning. If, as Phillips argued, the law is determined by existing legal practice and original legislative intent, then the Constitution is proslavery;<sup>123</sup> if the text of the constitutional document is to be interpreted according to the principles declared in the preamble, as Angelina Grimké argued, then the Constitution is antislavery.<sup>124</sup> Douglass, for his part, famously advocated a “plain meaning” approach to constitutional construction in his defense of the constitutional document as anti-slavery.<sup>125</sup> But throughout his voluminous reflections on the legal status of slavery, his more constant focus was on the ‘gross absurdity’ inherent in a legal system that reduced human beings to the status of property while also treating them as apt objects of legal punishment.<sup>126</sup>

In a speech on the Fugitive Slave Law, Douglass compares the claim that a right to slavery was *written into* the Constitution with a claim to have written “a deed to give away two or three acres of blue sky.” Both claims are equally “absurd.” “The binding quality of law,” Douglass claims, “is its reasonableness” and therefore “slavery cannot be legalized at all.”<sup>127</sup> Responding to the Christiana Resistance, he argues that prosecution of “fugitive slaves” was “the climax of American absurdity” and his argument relies on recognizably Hobbesian premises.

The basis of allegiance is protection. We owe allegiance to the government that protects us, but to the government that destroys us, we owe no allegiance. The only law which the alleged slave has a right to know anything about, is the law of nature. This is his only law. The enactments of this government do not recognize him as a citizen, but as a thing.<sup>128</sup>

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<sup>123</sup> WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER’S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY REPRINTED FROM THE “ANTI-SLAVERY STANDARD,” WITH ADDITIONS 6–10 (1847).

<sup>124</sup> ANGELINA EMILY GRIMKÉ, LETTERS TO CATHERINE E. BEECHER, 9–10 (1838). It is worth noting, however, that Grimké asserted “the great fundamental principle of abolitionists” that “man cannot rightfully hold his fellow man as property” and that this right was for all human beings “inalienable.” *Id.* at 4.

<sup>125</sup> Frederick Douglass, THE CONSTITUTION OF THE UNITED STATES: IS IT PRO-SLAVERY OR ANTISLAVERY? In PHILIP S. FONER & YUVAL TAYLOR, FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 380–390 (2000).

<sup>126</sup> “(S)lavery is the grossest of all absurdities, as well as the guiltiest of all abominations, and that there can no more be a law for the enslavement of man, made in the image of God, than for the enslavement of God himself.” A LETTER TO THE AMERICAN SLAVES FROM THOSE WHO HAVE FLED FROM AMERICAN SLAVERY. *Id.* at 162. Cf. LECTURE ON SLAVERY, NO. 1. *Id.* at 167–8.

<sup>127</sup> THE FUGITIVE SLAVE LAW, speech to the National Free Soil Convention at Pittsburgh, August 11, 1852 in FONER AND TAYLOR, *supra* note 125 at 209.

<sup>128</sup> FREEDOM’S BATTLE AT CHRISTIANA. *Id.* at 181–2.

In his famous oration of July 5, 1852, Douglass pointedly refuses to *argue* that the enslavement of human beings was wrong. To do so, he claims—to treat the wrongfulness of slavery “as a matter beset with great difficulty, involving a doubtful application of the principle of justice” or “hard to understand”—would be to make himself ridiculous, and to insult the understanding of his audience. “There is not a man beneath the canopy of heaven, that does not know that slavery is wrong for him.” The only point that would need to be established is that an enslaved person is a human being, that is, “a moral, intellectual and responsible being,” and this point is already conceded by laws that “punish disobedience on the part of the slave.” When confronted with such patent absurdity what is called for is “scorching irony, not convincing argument” to rouse “the conscience of the nation” and expose its hypocrisy.<sup>129</sup>

E.

In *Federalist* 49, Madison argues against Thomas Jefferson’s proposal in “Notes on the State of Virginia” that the constitution should provide a mechanism for convening constitutional conventions, not only to amend the constitution, but also for “correcting breaches of it.” While acknowledging that the proposal is “strictly consonant to the republican theory” under which “the people are the only legitimate fountain of power,” he considers the possibility of both regular and irregular constitutional conventions too destabilizing. “(E)very appeal to the people would carry an implication of some defect in the government” and frequent appeals would “deprive the government of that veneration which time bestows on every thing” and hence, undermine its authority. However true this claim may have been in Madison’s time, it is at least doubtful that it accurately describes contemporary attitudes in modern liberal democracies. More significant for present purposes, however, is Madison’s depiction in that context of the opposition between the “passions” of the people and their “reason.” Madison’s great fear of constitutional conventions is that they would inevitably be captured by partisan and factional interests, and hence would not be an expression of the “reason of the public.”<sup>130</sup> It is this distinction, between judgements motivated by private or factional interests, on the one hand, and those motivated by “the obligations that form the bands of society,” on the other hand, that in the *Federalist Papers* gives content to the distinction between the “reason” and the “passion” of the people.<sup>131</sup>

It is the common reason of the people subject to the authority of a constitutional order that grounds the legitimacy of constitutional law. The American “compromise” with human enslavement radically

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<sup>129</sup> THE MEANING OF JULY FOURTH FOR THE NEGRO, speech at Rochester, New York, July 5, 1852. *Id.* at 195–6.

<sup>130</sup> *The Federalist* No. 49 (James Madison)

<sup>131</sup> *The Federalist* No. 85 (Alexander Hamilton)

betrayed this principle from the founding, as both “proslavery” and “antislavery” constitutionalists agreed, and the legacy of this betrayal continues to be a source of constitutional corruption. This principle of constitutional legitimacy is, as Douglass asserts, not hard to understand. Nor does judicial fidelity to this principle depend upon judges possessing the correct account of the human good or the right ideology of personhood and dignity. One could believe, for example, that it would be better, all things considered, for one exceptionally wise and benevolent individual to be able to compel some group of individuals to behave in certain ways and still recognize that such compulsion could not be *constitutionally legitimate*. Not all goods are political goods nor is political virtue the highest virtue, as Douglass and Aristotle would agree.<sup>132</sup> For a constitutional order to be both *just* and *good*, therefore, it must be one that recognizes the inalienable right of citizens to equal participation in determining the rights, duties and obligations of citizenship *and* one in which the political community *chooses* to recognize further limitations on the duties and obligations of citizenship. The next section will offer a reading of the First Amendment in these terms, as an appeal to the common understanding of the political community about the scope and limits of the power of the people as sovereign over its constituent members as subjects. It will, at the same time, show how recent Supreme Court rulings articulate an interpretation of the First Amendment that not only does not protect our right to determine together our common good as a people, but actively undermines that possibility.

Before turning to that argument, however, a point of clarification about our use of ‘deliberate practices’ is in order. We have argued that the meaning of constitutional law must be determined by the deliberate practices of the people, with the proviso that a ‘deliberate practice’ must be one that expresses the common reasoning of a people. Therefore, evidence of an unbroken legislative history of invidious discrimination is not evidence of a deliberate practice in our sense. For reasons that will become clearer in the discussion that follows, this appeal to the *common reasoning* of a people should be understood as equivalent to an appeal to the *conscience* of a people. The demand that a deliberate practice express the common reasoning of a people, then, should not be confused with formal or quasi-formal principles of “reasonable” discursive practices imposed upon parties to public deliberation. Whether and to what degree such quasi-formal principles are reasonable in a given context depends entirely on the pathologies of existing political conditions. Acts of resistance, such as King’s civil disobedience, or refusals to engage in “reasonable” discursive practices of formal argument, offering instead “scorching irony... biting ridicule, blasting reproach, withering sarcasm, and stern rebuke” as Douglass did—in the presence of

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<sup>132</sup> FONER AND TAYLOR, *supra* note 125 at 192. Aristotle, NE VI, 7 1141a20-22.

profound injustice, acts such as these can be the greatest expression of reasonable deliberative practices.<sup>133</sup>

### PART THREE: THE BILL OF RIGHTS, THE FIRST AMENDMENT AND THE SHAPE OF CITIZENSHIP

This article has argued that the legitimacy of a constitutional legal order is grounded on the real possibility of that legal order functioning as a vehicle for a people reasoning in common about the rights, duties and obligations of citizenship, and that it is this shared conception of citizenship that is the fundamental principle of a genuine political association. This section will present a reading of the First Amendment of the US Constitution as an attempt to give partial expression to such a shared understanding. This reading is presented not in the belief that the framers' or ratifiers' understanding of the text of the First Amendment grounds our constitutional rights. There is, in any case, every reason to doubt that they themselves thought of the amendment in that way. The point is rather to see how the debates surrounding the ratification of the Bill of Rights reflected an awareness among their participants of the interdependence, inherent to the nature of a 'free and popular government,' between constitutionally protected rights and constitutionally delegated powers. The Bill of Rights, and in particular, the First Amendment, should be seen as an attempt to articulate within the context of the nascent American constitutional order, the *kind* of rights the people must protect for the coercive authority of their government to be legitimate. On this view, the protection of individual and collective rights is not a limitation on legitimate governmental power, but its foundation.

The claim that the Bill of Rights articulates the *kind* of rights protected in a legitimate constitutional order, rather than simply the rights so protected, is meant to underscore two points. First, the Bill of Rights should not be understood as a laundry list of discrete rights that human beings (or late 18<sup>th</sup> century white American men) happen, upon inspection or introspection, to possess. The Bill of Rights is best understood as an evocation and reminder for the political community of what it means to be a free American citizen and the purpose of the American constitutional order. Both the individual clauses of the First Amendment and the individual amendments in the Bill of Rights should be read together as jointly delineating some of the essential features of the free citizenship Americans instituted their government to defend and preserve. The amendments were not intended to *define* the rights of American citizenship; the amendments were intended, in the words of James Madison, "to rouse the attention of the whole community" to the way their constitutional order embodied, or sought to embody, the "perfect equality"

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<sup>133</sup> Steven Gormley, *Deliberation, unjust exclusion, and the rhetorical turn*, 18 CONTEMP. POLIT. THEORY 202 (2018). Emily Tucker, *Deliberate Disorder: How Policing Algorithms Make Thinking About Policing Harder*, 46 N. Y. UNIV. REV. LAW SOC. CHANGE 86 (2022)

in political rights that characterized free republican government. In Madison's view, while a declaration of rights in the constitutional document could help guard against misuse of power in the legislative and executive branches, its most important function was as a reminder for "the body of the people" of their constitutional *obligation* to safeguard equality of rights for all members of the political community. The vast distance between this fundamental constitutional principle of political equality and the grotesque inequities that characterized the actual systems of coercive authority at the founding is an exceptionally stark reminder of the enduring necessity of, in Martin Luther King's words, "arousing the conscience of the community" against "difference made legal."

The second reason to speak of the *kind* of rights articulated in the First Amendment is to re-emphasize the contention that understanding and properly interpreting the textual expression of fundamental constitutional principles requires a kind of reenactment of the practical reasoning of a people founding a constitutional order for their common good. It requires using the constitutional text as a vehicle for the people *thinking as founders* of their present constitutional order. In attempting to take up this task, any putative 'original public meaning' of individual words and phrases of the Bill of Rights could only get us so far. Our constitutional order today differs in many ways—socially, historically and institutionally—from the constitutional order at the founding; the aspects of our lives we would choose as examples of the freedoms of American citizenship, and the specific words we would use to describe its essential features, are not the same now as they were then. 18<sup>th</sup> century Americans did not speak about "personal autonomy"; we do not generally talk about "bearing arms." Scouring textual corpora in the attempt to give precise definitions to individual phrases in the Bill of Rights and derive from those definitions discrete constitutional rights, even if it were done in 'good faith', necessarily separates these phrases from their foundation in the constitutional activity of a people. The First Amendment should be understood *descriptively*, as a partial articulation of the shape of constitutional citizenship for a people who can recognize the citizenship so described as both the purpose and the ultimate source of their constitutional order. For the First Amendment to be understood in this way, the individual words and phrases matter, but they matter *less* than the way these words and phrases together offer a recognizable picture of constitutional citizenship.

The Roberts Court is not the first Supreme Court to treat the Constitution as a patchwork of historically and textually isolated clauses, nor the first Court to ignore profound changes in our historical constitutional order. As we will see below, the Roberts Court's recent jurisprudence centrally relies on the 'undisturbed' precedent set in the *Slaughter-House Cases*, a disastrously enduring monument to the

dangers of this kind of jurisprudence.<sup>134</sup> In fact, current arguments in favor of textualist originalism, sadly and ironically, have been made to seem more plausible by the degree to which American constitutional jurisprudence has been distorted by textualist precedents like *Slaughter-House*. When viewed in isolation from 1) the broader descriptive context of the Bill of Rights, and from 2) fundamental changes in our constitutional order, the proper judicial response to questions concerning novel applications of the rights enumerated in the First Amendment (e.g., “Are computer algorithms speech?”) can seem arbitrary. The Court’s attempt to grapple with the substance of such questions can seem to be determined only by the ideology and preferences of the individual justices. In this context, the claims of textual, empirical and logical restraint put forward by public meaning originalists, however implausible these claims are, can seem to be—as Antonin Scalia once put it—“the lesser evil.”<sup>135</sup> This is, however, a false dichotomy. The alternative is to see in the provisions of the Bill of Rights an imperfect attempt among members of the political community at the founding to articulate a shared conception of constitutional citizenship. To interpret those provisions well requires seeing how, and whether, they can still articulate a shared conception of citizenship constitutive of our political community and legal order. Such a shared conception of citizenship, if it is still achievable for US citizens, requires our thinking both retrospectively and prospectively. Asking the question “How should we, as a people, live?” involves thinking both about who we have been and who we want to be. It involves, in Justice Harlan’s words, “having regard to what history teaches are the traditions from which (our nation) developed as well as the traditions from which it broke.” An important step in that process is seeing how our constitutional jurisprudence has gone astray.

A.

In his speech to Congress introducing the proposed amendments to the Constitution that would become our Bill of Rights, James Madison’s argument in favor of their ratification can seem to a contemporary reader surprisingly tepid. He describes the addition of a Bill of Rights to the Constitution as “neither improper nor altogether useless” and argues that Americans have “nothing to lose” by its ratification. The reason for Madison’s understated rhetoric is not because he was half-hearted in his defense of the rights referred to in the proposed amendments. It was because he did not believe that *any* of these rights depended upon their enumeration in the constitutional document. Their enumeration was intended as a partial declaration of the rights retained by the people, which declaration was understood by Madison and the majority of his fellow congressional representatives as strictly legally unnecessary. As Hamilton argues in *Federalist* 33, the Constitution delegates certain powers to the Federal government, and whatever powers are not so delegated are retained by the states and the people. For this reason, “the

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<sup>134</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010) at 10.

<sup>135</sup> Antonin Scalia, *Originalism: the lesser evil*, 57 UNIV. CINCINNATI LAW REV. 849 (1989).



Constitution is *itself*, in every rational sense, and to every useful purpose, a Bill of Rights.”<sup>136</sup>

Nonetheless, Madison contended, a declaratory statement of some of those rights “may have, to a certain degree, a salutary effect against the abuse of power.” In the United States, due to the character of its popular government, such a declaration will have the most effect “against that quarter where the greatest danger lies...in the body of the people, operating by the majority against the minority.” He therefore expressed the hope that the constitutional enumeration of rights would “impress some degree of respect for them” so as to dissuade “the majority from those acts to which they might be otherwise inclined.”

It is only in the context of this profoundly non-positivist conception of fundamental rights that we can understand the most salient feature of the original debates about whether to amend the Constitution to contain a Bill of Rights. This is the fact that opponents to a Bill of Rights did not argue against them as unduly constraining the Federal government. Rather, they argued that their inclusion was at best unnecessary<sup>137</sup> and at worst would suggest that rights were dependent upon their enumeration in the constitutional document.<sup>138</sup> Madison put the latter objection as follows.

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.

While Madison allowed that this was “one of the most plausible arguments” he had ever heard against a bill of rights, he thought it could be adequately “guarded against” by including in the Bill of Rights an explicit guarantee that “the exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people.”<sup>139</sup> This statement by Madison became the basis for the 9<sup>th</sup> amendment’s declaration that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

This understanding of the *declaratory* character and purpose of the first eight amendments to the Constitution is announced in their preamble, which begins with these words.

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<sup>136</sup> *The Federalist* No. 85 (Alexander Hamilton), emphasis added.

<sup>137</sup> Gienapp, *supra* note 54 at 344–345.

<sup>138</sup> This objection to ratification of the Bill of Rights was most clearly expressed by Rep. James Jackson of Georgia. “There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.” 1 ANNALS OF CONG. 435 (1789) (1789-1824).

<sup>139</sup> *Congressional Register*, June 8, 1789, vol. 1, pp. 427-28.

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

These amendments, then, were intended to clarify the existing constitutional powers of the government of the United States so that the public would have greater confidence that these powers would not be misconstrued or abused. To that end, the Bill of Rights made explicit certain restrictions on the powers of the government, acknowledged *some* of the rights retained by the people, and made clear that the powers not delegated by the Constitution to the United States were retained by the states or the people. The original amendments to the constitution, that is, were not intended to *create* anything. They were no more considered to be a *source* of individual or collective rights than were the words of the Declaration of Independence. To state the position as simply as possible, according to the framers and ratifiers of the Bill of Rights, we do not have rights to, e.g., “free speech” or “freedom of assembly” because they are enumerated in the constitutional document, they are enumerated in the constitutional document as a declaration by the political community and reminder for the political community of the rights essential to a free government.

Current debates within the legal academy about the character of the rights enumerated in the first eight amendments typically revolve around whether a particular right is best understood as 1) a collective political right, 2) an individual right, or 3) applying both to “the people” as a political body and to individuals. The advocates of the collective rights model take the Bill of Rights to protect the right of the people of the United States as a whole to alter or amend their government, and/or the rights of the people of the several states to resist the expansion of federal power. The defenders of the individual rights model, on the contrary, typically take the Bill of Rights to protect judicially enforceable individual natural or positive common-law rights grounded outside the constitutional order. An alternative interpretation neglected in all these accounts, however, and one strongly suggested by Madison’s initial defense of the Bill of Rights to Congress (and by Hamilton’s claim that the Constitution itself is a bill of rights) is that *both* the legitimate powers of government *and* the rights of the people, collectively and individually, are grounded in the nature of free constitutional self-governance.

The text of the First Amendment, in particular, should be understood as a declaratory reminder of the kind of rights essential to active civic association, and hence to the possibility of constitutional legitimacy.<sup>140</sup>

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<sup>140</sup> This account of the First Amendment is consonant with aspects of Stephen Breyer’s account of the Amendment as intended to foster active democratic participation. Breyer, however, is not concerned with broader questions of

This conception of the meaning and purpose of the First Amendment is even more evident in the description of these rights that Madison first presented to Congress, and we will use Madison's version as a guide to our interpretation of the Amendment throughout. One might object to this procedure if this article were offering a 'textualist' or 'originalist' account of our constitutional rights, but it is not. It is, instead, offering this reading of the First Amendment as an example of how the reasoning of members of the first founding generation about the fundamental rights and duties of American citizenship can inform our reasoning about the same subject.

B.

Madison begins his version of the Bill of Rights with the proposal that "a declaration" should be "prefixed" to the Constitution affirming that "all power is originally vested in, and consequently derived from, the people," that "Government is instituted and ought to be exercised for the benefit of the people," and that "the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution." His fourth proposed amendment, intended to be inserted between the third and fourth clauses of Article 1, section 9, became the basis, with some alterations, of the First, Second, Third, Fourth, Fifth, Sixth, Eighth and Ninth Amendments.<sup>141</sup> The first three sentences of Madison's fourth proposed amendment, which together became our First Amendment, read as follows.

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.

Madison begins, as the text of the First Amendment does, with a prohibition concerning religion. Unlike the First Amendment's Establishment and Free Exercise Clauses, however, Madison's first sentence does

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constitutional legitimacy. STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (1st ed. ed. 2005).

<sup>141</sup> Seventh Amendment guarantees were included in Madison's sixth proposed amendment. Parts of the Fifth Amendment were included in Madison's seventh proposed amendment. Both of these amendments were intended to be inserted in Article 2, section 3, the third clause of which was to be deleted. One imagines that considerable subsequent controversies about constitutional 'fixity' would have been avoided had the first Congress heeded Madison's suggestions and incorporated their amendments into the main body of the constitutional document.

not refer either to Congress or to laws. His assertion of the restraint on legitimate constitutional powers is more universal in its scope, and it makes explicit the essential connection between limitations of constitutionally delegated governmental powers and the rights retained by individuals. Beginning with a general guarantee of individual and collective rights against religious discrimination, he proceeds to a specific prohibition against establishing a national religion, and finally to an affirmation of maximally broad protections for “the full and equal rights of conscience.”

Significantly, Madison’s first sentence makes no mention of “the people.” This is not an accidental omission. As Madison made clear in his *Memorial and Remonstrance against Religious Assessments*, he considered liberty of conscience to be an essential precondition for the formation of the social contract, and the rights of conscience to be fundamental to any form of civic association. The right of conscience is “in its nature” an inalienable individual right for two reasons. First, on Madison’s account, one’s conscience is equivalent to one’s judgement or practical reason and therefore cannot by its nature be transferred to another. “(T)he opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.”<sup>142</sup> Second, this same capacity for judgment, which is an inalienable right in relation to other human beings, is a *duty* in relation to “the Creator.” “It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.”<sup>143</sup> This individual duty of conscience to render “such homage”—that is, each individual’s duty to esteem or value what they deem most worthy of esteem—is, on Madison’s account, normatively prior to membership in civil society. It can neither be infringed legitimately by the political community, nor can it be the legitimate basis for abridging the civil rights of any member of that community. Any legal recognition given to one religious sect in preference to another threatens in principle “that equality which ought to be the basis of every law.”<sup>144</sup>

Despite Madison’s reference to “the Creator,” his account of the freedom of conscience here and throughout his writings does not depend upon any substantive views about the nature of the divinity. It applies equally to believers and unbelievers.<sup>145</sup> His primary concern is to articulate an account of religious liberty that does not infringe upon any individual’s civil rights, or as he put it in a letter to Edward Livingston in 1822, he believed that religion should be free from government interference “in every case

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<sup>142</sup> MADISON, *supra* note 12 at 22.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 23.

<sup>145</sup> Jefferson was more explicit in his assertion that Virginia’s ‘Bill for Establishing Religious Freedom’ of 1779 was intended to protect both believers of all kinds and ‘infidels.’ THOMAS JEFFERSON, *THE AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790 TOGETHER WITH A SUMMARY OF THE CHIEF EVENTS IN JEFFERSON’S LIFE* 71 (2005).

where it does not trespass on private rights or the public peace.”<sup>146</sup> He was, moreover, generally skeptical about theological speculation.<sup>147</sup> For these reasons, it is worth attempting to reframe his claims about conscience in less overtly theological terms.

The “common good” of a political community is constituted in part, but only in part, by people holding a good in common. It is determined by members of the political community deliberating together about the goods they hope to realize in a form of life shared with other members their community, and also about the kind of private and trans-political goods they want to protect *from* the community. Madison’s account of the liberty and right of conscience helps make clear why such limitations on the power of the people as sovereign over its constituent members as subjects are necessary. A people’s common reasoning about the good of their political community depends upon individuals capable of reasoning about their own good and about the good for human beings as such. The deliberative determination of the common good, moreover, cannot consist merely of *shared opinions* about our individual or collective good. Genuine deliberation is not merely an ‘exchange of ideas.’ It is, as Aristotle says, a form of inquiry.<sup>148</sup> Such deliberation must involve disparate individuals and groups, with different lives and individual aspirations, *finding* a good they share in common through their political activity. For this reason, genuine deliberation about a common good requires a sufficiently diverse political community. Perfect unanimity of opinion, even if it were possible, would be no more conducive to genuine political community than extreme factionalism.<sup>149</sup> The ‘reason of the public’ is realized through the reasoning of its citizens, and the conscience of the nation is realized through the consciences of individuals. The liberty of each individual’s conscience, so understood, is a condition for the possibility of genuine political community.

The liberty of individual conscience, however, is also a threat to the political community. Individual conscience, as Madison claims, cannot “follow the dictates” of other human beings. One’s conscience can be educated; it cannot be compelled without ceasing to be what it is. To follow one’s conscience involves recognizing both one’s obligations as a citizen and one’s obligations as a human being. And while these obligations will often coincide, they can certainly come into conflict. This conflict need not manifest itself as a conflict between an individual’s commitment to a particular religious community and their commitment to the broader political community, or between a particular religious doctrine and the

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<sup>146</sup> MADISON, *supra* note 12 at 306.

<sup>147</sup> Letter to Frederick Beasley, November 20, 1825 *Id.* at 303–4.

<sup>148</sup> NE 1142b13-15

<sup>149</sup> “A *polis* is not only made up of many human beings, but also from different kinds (of human beings); a *polis* does not come to be from those who are all alike.” Aristotle, *Politics* 1261a22-24

common reasoning of a people, but there are obvious reasons why the conflict in such cases is particularly stark and particularly difficult to adjudicate.

Madison’s account of “religious liberty” in his proposed amendment focuses primarily on protecting members of a minority religious community from interference by the majority.<sup>150</sup> His account of the “rights of conscience” emphasizes the spiritual or intellectual side of religious conviction. Unlike either his *Memorial and Remonstrance against Religious Assessments* or the ratified text of the First Amendment, it contains no mention of ‘free exercise’. But both of those documents remind us that religious observance has, for most people, a practical component. The tension between the practical demands of religious observance, on the one hand, and the “perfect equality” in political rights characteristic of a free government was broadly recognized in the founding era, and in much of our constitutional jurisprudence.<sup>151</sup> The Roberts Court’s recent claim in *Kennedy v Bremerton* to find no tension between the Establishment Clause and the Free Exercise Clause but only the “‘mere shadow’ of a conflict” depends on treating the sole aim of both the religion clauses to be preventing government infringement of religious practices.<sup>152</sup> This decision was perfectly mirrored by *Carson v Makin*, in which the Court ruled that government restrictions on funding religious institutions (the precise issue that inspired Madison’s *Memorial*) is itself an impermissible violation of free exercise.<sup>153</sup> Madison’s primary concern—protecting everyone’s civil rights from religiously motivated discrimination—has not simply been forgotten, it has been decisively repudiated by the current Court.<sup>154</sup>

The right of “freedom of conscience” understood as the right of each individual to their own perceptions of and judgements about what is best, for themselves and for their community, is the most fundamental of inalienable rights. It is essential to any possibility of members of a political community reasoning

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<sup>150</sup> Compare Justice O’Connor’s concurrence in judgment to *Employment Division v. Smith*. “(T)he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.” 494 U.S. 872, 902 (1990)

<sup>151</sup> See Justice Breyer’s dissent to *Carson v. Makin*. “The apparently absolutist nature of (the religion clauses) means that either Clause, “if expanded to a logical extreme, would tend to clash with the other.”...Because of this, we have said, the two Clauses “are frequently in tension,” ...and “often exert conflicting pressures” on government action.” 142 S. Ct. 1987, 2003 (2022).

<sup>152</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022). The majority opinion cites only these two words from Justice Goldberg’s concurrence in *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 308 (1963). While Goldberg maintains that the “basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all,” he also asserts that “delineation of the constitutionally permissible relationship between religion and government is a most difficult and sensitive task, calling for the careful exercise of both judicial and public judgment and restraint.” *Id.* at 305.

<sup>153</sup> 142 S. Ct. 1987 (2022).

<sup>154</sup> In her dissent to *Carson v Makin*, Justice Sotomayor presents a concise overview of “the Court’s rapid transformation of the Religion Clauses.” 142 S. Ct. 1987, 2013.

together about their common good. The right to “free exercise of religion,” if it is understood as the right to be guided in one’s actions by authoritative texts or institutions governing a sect or faction distinct from the political community, is not an inalienable right. That is, the possession of such a right is not a necessary condition for being a party to the social contract. The freedom to put their religious faith into practice is, for many individuals, a good higher than any political good and an obligation greater than any political obligation. Its status as a constitutional *right* and the scope of its application, however, must be determined by a people reasoning together about their common good. A right to free exercise of religion, that is, depends on a people choosing to recognize the unique role that religious or spiritual practices play in the lives of their citizens and, on that basis, taking on a prima facie obligation to recognize some scope for religiously motivated exceptions to generally applicable laws.<sup>155</sup> Such exceptions inevitably raise concerns—cited in Supreme Court opinions from *Reynolds v. United States*<sup>156</sup> to *Employment Division v. Smith*<sup>157</sup>—about an individual citizen becoming “a law unto himself.” These concerns are not to be dismissed lightly, but neither are the profound goods made possible for individuals—and through those individuals for their political community—by their participation in practices that recognize obligations which transcend the political community.

Any exemptions granted to religious practitioners from the general obligations of civic association will impose some burdens, direct or indirect, on those members of the community who are not granted similar exemptions. It is not necessary for the legitimacy of a constitutional order as such that religious exemptions from neutral laws of general applicability be recognized, but such exemptions may be necessary for the welfare and aspirations of a given self-governing people. The nature of these exemptions is inherently difficult because the boundaries between religious and non-religious associations, and between religious belief and religious practice, are inherently fraught. The proper determination of their scope of application demands “the careful exercise of both judicial and public judgment and restraint.”<sup>158</sup> If, however, they are to be consistent with constitutional principles of democratic citizenship they cannot include rights to infringe upon the civil rights of other citizens. Allowing religiously motivated exemptions from otherwise valid laws prohibiting discrimination against

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<sup>155</sup> Robin West aptly characterizes such exemptions as “rights of exit” from the general obligations of civic association. Robin West, *Freedom of the Church and Our Endangered Civil Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (2016). Madison’s version of what became our Second Amendment, recognizing an exemption from the general obligation “to render military service in person” to those persons “religiously scrupulous of bearing arms,” is an excellent example of such a right. MADISON, *supra* note 12 at 167–8.

<sup>156</sup> 98 U.S. 145, 166–67 (1879).

<sup>157</sup> 494 U.S. 872, 879 (1990).

<sup>158</sup> 374 U.S. 203, 308 (1963). The problems associated with distinguishing religious from non-religious objections to generally applicable laws is inherently difficult but not “insoluble,” as Howard Gilman and Erwin Chemerinsky contend. HOWARD GILLMAN, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 128 (2020).

classes of persons within the political community undermines the possibility of a genuinely shared conception of constitutional citizenship.

In our constitutional history, the “wall of separation between church and state” has always been more or less permeable. One area where it has been respected in our constitutional jurisprudence is the wide latitude granted to religious communities to determine their membership, institutional organization, and doctrine without government interference. This latitude can be defended on the same grounds and for the same reasons as limited religious exemptions from some generally applicable laws—that is, in terms of the people’s determination of their common good. This is not, however, the direction taken by the current Court, which has increasingly embraced the view that religious institutions as institutions possess fundamental Constitutional rights. Chief Justice Roberts has been the figure on the current Court most responsible for importing into Supreme Court jurisprudence the doctrine known in the literature as “Corporate Religious Liberty,” that is the claim that religious institutions possess the same constitutional right to free exercise as individuals, while asserting at the same time that due to their status as religious institutions they are exempt from the constitutional obligations of ordinary citizens. Roberts’ inclination toward this view was already evident in his majority opinion in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, which asserts that “Trinity Lutheran is a member of the community too.”<sup>159</sup> It became Court doctrine in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, which claims that “the text of the First Amendment itself ... gives special solicitude to the rights of religious organizations.”<sup>160</sup> The *text* of the constitutional document, of course, makes no reference to religious organizations, or to any other nongovernmental organizations. This serves as a potent reminder that, for the current Court, the ‘text’ of the constitutional document is identical to the interpretive gloss they choose to place on it.

On the view argued for here, religious organizations cannot have fundamental constitutional rights, nor can political action committees, nor can closely held for profit corporations. Fundamental constitutional rights are grounded in the people’s deliberative determination of the rights, duties and obligations of their shared conception of citizenship. While there are reasons for extending certain positive legal rights to corporate entities, the scope of these rights must ultimately be assessed by the degree to which they enable or disable the central constitutional principles of democratic citizenship.

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<sup>159</sup> 137 S. Ct. 2012, 2022 (2017). Compare *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 394, (2010) (Stevens, J., concurring in part and dissenting in part.). “Although they make enormous contributions to our society, corporations are not actually members of it.”

<sup>160</sup> 132 S. Ct. 694, 706 (2012).



C.

The First Amendment begins at the boundary of the political community. The religion clauses declare limitations on the power of the government of the people either to impose any trans-political obligations on members of the political community, or to forbid members of the political community from recognizing such obligations. The remainder of the amendment looks inward, describing the rights of American citizenship in terms of the rights essential to civic association and collective self-rule. This is the most plausible reading of what unites the rights of freedom of speech and of the press, the right of the people to assemble, and to petition their government for a redress of grievances.<sup>161</sup> It is even more evident in Madison's version. Beginning with the right of conscience understood as the right to think and judge for oneself, each successive sentence expands outward to different levels of civic association. The right of the people "to speak, to write or to publish their sentiments" places the emphasis on the people's right to communicate with one another, rather than on each individual's right to freedom of expression. The freedom of the press is not framed in terms of individual rights at all; it is declared inviolable "as one of the great bulwarks of liberty." The people's right to assemble is understood as the means through which they can consult with one another for their common good. Rather than indulging the hope that the "parchment barriers" of enumerated rights would be effective in limiting government and protecting individual rights, the first founding generation saw the First Amendment as a reminder of the inalienable rights of civic association they needed to protect for their government to remain an expression of their popular sovereignty.

The inalienability of rights of civic association and communal deliberation is, obviously, central to the account of constitutional legitimacy presented here. It is also, we fear, an understanding of the First Amendment that a century of Supreme Court jurisprudence has rendered largely inaccessible to most Americans. One clear sign of this is the tendency among both legal academics and popular commentators to treat the phrase 'First Amendment rights' as synonymous with "expressive rights." We cannot, in the context of this essay, hope to engage with the enormous body of Supreme Court case law and legal scholarship devoted to "freedom of speech" in the 103 years since Justice Holmes' dissent in *Abrams v. United States*.<sup>162</sup> We will, instead, confine our discussion to the following three points.

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<sup>161</sup> In the Congressional debates on the amendments, Theodore Sedgwick argued against including an enumeration of both a right to freedom of speech and a right to assembly since the first implied the second. "(S)hall we secure the freedom of speech, and think it necessary, at the same time, to allow the right of assembling? If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess." *Annals* 1:731.

<sup>162</sup> 250 U.S. 616 (1919)

First, any conception of the right of the people to consult with one another for their common good must recognize Madison's distinction between speech as a vehicle for the communication of ideas and the ideas expressed through that vehicle. This distinction is already implied in the distinction between the communicative content of a form of expression and the time, place and manner of its expression;<sup>163</sup> it is fatally undermined by recent decisions which equate restrictions on financial resources which amplify certain voices over others with unconstitutional restrictions on the freedom of speech. It is no more reasonable to defend the endless reduplication of campaign advertisements, financed by corporate wealth, which now saturate our popular media as "more speech" than it is to defend, on the same grounds, "overamplified loudspeakers assault(ing) the citizenry."<sup>164</sup>

Second, even were Holmes's claim that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" even remotely plausible, it is beside the point.<sup>165</sup> Abstract pronouncements on the value of "speech" as a quantifiable contribution to "the free trade of ideas" have no role to play in the determination of fundamental constitutional rights. The Constitutional right to speak, write and publish should be understood as the inalienable right of each member of the political community to participate in the deliberative practices of the community. Our First Amendment should serve as a reminder of our constitutional obligation to enable the equal participation of all citizens, particularly those who are otherwise disfavored or marginalized, both for the sake of justice and in the interests of political prudence.<sup>166</sup> The First Amendment affirms an aspirational commitment to preserve and protect the people's right to constitutional self-determination; it is not a textual mechanism designed to increase the flood of units of 'information' into our political discourse.

Third, the right of the people to communicate with one another about their common good is an inalienable condition of legitimate constitutional self-governance. It is a mistake, however, to identify such communicative or deliberative rights with an individual right to freedom of artistic, aesthetic or sexual expression. Some recognition of rights to privacy and personal autonomy are essential conditions for genuine freedom of association, and hence there are good reasons to defend some individual expressive rights as aspects of constitutionally mandated privacy or autonomy rights. Specific instances of artistic, aesthetic or sexual expression can also be defended as constitutionally protected precisely insofar as they have a communicative purpose. Like the free exercise of religion, freedom of personal expression is, for

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<sup>163</sup> See *Cox v. New Hampshire*, 312 U.S. 569 (1941).

<sup>164</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010). *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Compare Tim Wu, *IS THE FIRST AMENDMENT OBSOLETE?*, 117 MICH. LAW REV. 547 (2018).

<sup>165</sup> 250 U.S. 616, 630 (1919).

<sup>166</sup> See *Stromberg v. People of State of Cal.*, 283 U.S. 359, 369 (1931)

many individuals, a good higher than any political good.; a right to freedom of expression may be necessary for the welfare and aspirations of a given self-governing people. Its status as a constitutional right and the scope of its application must be determined, however, by a people reasoning together about their common good. Our understanding of fundamental constitutional law has been deformed, rather than developed, by a jurisprudence that treats laws prohibiting virtual child pornography<sup>167</sup> or the mining of medical data for commercial advertisements<sup>168</sup> as if they were restrictions on constitutionally protected freedom of speech.

#### D.

The framers and ratifiers of the Bill of Rights understood our most fundamental rights as inhering in the nature of free constitutional self-governance, not as stemming from positive legal enactments. This profoundly non-positivist understanding of constitutional rights has been all but entirely effaced from American constitutional jurisprudence.<sup>169</sup> The convoluted history of its effacement begins with *Barron v. Baltimore*, in which the Court first ruled that the Bill of Rights only limits “the power of the General Government” and is not “applicable to the States.”<sup>170</sup> John Marshall’s opinion in *Barron* was the first example of what we would now call ‘textualist’ jurisprudence and, like *Marbury v. Madison* before it, is revered less for the soundness of its legal reasoning than for its subsequent political success.<sup>171</sup> *Barron*,

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<sup>167</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>168</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

<sup>169</sup> Consider in this context John Hart Ely’s dismissal of the Framers’ contention that delegated powers and retained rights must be understood together as a “category mistake.” Ely tries to correct this mistake by asserting as an obvious truth that a governmental act “supported by one of the enumerated powers” can violate one of the “enumerated rights,” and he does so without any apparent awareness that the issue at stake is precisely the relation between a right or power and its enumeration. Ely supports his argument with reference to the Article 1, §9 prohibition of bills of attainder and ex post facto laws. He notes that no power to pass ex post facto laws was included in the constitutional document, and somehow uses this as evidence that “our forebearers” contemplated constitutional powers and rights coming into conflict. This merely repeats the mistake the 9<sup>th</sup> amendment was designed to guard against, reading a declaratory or restrictive clause in the constitutional document as evidence that a right depended upon its enumeration. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 35–37 (1980). This was a danger that delegates to the constitutional convention foresaw with reference to exactly this provision. Rep. James Wilson argued that including a provision prohibiting ex post facto laws would reflect poorly on the constitution and suggest that Americans were “ignorant of the first principles of Legislation, or are constituting a Government which will be so.” There is no power to pass ex post facto laws in the constitutional documents because, as Oliver Ellsworth put it, everyone recognized that “ex post facto laws were void of themselves,” hence there could be no such power enumerated or implied. Cf. *The Federalist* 44 (James Madison).

<sup>170</sup> *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833)

<sup>171</sup> While the correctness of *Barron* has become constitutional dogma, there are good reasons to doubt it was as simple a matter to adjudicate as Justice Marshall contended. Marshall asserts, rather than argues for, the claim that for “every inhibition intended to act on State power, words are employed which directly express that intent” (32 U.S. 249). He then cites the prohibition against State ex post facto laws and bills of attainder in Article 1, §10 as evidence that any limitations of legitimate governmental powers not expressly extended to the States could only limit the Federal government. As we have shown, however, this is a misreading of the role of “declaratory and

however, would be a dead letter were it not for the *Slaughter-House Cases*, the Supreme Court decision which—in the words of Justice Stephen Field’s dissent—reduced the 14<sup>th</sup> Amendment to a “vain and idle enactment.”<sup>172</sup> Much has been written about how the Court’s ruling in *Slaughter-House* fundamentally misconstrues both the plain meaning and the legislative intent of the 14<sup>th</sup> amendment, and those arguments will not be rehearsed here.<sup>173</sup> Instead, the focus will be on the way that *Slaughter-House*’s exhumation of *Barron* as a precedent exemplifies the absurdity and the danger of the kind of textualist originalism espoused by the current Court. *Slaughter-House* not only ignores the explicit statements offered by the authors and ratifiers of the 13<sup>th</sup> and 14<sup>th</sup> Amendments regarding the purpose of those amendments, it ignores entirely the significance of the Civil War and Congressional Reconstruction for thinking about our constitutional order and the relation between state and national sovereignty.

Justice Miller’s majority opinion in *Slaughter-House* rejects the claim that the “privileges or immunities” clause of the 14<sup>th</sup> Amendment protects fundamental constitutional rights from being “abridged by State legislation,” asserting instead that it only applies to State interference with ‘privileges and immunities...which owe their existence to the Federal government,’ such as the right to run for federal office, or “the right of free access to its seaports.”<sup>174</sup> His argument turns on the claim that any reading of the 14<sup>th</sup> Amendment that implied a restriction on a State’s legislative authority over its own citizens would radically change “the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”<sup>175</sup> This ‘theory,’ first established as Supreme Court doctrine by *Barron*, held that State citizenship is prior to and independent of Federal citizenship. According to this theory, with the exception of the constitutional prohibition of, e.g., *ex post facto* laws “the entire domain of the privileges and immunities of citizens of the States...lay within the constitutional and legislative power of the States.” Miller continues by posing the following as rhetorical questions.

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restrictive clauses” in the constitutional document. *Barron*’s use of the express prohibition of *ex post facto* laws is especially striking, given the general understanding that *ex post facto* laws needed no express prohibition to be necessarily constitutionally invalid. See *supra* n. 169. Rather than clarifying a constitutional question “not of much difficulty” (32 U. S. 247), Marshall’s sudden turn to textualism appears to have been a politically motivated response to threats to the Court’s authority—in the Nullification Crisis, and in President Jackson’s refusal to recognize the Court’s ruling in *Worcester v. Georgia*. 31 U.S. 515 (1832). It was out of step with both the dominant views at the time of the ultimate sources of constitutional law and with Marshall’s own previous jurisprudence. MERCER, *supra* note 61.

<sup>172</sup> *Slaughter-House Cases*, 83 U.S. 36, 96 (1872)

<sup>173</sup> “The reading given to the Privileges or Immunities Clause in *Slaughter-House* and its progeny is contrary to an overwhelming consensus among leading constitutional scholars today, who agree that the opinion is egregiously wrong.” Brief of Constitutional Law Professors as Amici Curiae, p. 33, *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>174</sup> *Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

<sup>175</sup> *Id.* at 78.

Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?<sup>176</sup>

This gesture—basing an argument abrogating a fundamental constitutional right on a rhetorical question—is remarkable for its arrogance. It is also a gesture echoed in recent decisions of the Roberts Court.<sup>177</sup>

Recall the first section of the 14<sup>th</sup> Amendment:

"All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In their dissents, Justice Field, Justice Bradley, and Justice Swayne all answered Miller's rhetorical questions about the intent of the 14<sup>th</sup> Amendment in the affirmative. Unlike the majority opinion, those dissents actually refer to the history of the Amendment's drafting and ratification. Justice Swayne's brief dissent is particularly relevant. He responds to Miller's tendentious textualist construction of the clause of the Amendment in which 'privileges or immunities' appears by focusing on what the entire first section of the Amendment actually *does* and the governmental powers implied by its enactment.<sup>178</sup> He concedes to the majority, citing *Barron*, that the first eleven amendments to the Constitution "were intended to be checks and limitations upon the government which that instrument called into existence," but asserts that the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments directly limit the power of the States and hence "mark an important epoch in the constitutional history of the country."<sup>179</sup> The Amendment's guarantee of US citizenship to all

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<sup>176</sup> *Id.*

<sup>177</sup> In *Dobbs*, the majority opinion includes the following. "*Timbs and McDonald* concerned the question whether the 14th Amendment protects rights that are expressly set out in the Bill of Rights and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution." *Timbs*, however, had nothing at all to do with unenumerated rights; it concerned "novel applications of rights already deemed incorporated." Justice Ginsburg's opinion in *Timbs*, moreover, stresses that the Court's Due Process precedents asked whether a constitutional right was *either* "fundamental *or* deeply rooted" in history and tradition and emphasizes the distinction between a Constitutional right and particular applications of that right.

<sup>178</sup> Miller's textualist reading of the clause construes the absence of a specific reference to the privileges and immunities of State citizenship in the second sentence as evidence for the claim that it only applies to US citizenship. Swayne in his dissent responds by emphasizing the plain meaning of the first section of the Amendment as a whole. "No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct...Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out."

<sup>179</sup> *Id.* at 124, 125.

persons born or naturalized in the United States, and *State citizenship* to all US citizens residing in the several States, directly contradicts the majority's claim that State citizenship has a basis independent of National citizenship. With regard to the fundamental constitutional rights guaranteed to all US citizens, the various State citizenships can only be understood as *special cases* of US citizenship. It is not within the power of any State to deprive State citizenship to US citizens residing in that State; State citizenship is directly conferred by National citizenship and each citizen's choice of where they reside. In Swayne's words, "(t)he citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State." More broadly, all three dissents argue that there are certain privileges and immunities "which belong of right to the citizens of all free governments," upon which no government, state or federal, can legitimately infringe.

The three dissenting opinions in the *Slaughter-House Cases* present persuasive refutations of the majority's construal of the 14<sup>th</sup> Amendment, both in terms of the legislative history of its enactment and in terms of the plain meaning of the Amendment's language. Quite apart from these arguments, however, there is another reason why the majority opinion should be recognized as facially absurd. Whatever precedential authority *Barron* and its progeny held prior to the Civil War, and whatever the merits of its reasoning concerning the relation between Federal and State sovereignty in the antebellum US, it is nonsensical to apply the 'theory' of Federalism asserted in *Barron* to the postbellum constitutional order. It was decisively refuted, not by another theory, but by the actual process of reconstituting the nation following the Civil War. Under the Reconstruction Acts, former Confederate states were required by Congress to draft new state constitutions explicitly guaranteeing universal male suffrage, these state constitutions then had to be approved by Congress, and these states were required to ratify the 14<sup>th</sup> Amendment before they could be re-admitted to the Union. Any "originalist" account of the US Constitution which asserts, as *Slaughter-House* does, that the Federal government does not "control the power of the State governments over the rights of its own citizens," was rendered indefensible by the profound changes to our constitutional order wrought by the Civil War. The majority in *Slaughter-House* turns to "(t)he first occurrence of the words 'privileges and immunities' in our constitutional history" in the Articles of Confederation (!) to explicate the scope of the privileges and immunities guaranteed to all US citizens in the several states, and wholly ignores the significance of the breakdown and re-founding of our constitutional order.<sup>180</sup>

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<sup>180</sup> The stranglehold positivism has on most contemporary American legal academics is nicely illustrated by Noah Feldman's recent work on the "broken constitution." His book-length indictment of the constitutionality of Abraham Lincoln's actions during the Civil War fails to even consider the question of whether human enslavement can be constitutionally legitimated. It also demonstrates a remarkable reluctance to think about the difference between

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The *Slaughter-House Cases* are still binding precedent. The majority opinion in *Dobbs* rests squarely on Justice Alito’s dubious interpretation of the ‘doctrine’ of “selective incorporation” under the Due Process clause of the 14<sup>th</sup> Amendment, and hence on *Slaughter-House*. According to this ‘doctrine’, expounded by Justice Alito in *McDonald v City of Chicago*, the line of cases applying most of the first eight amendments to the Constitution to the states through the Due Process clause of the 14<sup>th</sup> amendment are *not* to be understood as the Court’s successive attempts over time to undo some of the damage wrought by *Slaughter-House*. Instead, *McDonald* treats these precedents as articulating a unified theory whereby the scope of our constitutional rights depends entirely on Supreme Court precedent. In the aftermath of the Civil War and Congressional Reconstruction, however, incorporation should never have been necessary. The historical circumstances at the first founding which gave any plausibility to Marshall’s argument in *Barron* were upended by the second founding. The plain meaning of the 14<sup>th</sup> Amendment, its legislative history, and most significantly, the nature of our postbellum constitutional order demand that *Slaughter-House* should be overruled.

There is, of course, a real possibility that *Slaughter-House* will be overruled by the Roberts Court, but in a way that would exacerbate rather than ameliorate its damage. Justice Clarence Thomas’s concurrence in *Dobbs* restates his long-standing call to recognize the 14<sup>th</sup> Amendment’s Privileges or Immunities clause as binding on the States. For Thomas, however, this is merely one side of his attempt to undermine substantive due process, and the interpretation of the Privileges or Immunities clause he offers is an amalgam of those elements of natural law legal theory and textualist positivism most hostile to collective

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unconstitutional actions undertaken by an executive under a functioning constitutional order, and extra-constitutional measures during a time of constitutional breakdown. Lincoln reflected on precisely this distinction in a letter to Albert G. Hodges in April of 1864.

“Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed this ground and now avow it.”

Feldman quotes a snippet from the beginning of this letter, but nowhere addresses its substance. NOAH FELDMAN, *THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA* 22 (2021). Feldman has no qualms about asserting that the seceding states “joined together, drafted and ratified a new constitution that represented the popular will,” without pausing to mention the wills of the enslaved human beings within those states. *Id.* at 178. He is, however, quite vexed by Lincoln’s “rejection of legal logic” in a letter to James C. Conkling defending the Emancipation Proclamation as strategically and *hence* constitutionally necessary. Lincoln ridicules as “a paper compromise” any agreement to withdraw the Proclamation because, by that point in the war, no such compromise would “keep Lee’s army out of Pennsylvania.” Feldman’s stunningly legalistic response to Lincoln’s argument is this: “If the proclamation was an unconstitutional act...of course it ought to have been withdrawn.” *Id.* at 295–7.

constitutional self-rule. Thomas contends that certain rights, including the right to own handguns, are *both* inalienable natural rights *and* that those rights have no legal status unless they are codified in positive law.<sup>181</sup> This reduces ‘inalienable’ rights to nothing more than an extra-constitutional authority supporting the Court’s textualism. Justice Gorsuch, in his concurrence to *Timbs v Indiana*, indicates his willingness to be persuaded by Thomas’s view,<sup>182</sup> and as the dissenters in *Dobbs* note, the majority’s pointed silence about Thomas’s concurrence indicates all too clearly their sympathy for it.<sup>183</sup>

The grounds for overruling *Slaughter-House* were perfectly adequately articulated by Justice Field in his dissent. The “privileges and immunities” guaranteed by the 14<sup>th</sup> Amendment are those which are “fundamental” and “which belong of right to the citizens of all free governments.” These rights “do not derive their existence from ... legislation, and cannot be destroyed by its power.” In the postbellum constitutional order, these “fundamental rights, privileges, and immunities” belong to each individual “as a citizen of the United States, and are not dependent upon his citizenship of any State.”<sup>184</sup> In the line of cases which incorporated specific rights against the States, Federal courts have mostly navigated, rather than embraced, affirmed or built upon the holding in *Slaughter-House*. Deference to precedent, in the case of *Slaughter-House*, has burdened and confused jurisprudence on fundamental rights to such an extent that it is no longer seen as useful even to the ideological projects of the judiciary’s most conservative members. It may be that at other times in Supreme Court history, there were reasons to avoid overruling *Slaughter-House* as part of a broader commitment to the principle of *stare decisis*. In 2023, after a term in which the Court has both overruled long-standing precedents and where individual members of the Court have explicitly subordinated the value of precedent to other concerns, *stare decisis* can no longer provide an excuse.

## CONCLUSION

We have positioned our account of constitutional legitimacy as an alternative both to legal positivism and to natural law legal theory. Fundamental constitutional law is grounded, we have claimed, neither in the

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<sup>181</sup> *McDonald v. Chicago*, 561 U. S. 742, 813–850 (2010) (THOMAS, J., concurring in part and concurring in judgment).

<sup>182</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (GORSUCH, J., concurring).

<sup>183</sup> The majority goes out of its way to underline this silence. Not only is there no mention of Thomas’ concurrence, in contrast to the five pages devoted to savaging Chief Justice Roberts concurrence in judgment, the majority refers to Roberts’s concurrence as ‘the concurrence’ “for convenience.” *Dobbs*, 597 U.S., \_\_\_\_ (2022) at 72. The majority cites Thomas’s concurrence in *McDonald* noting that, on Thomas’s view, rights under the Privileges and Immunities clause “would need to be rooted in the Nation’s history and tradition” and “reserve(es) the question whether the Privileges or Immunities Clause protects “any rights besides those enumerated in the Constitution.” *Id.* at 15, n.22.

<sup>184</sup> 83 U.S. 36, 95-6 (1872)



authoritative habits of legal officials nor in universal “dictates of reason,” but in the deliberate practices of the people, making use of their historically embodied constitutional order as a vehicle for reasoning about their common good. A legal theorist who seeks to ground our constitutional law in the intentions of the founding generation, or in contemporary moral theory, asks the question of legal legitimacy with reference to the wrong sources, but at least there *are* sources to which such a theorist believes herself accountable, and into which she must inquire. The current Supreme Court, by contrast, is interpretively faithless. Their “textualism” addresses itself less to the words of the constitutional document than to a constitution fabricated out of their own precedents, from which they cull selectively depending on the jurisprudential agenda of the moment. In *Dobbs* the majority explicitly rejects the injunction in *Casey* that their decisions must be “sufficiently plausible to be accepted by the Nation.” They claim, instead, that their job is to instruct the nation on the “proper understanding of the law,” and discount *any* concern with the people’s settled understanding of their rights as succumbing to “social and political pressure.” This is not judicial review or even judicial activism. This is the Court imposing a legal order as a sovereign power over the people.

Scholars have presented powerful arguments against judicial review of legislation, in general and in the United States, and any plausible defense of judicial review must begin by radically re-envisioning the constitutional role of the High Court in our constitutional order.<sup>185</sup> The primary purpose of the Court should be the preservation of the people’s ability to rule themselves equitably, and its jurisprudence should be oriented by that purpose. Rather than implementing abstract theories of textual interpretation, the role of the judiciary should be to ask questions about constitutional tensions—between statutes, for example, or between institutions—not with reference to a single document or a body of legal precedent, but as part of a larger inquiry into the meaning and status of the constitutional order as expressed through all the activities of the people as they engage in collective self-rule. To do this well, to do it at all, would mean prioritizing the protection of those rights, and enforcement of those responsibilities, most fundamental to the possibility of democratic deliberation. In a large representative democracy, universal and unobstructed access to the franchise is the most basic condition of political equality, and the protection of voting rights is a category of constitutional concern where judicial intervention would therefore be most justified.

Ultimately, while courts can certainly do much (and in this country the highest court is doing all it can) to interfere with the ability of a people to engage in the kind of shared deliberative inquiry necessary for true

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<sup>185</sup> See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

self-governance, there is nothing that any court can do to deliver constitutional legitimacy to a people that have lost the sense of “their common fate and their common aspirations.”<sup>186</sup> As Tocqueville warned, when a people “lose[s] sight of the close connection that exists between the private fortune of each and the prosperity of all...it is not necessary to forcibly strip such a people of the rights they enjoy; the people themselves willingly relinquish them.”<sup>187</sup> The evidence that we, in the United States, are already far down this path is overwhelming, and there is reason to worry that even a fundamental reshaping of our existing political institutions will be insufficient to reverse course.

Defenders of textualism and public meaning originalism reject the idea that a group of individual citizens or legislators or ratifiers could share a collective intention.<sup>188</sup> Whatever the merits of their various arguments, we misunderstand the shared intention of the people as long as we think of it in terms of individualized contributions to an amorphous ‘public opinion’. The constitution belongs to the people, not as shareholders in a common concern, but as participants in a shared experiment in democratic self-governance. A legitimate constitutional order is grounded in the deliberate practices of a people finding a good they share in common through their political activity, and the shared intention to realize such a common good cannot be equated with any individual or collective opinion. A deliberative inquiry is sharing in a *question*. Any hope for the future of American citizenship must be a hope that it is still possible for us to share the question: *how should we, as a people, live?*

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<sup>186</sup> HAND, *supra* note 112.

<sup>187</sup> ALEXIS DE TOCQUEVILLE, DE LA DÉMOCRATIE EN AMÉRIQUE. 17TH ED., VOL. 3, C. LÉVY, (1888).

<sup>188</sup> See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUMBIA LAW REV. 1, 71–78 (2001). SCALIA, *supra* note 23 at 392–3.