

## ARTICLES

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### THE MYTH OF THE WRITTEN CONSTITUTION

Todd E. Pettys\*

The government of the Union rests almost entirely on legal fictions.

—Alexis de Tocqueville<sup>1</sup>

*Many Americans have long subscribed to what this Article calls the myth of the written constitution—the claim that the nation’s Constitution consists entirely of those texts that the sovereign American people have formally ratified, and the claim that the will of the American people, as expressed in those ratified texts, determines the way in which properly behaving judges resolve constitutional disputes. Drawing on two different meanings of the term myth, this Article contends that neither of those claims is literally true, but that Americans’ attachment to those claims serves at least three crucial functions. Subscribing to the myth helps to ease the tension created by the American people’s paradoxical beliefs that they are morally entitled to govern themselves and that human beings often cannot be trusted to behave in morally praiseworthy ways; it helps to ease the tension between Americans’ commitment to self-rule and their attraction to judicial supremacy; and it helps to secure the strong sense of nationhood that so many Americans deeply desire. The Article suggests that embracing the myth of the written constitution for its functional value need not be seen as a shameful act of self-delusion, despite the fictive qualities of the myth’s claims. So long as courts and scholars maintain the necessary conditions, the American people can responsibly embrace the myth as an act of “poetic faith.”*

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<sup>1</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 164 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

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INTRODUCTION

Either explicitly or implicitly, two claims commonly appear in American citizens’ debates about the content of their nation’s fundamental law: (1) the United States’ Constitution consists solely of those texts that the sovereign American people have formally ratified using the procedures proposed by the Philadelphia Convention in 1787,<sup>2</sup> and (2) when judges properly adjudicate constitutional disputes, their rulings are determined by the collective will of the American people as expressed in those ratified texts. Referring to those two claims together as the myth of the written Constitution, I shall argue in this Article that both of those claims play central roles in helping to legitimize and stabilize the political regime in which the American public wishes to live, but that neither of those claims is literally true. Judges and constitutional scholars thus face an extraordinary dilemma, one that they have not yet fully appreciated: should they work to reinforce the American people’s attachment to the myth because of the benefits that attachment yields, or should they take on the demythologist’s usual task of urging the rejection of fictitious claims no matter what the costs?

The term *myth* carries two paradoxically different meanings, and I intend to invoke both of them here. First, the term frequently is used as a synonym for *fiction*.<sup>3</sup> To say that a belief or story is a myth is to say

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2 See U.S. CONST. art. V (describing alternative ways in which amendments to the Constitution may be proposed and ratified); *id.* art. VII (“The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

3 See, e.g., Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 536 (2008) (“Is the [whole project] dependent on an epistemological fiction, a myth . . . ?”); Steven D. Smith, *De-Moralized: Glucksberg in the Malaise*, 106 MICH. L. REV. 1571, 1587 (2008) (“[M]orality may be a ‘myth’ or ‘fiction’ . . .”).

that it rests upon premises or makes claims that are—in some noteworthy sense—false.<sup>4</sup> In the realms of science and history, for example, where we place a post-Enlightenment premium on literal accuracy, the term sometimes is used to describe those things that our benighted forebears quaintly accepted as true, but that we find ourselves no longer able to believe.<sup>5</sup>

Second, the term often is used to describe a story or belief that, although false in some respects, nevertheless reflects a community's convictions about fundamental matters or helps the community achieve important objectives.<sup>6</sup> From the vantage point of this latter definition, the chief purpose of a mythological story or belief is not to make claims that scientists, historians, and others would accept as literally true; indeed, in the eyes of a literalist, a myth's premises or claims might be transparently false.<sup>7</sup> Rather, a myth's purpose is to encapsulate a community's perceptions of its origins, its identity, or its commitments, and thereby advance the lives of its members.<sup>8</sup> As religious historian Karen Armstrong explains, a myth "is true because it is effective, not because it gives us factual information. . . . If it *works*, that is, if it forces us to change our minds and hearts, gives us new hope, and compels us to live more fully, it is a valid myth."<sup>9</sup>

When a word carries different possible meanings—as is the case with such words as *trip* (a journey or the act of stumbling) and *class* (a

4 See KAREN ARMSTRONG, *A SHORT HISTORY OF MYTH* 7 (2005) ("Today the word 'myth' is often used to describe something that is simply not true.").

5 See PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 27 (1992) ("In modern times, from at least the eighteenth century, mythology has been relegated to the fabulous and the false in contrast to reality and to its forms in science and history which were launched on an unbounded quest for truth.").

6 See RICHARD T. HUGHES, *MYTHS AMERICA LIVES BY* 2 (2003) ("Contrary to colloquial usage, a myth is not a story that is patently untrue. Rather, a myth is a story that speaks of meaning and purpose, and for that reason it speaks truth to those who take it seriously.").

7 See ARMSTRONG, *supra* note 4, at 8 ("Mythology is not an early attempt at history, and does not claim that its tales are objective fact."); KEN DOWDEN, *THE USES OF GREEK MYTHOLOGY* 3 (1992) ("[Myths] are not factually exact: they are false, not wholly true, or not true in that form. But they have a power which transcends their inaccuracy, even depends on it.").

8 See FITZPATRICK, *supra* note 5, at 15–16 (stating that myths often concern a community's origins or identity); SHIRLEY PARK LOWRY, *FAMILIAR MYSTERIES* 3 (1982) (stating that a myth is "a story whose vivid symbols render concrete a special perception about people and their world").

9 ARMSTRONG, *supra* note 4, at 10; *accord* LOWRY, *supra* note 8, at 4 ("What makes a myth important is how it guides our personal lives, supports or challenges a specific social order, makes our physical world a manageable place, or helps us accept life's mysteries—including misfortune and death—with serenity.").

group of students or a qualitative rank), for example—the usage’s context ordinarily focuses the listener on the specific definition the speaker intends to employ, taking any competing definitions entirely out of play. Matters can be far trickier with the term *myth*, because a community’s members might disagree sharply about the relationship between a belief’s or story’s capacity to serve useful functions and the literal truth or falsity of all of its claims.<sup>10</sup> Some might contend that a particular belief’s or story’s functional value is severable from its literal accuracy—and that the belief or story thus can accurately be described as a myth in both senses of the term—while others might see the same belief’s or story’s value and literal accuracy as inextricably joined.

Christian theologians disagree, for example, about whether Christianity’s longstanding assertion of Jesus’ divinity should be accepted as literal fact. In 1977, a group of theologians published a provocative collection of essays titled *The Myth of God Incarnate*, arguing that modern-day Christians should acknowledge that Jesus was not actually divine, but that attributing divinity to Jesus is “a mythological or poetic way of expressing his significance.”<sup>11</sup> A second group of theologians responded with a set of essays titled *The Truth of God Incarnate*, arguing that Jesus’ literal divinity is essential to the Christian faith.<sup>12</sup> The first group was willing to draw a distinction between the functional value of claims about Jesus’ divinity and those claims’ literal truth; for the second group, claims about Jesus’ divinity were sapped of any real worth if they were not rooted in historical fact. One undoubtedly will find similar disagreements concerning the myth on which this Article focuses.

The two propositions composing the myth of the written Constitution are familiar to anyone who has been exposed for long to Americans’ constitutional debates. In arguments among laypeople about fundamental legal issues, for example, the ratified texts routinely are invoked as controlling.<sup>13</sup> As Laurence Tribe recently observed, “[a]

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10 Cf. James A. Francis, *Truthful Fiction: New Questions to Old Answers on Philostratus’ Life of Apollonius*, 119 AM. J. PHILOLOGY 419, 421 (1998) (stating that “ancient readers . . . could, more readily than moderns, believe something to be truthful though not factual”).

11 John Hick, *Preface to THE MYTH OF GOD INCARNATE*, at ix, ix (John Hick ed., 1977).

12 Michael Green, *Preface to THE TRUTH OF GOD INCARNATE* 9, 13–14 (Michael Green ed., 1977) (rejecting the idea that Jesus was not actually divine).

13 See Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 375 (1982) (“Citizens of the United States, however, retain within their active political language the purported commands of an allegedly comprehensible Constitution.”).

standard technique used by nearly everyone engaged in constitutional debate is to denounce an opponent's constitutional claim as unsupported by the Constitution's explicit words."<sup>14</sup> The myth finds expression in legal scholarship, as well, such as when Keith Whittington argues that "the people are taken to be sovereign, . . . the written text of the Constitution is taken to be the durable expression of their will," and the nation's courts are "the designated enforcer of that embodied popular will."<sup>15</sup> One sees shades of the myth in Chief Justice John Roberts' statement during his confirmation hearings that "[j]udges are like umpires," in the sense that they "don't make the rules, they apply them."<sup>16</sup> An early iteration of the myth appears in no less a canonical source than Chief Justice John Marshall's opinion for the Court in *Marbury v. Madison*<sup>17</sup>:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . The principles . . . so established, are deemed fundamental. . . . [T]hat those [principles] may not be mistaken, or forgotten, the constitution is written. . . . Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the [acts of elected officials]. This doctrine would subvert the very foundation of all written constitutions.<sup>18</sup>

Of course, Americans do not all hold precisely the same understanding of the myth's claims. As I shall discuss, for example, originalists and living constitutionalists have different understandings of the

14 LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 39 (2008).

15 KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 112 (1999); accord CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS* 290 (2008) ("A central teaching of American constitutionalism is that in America the people are the sovereign who rule through the means of written constitutions."); cf. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 112 (2004) ("Though constitutional scholars and activists may be more daring than judges, even they are generally reluctant to abandon the rhetoric of adherence to the written Constitution. Even they want to argue that it is the Constitution, not them, that mandates a particular result.").

16 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States).

17 5 U.S. (1 Cranch) 137 (1803).

18 *Id.* at 176–78 (1803); see also WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 16 (1964) (stating that, early in the nation's history, judges "appropriated to themselves the myth that their function was solely expository" in the sense that they decided constitutional issues "not by reference to any personal or partisan value system, but solely by reference to the terms of the Constitution itself").

proposition that the constitutional rulings of properly behaving judges are determined by the will of the American people as expressed in the nation's formally ratified texts: originalists commonly insist that the texts' demands are fixed and non-evolving, while living constitutionalists are willing to read the texts differently at different moments in time.<sup>19</sup> Regardless of their precise interpretive philosophies, however, laypeople and scholars alike frequently align themselves with the myth's claim that it is the will of the sovereign people, as revealed at one level of abstraction or another in the formally ratified texts, that ought to determine the way in which constitutional disputes are resolved.<sup>20</sup>

Drawing from both senses of the term *myth*, this Article seeks to establish and understand the mythological character of the two propositions that compose the myth of the written Constitution. I argue in Part I that, in significant ways, both of the myth's propositions are false. The United States' Constitution consists of far more than the formally ratified texts; the great bulk of the nation's constitutional work is performed by political forces, tradition, and judicial precedent. Moreover, laypeople and specialists alike frequently endorse constitutional rulings that cannot credibly be said to have been determined by the textually expressed will of the American people.

While the fictive nature of the myth's claims is itself significant, it is only part of the picture. For some, of course, it might be the *entire* picture. Like those Christian theologians who insist that the value of their faith critically turns on whether Jesus was, in fact, divine,<sup>21</sup> some might insist that the propositions composing the myth of the written Constitution are worthless if they do not accurately reflect literal truth. I argue in Part II, however, that there are good reasons to resist that conclusion. Hans Kelsen observed that fictions are a "cognitive device used when one is unable to attain one's cognitive goal with the material at hand."<sup>22</sup> Just as fictions frequently are profitably formulated and used within the law,<sup>23</sup> I contend that the fictions composing

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19 See *infra* notes 80–92 and accompanying text (discussing originalism and living constitutionalism).

20 See *supra* notes 13–18 and accompanying text.

21 See *supra* notes 11–12 and accompanying text (introducing this analogy).

22 HANS KELSEN, *GENERAL THEORY OF NORMS* 256 (1991).

23 See LON L. FULLER, *LEGAL FICTIONS* I (1967) ("There is scarcely a field of the law in which one does not encounter one after another of these conceits of the legal imagination."); *id.* at 9 (defining a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility"); see also Peter J. Smith, *New Legal Fictions*, 95 *GEO. L.J.* 1435, 1437–38 (2007) (giving several examples of judges' frequent reliance upon fictions).

the myth of the written Constitution usefully help to legitimate and stabilize the legal regime itself. I argue that the myth helps to ease the tension between the American people's beliefs that they are morally entitled to govern themselves and that human beings often cannot be trusted to behave in morally praiseworthy ways; it helps to ease the tension between their commitment to self-rule and their attraction to judicial supremacy; and it helps to secure the strong sense of nationhood that so many Americans deeply desire.

In Part III, I conclude by describing the delicate balance that the myth of the written Constitution requires judges and scholars to strike. Although the myth's claims need not literally be true in order to serve the valuable functions I have identified in Part II, they must remain within the realm of perceived plausibility. The fictitious nature of the myth's claims provides the nation with the flexibility it needs in order to construct a workable constitutional regime, but the risks posed by abuses of that flexibility are grave. If judges and scholars push the nation's formally ratified texts too far to the periphery and the myth's fictive qualities are repeatedly shoved to the forefront of the nation's attention, the myth's claims may become too implausible for anyone to embrace even for those claims' functional value, and the important objectives that those claims serve will be jeopardized. Courts' and scholars' overarching challenge is to maintain the conditions under which they and the American people can intelligently regard the myth of the written Constitution with what Samuel Taylor Coleridge called "poetic faith," better known in our cultural vocabulary today as the willing suspension of disbelief.<sup>24</sup>

### I. THE MYTH AS FICTION

Again, the myth of the written Constitution consists of two claims: that the United States' Constitution consists solely of those texts that the American people have formally ratified using the procedures proposed by the 1787 Convention, and that when judges properly adjudicate constitutional disputes, their rulings are determined by the will of the American people as expressed in those formally ratified texts.<sup>25</sup> In significant ways, both of those claims are false.

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24 2 S.T. COLERIDGE, *BIOGRAPHIA LITERARIA* 6 (J. Shawcross ed., Oxford Univ. Press, photo. reprint 1939) (1817).

25 See *supra* note 2 and accompanying text.

### A. *Our Unratified Constitution*

At first blush, the claim that the ratified texts compose the entirety of the United States' Constitution might seem patently obvious. After all, the delegates to the 1787 Convention identified specific ratification procedures for elevating texts to constitutional status, and it ordinarily<sup>26</sup> is not difficult to discern whether a given text has met those procedural requirements. Article VII of the Convention's proposal declared that "[t]he Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."<sup>27</sup> That threshold was reached on June 21, 1788, when New Hampshire became the ninth state to give the document its formal approval.<sup>28</sup> Article V of the newly ratified document described several ways in which amendments could be proposed and ratified: amendments could be proposed either by a supermajority of Congress or by a constitutional convention if two-thirds of the states called for such a convention to be formed.<sup>29</sup> In either case, any proposed amendment would need to be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."<sup>30</sup> To date, the 1787 document has been formally amended twenty-seven times.<sup>31</sup> In light of the fact that there is no ongoing dispute concerning which texts have been properly ratified and which have not,<sup>32</sup> Stephen Calabresi is surely correct when he writes:

I think the people in this country still believe largely what they have been learning in their high school civics classes for the last 200 years. They think that we have a written constitution that has been

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26 *But cf.* *Hawke v. Smith*, 253 U.S. 221 (1920) (adjudicating the federal legality of an amendment to the Ohio Constitution which provided for a popular referendum on the Ohio General Assembly's decision to ratify a proposed amendment to the Federal Constitution).

27 U.S. CONST. art. VII.

28 *See* Calvin H. Johnson, *Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMMENT. 463, 464 (2003) (noting the passing of this threshold when New Hampshire voted to ratify the Constitution).

29 U.S. CONST. art. V.

30 *Id.*

31 *See generally* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992) (discussing the history and ratification of the Constitution's most recent amendment).

32 That is not to say, however, that all of the amendments that are widely deemed to have been properly ratified were, in fact, ratified in accordance with Article V. *See, e.g.*, 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 110–13 (1998) (discussing irregularities in the ratification of the Fourteenth Amendment).



amended twenty-seven times, unlike the British who have an unwritten constitution that comprises important texts as part of their constitutional tradition.<sup>33</sup>

The written-unwritten distinction is indeed routinely invoked to contrast the American and British systems of fundamental law.<sup>34</sup> While the British Constitution is unwritten and highly malleable, the common wisdom in America often goes,<sup>35</sup> the United States' Constitution consists entirely of the writings that are venerably housed in the National Archives in Washington, D.C.<sup>36</sup> Although it has been more than a century since he offered it, Christopher Tiedeman's assessment of the American public's regard for the amended 1787 text remains accurate today: it "has been placed upon a pedestal and worshipped as a popular idol."<sup>37</sup>

Just as it is inaccurate to say that the British Constitution is mostly unwritten,<sup>38</sup> however, it is wrong to say that the American Constitution consists solely of the 1787 document and its formally ratified

33 Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 *FORDHAM L. REV.* 1435, 1454 (1997).

34 See, e.g., ADAM TOMKINS, *PUBLIC LAW* 7–8 (2003) (stating that "[t]he first thing anyone learns about English public law is that in England the constitution is unwritten," while the American Constitution is held up as the world's leading example of a written constitution); Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 *GEO. WASH. L. REV.* 51, 53 (2003) (noting that scholars frequently assert that "the United States has a written constitution, while England's constitution remains in unwritten form to this day"); Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of "Higher" Law*, 3 *TEX. REV. L. & POL.* 225, 241–42 (1999) ("If the people of the United States so desired they could have emulated their English ancestors and established an 'unwritten' common-law constitution, but they did not do so.").

35 See TOMKINS, *supra* note 34, at 9 (stating that a "frequent mistake is to say that the unwritten nature of the [British] constitution means that the constitution is flexible"); TRIBE, *supra* note 14, at 14 (stating that "plasticity may be said to be a defining feature of the British 'constitution,' under which Parliament reigns supreme").

36 See Nat'l Archives, Rotunda for the Charters of Freedom, <http://www.archives.gov/nae/visit/rotunda.html> (last visited Nov. 4, 2008).

37 CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 21 (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 1975) (1890); see also TRIBE, *supra* note 14, at 14 (observing that the ratified texts are "almost instinctively treated with a devotion ordinarily accorded only to an object of national veneration").

38 See TOMKINS, *supra* note 34, at 7 (pointing out that most of the British Constitution "is written, somewhere" and that what the British lack is a "codified" constitution—a document "in which all the principal constitutional rules are written down in a single document named 'The Constitution'").

amendments.<sup>39</sup> Nor is it the case that those ratified texts are incomplete in only minor respects. As Bruce Ackerman observes, the 1787 document and its enumerated amendments are “a radically incomplete statement of our higher law.”<sup>40</sup> Adam Tomkins makes the same point, viewing the American Constitution from the British perspective: “[E]ven a cursory glance at the American constitutional text suffices to illustrate that notwithstanding its almost sacred status in the USA it does not contain a complete code of all America’s constitutional rules, nor even of all the important ones.”<sup>41</sup>

To see how that is the case, one must start by defining precisely how the United States’ Constitution may be identified. The American Constitution may be recognized by the three chief functions that it serves: (1) it creates the federal government’s institutions, gives them their powers, and defines their relationships with one another and with their counterparts among the states; (2) it identifies basic rights that individuals may invoke against governmental action; and (3) it serves as the nation’s fundamental law in the sense that, on matters of governmental powers and individual rights, it supplies the rules and principles that ultimately determine whether a given governmental action is legally valid or void.<sup>42</sup>

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39 See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 29 (1969) (“The precision of textual explication is nothing but specious in the areas that matter.”); TIEDEMAN, *supra* note 37, at 45 (“[T]he great body of American constitutional law cannot be found in the written instruments, which we call our constitutions; it is unwritten, . . . and is to be found in the decisions of the courts and the acts of the National and State legislatures . . . .”); TRIBE, *supra* note 14, at 155 (“That there is more ‘out there’ than is encompassed in constitutional text, and that much of what is out there nonetheless counts as part of our Constitution, . . . seems plain enough.”); Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 928 (2007) (stating that there are fewer differences than commonly supposed between British and American constitutionalism); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 890 (1996) (stating that the distinction between written and unwritten constitutions is less significant than commonly supposed).

40 Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737, 1744 (2007).

41 TOMKINS, *supra* note 34, at 8.

42 See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 113 (2001) (“First, a constitution establishes the supreme law that prevails in collision with all other law. Second, a constitution literally constitutes the fundamental elements of government and defines the powers of the most central institutions.” (footnotes omitted)); TOMKINS, *supra* note 34, at 3 (“Constitutions perform three main tasks: they provide for the creation of the institutions of the State; they regulate the relations between those institutions and one another; and they regulate the relations between those institutions and the people (citizens) they govern.”); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 411–12 (2007) (“A constitution generally does three primary things: It constitutes the government, that is, it establishes

The formally ratified texts certainly do important work on each of those three fronts—they establish and allocate powers to the federal government’s three branches, they identify a variety of individual rights, and they expressly claim the status of “the supreme Law of the Land.”<sup>43</sup> Yet those texts fall far short of doing all of the nation’s constitutional work. If a newcomer to the United States wished to understand the structure of the federal government, the powers of its institutions, the content of its citizens’ rights, and the rules and principles from which Americans ultimately draw when determining whether the government has behaved permissibly in a given instance, he or she would need to do much more than merely study the texts that the American people formally have assigned constitutional status.<sup>44</sup>

If one sets aside for a moment the critically important third function of the nation’s Constitution (that of providing the nation’s supreme, fundamental law) and focuses on the Constitution’s first two functions (those of creating and empowering federal institutions and of specifying individual rights), one finds that a great deal of the nation’s “constitutive” work is performed today by federal legislation.<sup>45</sup> As Ernest Young points out:

For virtually all practical purposes, the boundary between federal and state power is set by the terms of federal statutes; likewise, statutes and regulations play a far more significant role in regulating the separation of powers at the national level than do constitutional rules. Many of our most important individual rights—rights against discrimination based on age or disability, rights to welfare, medical care, and social security—stem from statutes rather than the Constitution.<sup>46</sup>

Nearly all federal employees, for example, hold positions created by statutes and administrative regulations, rather than by formally rati-

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the various institutions of the government and sets out their powers and obligations. It identifies certain rights of individuals against that government. And (sometimes) it entrenches these structures against change . . .”).

43 U.S. CONST. art. VI, cl. 2.

44 See WILLIAM BENNETT MUNRO, *THE MAKERS OF THE UNWRITTEN CONSTITUTION* 1 (1930) (“[N]o one can now obtain even a silhouette of the American political system, if he confines his study to the nation’s fundamental law as it left the hands of its architects in 1787.”).

45 Young, *supra* note 42, at 412; see also MUNRO, *supra* note 44, at 8 (stating that there are numerous federal statutes that “are theoretically open to amendment or repeal by exactly the same process as ordinary laws, but which supply certain important cogs in the mechanism of government and hence are virtually permanent and no more likely to be changed than is the Constitution itself”).

46 Young, *supra* note 42, at 412.

fied constitutional texts.<sup>47</sup> Administrative agencies whose acronymic names are familiar to lawyers and laypeople alike perform a significant proportion of the federal government's labors, yet are created by statutes and are governed largely by another statute—the Administrative Procedure Act<sup>48</sup>—and its accompanying judicial interpretations.<sup>49</sup> The committee system and voting rules that dominate the way the House and Senate do business owe their origins almost entirely to House and Senate rules and conventions.<sup>50</sup> To many Americans today, individual rights conferred by such statutes as the Civil Rights Act of 1964,<sup>51</sup> the Voting Rights Act of 1965,<sup>52</sup> and the Americans with Disabilities Act of 1990<sup>53</sup> are every bit as important as many of those that are explicitly conferred by the formally ratified constitutional texts.<sup>54</sup> In these respects, the 1787 document and its enumerated amendments do comparatively little of the actual work of constituting the nation's government and of protecting individual rights that the citizenry deems important.

It is true, of course, that all of these statutory and regulatory arrangements may themselves be altered by ordinary legislation, and thus they do not provide the nation with the body of fundamental law that ultimately determines whether particular governmental actions are legally permissible. Even when one takes the Constitution's three functions together, however—allocating governmental powers, identifying individual rights, *and* providing the nation with its supreme law—one finds that the formally ratified texts embody only a small portion of the nation's Constitution.

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47 See *id.* at 417 (“Of the 2,677,999 civilian persons employed by the national government in 2006, only 546 were Presidents, Vice Presidents, Supreme Court Justices, or members of Congress. The rest served in positions created . . . by federal statutes or regulations.” (footnote omitted)).

48 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

49 See Young, *supra* note 42, at 417–18 (emphasizing the importance of statutorily created administrative agencies).

50 See *id.* at 419–20 (“Once Congress is elected, its operations are likewise framed largely by extracanonial measures.”).

51 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

52 Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 42 U.S.C.).

53 Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

54 See Peter M. Shane, *Voting Rights and the “Statutory Constitution,”* 5 LAW & CONTEMP. PROBS., Autumn 1993, at 243, 243–45 (emphasizing the role of the legislature and courts in creating rules and shaping rights).

Taking the Constitution's three functions as a group, the contours of American constitutional law are predominantly shaped today by political forces, tradition, and judicial precedent.<sup>55</sup> As every law student knows, courses in constitutional law do not devote most of their time to examining the ratified texts.<sup>56</sup> To be sure, those texts are not ignored. Yet if discerning the scope of governmental powers and individual rights were as simple as reading the ratified texts, there would be no need for judges and lawyers specially trained in constitutional doctrine and theory: the ratified texts are not particularly lengthy, and lawyers, their clients, and the general public could easily read them for themselves. When trying to discern the ultimate answers to most constitutional questions, one quickly reaches the point at which the ratified texts' explanatory usefulness has been exhausted and, to really understand the government's powers and citizens' rights, one must turn to sustained political movements, long-standing historical practices, and the courts' evolving bodies of doctrine.<sup>57</sup>

Consider two brief examples. Article I of the 1789 document makes the unelaborated declaration that Congress may "regulate Commerce . . . among the several States."<sup>58</sup> That short statement does not even purport to provide clear answers to the host of specific questions that courts have been asked to address concerning Congress' power to regulate interstate commerce. May Congress regulate intra-

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55 See FALLON, *supra* note 42, at 113–16 (emphasizing the constitutional importance of judicial precedent and "[e]ntrenched historical practices"); cf. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 185 (1988) (arguing that the American Constitution includes judicial and political precedent, as well as "fundamental documents such as the Declaration of Independence and the Gettysburg Address and, beyond that, aspects of the American experience that cannot be reduced to a text at all"); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006) (stating that some Supreme Court decisions are "super precedents," meaning that they are "constitutional decisions whose correctness is no longer a viable issue for courts to decide").

56 See, e.g., RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* (8th ed. 2007 & Supp. 2007) (using court cases to explain the fundamentals of constitutional law).

57 See LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES* 66–67 (2004) (emphasizing the fact that many of the ratified texts' liberty-conferring provisions are framed in abstract terms that do not purport to dictate how particular cases should be decided); Daniel A. Farber, *Did Roe v. Wade Pass the Arbitrary and Capricious Test?*, 70 MO. L. REV. 1231, 1245 (2005) ("The special status of the constitutional text is unquestioned, yet also puzzling. In a great many cases, the text plays no role—the terms 'equal protection' and 'due process' simply do not tell us very much about how to decide particular questions, nor does the phrase 'the freedom of speech.'"); Levinson, *supra* note 13, at 378 ("To view [the ratified texts] as a genuine source of guidance is naïve, however heartbreaking this realization might be.").

58 U.S. CONST. art. I, § 8, cl. 3.

state economic activities that have interstate economic effects?<sup>59</sup> May Congress regulate intrastate economic activities that influence interstate commerce only when taken in the aggregate?<sup>60</sup> May Congress regulate activities that, although themselves noneconomic in nature, have economic consequences?<sup>61</sup> May Congress compel the states to enact economic regulations or to help administer federal regulatory schemes?<sup>62</sup> In the absence of conflicting federal legislation, may state and local governments adopt protectionist measures aimed at shielding their citizens from economic competition?<sup>63</sup> Do state and local governments have greater freedom to shield government-owned enterprises from competition than they do privately owned enterprises?<sup>64</sup> To what extent may state and local governments adopt non-protectionist measures that burden interstate commerce?<sup>65</sup> Answers to these and numerous other questions are derived almost entirely from judicial precedent and longstanding historical practices, rather

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59 See, e.g., *United States v. Darby*, 312 U.S. 100, 118 (1941) (“The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . .”).

60 See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”).

61 See, e.g., *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

62 See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).

63 See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”).

64 See, e.g., *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1795 (2007) (“Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. . . . Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.”).

65 See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

than from any text that the American people formally have assigned constitutional status.<sup>66</sup>

One finds a similar pattern in the law governing individuals' right to speak freely. The First Amendment simply states that "Congress shall make no law . . . abridging the freedom of speech."<sup>67</sup> Does that mean that all speech is equally protected, or are some forms of speech more protected than others?<sup>68</sup> Are there some kinds of speech that receive no protection at all?<sup>69</sup> With respect to speech that is protected, are all government restrictions automatically invalid, or are some kinds of restrictions permissible?<sup>70</sup> To what extent do people have a right to engage in expressive activities in forms other than the spoken and written word?<sup>71</sup> Do government employees have the same right to speak within their workplaces as they do in their lives as ordinary citizens?<sup>72</sup> May the government restrict a person's ability to provide financial support to candidates for public office?<sup>73</sup> The notion that the First Amendment's text provides clear answers to such questions is utterly naïve. Even Justice Hugo Black—who famously toyed with the absolutist position that, when the First Amendment says Congress shall make "no law," it means it shall make "no law"—felt compelled to find nuances in the law of free speech that the First

66 See *infra* notes 97–102 and accompanying text.

67 U.S. CONST. amend. I.

68 See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

69 See, e.g., *New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that child pornography is "a category of material the production and distribution of which is not entitled to First Amendment protection").

70 See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) ("While time, place, or manner regulations must also be 'narrowly tailored' in order to survive First Amendment challenge, we have never applied strict scrutiny in this context.").

71 See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (alterations in original) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974))).

72 See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (holding that, if an employee is not speaking "as a citizen on a matter of public concern" when he or she speaks in the workplace, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech").

73 See, e.g., *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2663–73 (2007) (providing an overview of one portion of the Court's doctrines relating to campaign finance).

Amendment's text does not facially acknowledge.<sup>74</sup> For a useful understanding of the law, one must look beyond the text, to the ways in which the nation has done business over the past two centuries and the ways in which courts have adjudicated particular claimants' free speech claims.

The same point could be made, of course, about a host of other ratified texts: although they certainly help to compose the content of the nation's fundamental law, they do not even begin to contain that fundamental law in its entirety. With that reality squarely in mind, Barry Friedman and Scott Smith usefully propose the image of the "sedimentary constitution":

Picture the Constitution scattered on a tabletop, the clauses strewn all about. . . . Now, lay atop each clause its history, its interpretive development. Instantly the picture moves from two dimensions to three; the tabletop becomes a topography. Some clauses of the Constitution—like the Due Process Clause or the Fourth Amendment—are mountains of historical development . . . . Other clauses—such as the Third Amendment or the requirement that the President be thirty-five years old—are deep valleys, barely touched in the intervening two hundred plus years since the founding. . . .

Constitutional interpretation necessarily must take into account the complete sedimentary development of each clause that is our constitutional history.<sup>75</sup>

As that image nicely illustrates, the first component of the myth of the written Constitution—the claim that the formally ratified texts compose the entirety of the American Constitution, as defined by the three signature functions noted above<sup>76</sup>—is false.

One might try to resist that conclusion by arguing that ascribing constitutional status to tradition and precedent rests upon a failure to make the appropriate ontological distinction between the formally ratified texts and interpretations of those texts by courts and others.

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<sup>74</sup> See Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 576 (2001) ("Justice Black's insistence on the sanctity of the text in the context of the First Amendment—no law means no law—dissolved when he was confronted with intuitively uncomfortable forms of communication."); Patricia R. Stembridge, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907, 915 (2000) (observing that, despite his purported absolutism, Justice Black "rejected free speech protection for picketing by distinguishing pure speech, which deserved absolute protection, from speech attached to conduct, which remained unprotected").

<sup>75</sup> Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 36–37 (1998) (footnotes omitted).

<sup>76</sup> See *supra* note 42 and accompanying text (noting the American Constitution's three identifying functions).



That is, one might insist on the primacy of the ratified texts, and argue that tradition and precedent are permitted to wield the force of fundamental law only to the extent they are properly derived from those texts. The image of the sedimentary constitution begins, after all, with the texts' various clauses being strewn across a tabletop—those clauses are the bedrock on which the mountains, hills, and valleys are subsequently established. One might insist that the term *constitution* be reserved for that foundational, textual layer, and that the term *interpretation* be applied to all that rests above it.

At first glance, the question might thus seem to be one merely of semantics: within the realm of the supreme law of the land, are there sources of law that are appropriately denoted by the term *constitution* and others that are not? In *Cooper v. Aaron*,<sup>77</sup> for example, the Court carefully used that term—with a capital “C”—to refer only to the 1787 document and its formally ratified amendments. The Court declared that, because those texts are the “fundamental and paramount law of the nation,”<sup>78</sup> and because “the federal judiciary is supreme in the exposition of the law of the Constitution,” it follows that the Court’s “interpretation[s]” of those ratified texts are themselves “the supreme law of the land.”<sup>79</sup> Yet if the Court’s rulings on questions of governmental power and individual rights do enjoy “supreme law” status—that is, if those rulings ultimately determine whether particular governmental actions are legally permissible—then they are indeed functionally part of the nation’s Constitution. Approaching the issue most superficially, therefore, the issue might seem merely to be one of determining when it is appropriate to capitalize the “c” and when it is not.

If that were indeed all that was at stake, the issue could be placed in the capable hands of the authors of style manuals. In the insistence on the ratified texts’ primacy, however, one finds far more than a dispute about proper terminology and capitalization—one also finds the second component of the myth of the written Constitution. Joined tightly to the claim that the American Constitution consists solely of the formally ratified texts is the claim that, when judges properly adjudicate constitutional disputes, their rulings are determined by the will of the American people as revealed—at one level of abstraction or another—in those ratified texts. The myth of the written Constitution thus suggests that we should regard the ratified texts as akin to blueprints. Tradition and precedent properly exert the force of fun-

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77 358 U.S. 1 (1958).

78 *Id.* at 18 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

79 *Id.*

damental law, on this view, only to the extent that they have been erected in accordance with the formally ratified directives provided by the American people. If a particular tradition or line of precedent does not trace its roots to the will of the American people as expressed in the ratified texts, then it is illegitimate. It turns out, however, that the second component of the myth of the written Constitution is just as fictitious as the first.

### B. *The Ratified Texts' Lack of Adjudicative Primacy*

With respect to the myth's claim that the constitutional rulings of properly behaving judges are determined by the formally ratified texts, most Americans likely fall roughly into either of two familiar camps: originalism or living constitutionalism.<sup>80</sup> There are, in turn, two principal kinds of originalists.<sup>81</sup> Many laypeople endorse conservative politicians' call for judges who are "strict constructionists"—judges who, as journalist George Will described them more than thirty-five years ago, "base their decisions on the actual words and discernible intentions of the [written Constitution's] framers."<sup>82</sup> Originalist judges and scholars, meanwhile, have increasingly distanced themselves from efforts to discern the Framers' intentions, arguing instead that constitutional texts should be assigned the meanings that a reasonable interpreter would have assigned to them at the time of their ratification.<sup>83</sup> Regardless of whether they emphasize original intentions or original meanings, however, originalists are

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80 See, e.g., Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN. ST. L. REV. 683, 690–91 (2008) (describing the "great divide" between originalism and living constitutionalism).

81 See Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1110–13 (2008) (identifying and discussing these two species of originalism).

82 George Will, "Strict Construction": *An Interpretation*, WASH. POST, Mar. 2, 1973, at A18, quoted in Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 411 n.193 (2007); accord Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 215 (1987) (defining "strict constructionists" as those who "identify the [Constitution's] text narrowly with the intent of the framers").

83 See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999) (stating that "[n]o longer do originalists claim to be seeking the subjective intentions of the framers" and that originalists today seek to discern "the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment"); Farber, *supra* note 57, at 1246–47 (stating that the most common form of originalism among scholars today "insists that the meaning of the Constitution is fixed by what a reasonable reader of the text would have understood at the time of adoption").

commonly joined by the conviction that constitutional texts' demands are non-evolving.<sup>84</sup> When judges claim the power to deviate from the texts' fixed meanings, originalists argue, they illegitimately give themselves a license to force those texts into whatever shape suits their personal preferences.<sup>85</sup>

Living constitutionalists contend that, rather than try to limit constitutional texts to the subjectively intended or objectively perceived meanings that they carried at the time they were written and ratified, judges should ascribe to the texts those meanings that they most reasonably bear in light of the American people's beliefs and circumstances today.<sup>86</sup> Advocates of this view charge originalists with advancing an unfortunate brand of "legal fundamentalism"—the belief "that fundamental law is timeless and unchanging, a view that cannot be reconciled . . . with modern theories of law, language, and consciousness."<sup>87</sup> Rather than seeing all constitutional texts as containing fixed instructions, living constitutionalists argue, judges should flexibly interpret those texts' requirements, so that the meanings of those texts can keep pace with society's evolving conceptions of justice and desirable government.<sup>88</sup> So long as those evolving con-

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84 See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) ("[T]he Constitution . . . has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.").

85 See Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 526 (1988) (stating that conservative critics of the Court condemn those Justices who appear "to view constitutional adjudication as a freewheeling activity that can endow a text with any meaning whenever the (political) need arises").

86 See, e.g., Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735–36 (1963) ("There is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy. . . . A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society. In constitutions, constancy requires change."); cf. LEVINSON, *supra* note 55, at 193 (arguing that to be committed to the Constitution does not mean that one is committed to a fixed set of propositions; rather, it means that one is committed to working with others toward a political vision); Ackerman, *supra* note 40, at 1743 ("Although Americans may worship the [Constitution's] text, they have not allowed it to stand in the way of their rising national consciousness.").

87 Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 34 (1993).

88 See SAGER, *supra* note 57, at 5–6, 66–67 (criticizing instruction-giving theories of constitutional texts and advancing a justice-seeking theory of living constitutionalism); Strauss, *supra* note 39, at 877 (stating that, when courts interpret the Constitution today, their focus often is on society's "evolving understandings of what the Constitution requires"); cf. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the

ceptions are rooted in concepts that are enshrined in the formally ratified texts<sup>89</sup>—even if perceiving the connection between the specific conceptions and the texts’ concepts requires reading those texts at a high level of abstraction<sup>90</sup>—living constitutionalists insist that they are remaining faithful to the textually expressed will of the sovereign American people.<sup>91</sup>

Although they disagree about the methods by which the texts should be interpreted, originalists and living constitutionalists commonly agree that, when faced with a dispute concerning the Constitution’s demands, a court’s principal task is, at its core, one of textual interpretation.<sup>92</sup> Citizens in both camps contend that the formally ratified texts need to be the driving force behind constitutional adjudication because it is those texts that, at one level of abstraction or another, embody the will of the sovereign American people. When they purport to ascribe adjudicative primacy to the ratified texts, however, originalists and living constitutionalists alike rest their constitutional visions upon premises that are false. Members of both groups endorse adjudicative outcomes that cannot reasonably be said to have been determined by the textually expressed will of the American people.

Before proceeding to discuss the fictive qualities of the two camps’ claims, I hasten to emphasize that I am focusing here on originalism and living constitutionalism as they are commonly embraced by the American citizenry at large, rather than as they are embraced by all constitutional scholars who would call themselves originalists or living constitutionalists. Many scholars today, while placing themselves in one of those two camps, would readily concede that judges’ constitutional conclusions need not always be grounded

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United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”).

89 See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135–36 (1977) (providing a seminal discussion of the analytic distinction between “concepts” and “conceptions”).

90 Cf. RONALD DWORKIN, *FREEDOM’S LAW* 10 (1996) (arguing that judges’ constitutional adjudications should be rooted in the ratified texts, but need not track how the Framers expected those texts to be applied).

91 See Ackerman, *supra* note 40, at 1755 (“[B]oth [originalists and living constitutionalists] focus on the same constitutional canon—the formal text running from Article I . . . through the latest twentieth century amendment.”).

92 See, e.g., Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 *ARK. L. REV.* 1185, 1205 (2003) (stating that Justice Brennan, a living constitutionalist, claimed that the Constitution “must be interpreted by the Court in each era according to evolving notions of justice”).

in the nation's ratified texts. Over the past ten years, for example, a number of originalist scholars have emphasized that the ratified texts frequently do not speak plainly to important constitutional questions, and that courts and politicians alike on those occasions thus must shift from constitutional interpretation to constitutional construction in order to fill the ratified texts' gaps.<sup>93</sup> Although they insist upon the ratified texts' adjudicative primacy when they believe those texts do speak in a determinate fashion, these scholars acknowledge that there are numerous occasions when political forces properly play a leading role in shaping the constitutional conclusions that judges reach. The fact that originalism has grown continually more sophisticated in scholarly circles, however, certainly does not mean that popular conceptions have kept pace. Indeed, the very fact that distinguishing between constitutional interpretation and constitutional construction is regarded as an important new development in originalist scholarship highlights the fact that even those in scholarly circles have often failed to make that distinction, and thus have abetted an insistence upon the ratified texts' invariable adjudicative primacy. My focus here is on those many Americans (whether laypeople or scholars) who continue to insist that judges' constitutional rulings are legitimate only if they are derived from the nation's ratified texts.

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93 See, e.g., BARNETT, *supra* note 15, at 121 ("When interpretation has provided all the guidance it can give but more guidance is needed, constitutional interpretation must be supplemented by constitutional construction—within the bounds established by original meaning. In this manner, construction fills the unavoidable gaps in constitutional meaning when interpretation has reached its limits."); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. (forthcoming 2009) (manuscript at 2), available at <http://ssrn.com/abstract=1290869> ("Skyscraper originalism views the Constitution as more or less a finished product . . . Framework originalism, by contrast, views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004) ("Constitutional meaning must be 'constructed' in the absence of a determinate meaning that we can reasonably discover."). Interestingly, even these scholars sometimes blur the distinction between constitutional interpretation and constitutional construction, claiming for the latter the same aura of authority that the former enjoys. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 5 (1999) ("Both interpretation and construction . . . seek to elaborate a meaning somehow already present in the text, making constitutional meaning more explicit without altering the terms of the text itself."); *id.* at 8 ("The political construction of constitutional meaning helps close the gap between legal requirements and constitutional sensibilities, speaking with the authority of the Constitution even where the text does not seem determinative."); *id.* at 14–15 (stating that it is often hard to distinguish between interpretations and constructions, and that the distinction is often unimportant as a practical matter).

## 1. The Fictive Quality of Originalism

Regardless of whether they emphasize the Framers' original intentions or the ratified texts' original meanings, originalists generally share the conviction that the ratified texts' demands do not evolve over time.<sup>94</sup> Originalists insist that those texts' requirements remain static until the sovereign American people alter the texts using the procedures described in Article V of the 1787 document.<sup>95</sup> In the eyes of originalists who contend that courts' constitutional conclusions must always be derived from the ratified texts, therefore, there are only two occasions when it is appropriate for the nation's courts to alter their understanding of the Constitution's demands: (1) when, after a regrettable period of misdirection, the courts conclude that they have more accurately perceived the Framers' intentions or the texts' original meanings, or (2) when the texts themselves have been formally amended. Yet many of the most noteworthy changes in the courts' constitutional understandings—changes that originalists and others often readily embrace—have not followed either of those scripts.<sup>96</sup> Originalists are thus put to a choice: are they more firmly attached to their theoretical insistence upon the ratified texts' adjudicative primacy, or to the benefits that flow from some of the Court's non-text-driven shifts in direction?

No one would claim that all of the great shifts in the courts' constitutional bearings have been provoked by a rediscovery of the Framers' intentions or the ratified texts' original meanings.<sup>97</sup> Consider, for example, the vast expansion of federal regulatory power that occurred when the New Deal Court finally capitulated to the nationalistic ambitions of the federal government's elected officials.<sup>98</sup> The 1787 text was intended and understood by the founding generation to be remarkably antinationalistic—a fact we often conceal by glorifying a few of the Marshall Court's rulings, ignoring much of the nineteenth century, and pretending that the New Deal Court rediscovered the founding generation's nationalistic vision and placed the country

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94 See *supra* notes 83–84 and accompanying text (describing the views of the two main camps of originalism).

95 See *supra* note 30 and accompanying text (describing Article V's procedures).

96 See, e.g., Strauss, *supra* note 39, at 884 (“The Constitution has changed a great deal over time, but . . . the written amendments have been a sidelight.”).

97 See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 61–63 (1991) (arguing that the notion of rediscovery is often a fiction).

98 See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (declaring that “the mechanical application of legal formulas [is] no longer feasible,” and thereby rejecting the Court's then-recent efforts to place sharp limits on Congress' power to regulate interstate commerce).

back on the path from which the Court had briefly and regrettably diverted it.<sup>99</sup> Far from returning to the Founders' vision like a repentant prodigal child, the New Deal Court broke with the nation's original constitutional understandings by permitting the federal government to assume regulatory powers that the founding generation scarcely could have fathomed.<sup>100</sup>

Nor can one reasonably argue that most of the nation's constitutional changes have been provoked by formally ratified amendments. David Strauss points out that "[m]ost of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment."<sup>101</sup> Professor Strauss cites numerous examples, the accumulated force of which is difficult to resist:

[T]he Marshall Court's consolidation of the role of the federal government; the decline of property qualifications for voting and the Jacksonian ascendance of popular democracy and political parties; the Taney Court's partial restoration of state sovereignty; the unparalleled changes wrought by the Civil War (the war and its aftermath, not the resulting constitutional amendments, were the most important agents of change); the rise and fall of a constitutional freedom of contract; the great twentieth-century growth in the power of the executive (especially in foreign affairs) and the federal government generally; the civil rights era that began in the mid-twentieth century; the reformation of the criminal justice system during the same decades; and the movement toward gender equality in the last few decades.<sup>102</sup>

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99 See 1 ACKERMAN, *supra* note 97, at 62–63.

100 See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing that the post–New Deal Court's "case law has drifted far from the original understanding of the Commerce Clause"); *id.* at 596 ("I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century."); BARNETT, *supra* note 15, at 312 (concluding that "[t]he historical evidence overwhelmingly supports a narrow original meaning of Congress's power 'to regulate Commerce . . . among the several States'" (quoting U.S. CONST. art. I, § 8, cl. 3)).

101 Strauss, *supra* note 39, at 884; see also Ackerman, *supra* note 40, at 1750 (observing that "amendments tell a very, very small part of the big constitutional story of the twentieth century"). Professor Strauss goes so far as to say that the amendments that *have* been ratified have played only a small role in shifting the nation's constitutional course. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) ("[With] only a few qualifications, our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment.").

102 Strauss, *supra* note 39, at 884.

These important constitutional developments were not prompted by formal revisions to the ratified texts. Indeed, in the case of Professor Strauss' final example—the development of a body of law aimed at achieving gender equality—the constitutional changes occurred at the very same time that efforts to add a gender-equality provision to the ratified texts were failing.<sup>103</sup>

Article V's lack of frequent use over the past two centuries is hardly surprising. After all, complying with Article V was intended by the document's authors to be extraordinarily difficult.<sup>104</sup> When urging ratification of Article V and the rest of the 1787 document, James Madison argued that, unlike the founding generation, Americans in the future might try to amend the Constitution during periods when the nation was not confronting the kinds of emergencies that prod people to band together in a common endeavor, suppress their discordant passions, and find honorable ways to resolve their disagreements.<sup>105</sup> He also worried that if the amendment process could readily be set in motion, efforts to amend the ratified texts would become commonplace, an eventuality that would yield undesirable consequences:

[A]s every appeal to the people [to amend the ratified texts] would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.<sup>106</sup>

Madison claimed, moreover, that those at the 1787 Convention had been aided by “a finger of th[e same] Almighty hand” that had helped liberate the Americans from British tyranny<sup>107</sup>—hardly the sort of document that mere mortals ought to tinker with lightly.

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103 See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1324 (2006) (noting that the Court adopted heightened review for gender classifications during the 1970s and 1980s, the same period when efforts to ratify the Equal Rights Amendment were failing).

104 See generally John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 386 (2007) (stating that supermajority rules, such as those required by Article V for constitutional amendments, usefully permit “only norms with substantial consensus to be entrenched”).

105 See THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

106 *Id.* Madison also argued that frequent efforts to amend the Constitution would “disturb[] the public tranquility by interesting too strongly the public passions.” *Id.* at 315.

107 THE FEDERALIST NO. 37 (James Madison), *supra* note 105, at 229–30.



Although it was important that citizens retain the power to amend their constitutional texts on “great and extraordinary occasions,”<sup>108</sup> therefore, it also was deemed crucial that the amendment process not be made temptingly easy.<sup>109</sup>

Over the past two centuries, the American people have embraced Madison’s argument that they owe the ratified texts great reverence.<sup>110</sup> Those texts have come to be seen as sacred, with some modern-day Americans joining Madison in believing that “the Almighty” played a role in their creation.<sup>111</sup> Children’s textbooks in the nineteenth century reflected the nation’s enduring sentiments when they urged their young readers to see the 1787 document as “‘an old and sacred bargain’”<sup>112</sup> that was authored by “‘the wisest men of the country,’”<sup>113</sup> that was one of the greatest written works ever produced,<sup>114</sup> and that ought to be defended “as it stands,” without suffering the dangerous indignity of frequent amendment.<sup>115</sup> David Hume’s description of many of his contemporaries in nineteenth-century Britain applies just as readily to many in the United States today: there is a sense in which they see their government as “so sacred and inviolate, that it must be little less than sacrilege . . . to touch or invade it, in the smallest article.”<sup>116</sup>

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108 THE FEDERALIST NO. 49 (James Madison), *supra* note 105, at 314.

109 *See id.* (claiming that although having the power to amend the Constitution is crucial, there are “insuperable objections against [its] proposed recurrence to the people”).

110 *See supra* note 37 and accompanying text (noting the 1787 text’s status as “a popular idol”).

111 *See* Michael Sink, Note, *Restoring Our Ancient Constitutional Faith*, 75 U. COLO. L. REV. 921, 929 (2004) (“Some Americans still believe that the Constitution is a divinely inspired document.”).

112 RUTH MILLER ELSON, *GUARDIANS OF TRADITION* 293 (1964) (quoting JOHN BENSON LOSSING, *PRIMARY HISTORY OF THE UNITED STATES* 170 (New York, Mason Bros. 1857)).

113 *Id.* at 292 (quoting G.P. QUACKENBOS, *A PRIMARY HISTORY OF THE UNITED STATES* 141 (New York, D. Appleton & Co. 1869)).

114 *Id.* (citing HENRY E. CHAMBERS, *A HIGHER HISTORY OF THE UNITED STATES* 271 (New Orleans, F.F. Hansell & Bro. 1889)).

115 *Id.* at 293.

116 DAVID HUME, *OF THE ORIGINAL CONTRACT* (1752), *reprinted in* 1 *ESSAYS MORAL, POLITICAL, AND LITERARY* 443 (photo. reprint 1964) (Thomas Hill Green & Thomas Hodge Grose eds., 1882). The Eighteenth Amendment, for example, is regarded as a national embarrassment, not only because it adopted prohibitionist policies deemed unacceptable only a few years later, but because it used the nation’s sacred texts as a vehicle for trying to achieve narrow policy objectives. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 99 (1980) (citing the Eighteenth Amendment and its quick repeal as an example of what can happen when the nation foolishly attempts to “freeze” shifting values in a constitutional text); Laurence H. Tribe, *How to Violate the Constitution With-*

While sharing Madison's profound reverence for the ratified texts, the American people over the past two centuries have paradoxically identified numerous ways in which the nation's constitutional bearings have needed to be changed.<sup>117</sup> To put those changes into effect, the American people have opted to make formally amending their sacred texts the exception, rather than the rule. Americans in the modern era instead have relied primarily upon judicial review and upon the transformative power of social movements,<sup>118</sup> reserving Article V for making several structural changes in the federal government<sup>119</sup> and for addressing a handful of issues concerning the right to vote.<sup>120</sup> As Paul Brest observed more than a quarter of a century ago, "the practice of [informally] supplementing and derogating from the [ratified] text and original understanding is itself part of our constitutional tradition."<sup>121</sup>

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*out Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 217 (1995) ("The Eighteenth Amendment . . . is nearly everybody's prime example of a constitutionally dumb idea."). See generally U.S. CONST. amend. XVIII, § 1 ("After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes is hereby prohibited."); *id.* amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

117 See *supra* notes 101–03 and accompanying text.

118 See generally Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) ("[T]he first, most undeniable, inalienable and important, if unenumerated, right of the People is the right of a majority of voters to amend the Constitution—even in ways not expressly provided for by Article V.").

119 See U.S. CONST. amend. XVII (providing for the popular election of Senators); *id.* amend. XX (establishing calendars for presidential terms and congressional assemblies, and providing for the filling of presidential vacancies arising between the time of the election and the time of the newly elected president's installation); *id.* amend. XXII (limiting presidents to two terms in office); *id.* amend. XXIII (allowing the District of Columbia to participate in the Electoral College); *id.* amend. XXV (addressing issues of presidential succession in cases of death, resignation, and incapacity); *id.* amend. XXVII (preventing changes in senators' and representatives' salaries from taking effect "until an election of Representatives shall have intervened").

120 See *id.* amend. XIX (granting women the right to vote); *id.* amend. XXIV (abolishing poll taxes in federal elections); *id.* amend. XXVI (guaranteeing the right to vote to persons who are at least eighteen years old). The one exception is found in the nation's brief experiment with establishing Prohibition as a matter of federal constitutional law. See *id.* amend. XVIII (establishing Prohibition); *id.* amend. XXI (repealing the Eighteenth Amendment).

121 Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980); see also Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We the People*, 9 CONST. COMMENT. 309, 324 (1992) (book review) ("Nothing in our history . . . supports the view that the decisions [made at one moment in time] serve

Consider, once again, Professor Strauss' recitation of some of the many areas in which the nation's constitutional precepts have shifted—areas ranging from the dramatic increase in the scope of the federal government's regulatory power, to the increased power of the President in matters involving foreign affairs, to the recognition of a right to privacy and other civil rights, to dramatic reforms of the criminal justice system.<sup>122</sup> As several scholars have pointed out in recent years, these and other constitutional changes have been produced by complex interactions between the citizenry, its social and political leaders, and the courts. Jack Balkin and Sanford Levinson contend, for example, that “[p]artisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”<sup>123</sup> Professor Balkin and Reva Siegel argue that social movements are central tools of constitutional change.<sup>124</sup> William Eskridge and John Ferejohn point out that judicial resolution of constitutional disputes “has proven easier for our system than the bulky process of formal constitutional amendment entailed by Article V.”<sup>125</sup> To find the impetus for many of the nation's most important constitutional changes, one would indeed search in vain for corresponding changes to the formally ratified texts. One must look instead to the norm-shaping activities of the American people, their leaders, and the courts.<sup>126</sup>

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as a blueprint, a set of instructions by which one generation binds its successors until such time as one of the latter deliberately alters the blueprint.”).

122 See *supra* note 102 and accompanying text.

123 Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001).

124 See Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 947 (2006) (“Courts arrive *in medias res*, absorbing the shocks caused by social movements and assisting in the reconstitution of social understandings in the wake of movement struggle. . . . Litigation before courts is only one of many possible fora in which movements fight these battles.”).

125 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1267–68 (2001); see also James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1537–39 (1998) (arguing that many of the nation's constitutional changes in the twentieth century occurred through creative acts of judicial review, rather than through ratified amendments).

126 See Siegel, *supra* note 103, at 1324 (citing the rejection of the Equal Rights Amendment as an example of a nontextual event that shaped constitutional law); Strauss, *supra* note 39, at 934 (“Today it is those principles [developed by judges and the American people] that make up our Constitution.”); Strauss, *supra* note 101, at 1459 (“[O]ur [constitutional] system has other ways of changing besides formal amendments: court decisions, important legislation, [and] gradual accretion of power . . .”).

An originalist might respond by contending that, if changes in the nation's constitutional bearings have indeed been provoked by forces other than changes in the ratified texts or discoveries regarding the Framers' original intentions or the ratified texts' original meanings, then all of those changes are illegitimate. It is virtually impossible, however, to commit oneself seriously to that argument. Even originalists ignore the constitutional directions toward which original intentions or meanings seem to point when those intentions or meanings are judged to be sufficiently undesirable.<sup>127</sup> As Morton Horwitz has argued, “[t]o the extent proponents of originalism insist that their constitutional vision reflects timeless textual truths, the exceptions they make—either for practical or political purposes—strip the theory of much of its legitimating power.”<sup>128</sup> One familiar example, already noted, is the vast expansion of power that Congress is permitted to wield in the name of the Commerce Clause—an expansion that some originalists might protest in select respects, but that few would denounce in its entirety.<sup>129</sup> Another familiar example, also already noted, is the increased protection that the courts provide today against acts of gender discrimination.<sup>130</sup> Briefly consider two additional examples that are somewhat less well known.

The First Amendment states that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the

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127 See Horwitz, *supra* note 87, at 66 (noting that modern originalists would not accept the “original” assumption that the President’s primary role was to merely execute the laws, or debate whether the President had the power to effectuate the Louisiana Purchase).

128 *Id.* at 65–66; see also FALLON, *supra* note 42, at 14 (stating that one of originalism’s great weaknesses is “its incompatibility with enormous bodies of nonoriginalist precedent,” much of which “is now so rooted in our system, and so surrounded by institutions and expectations that depend on it, that even originalists commonly acknowledge that their theory could not sensibly be put into practice without a good deal of trimming”).

129 See *supra* notes 58–65 and accompanying text (discussing the Commerce Clause). Justice Thomas is one of the few prominent advocates of dramatically cutting the powers Congress is permitted to wield under the Commerce Clause. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (“In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.”).

130 See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 559–60 (2006) (arguing that few originalists today would argue against applying heightened scrutiny for gender classifications, notwithstanding the lack of originalism-based justifications for reading the Fourteenth Amendment’s Equal Protection Clause in that way); see also *supra* note 103 and accompanying text (noting the increased protection against gender discrimination).

Government for a redress of grievances.”<sup>131</sup> Today, the Petitions Clause has largely been collapsed into the First Amendment’s guarantee of the freedom of speech.<sup>132</sup> Viewed superficially, that seems appropriate—if one has a right to speak, then surely one has a right to speak in the form of sending oral or written petitions to one’s governing officials. At the time of the First Amendment’s ratification, however, the Petitions Clause was not nearly so redundant.<sup>133</sup> Building on practices developed in Britain and in the American colonies, and remembering the colonists’ outrage when King George III refused to respond to the colonists’ grievances, the nation’s Founders and their immediate successors regarded the right to petition as an important means by which citizens could force items onto the nation’s legislative agenda.<sup>134</sup> When citizens presented their elected legislative leaders with a request that they address a given matter, it was understood by all concerned that those legislative officials were obliged to consider the matter and respond.<sup>135</sup> That practice endured for nearly half a century,<sup>136</sup> until Congress found itself deluged by abolitionists’ antislavery petitions.<sup>137</sup> In 1844, Congress finally disclaimed any obligation to respond, adopting a rule under which petitions were

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131 U.S. CONST. amend. I.

132 See Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. REV. 739, 751 (1999) (“In this century, the Supreme Court has tended to collapse the right to petition into the rights of free speech and expression.”).

133 See *id.* at 741, 750–51.

134 See THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776) (“In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.”); K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 827–30 (2006) (reviewing the Petitions Clause’s history); Lawson & Seidman, *supra* note 132, at 739 (“The near-unanimous conclusion of the modern commentators, drawing on the rich and important history of the Anglo-American right to petition, is that there is more to the Petitions Clause than is generally recognized by the Supreme Court’s jurisprudence or by contemporary understandings and practice.”).

135 See Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142–43 (1986) (“The original design of the First Amendment petition clause—stemming from the right to petition local assemblies in colonial America, and forgotten today—included a governmental duty to consider petitioners’ grievances.” (footnotes omitted)).

136 See *id.* at 155–57 (describing the manner in which petitions were customarily handled).

137 See Lawson & Seidman, *supra* note 132, at 751 (stating that “an onslaught of antislavery petitioning [beginning in the 1830s] sparked heated debate about Congress’ duties to receive and respond to petitions”); Higginson, *supra* note 135, at 158–65 (describing the battle in Congress about how antislavery petitions should be handled).

referred to committees where, if the committee members were so inclined, the petitions could “sleep the sleep of death.”<sup>138</sup> Restoring the original meaning of the Petitions Clause in modern America is inconceivable—Congress simply could not genuinely consider and respond to each and every petition that its millions of citizens decided to present. Like their nonoriginalist counterparts, originalists have been happy to allow the Petitions Clause’s original significance to fade quietly into the nation’s premodern past.<sup>139</sup>

The Suspension Clause provides a second example. Article I of the 1787 Convention’s text states, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>140</sup> Today, it is almost universally believed that the Suspension Clause’s central purpose is to place limits on Congress’s ability to strip the federal courts of their power to award habeas relief to persons illegally held by state or federal officials.<sup>141</sup> When the 1787 text was ratified, however, the Suspension Clause was understood to be aimed at ensuring that *state* courts would retain the power to order the release of persons wrongly imprisoned by the federal government.<sup>142</sup> After all, the early Americans had great trepidations about the ways in which persons holding the newly

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138 DuVivier, *supra* note 134, at 829–30 (quoting 11 REG. DEB. 1137 (1835) (speech of Rep. John Dickson of New York)).

139 One commentator thus writes:

The historian may chide legal scholars and judges alike who, while protesting fidelity to the Framers’ intent, have in fact acquiesced in the evisceration of the original meaning of the right to petition, a right which had compelled legislatures to accord citizens’ petitions fair hearing and consideration.

Higginson, *supra* note 135, at 166.

140 U.S. CONST. art. I, § 9.

141 See Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 311 (2007) (“[C]ourts and scholars . . . have almost invariably assumed that the Suspension Clause’s chief function is to place limits on Congress’s ability to suspend the *federal writ*.”).

142 William Duker convincingly argues:

[T]he debates in the federal and state conventions, the location of the habeas clause [in Section 9 of Article I, which in several instances imposes limits on Congress’ power with respect to the states], and the contemporary commentary support the thesis that the habeas clause was designed to restrict Congressional power to suspend state habeas [relief] for federal prisoners.

WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 135 (1980); see also Pettys, *supra* note 141, at 309–10 (identifying several scholars who, like the author, believe that “the framers’ primary objective was to protect state courts’ ability to come to the aid of federal prisoners”).

created federal offices might violate citizens' liberties, and they regarded the state governments as their liberties' primary guardians.<sup>143</sup> For more than three-quarters of a century, it remained widely understood that the state courts were assured of the power to provide relief to persons unlawfully detained by federal officials; in hundreds of cases, state courts successfully granted habeas relief to persons deemed unlawfully held in federal custody.<sup>144</sup> That practice abruptly came to an end in 1872, however, when the Supreme Court—with no discussion of the Suspension Clause's history, original purpose, or original understanding—summarily declared that, if a person alleges that he or she is being held illegally by federal officials, "it is for the courts or the judicial officers of the United States, and those courts or officers alone, to grant him [or her] release."<sup>145</sup> Finding themselves unable to imagine a nation in which the federal government is not predominant in such matters, many modern-day Americans might agree with William Duker that reviving the Suspension Clause's original meaning is a cause best "reserved for the antiquarian."<sup>146</sup> One will search in vain today for originalist scholars and judges who are willing to call that cause their own.

Such examples reveal that the force ultimately driving the push to adopt originalism's methods is not always an unyielding commitment to the Framers' intentions or the ratified texts' original meanings. Rather, originalism often is fueled by its proponents' belief that an emphasis on original intentions or original meanings ordinarily will produce outcomes that are compatible with the values that originalism's proponents hold as their own.<sup>147</sup> Because modern-day political

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143 See Pettys, *supra* note 141, at 309 (arguing that the Framers believed the Suspension Clause ensured that state courts could order the release of persons unlawfully held by the federal government).

144 See *id.* at 270–88 (describing numerous such cases).

145 *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411 (1872); see also Pettys, *supra* note 141, at 288–307 (critiquing *Tarble's Case*).

146 DUKER, *supra* note 142, at 155. But see Pettys, *supra* note 141, at 322 ("Neither the Court nor scholars have identified any persuasive rationale for concluding that the [Suspension Clause's] promise is one we may ignore. It is time to allow state courts to leave their seats on the sidelines and get back into the game.").

147 See Post & Siegel, *supra* note 130, at 560 ("As a political practice, . . . originalism aspires to 'return to Constitutional authenticity' only insofar as it perceives authenticity to make sense in the present." (quoting Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 931 (1996))); see also Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 272–73 (1996) (suggesting that we purport to "defer" to traditions only when they coincide with our own preferences, and that a "past that has authority only insofar as it agrees with present judgment has no authority at all").

conservatives assume that many of the values they hold dear were held by many Americans at the time that the constitutional texts were written and ratified, it thus is not surprising to find that originalism is especially popular in conservative circles.<sup>148</sup> Morton Horwitz contends, for example, that originalists' willingness to abandon their methods when they produce undesirable outcomes reveals "the extent to which originalism is a rather thin disguise for political conservatism."<sup>149</sup> Robert Post and Reva Siegel similarly argue that originalism's popularity "does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement."<sup>150</sup> Professors Post and Siegel specifically trace originalism's recent ascendancy to the efforts of Attorney General Edwin Meese, during the administration of President Ronald Reagan, to "fus[e] conservative activism with the idea of originalism."<sup>151</sup> "No politically literate person," they write, "could miss the point that the Reagan Administration's use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court."<sup>152</sup>

When one examines originalists' claim that the ratified texts' demands remain static until those texts have been amended pursuant to Article V, and that properly adjudicated cases are those in which judges' rulings are determined either by the texts' original meanings or by the intentions of the texts' Framers, one thus finds oneself confronted with a fiction. Originalists certainly do approve of many of the outcomes produced by originalism's methods. At its core, however, that approval is commonly based not on the fact that originalism's methods were employed, but rather on the fact that the outcomes produced are consistent with originalists' own values. When a single-minded focus on original intentions or original meanings points in sufficiently undesirable directions, originalists often are willing to permit judges to look elsewhere for guidance.

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148 See Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1073 (2006) (observing that Justices Antonin Scalia and Clarence Thomas, both of whom endorse originalism, perceive remarkable similarities between their own values and those of the founding generation).

149 Horwitz, *supra* note 87, at 70.

150 Post & Siegel, *supra* note 130, at 549.

151 *Id.* at 550.

152 *Id.* at 554–55.



## 2. The Fictive Quality of Living Constitutionalism

Like many of their originalist counterparts, many living constitutionalists claim fidelity to the second component of the myth of the written Constitution—the belief that judges’ constitutional rulings should be grounded in the will of the American people as expressed in the formally ratified texts.<sup>153</sup> As I have noted, however, proponents of living constitutionalism have a very different understanding of what it means to say that a judge has properly ascertained the textually expressed will of the American people.<sup>154</sup> Living constitutionalists do not purport to consider themselves bound by original intentions or original meanings, and thus do not contend that the ratified texts’ requirements remain static until those texts have been formally amended. If changes in the nation’s circumstances suggest that the ratified texts should be assigned meanings that differ from the meanings assigned to those texts in the past, living constitutionalists encourage judges to alter their interpretations accordingly.<sup>155</sup> Despite this interpretive flexibility, living constitutionalists who adhere to the myth of the written Constitution insist that textual interpretation is indeed courts’ core constitutional function. The claim that the ratified texts are the central driving force in proper constitutional adjudication is just as false when the living constitutionalist makes it, however, as it is when made by the originalist.

In claiming that they give adjudicative primacy to the formally ratified texts, proponents of living constitutionalism face at least two problems. First, when they disclaim fidelity both to the intentions of the texts’ Framers and to the original meanings of the texts themselves, living constitutionalists simultaneously disclaim the traditional rationale for treating the fact of a text’s ratification as the dispositive reason for raising that text to the status of fundamental law. When the American people debate a text’s merits and then elevate it to constitutional status using a supermajoritarian voting process, there are only two sensible ways to determine what it is about that text that prompted the American people to add it to the nation’s sacred canon: one can try to ascertain the intentions of those who wrote and ratified the text, or one can try to ascertain the objective meaning of the text at the time of its ratification.<sup>156</sup> If one is instead free to ascribe to a ratified text whatever meaning one thinks is reasonable, then there is

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153 See Reich, *supra* note 86, at 735.

154 See *supra* notes 86–91 and accompanying text (describing living constitutionalism).

155 See Ackerman, *supra* note 40, at 1743.

156 See Fish, *supra* note 81, at 1114–15.

no obvious reason to treat the text's ratification as a legally significant event. That is not necessarily a serious problem, of course, if one is willing to concede that the nation's Constitution consists of much more than the formally ratified texts, that the nation's Constitution frequently has been amended by means other than those specified in Article V, and that formal ratification thus is not the *sine qua non* of fundamental law that it traditionally has been thought to be.<sup>157</sup> But it certainly is a problem if one wishes to insist upon the literal truth of the two claims of the myth of the written Constitution.

Second, and relatedly, if the ratified texts' meanings are fluid, and interpreters thus are free to attach new meanings to those texts whenever a change in beliefs or circumstances suggests such a change is appropriate, then the driving force in constitutional adjudication is not the ratified texts, but rather the interpreters' own judgments about the optimal content of individual rights and the optimal contours of desirable government.<sup>158</sup> As Michael McConnell argues, if the meanings one ascribes to the ratified texts are determined by one's present-day judgments "about what is good, just, and efficient," then the ratified texts are "only a makeweight," invoked when convenient, but never deemed absolutely essential.<sup>159</sup> Stanley Fish asks living constitutionalists a question that cuts to the heart of the matter: if one's interpretation of the ratified texts is guided by

the needs and perspective of the current generation of interpreters. . . . why bother with the text of the Constitution (or any text) at all? Why not take the shorter route and just enact statutes that reflect your will and be done with it? The proponents of the 'living Constitution' or the 'dynamic Constitution' or the 'best that can be Constitution' are not urging another form of interpretation; they are urging its abandonment by removing from it any constraint whatsoever.<sup>160</sup>

Consider, for example, two of the most important developments in American constitutionalism over the past century: the emergence

157 See *supra* Part I.A (arguing that the nation's Constitution consists of more than the formally ratified texts); cf. FALLON, *supra* note 42, at 18–19 (arguing that the ratified texts' status as law depends not on the fact that they were ratified, but rather on the fact that we accept them as law); *id.* at 19 ("Once it is recognized that the Constitution's status as law depends on practices of acceptance, the claim that the written Constitution (as originally understood) is the only valid source of norms of constitutional interpretation loses all pretense of self-evident validity.").

158 See Fish, *supra* note 81, at 1115.

159 Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1129 (1998).

160 Fish, *supra* note 81, at 1114–15 (footnote omitted).

of the doctrines of incorporation and substantive due process. With respect to the doctrine of incorporation, it is generally accepted that the Bill of Rights originally imposed restraints only on the federal government.<sup>161</sup> Since the early twentieth century,<sup>162</sup> however, the Supreme Court has determined that many of the Bill of Rights' provisions are incorporated by the Due Process Clause of the Fourteenth Amendment,<sup>163</sup> so that those provisions are binding on federal and state officials alike.<sup>164</sup> Scholars have vigorously debated whether the doctrine of incorporation can be discovered in the Fourteenth Amendment's original meaning or in the subjective intentions of that Amendment's Framers, and whether that doctrine is better grounded in the Amendment's Due Process Clause or in the Amendment's declaration that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>165</sup> Some have insisted that the Fourteenth Amendment incor-

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161 See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) ("These amendments contain no expression indicating an intention to apply them to the state governments."); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 339 (16th ed. 2007) ("The Bill of Rights originally guaranteed individual liberties only against the federal government.").

162 The Court set the stage for the incorporation doctrine in 1908, observing in dictum that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

163 See U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

164 See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (holding that the Fifth Amendment's Double Jeopardy Clause applies to the states); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (declaring the assumption that the First Amendment's protections of free speech and a free press apply to the states). Today, all but a small handful of the Bill of Rights' provisions have been deemed applicable to the states. See SULLIVAN & GUNTHER, *supra* note 161, at 360 (identifying the unincorporated rights).

165 U.S. CONST. amend. XIV, § 1. On the Court, the debate was famously framed by Justice Felix Frankfurter, who argued that the Fourteenth Amendment incorporates some, but not necessarily all, of the Bill of Rights' provisions, and Justice Hugo Black, who argued that the Fourteenth Amendment incorporates the Bill of Rights in its entirety. See, e.g., *Adamson v. California*, 332 U.S. 46, 62–67 (1947) (Frankfurter, J., concurring) (endorsing selective incorporation); *id.* at 71–75 (Black, J., dissenting) (endorsing total incorporation). The academic literature on the incorporation doctrine is enormous, but several treatments are widely regarded as classics in the field. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 155–74 (2d ed. 1997) (rejecting the argument that the Fourteenth Amendment was intended to incorporate the Bill of Rights); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE 2* (1986) (positing that the Fourteenth Amendment's Privileges and Immunities Clause incorporates the Bill of Rights); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 9–21 (1954) (defend-

porates some or all of the Bill of Rights' provisions, while others have insisted that it does not.<sup>166</sup> As the existence of such debates suggests, the Amendment's incorporation demands, if any, are far from obvious. It is difficult to believe, however, that the nation's adherence to the incorporation doctrine turns on whether the doctrine is textually prescribed. Most Americans—laypeople and lawyers alike—develop an attachment to the incorporation doctrine (even if they do not know it by that name) not because they have read the Due Process Clause and find themselves pushed clearly in that direction, but rather because they first make the judgment that the nation's fundamental law *ought* to place comparable restrictions on state and federal officials with respect to certain individual rights.<sup>167</sup> It is only after making that determination that one typically tries to find a plausible way to ground that conclusion in the ratified texts.<sup>168</sup>

To a large extent, that is the analytic sequence that even the Supreme Court has followed. When deciding whether a right articulated in the Bill of Rights is enforceable against the states, the Court has asked whether the given right is “implicit in the concept of ordered liberty,” whether liberty and justice “would exist if [that right] were sacrificed,” and whether a right seems part of the “‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”<sup>169</sup> If the Court believes that a particular right should be deemed fundamental, then it grafts that belief onto the text and deems the right incorporated by the Fourteenth Amendment; if the Court does not believe that a given right should be deemed fundamental, then it reaches the contrary conclusion and declares that

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ing Justice Black's contention that the Framers of the Fourteenth Amendment intended to incorporate the Bill of Rights in its entirety); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (providing a seminal examination of the historical record and rejecting Justice Black's contention that the Framers of the Fourteenth Amendment intended to incorporate the Bill of Rights in its entirety).

166 See *supra* note 165 (citing classic entries in the incorporation debate).

167 See Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 436 (1981); cf. BLACK, *supra* note 39, at 95 (arguing that the First Amendment's protection of the freedom of speech would have been deemed applicable to the states even “without any supporting text”).

168 Berger, *supra* note 167, at 435–36 (arguing that those who endorse incorporation do not genuinely begin their analysis with the Fourteenth Amendment's text, but instead “reason[] back from” what they believe is the most desirable result); *id.* at 466 (“Those who . . . insist upon judicial enforcement of the Bill of Rights against the states premise that the results are so laudable that they must perforce be constitutional.”).

169 *Palko v. Connecticut*, 302 U.S. 319, 325–28 (1937) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

enforcing the right against the states is not textually authorized.<sup>170</sup> In either case, the dispositive question is whether the Court believes the right should be deemed fundamental. The Court turns to the text only when it is prepared to declare its answer and wishes to try to express that answer in textually appropriate language.<sup>171</sup>

The same analytic pattern underlies the related development of the doctrine of substantive due process, through which the nation's courts have declared the existence of unenumerated rights that receive strong protection from governmental intrusion.<sup>172</sup> Although the term *privacy* does not appear anywhere in the ratified texts, for example, the modern Court has found that citizens do possess constitutionally protected privacy rights. Some of the Court's privacy rulings (such as those concerning abortion<sup>173</sup> and sodomy<sup>174</sup>) are controversial, while others (such as those concerning contraception<sup>175</sup> and forced sterilization<sup>176</sup>) appear to enjoy a broad degree of public acceptance. Of course, all of those rulings share an equally tenuous relationship with the language of the ratified texts—the Court quickly backed away from its initial effort to give the right to privacy a textual anchor through the notion of “penumbras,”<sup>177</sup> and the Court's cur-

170 See Berger, *supra* note 167, at 465–66 (stating that Justices decide most cases based on their “gut” and then use reason to support that conclusion).

171 *Id.*

172 See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 942 (“Advocates of a living Constitution have not hesitated to find in due process a source of evolving rights to cope with evolving problems of modern society, while critics have treated substantive due process as a textually unwarranted judicial gloss on the Constitution.” (footnote omitted)). See generally James W. Ely, Jr., “To Pursue Any Lawful Trade or Avocation”: *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 929–49 (2006) (discussing the early emergence of the doctrine of substantive due process in economic settings).

173 See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (holding that a pregnant woman has a limited, privacy-based right to obtain an abortion).

174 See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (striking down a state law that criminalized consensual homosexual sodomy between adults).

175 See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that married couples have a privacy-based right to use contraception).

176 See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating, in a case decided on equal protection grounds, that those who are forcibly sterilized are “forever deprived of a basic liberty”).

177 See *Griswold*, 381 U.S. at 484 (stating that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,” and that some of those textually enumerated “guarantees

rent effort to affiliate the privacy right with the Fifth and Fourteenth Amendments' Due Process Clauses<sup>178</sup> is bedeviled by the fact that those clauses facially appear to address only procedural matters.<sup>179</sup> The ultimately dispositive factor in these rulings (and in citizens' choices about which of these rulings to contest and which to embrace) is not the ratified texts, but rather an assessment of whether a certain right *ought* to be protected because one perceives it to be especially fundamental.<sup>180</sup>

In the end, therefore, originalists and living constitutionalists frequently are driven by the same impulse: the desire to ensure that the Constitution's demands square with their own deeply rooted convictions about the rights that citizens hold and the ways that government officials should and should not be permitted to behave. Of course, those who claim fidelity to the myth of the written Constitution cannot confess to the charge; they cannot openly embrace Thomas Grey's contention, for example, "that the courts do appropriately apply values not articulated in the constitutional text, and appropriately apply

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create zones of privacy"). *But see Roe*, 410 U.S. at 153 (distancing itself from the notion of penumbras and opting to tether the right to privacy to due process).

178 See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); *id.* amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."); see also, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (grounding the existence of "a realm of personal liberty which the government may not enter" in the Due Process Clause).

179 See *Casey*, 505 U.S. at 846 ("Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986))). Critics charge the Court with ascribing meaning to the Due Process Clause that the text simply will not bear. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* 32 (1990) ("It is clear that the text of the due process clause simply will not support judicial efforts to pour substantive rather than procedural meaning into it.").

180 See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975) [hereinafter Grey, *Unwritten Constitution*] (stating that a willingness to decide constitutional cases based upon norms derived from sources other than the ratified texts "tacitly underlies much of the affirmative constitutional doctrine developed by the courts over the last generation"). See generally Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 9 (1984) (arguing that, when a person insists that all legitimate constitutional law is derived from the formally ratified texts, the person "begins to justify in textual terms results that so little follow from any ordinary meaning of the words that critics increasingly see not interpretation of any kind, but concealed legislation").

them in determining the constitutionality of legislation.”<sup>181</sup> Nevertheless, disputants and adjudicators frequently do settle upon the outcomes they believe are appropriate before they encounter the ratified texts, and then search for the interpretive methodologies that will best allow them both to square their constitutional understandings with those texts and to invoke those texts when trying to persuade others to adopt those constitutional understandings as their own.<sup>182</sup> The contention that the outcomes in properly adjudicated constitutional cases are always determined by the textually expressed will of the American people is simply false.

## II. THE MYTH AS TRUTH

If the two claims composing the myth of the written Constitution are not literally true, why does the myth continue to find such frequent expression in Americans’ constitutional debates? Why do Americans persist in professing that the formally ratified documents compose the entirety of their Constitution, when those texts actually do only a small portion of the nation’s constitutional work? Why do so many Americans continue to assert that strict constructionism or some other variety of originalism is the only legitimate method of constitutional interpretation, when those same Americans frequently reject the outcomes that an honest application of originalist methods would yield? Why do living constitutionalists continue to insist upon their fidelity to the ratified texts, if those texts often are not the source of the meanings that living constitutionalists ascribe to them?

The myth’s prevalence cannot be attributed to ignorance on the part of all who espouse its literal truth.<sup>183</sup> After all, judges and constitutional scholars who are well acquainted with the ratified texts’ limi-

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181 Grey, *Unwritten Constitution*, *supra* note 180, at 705.

182 Cf. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 365 (1980) (“In short, we try to persuade others to our beliefs because if they believe what we believe, they will, as a consequence of those beliefs, see what we see [in a particular text].”); Balkin & Levinson, *supra* note 123, at 1078 (observing that many Americans “tend to associate the Constitution with whatever they regard as most right and just”); Jeremy Waldron, *Do Judges Reason Morally?*, in *EXPOUNDING THE CONSTITUTION* 38, 64 (Grant Huscroft ed., 2008) (stating that disputants in constitutional cases typically purport to draw their conclusions from the ratified texts, but will not admit what “is obvious: The bland rhetoric of the Bill of Rights was designed simply to finesse the very real and reasonable disagreements that are inevitable among people who take rights seriously for long enough to see the Bill enacted”).

183 See Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 L. & SOC’Y REV. 385, 408 (1974) (stating that the results of the author’s survey indicated that “respondents most knowledgeable about judicial decisions are most rather than least likely to mythify the Court”).

tations often are as likely as laypeople to invoke the myth and its accompanying rhetoric. Of course, one might hypothesize that those judges and scholars invoke the myth—despite its fictive qualities—because they value the power they wield when they are able to convince a credulous public that the formally ratified texts dictate adjudicative outcomes that correspond to the outcomes that those judges and scholars themselves favor.<sup>184</sup> After all, the American people's profound reverence for the ratified texts does render them susceptible to text-centered forms of argument.<sup>185</sup> Although the myth's rhetorical power surely does contribute to the myth's continuing vitality, there is far more to the story than that.

As is the case with many myths in this and other societies, the myth of the written Constitution persists in large part because there are senses in which it is true and valuable.<sup>186</sup> As Walter Murphy observes, “[m]agic and mythology cannot long survive . . . if they do not seem to contain some truth and do not in fact perform a useful function.”<sup>187</sup> The specific reasons for the persistence of the myth of the written Constitution may be grouped into two categories. First, the myth eases the tension between seemingly conflicting beliefs to which the American people are paradoxically committed. Second, the myth reflects and reinforces Americans' convictions about their origins and national identity.

#### A. *Easing the Tension Between Conflicting Commitments*

A myth sometimes is the product of a community's commitment to two or more seemingly conflicting beliefs—the myth can alleviate the tension between the paradoxical commitments and help the com-

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184 See BARNETT, *supra* note 15, at 2 (stating that judges and scholars commit “a fraud on the public” when they interpret the Constitution however they see fit, believing that, “because it is The Constitution [they] are expounding, the loyal but unsophisticated citizenry will follow”); Chemerinsky, *supra* note 148, at 1076 (arguing that power-seeking judges continue to speak the language of formalism in an effort to persuade the public that judges' discretion plays little or no role in shaping adjudicative outcomes).

185 Cf. Friedman & Smith, *supra* note 75, at 22 (stating that the Court sometimes uses originalist rhetoric when issuing rulings that it fears might “arouse public opinion”).

186 See Donald A. Stauffer, *The Modern Myth of the Modern Myth*, in ENGLISH INSTITUTE ESSAYS: 1947, at 23, 33 (1948) (“A society that possesses myths is a healthy human society.”); *supra* notes 5–8 and accompanying text (noting the truth-bearing and function-serving value of myths).

187 MURPHY, *supra* note 18, at 16; cf. PAUL VEYNE, DID THE GREEKS BELIEVE IN THEIR MYTHS? 84 (Paula Wissing trans., 1988) (stating that the ancient Greeks “cease[d] believing [in their myths] at the point where their interest in believing end[ed]”).



munity achieve the objectives at which those commitments are aimed.<sup>188</sup> To a significant degree, the myth of the written Constitution is the product of two different sets of such commitments. First, it is a product of Americans' commitment to two beliefs: that the most morally legitimate form of government is one in which a nation's citizenry is that nation's ultimate sovereigns and that human beings are innately flawed creatures who cannot be trusted to behave in the ways that they should. Second, the myth is a product of Americans' paradoxical commitment to both self-rule and judicial supremacy.

### 1. Reconciling Self-Rule with Moral Fallibility

In certain respects, the American people's commitment to popular sovereignty is not as thoroughgoing as one might superficially presume.<sup>189</sup> At the national level, there are no means by which ordinary, unelected citizens can place their hands directly on the levers of governmental power. Popular referenda and initiatives, for example, remain entirely creatures of state and local governments.<sup>190</sup> Citizens do not directly cast the decisive votes for the presidency and vice presidency,<sup>191</sup> they do not directly select the members of the federal judiciary,<sup>192</sup> they do not directly vote on whether to amend the nation's formally ratified constitutional texts,<sup>193</sup> and it was not until the early

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188 See FITZPATRICK, *supra* note 5, at 24 (stating that myths often are "about the resolution of inconsistencies, the resolution of opposition"); cf. VEYNE, *supra* note 187, at 84 ("The coexistence of contradictory truths in the same mind is . . . a universal fact."); Stauffer, *supra* note 186, at 34 (observing that myths often flourish because they reflect a society's "profound conviction[s] and satisfy the impossible desires of that culture").

189 See generally ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 15–20 (2d ed. 2003) (identifying ways in which the texts ratified by the founding generation were undemocratic). Indeed, the term *democracy* did not finally shed all of its negative connotations until the mid-twentieth century. See Horwitz, *supra* note 87, at 58–61 (describing the traditional preference for a republican form of government rather than direct democracy).

190 See DuVivier, *supra* note 134, at 823, 864 (observing that the United States is one of the world's few democracies whose citizens have never been permitted to vote on initiatives or referenda at the national level).

191 See U.S. CONST. art. II, § 1, cl. 2 (describing states' appointment of "Electors" to cast ballots in presidential elections); *id.* amend. XII (describing the casting and counting of electors' ballots).

192 See *id.* art. II, § 2, cl. 2 (authorizing the President to appoint federal judges "by and with the Advice and Consent of the Senate").

193 See *id.* art. V (describing ways in which the formally ratified texts may be amended); LESTER B. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 216 (1942) ("Before we can correctly speak of the people as being sovereign in the United

twentieth century that they were permitted to vote directly for their representatives in the Senate.<sup>194</sup>

The American people nevertheless are committed to the proposition that, by claim of moral right, the citizenry is the nation's ultimate sovereign.<sup>195</sup> To find evidence of that commitment, one need look no further than the documents that marked the nation's birth. In *Common Sense*, Thomas Paine's revolution-inspiring essay published in early 1776, for example, Paine argued that the only legitimate political leaders were those who had been "empowered by the people"<sup>196</sup> and that "[a] government of our own is our natural right."<sup>197</sup> Although he avoided using the term *democracy*, knowing the fears that word might stoke among society's elite, Paine "radically articulated the ideal of self-government."<sup>198</sup> The signatories to the Declaration of Independence similarly emphasized their conviction that governments "deriv[e] their just powers from the consent of the governed," that it is "the Right of the People to alter or abolish [any destructive form of government], and to institute a new Government . . . as to them shall seem most likely to effect their Safety and Happiness,"<sup>199</sup> and that the signatories themselves were entitled to declare America's independence from Great Britain "by the Authority of the good People of these Colonies."<sup>200</sup>

Counterpoised against this insistence on citizens' sovereignty is the deep-seated conviction that human beings often cannot be trusted to behave in a morally praiseworthy manner. That conviction has both religious and secular dimensions. In the religious realm, for example, the Christian doctrine of original sin holds that human beings have an ineradicable tendency to engage in morally condemnable conduct.<sup>201</sup> Although its contours have shifted over time, many

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States, we must amend the Constitution so as to permit a majority of the electorate of the entire country to amend the Constitution.").

194 See U.S. CONST. amend. XVII (requiring the popular election of senators).

195 See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793) (stating that, upon the issuance of the Declaration of Independence, "the sovereignty of [America] passed to the people of it").

196 THOMAS PAINE, *COMMON SENSE* (1776), reprinted in *COMMON SENSE, RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE* 3, 37 (Signet Classics 2003).

197 *Id.* at 38.

198 HARVEY J. KAYE, *THOMAS PAINE AND THE PROMISE OF AMERICA* 43 (2005); see also *id.* at 56 (stating that many of society's leaders had "grave reservations about the popular politics and democratic aspirations of the working classes").

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

200 *Id.* para. 31.

201 See *Genesis* 3:1–21 (recounting the story of Adam and Eve succumbing to temptation and thereby incurring the deity's condemnation of humanity).

Americans have embraced that doctrine, from the days of the Great Awakening in the early eighteenth century to the present.<sup>202</sup> In the secular realm, extending back well before the United States' Founding, one finds frequent acknowledgements of humanity's moral fallibility. In the sixteenth century, for example, Niccolò Machiavelli observed that "[a]ll writers on politics have pointed out . . . that in constituting and legislating for a commonwealth it must . . . be taken for granted that all men are wicked and that they will always give vent to the malignity that is in their minds when opportunity offers."<sup>203</sup> David Hume picked up that same theme in the eighteenth century, observing that "[p]olitical writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controls of the Constitution, every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest."<sup>204</sup>

In deciding how best to distribute the new nation's political power, the delegates to the 1787 Convention were keenly aware of people's moral unreliability.<sup>205</sup> As Michael McConnell points out, the "idea that government must be created in recognition of the sinfulness of mankind pervades *The Federalist Papers*."<sup>206</sup> In his *Federalist No. 10*, for example, James Madison argued that representative forms of government are superior to direct democracies because people inevitably tend toward factions, by which Madison meant "a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the

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202 See H. SHELTON SMITH, *CHANGING CONCEPTIONS OF ORIGINAL SIN*, at ix-x (1955) (providing an overview of the doctrine's development in America between the Great Awakening and the twentieth-century writings of theologians Reinhold Niebuhr and Paul Tillich); TATHA WILEY, *ORIGINAL SIN* 3-9, 305-08 (2002) (providing an overview of the doctrine, from its roots in Judaic texts to modern-day Christian teachings).

203 1 *THE DISCOURSES OF NICCOLÒ MACHIAVELLI* 216-17 (Leslie J. Walker trans., Yale Univ. Press 1950) (1532); see also *id.* at 234 ("[M]en are more prone to evil than to good.").

204 DAVID HUME, *OF THE INDEPENDENCY OF PARLIAMENT* (1742), in 1 *ESSAYS MORAL, POLITICAL, AND LITERARY*, *supra* note 116, at 117-18.

205 See generally Frank Goodman, *Mark Tushnet on Liberal Constitutional Theory: Mission Impossible*, 137 U. PA. L. REV. 2259, 2303 (1989) (book review) (stating that "[t]he image of human nature as passionately selfish and greedy for wealth and power long antedated liberalism" and that "[g]enerations of Protestant churchgoers on both sides of the Atlantic needed no reminder from Thomas Hobbes of the failings of fallen man").

206 Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 5, 7 (Michael W. McConnell et al. eds., 2001).

permanent and aggregate interests of the community.”<sup>207</sup> Like Machiavelli and Hume before him, Madison believed that people ordinarily behave selfishly when given the chance to do so: “If the impulse and the opportunity be suffered to coincide,” he wrote, “we well know that neither moral nor religious motives can be relied on as an adequate control.”<sup>208</sup>

There plainly is tension between the beliefs that people are innately prone to act in evil ways and that people are morally entitled to govern themselves.<sup>209</sup> Indeed, some have cited that very tension as a reason to reject democratic forms of government. During the English Civil War in the mid-1600s, for example, royalist Sir Robert Filmer argued that subjects were not entitled to overthrow monarchs they found unacceptable. He opened his essay *Patriarcha* with the declaration that those who believed people were free to choose their own form of government were forgetting “that the desire for liberty was the cause of the fall of Adam.”<sup>210</sup> Filmer argued that God had assigned similar duties to fathers and kings, charging fathers with the duty to care for their families and kings with the duty to care for their commonwealths—and just as children cannot choose their own fathers, subjects cannot choose their own kings.<sup>211</sup> Even *wanting* to

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207 THE FEDERALIST NO. 10 (James Madison), *supra* note 105, at 78.

208 *Id.* at 81; THE FEDERALIST NO. 51 (James Madison), *supra* note 105, at 322 (“If men were angels, no government would be necessary.”). The founding generation’s primary solution was to establish a representative form of government, with power distributed among multiple branches that could jealously guard against any one branch aggrandizing itself at the expense of the others. See THE FEDERALIST NO. 10 (James Madison), *supra* note 105, at 81–84; THE FEDERALIST NO. 51 (James Madison), *supra* note 105, at 322 (“Ambition must be made to counteract ambition.”). See generally HUME, *supra* note 116, at 118 (arguing that political architects must find ways to make people, “notwithstanding [their] insatiable avarice and ambition, co-operate to public good”); Patrick M. O’Neil, *Bible in American Constitutionalism*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 29, 29 (Paul Finkelman ed., 2000) (“The story of the Fall of Man in Genesis with its attendant dogma of Original Sin was something that would have lent strong weight to the notion of the need for checks and balances in government, because the best of statesmen would be seen as flawed and imperfect beings . . . .”); Goodman, *supra* note 205, at 2304 (arguing that “nearly all politically conscious Americans” at the time of the Founding believed that “checks and balances” were the appropriate remedy for the fact “that unchecked power would be abused and turned to private ends”).

209 Cf. Ted G. Jelen, Book Review, 35 J. FOR SCI. STUDY RELIGION 454, 456 (1996) (reviewing RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE) (“If one’s [political] opponents [in a democracy] are arguing from a perspective judged to be sinful and corrupt, why is it necessary to deal directly with their arguments?”).

210 ROBERT FILMER, PATRIARCHA (1680), *reprinted in* PATRIARCHA AND OTHER WRITINGS 1, 2 (Johann P. Sommerville ed., Cambridge Univ. Press 1991).

211 See *id.* at 12–13.

govern oneself, Filmer contended, was evidence of one's inherent moral weakness.<sup>212</sup>

The myth of the written Constitution helps to ease the tension between Americans' beliefs in their moral fallibility and in their right to govern themselves. To see how that it so, consider the way in which many religions use ancient texts: believing that morally flawed humans cannot create any worthy religious framework on their own, they anchor their faith to ancient documents, assign those texts sacred origins, and purport to find in those texts decisive guidance for dealing with modern life's many complex problems.<sup>213</sup> Many Americans similarly anchor their civic faith to the formally ratified constitutional texts, assign those texts extraordinary origins, and believe that properly behaving judges can find in those texts—at one level of abstraction or another—the answers to the nation's complex constitutional questions.<sup>214</sup> Because the formally ratified texts are seen as the people's documents, the myth of the written Constitution enables Americans to regard themselves as self-governed; because those texts are seen as having been written (perhaps with divine guidance<sup>215</sup>) by heroic figures of unusual brilliance, the myth enables Americans to believe that those texts transcend the ordinary moral unreliability of citizens and their leaders.

In that respect, those who wrote and ratified the nation's revered constitutional texts have the singular advantage of being long since dead. Their everyday humanity is so far from view—their prejudices, their temperaments, their vanities and insecurities, their voices, their physical appearances—that they are easily elevated to the status of mythic national heroes who were far wiser than anyone today could hope to be.<sup>216</sup> As Christopher Tiedeman noted, “the national habit is to look upon the members of the convention of 1787 as demigods,

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212 Cf. *id.* at 24 (stating that the only good thing about democracies was “that they continued but a small time”).

213 See THE OXFORD DICTIONARY OF WORLD RELIGIONS 869–70 (John Bowker ed., 1997) (noting numerous religions' ascription of extraordinary origins to sacred texts and reliance upon those texts for guidance in modern life).

214 Cf. Harold J. Berman, *Religious Foundations of Law in the West: An Historical Perspective*, 1 J.L. & RELIGION 3, 31 (1983) (“The Calvinist doctrine of original sin . . . supported the idea of a written constitution, which in effect embodied the social contract and made it, by virtue of the writing, more difficult to break.”).

215 See *supra* note 107 and accompanying text (noting Madison's assertion in *Federalist No.* 37 of divine guidance in the Revolution of 1776 and the Convention of 1787).

216 See Stauffer, *supra* note 186, at 28 (observing that Presidents are more easily mythologized the further they recede into the past).

giant heroes, far surpassing the foremost men of today.”<sup>217</sup> If we could transport ourselves backward in time, however, and listen as the members of the founding generation debated the constitutional issues they faced—if we could concretely experience all of the ways in which their world and outlook were radically different from our own, beginning with their acceptance of slavery and their denial of the franchise to women—we might find ourselves far less inclined to insist that all of the answers to the nation’s constitutional questions are enshrined in the texts that they and their successors wrote and ratified. We might find ourselves agreeing with Jon Elster that one cannot draw a sharp distinction between the framers of a constitution and ordinary politicians, assuming that the former are free of the kinds of interests, biases, and passions that afflict the latter.<sup>218</sup> Given the distance in time that separates us from the founding generation, however, we are able to imagine the Framers as geniuses whose every utterance rewards the closest scrutiny.<sup>219</sup> So long as we remain tethered to those revered texts, the myth of the written Constitution tells us, we will be truly and safely self-governed notwithstanding our moral flaws.

## 2. Reconciling Self-Rule with Judicial Supremacy

While Americans commonly embrace the belief that the formally ratified texts provide the people’s answers to the nation’s ever-changing constitutional questions, they recognize that those texts demand interpretation.<sup>220</sup> There is little doubt today about where the nation ordinarily locates the supreme interpretive power. The U.S. Supreme Court has asserted that “the federal judiciary is supreme in the exposition of the law of the Constitution,”<sup>221</sup> and the rest of the nation has,

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217 TIEDEMAN, *supra* note 37, at 21; *cf.* Max Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290, 1299 (1937) (“When the Americans began seeing the revolutionary heroes in the hazy light of semi-divinity and began getting them associated or confused with the framers of the Constitution, the work of consolidating the new government was assured.”).

218 *See* JON ELSTER, *ULYSSES UNBOUND* 172–73 (2000) (arguing that framers are no more immune to political pressures than other politicians); *see also id.* at 172 (“The idea that framers are *demigods legislating for beasts* is a fiction.”).

219 *Cf.* Ackerman, *supra* note 40, at 1802 (observing that some judges today “endlessly debate the meaning of the merest jottings from the Founding and Reconstruction”).

220 *See* FRED RODELL, *NINE MEN* 7 (1955) (stating that “even non-lawyers have come to find a trifle naïve” the notion that the Court is like “a nine-headed calculating machine, intricately adjusted to the words of the Constitution and of lesser laws, and ready to give automatic answers to any attorneys who drop their briefs in the proper slot and push the button”).

221 *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

for the most part, happily acquiesced.<sup>222</sup> As scholars have long recognized, however, there is tension between the claims that the citizenry is the nation's ultimate sovereign and that unelected, life-tenured judges ultimately determine whether a given governmental action is valid or void.<sup>223</sup> By positing that properly behaving judges rely upon the formally ratified texts to determine whether the government's behavior in a given instance is legally permissible, the myth of the written Constitution helps to resolve that conflict. Viewing the nation through the myth's lens, judges are not running afoul of the people's will when they declare that elected officials have behaved unconstitutionally. To the contrary, they are vindicating the people's wishes by enforcing the dictates of the formally ratified texts.<sup>224</sup>

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222 See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 5 (2004) ("Newspapers and constitutional law texts typically treat Court interpretations of the Constitution as supreme."); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *HARV. L. REV.* 1594, 1637–39 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)) (arguing that, although citizens sometimes disagree with the Supreme Court's rulings, they widely accept judicial supremacy). Of course, that acquiescence has not been absolute. See, e.g., Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-1 to -4 (2000)), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (expressly disapproving of the Supreme Court's construction of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), and seeking to restore the construction advanced by the Court in an earlier era); *Boerne*, 521 U.S. at 519 (examining the Religious Freedom Restoration Act and holding that Section 5 of the Fourteenth Amendment does not authorize Congress to reject the Court's determination of "what constitutes a constitutional violation"); SULLIVAN & GUNTHER, *supra* note 161, at 23–25 (reviewing various Presidents' assertions of interpretive authority).

223 This, of course, is the famous "countermajoritarian difficulty." See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986) (providing a classic articulation of the problem); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 155–62 (2002) (examining the development of, and reasons for, scholars' unflagging interest in the problem); Horwitz, *supra* note 87, at 63 ("The competing conceptions of democracy and its relationship to judicial review . . . have framed the central debates in American constitutional theory during the past fifty years.").

224 See WHITTINGTON, *supra* note 15, at 111 (arguing that when courts employ originalist methods of constitutional interpretation, judicial review is not countermajoritarian because the courts are enforcing the sovereign people's will); Balkin & Levinson, *supra* note 123, at 1076 (stating that when courts declare legislation unconstitutional, they often are not acting in a countermajoritarian fashion because their rulings "represent[] a temporally extended majority rather than a contemporaneous one"); Barnett, *supra* note 83, at 643 (arguing that judicial review is not countermajoritarian if one embraces certain originalist theories of constitutional interpretation).

Citizens do not always agree with judges' rulings, however, and so the foregoing reasoning begs a critical question: if the purpose of the ratified texts is to express the supreme will of the American people, and if citizens believe that judges' interpretations of those texts are sometimes mistaken, why don't the people shift the nation's ultimate interpretive authority to the political domain? In recent years, a number of scholars have urged Americans to do precisely that. Vigorously opposing judicial supremacy, advocates of "popular constitutionalism" have argued that wielding the nation's supreme interpretive power is one of the chief prerogatives of the nation's sovereign people.<sup>225</sup> Thus far, however, Americans have shown little inclination to loosen their attachment to judicial supremacy.<sup>226</sup> Moreover, they continue to rationalize that attachment by embracing a myth whose claims lack literal accuracy.<sup>227</sup> By helping to legitimate judicial supremacy, what deeper objectives is the myth of the written Constitution enabling citizens to achieve?

There are at least three interrelated answers. First, just as concerns about people's moral fallibility prompt Americans to ascribe extraordinary origins to the nation's ratified texts and to idolize the individuals who wrote them,<sup>228</sup> those same concerns cause Americans to be skeptical about placing the ultimate power to interpret those

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225 See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); see also Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 345–59 (2008) (arguing that if the ultimate power to interpret the ratified texts were shifted from the courts to the political domain, the American people would prove themselves able and willing to distinguish between their long-term fundamental interests and their short-term political desires in the kinds of ways that constitutionalism demands). See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing that there are reasons to support the rejection of the general theory of judicial supremacy and exploring the idea of populist constitutional law); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 278–79 (2006) (arguing that legislatures should control the evolution of the Constitution because they represent a "broader range of views, professions, and social classes" than judges); JEREMY WALDRON, *LAW AND DISAGREEMENT* 254–88 (1999) (criticizing various arguments supporting the view that judicial supremacy is a democratic and desirable doctrine).

226 See Alexander & Solum, *supra* note 222, at 1637–39 (arguing that the chief problem with popular constitutionalism is that, although they sometimes disagree with particular rulings, Americans appear to embrace judicial supremacy); cf. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2616–17 (2003) (stating that social scientists have found that the Supreme Court enjoys a reservoir of good will among the larger public).

227 See *supra* Part I (identifying ways in which the claims of the myth of the written Constitution are not literally accurate).

228 See *supra* notes 213–19 and accompanying text (noting the tendency to view the Founders as mythic heroes).



texts in the hands of individuals who are transparently politically motivated. Rather than give legislators or executive officials the final word on whether their own actions are legally permissible, the American people prefer to confer that power upon politically unaccountable judges. The nation then invests those judges with the trappings of a priesthood class, from body-concealing black robes, to elevated benches, to a specialized language. Harry Stumpf accurately observes that, by setting judges apart from the rest of the citizenry in such ways, the American people are able to “sustain the myth of an impersonal judiciary divining decisions based on some objective truth contained in the Constitution.”<sup>229</sup>

Focusing specifically on judges’ “curious” attire, Jerome Frank makes the same point.<sup>230</sup> By obscuring judges’ physicality, he writes, robes promote the public’s image of judges as a select class of people blessed with an almost superhuman capacity to deduce case-specific answers from the nation’s fundamental legal precepts.<sup>231</sup> Indeed, to appreciate the rhetorical power of those black robes, simply imagine the nation’s President beginning to dress in a comparable manner for such events as press conferences and the annual State of the Union Address. Although the President might try to justify the choice by explaining that such attire befits the dignity of the office, he or she would be mercilessly ridiculed, and not merely because the sight was unfamiliar. Such modes of dress seem fundamentally incompatible with the nature of the presidency. Yet if judges today were to *cease* wearing those same robes when performing their official duties, many citizens would find it difficult to reconcile judges’ new appearance with the image that the citizenry wishes to attach to them—the image of judges as better-than-human individuals who are rarely susceptible to the kinds of moral and cognitive weaknesses that afflict ordinary people.

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229 HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 49 (2d ed. 1998); see also Casey, *supra* note 183, at 387 (“Symbols can elevate the [Court], setting it up as special, remote from ordinary skills and practices, difficult to check against daily experience, and unapproachable by the common man.” (citations omitted)).

230 JEROME FRANK, *COURTS ON TRIAL* 254 (1949).

231 See *id.* at 254–57 (exploring the cultural and historical role of judicial robes); see also MURPHY, *supra* note 18, at 13 (noting that judges’ black robes foster the image “of the judge as a high priest of justice with special talents for elucidation of ‘the law,’ that sacred and mysterious text which is inscrutable even to the educated layman”); RODELL, *supra* note 220, at 28 (stating that a “myth . . . deeply imbedded in our folklore of government” is the notion that judges “put on, or should put on, with their robes a complete impartiality or indifference toward the nation’s social and economic problems”).

Second, although diehard devotees of constitutional law might find it hard to understand, many citizens have little interest in regularly devoting their energies to political and constitutional disputes. As political scientists John Hibbing and Elizabeth Theiss-Morse persuasively argue, “people do not like politics even in the best of circumstances; in other words, they simply do not like the process of openly arriving at a decision in the face of diverse opinions.”<sup>232</sup> Many would prefer to go about their daily activities without having to worry about whether their elected leaders are behaving in an honorable fashion. What typically provokes them to turn their attention to political matters is not an irresistible urge to engage in politics; rather, it is the suspicion that the political system has become one “in which decision makers—for no other reason than the fact that they are in a position to make decisions—accrue benefits at the expense of non-decision makers.”<sup>233</sup> If the people believe they are “being played for a sucker,” they will energetically search for ways “to get power away from [the] self-serving politicians.”<sup>234</sup> Otherwise, they would prefer to leave the tasks of governing to others.<sup>235</sup>

Even when they disagree with particular rulings, Americans believe that judges are unlikely to decide cases in a manner aimed at making themselves better off at the expense of the larger public.<sup>236</sup> The American people are fairly confident, in other words, that judges ordinarily will not behave in the kinds of self-serving ways that cause citizens to decide that they must temporarily set aside their usual activ-

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232 See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* 3 (2002); see also *id.* at 1 (“The last thing people want is to be more involved in political decision-making . . .”); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 *GEO. L.J.* 897, 913 (2005) (citing the work of Professors Hibbing and Theiss-Morse, among others, for the proposition that political scientists have been amassing “studies showing that the People have little interest in increased civic responsibility”).

233 HIBBING & THEISS-MORSE, *supra* note 232, at 2; see also *id.* at 159 (stating that citizens become agitated when they believe that elected officials have made decisions based upon a desire “to better themselves by securing reelection, by getting a trip to Maui, by getting rich, or by garnering a major contribution for their campaign coffers”).

234 *Id.* at 130.

235 See, e.g., HUME, *supra* note 116, at 453–55 (arguing that individuals often are more willing than their rhetoric might indicate to allow others to wield political power over them).

236 See HIBBING & THEISS-MORSE, *supra* note 232, at 158 (“When the Court permits criminals to get off on technicalities or radicals to burn the American flag, the public, by wide margins, believes the decisions to be seriously wrong-headed. But approval of the Court persists because the situation of the justices themselves has not been improved by those decisions . . .”).

ities and devote their energies to issues of governance.<sup>237</sup> As a result, the citizenry believes that judges, rather than overtly political actors, are best positioned to resolve constitutional controversies.<sup>238</sup> To the extent that citizens worry that assigning such weighty responsibilities to politically unaccountable individuals might conflict with the people's desire to be self-governed, the myth of the written Constitution provides them with the assurance they need: in the formally ratified texts, the American people have provided judges with ample guidance for determining how particular constitutional disputes should be resolved.<sup>239</sup> Viewed from the myth-holder's perspective, judges ordinarily can be trusted selflessly to enforce the people's textually expressed constitutional directives.

Third, counterintuitive though it initially might seem, Americans often find it easier both to regard themselves as self-governed and to respect decisions about issues of fundamental law when those decisions have been hammered out behind closed doors before being announced and explained to the larger public. Buoyed by the fiction that they have textually provided the raw materials for answering the nation's constitutional questions, the American people would prefer to believe that ascertaining the answers to those questions is largely a matter of deducing conclusions from the legal premises that the people have provided. As Professor Murphy explains, many Americans find it easier to accept "decisions which appear to be the ineluctable result of rigorously logical deductions from 'the law,' than . . . rulings which are frankly a medley of legal principle, personal preferences, and educated guesses as to what is best for society."<sup>240</sup> Americans do not want to see the nation's constitutional decisionmakers frequently

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237 In a celebrated essay published three-quarters of a century ago, Max Lerner observed:

We have somehow managed in our minds to place the judges above the battle. Despite every proof to the contrary, we have persisted in attributing to them the objectivity and infallibility that are ultimately attributes only of godhead. The tradition persists that they belong to no economic group or class; . . . that their decisions proceed through some inspired way of arriving at the truth; that they sit in their robes like the haughty gods of Lucretius, high above the plains on which human beings swarm, unaffected by the preferences and prejudices that move common men.

Lerner, *supra* note 217, at 1311.

238 See HIBBING & THEISS-MORSE, *supra* note 232, at 158 ("The Supreme Court is relatively popular not just because the justices hide their internal conflict from public view but mostly because their decisions are not perceived to affect their own material well-beings.").

239 See MURPHY, *supra* note 18, at 16–17.

240 *Id.* at 17.

feeling torn between two or more attractive yet incompatible alternatives, vacillating before making a final decision, or suffering any of the other ailments that often trouble those charged with making difficult decisions.<sup>241</sup> Professor Stumpf puts it well: “[A]fter the tumult, greed, and indecisiveness of the legislative process, . . . we quickly weary of the frustrations and disappointments of plain old politics and wish to repair to the serenity, the sureness, indeed the utter sublimity of justice, which the law and its purveyors promise.”<sup>242</sup> Americans make progress toward those ends by relying upon judges to conduct much of their decisionmaking work out of the public view.

### B. *Preserving a Meaningful Sense of Nationhood*

Myths frequently take the form of “stories [that] deal with origins and identity.”<sup>243</sup> When a myth concerns the origins or identity of a nation, it can help foster a deep sense of attachment among the nation’s members, binding them together in service to a perceived national project.<sup>244</sup> One of the United States’ widely embraced nation-building myths is the myth of the written Constitution.<sup>245</sup>

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241 Cf. HIBBING & THEISS-MORSE, *supra* note 232, at 158 (stating that the Supreme Court is popular in part because the Court’s members conceal some of their conflicts from the larger public).

242 STUMPF, *supra* note 229, at 49; see also Gewirtzman, *supra* note 232, at 923 (“Compared with the heated and contentious rhetoric that often accompanies national elections and Congressional debate, [the Court] operates as a model of civility. Its decisionmaking procedures are highly circumscribed, with most debate and horse trading taking place behind closed doors. Norms of professional courtesy and decorum are well established.”). If that means that judges’ closed-door decisionmaking processes are sometimes shrouded in mystery, that may only enhance the weight that Americans ultimately are willing to ascribe to their decisions. See MURPHY, *supra* note 18, at 16 (arguing that a public sense of mystery concerning a person’s or institution’s qualities or decisionmaking processes can enhance that person’s or institution’s public prestige).

243 FITZPATRICK, *supra* note 5, at 15; see also VEYNE, *supra* note 187, at 80–81 (discussing the role of myths in describing cities’ origins in ancient Greece).

244 See FITZPATRICK, *supra* note 5, at 113 (“[N]ational histories were constructed . . . which . . . told . . . of exclusive origins and identity, of distinct community and a unique spirit.”).

245 Another nation-building myth toward which many Americans have gravitated since the earliest days of the country’s history is the myth that the deity of the Christian religion chose the United States “for a special, redeeming role on the stage of world history,” a role aimed at bringing freedom to “all the peoples of the earth.” HUGHES, *supra* note 6, at 6–7; see also Todd E. Pettys, *Our Anticompetitive Patriotism*, 39 U.C. DAVIS L. REV. 1353, 1370–73 (2006) (describing the prevalence of this myth, from the speeches of President George Washington to President George W. Bush’s State of the Union Address in 2004).

Many Americans report that counting themselves as members of the United States' national community provides them with an important dimension of their individual identities.<sup>246</sup> As Kenneth Karst writes, "membership in the national community helps to provide a sense of wholeness, not only for the society but also for the citizen's sense of self."<sup>247</sup> That sense of membership in a national community also helps to enhance the perceived legitimacy of national electoral outcomes. Although a great many Americans surely would have difficulty accepting being outvoted by those in other countries in an international popular election on some important matter, they accept outcomes in which they have been outvoted in national elections because they share (and wish to preserve) a strong sense of identity with those who voted differently.<sup>248</sup>

Yet on what do Americans build that shared sense of nationhood—that sense of solidarity or, as Benedict Anderson describes it, that sense of "a deep, horizontal comradeship with one another"?<sup>249</sup> Mere possession of legal citizenship is not the answer, nor is mere presence within the United States' borders—citizenship and physical presence help to define one's *legal* relationship with a jurisdiction, but they never have been the stuff of which *nations* are made. Moreover, as a collection of immigrants drawn from far-flung regions of the world, Americans cannot build a nation on the same foundations on which nations traditionally have been erected, such as a shared ethnicity or a common geographic origin.<sup>250</sup>

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246 See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 250 (1996) (reporting, after interviews with numerous Americans, that many feel "a widespread and strong identification with the United States as a national community").

247 KENNETH L. KARST, *BELONGING TO AMERICA* 184 (1989).

248 Cf. Mattias Kumm, *Why Europeans Will Not Embrace Constitutional Patriotism*, 6 INT'L J. CONST. L. 117, 118–19 (2008) (arguing that if the European Union is to be able to make binding decisions "on policies that concern the security of its citizens or that have significant distributive effects, then a sufficiently robust common identity seems necessary to legitimate the polity and ensure its functioning in the long term").

249 BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6–7 (rev. ed. 1991); accord Ernest Renan, *What Is a Nation?*, in *BECOMING NATIONAL* 42, 53 (Geoff Eley & Ronald Grigor Suny eds., 1996) (stating that to be a nation is to feel "a large-scale solidarity").

250 See HANS KOHN, *AMERICAN NATIONALISM* 3 (1957) (stating that Americans "established themselves as a nation without the support of any of those elements that are generally supposed to constitute a separate nation"); see also BENJAMIN AKZIN, *STATE AND NATION* 8–10 (1964) (stating that the term "nation" usually is used to denote people of a common ethnicity); E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780*, at 14–18 (2d ed. 1990) (stating that the term "nation" traditionally denotes people of a common ethnic descent or people from a common geographic origin).

More than anything else, American nationhood is built upon two professed commitments: a commitment to principles of liberty and equality, such as one finds in the Declaration of Independence,<sup>251</sup> and a commitment to work out what those principles mean in specific cases through appeals to the nation's formally ratified constitutional texts.<sup>252</sup> As political scientist Thomas Pangle points out, the United States was "the first nation in history explicitly grounded . . . on appeal to abstract and universal philosophic principles of political right."<sup>253</sup> A professed commitment to those principles remains at the heart of what Gunnar Myrdal called the "American Creed"—"the belief in equality and in the rights to liberty."<sup>254</sup> Of course, liberty and equality are highly malleable concepts, demanding elaboration in the fact-specific instances in which they are invoked. While originalists and living constitutionalists alike bring their own deeply rooted convictions to bear when determining whether the government has behaved permissibly in a particular case, they also are joined by a determination to try to reconcile those convictions with, and articulate their arguments in the language of, the formally ratified constitutional texts.<sup>255</sup>

Americans' determination to work within the ratified texts' parameters is animated by much more than a desire to present consti-

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251 See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.").

252 Cf. TRIBE, *supra* note 14, at 14 (stating that the formally ratified texts "memorialize[] the commitments defining us over the course of time in a way that neither our physical territory nor the multiple ancestral origins of our nation can"); TUSHNET, *supra* note 225, at 31–32 (arguing that when interpreting the nation's ratified texts, one should take one's guiding principles from the Declaration of Independence, which lays out "unassailable moral truths" and describes the "project" that "constitutes us as a people").

253 THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM 278 (1988); see also KOHN, *supra* note 250, at 8 (stating that America built its sense of nationhood around "an idea which singled out the new nation among the nations of the earth," namely, the idea of liberty); Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in THIS FIERY TRIAL 183, 184 (William E. Gienapp ed., 2002) ("Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.").

254 GUNNAR MYRDAL, AN AMERICAN DILEMMA 8 (20th anniversary ed. 1962); see also WALTER BERNS, MAKING PATRIOTS 50 (2001) (stating that Americans' devotion to these principles is what makes them "one people"); SAMUEL P. HUNTINGTON, WHO ARE WE? 46 (2004) ("Americans, it is often said, are a people defined by and united by their commitment to the political principles of liberty, equality, democracy, individualism, human rights, the rule of law, and private property embodied in the American Creed.").

255 See *supra* notes 80–94 and accompanying text.

tutional arguments in a form that others will find persuasive (although that surely is an incentive). Most fundamentally, it is driven by Americans' sense of who they are and of what binds them to one another.<sup>256</sup> By working out the demands of liberty and equality through appeals to the ratified texts, Americans not only are able to see themselves as the ideological descendants of the idolized individuals who wrote and ratified those documents,<sup>257</sup> but they are able to maintain a meaningful sense of nationhood with their contemporaries, as well.<sup>258</sup> As Max Lerner ably put it, "[e]very tribe needs its totem . . . and the Constitution is ours."<sup>259</sup> The United States' diverse population finds unity in the project of trying to assign persuasive meanings to their formally ratified constitutional texts.<sup>260</sup>

The myth of the written Constitution contributes to the ratified texts' nation-building capacities in a number of ways. By positing that the ratified texts provide the major premises from which all constitutional conclusions ultimately can and must be drawn, the myth gives

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256 See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 2027 (2003) ("[The Constitution] is the compendium of values and commitments that holds us together despite our diversity and differences.").

257 See Farber, *supra* note 57, at 1247 (stating that trying to tie one's views to those of the Framers "is a way of connecting modern decisions to the very formation of our country, and hence to the American mythos"); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 *S. CAL. L. REV.* 551, 563 (1985) (arguing that appealing to the ratified texts is a means of recalling the Framers' "founding, constitutive aspirations and . . . responding to them").

258 See generally FALLON, *supra* note 42, at 130 ("[O]ur sense of national identity as a people literally constituted by the Constitution is linked indissolubly with ideals of common constitutional rights . . . . [N]ational ideals require national enforcement as an affirmation of our shared nationhood."); Jürgen Habermas, *Why Europe Needs a Constitution*, in *DEVELOPING A CONSTITUTION FOR EUROPE* 19, 27 (Erik Oddvar Eriksen et al. eds., 2004) (arguing that shared participation in democratic processes "establishes an abstract, legally mediated solidarity between strangers").

259 Lerner, *supra* note 217, at 1294; see also LEVINSON, *supra* note 55, at 73 ("[O]ne reason for the emphasis on reverence for the Constitution . . . is the realization that there may be no other basis for uniting a nation of so many disparate groups."); Post & Siegel, *supra* note 256, at 2027 ("From the very founding of the republic, the Constitution has been viewed by Americans as the preeminent and all-encompassing symbol of American nationhood.").

260 Cf. ACKERMAN, *supra* note 97, at 36 ("In part because Americans differ so radically in other respects, our constitutional narrative constitutes us [as] a people. If you and I did not try to discover meaning in our constitutional history, we would be cutting ourselves off from each other . . . ."); Kumm, *supra* note 248, at 122 (arguing that "constitutional patriotism" does not require a full consensus on what a constitution demands, but does require "a consensus on the vocabulary that is to be used to structure debates about what should be done").

citizens an argumentative starting point that they can embrace, no matter what their political viewpoint.<sup>261</sup> Casting one's constitutional arguments in the language of the ratified texts thus becomes a way not only of trying to persuade one's opponents, but of showing them respect by appealing to shared premises, as well.<sup>262</sup> Moreover, because the myth holds that the entirety of the nation's Constitution was written and adopted by the American people, citizens feel entitled to make claims about what those texts demand in particular cases.<sup>263</sup> As Reva Siegel observes, the ratified texts are "the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims on the Constitution's meaning."<sup>264</sup> Making claims about the texts' meaning thus itself becomes an important means by which one marks and strengthens one's membership in the national community.<sup>265</sup>

The myth and the accompanying ability of citizens to make claims about the ratified texts' meaning also give citizens at least two incentives peacefully to accept constitutional outcomes with which they disagree. First, the myth provides citizens with the context they need for making face-saving, dignity-preserving concessions to their opponents—after all, it is far easier to declare that one is acquiescing to outcomes that purport to be rooted in the textually expressed will of the American people than it is to acquiesce to outcomes that purport to be rooted in nothing more than the preferences of one's particular opponents.<sup>266</sup> Second, because one might prevail in a debate about a

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261 See Strauss, *supra* note 39, at 907 ("[W]hatever their disagreements, people can agree that the text of the Constitution is to be respected.").

262 See *id.* at 908 ("Even among people who disagree about an issue, it is a sign of respect to seek to justify one's position by referring to premises that are shared by the others.").

263 See Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 322 (2001) (stating that the perception of the ratified texts as the people's documents empowers citizens to "understand themselves as authorized to speak to matters involving 'what is officially the law/legal system' where the Constitution is concerned, in a way that they do not feel authorized to speak about questions of tort or property law").

264 *Id.* at 299 (emphasis removed).

265 Cf. LEVINSON, *supra* note 55, at 193 (arguing that a commitment to the nation's Constitution is not a commitment to "a series of propositional utterances, [but rather is] a commitment to taking political conversation seriously"); Kumm, *supra* note 248, at 134 ("Citizens' identities are not shaped by constitutional texts, unless the texts have been the focal point of political and legal contestation and deliberation meaningfully connected to the citizens' collective political action.").

266 See VEYNE, *supra* note 187, at 80 ("By referring to lofty [myth-based] reasons instead of making a show of force, one encourages the other to submit willingly and for honorable reasons, which saves face.").



particular text's demands in the future, one has an incentive to reinforce the text's apparent authority by accepting temporary defeat in a debate about that text's demands today.<sup>267</sup>

It is here that the myth's nation-building role is most ironic. If citizens of diverse persuasions are to believe that those texts provide the raw material for generating favorable constitutional outcomes, those texts must indeed be perceived as providing premises around which a diverse population can rally. If a citizen is deeply dissatisfied with the outcome produced by a court's interpretation of a particular text today, she will continue to rally around that text only if she believes that she may be able to persuade judges and her fellow citizens to interpret it differently tomorrow.<sup>268</sup> Yet the texts are able to retain their broad appeal to a diverse citizenry only because they are susceptible to diverse interpretations.<sup>269</sup> The texts are able to unite a diverse population only because they, in fact, *do not* provide ample guidance as to how the American people want all constitutional disputes to be resolved. To see the texts as a nation-building force, one thus cannot say that the job of judges is simply to call balls and strikes, to use Chief Justice Roberts' unfortunate analogy.<sup>270</sup> One must acknowledge that the ratified texts do not themselves prescribe clear answers to all of the nation's constitutional controversies, and that those texts constitute far less than the entirety of the nation's fundamental law.<sup>271</sup> In a very real sense, therefore, the myth of the written

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267 See Post & Siegel, *supra* note 82, at 383 ("The ongoing possibility of shaping constitutional meaning helps explain why Americans remain faithful to their Constitution even when their constitutional views do not prevail."); see also LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* 8–9 (2001) (arguing that it is important in constitutional debates to "entic[e the] losers into a continuing conversation").

268 See Siegel, *supra* note 103, at 1342 ("In the United States, popular confidence that the Constitution is the People's is sustained by understandings and practices that draw citizenry into engagement with questions of constitutional meaning and enable communication between engaged citizens and officials charged with enforcing the Constitution."). Keith Whittington makes a comparable point concerning the possibility of formally amending the ratified texts. Because such amendments are possible, he argues, unhappy citizens are invited to continue in the nation's dialogue about the Constitution's ideal content. See WHITTINGTON, *supra* note 15, at 150–51.

269 Cf. Farber, *supra* note 57, at 1246 ("The words of the Constitution set the parameters for constitutional debate but are rarely decisive.").

270 See *supra* note 16 and accompanying text (recounting Chief Justice Roberts' use of this analogy during his confirmation hearings).

271 Christopher Tiedeman made a comparable point more than a century ago:

It is, no doubt, convenient for the practical lawyer to accept the fiction that the judge does not make law; that he simply declares what was the pre-existing law; but the critical student of political science repudiates it in the presence of the undoubted formulation by the courts of principles, never

Constitution is an effective nation-building device only because it is false.

#### CONCLUSION: CONFRONTING THE PREDICAMENT

Our Enlightenment-bred instincts often tell us that, upon discovering beliefs or assumptions that are false, our responsibility is to expose their fictive qualities and to insist that society not build upon their unreliable foundations.<sup>272</sup> Fulfilling that responsibility can be the source of undeniable intellectual pleasure. There can be few greater joys for the scientist or historian, for example, than discovering that his or her predecessors' assumptions were inaccurate and that the path of truth leads in a wholly unanticipated direction.

Although legal scholars certainly share in such pleasures, they also operate in a world in which reliance upon fictions is often encouraged. Of course, the law does not offer a fiction-creating license to everyone who finds that their preferences inconveniently conflict with the facts. Yet as Lon Fuller explained in his classic treatment of the subject, we routinely do use legal fictions "to reconcile a specific legal result with some premise or postulate."<sup>273</sup> Believing that it is unfair to punish a person for breaking laws of which they had no notice but that ignorance of the law should not excuse criminal conduct, for example, we posit (sometimes inaccurately) that criminal defendants were aware of the laws they are accused of violating.<sup>274</sup> Believing that a state's sovereign immunity should not wholly foreclose the possibility of providing meaningful relief when a state behaves unlawfully, we often draw a fictitious distinction between a state's officers and the state itself.<sup>275</sup> Believing that a person who intends to harm one person but instead accidentally harms a

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before enunciated, and which in many cases conflict hopelessly with the fundamental principles of the past.

TIEDEMAN, *supra* note 37, at 44–45.

272 See FITZPATRICK, *supra* note 5, at 27 ("In modern times . . . mythology has been relegated to the fabulous and the false in contrast to reality and to its forms in science and history . . .").

273 FULLER, *supra* note 23, at 51.

274 See *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.").

275 See, e.g., *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (acknowledging that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), relies upon a "fiction"); see also Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1137 (1989) ("[T]he Court has simply called the *Young* analysis a fiction and persisted in relying on it . . .").

bystander should not escape civil liability for acting with the intent to cause injury, the common law of intentional torts has long relied upon the doctrine of transferred intent, an “arrant, bare-faced fiction.”<sup>276</sup> Far from signaling one’s naïveté, embracing such fictions often marks one as an insider, as one who possesses a sophisticated understanding of the law and of the forces that give the law its shape.

The myth of the written Constitution thus places judges and constitutional scholars in a remarkable predicament. The myth’s claims are not literally true—the nation’s Constitution consists of much more than the formally ratified texts,<sup>277</sup> and judges frequently produce constitutional outcomes that are widely embraced as properly decided, even though one cannot reasonably say they were determined by the will of the American people as expressed in those ratified texts.<sup>278</sup> Once one recognizes the fictive nature of the myth’s claims, it can be difficult to indulge constitutional arguments that presume those claims’ literal accuracy. On the other hand, it is not clear what response one should hope to elicit by pointing out the ways in which those claims are false. After all, the myth helps the American people achieve objectives to which they are profoundly committed—it helps to ease the tension between their commitment to self-rule and their belief in people’s moral fallibility;<sup>279</sup> it helps to ease the tension between their commitment to self-rule and their attraction to judicial supremacy;<sup>280</sup> and it helps to secure the strong sense of nationhood that so many Americans deeply desire.<sup>281</sup> The criminal defense attorney who persuasively argues that her client was not actually aware of the laws her client is accused of violating is bound to be disappointed by her audience’s response: although you have made us acutely aware of your client’s ignorance, we might say, we have decided to embrace a contrary fiction. Should those who point out the literal inaccuracy of the myth of the written Constitution expect anything more?

At least two overarching responses are appropriate—one concerning the modest expectations that reform-minded judges and scholars should hold when venturing onto the myth’s territory, and the other concerning the important work that judges and scholars must nevertheless do. With respect to judges’ and scholars’ expectations, one must recognize that the myth’s claims are far too tightly interwoven with Americans’ fundamental commitments to be easily

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276 William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967).

277 See *supra* Part I.A.

278 See *supra* Part I.B.

279 See *supra* Part II.A.1.

280 See *supra* Part II.A.2.

281 See *supra* Part II.B.

discarded. By serving their insistence upon endorsing popular sovereignty, acknowledging human beings' moral fallibility, embracing judicial supremacy, and preserving a meaningful sense of nationhood, the myth of the written Constitution goes a long way toward legitimating and stabilizing the legal regime that many Americans desire. Those who argue that the myth's claims should be openly rejected are thus doomed for disappointment unless they carry either of two weighty burdens: they must demonstrate either that the objectives at which the myth's claims are aimed are not sufficiently important to warrant indulging such fictions, or that there are more desirable means by which those objectives may be achieved.

Those are heavy burdens indeed, particularly when one realizes that it is not always a pretension to literal truth that causes many to embrace the myth in the first place. Consider the virtual stalemate that often prevails in debates about the best methods of interpreting the nation's formally ratified texts. No matter how many holes originalists and living constitutionalists poke in one another's theories, they rarely manage to shake one another loose from their fundamental interpretive commitments.<sup>282</sup> One soon begins to perceive that those interpretive theories draw many of their loyal adherents not because those theories are seen as laying the strongest claim to literal truth, but because they are seen as providing the best means by which those theories' proponents can achieve the adjudicative outcomes that they believe are appropriate.<sup>283</sup> One never encounters originalists or living constitutionalists who regularly lament the outcomes that their own interpretive methods yield, yet one routinely encounters originalists and living constitutionalists who are critical of the outcomes produced by the interpretive methods of their opponents. Similarly, many Americans are committed to the myth of the written Constitution not because they have examined its claims and judged them to be literally accurate, but because they value the cognitive and nation-building work that those claims do. That is not to say that criticizing the myth is pointless; rather, it is to say that criticizing the myth is unlikely to get one very far unless one takes into account just how much the myth's proponents perceive to be at stake.

How, then, should judges and scholars proceed? To many modern minds, there might appear to be only one intellectually responsible option—namely, assuming the mantle of demythologization and

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282 Cf. Post & Siegel, *supra* note 130, at 570 (arguing that no matter how devastatingly one attacks originalists' methods, originalism will continue to thrive as a tool used by its proponents).

283 See *supra* notes 180–82 and accompanying text.

arguing that fictions should be resolutely shunned, no matter what the costs. After all, aren't we in the modern era defined, at least in part, by our intrepid willingness to follow the path of literal truth wherever it leads? To do otherwise, our instincts tell us, we must be either quaintly unenlightened or culpably deluded.

No matter how powerful our instinct to demythologize, it is not our only intellectually responsible option, and—given the widely valued functions that the myth ably serves—it might not even be our best one. Those trained in the law are well positioned to recognize that embracing fictions cannot be sweepingly denounced—again, the law is full of fictions that we knowingly endorse without giving them a second thought, because we value the conceptual work that they do.<sup>284</sup> Similarly, a community can embrace a mythological story or belief for its capacity to serve that community's deep commitments, even though the community knows that the myth's claims are not literally true.<sup>285</sup> In the case of the myth of the written Constitution, one might thus well choose to devote one's energies not to trying to eradicate the myth, but rather to trying to protect it from the kinds of attacks that, if left unchecked, would undermine its capacity to serve the functions for which it is so widely embraced.

If we acquiesce to the charge that the myth's claims are not literally true (as I have argued that we must<sup>286</sup>), what are the remaining attacks against which the myth requires protection? And how can we provide that protection without abetting an exercise in shameful self-delusion? In the limited space that remains, I want to propose that one can at least begin to respond to those difficult questions by developing a line of argument that starts with a source that might initially seem incongruous—namely, Samuel Taylor Coleridge's early-nineteenth-century musings on poetry.<sup>287</sup> At one point in his career, Coleridge set out to write a series of poems in which “the incidents and agents were to be, in part at least, supernatural,” with the ambition of provoking in the reader “such emotions, as would naturally accompany such situations, supposing them real.”<sup>288</sup> Coleridge summed up his challenge in language that introduced a new phrase into our cultural vocabulary: he believed he would have to write poems that would “transfer from our inward nature a human interest

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284 See *supra* notes 22–23, 273–76 and accompanying text.

285 See *supra* notes 6–12, 186–87 and accompanying text.

286 See *supra* Part I.

287 See COLERIDGE, *supra* note 24, at 5–6 (introducing the pertinent concepts).

288 *Id.* at 5.

and a semblance of truth sufficient to procure for these shadows of the imagination that *willing suspension of disbelief* for the moment, which constitutes *poetic faith*.”<sup>289</sup> When we choose to suspend our disbelief, one commentator later explained, we relax “the sinews ordinarily strung for the effort of criticism, [and] we relapse into an easy acceptance of a delightful thing.”<sup>290</sup> Something akin to poetic faith may be precisely what the myth of the written Constitution requires.

We frequently are deeply moved—sometimes even transformed—by poems, novels, plays, films, and other artistic creations, even though we know they are not literally all that they purport to be: the images are manufactured, the plot is constructed, the characters are played by actors, and so forth. By suspending our ordinary dismissal of those things that are not literally true, we find that artists are able to stir chords deep within us, causing us to see the world in more profoundly truthful ways. Similarly, the Christian theologians I described at the outset—those who do not believe Jesus was literally divine, but who find that asserting Jesus’ divinity is “a mythological or poetic way of expressing his significance”<sup>291</sup>—are suspending their disbelief in order to reach what is, for them, a deeper truth. In both the secular and sacred realms, poetic faith often is aimed not at avoiding the truth, but rather at finding deeper ways of perceiving and expressing it. The willingness to suspend one’s disbelief in order to achieve some larger objective is not the mark of one who is pre-modern; it is the mark of one who is human.

Poetic faith is difficult to exercise, however, when at the same time that one is trying to suspend one’s disbelief one is powerfully reminded of the ways in which one’s experiences are grounded in fictions. In the world of literature, for example, a novel’s resonance can be fatally thwarted by dialogue that rings false or a plot twist that does not plausibly flow from the events that preceded it. A scene in a film that we ordinarily would find deeply compelling would be considerably less so if, while viewing the scene, the film’s director were whispering in our ear about how the scene was constructed. Those Christian theologians who poetically assert that Jesus was divine, but do not believe the claim is literally true, surely would find the myth harder to embrace if they regularly encountered evidence that seemed irreconcilable with a literal ascription of divinity. Like poems,

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289 *Id.* at 6 (emphasis added).

290 E.T. Campagnac, *Make-Believe*, 24 PROC. ARISTOTELIAN SOC’Y 213, 214 (1924); see also *id.* at 215 (defining “poetic faith” as “a faith which creates and for a time maintains the conditions in which its objects can live and have their being”).

291 Hick, *supra* note 11, at ix.

novels, films, and plays, a myth need not be literally accurate in order to be the object of poetic faith, but neither can it appear patently contrived.

For Americans to embrace the myth of the written Constitution, therefore, they must find themselves reasonably able to suspend their disbelief in the myth's propositions. That does not mean that they must achieve the metaphysical impossibility of simultaneously believing and disbelieving the same claims, any more than the person wishing to be transformed by reading a novel or confessing a religious creed must do that which cannot be done. Rather, poetic faith demands that when Americans encounter the realms in which constitutional meanings are shaped, they do not find that the claims made by the myth of the written Constitution are so utterly implausible that they cannot be embraced even for their mythological value. If the fictive qualities of the myth's claims are regularly and powerfully underscored by the way in which the nation's courts and scholars do business—if the ratified texts' lack of adjudicative primacy is repeatedly shoved to the forefront of the public's attention—the myth will lose its power to help create a strong sense of nationhood and resolve the tensions produced by Americans' paradoxical commitments.

When one casts the matter in that light, it becomes apparent that poetic faith in the myth of the written Constitution remains persistently tenuous. The ratified texts leave vast domains of constitutional meaning still to be constructed. Because the ratified texts carry one only a short distance when one tries to decide how particular constitutional disputes ought to be resolved, lawyers' often decisive reliance on extratextual sources of meaning is apparent to anyone who reads judges' opinions with any measure of care. Moreover, courts threaten to short-circuit the American people's poetic faith whenever they produce adjudicative outcomes that bear no plausible relationship to the ratified texts. Even if one thinks that the doctrine of substantive due process ultimately can be justified by the various factors at play, for example, one must acknowledge that some manifestations of the doctrine are controversial for good reason: the doctrine threatens to create uncomfortable daylight between the plausible demands of the ratified texts and the outcomes that judges produce.<sup>292</sup> If the ratified texts come to be seen as empty vessels into which judges are free to pour whatever meanings suit their personal preferences—if the public begins to believe that judges do not find the texts constraining in any significant way—then the institutions that purport to honor those

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292 See *supra* notes 172–80 and accompanying text (discussing substantive due process).

texts will lose their credibility, the myth's fictions will become too implausible to be embraced even for their mythological value, and the objectives that the myth is meant to serve will be made harder to achieve.

At a minimum, therefore, poetic faith in the myth demands that courts and scholars take the ratified texts seriously. Indeed, the fact that those in the law often *do* appear to take the texts seriously goes a long way toward explaining how poetic faith in the myth has flourished for as long as it has. Despite all of their disagreements, originalists and living constitutionalists posit as shared premises that the nation's formally ratified texts provide important premises for constitutional analysis, that those texts must be treated with integrity, that one cannot simply ignore a textual provision because one finds it objectionable, and that the most unassailable constitutional conclusions are those that appear to flow naturally from the texts and that are articulated in the texts' vocabulary. By endorsing those propositions, originalists and living constitutionalists help to ensure that the myth of the written Constitution remains sufficiently plausible to do the work for which it is valued.

Those wishing to preserve the nation's poetic faith in the myth's claims thus face a challenge that is comparable to the one that Robert Post and Reva Siegel argue faces all those who wish both to influence and to benefit from the nation's constitutional regime:

Although the American constitutional system is rife with conflict, there is nonetheless widespread interest in preserving the integrity of constitutional law. This is because citizens who seek to embody their own particular constitutional understandings in law have reason to preserve the authority of the rule of law, even as they endeavor to influence the content of judicial decisionmaking. Those who wish to change the content of constitutional law thus face a dilemma: they must sway courts to their own constitutional values and yet they must also preserve the authority of courts to speak for the Constitution in the name of an independent rule of law.<sup>293</sup>

Because the claims made by the myth of the written Constitution are not literally true, the nation has the flexibility it needs to construct a constitutional regime that usefully places great weight upon tradition, judicial precedent, social movements, and other forces external to the formally ratified texts. But if judges, political leaders, scholars, and others abuse that freedom by pushing the ratified texts so far to

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293 Post & Siegel, *supra* note 82, at 385.



the side that the myth's claims lose their capacity to perform their mythological functions, we eventually may find that we have delegitimized and destabilized the very regime that so many Americans wish to preserve.

