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The Constitution of the United States is a document drafted in 1787, together with the amendments that have been adopted from time to time since then. But in practice the Constitution of the United States is much more than that, and often much different from that. There are settled principles of constitutional law that are difficult to square with the language of the document, and many other settled principles that are plainly inconsistent with the original understandings. More important, when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years. In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires.

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Despite this, the terms of debate in American constitutional law continue to be set by the view that principles of constitutional law must ultimately be traced to the text of the Constitution, and by the allied view that when the text is unclear the original understandings must control. An air of illegitimacy surrounds any alleged departure from the text or the original understandings. In the great constitutional controversies of this century, for example, the contestants have repeatedly charged their opponents with usurpation on the ground that they were insufficiently attentive to the text or the original understandings. That was the claim made by the Justices of the so-called *Lochner* era; it was the claim made by Justice Black, first against the *Lochner* judges and then against other opponents; it was the claim made, during the last twenty years, by opponents of the Warren Court innovations.[1] And today, textualism and originalism continue to be extraordinarily prominent on both sides of the principal debates in constitutional law.[2]

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[1] For uses of textualism and originalism in the *Lochner* era (so called after *Lochner v New York*, 198 US 45 (1905)), see, for example, *United States v Butler*, 297 US 1, 62 (1936) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."); *Home Building & Loan Association v Blaisdell*, 290 US 398, 453 (1934) (Sutherland dissenting) ("The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it."). For Justice Black's textualism and originalism, see, for example, *Adamson v California*, 332 US 46, 70-81 (1947) (Black dissenting); *Ferguson v Skrupa*, 372 US 726, 730-31 (1963); *Harper v Virginia Board of Elections*, 383 US 663, 677-80 (1966) (Black dissenting); *Griswold v Connecticut* 381 US 479, 519 (1965) (Black dissenting). For sustained attacks on the Warren Court, on originalist and textualist grounds, see, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 69-95, 130-32 (Free Press 1990); Edwin Meese, III, *Interpreting the Constitution*, in Jack N. Rakove, ed, *Interpreting the Constitution* 13, 18 (Northeastern 1990); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw U L Rev 226 (1988); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 283-99, 363-72 (Harvard 1977).

[2] See, for example, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131 (1991); Akhil Reed Amar and Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 Harv L Rev 701, 702-25 (1995).

Bruce Ackerman, 1 *We the People: Foundations* (Belknap 1991), should also be considered a form of originalism, for reasons discussed at text accompanying notes 29-30. See also Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv L Rev 799, 808-13 (1995). Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv L Rev 1221, 1225 & n 9 (1995), is critical of both of these originalist approaches, but on the ground that they are *insufficiently* respectful of "text, structure, and history."

But textualism and originalism remain inadequate models for understanding American constitutional law. They owe their preeminence not to their plausibility but to the lack of a coherently formulated competitor. The fear is that the alternative to some form of textualism or originalism is "anything goes"—that constitutional law, if cut loose from text and original understandings, will become nothing more than a reflection of judges' political views.

In fact, however, the alternative view is at hand, and has been for many centuries, in the common law. The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices. The emphasis on text, or on the original understanding, reflects an implicit adherence to the postulate that law must ultimately be connected to some authoritative source: either the Framers, or "we the people" of some crucial era. Historically the common law has been the great opponent of this authoritative approach. The common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time. And it is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by "we the people," that best explains, and best justifies, American constitutional law today.

In Part I, I will outline the common law approach to constitutional interpretation. I begin by identifying some puzzling aspects of our practices of constitutional interpretation—things that seem well settled but that so far lack a convincing theoretical justification. Then I will suggest how the common law approach can explain and justify those well settled practices. In Part II, I will discuss the rational traditionalism that is the most important part of common law constitutional interpretation. This form of traditionalism, characteristic of the common law method, calls for recognizing the value of conclusions that have been arrived at, over time, by an evolutionary process; but it also describes the circumstances in which such conclusions should be rejected. In Part III, I will discuss another component of the common law approach to constitutional interpretation, what might be called conventionalism. Conventionalism, which is the primary justification for the continued role of the text in constitutional law, is a generalization of the familiar idea that sometimes it is more important for a matter to be settled than for it to be

settled right. In Part IV, I will consider whether common law constitutional interpretation gives judges too much power or is otherwise inappropriate for a democracy.

I. THE PUZZLES OF CONSTITUTIONAL INTERPRETATION

A. Noah Webster's Problem, and Some Others

The practice of following a written constitution, increasingly common throughout the world, is puzzling on at least two levels. First is what might be called the central problem of written constitutionalism. Following a written constitution means accepting the judgments of people who lived centuries ago in a society that was very different from ours. To adapt an argument that Noah Webster made in 1787, it would be bizarre if the current Canadian parliament asserted the power to govern the United States on such matters as, for example, race discrimination, criminal procedure, and religious freedom.[3] But we have far more in common—demographically, culturally, morally, and in our historical experiences—with Canadians of the 1990s than we do with Americans of the 1780s or 1860s. Even if we pay no attention to specific intentions as revealed in the ratification debates and similar sources, the words of the Constitution reflect decisions made by those Americans. Why should we allow those decisions to govern our politics today?

Our practice is also puzzling on a less abstract level. There are a number of specific aspects of our practice of constitutional interpretation that are well settled, and that lie at the core of how constitutional law operates in our society, but that are difficult to justify under any theoretical approach now in circulation. These puzzles concern not just how the courts interpret the Constitution but how the Constitution is received in the society as a whole.

1. Text.

Everyone agrees that the text of the Constitution matters.[4]

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[3] "[T]he very attempt to make *perpetual* constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia." Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 379 (North Carolina 1983) (quoting Webster). On the context and significance of Webster's argument, see Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 137-42 (Chicago 1995).

[4] See, for example, Paul Brest, *The Misconceived Quest for the Original Understand-*

Virtually everyone would agree that sometimes the text is decisive.[5] But some constitutional provisions are interpreted in ways that are very difficult to reconcile with the text.[6] And principles with no clear textual source are enforced.[7] If we are cavalier with the text sometimes, why do we treat it somewhat seriously almost all the time, and extremely seriously sometimes?

2. The Framers' specific intentions.

Virtually everyone agrees that the specific intentions of the Framers count for something.[8] In litigation over constitutional issues, evidence that the Framers' specific intentions favored one position is at least a strong argument. It is unusual for clear evidence of a specific intention to be disregarded, and occasionally specific intentions are decisive.[9]

But sometimes, and on important issues, the Framers' specific intentions are overridden with only a little concern.[10] Originalists urge that specific intentions must be taken more seriously; some critics reject the originalist position and suggest that specific intentions should count for little or nothing.[11] In the meantime a practice somewhere in between—counting specific intentions for something but not everything—seems well settled.[12] But that settled practice is not easy to rationalize.

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ing, 60 BU L Rev 204, 205 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan L Rev 703, 706 (1975).

[5] See, for example, Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189, 1244 (1987); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan L Rev 843, 844 & n 6 (1978). But see Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 Nw U L Rev 250 (1989); Gary Peller, *The Metaphysics of American Law*, 73 Cal L Rev 1151 (1985).

[6] See text accompanying notes 54-69.

[7] See text accompanying notes 69-70.

[8] See, for example, Brest, 60 BU L Rev at 236 (cited in note 4) ("[N]onoriginalist adjudication . . . accord[s] presumptive weight to the text and original history."); Tribe, 108 Harv L Rev at 1242 n 66 (cited in note 2); Fallon, 100 Harv L Rev at 1198 & n 36 (cited in note 5).

[9] See, for example, *Marsh v Chambers*, 463 US 783, 790 (1983).

[10] See Cass R. Sunstein, *The Partial Constitution* 97-98 (Harvard 1993) (citing examples). See also Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* 61-69 (Yale 1982); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv L Rev 30, 66-67 (1993); Grey, 27 Stan L Rev at 710-14 (cited in note 4).

[11] For a defense of originalism on this point, see, for example, Bork, *Tempting of America* at 155-60 (cited in note 1); Berger, *Government by Judiciary* at 193-220 (cited in note 1); Kay, 82 Nw U L Rev at 258-59 (cited in note 1). For the critique, see Brest, 60 BU L Rev at 213-17, 229-34 (cited in note 4); Grey, 27 Stan L Rev at 715-17 (cited in note 4).

[12] See, for example, Philip Bobbitt, *Constitutional Interpretation* 12-15 (Blackwell

3. The role of moral judgments.

A similar hard-to-rationalize equilibrium seems to hold on the question whether judges and other actors interpreting the Constitution may rely on their own judgments of right and wrong (generally phrased as judgments of fairness or good policy). It's hard to see how anyone could interpret the Constitution without relying on such judgments at least sometimes.[13] But at the same time, the practice has an air of illegitimacy about it. It is often condemned as usurpation.[14] And no one suggests that the interpreter's judgments of right and wrong are the only things that matter.

4. The "preferred position" of some provisions.

Not all constitutional provisions are equal; some are interpreted more expansively than others.[15] For about the last half century, courts have narrowly interpreted the provisions of the Constitution that protect economic liberties, while interpreting other provisions, such as the guarantee of free speech, broadly.[16] The legitimacy of this practice, by now well settled, has been one of the great issues of modern constitutional law. This is the issue

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1991); Fallon, 100 Harv L Rev at 1998 (cited in note 5).

[13] See, for example, Sunstein, *Partial Constitution* at 101 (cited in note 10); Fallon, 100 Harv L Rev at 1204 & n 67 (cited in note 5); Bobbitt, *Constitutional Interpretation* at 20-22 (cited in note 12).

[14] This charge was frequently made by Justice Black. See, for example, *Harper v Virginia Board of Elections*, 383 US 663, 677 (1966) (Black dissenting) (accusing the majority of "consulting its own notions rather than following the original meaning of the Constitution"). See also Bork, *Tempting of America* at 258-59 (cited in note 1); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 63-69 (Harvard 1980); Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L Rev 353, 353-61 (1981).

[15] Or at least so it is conventionally said. It is difficult to define in the abstract what counts as a more or less expansive interpretation, or as a "narrow" or "broad" interpretation. The terms may more properly refer to a level of judicial activity, rather than to the interpretation of the clause. Current interpretations of the Free Speech Clause entail more judicial invalidation of statutes and other government actions than do current interpretations of the Takings or Contract Clauses; in that sense the Free Speech Clause might be said to be interpreted more broadly. On the other hand, one might say that there is more judicial intervention only because a wide range of confiscations of property or abrogations of contracts are unthinkable politically, and that the features of the political culture that make them unthinkable are themselves part of the way the Takings Clause and the Contract Clause are understood. In that sense there is no basis for saying that those clauses are interpreted more narrowly.

[16] See, for example, *Chicago Board of Realtors, Inc. v City of Chicago*, 819 F2d 732, 743-44 (7th Cir 1987) (Posner concurring) ("Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment—which is no more absolute in its language or clearcut in its history than the contract clause—as loosely as it now interprets the contract clause.").

to which the "preferred position" debate and the *Carolene Products* footnote were directed.[17] Here again there is a disjunction between settled practice and the theoretical debate, because a fully convincing theoretical justification for the practice still seems elusive.

5. The priority of doctrine over text.

Although everyone agrees that the text is in some sense controlling, in practice constitutional law generally has little to do with the text. Most of the time, in deciding a constitutional issue, the text plays only a nominal role. The issue is decided by reference to "doctrine"—an elaborate structure of precedents built up over time by the courts—and to considerations of morality and public policy.

This point is, I think, obvious for judicial decisions. It is the rare constitutional case in which the text plays any significant role. Mostly the courts decide cases by looking to what the precedents say.[18] But the same is true for other political actors and for society as a whole. In public and political debates over the First Amendment, while the text is ritually incanted ("no law"), in fact the text matters very little (no one suggests that the First Amendment applies only to Congress), and instead the public debate invokes notions derived from precedents—clear and present danger, prior restraint, obscenity, fighting words, viewpoint discrimination, subsidy versus prohibition, reckless disregard, incidental regulation, the centrality of political speech. Debates over the Equal Protection Clause invoke not the words of the Constitution but the supposed principles of *Brown v Board of Education*[19] and subsequent cases. The "requirement" of a search warrant is notoriously hard to square with the words of the Fourth Amendment.[20] Most informed nonlawyers would

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[17] *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938). On the "preferred position" debate, see, for example, *Murdock v Pennsylvania*, 319 US 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."), and Justice Frankfurter's criticism of this approach in *Kovacs v Cooper*, 336 US 77, 90-97 (1949) (Frankfurter concurring).

[18] See, for example, Charles Fried, *Constitutional Doctrine*, 107 Harv L Rev 1140 (1994); Brest, 60 BU L Rev at 234 (cited in note 4); Harry W. Jones, *The Brooding Omnipresence of Constitutional Law*, 4 Vt L Rev 1, 28 (1979); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum L Rev 723, 770-72 (1988).

[19] 347 US 483 (1954).

[20] See Telford Taylor, *Two Studies in Constitutional Interpretation* 23-24 (Ohio State 1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 761 (1994).

probably say that the Constitution requires "the separation of church and state"—a principle that is by no means a necessary implication of the words of the Establishment Clause.[21] Debates over criminal justice invoke such ideas as reasonable doubt and the presumption of innocence that are not found in the text.

6. The prevalence and importance of nontextual amendments.

The Constitution has changed a great deal over time, but—to overstate the point only slightly—the written amendments have been a sidelight. Most of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment. This is true, for example, of the 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. In some of these instances—notably the expansion of the congressional commerce power and the enforcement of gender equality—amendments bringing about the changes were actually rejected,[22] but the changes occurred anyway.

B. Common Law Constitutionalism

1. The two traditions.

There is, prominent in our legal tradition, a method—the method of the common law—that both resolves the central puzzle

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[21] See, for example, Michael W. McConnell, *Religious Freedom at a Crossroads*, in Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein, eds, *The Bill of Rights in the Modern State* 115, 117-18, 168-94 (Chicago 1992).

[22] See, for example, Gerald Gunther, *Constitutional Law* 115 (Foundation 12th ed 1991) (child labor amendment); Jane J. Mansbridge, *Why We Lost the ERA* (Chicago 1986).

of written constitutionalism and makes sense of these apparently problematic aspects of our settled interpretive practices. The common law method has not gained currency as a theoretical approach to constitutional interpretation because it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind. But our written constitution has, by now, become part of an evolutionary common law system, and the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law.[23]

The currently prevailing theories of constitutional interpretation are rooted in a different tradition: implicitly or explicitly, they rest on the view that the Constitution is binding because someone with authority adopted it. This view derives from a tradition—that of Austin and Bentham, and ultimately Hobbes—that historically has been the great opponent of the common law tradition. This authoritative tradition sees the law as the command of a sovereign.[24] Most current theories of constitutional interpretation are of course vastly more refined than

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[23] The notion that American constitutional law is a common law system has no doubt occurred to many, see, for example, Frederick Schauer, *Is the Common Law Law?*, 77 Cal L Rev 455, 470 & n 41 (1989), but it does not seem to have received a theoretical defense, see, for example, Brest, 60 BU L Rev at 228-29 & n 90 (cited in note 4) (identifying "adjudication" and the "'common law' method" with "nonoriginalist strategies of constitutional decisionmaking"). Harry H. Wellington has endorsed what he describes as a "common-law method of constitutional interpretation." Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* 127 (Yale 1990). See also Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L J 221, 265-311 (1973). But Wellington appears to understand the common law method quite differently, emphasizing the role of "public" or "conventional" morality and the text more heavily than the doctrinal structure established by precedent. Wellington, *Interpreting the Constitution* at 82-88, 96-123; Wellington, 83 Yale L J at 284. See also Ely, *Democracy and Distrust* at 63-69, 218 n 112 (cited in note 14) (criticizing Wellington); Ackerman, 1 *We the People* at 17-18 (cited in note 2) (describing a "Burkean sensibility" that is "pronounced amongst practicing lawyers and judges," but that lacks a full theoretical justification). The "Burkean tendency" Ackerman describes—which he says is to some degree reflected in Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 Tex L Rev 35 (1981), and Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L J 1567 (1985)—seems substantially more conservative than the common law approach I defend here, which, as I will discuss below, allows for innovation and even sudden change. Compare Ackerman, 1 *We the People* at 17-18 (cited in note 2), with text accompanying notes 40-42.

[24] John Austin, *The Province of Jurisprudence Determined*, in John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* 1 (Noonday 1954) (H.L.A. Hart, ed); Jeremy Bentham, *Of Laws in General* (Athlone 1970) (H.L.A. Hart, ed); H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon 1982); Thomas Hobbes, *Leviathan: with selected variants from the Latin edition of 1668* 172, 173 (Hackett 1994) (Edwin Curley, ed).

the reference to a "command" would suggest. But they all in some way reflect the hold of the authoritative tradition rather than the tradition of the common law.

This point is perhaps most obvious in the case of straightforward forms of originalism. In its simplest form, originalism treats the Framers of the Constitution (or its ratifiers) as the authoritative entity, comparable to Austin's sovereign. Originalism can, of course, be defended on other grounds;[25] but much of the intuitive plausibility of originalism stems from the notion that the Framers are a super-legislature. Just as our representatives in Congress have the power to tell us how to act, so do, in a more indirect way, the Framers.[26]

The more sophisticated variants of originalism also belong to the Austinian tradition. Some of these variants emphasize the need to reinterpret or "translate" the Framers' commands in ways that take account of, for example, changes in factual knowledge and social understandings that have occurred since the Constitution was adopted.[27] But the Framers' command is still the starting point, and still authoritative in significant ways.[28] Perhaps the most important variant on originalism is what might be called the neo-Hamiltonian view,[29] according to which judges should enforce not necessarily the intentions or understandings of those who adopted the original constitutional provisions but rather the decisions made by "we the people" at subsequent moments, when the population at large was intensely involved in politics.[30] This approach, too, adheres to the command model;

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[25] See, for example, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849, 862-64 (1989).

[26] See Bork, *Tempting of America* at 143-60 (cited in note 1); Monaghan, 56 NYU L Rev at 362-63, 396 (cited in note 14).

[27] See Lawrence Lessig, *Fidelity in Translation*, 71 Tex L Rev 1165, 1169-82, 1263-68 (1993). Among the prominent antecedents of this view, I believe, is Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv L Rev 1 (1955).

[28] Lessig, for example, draws an analogy between constitutional interpretation and (sophisticated understandings of) the relationship between principal and agent, see Lessig, 71 Tex L Rev at 1254 (cited in note 27), and he emphasizes that "translation" is an act of "fidelity" to the decisions of the Framers: "Firm within our legal culture is the conviction that if judges have any duty it is a duty of fidelity to texts drafted by others, whether by Congress or the Framers." Id at 1182. The reliance on fidelity to a command makes Lessig's view Austinian. Lessig's account does, however, allow for changes based on the evolution of social understandings. See id at 1233-37. In those respects it may have more in common with the common law view than either more straightforward originalism or neo-Hamiltonian approaches do. See text accompanying notes 29-30.

[29] After Alexander Hamilton's famous justification of judicial review in Federalist 78, in Clinton Rossiter, ed, *The Federalist Papers* 464, 466-72 (Mentor 1961).

[30] Ackerman, 1 *We the People* (cited in note 2), is the leading statement of the neo-

now, the authoritative entity is not the Framers but "we the people," appropriately defined.[31]

My argument is that no version of a command theory, however refined, can account for our constitutional practices. Constitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory.

In a sense this should not be surprising. The common law is the most distinctive feature of our legal system and of the English system from which it is descended. We should expect that the common law would be the most natural model for understanding something as central to our legal and political culture as the Constitution. Other theories of constitutional interpretation struggle with the question why judges—and not historians, philosophers, political scientists, or literary critics—are the central actors in interpreting the American Constitution; the common law, more than any other institution, has been the province of judges. American constitutional law is preoccupied, perhaps to excess, with the question of how to restrain judges, while still allowing a degree of innovation; the common law has literally

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Hamiltonian view. Ackerman does call for "synthesis" of the judgments made at the various times when "the people" have acted, see id at 86-104, an idea that has some resemblance to the common law approach. But the emphasis in the neo-Hamiltonian view is still crucially on discontinuous change, and changes brought about by public opinion. The "synthesis" notion also associates Ackerman's approach (to a limited degree) with views that stress the need for narrative continuity in the law. Those views are at odds with the common law approach in important ways. See text accompanying notes 40-42. On the authoritarian nature of such views, see Frank Michelman, *Law's Republic*, 97 Yale L J 1493, 1515-24 (1988).

[31] There are other nonoriginalist approaches that, while they cannot be called Austinian, still seem to be under the sway of the command theory to some degree. The representation-reinforcement view of Ely, *Democracy and Distrust* at 77-88 (cited in note 14), and others, see, for example, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va L Rev 747, 747-48, 772-82 (1991), relies crucially on the text of the Constitution and its implicit structure. The argument is partly that representation reinforcement, or improving the democratic process, is the best approach because (among other things) it assigns judges the normatively best role, Ely, *Democracy and Distrust* at 101-04 (cited in note 14); but the argument is also partly that the representation-reinforcement approach is implicit in the Framers' design. See, for example, id at 88-101. This latter aspect of the argument seems to be originalist or textualist. The "law as integrity" theory of Ronald Dworkin, *Law's Empire* (Belknap 1986), might also seem implicitly (and unconsciously) beholden to the command theory, because it construes the law as if there were a single intelligence behind it: the law is to be seen as the work of "the community personified," id at 167-75, or as a chain novel that could have been written by one person, id at 228-38, or as an excogitation of "Hercules," id at 238-44, 379-81. The constructed single intelligence might be said to be the counterpart of the Austinian sovereign. A common law approach, by contrast, does not require that the law cohere in this way.

centuries of experience in the use of precedent to accomplish precisely these ends.

Historically, the common law tradition has been burdened with a degree of mysticism and also, at times, with excessive conservatism.[32] But neither of those features is an essential attribute of the common law tradition. As I will suggest below, the method of the common law can be understood in an entirely rational way, free of medieval holdovers and notions of "time immemorial." As for the resistance of the common law to change: at various periods in its history the common law has shown a great capacity for innovation, and some of the greatest common law judges—Coke, Hale, and Mansfield in Britain, and Shaw in this country—are famous for the changes they brought about in the common law. The same is true of, for example, Cardozo, perhaps the greatest common law judge of this century; and Cardozo's *The Nature of the Judicial Process*,[33] the leading statement of the common law approach in this century, emphasizes the importance of innovation.

Properly understood, then, the common law provides the best model for both understanding and justifying how we interpret the Constitution. The common law approach captures the central features of our practices as a descriptive matter. At the same time, it justifies our current practices, in reflective equilibrium, to anyone who considers our current practices to be generally acceptable—either as an original matter or because they are the best practices that can be achieved for now in our society.[34] The common law approach makes sense of our current practices in their broad outlines; but at the same time, it suggests some ways in which our practices might be modified. It also suggests other ways in which our practices should not be modified, for example in the direction of a greater emphasis on original intent.

Perhaps common law constitutionalism is not the best we could do if we were writing on a blank slate. But unless our current practices are to be rejected wholesale, the common law model is (I suggest) the best way to understand what we are doing; the best way to justify what we are doing; and the best guide to resolving issues that remain open.[35]

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[32] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* 36-55 (Cambridge 1957).

[33] Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale 1960).

[34] On reflective equilibrium, see John Rawls, *A Theory of Justice* 20-21, 48-51 (Belknap 1971); John Rawls, *Political Liberalism* 8-9, 96-97 (Columbia 1993).

[35] This type of approach—a combination of description and justification—has been

2. The common law, written constitutions, and statutes.

At least two somewhat counterintuitive consequences follow from the common law approach to constitutional interpretation. The first is that the interpretation of the Constitution has less in common with the interpretation of statutes than we ordinarily suppose. Conventionally we think of legal reasoning as divided into common law reasoning by precedent on the one hand, and the interpretation of authoritative texts on the other. Constitutional and statutory interpretation, while of course different in many respects, are viewed as forms of the latter and fundamentally different from the former.[36]

In fact, constitutional interpretation, as practiced today in this country, belongs on the other side of the line. The command view, although too simple, may make sense for many statutes: a recent statute enacted by the people's representatives is plausibly an authoritative command of the sovereign that should be followed for that reason. Of course this point must not be overstated. For many statutes, a common law approach to interpretation may again be both the best description of our practices and the best account of how we should proceed.[37] But the usual reflex is to associate the interpretation of statutes with the interpretation of the Constitution, and to contrast both with the common law. To whatever extent the contrast with the common law is true of statutes, it is not true of an eighteenth- and nineteenth-century constitution. Some of the puzzling aspects of our current practic-

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called "interpretive." See, for example, Dworkin, *Law's Empire* at 46-68 (cited in note 31); Fallon, 100 Harv L Rev at 1198-99 (cited in note 5). This may be a misleading term. The idea is not to interpret our own practices—"interpretation" seems to be an idea better applied to someone else's practices—but to see if we can *justify* practices to which we are (to some degree) committed, while leaving open the possibility of changing these practices to some degree and providing guidance on how to decide controversial issues that arise with these practices. The idea of justifying a practice in reflective equilibrium therefore seems more suitable.

[36] See Monaghan, 56 NYU L Rev at 392-93 (cited in note 14); Grey, 27 Stan L Rev at 703-04 (cited in note 4); Richard A. Posner, *Problems of Jurisprudence* 247-61 (Harvard 1990). See generally Lessig, 71 Tex L Rev at 1218-50 (cited in note 27) (applying same analysis to statutes and the Constitution).

[37] See, for example, *Northwest Airlines, Inc. v Transportation Workers Union*, 451 US 77, 95 (1981); *National Soc'y of Professional Eng'rs v United States*, 435 US 679, 688 (1978). See also Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 S Ct Rev 429, 527-40 (1994); Guido Calabresi, *A Common Law for the Age of Statutes* 101-19, 161-66 (Harvard 1982). It may be that statutory interpretation comes in different forms, and the interpretation of certain statutes (old statutes or those with relatively open-ended phrasing) resembles the common law more than the interpretation of others.

es of constitutional interpretation appear problematic only because of the unreflective association of constitutional and statutory interpretation. Once we understand constitutional interpretation as an outgrowth of the common law, those practices are much less puzzling.

The second consequence of the common law approach to constitutional interpretation is of particular significance now, in a time of constitutional ferment in much of the world. It is that the conventional distinction between written and unwritten constitutions should be reconsidered.[38] The important distinction is not between nations with written constitutions and those with unwritten constitutions, but rather between societies with mature, well established constitutional traditions and those with insecure traditions. The written constitutionalism of the United States has much more in common with the unwritten constitutionalism of Great Britain than it does with the written constitutionalism of a newly formed Eastern European state—or, for that matter, than it does with the written constitutionalism of, say, the postwar German Federal Republic or the Fifth French Republic in its first decade.

This conclusion should not be surprising. Anyone not antecedently committed to the distinction between written and unwritten constitutions would surely say that the constitutions of the United States and Britain have more in common than those of the United States and France, to say nothing of Poland or the Czech Republic. The common law approach to constitutional interpretation—an approach that reduces (although it does not eliminate) the distinction between written and unwritten constitutions—explains why this is so in a way that other views cannot.

3. An overview.

Common law constitutional interpretation has two components. Each of these components provides a partial explanation for why we should pay attention to the Constitution. Together they provide both the best available answer to that question and, I believe, the best account of our current practices of constitutional interpretation.

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[38] For an example of the conventional argument in support of this distinction, see Frank H. Easterbrook, *Abstraction and Authority*, 59 U Chi L Rev 349, 363, 375 (1992).

The first component is traditionalist. The central idea is that the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances. The second component is conventionalist. It emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying ready-made solutions to problems that otherwise would be too costly to resolve. The traditionalism underlying the practice of constitutional interpretation is a rational traditionalism that acknowledges the claims of the past but also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete. The conventionalist component helps explain why the text of the Constitution is important and how much flexibility judges should have in interpreting it.

II. TRADITIONALISM IN COMMON LAW CONSTITUTIONAL INTERPRETATION

A. Rational Traditionalism

Traditionalism in some realms of life is a matter of adhering to the practices of the past just because of their age. The traditionalist component of common law constitutional interpretation is different because it has a more rational basis. Its central notion is not reverence for the past either for its own sake or because the past is somehow constitutive of one's own or one's nation's "identity."[39] Instead, the traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.

The central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time. Judgments of this kind embody not just serious thought by one group

[39] For versions of these other forms of traditionalism in a legal context, see Fried, 107 Harv L Rev at 1140-41, 1144-57 (cited in note 18); Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029, 1046, 1066 (1990); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 215 (Belknap 1993). See Rebecca L. Brown, *Tradition and Insight*, 103 Yale L J 177, especially 212-13 (1993), and David Luban, *Legal Traditionalism*, 43 Stan L Rev 1035, 1040-42 (1991), for criticisms of this form of traditionalism. Each endorses an approach that, while not called traditionalist, seems compatible with the rational traditionalism I outline here. See, for example, Brown, 103 Yale L J at 213-22; Luban, 43 Stan L Rev at 1055-57.

of people, or even one generation, but the accumulated wisdom of many generations. They also reflect a kind of rough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough.

Because, in this view of traditionalism, the age of a practice alone does not warrant its value, relatively new practices that have slowly evolved over time from earlier practices deserve acceptance more than practices that are older but that have not been subject to testing over time. That is why this form of traditionalism is associated with the common law and a system of precedent. New precedents, at least to the extent that they reflect a reaffirmation and evolution of the old, count for more than old precedents that have not been reconsidered.[40]

The traditionalist argument for obeying the Constitution is that the Constitution reflects judgments that should be taken seriously for these reasons. As I will discuss later, traditionalism does not provide a completely solid justification for adhering to the text of the Constitution, but it is a start. The Framers do not have any right to rule us today, but their judgments were the judgments of people (the Framers and ratifiers) acting on the basis of serious deliberation. Moreover, the parts of the Constitution that have not been amended (the traditionalist argument says) have obtained at least the acquiescence, and sometimes the enthusiastic reaffirmation, of many subsequent generations. Consequently, these judgments should not be swept aside lightly. They should be changed only if there is very good reason to think them mistaken, or if they fail persistently.

Understood in this way, traditionalism is counsel of humility: no single individual or group of individuals should think that they are so much more able than previous generations. This form of traditionalism also subsumes the common-sense notion that one reason for following precedent is that it is simply too time consuming and difficult to reexamine everything from the ground up. The premise of that common-sense notion is that any radical reexamination of existing ways of doing things is likely to discard

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[40] See, for example, *Planned Parenthood v Casey*, 505 US 833, 864-70 (1992) (plurality opinion). See generally Michael J. Gerheardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo Wash L Rev 68, 109-10 (1991); Rupert Cross and J.W. Harris, *Precedent in English Law* 125-64 (Clarendon 4th ed 1991); Melvin Aron Eisenberg, *The Nature of the Common Law* 50-76 (Harvard 1988).

good practices, perhaps because it misunderstands them, and is unlikely to find very many better ones.

These are familiar ideas, perhaps most commonly associated with Burke. But they are also the underpinnings of the common law approach to precedent. Before Burke wrote, this form of traditionalism was developed by Hale, Blackstone, and Coke, the great ideologists of the common law.[41] Indeed, Burke wrote at a time when the common law approach was a mainstay of English

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[41] See, for example, *Calvin's Case*:

> [W]e are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.

77 Eng Rep 377, 381 (KB 1608). See also Matthew Hale, *Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe*, reprinted in William Holdsworth, *A History of English Common Law* 504 (Little, Brown 1937) (spelling and capitalization updated):

> [I]t is a reason for me to prefer a law by which a kingdom has been happily governed four or five hundred years than to adventure the happiness and peace of a kingdom upon some new theory of my own though I am better acquainted with the reasonableness of my own theory than with that law. Again I have reason to assure myself that long experience makes more discoveries touching conveniences or inconveniences of laws than is possible for the wisest council of men at first to foresee. And that those amendments and supplements that through the various experiences of wise and knowing men have been applied to any law must needs be better suited to the convenience of laws, than the best invention of the most pregnant wits not aided by such a series and tract of experience.

Compare Edmund Burke, *Reflections on the Revolution in France* 58-59 (Dent 1940):

> The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *à priori*. . . . The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society.

Compare also id at 84:

> We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.

political culture, and he may have drawn more or less consciously on the common law approach as his model for how society should change.[42] The common law ideology often had, in addition, a mystical component, with its appeal to "time out of mind" and the ineffable spirit of the English people.[43] But traditionalism need not have—and as I have defined it does not have—any such mystical aspect. It can be placed on an entirely rational footing.

In modern terms one might say that traditionalism is a recognition of bounded rationality.[44] Humans are not perfect computing machines. People do not have the resources, intellectual and otherwise, to consider every question anew with any hope of consistently reaching the right result. Given the limits of human capacities, it is often rational to use heuristic devices or rules of thumb that have been worked out by others over time—to draw on the common stock of wisdom, in Burke's terms.[45] The precise extent to which this is true, and exactly where we should look for heuristic aids, are matters of dispute; the common law reliance on precedent is only one possible approach. But the core ideas of common law traditionalism—humility, the limits of human reason, and distrust of abstract argument—are plausible and not at all parochial or mystical.

B. Innovation and Morally Unacceptable Traditions

Any traditionalist view must address the question of when a tradition should be rejected on the ground that it is morally wrong. Some of the most celebrated accomplishments of American constitutional law in this century have overturned established doctrine—notably the New Deal abandonment of freedom of contract and expansion of federal legislative power; the Warren Court's many innovations, especially *Brown*, the most famous case involving a morally unacceptable tradition; and more recent innovations in the law of gender equality. It might be thought

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[42] See J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in J.G.A. Pocock, ed, *Politics, Language, and Time: Essays on Political Thought and History* 206-32 (Chicago 1989).

[43] See, for example, Pocock, *The Ancient Constitution and the Feudal Law* at 33-34 (cited in note 32), quoting John Davies's unpaginated preface to *Les Reports des Cases & Matters en Ley, Resolves & Adjudges en les Courts del Roy en Ireland* (Atkyns 1674).

[44] The origin of this notion is in Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q J Econ 99, 99-101 (1955). See generally Herbert A. Simon, *Models of Man: Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting* (Wiley 1957).

[45] Burke, *Reflections on the Revolution in France* at 84 (cited in note 41). See also Hale, *Reflections* at 505 (cited in note 41).

that common law constitutionalism, with its emphasis on tradition and precedent, would be too receptive to pernicious traditions and would have a difficult time justifying dramatic innovations like these.

But when common law traditionalism is placed on a rational basis, it is not the iron rule that traditionalism is sometimes thought to be. Traditionalism need not mean that all traditions are sacrosanct or that abstract argument is never to be accepted. If one has a great deal of confidence in an abstraction, it can override the presumption normally given to things that have worked well enough for a long time. But that is the structure of the controversy: are we sufficiently confident in the abstract or theoretical argument to justify casting aside the work of generations? Even if we are, we should prefer evolutionary to revolutionary change. But revolutionary change remains possible, and tradition is not to be venerated beyond the point where the reasons for venerating it apply.

Traditionalism, once it is understood in this rational way, answers the concern about morally unacceptable traditions. That concern has greater force when traditionalism is justified in less rationalistic terms, for example as establishing a quasi-religious bond with the past or as maintaining a national identity. The question then becomes what to do when the past, or the nation's identity, is bound up with a practice that one considers morally wrong. But a rationalistic account of traditionalism just establishes a requirement that one give the benefit of the doubt to past practices. If one is quite confident that a practice is wrong—or if one believes, even with less certainty, that it is terribly wrong—this conception of traditionalism permits the practice to be eroded or even discarded.

In fact it is a great strength of the common law approach, compared to other views, that it gives relatively clear guidance about how we are to weigh the claims of tradition against our current assessment of the justice or appropriateness of a legal rule. Everyone recognizes that law, including constitutional law, is in substantial part about following precedent and otherwise maintaining continuity with the past. Nearly everyone also recognizes that sometimes we must depart from the teachings of the past because we think they are not just or do not serve human needs. Everyone also knows that it is not possible to specify an algorithm for deciding when such a departure is warranted. The challenge is to give as illuminating an account as we can of how that decision is to be made: to specify what we should take into

account and how we should think about the problem of reconciling the claims of the past with those of morality or fairness.

Other approaches are either less plausible or much less helpful in this respect than a common law theory based on rational traditionalism. Consider in this connection approaches that emphasize the need for the law to maintain some form of narrative continuity, or the theory of "law as integrity"—that maintaining continuity with the past is a requirement of "integrity" even when we would now regard the past decisions as wrong.[46] "Integrity" in this sense is to be balanced against the requirements of "justice and fairness." As others have argued, this view seems not fully to come to grips with how extraordinary, and problematic, it is to perpetuate judgments that we now believe, all things considered, to be morally wrong.[47] It is odd to say that "integrity" or "fairness" or any other recognized virtue requires us (even ceteris paribus) to continue to do things that are wrong, just because we have done them before.[48] Without a clear understanding of why we should not simply repudiate what are, by hypothesis, wrong judgments, it is difficult to know when we should discard them, or even how to think about that question.

The common law approach, as I have characterized it, escapes this predicament. It does not suppose that there is some independent value in adhering to past judgments that are by hypothesis wrong, which is to be compared to the value of making the right judgment. The idea of rational traditionalism is simply that we should think twice about our judgments of right and wrong when they are inconsistent with what has gone before. We adhere to past practices not despite their wrongness, but

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[46] "Law as integrity" is the theory developed in Dworkin, *Law's Empire* (cited in note 31). See also the discussion in Michelman, 97 Yale L J at 1513-14 (cited in note 30). The account offered in Fried, 107 Harv L Rev at 1156-57 & n 55 (cited in note 18) (citing Dworkin with approval, but arguing that his "chain novel" analogy "suggests too little by way of constraint"), is similar, although it appears to have a more strongly traditionalist component. Neil MacCormick, *Legal Reasoning and Legal Theory* 229-74 (Oxford 1978), although critical of several elements of Dworkin's approach, offers a similar argument.

[47] See in particular the discussion in Joseph Raz, *The Relevance of Coherence*, 72 BU L Rev 273, 297-309, 321 (1992).

[48] See the ironic comment of Jonathan Swift, *Gulliver's Travels* 309 (Oxford 1960):

> It is a maxim among [our] lawyers that whatever has been done before may legally be done again, and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly.

because we might be mistaken to think them wrong. It follows that if, on reflection, we are sufficiently confident that we are right, and if the stakes are high enough, then we can reject even a longstanding tradition.

In short, the danger is not that an action that we are convinced is otherwise morally right will affront "integrity" because it is inconsistent with some previous action. Rather, the dangers are recognizable human frailties—arrogance, vision limited to one's own circumstances, excessive trust in one's own rational powers, ignorance of the complexity of the situation. If we think we are justified in running those risks, we may move away from, and even break with, any tradition.

C. The Problems of Traditionalism and the Text

Although traditionalist ideas descend from the common law, to some degree they apply to the textual provisions of the Constitution as well. Except for the most recent amendments, the text of the Constitution has, by now, been validated by tradition. Subsequent generations have acquiesced in the judgments reflected in the provisions of the Constitution: they have not amended them, rebelled against them, insisted on judges who would refuse to enforce them, or repeatedly taken political actions that ignored them.[49]

At the same time, however, as the association with the common law suggests, traditionalism is not unequivocal in its support for the text. The judgments to which deference is due are not just those embodied in the text. Nor is deference due to all the judgments in the text equally. If practices have grown up alongside the text, or as a matter of interpreting the text, or even in contradiction of the text, those practices too are entitled to deference if they have worked well for an extended time. An old precedent that has been accepted by subsequent generations is, under the traditionalist component of the common law approach, on a par with the text.

Marbury v Madison[50] and *McCulloch v Maryland*[51] are examples. Neither decision has a particularly clear textual basis.

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[49] The persistence of a provision does not necessarily show that people generally approve of it or even acquiesce in it, of course; it might just show that powerful groups or actors are in a position to prevent it from being changed. But the longer a provision has survived, the more likely it is that people generally at least find it minimally acceptable.

[50] 5 US (1 Cranch) 137 (1803).

[51] 17 US (4 Wheat) 316 (1819).

They are simply extremely well established precedents. But there is no sense in denying that both are every bit as much a part of the Constitution as the most explicit textual provision. The same is true of a well established practice that is neither explicit in the text nor embodied in a judicial precedent, such as the rule that a majority vote of the members of each house of Congress is necessary and sufficient to constitute "pass[age]" of a bill under Article I, Section 7.[52] So far as traditionalism is concerned, provisions of the text are no more entitled to obedience than any other long-standing practice.

By the same token, not every textual judgment is entitled to equal deference. All are perhaps entitled to a degree of respect, since they represent serious, good-faith efforts to address problems. But if some textual judgments have worked better than others, they are entitled to greater support. And, perhaps more strikingly, under the traditionalist view there is nothing wrong with sometimes deciding (in exceptional cases, to be sure) that a textual provision should be discarded—just as precedents can be overruled. In that respect traditionalism is quite clearly not consistent with our practices and must be modified in ways I will discuss below.

Traditionalism in this form provides at least a colorable answer to Noah Webster's question. We follow judgments made long ago by people living in a different society for two reasons—serious judgments made in good faith merit some deference; and, more important, those judgments have worked, at least well enough to enjoy continued acceptance in many subsequent, different circumstances. There is no need to apotheosize the Framers of the Constitution—only to recognize their seriousness and their good faith, and the fact that many of their arrangements have been at least reasonably successful for generations.

D. Traditionalism and the Puzzles

Traditionalism also provides a partial explanation of some of the puzzling aspects of our current practices.

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[52] See, on this subject, Bruce Ackerman, et al, *An Open Letter to Congressman Gingrich*, 104 Yale L J 1539, 1541-43 (1995). Whatever the scope of congressional power to impose supermajority rules, the tradition that a majority vote is sufficient (at least in the absence of such rules) has grown up without any specific textual support, or for that matter any awareness of the kind of support identified in id.

1. Text.

The least satisfactory aspect of traditionalism, as an explanation for the basis of American constitutional law, is the way it accounts for the use of the text. But even here traditionalism at least points in the right direction. Unlike some competing views, traditionalism is able to explain why the text matters; but unlike others, it does not sanctify the text. On a traditionalist approach, as I have said, the text should count for something but not everything. In rough terms, that is our practice.

The problem with traditionalism is that, taken alone, it would justify much sharper departures from the text than our current practices allow. It would treat a textual provision as no more binding than a common law precedent. But it is no part of our practice ever to "overrule" a textual provision. Even if a provision is read very narrowly, even to the point of being in fact a dead letter, it is not acceptable explicitly to say (as one can say about a precedent) that a textual provision is no longer good law because it has outlived its usefulness. This is one reason that traditionalism must be supplemented by a conventionalist account.

2. The Framers' specific intentions.

Traditionalism also explains why the specific intentions of the Framers matter, but matter less than the text and can be disregarded more freely. Those intentions reflect judgments made with care at times when the Framers, and in some cases the entire society, were seriously addressing an issue. Consequently, on Burkean grounds, those intentions are entitled to some respect. This is especially true when subsequent generations have accepted those judgments.

At the same time, however, judgments not embodied in the text are likely to be less well considered than judgments that are. Moreover, while the fact that a provision has not been amended does suggest that subsequent generations have acquiesced in the judgments expressed in the text (however limited those might be), it does not necessarily suggest that they have acquiesced in the specific views of those who drafted or adopted the text.

In fact, in determining the significance of the Framers' intentions, the method of the common law seems to apply quite directly to constitutional interpretation. The text of the Constitution is analogous to the holding of an earlier case; the Framers' specific intentions (assuming they can be ascertained) are analogous to

the earlier court's reasoning. The reasoning counts for something. It cannot be brushed aside. But it definitely does not count for as much as the holding. Moreover, a later judge can be faithful to the precedent so long as she follows the holding, even if she disregards the specific reasoning. Likewise, in constitutional interpretation, the Framers' intentions should not be ignored, but sometimes one can be faithful to the obligation to follow the text even while acting in direct contradiction of the Framers' intentions. There is a good Burkean reason for this (rough) parallel: the language adopted by the Framers, like the holding of a case, represents the most fully considered judgment of the earlier decision maker. The Framers' explanations of why they adopted that language, like judges' elaborations of their reasons for a holding, are likely to be the product of less careful consideration, and may even be post hoc rationalization, self-justification, or political posturing.[53]

3. The role of moral judgments.

The traditionalist component of the common law model also explains the role of moral judgments in constitutional interpretation. Moral judgments—judgments about fairness, good policy, or social utility—have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging.[54] At the same time, it has always been a part of the common law that judges are not free to do whatever they think is right. Precedent limits them in significant ways.

This is essentially what the practice is in constitutional interpretation. Some matters are settled by the text; no policy arguments, however sound, could justify the conclusion that Congress may by majority vote elect the President.[55] Other matters

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[53] See, for example, Cardozo, *Nature of the Judicial Process* at 29-30 (cited in note 33) ("I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition.").

[54] The leading modern statement of the common law approach, Cardozo's *Nature of the Judicial Process* (cited in note 33), repeatedly asserts the importance of moral judgments. (Cardozo does not use that term, referring instead to "sociology" or "the welfare of society," but it is clear that he means moral judgments.) See, for example, id at 94-97. For the role of morality in the views of the classic common law theorists, see Gerald J. Postema, *Bentham and the Common Law Tradition* 60-77 (Oxford 1986). For the role of morality in the common law generally, see Eisenberg, *Nature of the Common Law* at 14-26 (cited in note 40); A.W.B. Simpson, *The Common Law and Legal Theory*, in A.W.B. Simpson, ed, *Oxford Essays on Jurisprudence* 79, 80-88 (Clarendon 2d series 1973).

[55] The original understanding is actually less clear. The Framers may have envi-

are settled by precedent. But within the boundaries set by the text and precedent, judgments of fairness and policy are appropriate. For substantive reasons, judges interpreting the Constitution should be less willing to make such judgments, or more willing to defer to the other branches, because a constitutional decision, unlike a common law decision, cannot be overturned by the legislature.[56] But this is a substantive principle about the proper scope of judicial review. The *legitimacy* of moral judgments should not be any more questionable in constitutional interpretation than it is in the common law.

Even though moral judgments are an inescapable part of constitutional interpretation, there are repeated suggestions that it is somehow illegitimate for such judgments to play a role,[57] and those who deny their illegitimacy are often defensive about using them. Part of the reason for this, I believe, is the continuing hold of some version of the command theory: those who deny the legitimacy of moral judgments are, on some level, agreeing with Hobbes's dictum that "[i]t is not Wisdom, but Authority that makes a Law."[58] If constitutional interpretation is a matter of faithfully carrying out authoritative decisions made by others, then it is indeed problematic—potentially a usurpation—for the interpreter to rely on her own moral judgments.[59] Sometimes, of course, the proper interpretation of a command is that the interpreter should do what is best by the interpreter's own lights. But in a command theory, moral judgments will properly have at most only that kind of limited and derivative role. That is the role we instinctively believe that moral or policy judgments should play in statutory interpretation.

But in constitutional interpretation as we practice it, the role of such judgments is more central. There is some moral (or policy, or fairness) component to many unsettled constitutional is-

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sioned that the House (voting by states) would routinely elect the President, because before the development of the party system the leading candidate would seldom have a majority. James Ceaser, *Presidential Selection: Theory and Development* 45-46 (Princeton 1979).

[56] See text accompanying notes 109-15.

[57] See, for example, Bork, *Tempting of America* at 16-18, 241-50 (cited in note 1).

[58] Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* 55 (Chicago 1971) (Joseph Cropsey, ed).

[59] See Monaghan, 56 NYU L Rev at 353 (cited in note 14); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L J 1501, 1527 (1989), reviewing Michael J. Perry, *Morality, Politics, and Law* (Oxford 1988). See McConnell, 98 Yale L J at 1535-38, for additional arguments to the effect that judges in particular should not be trusted to make moral judgments.

sues. Traditionalism, and the analogy to the common law, explain why this is so. The reason for adhering to judgments made in the past is the counsel of humility and the value of experience. Moral or policy arguments can be sufficiently strong to outweigh those traditionalist concerns to some degree, and to the extent they do, traditionalism must give way.

Similarly, if the tradition is weak, equivocal, or unsettled, moral judgments play a correspondingly greater role. Many of the Supreme Court decisions that seem most clearly to break with tradition—the New Deal decisions overthrowing freedom of contract; *Brown* and other decisions striking down state-enforced racial segregation; and more recent decisions enforcing gender equality—have this character. Perhaps the moral imperative was sufficiently great that those decisions would have been justified even if the traditions had been stronger.[60] But those lines of precedent were beginning to fray before the Supreme Court discarded them, and that made it easier to overrule them.[61] This is the method of the common law, and—with the qualification, men-

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[60] In the case of freedom of contract, in particular, the moral question is somewhat cloudy. See the discussion in Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 S Ct Rev 34, 40-54 (1962) (discussing other possible explanations). See also Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 Tulane L Rev 849, 849-60 (1980). The rejection of a constitutional freedom of contract might be understood as the result of a process that disclosed that a doctrine with some virtue was unworkable in practice—a process typical of common law development. See, for example, Edward H. Levi, *An Introduction to Legal Reasoning* 9-25 (Chicago 1963).

[61] The constitutionality of race discrimination had not been reaffirmed by the Supreme Court for decades before *Brown*. See, for example, *Cumming v Board of Education*, 175 US 528 (1899). Also, some pre-*Brown* decisions were hard to square with the continued existence of any form of "separate but equal." See, for example, *Gaines v Canada*, 305 US 337 (1938); *Sipuel v Board of Regents*, 332 US 631 (1948); *McLaurin v Oklahoma State Regents*, 339 US 637 (1950); *Sweatt v Painter*, 339 US 629 (1950). See also Louis Michael Seidman, Brown *and* Miranda, 80 Cal L Rev 673, 708 (1992) ("Given what came before, the real question is why *Brown* needed to be decided at all."). See generally Seidman's discussion, id at 699-708, tracing the disintegration of state-enforced racial segregation to *McCabe v Atchison, Topeka & Santa Fe Railway*, 235 US 151 (1914). See also Geoffrey R. Stone, et al, *Constitutional Law* 497 (Little, Brown 2d ed 1991) ("After *Sweatt* and *McLaurin*, was there anything left for the Court to decide in *Brown*?"). The Court had reaffirmed the constitutional freedom of contract not long before the New Deal shift, see *New State Ice Co. v Liebmann*, 285 US 262 (1932); *Louis K. Liggett Co. v Baldridge*, 278 US 105 (1928); *Adkins v Children's Hospital*, 261 US 525 (1923). The shift is generally taken to have begun with *Nebbia v New York*, 291 US 502 (1934), but the line of precedent was studded with inconsistencies. See David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* 210 (Chicago 1990). At the time of the change in the law of gender discrimination, which dates to *Reed v Reed*, 404 US 71 (1971), no gender-based classification had been upheld for ten years, see, for example, *Hoyt v Florida*, 368 US 57 (1961), but perhaps more important were the developments in the law of race discrimination, which drew gender classifications into question.

tioned but not yet explained, for the binding force of the text—this is our constitutional practice, too.

4. Preferred position.

Prima facie it seems questionable to interpret some provisions of the Constitution broadly and some narrowly. Even among those who think this practice is justified, many view it as one of the central puzzles of modern constitutional law.[62] In the background is the sense that the real reason for interpreting (for example) the First Amendment more broadly than the Contract Clause is that we think the First Amendment is better, or more important, as a matter of policy or justice—and that this is not a legitimate reason for treating provisions differently.

As a result, some theories try to devise other explanations for treating different provisions differently. Justice Black tried to address this issue by urging that all rights explicitly stated in the text—both the First Amendment and the Contract Clause—should be treated the same way, and that rights that do not have an explicit textual source should not be recognized at all.[63] Others have suggested that rights that are integral to the protection of the democratic process should be interpreted more expansively than those that are not.[64] But the problems with both of these theoretical approaches have been well catalogued,[65] and neither describes our practices very well.

Once constitutional interpretation is seen as a process akin to the common law, instead of as a matter of fidelity to an authoritative direction, the existing, settled practice becomes much less problematic. The interpretation of constitutional provisions parallels the interpretation of precedents. Not all precedents are treated the same, and the differences are (or legitimately can be) explicitly based on whether the precedent is a good idea as a matter of morality or social policy.[66] Some precedents and provi-

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[62] See, for example, Ely, *Democracy and Distrust* especially chs 2, 3 (cited in note 14); Archibald Cox, *The Court and the Constitution* 196-97 (Houghton Mifflin 1987); Laurence H. Tribe, *American Constitutional Law* 769-72 (Foundation 2d ed 1988) (describing this and kindred issues as the basic problem of post-1937 constitutional law).

[63] Compare, for example, *City of El Paso v Simmons*, 379 US 497, 517 n 1 (Black dissenting), with *Griswold v Connecticut*, 381 US 479, 508-18, 520-25 (1965) (Black dissenting).

[64] See, for example, Ely, *Democracy and Distrust* at 86-88 (cited in note 14). See also Klarman, 77 Va L Rev at 768-82 (cited in note 31).

[65] Ely, *Democracy and Distrust* at 11-41 (cited in note 14); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L J 1063 (1980); Paul Brest, *The Substance of Process*, 42 Ohio St L J 131 (1981).

[66] See K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 74-75 (Oceana

sions are read broadly, in the sense that they are taken to stand for an important principle that must be vindicated even at significant cost to other interests. Those precedents or provisions are treated as the foundation for an elaborate and far reaching doctrinal structure. The First Amendment is an example. Other precedents or provisions are "limited to their facts"—they are not overruled or ignored, but they are confined to a very narrow range of applications. The Contract Clause has been "limited to its facts" in this way. Roughly speaking, it is interpreted to reach the narrowest range of cases that it could reach without being effectively read out of the Constitution.

5. The priority of doctrine over text.

Here the superiority of the common law theory, as an account of existing practice, is apparent. In practice constitutional law is, mostly, common law. What matters to most constitutional debates, in and out of court, is the doctrine the courts have created, not the text.[67] Of course the text matters to some degree and, as I have said, it matters in ways that traditionalism alone cannot explain. But traditionalism, and the common law method, account for the largest part of constitutional practice.

In this connection, common law constitutional interpretation, with its traditionalist explanation for why we care about what the Constitution says, captures an aspect of our practice that differs from the usual rhetoric. The rhetoric habitually extols the exceptional wisdom and foresight of the Founding generation. There is reason for crediting the Framers with exceptional foresight, as I will explain below, if explanation is needed. But the notion that the Founding generation was *uniquely* wise (as the rhetoric sometimes suggests) is not borne out by our practice.[68] The great achievements of American constitutional law today are the product not just of the Framers and their generation but of Marshall and Story, of the generation that fought the Civil War and initiated Reconstruction, of Brandeis and Holmes, of the New Deal generation, of the Warren Court, and of many other people (not just judges) along the way.

1960); Cardozo, *Nature of the Judicial Process* at 149-52 (cited in note 33).

[67] See text accompanying notes 18-21.

[68] See Holmes's remark in *Missouri v Holland*: "The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago." 252 US 416, 433 (1920).

It is by no means clear—in fact it seems quite mistaken to say—that the Founding generation is the dominant or even the most important influence in American constitutional law today. The common law approach explains this. The vision of the common law is precisely that the law is the product not of a few exceptional lawgivers (or one lawgiving generation), but of many generations of lawyers and judges.[69] That is our practice.

6. Extratextual amendments.

The common law approach also explains this apparently settled aspect of our practice. The most important changes to the Constitution—many of them, at least—have not come about through changes to the text. They have come about either through changes in judicial decisions, or through deeper changes in politics or in society.

Moreover, contrary to the neo-Hamiltonian approach, many of these changes evolved over time instead of occurring all at once. To consider just this century, the following changes in the Constitution—they must be regarded as that—are neither traceable to a textual amendment nor the product of a sudden shift, but rather are the products of evolutionary growth: the accretion of federal power, roughly in the first half of this century; the accretion of executive power, principally in the middle third of this century; the growth of a federal regulatory state in ways difficult to square with previous understandings of the separation of powers; the development of extensive protections for freedom of expression; the development of constitutional protections for women; and the federalization of criminal procedure. Other important changes in this century are somewhat—only somewhat—less evolutionary, but again cannot be traced to any textual amendment. The demise of a constitutional freedom of contract and the growth of constitutional protection for racial minorities are examples.

In all of these instances, the development of constitutional law followed, more or less closely, a common law model. Changes occurred only after the groundwork was laid: either the old doctrine proved unstable on its own terms, or changes in society made it seem wrong. The changes were based on considerations of policy and social justice, and, to some extent, on earlier deci-

[69] See Coke's observation from *Calvin's Case* in note 41. See also Michelman, 97 Yale L J at 1498 (cited in note 30).

sions. The changes were evolutionary: there was no single, authoritative act that marked any of these changes. (The most prominent arguable exception—*Brown*—was the culmination of both an elaborate legal campaign and an evolution in social attitudes.[70]) In at least two instances—the Child Labor Amendment and the Equal Rights Amendment—the change in the law came about even though it was rejected, or at least not accepted, by "we the people" in the textual amendment process. These are very important parts of American constitutional law, and the common law approach seems to explain them best. Traditionalism—the cornerstone of the historic common law method—therefore provides both a plausible answer to the fundamental problems of written constitutionalism and a justification of some of the otherwise puzzling settled practices.

III. CONVENTIONALISM AND THE COMMON LAW METHOD

A. Conventionalism and the Text

1. The conventionalist justification for adhering to the text.

Traditionalism does fall short in at least one important respect: it cannot account for the deference that is given to the text. A strictly traditionalist approach would occasionally "overrule" textual provisions. But it is not acceptable, in our practice, to declare that a provision of the Constitution (for example, the provision requiring that the President be a natural-born citizen) has outlived its usefulness and therefore is no longer the law. Explicitly declaring that a provision was no longer part of the Constitution would be an act of civil disobedience or, if the provision were very important, revolution. In some way or another, however creative the interpretation, the text must be respected.

Moreover, where the text is relatively clear, it is often followed exactly. Simply as a descriptive matter, no one seriously suggests that the age limits specified in the Constitution for Presidents and members of Congress should be interpreted to refer to other than chronological (earth) years because life expectancies now are longer, that a President's term should be more

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[70] See generally Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (North Carolina 1987). See also Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 Va L Rev 7, 13-75 (1994) ("The reason the Supreme Court could unanimously invalidate public school desegregation in 1954 . . . was that deep-seated social, political, and economic forces had already begun to undermine traditional American racial attitudes.").

than four years because a more complicated world requires greater continuity in office, or that states should have different numbers of Senators because they are no longer the distinctive sovereign entities they once were.[71] The text is not always treated in this way: "Congress" in the First Amendment is taken, without controversy, to mean the entire federal government, even though elsewhere "Congress" certainly does not include the courts or the President. But sometimes the text is treated this way, and the traditionalist, Burkean account cannot explain why specific provisions are taken as seriously as they are, as often as they are.

Conventionalism, the second component of common law constitutional interpretation, takes care of this deficiency. Conventionalism is a generalization of the notion that it is more important that some things be settled than that they be settled right. The text of the Constitution is accepted (to adapt a term used in a related way by its originator) by an "overlapping consensus": whatever their disagreements, people can agree that the text of the Constitution is to be respected.[72]

Left to their own devices, people disagree sharply about various questions, large and small, related to how the government should be organized and operated. In some cases, the text of the Constitution provides answers; in many other cases, the text limits the set of acceptable answers. People who disagree will often find that although few or none of them think the answer provided by the text of the Constitution—either the specific answer or the limit on the set of acceptable answers—is optimal, all of them can live with that answer. Moreover, not accepting

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[71] See, for example, Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (a) <26; (b) 26; (c) >26; (d) all of the above)*, in Sanford Levinson, ed, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 13, 18 (Princeton 1995).

[72] On the notion of an overlapping consensus, see Rawls, *Political Liberalism* at 133-72 (cited in note 34). Rawls uses the term to refer to agreement on a "political conception"—a set of principles to govern the basic structure of society—which agreement is reached among people who have differing "comprehensive" views. See id at 134-40. Comprehensive views govern moral questions generally and therefore go far beyond the political. See id at 174-76.

It is crucial to Rawls's idea that the political conception is willingly affirmed by the holders of different comprehensive views, as fully consistent with their comprehensive views. See id at 171. An overlapping consensus is therefore different from a modus vivendi, which is the product of a compromise and a coincidence of self-interest among competing parties. A modus vivendi exists when people settle on a certain set of principles as a necessary evil, even though those principles do not follow from their comprehensive views. See id at 147. It is unclear to what extent conventionalism, as I have defined it, should be seen as describing an overlapping consensus as opposed to a modus vivendi, but in any case the metaphor of an overlapping consensus seems useful in describing it.

that answer has costs—in time and energy spent on further disputation, in social division, and in the risk of a decision that (from the point of view of any given actor) will be even worse than the constitutional decision. In these circumstances, everyone might agree that the best course overall is to follow the admittedly less-than-perfect constitutional judgment.

In addition, conventionalism can be justified on the ground that it is a way for people to express respect for their fellow citizens. 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. Moral argument in general has this structure (at least according to most modern conceptions). But appealing simply to shared abstract moral conceptions (such as a common abstract belief in human dignity) does less to establish bonds of mutual respect than appealing to more concrete notions that do more to narrow the range of disagreement—such as the appropriateness of adhering to the text of the Constitution.

These conventionalist ideas are, of course, not novel. They date to Aristotle and were expounded by Hume. More recently a number of people have offered various forms of conventionalist justifications for legal rules.[73] Conventionalist arguments of this form are an important part of the common law tradition. The common lawyers did not justify adherence to precedent simply on traditionalist grounds. They also insisted, plausibly in at least some cases, that it was important to have certain matters settled because the costs of further controversy were too great.[74] This

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[73] Aristotle, *The Nichomachean Ethics* 1134b18-35 (Harvard 1926) (H. Rackham, trans); David Hume, *A Treatise of Human Nature* 489-90 (Oxford 2d ed 1978) (L.A. Selby-Bigge, ed); David Hume, *An Inquiry Concerning the Principles of Morals* 125 (Bobbs-Merrill 1957) (Charles W. Hendel, ed). See also David Gauthier, *David Hume, Contractarian*, 88 Phil Rev 3, 22-24 (1979); Postema, *Bentham and the Common Law Tradition* at 110-43 (cited in note 54). See also the discussions in David K. Lewis, *Convention: A Philosophical Study* 3-4, 36-42 (Harvard 1977); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J Legal Stud 165, 182-97 (1982). Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S Ct Rev 231, 253-56, draws the specific connection between conventionalism and reliance on the language of an authoritative text.

[74] For instance, Hale wrote:

> [There is] instability, uncertainty and variety in the judgments and opinions of men touching right and wrong when they come to particulars . . . to avoid that great uncertainty in the application of reason by particular persons to particular instances; and the end that men might understand by what rule and measure to live and possess; and might not be under the unknown arbitrary, uncertain judgment of the uncertain reason of particular persons, has been the prime reason, that the wiser sort

aspect of the common law approach is sometimes overlooked when the common law is identified with an encompassing case-by-case method that emphasizes analogy, context, and "situation sense."[75] In fact, rules, as well as case-by-case decision making, are an important part of the common law.[76] It may be that conventionalism is a less celebrated aspect of the common law method than traditionalism because it is—in conception at least—a more uncontroversial, commonsensical idea. Some people will viscerally reject traditionalist arguments, but no one denies that, for some set of issues, it is better to have well settled answers even if they are less than perfect.

But although conventionalism is important to the common law and conventionalism itself is a familiar idea, the conventionalist approach to constitutional interpretation is at odds with many current understandings. Under the conventionalist account the text should be followed just because it is there, so to speak. There is nothing special about the fact that it was adopted, or the process by which it was adopted, or the people who adopted it. Adhering to the text of the Constitution, on this account, "has nothing to do with ancestor worship."[77]

Two analogies may be useful. First, on the conventionalist account, our practice of adhering to our eighteenth- and nine-

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> of the world have in all ages agreed upon some certain laws and rules . . . and these to be as particular and certain as could be well thought of.

Hale, *Reflections* at 503 (cited in note 41). On Hale's relationship to the common law tradition, see the discussion in Postema, *Bentham and the Common Law Tradition* at 77-80 (cited in note 54). For a summary of Hume's similar views, see F.A. Hayek, *The Legal and Political Philosophy of David Hume (1711-1776)*, reprinted in W.W. Bartley, III and Stephen Kresge, eds, 3 *The Collected Works of F.A. Hayek: The Trend of Economic Thinking: Essays on Political Economists and Economic History* 101, 107-17 (Chicago 1991).

[75] This aspect of the common law features prominently, for example, in the criticism of common law constitutionalism in Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 NY L Sch L Rev 5, 26-29 (1991).

[76] For example, the Statute of Frauds, the Rule in *Shelley's Case*, the Rule Against Perpetuities, and other similar rules are rule-like parts of the common law. Many of the rules governing estates in land also have the structure of a law. See Richard A. Posner, *A Theory of Negligence*, 1 J Legal Stud 29, 52-73 (1972) (surveying courts' behavior in railroad collision cases and concluding that, at least in the area in question, "the tendency of the common law is to become more certain and to precipitate specific rules of conduct from general principles"). See also Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J Legal Stud 319 (1992).

[77] See Holmes, *Passions and Constraint* at 10 (cited in note 3) ("[D]emocratic commitment to rules of the game that are difficult to change has nothing to do with ancestor worship. The present generation accepts some of the decisions of the past because, on balance, they are good decisions, . . . making present problems easier, not harder, to solve.").

teenth-century Constitution is comparable to the reception of Roman law in Continental Europe. Roman law became the standard in the late Middle Ages because it was an accessible, widely known, comprehensive, and basically acceptable set of rules. The reason Roman law was widely accepted was not that its promulgators had a claim to obedience. Nor was the reason that the provisions of Roman law were the best that could be devised as an original matter. It was simply that Roman law was a coherent body of law that was at hand, and its adoption avoided the costly process of reinvention.[78] Conventionalism such as this is not the whole explanation for why we should obey the Constitution; there is the traditionalist component too. But it is part of the explanation of why the Constitution should be followed.

The second analogy is to "focal points" in game theory.[79] In a cooperative game with multiple equilibria, the solution will often depend on social conventions or other psychological facts. A simple example would be deciding whether traffic should keep to the left or the right, or who should call back if a telephone call is disconnected. These are games of pure cooperation, but even when there is some conflict of interest a "focal point"—a solution that, for cultural or psychological reasons, is more "salient" and therefore seems more natural—might be decisive.[80] For example, some disputes in society have roughly the structure of the so-called "battle of the sexes" game: each side would prefer its own first choice, but both are willing to give up their own first choices if necessary to avoid conflict.[81] Similarly, in many disputes in society, although each faction has a different preferred outcome,

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[78] On the reception of Roman law in Europe, see Paul Vinogradoff, *Roman Law in Medieval Europe* (Barnes & Noble 1968); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* especially ch 3 (Harvard 1983).

[79] The classic discussion of focal points is Thomas C. Schelling, *The Strategy of Conflict* 58-80 (Oxford 1969). See also Eric Rasmusen, *Games and Information: An Introduction to Game Theory* 34-37 (Basil Blackwell 1989); David M. Kreps, *Game Theory and Economic Modelling* 170-74 (Clarendon 1990); Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law* 39-46 (Harvard 1994).

[80] See, for example, Schelling, *Strategy of Conflict* at 57-58 (cited in note 79); Lewis, *Convention* at 35-38 (cited in note 73); Kreps, *Game Theory and Economic Modelling* at 34-35, 101-02, 172-74 (cited in note 79); Rasmusen, *Games and Information* at 35 (cited in note 79). Gauthier says that Hume invoked this notion of salience in his account of legal rules. See Gauthier, 88 Phil Rev at 23-24 (cited in note 73).

[81] In the traditional statement of the "battle of the sexes" game, *A* wants to go to the ballet; *B* wants to go to a boxing match; but each would prefer to sacrifice his or her preference in order to be with the other. The game apparently originated in R. Duncan Luce and Howard Raiffa, *Games and Decisions: introduction and critical survey* 90-94 (Wiley 1967).

all might prefer an expeditious resolution to prolonged conflict.[82] The outcome of such a game can be determined by social conventions that may make one solution stand out as more natural or appropriate.[83] On the conventionalist account, the Constitution is a focal point of this kind: our culture has given it a salience that makes it the natural choice when cooperation is valuable. But its salience and general acceptability, rather than its authority or optimality, are the most important reasons for accepting it.

Conventionalism, understood in this way—as an allegiance to the text of the Constitution, justified as a way of avoiding costly and risky disputes and of expressing respect for fellow citizens—helps explain the deference given to the text more fully than traditionalism standing alone. We do not "overrule" the text because any such overruling would jeopardize the ability of the text to serve as a generally accepted focal point. Once one textual provision was explicitly disregarded, others could be disregarded too, and the benefits of having a focus of agreement—imperfect but "there" and "good enough"—would be diminished. Conventionalism thus accounts for a prominent feature of our practices and provides the rest of the answer to the question of why we adhere to the text of the Constitution.

2. Conventionalism and interpretation.

It may seem that this account of conventionalism assumes that the "text alone" provides answers to a significant range of constitutional issues. In fact the opposite is more nearly true. A conventionalist account not only accepts the need to interpret the text but gives relatively specific guidance about *how* to interpret the text. In any event, of course, the claim is not about the "text alone" at all, if that means the text read in isolation from any background understandings or presuppositions. Whatever guidance the text of the Constitution (or any other text) gives, it gives because of a complicated set of background understandings shared in the culture (both the legal culture and the popular culture).[84] The premise of conventionalism is only that the text,

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[82] Of course the game only roughly models the social controversy; among other things, in the game there is no communication. Still, the rough parallel seems illuminating.

[83] See, for example, the argument in Kreps, *Game Theory and Economic Modelling* at 102, 143-44 (cited in note 79).

[84] In the literature on interpretation generally this point is common ground among widely divergent views. Compare, for example, Hans-Georg Gadamer, *Truth and Method* 284 (Seabury 1975), with E.D. Hirsch, Jr., *Validity in Interpretation* 4-5, 87-88 (Yale

combined with a set of generally accepted background assumptions (that are difficult to specify but need not be specified for current purposes), occasionally provides answers and more often limits the set of acceptable answers.

That is, conventionalism does not presuppose that the Constitution provides specific answers to a wide range of questions. It only presupposes that the Constitution (interpreted according to various background understandings) says something significant. In some instances, such as age limits, what it says is relatively precise. But even when the text is not precise, it still serves to limit the range of disagreement.[85] For example, people disagree greatly over how to treat criminal defendants, and the text of the Constitution leaves many questions unanswered. But the text still narrows the range of disagreement. There are significant benefits in using the provisions of the Constitution as a starting point—however imperfect they are from everyone's point of view—and great potential costs in starting from scratch. Even when the constitutional provisions are quite open-ended, as in the case of the Religion Clauses for example, having the text of the clauses as the shared starting point at least narrows the range of disagreement, and is valuable for that reason. So even when the text does not come close to providing an answer, conventionalism still explains why the text is a shared starting point.

This is how conventionalism can guide the interpretation of the text. Conventionalism suggests that, other things equal, the text should be interpreted in the way best calculated to provide a focal point of agreement and to avoid the costs of reopening every question. In a sense there is nothing "inherent" in the text, whatever that might mean, that tells us that the President's "Term of four Years" means four years on the Gregorian calendar. But interpreting it that way is most likely to settle the issue once and for all without further controversy. The same is true when the text only narrows the range of disagreement instead of specifying an answer. The reason we do not engage in fancy forms of interpretation that would permit us to question the length of the

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1967). For a discussion of this point in the legal context, see, for example, Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 113-17 (Harvard 1990); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* 38-76 (Oxford 1991).

[85] See, for example, Fallon, 100 Harv L Rev at 1196 (cited in note 5); Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L Rev 797, 802-12, 824-31 (1982).

President's term, or the citizenship qualification, or other "textual" resolutions of issues, is not because we have an obligation to be faithful to the Framers' decisions as revealed by the text. We break faith with the Framers (if that is the right term) on issues that are far more important. Rather, it is because the leading function of the text is to provide a ready-made solution that is acceptable to everyone. That function would be subverted by interpretations of the text that struck most people as contrived.

3. Why the text?

The conventionalist justification need not be limited to adherence to the text. There are familiar conventionalist arguments for adhering to precedent: the precedent may be wrong, but it is established, and it is not worth the cost and risk of reopening the issue.[86] As I said, conventionalism of this form is prominent in the common law tradition. The adherence to precedent in constitutional law rests on conventionalist grounds as well as traditionalist grounds: the demands of stare decisis exceed the Burkean justification. That is, often it will be an exaggeration to say that a prior decision represents the kind of time-tested judgment that should be honored out of humility and a sense of one's own limitations. Rather, the practice of following precedent is a focal point. Everyone can agree, relatively easily, that precedent should generally be followed, and potentially disruptive disagreements on the underlying substantive issues can then be bracketed.

Undoubtedly the adherence to the Framers' original intentions is, in part, conventionalist, for the same reasons that conventionalism explains adherence to the text. Some practices that have grown up without clear textual warrant—such as judicial review itself—can claim a conventionalist, as well as a traditionalist, justification. Judicial review might be the best system for our society, but our acceptance of it outruns our belief that it is theoretically best: we are much more certain that we are going to retain judicial review than we are that it is the best system. One

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[86] Hume gives this conventionalist justification for precedent. See Hume, *An Inquiry Concerning the Principles of Morals* at 125 (cited in note 73) ("When natural reason [ ] points out no fixed view of public utility by which a controversy of property can be decided, positive laws are often framed to supply its place and direct the procedure of all courts of judicature. Where these two fail, as often happens, precedents are called for; and a former decision, though given itself without any sufficient reason, justly becomes a sufficient reason for a new decision.").

reason is that it works well enough, and it would be too costly and risky to reopen the question whether, abstractly considered, it is the best possible arrangement.

It might be objected, however, that conventionalism does not fully explain the status of the text, which was the deficiency in the traditionalist account that conventionalism was supposed to remedy. In a particular instance, we might think that the range of solutions consistent with the text is not good enough—that is, that the gains from deviating from the text would outweigh the losses. On a conventionalist account, it might be said, we should unapologetically reject the text in such a case. But it is not part of our practice to reject the text in such an explicit way. Why does our overlapping consensus seem to have settled so heavily on the text? The answer to this important question is multifaceted, but two things seem especially important. One is the specific way in which the Constitution was drafted; the other is the special status that the Constitution has in the American political culture.

One reason we do not explicitly disavow the text may be that the text seldom forces truly unacceptable actions on us. This is where the "genius" of the Constitution—that it consists of provisions that are sufficiently broad and flexible, yet not vacuous—becomes manifest. Many of the provisions are worded in terms broad enough to permit a course that we think is morally acceptable. We therefore seldom have strong reasons to reject the text overtly; instead we can reinterpret it, within the boundaries of ordinary linguistic understandings, to reach a morally acceptable conclusion. At the same time, the costs of disavowing the text, in terms of the ability of the text to serve as a focal point, are likely to be great. It is valuable to society that people who disagree sharply on important issues can have, as common ground, an acceptance of the text. Again there is perhaps an analogy to Roman law. Roman law provided a framework for resolving concrete legal disputes; but it was sufficiently open-ended that different societies could adapt it in different ways, without losing the advantages of having a ready-made, good-enough body of law that reduced the need to reopen issues and revisit first principles.

The text of the Constitution—interpreted, as always, in the way I described before, according to certain background assumptions—is far from wholly manipulable. As a result, the common ground it establishes is more than nominal. On all but very important issues, if you can make a good textual argument to me, I

will accede, even if the result seems morally wrong to me. That maintains stability and bonds of mutual respect as well as a culture in which disputes are resolved by appeals to common premises.

At the same time, the acceptance of the Constitution is not the product strictly of calculation, or of an entirely rational process. At first glance conventionalism might seem to be an overly rationalistic explanation that drains notions of national identity and heritage from constitutional interpretation and denies that the Constitution should be revered or accorded a scriptural status. In fact, on a conventionalist account, it is not that the Constitution is important just because of a rational calculation; rather, the calculations come out as they do because of the cultural importance of the Constitution. For a variety of complex reasons—rooted in patriotic impulses and narratives, in American exceptionalism, in Protestantism,[87] and in other sources of national culture—the Constitution has been a central unifying symbol for Americans.[88] That is why the Constitution, and not some other document or source of law, can serve so well as the focal point of agreement. This is one way to understand Madison's famous answer, in Federalist 49, to Jefferson's suggestions that constitutions should be easy to change:

> [A]s every appeal to the people 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. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. . . . When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect. . . . [T]he most rational gov-

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[87] See, for example, Sanford Levinson, *Constitutional Faith* 11-12 (Princeton 1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885, 889-94 (1985).

[88] See, for example, Michael Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (Knopf 1986); Levinson, *Constitutional Faith* at 11-17 (cited in note 87); Max Lerner, *Constitution and Court as Symbols*, 46 Yale L J 1290 (1937). See also Monaghan, 56 NYU L Rev at 356 (cited in note 14) ("The practice of 'constitution worship' has been quite solidly ingrained in our political culture from the beginning of our constitutional history.").

> ernment will not find it a superfluous advantage to have the prejudices of the community on its side.[89]

Societies hold together not just by virtue of rational calculation but also because of shared symbols, and there is little doubt that the Constitution is such a symbol for the United States. It is because of this special status of the Constitution that its text has become the focal point of agreement.[90]

B. Conventionalism and the Puzzles of Constitutional Interpretation

The principal argument for conventionalism is that it answers the last bit of Noah Webster's question left unanswered by traditionalist arguments: why we treat the text as sacrosanct. In addition, however, conventionalism sheds light on some other puzzling aspects of our practices—practices that, under competing theories of constitutional interpretation, seem hard to justify.

1. The text matters most for the least important questions.

That the text matters most for the least important questions is a relatively little noticed but persistent, and puzzling, aspect of our practices. The common law approach I have outlined explains it; other approaches seem very difficult to reconcile with it. For the most part we interpret the Constitution formalistically in just the circumstances that conventionalism would predict—when the stakes are relatively low but it is important that a matter be settled one way or another. Under the usual textualist or originalist understandings, this seems backward. If the text is important because of the authority of those who adopted it, then it should be more important when the issues are more important. But that is not our practice. Our practice is more consistent with conventionalism.

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[89] Federalist 49 (Madison), in Rossiter, ed, *Federalist Papers* at 314-15 (cited in note 29).

[90] Incidentally this may also justify classifying the agreement on the Constitution as something akin to an overlapping consensus, as distinguished from a modus vivendi. People are loyal, not just to liberal principles (as Rawls describes), but to specific national institutions (such as a particular form of democratic government, and perhaps even a particular governing text). They follow these particular institutional forms not because it is the best that can be done under the circumstances (that would be a modus vivendi) but because of a belief in the institutions that derives from their own moral views. That is, the explanation of *why* these institutions are a focal point is perhaps richer and more interesting than the rationalistic game theoretic account suggests.

The most striking example is the separation of powers. In the last decade or so there has been much litigation about the allocation of power between the executive and Congress. Much of the resulting law is notoriously formalistic, in the sense that the courts (as well as the broader legal and even popular cultures) emphasize the text and the original understanding far more in these cases than they do in addressing issues like equality and reproductive freedom.[91]

Sometimes it is suggested that the reason for this is that separation of powers is in the end more important than the guarantees of rights.[92] But that argument seems forced and overstated. Certain aspects of the separation of powers, such as an independent judiciary and the requirement that the executive follow the law, are of the first importance. But many controversial separation of powers issues concern matters about which well governed democratic societies might differ, such as the legislative veto and the question of who shall appoint which officials.[93] Those are the issues that we resolve formalistically. And the reason for formalism in dealing with separation of powers is precisely that specific separation of powers issues are, relatively speaking, often not particularly charged, as a matter of morality or public policy. Few people have passionate convictions about whether the legislative veto is good or bad for society, or about which classes of officials the President must appoint. In fact few people (if they thought about the issue as an original matter) would be certain that our society would be, on balance, much worse off even if we made much more dramatic changes in the allocation of power between Congress and the President—perhaps even if we had a parliamentary system.

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[91] See, for example, *Freytag v Commissioner of Internal Revenue*, 501 US 868 (1991); *Bowsher v Synar*, 478 US 714 (1986); *INS v Chadha*, 462 US 919 (1983); *Buckley v Valeo*, 424 US 1 (1976). This point has been made by Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U Pa L Rev 1513 (1991), and Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L Rev 488 (1987).

[92] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U L Rev 881, 894-97 (1983).

[93] Sometimes, of course, questions arising under the Appointments Clause might be of considerable significance, especially when they concern the power to discharge officials. But so far, in its formalistic decisions, the Supreme Court has confined itself to relatively insignificant applications. See, for example, *Freytag*, 501 US at 880-92; *Bowsher*, 478 US at 722-27; *Buckley*, 424 US at 109-43. In fact one might question whether the Court will continue on the course set by its formalistic decisions if the stakes in future cases are higher. The conventionalist approach suggests that the Court would not. (I am grateful to Peter Strauss for clarification on this point.)

Issues of equality and reproductive freedom, by contrast, elicit strong reactions. In these contexts, people are less likely to accept a solution just for the sake of having the matter resolved with minimal friction. They are willing to live with controversy as the price of trying to resolve the issue in the way they think is right. They are therefore much more likely to force the issue by directly addressing the moral rights and wrongs. But in dealing with separation of powers issues it is more important that the issue be settled than that it be settled just right—so that we know which acts are valid, which political actor must make which decision, and so on. Consequently our practices are more formalistic. That is what conventionalism predicts, and that is our practice. The more important the provision, the less formalistic its interpretation.[94]

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[94] See, in this connection, the discussion in Monaghan, 56 NYU L Rev at 361-63 (cited in note 14) (summarizing the "two-clause theory" and acknowledging that "[i]t provides at least a general account of what the supreme court has been doing"). Justice Frankfurter made a similar point in his opinions in *United States v Lovett*, 328 US 303, 321 (1946) (concurring), and *National Mutual Insurance Co. v Tidewater Transfer Co.*, 337 US 582, 646-47 (1949) (dissenting).

In dissent in *National Mutual*, Justice Frankfurter stated:

> No provisions of the Constitution, barring only those that draw on arithmetic, as in prescribing the qualifying age for a President and members of a Congress or the length of their tenure of office, are more explicit and specific than those pertaining to courts established under Article III. . . . The precision which characterizes these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic differences in treatment. Great concepts like "Commerce . . . among the several States," "due process of law," "liberty," "property" were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. But when the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the limitation. Precisely because "it is *a constitution* we are expounding," [citing *McCulloch*] we ought not to take liberties with it.

337 US at 646-47.

This discussion is notable because the interpretation of Article III has not proven to be governed by the text to the extent that Justice Frankfurter urged (his opinion was, after all, a dissent). See, for example, *Commodity Futures Trading Commission v Schor*, 478 US 833 (1986); *Thomas v Union Carbide Agricultural Products Co.*, 473 US 568 (1985); *Crowell v Benson*, 285 US 22 (1932). That is because questions about the scope and limits on federal judicial power also "relate to the whole domain of social and economic fact" and must "gather meaning from experience." But the general point—that the specific provisions of the Constitution are interpreted in a more formalistic way than the more general provisions, the meaning of which should evolve over time—has to a significant degree been borne out in the way separation of powers law has developed.

There are, of course, important provisions that are interpreted formalistically. The provision that each state have two Senators is an example, although in times of the greatest stress, such as Reconstruction, this provision was disregarded. Although this is an important provision, the reason for adhering to it remains conventionalist. It is a clear provision, and any violation of it would be highly salient. Consequently, violating it would greatly increase the risk that the valuable consensus on the text will dissolve generally, increasing the potential for disruption and for outcomes that are, even to those who dislike the textual solution, worse still.

2. The relative importance of text and intentions.

Conventionalism also explains what would otherwise be a very puzzling feature of constitutional interpretation—our willingness to depart from the intentions of the Framers much more dramatically than we would depart from the text. Originalism (defined as strict adherence to the specific intentions of the drafters of the Constitution) is subject to a variety of well known objections.[95] Even its purported adherents accept many departures from what originalism would dictate.[96]

But adherence to the text differs only in degree from adherence to the Framers' specific intentions. If we accept the judgments unequivocally reflected in the text, why should we not accept the other judgments the drafters thought they were adopting? Yet judgments reflected in the text are accepted almost categorically, in the sense that one can never simply disregard the text, while the understandings the drafters had when they adopted the text are accepted much less frequently.

One especially dramatic illustration of this paradox is that in some areas, the law has developed in a way that can be squared fairly easily with the text but is plainly at odds with the Framers' intentions. The interpretation of the right to counsel in the Sixth Amendment is an example. The Sixth Amendment gives a criminal defendant the right "to have the assistance of counsel for his defence."[97] There is little doubt that the original

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[95] See, for example, the discussions in Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St L J 1085 (1989); Brest, 60 BU L Rev 204 (cited in note 4).

[96] See, for example, the qualifications in Bork, *Tempting of America* at 161-85 (cited in note 1), and Scalia, 57 U Cin L Rev at 856-57, 861-62 (cited in note 25).

[97] US Const, Amend VI.

understanding of this provision was that the government may not forbid a defendant from having the assistance of retained counsel.[98] Today, of course, *Gideon v Wainwright*[99] and subsequent decisions have established that in serious criminal prosecutions the government must provide counsel even for defendants who cannot afford it. That rule fits comfortably with the language, and the language has been used to support it.

But in fact it is just a coincidence—almost a matter of homonymy—that the modern right to counsel is supported by the language of the Sixth Amendment. The drafters of the Sixth Amendment might have used some other language to express their intentions, language that would have made it more difficult to find support for the modern right (for example, that the accused shall have the right "to retain counsel for his defense").[100] At first glance it seems odd to use the language of the Sixth Amendment to support *Gideon* when it is only a coincidence that it does so.

Originalist views of the Constitution seem quite unable to account for this aspect of our practice. But conventionalism can. It is important to show that *Gideon* is consistent with the text because that helps preserve the overlapping consensus. So long as a judge can show that her interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text—so long as she can plausibly say that she, too, honors the text—she has maintained some common ground with her fellow citizens who might disagree vehemently about the morality or prudence of her decision. But once a judge or other actor asserts the power to act in ways inconsistent with the text, the overlapping consensus is weakened. If there is one unequivocal departure from the text, there can be others. Society's ability to use the text as common ground—to provide a basis of agreement or a limit on disagreement—will be eroded. That is why the text must be preserved, even though the Framers' intentions need not be.

There are other examples, less clear-cut than *Gideon*, of this aspect of our practice. The Establishment Clause is interpreted to forbid state establishments, although both the text and the origi-

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[98] See William M. Beaney, *The Right to Counsel in American Courts* 8-33 (Greenwood 1955); *Bute v Illinois*, 333 US 640, 660-66 (1948).

[99] 372 US 335 (1963).

[100] See, for example, Md Declaration of Rights, Art 21 ("to be allowed counsel"); NH Const, Part First, Art 15 ("to be fully heard in his defense, by himself, and counsel"); SC Const, Art 1, § 14 ("to be fully heard in his defense by himself or by his counsel or by both").

nal understanding say something more like the opposite (that Congress was forbidden from prohibiting state establishments).[101] The Warrant Clause is taken to require warrants, although it says nothing of the kind. The Equal Protection Clause is treated as a general constitutional injunction of "equality," despite the narrower wording and fairly clear evidence that the original understanding of the clause was different.[102] Of course, some of these interpretations may be incorrect (although they all seem well established). The point is that these interpretations gain strength from the presence, in the text, of some words that support them—even though the original understanding of the words is at odds with that interpretation. The question is why this significant aspect of our practices is not a weird form of verbal fetishism. The answer is that the words themselves provide a focal point, something on which people can agree, whatever their moral or policy disagreements.

Perhaps the most impressive example of this aspect of our practices is the application of the Bill of Rights to the states through the Fourteenth Amendment, the so-called incorporation doctrine. The Bill of Rights originally applied only to the federal government. In a series of decisions, mostly in the 1960s, the Supreme Court applied to the states essentially all of the provisions of the Bill of Rights that protect criminal defendants. The effect was to bring about a large-scale reform of the criminal justice systems of the states. These decisions were the culmination of a protracted argument, mostly between Justices Black and Frankfurter (and their respective followers outside the Court), over the appropriateness of incorporation.[103]

Three things seem clear about the incorporation issue. First, it went from being a subject of intense controversy—probably the most controversial issue in constitutional law between the mid-1940s and mid-1950s, and one of the most controversial for a decade or more thereafter—to being a completely settled issue.

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[101] *Wallace v Jaffree*, 472 US 38, 91-99 (1985) (Rehnquist dissenting); Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 14-15 (Lambeth 1982).

[102] See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 342-51 (Chicago 1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L J 1385, 1433-51 (1992). Harrison concludes that "during Reconstruction the interpretation of the Equal Protection Clause that is today accepted had a competitor which limited the clause to the protective functions of government," and that this view was "widespread among Republicans." Id at 1438, 1440.

[103] See, for example, *Adamson v California*, 332 US 46, 59 (1946) (Frankfurter concurring); id at 68 (Black dissenting).

The incorporation controversy involved the most divisive matters—criminal justice, federalism, and, implicitly, race. But by the mid-1980s, even the most severe critics of the Warren Court accepted incorporation, and some of them aggressively embraced it.[104]

Second, incorporation came to be a settled issue even though it was not widely accepted that incorporation was consistent with the intentions of the Framers of the Fourteenth Amendment. During the time that incorporation took hold in the legal culture, the received wisdom was that the Framers of the Fourteenth Amendment did not intend incorporation.[105] We now recognize that that received wisdom was at least too simple. But what the incorporation controversy and its denouement reveal about our practices is that—so far as the acceptance of incorporation in the legal culture is concerned—the Framers' intentions were essentially beside the point.

Third, and most striking, despite the fact that there are certain notorious textual difficulties with incorporation,[106] the widespread acceptance of incorporation has something to do with its use of the text. It helped enormously that the Court was reforming state criminal justice systems on the basis of conceptions that had some link to the text of the Bill of Rights. It seems very unlikely that incorporation would have succeeded in the way it did if the Court—instead of invoking the text of the Bill of Rights to aid its campaign to reform state criminal justice systems—had simply devised a new set of rules for the states to follow, however sensible those rules might have been.

Since there is no general belief that the Framers (of either the Bill of Rights or the Fourteenth Amendment) contemplated that the text would be viewed in this way, and since the text itself doesn't immediately lend itself to that interpretation, why should the textual basis of incorporation matter so much? If we

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[104] See, for example, Bork, *Tempting of America* at 94 (cited in note 1) ("[A]s a matter of judicial practice the issue is settled."); *Albright v Oliver*, 114 US 807, 814 (1994) (Scalia concurring) ("[Incorporation is] an extension I accept because it is both long established and narrowly limited.").

[105] See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 101-02 (Yale 1986) (observing that the "weight of opinion among disinterested observers" is against a historical basis for incorporation). See also the discussion of this consensus in Amar, 100 Yale L J 1131 (cited in note 2) (attacking the consensus).

[106] For example, incorporation makes the Due Process Clause of the Fourteenth Amendment redundant, since the incorporated Fifth Amendment already contains a Due Process Clause.

don't care about what the Framers thought they were doing, why do we care so much about the words they wrote? Conventionalism provides an answer to this question. By tying reforms of state criminal justice systems to the text of the Bill of Rights, the incorporation doctrine invoked the overlapping consensus. That is, in the face of widespread disagreement about criminal justice, the Court could take advantage of the fact that everyone thinks the words of the Constitution should count for something. The link to the text legitimated incorporation by connecting it to something everyone believed in. People who might have disagreed vigorously about the merits of various reforms of the criminal justice system could all treat the specific rights acknowledged in the Bill of Rights as common ground that would limit the scope of their disagreement. A reform program that had a plausible connection to the text of the Bill of Rights was therefore more likely to be accepted than one that did not.

It is in this sense that incorporation is "consistent with the Constitution" in a way that a nontextual program of criminal law reform would not be. The point is not that the Framers, or "we the people," commanded the reforms that the Court undertook. The Court undertook those reforms, and the reforms lasted, because they made moral and practical sense, and because, by virtue of their connection to the text, society could reach agreement (or at least narrow the range of disagreement) on a legal outcome even in the face of deep moral disagreement. That is why the text matters even if the Framers' intentions were to the contrary.

3. Formalism and new written constitutions.

It is customary, especially in this country, to distinguish between written and unwritten constitutions. Perhaps that is because it was important to the Framers of our Constitution that it was written, unlike Britain's.[107] But there is something unrealistic about supposing that today there is a great difference between written American constitutionalism and unwritten British constitutionalism. There are differences, of course, but they seem minimal when compared to the differences among nations with written constitutions—not just between, say, the United States and the nations of Eastern Europe, but also between the

[107] See, for example, Wood, *Creation of the American Republic, 1776-1787* at 259-305 (cited in note 3).

United States and even postwar Western European nations with new written constitutions, especially in the earlier years of those constitutions. Intuitively (and to most nonlawyers obviously) the important distinction is between nations that have well established liberal traditions and those that do not. That distinction does not track the one between written and unwritten constitutions.

Conventionalism helps account for this intuition, undermining the distinction between written and unwritten constitutions. When a nation does not have well established traditions, the words of its constitution are correspondingly more important in providing something on which people can agree. When a nation is just starting, it is important for political actors to be able to point to the text of the constitution to justify their actions. Creative interpretations of that text will breed distrust and make it more likely that whatever consensus exists will dissipate. Once people think that their political opponents are playing fast and loose with the text, all consensus is more likely to break down because there is so little to fall back on. Only by staying very close to the text—being as formalistic as possible—can political actors in an immature regime convince others that they are acting in good faith. By contrast, once a society develops political traditions, political actors can be more confident that their opponents, even if arguably departing from the text, will operate within the traditions, or will be reined in by other forces in society if they do not do so. In both Britain and the United States, the traditions and precedents are the dominant features of constitutional law, even though the United States has a text; in less mature societies, any written text will be more important.

We should, therefore, expect to find more formalism, and more emphasis on the "writtenness" of constitutions, in new constitutional regimes. This may explain why the written character of the American Constitution was so important to the Framers: with its traditions discarded, or in an uncertain state, the society was held together, to a greater degree than today, by its Constitution. But the longer a constitutional regime endures, the more it develops constitutional traditions, and the more stable the patterns of cooperation become in society. The text becomes less important, and the distinction between written and unwritten constitutions blurs. Therefore the fact that the Framers attached so much importance to the written character of our Constitution, as distinguished from the British constitution, does not mean that we should do so today.

IV. JUDICIAL RESTRAINT AND DEMOCRACY

Judges are not the only ones who interpret a constitution, of course. One virtue of common law constitutionalism is that despite initial appearances, it is not tied to judicial interpretation.[108] To the contrary, the common law can serve as a model for incremental change in society as a whole, as it did for Burke. As I suggested earlier, legislators and even ordinary citizens, in their encounters with the Constitution, act in ways consistent with the common law approach. In particular, glosses on the Constitution (by judicial decision and otherwise), when validated by tradition, operate in public discourse on a par with the specific provisions of the Constitution. In this respect, common law constitutional interpretation is actually less vulnerable than some of its competitors to the criticism that it is court centered. Certain justifications for originalism and textualism emphasize the need to limit judges' discretion and prevent abuses. But the common law approach does not necessarily link constitutional interpretation to particular capacities of judges and courts.

Nonetheless, any approach to constitutional interpretation must explain how it restrains the officials responsible for implementing the Constitution and prevents them from imposing their own will. A theory of constitutional interpretation for our society also ought to be able to explain how the institution of judicial review—judicial enforcement of the Constitution against the acts of popularly elected bodies—can be reconciled with democracy. It might be argued, in particular, that a theory of common law constitutional interpretation overlooks the crucial difference that common law judges can be overruled by the legislature but judges interpreting a constitution ordinarily cannot.[109]

Neither the concern with judicial restraint nor the concern with democracy, however, undermines the justification of common law constitutionalism. If anything, with respect to both

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[108] In addition, a common law approach is more consistent with the fact that the lower courts, federal and state—not just the Supreme Court—are centrally involved in constitutional interpretation. Those courts are, as a practical matter, the courts of last resort for most citizens. But for those courts, constitutional law consists almost exclusively of Supreme Court precedent. The intent of the Framers, and even the text, are of very limited importance to their work. See, for this important point, Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 Conn L Rev 843 (1993).

[109] See, for example, Ackerman, 36 NY L Sch L Rev at 29-32 (cited in note 75); Richard H. Fallon, Jr., *Common Law Court or Council of Revision?*, 101 Yale L J 949, 961 (1992) ("How much like a common law court could a Court with such nearly ultimate powers be?"); Monaghan, 56 NYU L Rev at 355-58 (cited in note 14).

concerns, common law constitutionalism is superior to its competitors.

A. Judicial Restraint

Textualism and originalism are sometimes defended as the best way of restraining judges and preventing them from abusing their authority.[110] On the surface this may seem to be at least a plausible claim. But on closer examination I believe that it owes all of its plausibility to the unspoken assumption that some version of the common law approach to constitutional interpretation is operating in the background.

A judge who conscientiously tries to follow precedent is significantly limited in what she can do. But a judge who acknowledges only the text of the Constitution as a limit can, so to speak, go to town. The text of the Equal Protection Clause, taken alone, would allow a judge to rule that the Constitution requires massive redistributions of wealth (reasoning that "equal protection of the laws" includes "equal protection" against the vicissitudes of the market); the text of the Contract and Just Compensation Clauses, taken alone, would allow a judge to invalidate a wide range of welfare and regulatory legislation.[111] The text of the Due Process and Cruel and Unusual Punishment Clauses, taken alone without reference to the precedents interpreting them, could justify a thorough overhaul of the criminal justice system. And so on.

The notion that the text of the Constitution is an effective limit on judges is plausible only if one assumes a background of highly developed precedent. Within the limits set by precedent, paying more attention to text might indeed limit judges' discretion. The appeal of textualism as a limit on judges—as the argument was made, most famously for example, by Justice Black[112]—stems entirely from the assumption that the text will be used to resolve disputes within the gaps left by precedent. If we assume that the various clauses of the Constitution are to be interpreted in something like the current fashion, then judges may indeed be more "restrained" if they insist on some relatively explicit textual source for any constitutional right. But that is

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[110] See, for example, Scalia, 57 U Cin L Rev at 862-64 (cited in note 25); Bork, *Tempting of America* at 146-47 (cited in note 1).

[111] As is argued in Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 327-29 (Harvard 1985).

[112] See note 1.

primarily a demonstration of the restraining effect of precedent, not of text; the bulk of the restraint by far is provided by precedent.

For similar reasons, it is implausible to say that adherence to the Framers' intentions, by itself (or together with adherence to text), limits judges more than precedent. The familiar problems—uncertainty about who counts as "the Framers," unclarity in the historical record (or no relevant record at all), difficulty in defining the level of generality on which to identify the intention, changing circumstances[113]—all make the historical record a poor restraint on judges. In fact the strongest advocates of adherence to the Framers' intentions are often, at the same time, embroiled in controversies over what the Framers of particular provisions actually did intend. The existence of controversy in applying a method does not invalidate the method, of course, but it does mean that that method is a less sure way of preventing a judge from "finding" her own moral or political views in the Constitution.

By contrast, the common law method has a centuries-long record of restraining judges. Needless to say, precedents can be treated disingenuously, and judges can abuse the freedom that the common law approach gives them to make moral judgments about the way the law should develop. But no system is immune from abuse. A conscientious judge will find substantial guidance in a well developed body of precedent, like that interpreting the Constitution. Judges who might be tempted to overreach, but who are susceptible to criticism (by others or by themselves), can be evaluated by fairly well developed standards under the common law method. None of the competing views seems superior on this score, and most—including the various forms of originalism—seem decidedly worse.

Finally, common law constitutionalism has the advantage of confronting the question of judicial restraint—that is, the question of how concerned we should be about the danger that judges will implement their own moral and political views under the guise of following the law—more directly and candidly than other theories do.[114] Under common law constitutionalism, the tension is between, on the one hand, the demands of tradition and

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[113] See, for example, Brest, 60 BU L Rev at 229-37 (cited in note 4).

[114] For a suggestion that the extent to which judges should be so restrained is perhaps a more difficult question than has generally been acknowledged, see Frederick Schauer, *The Calculus of Distrust*, 77 Va L Rev 653 (1991).

the need to maintain the text as common ground, and, on the other hand, the perceived requirements of fairness, justice, and good policy. By facing that tension, the judge is forced to decide how restrained she should be. Approaches that emphasize the text or the Framers' intentions, by contrast, ordinarily insist on the supposed absolute priority of the text or the Framers' intentions over the judge's moral views. Those approaches have a tendency to suggest that it is a usurpation for a judge ever to consider the fairness or justice of the action she is being asked to take.[115] In this way those approaches do not confront the issue of just how restrained a judge should be. Disputes that in fact concern matters of morality or policy masquerade as hermeneutic disputes about the "meaning" of the text, or historians' disputes about what the Framers did. By contrast, in common law constitutional interpretation, the difficult questions are on the surface and must be confronted forthrightly.

B. Democracy

A crucial part of the argument for textualist or originalist approaches is not just that they restrain judges but that they are more consistent with democracy. The objective of constitutional interpretation, on these accounts, is to uncover and enforce the will of "we the people" as expressed in the Constitution. By contrast, the argument goes, common law approaches that rely on precedent exalt the views of "Judge & Co.," an elite segment of the population.

So far as the argument from democracy is concerned, the more simplistic forms of textualism and originalism are, of course, subject to Noah Webster's objection. It is difficult to understand why democracy requires us to enforce decisions made by people with whom the current population has so little in common. It is true that the Framers were Americans, and we are Americans. But it does not follow that adherence to their decisions is democratic self-rule in any remotely recognizable sense. The originalist notion that the decisions of the eighteenth-century Framers somehow reflect the views of a continuous "we the people" extending since that time is as mystical and implausible as the most remote reaches of the common law ideology.[116]

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[115] See text accompanying notes 13-14. See also *Harper v Virginia Board of Elections*, 383 US 663, 676 (1966) (Black dissenting); Bork, *Tempting of America* at 251-59 (cited in note 1).

[116] This problem is not cured by allowing "we the people" to amend the Constitution

Neo-Hamiltonian views are less vulnerable to this objection. According to those views, judges are to enforce the decisions made by "we the people" at subsequent moments rather than those reflected in the original constitutional provisions. These approaches mitigate the objection that the dead hand of the past is governing the present. And at first glance it might seem that such views, whatever else one might say about them, are more suitable for a democratic, self-governing society than a common law approach. In particular, the common law approach seems elitist by comparison—a reflection of the guild interest of lawyers.[117]

This argument can be answered on several levels. To begin with, it is not obvious what should count as an appropriately "democratic" approach to constitutional interpretation. The most straightforward definition of democracy—rule by a current majority—is obviously not a good basis for constitutional interpretation. Constitutions are supposed to provide some protection against the current majority.

In addition, common law constitutionalism is democratic in an important sense: the principles developed through the common law method are not likely to stay out of line for long with views that are widely and durably held in the society. Indeed, by this standard the common law approach can plausibly claim to be as democratic as any of its competitors. Consider the most important principles that have emerged from constitutional common law in this century: expansive federal power; expansive presidential power, particularly in foreign affairs; the current contours of freedom of expression; the federalization of criminal procedure; a conception of racial equality that disapproves de jure distinctions and intentional discrimination; the rule of one person, one vote; a (somewhat formal) principle of gender equality; and reproductive freedom protected against criminalization. None of these important principles can be said to be rooted in original intent, and none has particularly strong textual roots. For most of them, it is hard to identify any "moment" at which a strong popular consensus crystallized behind them.

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by some suitable vote. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum L Rev 457, 499-503 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U Chi L Rev 1043 (1988). The question remains why, in the absence of such an extraordinary action by "the people," decisions made generations ago should govern.

[117] This charge is powerfully presented in Ackerman, 36 NY L Sch L Rev at 5 (cited in note 75).

Instead, all of these principles were developed essentially by common law methods—the evolution of doctrine in response to the perceived demands of justice and the needs of society. All of these principles were once highly controversial. But it is plausible to say that all of them now rest on a broad democratic consensus. They are evidence that the common law approach is at least broadly consistent with the demands of democracy.

In two ways, the common law approach does seem distinctly less democratic than neo-Hamiltonian views; but these are not obviously ways in which the common law approach is deficient. First, according to the common law approach, judges do not need to accept changes in popular sentiment, however profound, as ipso facto authoritative. Longstanding traditions have claims to acceptance, for Burkean reasons. But a sudden change in popular opinion, however strongly felt, does not by itself control the interpretation of the Constitution. If the judges are convinced that the popular sentiments are wrong, they may reject them. The abandonment of Reconstruction, and certain of the "national security" excesses of the Cold War era, may be examples of profound and long-lasting changes in popular sentiment that judges should have rejected.[118] Neo-Hamiltonian views, by contrast, would apparently obligate judges to follow genuinely democratic decisions, even if those decisions were deeply morally wrong.[119] Judges could of course engage in the equivalent of civil disobedience, but that raises other issues.

The common law approach is in a sense less democratic in this respect. The idea behind common law constitutionalism is that sometimes Burkean incrementalism, implemented by judges, is a good counterweight to the potential excesses of democracy. This is, for example, the way the doctrinal protections of freedom of expression are supposed to function.[120] There are two sides to this question: there is certainly a danger that judges will resist justified democratic imperatives for too long. The *Lochner* era can be seen in such terms. Ultimately the matter depends in large measure on an empirical assessment of the propensities of judges and popular majorities, and the answer will probably differ from one area of law to another. But simply to insist on the more

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[118] On the former, see Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 Const Comm 115 (1994).

[119] See Bruce Ackerman, *Rooted Cosmopolitanism*, 104 Ethics 516 (1994).

[120] See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am Bar Found Res J 521, 538-44; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum L Rev 449, 449-52 (1985).

"democratic" approach across the board—a greater response to changes in popular opinion—is not necessarily warranted.

The second way in which the common law approach can be said to be less democratic than the neo-Hamiltonian view is that judges, on the common law approach, are not limited to purported shifts in general popular sentiment when they decide whether the law should change. They may look to the work of previous judges and lawyers as well, as they did, in this century, in developing the law of freedom of expression and in taking at least the first steps toward racial and gender equality. But here again it is not clear that this is a problem. One of the premises of the neo-Hamiltonian view is that between constitutional "moments," the people are not engaged in constitutional politics. It follows that no decision made during that time—including a decision to adhere to the status quo ante—can be fully democratic. Seen in that light, a common law approach—judicial decisions that depart from the status quo by continuing evolutionary trends that have been generally accepted, even if they have not been ratified by a "constitutional moment"—may be as democratic a decision as we can hope for.

Finally, it is fair to say that the common law approach to constitutional interpretation does give a very prominent role to characteristic lawyers' methods of reasoning and to the professional training of lawyers. The elite and guild tenor of the common law ideologists was unmistakable. The ancient truths of the common law, they held, were accessible only to those with the proper (legal) training, not to kings, much less to hoi polloi.[121] But in this sense *all* interpretive methods—originalism, textualism, neo-Hamiltonianism, and legal process approaches—are elitist. They all require specialized capacities that only certain groups in society will have. Neo-Hamiltonian views (and some forms of textualism and originalism) claim to be democratic on the ground that they are trying to determine what "the people" decided. But it takes highly specialized training, and a great deal of sophisticated argumentation, to do that. Originalism requires highly refined historian's (and lawyer's) skills.[122] Textual inter-

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[121] See Hale, *Reflections* at 505 (cited in note 41); *Prohibitions Del Roy*, 77 Eng Rep 1342, 1342-43 (KB 1608); Simpson, *Common Law and Legal Theory* at 94 (cited in note 54).

[122] See, for example, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va L Rev 947 (1995); Michael J. Klarman, Brown, *Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 Va L Rev 1881 (1995); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 Va

pretation is not plausibly a matter of just reading the text in the way that an ordinary citizen would. Particularly if a textual approach draws "structural" inferences (as it probably must to be plausible), textual interpretation is a high legal art form. As for neo-Hamiltonian views, one can accept that "we the people" determined many important things at the time of, for example, the Civil War or the New Deal, but showing how those determinations bear on today's contested constitutional issues requires enormous interpretive skill and originality.

In fact, one great advantage of the common law approach is that it explains why trained lawyers—not historians, literary critics, philosophers, or political scientists—should play such a large role in constitutional interpretation.[123] It is not clear what, exactly, the distinctive lawyers' skills are, but the abilities required by the common law method—proficiency in a form of moral casuistry (distinguishing cases, recognizing significant particular facts, and so on), a rough understanding of social science, and skill at certain kinds of textual interpretation—are good candidates. It is less clear why lawyers should be thought to have the abilities required by the other approaches, such as the historian's skills required by originalism, the sophisticated skills of historical interpretation required for neo-Hamiltonian views, or the philosopher's skills required by other approaches.

C. Democratic Substance versus Democratic Method

This last point suggests the final answer to the charge that the common law approach is undemocratic: it may be a mistake to suppose that a *method* of constitutional interpretation should be democratic, at least when the courts have important responsibility for implementing it. Judicial review necessarily has a guild character in a sense, because by definition judges do it, and inevitably lawyers' norms will heavily influence it. This means that

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L Rev 1937 (1995). Although the Court in *Brown* conducted an extremely detailed examination of the original intent of the Fourteenth Amendment—the Court ordered rebriefing specifically on that question, 345 US 972 (1952), and reargument was devoted principally to that issue, see 347 US 483, 489 (1957)—the Court essentially conceded that the original understanding did not support its decision. See 347 US at 489-90. Even if Professor McConnell is right, and there is an originalist defense of *Brown*, it is surely a major difficulty with originalism as an approach to constitutional interpretation that no one was able to discover that defense for forty years—even though the advocates (and the Justices and law clerks) at the time of *Brown* had the strongest incentives to do so.

[123] See McConnell, 98 Yale L J at 1502 (cited in note 59); Fried, 60 Tex L Rev at 38 (cited in note 23).

we have to address the tensions between democracy and judicial review on the level of substance, not on the level of method. That is, we should not try to find—because we cannot find—a wholly democratic method of constitutional interpretation. Instead, we should determine, as a matter of substantive constitutional law, when judges in a constitutional democracy must accept the decisions of the political branches and when the judges should oppose the political branches.

The conceit shared by originalist and neo-Hamiltonian views is that when judges oppose the political branches they do so in the name of some other version of "the people." This conceit seems, falsely, to make it unnecessary to face the difficult substantive question of when, exactly, judges should be willing to overturn the decisions of the political branches. Common law constitutionalism can also claim a democratic basis, as I said above. But it may be more illuminating to recognize that judicial review, however practiced, has strongly undemocratic elements. The solution is to decide as a substantive matter when the democratic process should prevail and when it should be questioned. Common law constitutionalism focuses this question and forces us to answer it in the design of substantive doctrines. The other approaches (and the more mystical versions of the common law) obscure it by pretending that the method is sufficiently democratic to make it unnecessary to ask this question.

The objection that traditional common law decisions can be overruled by the legislature—and that the common law is therefore an inappropriate model for constitutional interpretation—can be met in the same fashion. This is, of course, an important difference between constitutional adjudication and common law adjudication, but it does not invalidate the common law model for constitutional interpretation. Instead it is a reason to adopt substantive principles of constitutional law that assign judges their proper role in constitutional adjudication. So, for example, we have adopted a principle that requires judges interpreting the Constitution to be deferential to legislative decisions in most circumstances. Similarly, the authority of constitutional judges to adopt innovative policies is much more sharply limited than that of traditional common law judges.

These principles themselves are excellent examples of principles that have developed by the common law method, rather than by any command. There is no specific textual warrant for them. Nothing in the text of the Constitution says that judges shall presume the validity of statutes, for example. No textualist

should feel comfortable referring to the "countermajoritarian difficulty" or kindred notions: the text does not say that the decisions of our government should presumptively be made by majorities. (Also, of course, the evidence that the Framers were majoritarians is problematic, to say the least.) The need to be appropriately deferential to popular majorities—like, for that matter, all the rest of the institution of judicial review—has evolved over time, by the common law method.

The principles that require unelected judges to be appropriately deferential to majorities are principles that any plausible theory of constitutional interpretation should adopt, in any democracy, whether it has our Constitution or any constitution. They are valid principles not because the text or the Framers or the people commanded them, but because they are sensible ways of reconciling judicial review with democracy. The common law method acknowledges that judicial review accommodates itself to democracy by adopting such principles—not by attempting to explain judicial constitutional interpretation in a way that makes it appear to be more democratic than it is.

CONCLUSION

Our legal system is distinctive, perhaps unique, for the prominence it gives to judges. The distinctiveness is manifested in two practices in particular: judicial interpretation of the Constitution, and the common law. I have suggested that these two practices have much in common, and that American constitutionalism, over the years, has increasingly, and justifiably, taken on the character of a common law system. We sometimes say that the written Constitution is another distinctive aspect of our legal order. The written text does play a crucial role as a focal point for the conventionalism that is important to any political order. There are powerful reasons not to interpret the text in a way that would seem too contrived. But the Constitution is much more, and much richer, than the written document. When we apotheosize the Framers we understate the importance of the many subsequent generations of lawyers and judges, and nonlawyers and nonjudges, who have helped develop the principles of American constitutional law.

Today it is those principles, not just the document, that make up our Constitution. Originalist and textualist approaches often find themselves in the position of making exceptions for, or apologizing for, or simply being unable to account for, some of the most prominent features of our constitutional order. The common

law approach greatly reduces the need to do any of that. It forthrightly accepts, without apology, that we depart from past understandings, and that we are often creative in interpreting the text. These practices, which are common and well settled, need not be carried on covertly or with a sense that they are somehow inappropriate. They are important parts of our system, and they can be justified on the basis of one of the oldest legal institutions, the common law.

Perhaps the most serious charge against the common law approach is that it is resistant to change. To some degree that is true. But properly understood the common law method does not immunize the past from sharp, critical challenges. Gradual innovation, in the hope of improvement, has always been a part of the common law tradition, as it has been a part of American constitutionalism. Even sudden changes are possible. They require a stronger justification, but the common law approach, unlike some other methods, allows judges to make them. Perhaps most important, the common law method identifies what is truly at stake: whether the arguments for change, in order to make the law fairer or more just, overcome the presumption that should operate in favor of the work of generations. Since we cannot avoid that question, we are perhaps better off with an approach that forces us to answer it.