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Footholds of Constitutional Interpretation

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Symposium

Constitutional Foundations

Footholds of Constitutional Interpretation

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

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

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

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

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

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

6. *See id.* art. II, § 2, cl. 2.

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

8. *See id.* art. I, § 8, cl. 3.

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

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

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

Bobbitt's approach resists any grand constitutional meanings.

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

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9. *See id.* art. I, § 5, cl. 3.

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

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

12. *Id.*

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

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

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

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

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

16. *Id.* at 87.

17. *Id.* at 88.

18. *Id.*

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

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

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

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

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

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

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

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22. *Id.* at 189.

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

24. *Id.*

25. *Id.* at 73.

26. *Id.* at 17.

27. *Id.* at 35.

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

29. *Id.* at 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39. *Id.* at 92–93.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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