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DOES THE CONSTITUTION PRESCRIBE RULES FOR ITS OWN INTERPRETATION?

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This Article is dedicated to the memories of three of my great, unforgettable teachers while I was a student at Northwestern University: Professor Richard W. Leopold (1912–2006) of the history department and Professors Victor Rosenblum (1925–2006) and Richard Speidel (1933–2008) of the law school. They not only taught; they inspired and encouraged. I will remember them all of my life.

INTRODUCTION

It is frequently assumed—indeed, it is often stated as an agreed premise in debates over constitutional interpretation—that the Constitution itself specifies no rules or principles governing how it is to be interpreted and applied. But is this really so? In this Article, I will argue that this commonly held assumption is seriously mistaken. A careful reading of the text of the Constitution—I will assume, provisionally, for the sake of developing the argument, that this is the appropriate method for seeking an answer to this constitutional question—shows that the Constitution *does* prescribe an interpretive methodology. That methodology is to read and apply the document's written words and phrases, taken in context, as they would have been understood by reasonably informed readers of such a document at the time they were written. The search is for the objective, original meaning of the language, as informed by concrete evidence as to how it actually was understood at the time; but it is not a search for the subjective views of individuals or their specific expectations about how a provision would apply.

Where such an understanding supplies a sufficiently clear *rule* of law, that rule must be applied to all matters falling within its scope; actions of government contrary to such a rule violate the Constitution.[1] Where such an understanding supplies a general *principle*, actions of government that fall within the scope of judgment or discretion admitted by the breadth with which that principle is expressed do not violate the Constitution, and are thus allowable;[2] actions outside the range of judgment permitted by the principle violate the Constitution.[3] And finally, where the text of the Constitution supplies *no rule or principle* concerning the issue in question, the Constitution is not a source of governing law concerning that matter; the decision defaults to some other source of governing law.[4]

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[1] The rule of law commonly called "judicial review" follows directly from the text of the Constitution, which supplies a clear, determinate principle of constitutional supremacy. *See* U.S. CONST. art. VI, § 1, cl. 2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), correctly explicates this principle, as did THE FEDERALIST NO. 78 (Alexander Hamilton) before it. *See* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707–24 (2003).

[2] This is the principle for which *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), is a prominent example. The breadth of the Constitution's language delegating powers to the national government admits of a broad range of possible applications by that government. *See id.* at 415 ("It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.").

[3] This is the proposition for which *Marbury* stands. *See* Paulsen, *supra* note 1, at 2713–14.

[4] *Marbury* also supports this proposition. The premise that justifies exercise of the power of "judicial review" is the existence of a rule of law supplied by the text of the Constitution with which the government action at issue conflicts. In the absence of such a rule of law in the text of the Constitution, there is no warrant for the exercise of the power of judicial review, under the reasoning of *Marbury*. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*,

This methodology is, I submit, set forth in the Constitution. It is not set forth in elaborate detail. The Constitution, on this point as with many others, uses spare, concise language. The document is refreshingly free of the language of interpretive theory, hermeneutic principles, or the academic gobbledygook that so pervades, and perverts, much law-review discussion of how the Constitution is to be interpreted. (Indeed, I tend to think that the absence of such language, in addition to other virtues, suggests that the injection of such academic terms into the discussion is almost literally an *unconstitutional* approach to interpreting this written Constitution.)

Instead, the Constitution sets forth its own interpretive principles simply, cleanly, and rather without pretense. It says, in express terms, that it is the written text of the Constitution that has been adopted by the People and that is authoritative and binding: "We the People . . . do ordain and establish *this Constitution*" for the United States.[5] "*This Constitution* . . . shall be the supreme Law of the Land."[6] It seems further to say, by virtue of the clarity of the specification of "This Constitution," that the written text comprising "This Constitution" is exclusive; nothing not included in the written Constitution is part of "This Constitution." And it specifies that judges are to be "bound" by this exclusive, written text; that they, and all other government officials, must swear a formal oath to support it; and that they must apply it as binding, supreme law.[7]

In short, the Constitution's text prescribes fidelity to a specific, exclusive, defined, determinate written text.

It does not say, quite, that judges and other officials may not change the *meanings* of the words and phrases of the Constitution. But that is fairly clearly implicit in the text's specification of a particular written text as authoritative, exclusive, and supreme over any other source of law or policy. Were it otherwise—if officials could alter, either at once or over time, the original content of the Constitution's rules, standards, and principles by interpreting its written words and phrases in ways that depart from their original public meanings in historical-political and textual context—such anachronistic readings would decisively undermine the Constitution as a written, authoritative, binding, and exclusive document. Supremacy would

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83 GEO. L.J. 217, 243 (1994) (arguing that exercise of the power of judicial review presupposes that the political branches have made a choice that is forbidden by the Constitution; where the Constitution permits a range of choice, and the Legislature or Executive has acted within that range, there is no warrant for exercise of the power of judicial review); *see also infra* note 80 and accompanying text; *cf.* Paulsen, *supra* note 1, at 2739–42.

[5] U.S. CONST. pmbl. (emphasis added). I call this provision the "Enacting Clause" of the Constitution. *See infra* Part I.

[6] U.S. CONST. art. VI, § 1, cl.2 (emphasis added). Vasan Kesavan and I have called this provision the "Supreme Law Clause," rather than the more conventional "Supremacy Clause." *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

[7] U.S. CONST. art. VI, § 1, cls. 2–3.

lie not in the written text of "This Constitution," but in the subjective, changing interpretations of government officials—a principle contradicted by the text, structure, and logic of the document. Even more peculiarly, supremacy might lie in changing linguistic conventions over time. In short, to grant the premise that meanings change, or that interpreters legitimately may change them, is to contradict the postulate of the supremacy and authority of the written text. That contradiction disproves the theory's validity.[8]

Finally, if the Constitution *had* meant to have incorporated such extraordinary interpretive principles, contradicting the fair implications of Article VI's "This Constitution" and "Oath" Clauses (and departing drastically from the baseline default interpretive principles of written legal texts at the time),[9] it almost certainly would have said so. But it does not. Dogs tend to bark when disturbed and elephants generally leave traces of having been present.[10] No one at the time of the Constitution's framing and ratification ever spoke for the proposition that the meaning of the words of the Constitution legitimately would be subject to change over time. (The words might admit of a range of different policy choices for governing officials, but that is different from saying that the text's *meaning* actually changes.[11]) The only men to bark a meanings-change doctrine were expressing fears of what *might* be done, *improperly*, because of insufficient checks against the abuse of interpretive power by judges (and others).[12] The Federalists took pains to

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[8] *Cf.* Paulsen, *supra* note 4, at 284–88 (using the method of indirect proof, borrowed from mathematics, to reinforce the textual and structural argument for coordinate constitutional review by all departments of the national government). As discussed below, to grant the premise that interpreters may change the meanings of the Constitution's text is also to contradict the text's specification of rules for amending the text, in Article V. *See infra* Part II.B.

[9] *See* Saikrishna Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 540–46 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)) (arguing that the default rule assumed by the Constitution itself is that it should be interpreted and applied in accordance with the original meaning of its words). Professor Prakash's point can be put even more strongly: the default rule is so natural that it is more than a default rule; it is one that comes with a very heavy presumption of correctness.

[10] John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33, 33 (2006) ("Elephants leave traces when they pass by.").

[11] *See* Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 994–96 (2008); *accord* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418–21 (1819).

[12] The most prescient and lucid anti-Federalist critic of the potential abuse of judicial power was "Brutus." Brutus first set forth what he regarded as the proper method of constitutional interpretation, in accordance with "the rules laid down for construing a law":

> [T]he courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context. The end of the clause will be attended to, and the words will be understood, as having a view to it; and the words will not be so understood as to bear no meaning or a very absurd one.

Letter XI from Brutus to the *New York Journal* (Jan. 31, 1788), *in* THE FEDERALIST WITH LETTERS OF "BRUTUS" 503 (Terence Ball ed., 2003). He contrasted this with the method he thought a likely abuse

deny that the checks were insufficient.[13] They never defended the propriety of latitudinarian construction to depart from the original public meaning of the document. There is no evidence of that elephant ever having been in the room—other than in the imagination and fears of the document's opponents.

Most importantly, the Constitution's own words give off absolutely no whiff of this elephant. *That* is the sense in which the oft-assumed absence of interpretive instructions in the document is pertinent: there is nothing—*nothing*—in the document in the way of interpretive directions that could remotely be taken *to contradict* the most natural sense of Article VI's (and related provisions') evident specification of the words of the written text, as enacted at a point in historical time, as the authoritative and exclusive source of constitutional meaning. Moreover, there are additional, confirming clues in the text that would contradict any such imagined contradiction of Article VI's interpretive instruction: the textual specification of an amendment process for changing the content of the authoritative text; and the text's specification of interpretive rules, procedures, interpreters, or gatekeepers for specific provisions or situations where there otherwise might be thought a reason to depart from the baseline rule that the document specifies the original meaning of the text as the beginning and end of constitutional interpretation.[14]

In short, the text of the Constitution *does* prescribe an interpretive methodology: original-meaning textualism.

In what follows, I develop this straightforward thesis. It is an "intratextual" argument and, in that (nonpejorative) sense, circular.[15] My meth-

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by the courts: "[I]n their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution." *Id.* at 504. Brutus expressed concerns that "[t]he constitution itself strongly countenances such a mode of construction" and "gives sufficient colour for adopting an equitable construction." *Id.* at 504–05. The clause Brutus feared might be taken to authorize such latitudinarian judicial interpretation was Article III's grant of jurisdiction to decide cases "in Law *and Equity*." U.S. CONST. art. III, § 2, cl. 1 (emphasis added); Letter XI from Brutus to the *New York Journal*, *supra*, at 503 ("The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity. By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."). In addition, Brutus continued, the judges "will be interested in using this latitude of interpretation" in order to enhance their own power. Letter XI from Brutus to the *New York Journal*, *supra*, at 505. Hamilton's *Federalist* essays on the judiciary were at pains to deny this latter charge. THE FEDERALIST NO. 81, at 451 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (rejecting the charge that judges rightly could construe the Constitution according to its "spirit" or that they legitimately would have "any greater latitude" with respect to constitutional interpretation than courts possess with respect to interpretation of laws generally).

[13] *See* THE FEDERALIST NO. 81, at 451 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (quoted in previous footnote).

[14] *See infra* Part II (discussing provisions that confirm the Constitution's general interpretive instructions and provisions that illustrate specific interpretive instructions with respect to specific points).

[15] On "intratextualism," see generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (encouraging interpreters to read the Constitution more "holistically" by self-consciously com-

odology is original-public-meaning textualism. Applying that methodology *to* the Constitution, I conclude that *the original public meaning of the Constitution's provisions nearly overwhelmingly suggests the conclusion that the Constitution is to be interpreted and applied in accordance with the original public meaning of its words, phrases, and internal structural logic.* One could (I suppose) posit an interpretive theory that begins with some "outside" stance, employ that stance to "interpret" the Constitution in a fashion governed by such external-to-the-document interpretive principles, and thereby break the hermeneutic circle from outside of it. Such approaches, however, in addition to their other flaws,[16] surely are no *less* bootstraps than the proposition that the original meaning of the text compels original-meaning textualism.[17] My objective here is simply to destroy the common canard that there exists no set of *internal* interpretive instructions in the Constitution.

Part I of this Article develops the main textual argument from Article VI's provisions, from related, confirming provisions paralleling Article VI's "This Constitution" language, and from the necessary implications of the written, bounded constitutionalism these provisions entail and describe. Part II then discusses the loud absence of any contravening interpretive instructions anywhere in the text—the lack of elephant evidence—and the supportive textual evidence that the document specifies particular interpretive rules where it intends any departure from the baseline norm. Further, the document specifies a single means for changing the Constitution's text, the strong textual negative implication being that amendment-through-interpretation is excluded. Interpretations must conform to original linguistic meaning, or they violate Article V's constitution-making provisions.

Part III addresses conventional objections to original-meaning textualism. Most of these objections are not actually directed at the textual argument for originalism, but are "external" critiques of its consequences or perceived limitations. Embracing arguments often made first by others, I conclude that some of these supposed consequences are simply wrong and tend to show only what poor original-meaning textualists its external critics frequently are. More fundamentally, the consequentialist arguments are really beside the point. Interpretation precedes evaluation, and is separate from it.[18]

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paring a word or phrase in a given clause to "identical or similar words or phrases elsewhere in the Constitution").

[16] Kesavan & Paulsen, *supra* note 6, at 1129 (explaining that to treat the Constitution as authoritative requires accepting it on its own internal terms and does not well admit of the bootstrap approach of beginning from an interpretive perspective external to the document).

[17] *See infra* text accompanying notes 36–41.

[18] On this point (and others), I am indebted to the clear-headed thinking and writing of Professor Gary Lawson as reflected in several of his articles. Two of my favorites are Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) [hereinafter Lawson, *Rise and Rise*],

As to the supposed limitations of original-meaning textualism—its failure to provide clear, determinate answers to all constitutional questions—I fully embrace them. There is no honest approach to constitutional interpretation that provides clear, determinate answers to all constitutional questions. This scarcely impeaches originalist textualism as the proper method of constitutional interpretation. It merely shows that the Constitution does less work—and thus leaves more questions to be resolved by democratic political choice—than its critics suppose, or prefer. That is not an *objection to* original-meaning textualism. It is simply the inevitable, and appropriate, *byproduct of* originalist textualism. As such, it is a fundamental feature of the Constitution's textual design.

Part IV concludes with some brief thoughts about why I am "for" original-meaning textualism as the appropriate method of constitutional interpretation, complying (minimally) with the assigned title for the panel at which this paper was originally presented, "Originalism: For and Against." I favor this method not on account of any highfaluting philosophical, linguistic, or political theory. I will not—other than in this sentence—mention Heidegger, Kant, Derrida, Locke, Hobbes, Rawles, Stanley Fish, Bruce Ackerman, or George Carlin. Rather, I favor original-meaning textualism because it is the method prescribed by the Constitution itself. It is the only legitimate method of constitutional interpretation, if the project really is constitutional interpretation. This is a purely internal perspective. If what one is *doing* is interpreting the Constitution, one must take it literally on its own terms—just as one would the Articles of Confederation, for example—as a specific textual, linguistic artifact. As I have said, interpretation precedes, and is distinct from, application.

There is no *a priori* reason to assume that the Constitution of the United States, understood and applied in accordance with the original public meaning of its words, phrases, and structure, is a good and worthy constitution; such a premise forms no part of my justification for originalism. The Constitution was bad, in important respects, from the start. (Consider the original Constitution's several protections and encouragements of slavery, defective representation and franchise rules, somewhat undemocratic—and originally slavery-reinforcing—presidential selection process, and the difficulty of alteration of the Constitution.[19]) It remains deficient in impor-

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and Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO L.J. 1823 (1997) [hereinafter Lawson, *On Reading Recipes*].

[19] *See* U.S. CONST. art. I, § 2, cl. 3 (the infamous Three-Fifths Clause); *id.* art. I, § 9, cl. 1 (forbidding Congress from interfering with the international slave trade for twenty years); *id.* art. V (forbidding any constitutional amendment altering Article I, Section 9, Clauses 1 and 4); *id.* art. IV, § 2, cl. 3 (Fugitive Slave Clause); *id.* art. I, § 3 (equal state Senate representation); *id.* art. II, § 1, cl. 2 (Electoral College); *id.* art. V (procedures for constitutional amendment, with enormous supermajority requirements at both the national and state levels). *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 20–21, 87–98, 119–20, 147–59 (electoral college), 255–59 (pro-slavery provisions) (2005).

tant respects today. (All of the above defects remain except slavery.[20]) These would furnish decent, or at least colorable, arguments against agreeing to exercise government authority pursuant to such a constitution, or even against agreeing to be bound by it as a citizen. That was, in various forms, the argument of Garrisonian anti-slavery advocates.[21] But it is not an argument that the language means something different from what it means.[22]

I. ARTICLE VI AS A RULES-OF-CONSTRUCTION PROVISION

A. "This Constitution": Article VI as a Specification of Textualism

There are several applicable provisions of the Constitution that contain instructions about constitutional interpretation and application. I will eventually touch on most all of them: the document's Enacting Clause ("Preamble"), Establishment Clause (Article VII), Amendment Article (Article V), Due Process Clauses (in the Fifth and Fourteenth Amendments), and several "retail" rules-of-construction provisions (the Ninth, Tenth, and Eleventh Amendments; the first sentence of the Fourteenth Amendment; and obscure provisions of Article IV and of the Seventeenth Amendment).[23]

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[20] In addition, I have suggested elsewhere, only half in jest, that the proper understanding of the Constitution's provisions is that the Vice President of the United States presides over his own impeachment trial! Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245 (1997). I set forth a few other provisions of the Constitution that I dislike *infra*, Part III.

For the record, I think the Constitution of the United States is, on the whole, as it stands today, a *very, very good* constitution, if interpreted and applied in accordance with the original public meaning of its language.

[21] *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 150–54 (1975). As Cover shows, the interpretive approaches of Lysander Spooner and other "utopian" anti-slavery advocates was to the contrary. *Id.* at 154–58; *see* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & REL. 33, 63–65 (1989).

[22] Before proceeding, a humble disclaimer: No "originalist" says much that is very original any more, and I am no exception. A fair amount of what I say here replows ground tilled by others, and I am indebted to their work. I may fail to cite all who have made versions of arguments I make here, but my thinking unquestionably has been influenced deeply by the best originalist scholarship that has come before. For a few important examples, see ANTONIN SCALIA, A MATTER OF INTERPRETATION 3–47 (1997); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Kesavan & Paulsen, *supra* note 6; Lawson, *On Reading Recipes*, *supra* note 18; Lawson, *Rise and Rise*, *supra* note 18; Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) [hereinafter Powell, *Original Understanding*]; H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); Prakash, *supra* note 9; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For more sources, see Kesavan & Paulsen, *supra* note 6, at 1124 n.39 (collecting citations to important academic contributions to the debate over originalist interpretive methodology).

[23] *See infra* Part II.

But the most important instructions are set forth in Article VI of the Constitution, the next-to-last Article of the Constitution. This is about where one would expect to find a rules-of-construction provision in a legal document, charter, or contract—at the tail end of the document, after its substantive provisions.

The *last* Article of the original document, Article VII, states a rule of recognition specifying when and how the new Constitution would become operative and to what political communities its authority would extend: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of *this Constitution* between the States so ratifying the Same."[24] It makes sense that this statement, which I call the "Establishment Clause" (notwithstanding—or, perhaps perversely, because of—the confusion it might cause with the religion clauses of the First Amendment) comes last, as a matter of style and form, following a rules-of-construction Article. Article VI is precisely such a how-to-understand-and-apply-this-document set of interpretive instructions.

The language of Article VI, in its entirety, is as follows:

> [1] All Debts contracted and Engagements entered into, before the Adoption of *this Constitution*, shall be as valid against the United States *under this Constitution*, as under the Confederation.
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> [2] *This Constitution*, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be *bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
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> [3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support *this Constitution*; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.[25]

I have emphasized the "this Constitution" language, repeated in each of Article VI's three clauses, for obvious reasons: First, the specification of *this Constitution*, and what exactly "this Constitution" is, is crucial to the entire interpretive enterprise. Taken seriously, as I will argue it should be, it establishes the metes and bounds of constitutional argument. The specification of what *constitutes* "this Constitution" literally defines the interpretive territory.

Second, and importantly, Article VI's references to "this Constitution" connect the document's concluding Articles (VI and VII) to its opening words: "We the People of the United States . . . do ordain and establish *this Constitution* for the United States of America." This provision, commonly known as the Preamble, might equally well be dubbed the "Enacting

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[24] U.S. CONST. art. VII (emphasis added).

[25] U.S. CONST. art. VI (emphasis added).

Clause." The different label is not entirely without consequence: indeed, it is relevant to the connection between this provision and Article VI. "Preamble" might have too much the sense of fluff and surplusage—as if the Constitution's opening words were empty rhetoric without any operative effect. To be sure, "Preamble" does, usefully, convey the sense that this clause does not itself confer specific powers or rights—those are set forth in the Articles and the subsequently adopted amendments that follow in the text—but instead states general purposes that those later, specific provisions are intended to serve. But the word "Preamble" fails to capture the force of what the provision declares: that "We the People" do hereby "ordain and establish"—in a word, enact—"this Constitution." Enactment is the function of this provision within this legal document. Thus, the "Enacting Clause."

And what precisely does the Enacting Clause enact? It enacts "*this Constitution* for the United States of America"—the same "*this Constitution*" that Article VI specifies as "supreme Law," the written document that follows the Enacting Clause and that concludes (in the original) with Article VI and Article VII. The opening and closing words of the Constitution refer to "this Constitution" as what has been enacted, is supreme law, and is established among the states that adopt it.[26]

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[26] I have been much influenced in my understanding of the Enacting Clause by Professor Akhil Amar's excellent analysis. *See* AMAR, *supra* note 19, at 5–53. For my (mostly) glowing review of Amar's book, see Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037 (2006) (reviewing AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) and JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (2005)).

Might the statement of purposes set forth in the Preamble/Enacting Clause itself contain an implicit rule of construction? Does not the fact that the Constitution was enacted "in order to form a more perfect Union, establish justice, promote domestic tranquility, provide for the common defense, and secure the blessings of liberty" mean that the Constitution should be interpreted, wherever fairly possible, in such a way as best to effectuate those purposes? I think that the answer is a very weak *yes*: the Enacting Clause's statement of purposes provides an extraordinarily gentle interpretive push. It is, after all, a preamble or enacting clause, and not a substantive "Establish Justice" Clause or "Domestic Tranquility" Clause or "Common Defence" Clause or "General Welfare" Clause. The statement of purposes is at such a high level of generality as not to supply substantive rules of law—certainly not to supply substantive content in conflict with the substantive constitutional provisions that follow, which presumably instantiate the purposes stated in the Enacting Clause. That is how preambles were understood in the legal tradition of the time. Finally, the statement of purposes in the Enacting Clause is so general, vague, and ambiguous as not really to supply much of a rule *of construction* concerning the meaning of the powers and rights the Constitution sets forth. (What is "justice"? What do the "blessings of liberty" require as a substantive matter? What is necessary to provide for the "common defence" or to assure "domestic tranquility?" What is the "general welfare"? Conceptions will differ greatly on all of these points.) In short, the specifics of the constitutional text's substantive provisions always prevail over the general statements of aspiration and purposes set forth in the Enacting Clause, and are not helpfully or meaningfully clarified by those statements of aspiration and purposes. *See generally* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459, at 444 (Boston, Hillard, Gray & Co. 1833) (stating that "in the exposition of every code of written law," preambles are "properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble"); *id.* § 462, at 445 ("[The Constitu-

The third coordinating function of the "this Constitution" language is to tie together the three clauses of Article VI. Plainly, Article VI, Clause 2, commonly referred to as the Supremacy Clause (my preferred name is "Supreme Law Clause"[27]), is the core rules-of-interpretation provision. But it is importantly reinforced by the Oath Clause of Article VI, Clause 3, as we shall see presently.

What about the first clause of Article VI? The question is worth a short detour. At first blush, Article VI, Clause 1—specifying that debts of the Confederacy remain valid under "this Constitution"—seems of a different character from the rest of the Article. It does not specify the authority and binding nature of the Constitution, as Clauses 2 and 3 do. But on careful reflection, Clause 1 can be seen as simply a specific rule of construction, included to refute the inference—which might otherwise have been a correct inference—that adoption of a new government worked a repudiation of the debts and contracts of the *ancién regime*. The Clause could as easily have read: "The adoption of this Constitution shall not be construed to repudiate Debts contracted and Engagements entered into before the Adoption of this Constitution, but shall be as valid against the United States under this Constitution, as under the Confederation."[28] The United States is still the United States, the provision states in effect, and those entering into the new government, identified in Article VII, will honor the debts and obligations of the prior government. This is an important specification of how the act of adoption of the Constitution should be interpreted in terms of legal obligations incurred by the old government. There is a related provision in Article VI, Clause 2: The language concerning treaties as part of the su-

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tion's preamble] never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power *per se*; it can never amount, by implication to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them."). Story used the example of the Preamble's phrase "to provide for the common defence":

> No one can doubt, that this does not enlarge the powers of congress to pass any measures, which they may deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words . . . ; if one would promote, and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation to be adopted?

Id.

[27] Kesavan & Paulsen, *supra* note 6, at 1127.

[28] The records of the Constitutional Convention confirm that negating the inference of debt-repudiation was indeed the purpose of this provision. Madison's Notes (Aug. 22, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 377 (Max Farrand ed., rev. ed. 1966) (recording that Madison and Gerry each favored an explicit provision to make clear that adoption of the Constitution could not supply a justification for "getting rid of the public engagements" and noting arguments for repudiating debts to British subjects on a theory that prerevolution contracts were "dissolved by the Revolution which destroyed the political identity of the Society"); *id.* at 414 (Aug. 25, 1787) (recording the introduction by Randolph of substitute language close to eventual language of Article VI, Clause 1, a statement by Dr. Johnson that changing the government of the United States should not be understood as changing the obligations of the United States, and the adoption of Randolph's motion).

preme law of the land contains a seemingly awkward verbal circumlocution—"[A]ll Treaties made, or which shall be made, under the Authority of the United States . . . ." But the slight awkwardness is easily explained as included to make clear a "savings"-effect rule-of-construction similar to Clause 1's: Treaties made under the Confederation are carried forward as part of the binding legal obligations of the United States under the Constitution, just as debts and contractual obligations are.[29]

But, as noted, the guts of the Constitution's interpretive instructions lie within Article VI, Clause 2: the Supreme Law Clause. Here it is again, in full:

> *This Constitution*, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The "bound thereby" command to state judges is buttressed, and extended comprehensively, in the Oath Clause, which immediately follows:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support *this Constitution* . . . .[30]

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[29] I argue below that the Ninth Amendment similarly functions as a savings provision. *See infra* Part II.A. Another such savings provision is Article IV, Section 3, Clause 2, which provides that the power of the national government to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" is qualified by the interpretive-instruction proviso that "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." *See infra* Part II.A.

[30] U.S. CONST. art. VI, § 1, cl. 3 (emphasis added). The President has his own, special oath, prescribed in Article II. It requires the President to swear (or affirm) to use his fullest abilities to "preserve, protect and defend"—not just "support"—"*the Constitution* of the United States." U.S. CONST. art. II, § 1, cl. 8 (emphasis added). For a discussion of the significance of the Presidential Oath Clause, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1260–67 (2004); Paulsen, *supra* note 4, at 257–62.

The Oath Clauses cannot be read as establishing merely a requirement of political loyalty to the United States as a nation, or to the "regime" loosely defined, or to "the government"—at least not if one attends to the actual language of these constitutional provisions. The words prescribe a requirement of fidelity to the Constitution, a frame of government comprised of specific assignments of powers and reservations of rights. It borders on the nonsensical to say that one may take an oath to support the Constitution but not mean that to include support for what the provisions of the written Constitution in fact say. I have developed this point in earlier writing. *See* Paulsen, *supra* note 4, at 260–62. On the oath's importance—and the Founding Generation's understanding of the moral and even eternal consequences of its violation—see *id.* at 257 (discussing the oath's "profound, almost covenantal significance" to the Framing Generation and collecting authorities); Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1486–89 & n.57 (1997) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)) (collecting authorities and noting

All senators and representatives, *all* members of state legislatures, and *all* executive and judicial officers, national and state, are bound to support *this Constitution* as "supreme Law of the Land."

What does the Constitution mean when it says, so repeatedly, "this Constitution"? To what does Article VI, Clause 2 of the Constitution refer when it says "this Constitution" and specifies it as "supreme Law"? To what does Article VI, Clause 3 refer when it says that all federal and state officials "shall be bound" by oath or affirmation to support "this Constitution"? To what does the Enacting Clause ("Preamble") similarly refer when it proclaims that the people do hereby ordain and establish "this Constitution"? To what does Article VII refer when it proclaims "the Establishment" of "this Constitution" upon ratification by nine states?

I submit that this question, or series of questions, has a single, almost painfully obvious answer: "this Constitution" means, each time it is invoked, *the written document.* It refers to the entire text of the written Constitution, of which the Enacting Clause, Article VI's Supreme Law Clause and Oath Clause, and Article VII's Establishment Clause are constitutive, *constituting* parts. *The document specifies the document* as authoritative. By very strong linguistic implication, if not quite by explicit language, the document's specification of the document as supreme and binding would appear to exclude anything outside the document as authoritative.[31] Nothing not set forth in the writing that constitutes "this Constitution" is part of the Constitution. The writing is exclusive. Structurally, Article VI functions in much the same way as a "merger" or "entire agreement" provision in a written contract. *This document* is "the Constitution." Nothing else is enacted. Nothing else is supreme law. To nothing else are all government officials bound by their oaths. And anything to the contrary is hereby superseded, as among the states that ratify this Constitution.[32]

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the significance of the prospect of eternal damnation by oath violators as part of the purpose for the criminal accused's Fifth Amendment privilege against compelled testimony).

[31] Again, it is worth emphasizing at this point the absence in the text of any provision pointing the interpreter outside the document.

[32] Article VI does specify that the document prevails over "any Thing" in state laws or constitutions. U.S. CONST. art. VI, § 1, cl. 2. It is probable that this is the only "Thing" the Framers thought it necessary to itemize in this regard, either by way of emphasis or clarity, or because it was the only plausible candidate in need of specification, especially with respect to federal statutory and treaty law. (This may also help explain Article VI's specific emphasis, in the form of a directive to state judges, that they are bound by the supremacy of the U.S. Constitution, a command made somewhat redundant by the Oath Clause's directive that *everybody* is bound by the Constitution.)

Article VII does much the same thing with respect to the legal authority of the Articles of Confederation that Article VI does with respect to state law. As among the states ratifying the Constitution, the Articles are superseded entirely. (They are not included within Article VI, Section 1, Clause 2 as forming any part of the "supreme Law of the Land"—which is why the savings provision for treaties "made . . . under the Authority of the United States" was necessary.) The Articles of Confederation themselves have no legal force as among the states ratifying the new Constitution for the United States.

Thus, it appears that the best, most faithful internal exegesis of the text itself—of Article VI's provisions, logic, and function, and of allied provisions like the Enacting Clause and the Establishment Clause that begin and end the original document—reveals textualism, in some proper form, as *the* textually prescribed method for interpreting and applying the Constitution.[33]

At least, that is the method that must be employed by those whom the Constitution charges with interpreting and applying it in connection with the exercise of actual governmental authority under the Constitution—those persons who, having agreed to exercise power under "this Constitution," have sworn an oath to "support" it, be "bound" thereby, and (in the case of the President) to "preserve, protect and defend" it. Under the Oath Clauses, it is not open to such persons to exercise authority under the Constitution other than in accordance with its own terms. Other people may choose (one supposes) to interpret the Constitution as if it were poetry, literature, aspiration, intergenerational political chain novel, or a monkey's keystrokes. Humpty Dumpty (or some other deconstructionist) might have the words mean whatever he wants them to mean.[34] But the Constitution binds those who exercise authority under it to regard it as controlling *law*, not as literature, inkblot, or anything else. And it specifies that its meaning is internal to the document, not imported from personal judgment or any other external authority.[35]

It is true, as noted above, that this argument is in a sense circular: it is original-meaning textualism that yields original-meaning textualism.[36] But this is not a very powerful objection at all, for the same will be true of any interpretive approach. For example, original understanding *intentionalism* (original intent), a close relative of original-meaning textualism and in some ways perhaps an earlier model of the same vehicle,[37] is "circular" in that it

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[33] I discuss presently some corollary propositions of Article V, Article VI, Article VII, and the Enacting Clause that specify what that "some proper form" of textualism entails—and excludes. *See infra* Part I.A.

[34] LEWIS CARROLL, THROUGH THE LOOKING-GLASS ch. 6 (Humpty Dumpty adopting idiosyncratic meanings of words and asserting that "When *I* use a word . . . it means just what I choose it to mean.").

[35] This is not to say that extrinsic evidence may never be employed to aid in ascertaining the meaning of the words of the text. It is simply to say that all such evidence, and all use of such evidence, must be directed to the project of ascertaining the objective, original public meaning of the words, phrases, and structure of the text. The project is ascertaining textual meaning; it is *not* ascertaining intent, creating the best policy, harmonizing meaning with practice or precedent, or anything else.

In other work, Vasan Kesavan and I have addressed the question of whether and how certain types of extrinsic evidence can assist the project of ascertaining objective, original public linguistic meaning of the text, arguing for clear rules constraining, and a hierarchy of sources with respect to, resort to such second-best and third-best evidence of meaning. *See* Kesavan & Paulsen, *supra* note 6, at 1133, 1148–1214; *see also* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 CAL. L. REV. 291, 332–95 (2002).

[36] *See* Kesavan & Paulsen, *supra* note 6, at 1128 (making a similar point).

[37] Vasan Kesavan and I have traced the evolution of the species of originalism in earlier work, from "original intent" to "original understanding" to "original public meaning." *See id.* at 1134–48.

starts from the premise that what matters in legal textual interpretation is the intention of a text's author(s); the intention of the lawgiver is the law.[38] This starting point yields the conclusion that discerning the lawgiver's intention is the object in reading the text.[39] It is, in a small way, an interpretive stance external to the text, and circular in its own way.

So too with the many variations of nonoriginalism—interpretive theories that eschew reliance on text, structure, intention, or history. These are circular as well. They adopt an interpretive stance radically external to the text itself and then reason from the premises of that stance to the conclusion that this is the interpretive stance that the text (as viewed through such an external lens) in fact presupposes—or at least the one that makes for the "best" interpretation of the text under that interpretive approach.

With any and all such interpretive theories there is a greater or lesser degree of bootstrapping. Textualism-yields-textualism is subject to the same objection, but it is not a unique objection and at least textualism has two discernible differences. First, intentionalists and nonoriginalists often will, before adopting their respective external stances, plead necessity: because the text itself does not prescribe any interpretive rules, one needs to look outside the document. The implication is that if the text *did* state interpretive rules, they would be binding; *that* sort of (internal) bootstrapping would be okay. Indeed, it would obviate the need to look outside the text. My argument here is precisely that a careful, patient exegesis of the text does yield interpretive rules that cohere nicely with the method of original-meaning textual exegesis employed to derive them. Thus, the "necessity" justification for looking elsewhere dissipates. The "very self-referentialism of the document,"[40] and the possibility of deriving reasonable principles of original-meaning textual interpretation from it, defeats the premise from which most extrinsic interpretive theories often start.

Second, the bootstrapping involved in other interpretive approaches is far more problematic. Specifically, it severs interpretive premises and principles from the text being interpreted. This is a problem for an enterprise that is seeking to interpret the Constitution in order to apply it as exclusive, authoritative, binding law. The more an interpretive approach is disconnected from the text, the more it is disconnected from the text's authority. If the text's prescribed approach is textualism, following that approach connects interpretive method to the text's supposed authority. That's a *better* circle than other, outside alternatives. As Vasan Kesavan and I have written, "[t]o invoke the Constitution as authoritative requires that the text be taken on its own terms. To reject the basis on which the Constitution purports to be authoritative and its own specification of what constitutes 'this

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[38] For an outstanding defense of this position, see Kay, *supra* note 22.

[39] I have made a version of this argument in earlier work, *see* Paulsen, *supra* note 21, at 41, but have since "evolved" in the direction of original public meaning.

[40] Kesavan & Paulsen, *supra* note 6, at 1128.

Constitution' is to reject any basis for invoking the Constitution as authoritative."[41]

B. Objective, Original-Public-Meaning Written Textualism

The written text prescribes written textualism. So what? Alas, one might object, all this both belabors the obvious and still does not get the interpreter very far. The fact that "this Constitution," as written text, is what counts does not of itself say very much about how the written text is to be interpreted and applied. The words are not self-defining. The fact that the Constitution prescribes textualism does not get one all the way to *objective, original-public-meaning* textualism. I agree, in small part: indeed, words' meanings do depend on context, and to that extent they are not self-defining. (I will have more to say about this as I proceed; it is part of the reason for an interpretive theory of *objective*, whole-text-in-*context*, *original* meaning.[42]) But even with this concession, the fact that the document specifies the document as what is authoritative, supreme, exclusive, and binding on all government officials exercising governmental power pursuant to it says a great deal. It says that understanding the meaning of the words of the text is the object of constitutional discussion, and that in itself establishes certain absolute interpretive boundaries.

Moreover, the text's specification of the text carries with it the clues that lead almost unavoidably to the conclusions of *objective*-meaning textualism, *public*-meaning textualism, and *original*-meaning textualism. Once again, the text does not say a lot in this regard. But this is not surprising. As Professor Saikrishna Prakash has persuasively and elegantly demonstrated, this approach to understanding the words simply was understood; it was the commonplace background premise that would have been applied then, and even now, to understanding the meaning of the words of a written legal document.[43] One thus would not expect the Constitution to waste a lot of words specifying that the meaning of its words is the objective meaning, as those words would have been understood in context by an informed public, and that the words' meanings were those that prevailed at the time that they were written. This almost literally went without saying.[44] Thus, the

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[41] *Id.* at 1129.

[42] *See infra* text accompanying notes 47–64.

[43] Prakash, *supra* note 9, at 540–46.

[44] *Id.* at 541 ("Indeed, some rules are so self-evident that they need not be expressed. For instance, I need not designate a particular mode of interpretation for the benefit of readers. Nor need I declare that English should be used to understand this Review. The reader automatically knows how to read it. Construction of the law is no different."). I should note that Professor Prakash, in his 1997 review essay, begins by apparently conceding, contrary to my thesis here, that the Constitution does not contain rules for its own interpretation. *See id.* at 540 ("Ordinarily, an originalist begins any inquiry with text. The Constitution, however, does not address how interpreters should go about divining its meaning; it lacks a handy decoder ring."). Prakash's argument is that it is far more probable that "the failure to specify an interpretive mode suggests implicit agreement" than an unresolved question left to subse-

document's sparsity of instructions in this regard is scarcely an argument for departure from original, objective public meaning. One would only expect copious interpretive instructions or rules-of-construction provisions, in explicit terms, where what was intended was some *departure* from such baseline background understandings of normal linguistic usage or where some specific construction-instruction was thought necessary for some special reason. (As we shall see below, there are quite a number of these.[45]) Relative silence thus tends to default to Professor Prakash's identified default rule that legal texts' words and phrases normally are given their objective, original linguistic meaning.[46] What spare language there is in the Constitution all tends to reinforce the natural inference that the text's meaning is its *objective*, *public*, *original* meaning and that the Constitution does not invite, and indeed forbids, interpreters from assigning to its words secret, private, idiosyncratic, shifting meanings. Nor does it permit interpreters to derive or invent abstract principles from texts and substitute those principles for the words of the text.

1. Objective, Public *Meaning: The Rule Against Subjective, Private, Idiosyncratic Assignments of Meaning.*—A necessary consequence of the Constitution's specification of the text as authoritative is that those charged with interpreting and applying it may not legitimately depart from the text. But if an interpreter could simply supply *his or her own, subjective* "inter-

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quent interpreters' varying discretion. *Id.* My argument here is that the Constitution's text *does* contain interpretive instructions, just not in great detail, and that the lack of wordiness on this point is readily explained by Prakash's excellent insight. (My hope would be that Professor Prakash would find this argument congenial to his own approach.)

[45] *See infra* Part II (discussing the specific interpretive instructions contained in the Ninth, Tenth, and Eleventh Amendments; the first sentence of the Fourteenth Amendment; and the Due Process Clauses of the Fifth and Fourteenth Amendments).

[46] Prakash, *supra* note 9, at 541–42. For the most part, in this Article I refrain from extended inquiry into what is sometimes called the "interpretive intent" of the Framers or Framing Generation concerning the Constitution—that is, historical evidence concerning that generation's intentions or understanding about how interpreters should go about reading and applying the document. This is because my argument-in-chief is that the text is surprisingly clear in its specification of original-meaning textualism, so that resort to extrinsic evidence of historical intention concerning a rule for interpretation is not very necessary. As I have written before, it sometimes is methodologically appropriate to resort to such historical evidence, to resolve textual ambiguity or unclarity. *See* Kesavan & Paulsen, *supra* note 6, at 1133, 1148–1214; Kesavan & Paulsen, *supra* note 35, at 332–95. Where the text is sufficiently clear, it simply does not matter what the Framers' interpretive intentions might have been. *See* Kesavan & Paulsen, *supra* note 6, at 1118 & n.19. To the extent the Constitution's text is thought unclear with respect to the interpretive method to be applied to the document's terms by those charged with authority under it, the best historical work strongly suggests, somewhat paradoxically, that specific historical intentions or expectations were not intended or expected to be controlling as to constitutional meaning. The Framers' "original intent" appears to have been that the document would be understood objectively, based on the generally understood public meaning of its terms, not predicated on any particular individual's or group's subjective views, even the draftsmen's own—which is exactly my position here. *See id.* at 1128–29 n.52 (discussing evidence marshaled and discussed in Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Lofgren, *supra* note 22; and Powell, *Original Understanding*, *supra* note 22).

pretation" of the words, that would accomplish the same thing. If, with Humpty Dumpty, words mean whatever I want them to mean,[47] I am free to adopt my own idiosyncratic meanings for the text as authoritative. The text then is not truly supreme and authoritative—I am. Nor am I (or anyone else) "bound thereby" in any meaningful sense. It is each interpreter's private, subjective assignment of meaning that is supreme law.

Written constitutionalism is thus decisively opposed to subjective interpretation. As Vasan Kesavan and I wrote on this point several years ago:

> It is simply not consistent with the idea of the Constitution as binding law to adopt a hermeneutic of textualism that permits individuals to assign their own private, potentially idiosyncratic meanings to the words and phrases of the Constitution. The meaning of the words and phrases of the Constitution as law is necessarily fixed as against private assignments of meaning.[48]

The logic of written textualism—the necessary implication of the text's specification of "this Constitution" as something meaningful that exists independent of anyone's subjective views—requires that the meaning of words be an *objective* one. It is not, and cannot be, anyone-in-particular's subjective understanding or intention that counts in constitutional interpretation. It is the objective meaning of the words—the meaning the words would have, in context, to some hypothetical "objective observer" or "reasonable person"—that matters.[49]

To this can be added a specific textual observation: The objective-observer-reasonable-man-hypothetical-person construct is actually supported by the text of the Constitution. Consider the famous first three words of the Enacting Clause: "WE THE PEOPLE." Who is this "We the People" guy that enacted the Constitution? It is a collective, hypothetical construct—a fictitious legal personage. Here is our reasonable, objective speaker and reader of the words of the document, from whose perspective we should view the Constitution. To the salient insight that words in legal enactments presuppose the intention of a "lawmaker" to whom the words point,[50] it may be replied that the lawmaker of the Constitution is "We the People," not the Framers or ratifiers or anyone else. "We the People" is the

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[47] *See* CAROLL, *supra* note 34.

[48] Kesavan & Paulsen, *supra* note 6, at 1130. This does not mean that *private sources*—letters, for example—cannot furnish relevant evidence of *public meaning* of constitutional language by displaying general linguistic usage at the time. *See id.* at 1146–47 (discussing hypothetical private correspondence from Clergyman to Farmer discussing meaning of constitutional language). It is simply to say that the meaning of constitutional language is *objective*; evidence concerning public and private expressions of understanding of the language can inform our understanding of its objective meaning, but that is a far cry from saying that it is allowable for interpreters today to ascribe their own private, personal meanings to the document's words and then purport to say that this is what the Constitution means.

[49] *See id.* at 1131–32.

[50] Kay, *supra* note 22, at 230–31.

political community to which the Constitution is addressed. These words—which stand for much else as well—confirm an objective, reasonable-person stance to reading the words of the text.

They also would seem to confirm a *public* stance toward constitutional interpretation. Whoever "We the People" is/are, these words plainly describe a public persona. The Constitution's meaning is not secret, the private province of some clandestine order, or accessible only to an elite class of high priests who serve as stewards of the document. The Constitution's words' meaning are their *public* meaning, not any hidden meaning. They are the publicly spoken words of the people.[51]

2. Original Meaning: The Rule Against Anachronistic Interpretation.—But what if we, the people, *now* understand the meaning of the document's words differently than we once did? How does one get from objective, public meaning to *original* public meaning?

There is much to be said for the legitimacy of popular, public constitutional *interpretation*. The document admits of—indeed, appears to command—a multiplicity of interpreters, including judges, legislators, executives, juries, and the people themselves.[52] But the fact that "We the People" may and should independently interpret the Constitution does not tell us *how* "We the People" *should go about the task* of accurately understanding the meaning of its words. Here again, the Constitution's own words are most naturally understood as directing that that meaning is the words' *original* meaning—the meaning they would have had at an established, fixed, determinate point in time.

First, Article VI's specification of "this Constitution," a written document, contemplates that the document is fixed as against changed content other than changes made in accordance with "this Constitution" itself—that is, changes achieved through the document's specified mode for changing the words of this Constitution. Article V, the Constitution's detailed amendment-procedure article, which I will treat at more length below,[53]

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[51] For a pop-culture, (hopefully) entertaining take on this point, see Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 ALB. L. REV. 671 (1995) (describing a *Star Trek* episode in which the meaning of some alien planet's society's startlingly similar Constitution had, as a result of a nuclear cataclysm, somehow wrongly become the exclusive province of an elite class of high priests, who alone could utter the words of the document, and who had mangled their meaning over the centuries; until, of course, Captain Kirk pointed out the three opening words of the document—"WE THE PEOPLE"—written larger than the rest, and derived the sound textual insight that the document's words were written for and belong to all the people).

[52] This is one of my recurrent schticks in writing about the Constitution. *See* Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008) [hereinafter Paulsen, *Lincoln*]; Paulsen, *supra* note 1; Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1345–69 (1999) [hereinafter Paulsen, Nixon *Now*]; Paulsen, *supra* note 51; Paulsen, *supra* note 4.

[53] *See infra* Part II.B.

verifies this understanding. Article V uses the language "this Constitution" twice in referring to how to change the content of the text. This of course is the identical language employed in Article VI, in the Enacting Clause, and in the Establishment Clause of Article VII to describe what the enacted, supreme law is. Article V makes clear that to change the content of the supreme law—to change whatever "this Constitution" refers to—involves changing the words of the text. By implication, the meaning of "this Constitution" cannot change otherwise.

The alternative to fixed time-point meaning is to license pure linguistic anachronism. Words' meanings indeed change over time. But to permit common linguistic usage to change constitutional meaning is to make the Constitution subject to amendment by the relatively uncontrollable practice of changed usages of words. This is what I have elsewhere termed "creeping or lurching anachronism."[54] It is utterly irreconcilable with first premises of written constitutionalism, as explained in *Marbury*. If Congress may not change the meaning of the Constitution, by adopting its own peculiar understanding at variance with the objective, original linguistic meaning, it is hard to see why the evolution of language should have a greater authority.[55] James Madison explained the point well: "If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject."[56] This was absurd, Madison thought: "What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!"[57]

Indeed, linguistic anachronism creates some self-evidently absurd readings. A colleague in practice once asked why the Establishment Clause of the First Amendment—"Congress shall make no law respecting an Establishment of Religion"[58]—ought not be read to forbid all government regulation of churches or other religious organizations. I recall answering that I thought that that principle, in some form, might flow from the Free Exercise Clause, to the extent such regulation amounted to "prohibiting the free exercise thereof."[59] Why, my colleague persisted, did not the natural language of the first clause serve the purpose better? Congress had no au-

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[54] Kesavan & Paulsen, *supra* note 6, at 1131.

[55] *Id.* at 1130–31. If anything, simple linguistic evolution should have *less* authority and legitimacy than a revisionist congressional interpretation of the Constitution. At least Congress is an institution created by the Constitution, intended to be (imperfectly) representative of We the People, and possessing a coequal power of constitutional interpretation. *See* Paulsen, *supra* note 1, at 2727–31. None of this is true for Noah Webster's or Wikipedia.

[56] Letter from James Madison to Henry Lee (June 25, 1824), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 442 (Phila., J.B. Lippincott & Co. 1867).

[57] *Id.*

[58] U.S. CONST. amend. I.

[59] *Id.*

thority to regulate religious "establishments," he pointed out, using the word "establishment" in the same more-modern, unspecialized sense that one would use to refer to, say, an "eating and drinking establishment." The illustration also shows that the usage of words must be considered in the temporal context in which they are used. *Time* context goes along with every other context.

Another example of linguistic anachronism would be to find a general federal legislative power to pass criminal legislation prohibiting purely intrastate acts of domestic violence, as that term is now commonly employed in twenty-first century American discourse, notwithstanding the Supreme Court's decision in *United States v. Morrison* finding an absence of such legislative power under the Commerce Clause or Section Five of the Fourteenth Amendment.[60] The source? Why, Article IV, Section 4, of course: If a state consents, the national government has power to "*protect* each of them . . . *against domestic Violence*"![61]

There is a second textual confirmation of *original* meaning—of fixed-in-time-ness. It is one I almost hesitate to mention because it seems too cute. But there it is, right at the very end of the text of the original Constitution: "This Constitution" was "Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth."[62]

What should one call this clause? One might call this the "Done Deal Clause" or, less comically, the "September 17, 1787 Clause."[63] Whatever the label, this little noted nor long remembered language from the tail end of Article VII *fixes a date certain for the original Constitution's language*. It functions much as a contract provision specifying the date executed might function—and similarly guides the interpreter to the extent that it establishes a linguistic time frame. The meaning of the document is fixed at a specific point in historical time. Its meaning is that time-bound original meaning. It does not change with changes in the language over time.[64]

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[60] 529 U.S. 598, 598 (2000).

[61] U.S. CONST. art. IV, § 4. I have swiped this example from Professor Larry Tribe. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-14, at 52–53 (3d ed. 2000) (discussing why new meanings to phrases should be resisted and using the term "domestic Violence" in Article IV, Section 4 as an example).

[62] U.S. CONST. art. VII, cl. 2.

[63] Senator Robert Byrd might call it the Constitution Day Clause. *See* Nelson Lund, *Is Constitution Day Unconstitutional?*, 9 GREEN BAG 2D 247, 247 (2006) (discussing the constitutionality of a statutory provision introduced by Senator Byrd that requires educational institutions that receive federal funds to hold a program on the Constitution on September 17 of each year).

[64] Article V would appear most naturally to carry forward the reasoning of the original Constitution's instruction that the date of enactment fixes the time frame for understanding the meaning of its terms. The text of amendments, as proposed, become "valid to all Intents and Purposes, as Part of this Constitution, when ratified" according to the specified procedure. U.S. CONST. art. V.

3. Specific Meanings and Default Rules: The Rule Against Abstraction.—It is a common observation that some of the Constitution's provisions are written in terms that seem to be general or unspecific. And it is a common move in constitutional argument to use such asserted lack of specificity as a warrant for interpreters to infuse such provisions with more specific content—often, it seems, content of the interpreters' own choosing.

There is something to this observation, but not as much as is usually made of it. First, many constitutional provisions' meanings become much less vague or unspecific if the interpreter properly attends to the meaning such words and phrases would have had, in context, to a reasonably informed speaker or reader of the language, at the time of the language's enactment as part of the Constitution. That is to say, if one is a good practitioner of original-meaning textualism, the asserted vagueness frequently disappears. (In just a few pages, I will offer explanations of two of the Constitution's provisions that are often, wrongly, thought to be extremely broad or vague—the Ninth Amendment and the Due Process Clause. In fact, I believe these provisions have clear original meanings.[65])

Second, it does not follow from the proposition that a text is unspecific, vague, or ambiguous (even after examination of all relevant second-order evidence of original meaning) that an interpreter therefore has interpretive license to fill the gaps with whatever content the interpreter desires. That would simply be a species of pure subjectivism, subject to all the problems I have identified above. Yet that is the move many anti-originalists like to make, often under thin disguise as textualism (very loosely conceived). The technique is to take an assertedly vague text and discern or divine from it some equally general *abstract principle*; then, the interpreter takes that abstract principle and assigns to it some desired content, thought to flow, loosely, from the vague or general text; and finally, the interpreter

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Interestingly, the date fixed by Article VII for the original Constitution is not the time of ratification, but the time the words were committed to paper in final proposed form. It appears to be when the *writing* is "done" that fixes the time-frame for understanding the words' linguistic meaning. *See* U.S. CONST. art. VII.

This poses some interesting problems that I will mostly leave for another day. As it happened, there turned out to be only a brief period of time between the Constitution's proposal and its ratification by the requisite number of states, so that there could have been very little linguistic creep in the meantime. But this is not necessarily always the case: The Twenty-seventh Amendment had a gap between proposal and ratification of 202 years, during which time ordinary linguistic meanings certainly *could* have changed. *See generally* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993). If they did, this poses a unique problem for applying original-meaning textualism. My intuition is that the better answer is that the meaning of the amendment is fixed by the time of proposal, so that states ratifying at different times could reference a common original meaning; this is also consistent with what appears to be the decision of Article VII in regard to the time when the document was "done."

[65] *See infra* text accompanying notes 84–88, 114–120. For discussion of a few other such provisions, see Michael Stokes Paulsen, *Paulsen, J., Dissenting*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID 198–207 (Jack M. Balkin ed., 2005) (discussing the Ninth Amendment, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause of the Fourteenth Amendment).

takes that principle-infused-with-content and reads it back into the text, substituting the interpreter's discernment of principle and infusion of content for the vagueness thought to have been present before. The new principle, as refined and specified by the interpreter, becomes, functionally, the new authoritative, written text.[66]

This, of course, is Lawyers' Tricks 101. Though I hate to pick on my friends,[67] Professor Jack Balkin's recent *Abortion and Original Meaning* is a perfect illustration of this phenomenon.[68] Professor Balkin's fiendishly clever article declares his conversion to originalism, but it is an originalism that focuses on the original meaning of "text *and underlying principle*."[69] But "underlying principle" is the pocket-picking phrase that does all the work: Balkin focuses on the Fourteenth Amendment's Privileges or Immunities Clause and, by ratcheting it up to a sufficiently high level of abstraction, is able to discern general principles that, in the name of the "original meaning," produce, magically, a right to abortion, as against government regulation. Voila! Who needs "substantive due process" or undisguised nonoriginalism if a sufficiently abstract theory of "original" textual meaning can get you to the same result?

Two can play at this game. (In fact, *everyone* can play this game, which is essentially the problem, as I discuss in a moment.) And the game can be played with equal ease with just about any text. Some such plays are more plausible than others, perhaps, but in principle, the game of ascertaining "principles" and reading them back into the text should be valid or invalid as an interpretive method irrespective of the specific text at hand.

For example, a dozen years ago I wrote a short, tongue-in-cheek article making precisely the same type of argument as Balkin's. Article II's requirement that the President must be thirty-five years of age, I wrote, in actuality stood for the *principle* that the President of the United States must be

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[66] For excellent judicial descriptions, and criticisms, of this series of moves, see, for example, *Griswold v. Connecticut*, 381 U.S. 479, 507–10 (1964) (Black, J., dissenting), and *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128–29 (7th Cir. 1987) (Easterbrook, J., dissenting).

[67] This is a lie. I love to pick on my friends. (Note that this footnote is a specific interpretive instruction as to how to read the text, at variance from the text's objective, original public meaning. Where I mean such variance, I specify it. *See infra* Part II.A.)

[68] Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). This important article generated an entire symposium of distinguished and critical commentary in that issue of *Constitutional Commentary*, which I had the good fortune to edit. In addition, Professor Balkin's rebuttal to his critics—a second act even longer than the first—forms an important part of the principal work. Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007). My treatment of Balkin's project is thus hugely reductionist. There is a lot of there there. But my essential point, set forth in the text, remains, I think, valid: the critical slick move in Balkin's purported conversion to originalism is the "and underlying principle" part, which I discuss presently. That is what permits Balkin to reach the results he does.

[69] Balkin, *Abortion and Original Meaning*, *supra* note 68, at 293.

"mature," as "measured by a proportion of the normal expected lifespan."[70] (And isn't that really and truly the principle underlying this particular text? I think it is.[71]) To Balkinize, we should then seek to apply *this* "original meaning"—the meaning of the text's underlying principle: "To paraphrase the Supreme Court's words on another occasion, although the text would appear to be limited only to those under age thirty-five, we should understand the Qualifications Clause 'to stand not so much for what it says, but for the presupposition . . . which it confirms.'"[72]

While the maturity principle was instantiated at the time of the Framing in the flat line of thirty-five years, the original meaning of the Presidential Qualifications Clause, conceptualized at a suitably lofty level of abstraction (as befits a Constitution)[73] permits—yea, invites—the interpreter to give that requirement different specific applications at different times. My abstract principle yielded the conclusion that the President, as of 1996, needed to be at least fifty-nine-and-one-half years old—the youngest age for penalty-free IRA withdrawals.[74] Voila! Bill Clinton was (then) too young to be President of the United States. Likewise for Vice President Al Gore and Speaker Newt Gingrich, leaving the office to President Strom Thurmond, the (then) ninety-three-year-old President pro tempore of the Senate.[75]

Jack Balkin and I can enjoy an interpretive picnic together. Jack can bring all the words he wants. I will bring the underlying principles for which they stand. My principles will eat his words every time.

Because they are, after all, *my* underlying principles. If I get to extrapolate from general text to general principles and interpolate from general principles to more specific rule or conclusion, I may in effect substitute for unspecific text more specific words that I have written. I can amend by emending; I can change the content of the text from one thing to another. And, as noted above, *everybody* can come to this broader-principles-for-

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[70] Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 220 (1996). For a recent reprise, see Steven G. Calabresi, *Too Young for the No. 1 Job?*, CHI. TRIB., July 22, 2008, at C13 (arguing that Barack Obama is too young to be President, as were Theodore Roosevelt, John F. Kennedy, and Bill Clinton, under a "purposive, pragmatic interpretation of the Constitution").

[71] Professor Akhil Amar has identified a possible further purpose: avoiding quasi-hereditary dynastic presidential successions and the problems of the "unready heir." AMAR, *supra* note 19, at 159–64.

[72] Paulsen, *supra* note 70, at 230 (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996)). As *Seminole Tribe*, and an almost infinite number of other potential "see also" cites could show, the Supreme Court can play this game, too.

[73] For support for this facetious proposition, I turn to the second most frequently quoted-out-of-context famous line of John Marshall: "[W]e must never forget that it is a *constitution* we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). (The most frequently quoted out-of-context line is: "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).) *See generally* Paulsen, *supra* note 1.

[74] At least, that was the figure as of 1996. It may have evolved since then.

[75] Paulsen, *supra* note 70, at 221–22.

which-the-text-stands picnic. Therein lies the essential incompatibility of such an approach with written textualism: it collapses, almost unavoidably, into the ability of interpreters to adopt and assign their own private, subjective, idiosyncratic meanings to the text—in violation of the rule against such practice discussed above.

The fact that the Constitution is a written, determinate text—that "this Constitution" is the object of interpretation—supplies a rule against abstraction. Constitutional provisions do not "stand for" abstract principles; they "stand for" *what they say*. Sometimes the words state bright-line rules, like the thirty-five years of age requirement. Sometimes they state standards that may call for judgment by some relevant decisionmaker, as with "unreasonable" searches or "cruel and unusual" punishment or "excessive" fines.[76] And sometimes the structure and logic of a provision or group of provisions permits valid deductions.[77] But rules or standards may not properly be *de*duced from the text by first illegitimately *in*ducing it to stand for some principle that its unspecific words do not in fact justify. A text does not contain a "principle" apart from its true range of meaning. With certain texts thought to be highly general or vague, the answer might simply be that the text in fact does not supply a rule or a standard. Sometimes a cigar is just a cigar, and sometimes an unspecific text is simply unspecific.

What should one do with such an unspecific text? Robert Bork's famous reply was that the interpreter should treat such a provision as one would an inkblot.[78] A somewhat improved answer might be that the Constitution's text itself suggests, as a practical matter, a default rule of interpretation where the constitutional text is unspecific: popular republican self-government. The more specific a text (like the thirty-five-year-old requirement), the more it will limit democratic choice with respect to the rule specified. The more unspecific a text, the more room it leaves for democratic choice, in accordance with the structures of government the Constitution creates at the federal level and mostly leaves alone at the state level.[79]

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[76] *See* U.S. CONST. amends. IV, VIII. For an important argument that the Eighth Amendment's use of the term "cruel and unusual" bears a determinate and specific meaning, see John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

[77] The deduction of judicial review is a good example of sound textual reasoning. *See* Paulsen, *supra* note 1, at 2711–24. Likewise for the deduction of coordinate interpretive power by other institutions of government. *See id.* at 2724–31. *See generally* Paulsen, *supra* note 4, at 226 (using the Euclidian method of deriving logical theorems from textual postulates or specific provisions).

[78] *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1989) (discussing the inkblot metaphor in the context of the Fourteenth Amendment and the similar lack of clarity in the Ninth Amendment). Bork's example was the Ninth Amendment. As I discuss below, the Ninth Amendment actually states a rather specific rule of construction. *See infra* Part II.A. Thus, I think Bork wrong in viewing the Ninth Amendment as an unspecific text.

[79] I have argued elsewhere that to the extent the content of the Privileges or Immunities Clause of the Fourteenth Amendment is thought unspecific, the power to supply specific content is vested in the

If the Constitution's text supplies no rule or standard governing the issue in question, the issue defaults to some other source of law or the designated authority of some decisionmaker who otherwise possesses policy discretion with respect to that issue.[80] Where the document's broad or unspecific language admits of a range of possible actions, consistent with the language, government action falling within that range is not unconstitutional.[81]

In short, the Constitution's specification of written textualism establishes the impropriety of the manipulation-of-the-level-of-abstraction trick. To permit the trick would circumvent the rule against private, idiosyncratic assignments of meaning and wholly defeat the enterprise of written textualism. Unspecific texts do not warrant abstracting more specific principles. The Constitution's structure suggests the opposite rule: Unspecific texts, to the extent of their un-specificity, permit a range of legitimate interpretation and application by *political* decisionmakers.

* * *

If one reads the text of the Constitution carefully, giving its words the meaning they would have had, in context, to reasonable, informed speakers of the English language, at the time and within the political community in which they were adopted, it is reasonably clear that the Constitution contains general interpretive instructions, wholly consistent with the normal rules for understanding legal language. The Constitution specifies textualism, invoking repeatedly "this Constitution" as the supreme, authoritative, exclusive, binding, enacted, amendable text that is the object of interpretation. By necessary implication, the specification of the text excludes subjective, idiosyncratic, personal interpretation; it excludes anachronistic readings of the meanings of its words; and it excludes the concoction of abstract readings of the document's provisions as substitutes for the sometimes vague or limited commands or prohibitions of the language itself. In short, the Constitution's general interpretive instruction, embedded throughout the text, is objective, original-public-meaning, in-context, written textualism.

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grant to Congress of legislative power in such matters, under Section 5 of the Amendment. *See* Paulsen, *supra* note 65, at 200–01.

[80] That is the premise of *Marbury*'s justification of judicial review. *See* Paulsen, *supra* note 1, at 2739–41 (explaining that *Marbury*'s argument depends on the underlying assumption that the text has an objective, public meaning that stands outside the interpretation of any specific individual or entity); *see also id.* at 2741 ("[The] writtenness of the Constitution . . . supplies both the basis for judicial review and the standard for judging whether another branch has departed from the Constitution. The paramount authority of the written text is the core of the argument for the power of judicial review and the controlling standard for the practice of judicial review. *Marbury*, quite simply, stands for textualism as the proper method of constitutional interpretation." (emphasis deleted)).

[81] *See* Paulsen, *supra* note 11, at 994–1004 (setting forth this point); Paulsen, *supra* note 4, at 233 (similar).

II. OTHER INTERPRETIVE INSTRUCTIONS IN THE CONSTITUTION

What else does the Constitution say about how its provisions are to be interpreted? Does it contain other interpretive instructions?

In one sense, as noted above, the general absence of interpretive instructions *other than* Article VI's specification of "this Constitution"—the text itself—as authoritative, binding, and supreme, reinforces the conclusion that the Constitution reflects an imbedded premise that, unless otherwise stated, the document would be interpreted and applied in accordance with the ordinary meaning of language and background principles understood to govern the interpretation of legal texts.[82] The customary default rules of language and legal convention are not departed from, unless specified.[83] There is no other, general rules-of-construction clause. Thus, the argument commonly employed to justify extrinsic interpretive methods or theories—that the Constitution does not contain any instructions about how its provisions are to be interpreted—becomes turned on itself. The absence of any interpretive instructions, anywhere, *contradicting* the natural sense of Article VI's specification of the constitutional text as supreme and its command of fidelity to that written, historical textual artifact, powerfully reinforces the inference of original-meaning textualism. Elephants leave traces, and there are none in the text that suggest anything other than the path of originalist textualism marked by Article VI and related provisions.

To this can be added three further, reinforcing points. First, a tour of the Constitution reveals that the document contains certain *specific* rules of construction, where such interpretive instruction might have been thought needed in order to avoid a possible but unintended inference that otherwise might flow from the ordinary linguistic meaning of the text's words in public discourse at the time. Or a specific rule of construction might be included to clarify an otherwise doubtful general principle resulting from the text or structure as a whole, or to direct that a specific prior judicial interpretation no longer be followed. The most prominent examples of this are the Ninth, Tenth, and Eleventh Amendments, and the first sentence of the Fourteenth Amendment. (There are other examples as well, including the savings provision with respect to land claims, in Article IV, and the first clause of Article VI of the original Constitution.) These interpretive instructions suggest that where the Framers intended specific interpretive rules, in any way departing from the baseline understanding that otherwise would (or might) result from the ordinary public meaning of the text or from prior interpretations of the text, they knew how to write them. (These

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[82] *See* Prakash, *supra* note 9, at 540–46.

[83] *See* Kesavan & Paulsen, *supra* note 6, at 1128 ("We think the very self-referentialism of the document, and the absence of any reference by the text to governing principles extrinsic to it, reinforces the ordinary, common sense 'default rule' for interpreting texts in general and legal texts in particular: that the text itself must be treated as authoritative." (footnotes omitted)).

retail interpretive instruction provisions are also interesting lessons in original-public-meaning textualism in their own right.)

Second, Article V's specific and detailed procedures for enacting changes *to the constitutional text itself* strongly reinforce Article VI's interpretive rule of original-meaning textualism. Where one intends to transform the meaning of the Constitution, Article V presumes that one needs to write new words and put them in the text, not alter the meaning of the old words. This, too, bounds what can be done in the name of the Constitution. Further, Article V reinforces the primacy of the constitutional *text* as against any interpretation—and as against any interpretive method—that departs from the text.

Third, further support of original-meaning written textualism can be found in what, under present judicial doctrine, might be thought a surprising source: the Due Process Clauses of the Fifth and Fourteenth Amendments. These clauses, understood in their original sense, are rule-of-law commands. In a system of *written* law, like that of the Constitution, the Due Process Clauses forbid government action not in accordance with the law as written. "Interpretations" of "law" by executive or judicial officers that create (or erase) legal requirements or restrictions of the text deny to all adversely affected persons due process of law.

A. "Retail" Rules-of-Construction Provisions

If Article VI supplies general interpretive principles, certain constitutional provisions surely state specific ones for specific situations. The most clear of these are the Ninth and the Eleventh Amendments, which are *in terms* rules-of-construction provisions, but the Tenth Amendment can be seen to fit this description as well.

The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not *be construed* to deny or disparage others retained by the people."[84] It is remarkable that, in the voluminous academic discussion of the Ninth Amendment, so little is made of the obvious textual fact that the Ninth Amendment is a rule of construction, not a substantive rule. Liberal legal academics, in their rush to find in the Amendment either specific substantive content or an open-textured loophole into which to pour the objects of their interpretive desire, miss what is staring them in the face. The Ninth Amendment is, in explicit terms, a straightforward rule of construction concerning the legal effect of the specific enumeration of rights elsewhere in the Constitution (both in the Bill of Rights amendments that immediately precede the Ninth and that spurred its inclusion, and in Article I, Sections 9 and 10 of the original document). It is a classic lawyer's "savings clause" such as one might commonly find in a contract or a statute. It is a rule of nonrepeal (or what constitutional lawyers today might call

[84] U.S. CONST. amend. IX (emphasis added).

"nonpreemption"), designed to make clear that the effect of listing specific individual or collective rights is not, of its own force, to repeal by implication other such rights that might exist under other sources of law that remain operative.[85]

Most obviously, it is a rule of nonrepeal-by-implication of whatever state law rights individuals might possess against their states' governments by virtue of state constitutional law, statutory law, or common law. Such rights are retained "by the people." The Ninth Amendment says that the enactment into the Constitution of the substantive Bill of Rights amendments, and the presence of other rights in the Constitution, does not have the effect of vacating these state law rights and transferring the whole subject of individual rights to the federal government—of "pre-empting the field," as it were (to use modern jargon). The federal constitutional enumeration does not as a matter of constitutional law limit the universe of individual rights against governments to those written down in the Constitution. More abstractly (and more speculatively), the Ninth Amendment might also have been thought a rule of nonrepeal of the "natural rights" of the people, whatever those might be. Certainly the idea of natural rights was much in the air at the time, so soon after the American Revolution. But it is instructive that the Ninth Amendment is written as a rule of construction: it does not *confer* natural rights as a matter of supreme federal constitutional law; it merely states that nothing in the Constitution should be construed as a pro tanto repeal of *whatever* other (nonfederal, nonconsti-

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[85] The Ninth Amendment functions as a rule of nonrepeal, in much the same way that Article VI, Clause 1 functions as a rule of nonrepudiation of debts. *See supra* text accompanying note 28. In like fashion, Article IV, Section 3, Clause 2 functions as a rule of nonpreemption (or nonextinguishing) of existing state and national claims to territory. Article IV does nothing to resolve those claims and should not be so construed. In each instance—in Article IV, in Article VI, and in the Ninth Amendment—the provision serves to disavow a particular implication that otherwise might result from the fact of adoption of new constitutional provisions of government.

Representative James Madison, introducing his precursor version of what became the Ninth Amendment, could not have been much clearer in this regard: the purpose of the amendment was to avoid any inference of implied repeal or reassignment of all rights to the domain of the national government:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

1 ANNALS OF CONG. 439 (Gales & Seaton eds., 1834). Madison's proposed language was as follows:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Congressional Register 427–28 (June 8, 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 627 (Neil H. Cogan ed., 1997).

tutional) rights might be thought retained by the people, remaining, linguistically, completely agnostic as to the precise source and content of such rights.[86]

Why would it have been necessary to include such a technical rule-of-construction provision at the tail end of a glowing set of Bill of Rights amendments? Precisely because it was assumed that the Constitution would be read and understood in accordance with the natural meaning of the text in public political discourse—that is, that it would be interpreted according to ordinary, baseline principles of language applied to public legal documents—and because it was feared, at least by some, that one possible application of such principles would depart from the drafters' intended meaning. Thus, a general rule of construction was included to clarify a possible textual ambiguity. The concern was that the effect of a *writing* setting forth specific rights was that the terms of the writing would be regarded as exclusive and exhaustive. The writing might be understood as setting forth the entire agreement, as it were, of the body politic of the people of the United States as to *all* constitutional rights against government. *Expressio unius* of certain rights might be taken as *exclusio alterius*.[87] The concern

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[86] I have set forth brief versions of this argument in prior writing. *See* Paulsen, *supra* note 65, at 198 ("[T]he Ninth Amendment . . . is plainly not itself a *grant* of (unspecified) further rights but a rule of construction about the legal effect of the Constitution's enumeration of other rights. The Ninth Amendment is a rule of nonpreemption; the enumeration of certain federal constitutional rights does not itself operate to displace or vitiate other legal rights, resting on *other* legal authority. . . . The enactment of a federal Bill of Rights, the Ninth Amendment says, does not repeal such other rights. But the Amendment scarcely creates new, unspecified, substantive *federal* constitutional rights."); *see also* COVER, *supra* note 21, at 29 (noting that the Founding Generation knew well the difference between natural law and positive law); Paulsen, *supra* note 26, at 2047–48 (criticizing Akhil Amar's reading of the Ninth Amendment as recognizing majoritarian, popular, natural-law-based extratextual federal constitutional rights (in AMAR, *supra* note 19, at 328–29) as inconsistent with the Ninth Amendment text's plain language as a rule of construction and nonpreemption: "no one would have mistaken the language of the Ninth Amendment as conferring, as a matter of positive law, unspecified natural law rights. At most, the Ninth Amendment could be read as stating the truism that nothing in the Constitution legitimately could take away the natural rights of all human beings . . . . The adoption of a Bill of Rights does not somehow repeal by implication the natural rights principles embraced in the Declaration of Independence."). For additional arguments and evidence in support of the nonpreemption-of-state-law-rights reading of the Ninth Amendment, see Bork, *supra* note 78, at 183–85; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); *cf.* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) (arguing that the Ninth Amendment was understood as a rule of construction forbidding latitudinarian construction of federal powers).

[87] *See, e.g.*, 3 STORY, *supra* note 26, § 1898, at 751–52 ("This clause was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and *é converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights." (footnotes omitted)). The expressio unius argument was raised in objection to Madison's proposal of a bill of rights in the House of Representatives: "There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of

flowed from uncertainty about the consequences of written constitutionalism generally, as applied to an enumeration of specific rights, especially in light of the weight of the many new amendments protecting individual rights. It was, in short, a legitimate concern borne of the consequences of original-public-meaning textualism as a baseline interpretive rule, applied to the enactment of Amendments One through Eight.

The concern was, in my opinion—from the advantageous perch of two centuries later—somewhat exaggerated. It was also largely a problem of the Federalists' own creation. The concern might not have merited a clarifying rule of construction but for the fact that some prominent defenders and defenses of the Constitution had argued publicly, even if not entirely persuasively, that the addition of a Bill of Rights might be taken to suggest, contrary to the original design, a general assignment of all rights into the hands of the national government or construed as altering the principle of delegation so as to enlarge the powers of the national government into general and plenary powers.[88] For better or worse, the Federalists, by raising

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all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government." 1 ANNALS OF CONG. 442 (Joseph Gales ed., 1834) (statement of Rep. Jackson).

[88] The worst offender on this score was probably Alexander Hamilton, who wrote, in *The Federalist No. 84*, that the addition of a Bill of Rights was not only unnecessary in a government of limited, delegated powers, but might be affirmatively harmful:

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? . . . I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

THE FEDERALIST No. 84, at 476 (Alexander Hamilton) (Isaac Kramnick ed., 1987); *see also* James Wilson's State House Yard Speech (October 6, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON 172 (Kermit L. Hall & Mark David Hall eds., 2007). In the following paragraph of *The Federalist No. 84*, Hamilton made the corollary argument that a bill of rights might not define the requisite rights in sufficient breadth. THE FEDERALIST No. 84, *supra*, at 476–77.

Note that Hamilton did not say that this would be the *correct* inference from the enactment of a bill of rights; but he did raise the danger sufficiently as to require a clarifying amendment when the First Congress actually did propose a bill of rights. (Madison, in introducing what became the Ninth Amendment, was plainly replying to this argument by Hamilton, his writing partner in producing *The Federalist*, when he explained the reason for introducing this proposed amendment. *See supra* note 85.)

One cannot entirely blame Hamilton. The ratification politics of the time were complicated, especially in New York, where ratification opponents held the upper hand and were arguing (some sincerely and some because of the argument's political appeal) that the absence of a bill of rights was a reason to vote against ratification entirely. *See* RON CHERNOW, ALEXANDER HAMILTON 260, 262–68 (2004); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS 125–27 (1996). The Federalists' compromise countergambit of promising to propose amendments after ratification was not yet in play. In such a political

the specter of such inferences, created the need to refute them when they came around and agreed to propose a bill of rights after ratification; the argument that this was how a bill of rights might well be construed had become a part of the public discourse concerning the Constitution's interpretation, as a consequence of their own advocacy. The Ninth Amendment is a rule of construction negating the first hypothesized improper inference—implied repeal of other rights. The inference was not a necessary one from the text, or a proper one, but it was one that fell within the range of possibilities admitted by original-meaning textual interpretation of a written Constitution, taken as a whole, given public discussion at the time.

Likewise for the Tenth Amendment: The Tenth Amendment is the Ninth Amendment's mirror twin, a cognate rule of construction negating the second hypothesized incorrect inference from enactment of a bill of rights—implied enlargement of national powers at the expense of the states, or in any other way a departure from the scheme of limited, enumerated national government powers.[89] The Tenth Amendment does not contain the explicit "shall not be construed" language of the Ninth, but in textual and historical context it is every bit as much a rule of construction. It reads, simply: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[90] Though some have attempted to read substantive content into the Tenth Amendment,[91] such efforts—more frequently committed by political conservatives—mimic the error of political liberals who would inflict the same wrong on the Ninth Amendment. To the objection that the alternative is to render the Tenth Amendment a mere "truism,"[92] without effect, the proper response is that this pejorative overstates the matter, if only slightly. A rule of construction is not without effect. It clarifies what otherwise might have been misunderstood and thus has real consequence. The Tenth Amendment is an *interpretive instruction*. To be sure, as with the Ninth, the Tenth's interpretive instruction might not have been necessary but for the presence of contemporaneous suggestions that adoption of a bill of rights might have the undesirable effect of enlarging national powers. But the Tenth Amendment states a "truism" only because it nails down a

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context, to have acknowledged the defect of the absence of a bill of rights would have provided fodder to the Constitution's opponents. Hamilton could not afford to let such blood in the water and so, in classic Hamilton fashion, he responded by making as brilliant an argument as he could fashion for the extreme opposite position—even if it went a bit overboard in that opposite direction.

[89] *See* Paulsen, *supra* note 65, at 198 ("The Tenth Amendment clarifies for state powers what the Ninth Amendment clarifies for state citizens' rights.").

[90] U.S. CONST. amend. X.

[91] *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (denying Congress the power to regulate labor wages for state government employees in areas of "traditional governmental functions"), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[92] United States v. Darby, 312 U.S. 100, 124 (1941).

truth that some thought might be lost in the confusion created by the argument over whether or not a bill of rights was necessary and what its adoption might imply.[93]

The Eleventh Amendment, adopted in 1798, seven years after the Ninth and Tenth amendments, is another retail-level interpretive instruction. Like the Ninth, the Eleventh is explicitly a rule of construction, tracking its predecessor's "shall not be construed" language:

> The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[94]

I will not wade into—at least not very deeply—the academic and judicial debate over the proper interpretation of the Eleventh Amendment and whether it confers (or assumes) state "sovereign immunity" from certain lawsuits otherwise within federal jurisdiction. Other than to say this: the Eleventh Amendment is, in terms, a rule of construction about the proper interpretation of Article III's description of the scope of constitutionally authorized federal court jurisdiction to hear and decide lawsuits.[95]

The Eleventh Amendment is a rule of construction that arguably "interprets" Article III in such a way as to effect a limited *repeal* of it, erasing a subcategory of federal jurisdiction that the most natural reading of the words of Article III would appear to have granted (suits presenting nonfederal questions "between a State and Citizens of another State," brought by the citizen for damages). There is no reason why an interpretive instruction might not direct an interpreter *not* to read certain constitutional language according to the natural public meaning of its words. An interpretive instruction can state an anti-truism as well as a truism.[96] Each is an example of a clarification or more precise specification of the intended consequence of written legal language; they are simply opposite specifications.

The Eleventh Amendment's rule of construction assumes that it sometimes may be necessary to direct an interpreter to depart from plain linguistic meaning, if the natural linguistic meaning does not capture precisely what the lawmaker intended, or no longer does. That such an anti-default-linguistic-meaning interpretive instruction would be necessary in a given case testifies to the fact that original linguistic meaning was the assumed,

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[93] For an enlightening take on the Tenth Amendment as truism, see Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME. L. REV. 469 (2008).

[94] U.S. CONST. amend. XI (emphasis added).

[95] *See* U.S. CONST. art. III, § 2 (listing categories of cases and controversies to which the judicial power extends). I doubtless have been much influenced, or corrupted, on this score by Akhil R. Amar's *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987), which I first read in early draft when we were law students together, one million years ago. I found it (mostly) persuasive then, and still do.

[96] Recall my earlier footnote in which I admitted that the statement in the text was a lie, and should be so construed. *See supra* note 67.

default rule for reading and applying such constitutional language.[97] Absent the interpretive instruction set forth in the Eleventh Amendment—that the judicial power "shall not be construed" to extend to suits by citizens of one state (or of a foreign nation) against a state—an interpreter simply reading the language of Article III in accordance with the usual rules of language might well conclude that Article III's recognition of federal judicial jurisdiction in such cases meant what it seemed to say: that the federal judicial power extends to such suits "between a State and Citizens of another State."[98]

Indeed, that is what the Supreme Court had recently held, almost certainly correctly, in *Chisholm v. Georgia*.[99] *Chisholm*'s jurisdictional holding follows simply and straightforwardly from the original public meaning of Article III's jurisdictional provisions. Of course, undoing *Chisholm* was the reason for the movement for what became the Eleventh Amendment. The Eleventh Amendment is clearly a direct repudiation of *Chisholm*: "No, no, no," says the Amendment. "That's not what We (the People) want." (It might even not have been what we the people thought we had *meant* in Article III, a parenthetical point to which I will return, parenthetically, in a moment.) A sufficient consensus prevailed on this view. And so the Eleventh Amendment enacted un-*Chisholm*.[100]

The Eleventh Amendment's enactment of un-*Chisholm* took the form of a text written as an interpretive instruction. Why write it this way, rather than as a rule of *repeal* of Article III's jurisdictional authorization? Wouldn't that have been more straightforward? Perhaps so; and that might have avoided two-centuries-plus worth of argument over whether the Eleventh Amendment means what it says or means what it does not say but what some speculate the Framers must have intended.[101] But there is a fairly clear historical reason for the adoption of "shall not be construed" language rather than "hereby repealed" language: the former does not in any way imply that the decision in *Chisholm* was right, and may even contain a gentle

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[97] Prakash, *supra* note 9, at 540–46.

[98] *Compare* U.S. CONST. amend. XI, *with id.* art. III, § 2, cl. 1.

[99] 2 U.S. (2 Dall.) 419, 467 (1793).

[100] I return to the significance of the fact that overruling *Chisholm* took the form of enacting a written text below, in terms of that fact's relevance in supporting the conclusion that the Constitution prescribes an interpretive method of original-public-meaning textualism. *See infra* Part II.B. Here, I want to stick to the point that the Eleventh Amendment is an interpretive instruction directing a departure from original meaning, as an illustration both of the fact that there are specific interpretive instructions in the Constitution and the fact that when a departure from original meaning is intended, the Framers knew how to draft interpretive instructions to that effect.

[101] *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Hans v. Louisiana, 134 U.S. 1 (1890) (all discussing the Eleventh Amendment's grant of state sovereign immunity and Congress's ability to abrogate it). Perhaps it would have been helpful if the Eleventh Amendment had contained a further instruction about how to construe its rule of construction: "This amendment shall not be construed to grant or deny state sovereign immunity, but merely to remove a category of Article III controversies from federal judicial jurisdiction."

whiff of the suggestion that *Chisholm* was wrong. Language of repeal might be taken as suggesting that *Chisholm* had been right, a suggestion perhaps needlessly irritating to those who had been surprised, and annoyed, by the decision.[102]

Thus, the Eleventh Amendment, too, like the Ninth and the Tenth, is useful supporting-cast evidence that the written Constitution's designated interpretive method is original-meaning textualism. Where draftsmen intended either a *departure from* the ordinary understanding of the document's words, in order to negate or refute a prior judicial interpretation, or a *clarification of* the meaning and effect of the document's words, as a precaution to guard against a plausible but improper inference, they knew how to write such specific interpretive instructions. In each case, the nature of the interpretive instructions and the fact that they were thought necessary or useful is strongly suggestive of what the assumption was as to how written texts would be interpreted in the absence of such instructions.

There are a few other, minor rules-of-construction provisions in the Constitution that serve to complete the picture. Article IV, Section 3, Clause 2 is a straightforward example. The entire clause is as follows: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution *shall be so construed* as to Prejudice any Claims of the United States, or of any particular State." The final sub-clause, following the semi-colon, is, like the Ninth Amendment, a rule of construction about what *not* to infer from what had just been said. Lest anyone think that the grant of a plenary federal regulatory power with respect to the territories and other federal property effected in any way a resolution in favor of (or against) the national government of any existing "claims" with respect to such territory or property, the proviso tells the interpreter not to interpret the main provision in such a manner. All such issues are left unaffected. Was such a point of clarification necessary? Would the language of the grant of power to make "all needful Rules and Regulations" naturally have been understood to have affected competing territorial or property claims? Perhaps; perhaps not. The Framers evidently thought it sufficiently plausible that this, or some other, provision of the Constitution might be construed in such fashion that they took care to make sure such a reading was specifically disapproved. Thus, they appended a specific interpretive instruction, applicable to the entire document.[103]

The next example is somewhat counterintuitive. The first sentence of the Fourteenth Amendment—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"[104]—is not written in the form of

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[102] *See generally* Amar, *supra* note 95.

[103] My thanks to Vasan Kesavan for suggesting this example.

[104] U.S. CONST. amend. XIV, § 1.

an interpretive instruction. But that is very much its function. It prescribes the correct interpretation of "citizens" of the United States and of the states as the term is employed earlier in the Constitution: in Article III's Diversity Jurisdiction Clause and in Article IV's Privileges and Immunities Clause. In doing so, this sentence is a specific repudiation of a prior judicial interpretation of those provisions—*Dred Scott*'s infamously and seemingly deliberately result-oriented reading of those provisions to exclude the possibility of free black citizens possessing legal rights under the Constitution.[105]

The Seventeenth Amendment contains an explicit rule-of-construction provision concerning one effect of the adoption of its own new rule of direct election of U.S. senators: "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."[106] Like the Ninth Amendment, it is designed to avoid an unintended inference of implied repeal—here, that the operation of the first paragraph of the Amendment might be thought to "vacate" the offices of current senators and require direct elections immediately for all U.S. senators. Once again, there is a more-than-plausible argument that, absent such a specific contrary interpretive instruction concerning the effect of the general rule, the language of the first paragraph fairly could be read as having such effect: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . ."[107] And once again, the need for such an interpretive instruction would seem to result from the presumption that the operative language of the first paragraph otherwise would be applied in accordance with the natural meaning of its words and phrases, in context, and not by resort to extrinsic general principles, policy considerations, or evidence of purpose or intent. Absent the third paragraph, the baseline interpretive method of original-meaning textualism would yield at best an ambiguity and at worst an answer contrary to the drafters' intentions. For to say that the Senate "*shall* be composed" of members "*elected*" by popular suffrage in each state is, standing alone, probably more naturally understood as requiring such composition *when* the Amendment becomes operative and meaning that a U.S. Senate not so composed is unconstitutional.[108]

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[105] For discussion of *Dred Scott* on the citizenship holding, see Michael Stokes Paulsen, *Can a Constitutional Amendment Overrule a Supreme Court Decision?*, 24 CONST. COMMENT. 285, 286 (2008) [hereinafter Paulsen, *Constitutional Amendment*]; Paulsen, *Lincoln*, *supra* note 52, at 1227 & n.2; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011–16 (2003) [hereinafter Paulsen, *Worst Constitutional Decision*]; Michael Stokes Paulsen, Was *Dred Scott* Rightly Decided? (unpublished manuscript, on file with author).

[106] U.S. CONST. amend. XVII, cl. 3. My thanks to Geoff Miller for this example.

[107] U.S. CONST. amend. XVII, cl. 1.

[108] Article V of the Constitution tends to support this reading. It states that amendments to the Constitution "shall be valid to all Intents and Purposes, as Part of this Constitution, *when* ratified" by state legislatures or conventions. U.S. CONST. art. V (emphasis added). For a related debate, compare Gary

In each case—the Ninth Amendment, the Tenth Amendment, the Eleventh Amendment, the first sentence of the Fourteenth Amendment, the third clause of the Seventeenth Amendment, and (as discussed earlier) the first clause of Article VI with respect to debt preservation—an interpretive instruction was made necessary in order to clarify, or effectuate, the intent of the lawmaker, whenever that intent differed from what a reasonable reader otherwise might conclude by simply giving effect to the ordinary meaning of the words, phrases, and linguistic structure of other enacted provisions. These retail rules-of-construction provisions—have I missed any?—tend to confirm the baseline rule, inherent in written constitutionalism and textually supported by Article VI's fundamental identification of "this Constitution" as authoritative, that the Constitution adopts as its general principle an interpretive methodology of original-meaning textualism.

There are at least two other corroborating textual clues that the Constitution prescribes original-meaning textualism. They are not interpretive instructions per se. But their logic confirms the correctness of this reading of Article VI. They are Article V—the provision for amendment of the text—and the Due Process clauses of the Fifth and Fourteenth Amendments.

B. Article V as a Confirmation of Original-Meaning Written Textualism

Article V of the Constitution confirms original-meaning textualism in two related, obvious ways. The first has been so often noted by others that one is almost embarrassed to bring it up: the existence of an explicit, detailed set of procedures for amendment of the text strongly implies that the content of the document—"this Constitution"—is otherwise fixed in place.[109] It is a powerful implicit confirmation of the rule against anachronistic interpretation, and thus of *original*-meaning textualism. If, according to the text, the text may not be changed except by formal amendment of the words of the text, it would defy logic for the text's *meaning* to change when

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Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001) (suggesting that "[d]ifferent clauses of the Constitution actually became effective at different points in time" and that "certain crucial provisions, especially those limiting the power of state governments, took effect immediately upon completion of the ninth [state] ratification in 1788"), with Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?*, 78 NOTRE DAME L. REV. 35 (2002) (suggesting that there may have been a gap in federal governmental authority between the adoption of the Constitution and the convening of the new government under the Constitution, from summer 1788 to spring 1789).

[109] Rather than send a hapless research assistant (or worse, myself) on a Westlaw search for an infinite string-cite of law review articles making this simple point, I repair to James Madison's explanation in *The Federalist No. 43* of why an amendment provision was appropriate to include in the Constitution: because it is necessary to provide for a means of changing the constitutional text. "That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety." THE FEDERALIST NO. 43, at 284 (James Madison) (Isaac Kramnick ed., 1987).

the text has not been changed. That would completely circumvent the most natural linguistic meaning, and deep structural logic, of Article V. Article V, by prescribing that amendments take the form of new, enacted *text*, confirms originalist written textualism as the Constitution's prescribed method of interpretation and application.[110]

The second Article V argument is one I recently have sketched in a light article in *Constitutional Commentary*, entitled *Can a Constitutional Amendment Overrule a Supreme Court Decision?*[111] My point of departure is an actual student question I receive in introductory Constitutional Law from time to time, usually in the first week of class, after noting (what I have already noted here) that the Eleventh Amendment overruled *Chisholm v. Georgia* and the Thirteenth and Fourteenth Amendments overruled *Dred Scott*. With charming innocence, a student sometimes asks whether the Supreme Court could "strike down" such an amendment and stick with its earlier decision. After all, the Supreme Court is supreme, right? How can anything overrule a Supreme Court decision?

The answer, of course, is that the newly enacted text overrides the prior interpretation of the old text *and*—what almost goes without saying, but may need to be said after all—that the Court could not legitimately disregard the new text or "interpret" it to mean something other than what it says. The Court may not disregard the objective, linguistic meaning of the new text and substitute in its place the Court's interpretation of the *old* text, just because it preferred the old rule. Everybody understands this (except perhaps a complete novice to constitutional interpretation), but not everybody recognizes that this is a powerful confirmation of textualism and specifically of *objective*, original-public-meaning textualism. It confirms the rule against subjective, private, idiosyncratic assignments of meaning. The Court may not—not legitimately, at least—simply make up whatever meaning it likes, nor may it read the overruling amendment out of the Constitution. It is bound by the meaning of the text.

The same logically holds true for any and all chunks of constitutional text. The reason that the Thirteenth and Fourteenth Amendments overrule *Dred Scott* is not because of some last-in-time rule with respect to constitu-

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[110] Even Professor Akhil Amar's suggestion of the possibility of legally valid textual amendment of the Constitution outside of Article V's designated procedures contemplates the enactment of new constitutional *text*. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). Amar's argument is, in essence, a textual argument that Article V's amendment provisions should not be read as the exclusive mode of enacting new constitutional text. It is *not* an argument for "amendments" that are not part of the text. (It *is* an argument for an *extra-textual process* for producing new constitutional texts. There are thus great difficulties with Amar's argument as a matter of the original public meaning of the text of Article V—not the least of which is that the text of Article V plainly is the exclusive *constitutional text* concerning constitutional amendments—but that discussion would take me far afield from my purpose here.)

[111] Paulsen, *Constitutional Amendment*, *supra* note 105.

tional texts and Supreme Court decisions. (If it were, the Court *could* simply overrule the Amendments.) It is because the text *always* prevails over subjective "interpretations" that depart from the text itself; the text has an objective meaning that stands apart from, and prevails over, any and all subjective assignments of meaning.[112] That principle applies to parts of the Constitution adopted before some interpreter mangles the text as well as parts adopted after the mangling. The validity and primacy of an enacted constitutional amendment's text—the meaning of its words at the time of its enactment—over and against any contrary prior interpretation, thus becomes an argument for original-public-meaning textualism generally, as the Constitution's prescribed rule for constitutional interpretation.[113]

C. The Due Process Clauses as Rules of Fidelity to Authoritative Legal Texts

The Fifth Amendment provides that the federal government may deprive no person "of life, liberty, or property, without due process of law." The Fourteenth Amendment similarly provides that no state may "deprive any person of life, liberty, or property, without due process of law."[114] These well-known provisions have given rise to well-known disputes over constitutional interpretation, and well-known abuses of that power by the Supreme Court.[115]

Putting such abuses (temporarily) to one side, all seem to agree that the core of these "due process of law" provisions—the original meaning of the term—is a requirement of *legal regularity*. Persons may not be deprived of life, liberty, or property except in accordance with (in the words of Magna Carta) the "law of the land"—that is, in accordance with legitimately and properly enacted, authoritative rules of law binding on the community, and in accordance with a fair process for determining whether the individual's action has departed from such authoritative, duly-enacted rules.[116] The most

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[112] *Id.* at 288. As noted above, *Marbury* stands for this proposition, too. Paulsen, *supra* note 1, at 2739–42.

[113] Paulsen, *Constitutional Amendment*, *supra* note 105, at 288–90.

[114] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[115] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Lochner v. New York, 198 U.S. 45 (1905); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For an efficient grand tour of this doctrine, see Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004).

[116] The best short treatment of the meaning of the Due Process Clause(s) I have read is Gary Lawson, *Due Process Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 337–41 (Edwin Meese et al. eds., 2005). Lawson traces the term's meaning from its roots in Magna Carta through Blackstone's *Commentaries* to inclusion in the U.S. Constitution, to modern judicial interpretations departing from original meaning. Another excellent formulation is then-Professor Michael McConnell's, in his mock opinion concurring in the judgments in *Brown v. Board of Education* and *Bolling v. Sharpe*. Michael W. McConnell, *McConnell, J., Concurring in the Judgment*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 166 (Jack M. Balkin ed., 2001) ("The Due Process Clause is fundamentally a guarantee of procedural regularity: government may not deprive individuals of vested legal rights without

famous elements of such procedural fairness are the well-recognized requirements of notice and an opportunity to be heard. As Professor Gary Lawson has explained, "due process of law" stood for the traditional "principle of legality."[117] The core eighteenth-century American understanding of what it meant to deprive someone of due process of law, derived from Magna Carta and mediated by Blackstone, was "something like 'executive or judicial action taken without lawful authorization and/or not in accordance with traditional forms of justice.'"[118] Executive and judicial officials may not simply make up new rules for the occasion and then apply them against persons subject to their authority.

In a system of written, enacted law, I submit that this requirement of legal regularity—of action in accordance with law—means that neither executive nor judicial officials legitimately may act in a manner not authorized by the terms of the written law. The requirement of due process of law, in a system of written law, thus confirms the requirement of textualism. Due process of law means *done in accordance with written, enacted law*. In a system of written law, that which is written is what constrains executive and judicial authority. Likewise, it is the *written* law that, by its terms, gives notice to the citizen of the content of law and prevents arbitrary impositions upon his or her life, liberty and property.

It is hugely significant that it is the written law that constitutes the "law of the land" and to which the "due process of law" clauses require strict adherence. Note in this regard the powerful textual connection between Article VI's designation of "this Constitution," along with federal statutes and treaties—written texts all—as the supreme, authoritative, and binding "Law of the Land," and the Fifth and Fourteenth Amendments' translation of that lofty Blackstonian phrase into a specific command that government officials not act against persons' interests other than in accordance with "due process of law."

The idea of due process also tends to confirm *originalist* textualism and *objective*, public-meaning textualism. If executive officials or judges could, through the guise of subjective interpretation, invent, without notice, new legal requirements, prohibitions, or authorities, such essentially arbitrary power would completely circumvent the requirement of legal regularity—of action in accordance with prescribed, written law—and utterly subvert the principle of legality that is at the core of the idea of due process of law.[119]

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proper legal authorization and nonarbitrary process in accordance with the established laws of the land.").

[117] Lawson, *supra* note 116, at 337 (emphasis deleted).

[118] *Id.* at 338.

[119] I owe the inspiration of this idea to a conversation with my brilliant colleague Robert J. Delahunty.

Thus, the discredited (but, seemingly, eternally un-dead) idea of "substantive" due process is doubly wrong. Not only is it a made-up, atextual invention latched on to a clause that does not properly bear that meaning, it is a made-up, atextual invention latched on to a clause that affirmatively *contradicts* such a meaning. "Substantive due process" *violates* the Due Process Clause. It violates the Clause's core meaning prescribing legal regularity, in accordance with the written "law of the land." It substitutes instead the subjective, shifting judgment of government officials (typically judges). It substitutes a government of men (and women) for a government of laws and for the rule of law.

It is therefore no accident that one of the best, most succinct judicial defenses of original-meaning textual interpretation of the Constitution, as against shifting, subjective judicial construction, came in Justice Benjamin Curtis's dissent in *Dred Scott*, in the course of attacking Chief Justice Taney's invocation of the Due Process Clause of the Fifth Amendment as a substantive protection of a constitutional right to slavery in federal territories. Wrote Curtis:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[120]

Due process of law, rightly understood—that is, given its original public meaning, in context—requires that all who administer the law or exercise governmental authority adhere to the original public meaning of binding, authoritative written legal texts. It forbids exactly what the Court did, so horribly, in *Dred Scott*, and continues to do, so regularly, today: create new "meanings" for old constitutional provisions (like the Due Process clauses), enabling the Court to exercise arbitrary power.

III. UNORIGINAL OBJECTIONS TO ORIGINALISM

If the Constitution's text indeed prescribes original-meaning textualism as the general rule for understanding the Constitution's terms, and contains other interpretive instructions where a departure from that baseline was contemplated, then long gone is the argument that the Constitution specifies no rules or principles governing its own interpretation. The only remaining objections to originalism reduce to some version or another of the proposition that we should not follow the Constitution's interpretive instructions. It would produce bad outcomes; it is in any event contrary to so much well-established practice and thus does not truly comport to our modern understanding of what adherence to "the Constitution" really means; and even if

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[120] *Dred Scott*, 60 U.S. (19 How.) at 621 (Curtis, J., dissenting).

it were in theory a better thing to do, it is too difficult a task to be useful, too uncertain as to outcomes in many cases, and too indulgent of the notion that a society should be governed by the dead hand of dead text-writers and -adopters.

Each of these objections has some force, but nearly all of them have little force as critiques of original-meaning textualism *as a method of constitutional interpretation*. They are, instead, critiques of *written constitutionalism* understood on its own terms. They may be valid as such; I do not regard it as impossible to object to written constitutionalism as a political principle of governance.[121] But they do not truly answer, or even address, the question of the proper way *to read and apply* a written Constitution that purports to be authoritative as a written text. In this Part, I take up the most common of these objections and attempt to swat them away as quickly as I can.

A. The Argument from Bad Results

The problem with most academic critiques of originalist textualism is that they tend to be written by *bad* originalists—borderline incompetent practitioners of the method of original-meaning textualism. More precisely, they are written by those who are not originalists at all. They are unbelievers. They do not really take seriously the idea of seeking the original meaning of the written text as the proper method of interpreting the Constitution. Accordingly, in service of a purported critique of originalism, they point to what they conclude are its untoward results: original-meaning textualism is unthinkable as an interpretive method (the argument goes) because it would produce so many unthinkable outcomes. Relatedly, the critique continues, such results would be radically inconsistent with much modern constitutional doctrine.[122]

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[121] I am inclined, however, to agree with John Marshall's claim that this "reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution . . . ." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[122] To pick (on) just one prominent example, among many from which one might choose: This appears to be a large part of Cass Sunstein's argument in his recent pop-con-law book, *Radicals in Robes*. Before I'd had a chance to read it, I heard Professor Sunstein deliver a portion of it in a lecture and debate format. I scribbled down his parade of horribles literally on the back of an envelope, which I transcribe below exactly as I recorded it:

1. = Pro as to nat'l gov't.
2. Bolling
3. Sex Discrim by Fed & States
4. Race Discrim by States (as to non-P or I)
5. One-person, one-vote
6. Property qualification for voting
7. Incorp. of Establishment Clause (Thomas)
8. Incorp. generally (Janice Rogers Brown)
9. No right to privacy
10. No ban on regulatory takings—physical invasions only
11. Non-delegation doctrine

There are three good responses to this objection, which I discuss in ascending order of importance (for good dramatic effect): First, original-meaning textualism does not yield bad outcomes. (It certainly yields fewer than its critics imagine.) Moreover, some of the ostensibly "bad" outcomes are not bad at all. And almost all of the supposedly undesirable results may be remedied by democratic choice; none is uncorrectable if the people agree that the result is bad.

Second, *anti*-originalism—"interpretation" *not* bound by the original public meaning of the words of the text—can produce, and *has* produced, plenty of bad outcomes of its own. (This is the universally familiar "So's your mother" retort, but one that has real content here.)

The third, and most important, response is a simple demurrer: even if the charge that originalism produced undesirable outcomes were true (or partially true), what of it? The charge is not really an argument against the correctness of originalist textualism as the approach prescribed by the document itself for ascertaining its meaning; it is an argument against giving effect to that meaning in practice. It is an argument against choosing to be governed by this Constitution. I will develop each of these points in turn. (If you are already persuaded, skip ahead to section B, where I address the argument from contrary practice.)

First, I deny that originalism produces a rash of bad results. As noted, skeptics of a method, in any field, tend to make rather poor practitioners of it. The "originalism" practiced by anti-originalists is no exception. The problem with most anti-originalists' arguments about what horrible results originalism produces is that most anti-originalists are simply horrible originalists. They are not good at it.

Take, for example, Professor Sunstein's charge that following the Constitution's original meaning would (or might) mean these terrible things: the federal government would not be bound by equal protection principles, and thus *Bolling v. Sharpe*[123] would be wrong; both Congress and the states could discriminate with impunity on the basis of sex; states could discriminate on the basis of race as to anything not a "privilege or immunity" of citizenship; the one-person, one-vote principle of such cases as *Baker v.*

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12. Independent agencies

13. Commerce Clause.

At the bottom of the envelope, I had written two words—"Profoundly Destabilizing"—summarizing Sunstein's thesis and critique of originalism: If one followed the method of originalism, one ends up with a profound upheaval of well-accepted modern constitutional doctrine. Those who advocate this, were they to become judges, would be radicals in robes—thus the title of his book. My reading of the book confirmed that the live performance tracked the written text (of the book) closely. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 63–65, 75, 81–150, 199–252 (2005). I will take up each of these thirteen points, briefly, in the text. For a devastating indictment of Sunstein's book, see Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Professors are Wrong for America*, 106 COLUM. L. REV. 2207 (2006) (book review).

[123] 347 U.S. 497 (1954).

Carr[124] and *Reynolds v. Sims*[125] (and for that matter *Bush v. Gore*[126]) would vanish; states could impose property qualifications for voting; states could have officially established churches; the Bill of Rights would not apply to the states; there would be no right to privacy, no ban on regulatory takings, a resurrected nondelegation doctrine, and no independent agencies; and Congress's legislative powers would be drastically narrower.[127]

Most of these claims are false, if one truly applies the objective, original public linguistic meaning of the words and phrases of the document—that is, if one is a sound originalist interpreter in the first place. Some of these charges are true, but the alleged bad results are not really so bad. (And if they *were* bad, they would be fully correctable by popular democratic choice, if the operative political majority agreed that such results were bad. The Constitution does not *require* these bad things; at worst, it just permits them.) Still other instances are fairly arguable either way on the merits, on originalist principles, illustrating that original-meaning textualism does not necessarily yield unanimity as to specific answers. (This is, perhaps, a problem of a different sort, but not one unique to originalism and in fact not truly a problem, as I discuss below.[128])

Thus a quick originalist point-by-point rebuttal:

1. The Equal Protection Clause does not limit the national government, but other provisions do, including the Fifth Amendment Due Process Clause and Article I, Section 9's ban on bills of attainder. The federal government may not lawfully incarcerate people—literally deprive them of their liberty—based on race or lineage, without such persons being properly determined to be guilty of unlawful criminal conduct prescribed in advance of their actions or being enemy combatants properly subject to the war power. As discussed above, that is at the core of what "due process of law" means. *Korematsu* and *Hirabayashi* were simply wrongly decided.[129]

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[124] 369 U.S. 186 (1962).

[125] 377 U.S. 533 (1964).

[126] 531 U.S. 98 (2000).

[127] *See supra* note 122.

[128] *See infra* Part III.D.

[129] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States 320 U.S. 81 (1943). This does not make *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *rightly* decided, however. They are not. Lengthy discussion of the merits of those decisions here would take me far afield. Put succinctly—I hope to develop the point at length in other writing—*Hirabayashi* and *Korematsu* are wrongly decided, in that the arrest and detention of *civilian noncombatants*, whether citizens or lawful resident aliens, where there is no evidence to support the judgment that such persons are in fact lawful or unlawful enemy combatants, falls outside the constitutional power to wage war and thus is subject to the constitutional constraints that govern civilian deprivations of liberty. Capture, detention, interrogation, and appropriate military punishment of *enemy combatants* (of both the lawful and unlawful varieties, and whether citizens or noncitizens) fall within the war power, where constitutionally brought into play. Due process requirements apply differently in such different contexts. *Contra Hamdan*, 548 U.S. at 567; *Hamdi*, 542 U.S. at 524–35 (plurality opinion). The availability of habeas corpus as a procedural

A (debatable) argument can be made for *Bolling v. Sharpe*'s outcome on alternative legal grounds.[130] At all events, segregation in the District of Columbia unquestionably was within Congress's power to prohibit by statute.[131] Thus, even if the Constitution's original meaning does not prohibit segregation in the District, it surely does not *require* segregation (which really would be horrible). The original meaning of the text does not disable the political community from acting justly. Moreover, the fact that the Fourteenth Amendment does not limit the federal government, but rather empowers it to legislate in furtherance of the equal legal protection of persons from their state government's actions or inactions, may well justify federal race-conscious legislation that states could not adopt on their own.[132]

While we're at equal protection: *Brown v. Board of Education*[133] is right on original-meaning textualist grounds that focus on the meaning of the *words* of the Equal Protection Clause rather than subjective specific intention or expectation.[134] (*Brown* is also probably right as a matter of historical understanding, despite some serious conflicting evidence as to the Framers' "intent."[135])

On the same principle, state sex discrimination is (largely) unconstitutional, assuming women are "persons" within the meaning of the Fourteenth Amendment, an assumption that seems unavoidable from the perspective of original linguistic textual meaning. *Of course* women are "persons"! There is no remotely plausible textualist argument that women are not embraced

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remedy for bringing to bear judicial review in such matters is subject to Congress's constitutional power, which legitimately may be employed to provide such a remedy to citizens but not to enemy aliens. *Contra Boumediene*, 128 S. Ct. at 2240.

[130] *See* McConnell, *supra* note 116, at 168 (arguing that the District of Columbia government's delegated statutory authority should have been construed strictly, so as not to include the authority to segregate local schools on the basis of race).

[131] U.S. CONST. art. I, § 8, cl. 17.

[132] *Contra* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[133] 347 U.S. 483 (1954).

[134] *See, e.g.*, Paulsen, *supra* note 4, at 227 n.23 (1994) (arguing that the meaning of the Fourteenth Amendment's language "entails a prohibition on racial segregation or other racial discrimination by state law" irrespective of specific intentions of some drafters that the language would not have this consequence).

[135] *Compare* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995), *and* Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457 (1996) (proposing that despite scholarly consensus to the contrary, the Framers contemplated that the Fourteenth Amendment would prohibit segregation), *with* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (arguing that the original understanding of the amendment did not invalidate segregation). Early Supreme Court decisions leaned toward a reading of segregation as a denial of legal equality on the basis of race, holding racial exclusions and segregation unlawful. *See* Strauder v. West Virginia, 100 U.S. 303 (1879) (rejecting racial exclusion from jury service); Railroad Co. v. Brown, 84 U.S. (17 Wall.) 445 (1873) (statutory case rejecting racial discrimination in transportation). It took an aggressively nontextualist, "purposivist," social-policy, evolving-meaning, underlying-principle-ish judicial approach to constitutional interpretation to erase that prior understanding of the text and establish segregation as constitutional for six decades. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

by the literal, ordinary meaning of the document's language forbidding denials of due process of law or equal protection of the laws to any "person." The fact that the Amendment's drafts*men* may not have had women, but mainly race, *in mind* does not negate what the Amendment says *in words*. The word used was "person" and there is no reason to believe that the men who drafted the Fourteenth Amendment did not regard women as, legally, persons or that they used the word "person" in some nonstandard, specialized, technical sense so as not to mean what it ordinarily meant. Women were persons, within the meaning of the Constitution, everywhere else that term was employed in the original document—plainly so in Article I, Section 2's representation-rule provisions; in Article IV's fugitive from justice and fugitive slave provisions; and in the Fifth Amendment's criminal process protections (including the original Due Process Clause after which the Fourteenth's was modeled), all of which certainly included women.[136] There is no reason to think the words "persons" and "person" in the Fourteenth Amendment departed from conventional usage. Women's rights may not have been the chief object of concern of the Amendment's framers, but those objects of concern were addressed with language the plain meaning of which obviously includes women.

Thus, to treat the sexes differently under the law with respect to legal civil rights, privileges, or benefits for which there is no relevant difference in the sexes denies equal protection of the laws. This textualist conclusion seems a sound and straightforward reading of the words, if one remains uncorrupted by considerations of likely specific historical intentions or expectations, or by social expectations or customs prevailing at any given point in time.[137]

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[136] U.S. CONST. art. I, § 2, cl. 3; *id.* art. IV, § 2, cls. 2–3; *id.* amend. V.

[137] *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), was wrongly decided, but *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), was rightly decided, because the original meaning of the Fourteenth Amendment's text did not extend political voting rights to women (or anyone else for that matter). *See* U.S. CONST. amend. XIV, § 2 (permitting, but penalizing, state discrimination in voting rights against any class of "male inhabitants"); U.S. CONST. amend. XV (prohibiting state discrimination in voting rights on the basis of race).

The *application* of the general rule stated above—that the law may not treat the sexes differently with respect to rights, privileges, and benefits for which there is no relevant difference intrinsic to the different sexes—may be difficult or troubling in some cases, and reasonable original-meaning-textualist men (and women) may disagree as to whether differences between the sexes are legally relevant in any given situation. That, of course, is the core question of modern doctrine of equal protection, as it concerns sex (and I duck those questions here). My limited point is a general one: The Equal Protection Clause protects women from state government denials of equal protection of the laws. The possibility of legitimate disagreement as to how that principle applies in specific contexts merely shows that original-public-meaning textualism does not always yield agreement as to specific outcomes. (This may be a problem of a different sort, but not an especially large one and not one that is unique to originalism as an interpretive method, as I discuss below in Part III.D, *infra*.)

2. "One-person, one-vote" (the line of cases from *Baker v. Carr* to *Reynolds v. Sims* to *Bush v. Gore*)[138] is indeed a tough original-public-meaning row to hoe. Neither that rule, nor any other voting rights rule (like that of *Harper v. Virginia Board of Elections*[139]) appears supported by the original meaning of the Fourteenth Amendment, the better reading of which does not embrace political rights but only civil rights. Though the question is perhaps not entirely free of doubt, Section 2's penalty for a state's discriminatory denial of voting rights seems a powerful textual rebuttal to divining more general constitutional commands of equal voting rights from the Equal Protection Clause. While I would be open to evidence demonstrating that the Clause nonetheless had a determinate meaning supporting this line of cases, I have not yet seen such evidence.

This may indeed allow some "bad" state voting laws (from a policy perspective) under the Equal Protection Clause. It may be, however, that the original public meaning of the Guarantee Clause of Article IV supports a broad national governmental power to judge when state voting rules offend national political understandings of what is required of a "Republican Form of Government."[140] The same principle would apply to state property qualifications for voting or poll taxes. The Guarantee Clause, however, does not specify which branch of the national government is to exercise this power. The provision is best understood as creating a shared power of all three branches of the national government to revise state political and electoral arrangements that they judge not properly "republican" in form.[141]

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[138] Bush v. Gore, 531 U.S. 98 (2000); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[139] 383 U.S. 663 (1966) (invalidating $1.50 poll tax in state elections on Equal Protection Clause grounds).

[140] *See* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000) (contending that the Guarantee Clause should govern state redistricting cases); *see also* AMAR, *supra* note 19, at 276–81 (noting arguments of the Framers that the federal government had the power to judge whether a state's government was republican); *id.* at 364–76 (describing conceptions of the Guarantee Clause in the nineteenth century).

[141] For example, I have written elsewhere that the Guarantee Clause supported Congress's *power*, during Reconstruction, to condition the seating of federal representatives on a state government's support for certain vital principles and its extending the right to vote to a broad swath of the populace. Kesavan & Paulsen, *supra* note 35, at 328–29; *cf.* AMAR, *supra* note 19, at 365 (contending that Congress's seating conditions did not violate the Constitution). A further possibility is that the Guarantee Clause empowers the national government to require that states adhere to the rule of law, including their own written laws, and that this might invalidate some states' malapportionments. *See* Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984).

Who exercises final authority among the branches of the national government with respect to this judgment? Consistent with the default rule that the judiciary may not properly invalidate actions of the political branches unless those actions violate a rule of law set forth in the text, it follows that the courts should defer to the discretionary judgments of the national political branches in this area. *Luther v. Borden*, 48 U.S. (1 How.) 1 (1849), is best understood as standing for this proposition.

3. The "incorporation" question (next on Sunstein's list) is a dead horse if ever there was one. The Fourteenth Amendment incorporates as limitations on state governments those provisions of the Bill of Rights that constitute "privileges or immunities of citizens of the United States." This is almost as easy a textualist argument as they come.[142] Again, there may be room for disagreement as to which such constitutional provisions fall within the "privileges or immunities of citizens" description (the Establishment Clause of the First Amendment, for example),[143] but the general idea of incorporation is not a serious original-public-meaning textualism problem.

4. The "right to privacy" is another matter. Professor Sunstein is right: original-public-meaning textualism cannot yield a generic right to privacy or autonomy under any of the myriad texts invoked in support of such a right. This means that a whole boatload of modern Supreme Court substantive due process decisions are wrongly decided, including *Roe v. Wade*, *Lawrence v. Texas*, and *Griswold v. Connecticut*.[144] For some, this means that originalism produces bad results. But for others, this means that *non*-originalism produces bad results; the Court's anti-textualist decisions are the parade of horribles, not original meaning.

Count me in that latter group. Talk about bad results: The Court has created a federal constitutional right of some human beings to kill other, defenseless living human beings gestating in their mothers' wombs—a right to murder young human infants—in the name of "privacy" and under the rubric of "substantive" due process, paralleling almost precisely the constitutional logic (if one can call it that) that led the Court to create a constitutional right to own slaves, immune from federal regulation in federal territories, in *Dred Scott*, and a constitutional immunity from certain business and employment regulation, in the *Lochner* line of cases. *Anti*-originalism—judicial decisionmaking *not* consistent with the original public meaning of the language of the Constitution—has produced some truly monstrous, horrible results, including some of the very worst decisions in the Supreme Court's history.[145]

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[142] Paulsen, *supra* note 65, at 200–02; *cf.* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163–230 (1998) (surveying historical evidence and arguments and concluding that the Privileges or Immunities Clause incorporates all personal privileges, including those in the Bill of Rights, in the Constitution).

[143] *Compare* Cutter v. Wilkinson, 544 U.S. 709, 726 (2005) (Thomas, J., concurring), *with* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 323 (1986) (concluding that the Fourteenth Amendment incorporates the Establishment Clause's protection of the freedom of nonexercise of religion).

[144] Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). *See generally* Lund & McGinnis, *supra* note 115.

[145] *See generally* Paulsen, *Worst Constitutional Decision*, *supra* note 105 (discussing some of the most atrocious decisions of the Supreme Court and their lack of basis in the original meaning of the Constitution's language).

This anticipates to some degree my second response to the argument from bad results—what I call the "So's your mother" response. If originalism can yield (what some think) bad results, it is all the more true that anti-originalism can yield, and has yielded, bad results. More on this presently. For now, I simply accept the charge that originalism is not consistent with a free-floating right to privacy, but deny that this produces bad results. Often it avoids horrible results: originalism clearly would have foreclosed *Dred Scott*, *Lochner*, and *Roe.* In my view, it would have foreclosed *Plessy v. Ferguson*,[146] *Giles v. Harris*,[147] *Berea College v. Kentucky*,[148] *Buck v. Bell*,[149] *Debs v. United States*,[150] and *Bradwell v. Illinois*[151] too, among other atrocities. And where originalism would eliminate judicial "privacy" results that I might *like* on policy grounds—I am certainly no fan of criminal punishments for contraception use or for private consensual adult sexual conduct—I can think of almost no instance where the original public meaning of the Constitution could fairly be read to *require* prohibitions on truly private consensual adult conduct.[152]

5. Let me close out Professor Sunstein's list of alleged originalist disasters before the enterprise becomes too tedious. His last group involves administrative law and the federal regulatory state. First, the nondelegation doctrine is *not*, I think, a sound inference from the text of the Constitution (though I concede that there are some very good, serious textual arguments to the contrary).[153] Congress may, in the exercise of its assigned powers,

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[146] 163 U.S. 537 (1896) (permitting racial apartheid).

[147] 189 U.S. 475 (1903) (declining to enforce Fifteenth Amendment right to vote without discrimination on the basis of race on the grounds that it would be hard to grant relief in the face of determined state resistance and that it would not make sense to enforce the right to vote in a system alleged to be fraudulent).

[148] 211 U.S. 45 (1908) (deciding that a private religious college possesses no constitutional right to teach both black and white students together, as against a state law requiring segregation).

[149] 274 U.S. 200, 207 (1927) (finding that a state law requiring sterilization of a mentally impaired person, on the basis of mental impairment, does not deny the equal protection of the laws to such a person, because "[t]hree generations of imbeciles are enough").

[150] 249 U.S. 211 (1919) (upholding against a First Amendment challenge the criminal conviction of former presidential candidate Eugene V. Debs for making an antiwar, antidraft speech during World War I).

[151] 83 U.S. (16 Wall.) 130 (1873) (holding that state exclusion of women from the practice of law does not violate the Fourteenth Amendment).

[152] To be clear, however, a state's failure to protect a class or category of human beings from the private violence of others may well constitute a denial by the state of the equal protection of the laws to such persons, in violation of the Fourteenth Amendment. Paulsen, *supra* note 65, at 207–11. Popular democratic decisionmaking cannot constitutionally license conduct, in the name of "privacy," that yields some persons up to the private violence of others.

[153] Good textualist-originalists disagree on this point. *Compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), *and* Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331 (2003) (disputing the existence of the nondelegation doctrine and arguing that agencies acting pursuant to legislative delegation are exercising executive power), *with* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*,

delegate whatever discretion it likes, pursuant to whatever strict or lax standards it chooses, to administrative agencies within the executive branch. So long as Congress retains the authority to undo the delegation, delegation is a form of *exercise* of its legislative power, not a relinquishment of it.[154]

But even if I am wrong about this, a vigorous nondelegation doctrine is hardly a nightmare scenario. It might create certain difficulties for the leviathan of the modern administrative state, but that might well be a good thing from a policy standpoint. Second, so-called "independent" agencies—branchless government entities exercising executive power of the federal government but not accountable to the President—are indeed unconstitutional under the original meaning of the language of Article II, which vests all the executive power of the United States in the President.[155] If this means that some such agencies must be struck down, or modified to conform to the text of the Constitution, that is a good thing. If that means some dislocation in present government operations, so be it. The heavens will not fall if the FEC or FCC does. (They might even open.) Finally, I think the claim that adhering to the original meaning of the Commerce Clause (and Necessary and Proper Clause) would upend a huge amount of familiar government policy and practice is simply wrong. As I have explained elsewhere, the original public meaning of the words of the text of Article I admit of an extremely broad range of governmental legislative policy choice.[156]

6. As long as I am at it, let me conclude this brisk tour of alleged untoward consequences of originalism by looking at two common canards.[157] The first is uncommonly silly: that original-meaning textualism would render paper money unconstitutional. This false truism is mostly the result of two poorly reasoned Supreme Court opinions on the topic. The first one,

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93 VA. L. REV. 1035 (2007) (satirically examining the untoward ramifications of allowing Congress to delegate all of its powers), Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (contending that the nondelegation doctrine is rooted in an original understanding of the Constitution), *and* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (finding support for a vigorous nondelegation doctrine in the text of the Constitution).

[154] Justice Scalia has made a very similar argument in two notable delegation cases. Clinton v. New York, 524 U.S. 417, 463 (1998) (Scalia, J., dissenting); Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

[155] *See* Paulsen, Nixon *Now*, *supra* note 52, at 1390–97 (1999). The definitive, comprehensive treatment of this point is Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

[156] Paulsen, *supra* note 11. Some defenders of original-meaning textualism disagree with this conclusion. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003). But again, even if I am wrong on this point, this is hardly a disaster scenario.

[157] My friend Professor Marty Redish, moderating the symposium panel at which this Article was first presented, raised both of them, but they are common in the literature.

Hepburn v. Griswold,[158] wrongly concluded that federal government issuance of paper money is unconstitutional. The second one, decided under the name *The Legal Tender Cases*,[159] overruled *Hepburn* the next year, but on reasoning sufficiently convoluted and unsound as to make the conclusion seem dubious and the overruling feel result-oriented.[160] Wags sometimes try to sound clever and cynical by asserting the obvious wrongness of *The Legal Tender Cases*, but I suspect they probably have not thought seriously about the issue (or read the cases).[161] A moment's reflection reveals how foolish the conclusion is that paper currency is unconstitutional. Dumb arguments do not disprove the point asserted; just as some paranoids have real enemies, some bad Supreme Court opinions reach right results. There is a simple, good argument for the constitutionality of paper money: the federal government has power to issue paper money as legal tender, as a necessary and proper means of carrying into execution its powers to coin money and regulate its value, regulate foreign and interstate commerce, lay and collect taxes, and probably many more things. After *McCulloch v. Maryland*,[162] this is an easy case. If Congress may create a national bank to help accomplish such purposes, it surely can create paper notes as legal tender.[163]

The second common claim is that it is impossible to reconcile modern First Amendment free speech doctrine with the original public meaning of the text. Truly, this wonderful canard deserves its own full-length article (not the few paragraphs I give it here), for it is so intuitively appealing: how can nude dancing and flag burning be "speech"? Where does this "public forum" stuff come from? "Time, place, and manner"? How about all these exceptions and exclusions for "obscenity" (we know it when we see it),

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[158] 75 U.S. (8 Wall.) 603 (1870).

[159] 79 U.S. (12 Wall.) 457 (1871).

[160] The majority opinion in *The Legal Tender Cases* contains all sorts of errors: it implied that the desirability of a law figures strongly toward a conclusion that the law is constitutional, *id.* at 529; it declined to identify any particular power of Congress justifying the law, implying that power could be inferred from the penumbras of all of them, taken as a whole, *id.* at 533–34; and it stated that the presence of the Bill of Rights implied that Congress had implied, unenumerated powers, *id.* at 534–35—precisely the inference the Ninth Amendment and the Tenth Amendment were designed to prevent. It is also frequently noted that the change in result followed immediately upon a change of Court personnel. *See infra* sources cited in note 161.

[161] For a discussion and collection of views on this topic, see PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 291–99 (Paul Brest et al. eds., 5th ed. 2006). The modern article that provides the wags with fodder is Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367.

[162] 17 U.S. (4 Wheat.) 316 (1819).

[163] For a typically excellent analysis of *The Legal Tender Cases*, see 1 DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 320–29 (1985). For an interesting modern defense of paper money, starting from different premises, see Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017 (2008).

"fighting words," "true threats," commercial speech, government as proprietor, educator, employer, speaker, and the like?

The answer is that much (but not all) of modern free speech doctrine follows logically, if not quite unavoidably, from a careful, thoughtful exegesis of the text of the Free Speech and Free Press Clauses, understood according to the objective public meaning the words and phrases of the First Amendment would have had at the time of their enactment, and then applying that meaning to phenomena or situations not contemplated at that time. "Speech" and "press," taken together, embrace nearly all oral or written expression of messages, including the use of symbols and even the expressive aspects of certain conduct (but not the conduct itself, apart from its expressive aspects), through media and means in existence at the time of the Framing and any new ones arising after that time. Modern doctrine closely approximates this original meaning: government generally (there are exceptions) may not punish, prohibit, or penalize expression based on its message. To be sure, the "freedom of" speech and of the press may have had an original meaning that narrowed in certain respects the categories of speech to which this general principle applies. This becomes a legitimate originalist battleground. Modern doctrine reflects this battle. Many of the results reached are contestable, of course. But that does not make free speech doctrine an originalism-free zone; it simply means that originalism frames the inquiry but does not exclude the possibility of disagreement as to specific answers.

Similarly, the freedom of association follows logically from the original meaning of the Free Speech Clause. The freedom of speech may be an individual right, but individuals who all have that freedom may form groups and exercise their rights together. The freedom of speech certainly permits individuals to band together to formulate or advance shared agendas and common messages. Modern doctrine of "expressive association" (and disassociation) tracks in many respects (if imperfectly) the logic of this unexceptional observation.[164] In like manner, the meaning of the words "freedom of" speech may fairly be thought linguistically to embrace not only the freedom *to* say things but also the freedom *not to* say things. Modern "negative free speech" or freedom from "compelled expression" doctrine again approximates the text's meaning, and develops it.[165]

Finally, while a "law" "abridging" this freedom would seem to include all government action having the force of law that limits the "freedom of" individuals and groups to express messages through words, symbols, and conduct on account of the content or viewpoint of such messages, it does *not* so clearly extend to government action that incidentally may affect such

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[164] For a discussion of this issue (and a derivation of some First Amendment doctrine from original-public-meaning textualism), see Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917 (2001).

[165] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

expression by regulating conduct for reasons not having to do with any message, or that reasonably regulates the time, place, or manner of expression in ways not involving the content or viewpoint of the expression and that do not effectively take away all or most opportunities for expression. Again, modern doctrine pretty well instantiates the meaning of the text's words.[166]

Not all modern First Amendment free speech doctrine is sound on originalist grounds, of course.[167] But the claim that little to none of it is consistent with the objective original public meaning of the text is, upon examination, hard to sustain. At best, it is grossly exaggerated.

* * *

On claim after claim, charge after charge, the assertion that interpreting the Constitution according to the original meaning of its words would wreak havoc and horror is readily exposed as shallow, flimsy, based on bad originalism, or the product of tendentious, eminently contestable, political views about what outcomes would really be "bad." And what is more, the charge also ignores the ability of the democratic process, in nearly every case, to avoid the supposed "bad" results. For surely nothing in the (amended) Constitution's original meaning *requires* race discrimination, sex discrimination, legislative malapportionment, state official religions, government regulatory takings, expansive federal legislation, or interferences with "privacy" (however defined). As a rule, nothing in the Constitution's original meaning in any way disables the people, acting through elected representatives, from enacting the policies they think good and refraining from enacting the policies they think bad in any of these areas.

The same cannot be said for *anti*-originalist "interpretation." If the supposed evil policy consequences of being bound by the original meaning of the Constitution are mythical products of anti-originalist imagination, the evil consequences of *not* being bound by original meaning are real here and now. This is my "So's your mother" point. Any objection that the Constitution's original meaning produces bad results falls on the head of anti-original meaning far more heavily. Decisions like *Dred Scott*, *Roe*, and *Lawrence*, if one disagrees with them, produce policy results that cannot be overturned by ordinary democratic processes. They are disabling.

Moreover, one need not stop at *Dred Scott*, *Lochner*, *Roe*, and the other real-world atrocious nonoriginalist cases I mentioned a few pages ago.[168] Anti-originalism permits *any* result. So, if we're being fair—addressing all

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[166] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); United States v. O'Brien, 391 U.S. 367 (1968).

[167] For a sampling, see Michael Stokes Paulsen, How to Abridge the Freedom of Speech: Advice for the Aspiring Dictator (unpublished manuscript, on file with author).

[168] *See* text accompanying notes 146–151.

the supposed evil results that a particular theory *might permit* and not just the ones it has already fully accomplished—then the list of anti-originalist horror outcomes is truly a doozy, dwarfing Sunstein's imagined originalist mayhem. In addition to a constitutional right to kill infant human beings before they are born, one could discover a constitutional right to kill infants for the first two years (or three, or four) after they are born. One could discern a constitutional right to segregate on the basis of race. And, again, if the objective original meaning of the text is no constraint, why stop at inventing bad rights? Let's rearrange some (more) powers of government. If the text's meaning is not the limit, one could conclude that the Constitution grants all governing power to a military dictator who can make war, torture persons, and eliminate all civil and political rights at will. There is no freedom of speech, freedom of religion, or anything, except insofar as the dictator determines appropriate. And since such holdings are, by hypothesis, part of what the Constitution dictates as supreme law of the land, they are not correctable by ordinary democratic processes (which, of course, have been eliminated by our new nonoriginalist "constitutional" military dictatorship in any event).

Is this a bit over the top? Am I just being a bad *non*originalist, a poor practitioner of the method of which I disapprove (just as I've accused originalism's critics of being)? I really don't think so. In fact, I think I'm pretty darn good at it.[169] This involves no arrogance or claim of special talent on my part. Nonoriginalism is fun, and it's easy too! Nonoriginalism—the art of *not* being bound by the objective, original public meaning of the Constitution—is a truly liberating methodology. It is hard to say that any particular "interpretation," thus unbound, is really *wrong*. Unbound is unbound. Once the original meaning of the text is abandoned, all bets are off. There is no top to be over. So, when comparing the two alternatives in terms of their consequences, one has to imagine all the worst things that unbound nonoriginalism might permit. And so we ought to be weighing the bad consequences of requiring all administrative agencies ultimately to be subject to presidential direction and control (originalism) against the bad consequences of military dictatorship and elimination of all written constitutional rights or a constitutional right of parents to kill inconvenient three year olds.

* * *

Which brings me to my third, and ultimately most important, answer to the bad-outcomes objection: a simple demurrer. *So what* if I'm wrong

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[169] *See, e.g.*, Michael Stokes Paulsen, *I'm Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMMENT. 1 (1999) (responding to bad pseudo-originalism with even worse pseudo-originalism in the same vein); Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, *supra* note 70 (satirizing "evolving-meaning" nonoriginalism).

about any or all of these conclusions? What if the Constitution, interpreted and applied in accordance with its original public meaning, yields all sorts of dreadful outcomes? My answer is that this would have nothing to do with the proper *interpretation*—the meaning—of the Constitution. Rather, it would make an excellent argument against following the Constitution as a governing document. It is a bad constitution. So don't follow it.

One would, of course, have to weigh the Constitution's bad features as against its good features, if any. But if, on balance, the right conclusion is that the Constitution, *understood on its own terms*, is a really, really bad constitution, then . . . to the barricades! It is time to take that old Constitution of the United States, scrap it, and write up something new, if we can. (And hope that its wonderful features are not erased by subsequent generations who feel free to abandon the original meaning of *its* words, rendering the entire project of constitution-writing useless.[170]) That is what we, the people, did in adopting the Constitution in the first place. We scrapped the old Articles of Confederation because it was pretty much intolerable. We did it before. We can do it again.

But two key points immediately arise: First, one can only make such an evaluation of the goodness or badness of the Constitution by first reading and understanding it in accordance with its objective, original, public meaning—just as one would have read the Articles of Confederation in order to make a similar such evaluation. The Constitution must be *understood on its own terms*. Interpretation precedes evaluation.[171]

Second, however relevant it may be, to someone deciding whether to embrace the Constitution as a governing document, whether its objective meaning produces good results or bad results, that exercise is past due for the interpreter who has signed on to interpreting and applying the document in the role of a government official—legislator, executive official, judge. It might be relevant to the decision to accept, or to resign from, such office: it would be a terrible moral thing to exercise government power under a constitutional regime one thought horribly, monstrously evil.[172]

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[170] I suppose that we could, in this hypothetical new-and-much-improved written constitution, include even better, absolutely explicit, interpretive instructions in order to avoid anti-originalist interpretation in the future. But even that might not do the trick. The anti-anti-originalism rules of interpretation clause of the new constitution might one day itself be given a nonoriginalist interpretation and be held to mean something other than what they said. Oh well.

[171] Even Professor Sunstein knows this. Though he is perhaps not a good, faithful practitioner of original-meaning textualism, his thesis that adhering to the original meaning of the Constitution would yield awful outcomes *depends first on discerning the original meaning of the Constitution*. It is because the original meaning of the Equal Protection Clause would permit racial segregation and does not protect women at all (or so Sunstein asserts) that we ought not to be bound by it. For Sunstein, too, interpretation precedes evaluation.

[172] *See generally* COVER, *supra* note 21. Professor Cover's great book is all about the dilemma of antislavery judges called upon to enforce proslavery law against conscience, the different postures of competing antislavery advocacy camps on this topic, and the various ways in which judges wrestled with this problem.

What about using the rubric, or ruse, of creative "interpretation" to *correct* the Constitution's perceived flaws? Might it not be morally permissible for someone to accept office under a defective constitutional regime and work, under cover as it were, to fix it? We can discuss the moral and ethical implications of this some other time. My point here is the same as above: interpretation precedes evaluation. The very framing of the hypothetical assumes that one has, first, interpreted the Constitution in a search for the meaning of its words, found that meaning uncongenial to one's sense of justice, and therefore propounded, at least somewhat disingenuously, a different "interpretation" of the provision at hand—or maybe even an entire new theory of "interpretation"—in order to get around the document's unfortunate actual meaning(s). This is simply a different version of "to the barricades!" It is "to the barricades" wearing robes (or tweed jackets)[173] and armed with a clever mind and a word processor, rather than a pitchfork or personal firearm. Again, this may or may not be morally justified stealth subversion of the regime, in any given case. It just is not constitutional interpretation. *That* came earlier.

In a great constitutional law class discussion near the end of the term, when we all had become familiar with each other, I once asked an insistent interpret-the-Constitution-to-be-the-best-constitution-it-can-be student whether, under her theory, it was possible for the Constitution ever to mean something that she did not like. It was an inadvertently good question, and she gave a refreshingly honest answer. "No," she admitted, after a long pause. I let her answer hang in the air. She recognized the apparent problem with this, but simply did not wish to countenance the possibility that the Constitution, rightly construed, could lead to outcomes in opposition to her preferred political views. Some other students recognized the problem with this, too.

B. The Argument from Contrary Practice

Original-public-meaning textualism simply cannot be squared with much of our constitutional practice, another objection goes. It therefore cannot be justified as an interpretive method of the Constitution.

This objection, which in many ways is simply a variation on the bad-results objection, can be answered much more briefly: From the above discussion it should be clear that I agree that a certain amount of our practice, including a certain fair amount of modern judicial decisionmaking, cannot be squared with objective, original-public-meaning textualism. What of it? The fair-minded observer does not therefore conclude that textualism is an incorrect interpretive method for understanding the meaning of the Constitution, but only that textualism is to a fair degree inconsistent with some past and present practice. This is a descriptive claim: constitutional mean-

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[173] With apologies to Saikrishna Prakash, *supra* note 122.

ing and actual practice are not congruent. For those who are bound by their oaths of office to support "this Constitution," the response should be "so much the worse for 'constitutional' practice." As I have argued elsewhere, original public meaning as an interpretive method, binding on those exercising authority under the Constitution, does not permit actions contrary to original public meaning. Stare decisis, if understood as a doctrine requiring or permitting decisions contrary to the original public meaning of the Constitution, is simply unconstitutional.[174]

Perhaps this might mean that following the Constitution's meaning, rather than past practice at variance with that meaning, will produce certain "bad" results. If so, we are back to the preceding objection and the preceding set of responses. *Interpretation* precedes, and is distinct from, the personal or political decision to follow what the Constitution means as law. It is no objection to original-meaning textualism as the proper interpretive method that it might lead to results inconsistent with present practice.

C. The Argument from Difficulty

The work of interpreting the Constitution in accordance with the objective, original public meaning of its words and phrases is hard work. Moreover, it is, for many, *unfamiliar* work. It is not what law schools have trained students in, at least not very well, for the past many decades. Consequently, many lawyers and judges are not very skilled at it.[175] They would rather read judicial precedents, extrapolate and interpolate, and fill in holes with their policy preferences. That is what they have been trained to do and are familiar with. Moreover, for many, the task of originalism is *unappealing* work. (This might have something to do with how they were taught, with originalism's policy-making-limiting nature, or with the specific task of careful linguistic, structural, and historical analysis.)

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[174] Kesavan & Paulsen, *supra* note 16, at 1131 n.57 ("We think it also follows from these same premises that judicial interpretations may not properly alter the Constitution by ascribing new meanings to constitutional requirements or prohibitions. The doctrine of *stare decisis*, to the extent it is understood to command or encourage adherence to (by hypothesis) prior judicial interpretive departures from the original public meaning of the words of the Constitution's text, cannot be squared with the view that the language of Article VI prescribes originalist textualism as the sole legitimate method of constitutional interpretation."); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) ("Whatever one's theory of constitutional interpretation, a theory of *stare decisis*, poured on top and mixed in with it, *always corrupts the original theory*. If one is an originalist—that is, if one believes that the Constitution should be understood and applied in accordance with the objective meaning the words and phrases would have had to an informed general public at the time of their adoption—then *stare decisis*, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism. *Stare decisis* contradicts the premise of originalism—that it is the original meaning of the words of the text, and not anything else, that controls constitutional interpretation."); Paulsen, *supra* note 1, at 2731–34.

[175] Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 280–82 (2005) (making this point as an argument in favor of stare decisis).

So what? Again, this is not a critique of original-meaning written textualism as an interpretive method. It is either a crybaby complaint about working hard in general or working on things other than one's preferences, or the expression of a desire to be free of the constraints of the Constitution's text—that is, an objection to written constitutionalism.

For what it is worth, objective, original-public-meaning textualism does not strike me as all that hard. It is certainly no harder—and I for one find it far more interesting—than reading judicial cases (a task that likewise involves attempting to ascertain the meanings of words and phrases, and to apply them; case-reading just involves different words and phrases, even more of them, and judgments that sometimes conflict with one another[176]). To be sure, original-meaning textualism is probably a harder method than simply making up whatever answer one likes, but most anti-originalist approaches at least put on the clothes of an interpretive theory to cloak such actions. If one is a serious nonoriginalist, one purports to take these theories very seriously indeed. I have read a bunch of those theories, and must confess that they strike me as much, much more difficult—convoluted, abstract, philosophical—than original-public-meaning textualism. Call me an unsophisticated simpleton who grew up in a small town in northern Wisconsin—you would not be far off[177]—but these elaborate theories make my brain hurt. My more sophisticated interpretive-theory friends might make fun of me, saying that I should just work at it harder. But there goes the objection to originalism, certainly, on the ground that originalism is just too difficult to do.

The argument from difficulty ends up being pretty weak. Arriving at objective, original textual meaning is hard work, but not that hard. It is no harder than any realistic competitor methodology. And even if it were, so what? If it is the *right* method, the response should be to learn it, teach it, work at it, practice it, and get better at it.

D. The Argument from Indeterminacy

Maybe the problem is not that originalism is too hard; it is just that it cannot reliably produce more determinate results than any other method. The objection is partially valid; original-public-meaning textualism *is*, sometimes, indeterminate, as we have seen a number of times. The method does not always produce single right answers, and good practitioners of it will sometimes (as we have seen) arrive at differing conclusions on its application to particular questions.

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[176] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1544–45 (2000) (arguing that any supposed "efficiency" gain from a system of precedent is negated by the fact that stare decisis is not absolute and by the work entailed in reading and reconciling cases); Paulsen, *supra* note 51, 678–79 (discussing the proliferation of doctrinal gobbledygook resulting from a system of reading case precedents).

[177] Wausau is not all that small.

But how much of an objection is this, really? Originalism is not *that* indeterminate. It is determinate enough, for most purposes. It certainly limits the range of fair argument. And if one actually applies the method faithfully, carefully, and with the requisite skill (that is, if one takes the steps necessary to overcome the argument from difficulty), the range of disagreement tends to become narrower yet.

Moreover, compared with anti-originalism—with *not* being constrained by the meaning of words of the text—originalism is a paragon of determinacy. (The "So's your mother" point works here, too.) Likewise, an interpretive method that privileges the reading and applying of prior judicial cases, after the fashion of the common law, is subject to all the indeterminacy objections leveled at originalism and then some, as texts and competing interpretations proliferate (and one still needs to develop, interpret, and apply principles for when, how, and whether to reconcile cases with each other and with conflicting constitutional texts).[178]

And so what if originalist methodology is indeterminate as to results? That does not prove that it is wrong, or even flawed, as a method. It only proves that it leaves some constitutional questions unanswered, or not answered with certainty. Again, this objection is not unique to originalism. What's more, original-meaning textualism supplies a default rule: where the Constitution fails to resolve a particular issue, or leaves open a range of meaning or choice, it is open for popular, representative self-government to act, because it cannot be said that the Constitution supplies a rule (or at least not one of sufficient definiteness) that invalidates such political action.

A variation of the argument from indeterminacy is the assertion that original-meaning textualism is manipulable—putty in the hands of its practitioners. This is simply the suspicious (or paranoid) cousin of the argument from indeterminacy. Indeterminacy invites manipulation. The responses to the conspiratorial variation are essentially the same as the responses to the innocent version: Originalist textualism is perhaps manipulable to some extent, but it is not all that manipulable. Indeed, it supplies reasonably clear methodological rules, making manipulation less possible because it is more readily detectable. To the extent it supplies an agreed standard of practice, departures by malevolent manipulators should be more easily spotted and the malefactors more quickly and universally condemned.

Moreover, if one is concerned about manipulability, one certainly should be much more concerned with nonoriginalism, which seems to invite, yea welcome, manipulation and lacks coherent, binding standards to limit the willfulness of its practitioners.

And finally, there is the simple demurrer: So what? The abuse of a power does not disprove its existence; the fact that an interpretive method

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[178] For an extended riff on the problem of precedent and stare decisis, see Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008).

could be abused, or misused, does not establish that such method is wrong. And in any event, originalism, taken on its own terms, is less intrinsically manipulable than its alternatives. The answer to the possibility of abuses is to fight the abuses, not the method. Throw out the dirty bathwater, not the baby.[179]

E. The Argument from the Dead Hand

Last, and least, there is the argument that originalism privileges the "dead hand" of the past. Why should constitutional interpretation be governed by original meaning? After all, is it not *our* Constitution, *today*? Shouldn't we be able to interpret it to suit today's needs?

At bottom, this is not an argument against original-meaning textualism as an interpretive method—as a way of understanding what the document actually says and means. Rather, it is an argument *against written constitutionalism*. Written constitutionalism *is* the idea that we should be governed, to some degree, by the dead hand of the past. It *does* privilege the dead hand of the past. That is what writing constitutions is all about—

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[179] A variation of this variation is that political conservatives favor originalism because they prefer its results. Well now. The first answer to this ad hominem version of the argument is "sometimes yes, sometimes no." Unlike my student who had decided to find nothing in the Constitution inconsistent with her political preferences, I can find a *lot* in the Constitution (that is, the objective original public meaning of its words and phrases) that I dislike. I think its political arrangements in numerous respects too anti-democratic. I especially object to Article V on this basis, as it hugely overentrenches the past against constitutional change. Article I gives Congress more national power than I would prefer. Paulsen, *supra* note 11, at 992–93. I find it ludicrous that the Vice President presides at his own impeachment trial. *See* Paulsen, *supra* note 20, at 245–46. I am not a big fan of the Second Amendment, which strikes me as now-somewhat-anachronistically protecting individual gun ownership against government limitation every bit as much as the First Amendment protects individual expressive freedom against government limitation—a result I find more than a bit disturbing. Yet that appears to be the consequence of following the original public meaning of the text. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2818 n.27 (2008). The Fifth Amendment privilege against self-incrimination, textually undeniable, seems to me of quite dubious worth today as a matter of criminal justice administration and individual liberty. *See* Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1486–91 (1997) (book review) (contending that the privilege against self-incrimination is an anachronism). I find the death penalty distasteful, but constitutional. I could go on and on. On the other hand, there is a lot in the Constitution that I like a great deal, and I am willing to accept its bad parts for the sake of the good. And I certainly prefer the Constitution to the Supreme Court's nonoriginalist interpretations of it in many ways.

The second answer is a very big "So's your mother": political *conservatives* choose *originalism* because *they* like the outcomes *it* produces? Is this really to be taken seriously? Is it not much more the case that modern political *liberals* choose anti-originalism because *they* like the outcomes *it* permits them to produce? Let's get real. If I could offer Cass Sunstein or Jack Balkin one week of total power to amend, through written text, the Constitution in any way they pleased, so that it perfectly reflected their political preferences (or at least as nearly so as the use of language admits), would they prefer that their handiwork be interpreted and faithfully applied in accordance with the objective, original public meaning of the words and phrases they selected to express their preferences? Or would they prefer that its interpretation and application *not* be so bound (and that *I* be placed in charge of nonoriginalist "interpretation" of their preferred written constitution)?

entrenching certain decisions and choices against present and future popular choices to the contrary.[180] The argument for constitutional judicial review is a dead-hand-of-the-past argument.[181] *Everything about* the written Constitution as supreme law, trumping current practices, policies, or preferences inconsistent with it, is dead-hand-of-the-past reasoning. If one were to make a popular Hollywood movie about written constitutionalism, it probably should be entitled *Dead Framers Society*.[182]

One could, of course, object to any and all dead-hand, entrenchment rules that constrain present political or individual choice. That is a perfectly legitimate (if perhaps a bit extreme) position to hold as a matter of political philosophy. But that is an objection to any form of written constitutionalism—indeed, any form of constitutionalism—that purports to constrain present policy choices.

Ironically, originalism, applied to the dead hand of written constitutionalism, tends to permit *more choices for the living*—and increasingly more as time goes by. Because the Constitution cannot properly be "updated" in the guise of interpretation (recall the rule against anachronistic interpretation),[183] there are, or should be, no *new* limitations on current democratic choice. The original ones tend to recede in importance as they recede into the past, leaving less and less of what the living wish to do constrained by earlier generations' decisions.

Anti-originalism cannot claim the same thing. If constitutional interpreters are not constrained by the original meaning of the words, they can constantly discover or invent new meanings that invalidate current popular choices. Weirdly, then, the dead hand of the written Constitution governs less under originalism than under nonoriginalism. Or, to be more precise, the dead hand of the Constitution's original meaning impairs far less popu-

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[180] Justice Robert Jackson expressed this idea eloquently in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943): "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

[181] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent."); THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (arguing that where present popular political choice is contrary to choices made earlier by the people in framing the Constitution, the Constitution prevails).

[182] *Cf.* DEAD POETS SOCIETY (Touchstone Pictures 1989). Robin Williams could play the brilliant, irrepressible, inspiring, originalist constitutional law professor.

[183] *See supra* Part I.B.2.

lar democratic choice and written liberty than does the live hand of the nonoriginalist pickpocket.

IV. FOR ORIGINALISM

The assigned theme for the symposium panel for which this paper was written was "Originalism: For and Against." It may already be clear, from the above, that I think no "normative" argument is necessary to justify original-public-meaning textualism as the sole, legitimate, correct method of constitutional interpretation. The argument "for" originalist textualism is simply that that is what the Constitution itself prescribes. If what one is *doing* is "constitutional interpretation," original-meaning textualism is the only enterprise consistent with that description.

This is no different from the method one would employ with respect to interpreting the Articles of Confederation. If what one is doing is *interpreting* that document, one would presumably seek to ascertain the objective public meaning that its words and phrases would have had, in context, to reasonable, informed speakers and readers of the English language within the political community at the time (unless of course the document had general or specific interpretive instructions to the contrary).[184] One would not, presumably, read the Articles subjectively and idiosyncratically, or ascribe to their words changed meanings in order to improve them, make them more in tune with the times, or otherwise reimagine the Articles of Confederation to make of that charter of government the best Articles of Confederation it could be.

The reason for this is that the Articles of Confederation is an historical artifact. One reads it out of historical interest, in order to understand its meaning—its objective public meaning at that point in historical time. It gives us, perhaps, an improved understanding of what the draftsmen of the Constitution were reacting against, departing from, and seeking to correct. It gives us an artifact to study, evaluate, and compare. We read it the same way the generation that made the Constitution would have read it: first, to understand what it means; and second, to decide whether we like what it means or not, and whether we might prefer it or something else as a governing legal regime. Interpretation first, evaluation second. The idea that one would interpret the Articles of Confederation so as to make it into the "best possible governing document for our society today," for the "principles for which it should be thought to stand" rather than the specific meanings of its terms, or in any other way to depart from its objective public meaning, is almost absurd.

My contention is that the Constitution of the United States is an historical artifact, too. One reads it out of historical interest, in order to under-

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[184] I have not studied whether the Articles of Confederation prescribes rules for its own interpretation.

stand its meaning—its objective public meaning at the points in historical time at which its language was adopted. We should read it the same way the generation that made the Constitution would have read it: first, to understand what it means; and second, to decide whether we like what it means or not, and whether we might prefer it or something else as a governing legal regime. Interpretation first, evaluation second. The idea that one would interpret the Constitution so as to make it into the "best possible governing document for our society today," for the "principles for which it should be thought to stand" rather than the specific meanings of its terms, or in any other way to depart from its objective public meaning, *is almost absurd*.

The difference between constitutional interpretation and Articles-of-Confederation interpretation is that the Constitution *is* our governing document and the Articles of Confederation is not. But that is the result of political decisions extrinsic to the document. *Such political decisions* require a normative justification. The decision to *accept* the Constitution as supreme law requires normative justification. The decision to *abide by* and *apply* the Constitution requires normative justification. But the decision to interpret the Constitution so as to ascertain the *meaning* of its words and phrases does not require normative justification. It merely requires a decision to interpret the Constitution and seek to understand it on its own terms. Interpretation first, evaluation second.

If one is exercising power under "this Constitution," the Oath Clause indicates that one has agreed to accept "this Constitution." In such an instance, one has made the relevant political decision (at least for oneself). That decision, however, entails accepting the Constitution on its own terms—literally on its own terms.

Objective, original-public-meaning textualism may have other advantages—positive features that make it a good thing as a policy matter. If I were a political scientist (or giving a Constitution Day speech or talking to an elementary school group), I might discuss them. But I am concerned here with constitutional interpretation. As far as that business goes, objective, original-public-meaning textualism requires no normative justification.[185]

CONCLUSION

I therefore end by answering the question with which I began: *Does the Constitution prescribe rules for its own interpretation?* Absolutely, it does. Indeed, it sets forth a bunch of them. There are wholesale rules of construction and a large number of retail rules of construction, significant in themselves and as indirect confirmation of the general rule.

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[185] My attitude is that of Mr. Rick (Richard Blaine, American, played by Humphrey Bogart), leaving a conversation at his café with visiting Nazi officers and French Police Captain Renault: "You'll excuse me, gentlemen. Your business is politics. Mine is running a saloon." CASABLANCA (Warner Bros. Pictures 1942). Your business may be politics. Mine is interpreting a written constitution.

In general, the Constitution, both as a consequence of its nature as a written document, and by virtue of its specific words, prescribes *written textualism* as the sole appropriate approach to understanding and applying its provisions. The Constitution specifies the Constitution—a specific written text—as supreme, binding law. The specification of "this Constitution" as supreme and binding occurs in Article VI, the next-to-last Article of the original document, and functions as a description of exactly what is included within the scope of the political agreement "ordain[ed] and establish[ed]" in the Enacting Clause and brought into operation through the method of the Establishment Clause of Article VII. It is "this Constitution"—a specific written text—that all officers of government swear to support and to be bound by, according to its written terms. It is "this Constitution"—a specific written text—that is amended, by the addition of new written text, when amendments are adopted pursuant to the procedures specified in Article V.

Written textualism means giving the text its *objective* and *public* meaning. The document's instruction to look to the document—"this Constitution"—commands an internal perspective, forbidding external, private assignments of meaning. The fact that the document specifies the document as the sole source of binding authority also implies the exclusivity of the text. It precludes treating any "thing" external to the text as authoritative. Thus, it is not anyone's "intent," outside the document, that governs, but the meaning of the language inside the document: that is, the objective meaning of the words, according to the usual rules of language as they would have been employed by a hypothetical objective observer (that old friendly ghost of the law, the "reasonable man") at the time. The text itself buttresses the objective-observer, abstract, public perspective: the "lawgiver" of the Constitution is a construct—"We the People"; it is not the Framers or the ratifiers of the document. The Constitution dictates the perspective of an abstract hypothetical collective Person, We the People, who speak through the document itself.

Written textualism also implies that the meaning of the text is *fixed.* It is fixed not only as against private assignments of meaning, but as against shifting understandings of words and phrases over time—that is, it is fixed as against sudden or gradual anachronistic readings of its words. The meaning of the text is fixed at a point in time. Again, the text appears to command this perspective, stating in Article VII that the text was written at a particular designated point in historical time, September 17, 1787, and stating in Article V that subsequent amendments become operative as "Part of this Constitution" at the time "when ratified." Thus, the meaning of the words is necessarily the *original* meaning—the meaning they had at the designated time(s).

And then there are all the retail rules-of-construction provisions: Article VI, Clause 1 is an instruction concerning the effect of adoption of the Constitution on debts incurred by the prior constitutional regime. The

Ninth Amendment is in terms a rule of construction concerning the effect of the enumeration of rights elsewhere in the Constitution. The Tenth Amendment is an interpretive instruction about appropriate default rules with respect to the text's allocation of government powers. The Eleventh Amendment is a specific rule of construction dictating a particular interpretation of a prior grant of judicial power in Article III, directing a departure from the text's natural linguistic meaning (and its previous judicial interpretation). The Fourteenth Amendment's citizenship sentence dictates the interpretation of that term in Article III's Diversity Jurisdiction Clause and Article IV's Privileges and Immunities Clause, and overrides a prior judicial misconstruction. The Seventeenth Amendment's third section is an interpretive instruction concerning the effect of the adoption of that Amendment itself. And the Due Process Clauses of the Fifth and Fourteenth Amendments are instructions requiring, among other things, that executive and judicial officers adhere strictly to written law and inflict no punishments or deprivations other than in accordance with written law.

Thus, if one reads the text of the Constitution carefully, one can see that, at practically every turn, the Constitution contains interpretive instructions, general and specific. It is simply not true that, as so many assume, the Constitution specifies no principles governing its own interpretation. It contains a wealth of them.

This plain fact about the text, so obvious that it is a wonder how it can be so often ignored, is important. The argument of many anti-originalists is that, because the Constitution does not contain any principles governing its own interpretation, the interpreter necessarily must supply them—and may derive them from principles extrinsic to the text, or even make them up subjectively. Exactly the reverse is true. Because the Constitution *does* supply instructions concerning its own interpretation, the absence of *other* interpretive instructions precludes exactly the move that is so frequently anti-originalists' point of departure. That departure, the Constitution makes clear, is a departure from the Constitution itself.