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JUSTICE AND THE TEXT: RETHINKING THE CONSTITUTIONAL RELATION BETWEEN PRINCIPLE AND PRUDENCE

CHRISTOPHER L. EISGRUBER†

INTRODUCTION

Americans seem to settle for a set of second-best norms. In politics and law, constitutionality, rather than wisdom or justice, often serves as the ultimate criterion of legitimacy. U.S. Supreme Court Justice Felix Frankfurter noticed this tendency and lamented it.

> Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism.[1]

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† Associate Professor, New York University School of Law. For helpful comments on earlier drafts of this Article, I thank Vicki Been, Richard Bernstein, Sam Estreicher, Jim Fleming, Sarah B. Gordon, Lewis Kornhauser, William E. Nelson, David Richards, Lawrence Sager, and Mark Tushnet; the participants in several faculty workshops at the New York University School of Law; and the students in Discourses and the Friday section of my Spring 1992 seminar on substantive due process. I am also grateful to the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law for support of this research.

1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 670 (1943) (Frankfurter, J., dissenting). Justice Frankfurter repeated his observation when he concurred in the U.S. Supreme Court's infamous ruling in Dennis v. United States, 341 U.S. 494, 555–56 (1951).

Justice Frankfurter's comments track James Bradley Thayer's ideas. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155 (1893) ("No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with

No doubt every polity must settle on some minimal description of offices and powers, lest politics decay into anarchy. The American fixation on constitutionality is problematic only because it extends to finer points. It is not clear what we gain by an interpretive practice that, for example, leads judges to discuss individual rights in terms of incorporation, due process, and the Framers' intent or to construe congressional power by imaginative definitions of "commerce among the several states." Absent a satisfying explanation of the Constitution's role, we might reasonably regret, or even doubt, its authority.

This Article attempts to answer Justice Frankfurter by justifying the supremacy of constitutional norms. In doing so, it proposes new standards for judging controversial constitutional debates, such as those about privacy, abortion, and federalism. The basic idea is this: because constitutional norms represent the political beliefs of the American people, those norms bear a comparative strategic advantage to ones we might select through more abstract processes, such as moral philosophy or economic analysis. In particular, this Article asserts that fidelity to constitutional norms is a good means for achieving long-term public support for just policies—support that is essential to the practical pursuit of justice in a democracy.

My justification for the supremacy of constitutional norms borrows from Alexander Bickel's work. Bickel analyzed American politics in terms of a tension between principle and consent and recommended prudence as a means for negotiating that tension. This Article builds on Bickel's insight, but with an important twist. Whereas Bickel treated prudence as a *restraint on* constitutional principle, this Article instead treats it as an *ingredient of* constitutional principle. The resulting theory traces constitutional authority to the substantive goodness of constitutional norms, rather than to the process that created them. For that reason, the theory's use of prudence tends to reduce the conservatism inherent in constitutional interpretation, rather than exacerbating it in the way that Bickel's argument did.

Parts I and II situate my argument within contemporary constitutional theory. Part III explains my debt to Bickel. Parts IV and V describe why constitutional interpretation is an unusually

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thoughts of mere legality, of what the constitution allows.").

good means for coming to terms with the tension between principle and expediency. Part VI addresses the interpretive consequences of the argument by analyzing federalism and substantive due process, areas that illustrate how the argument alters the significance of language and history.

I. CONSTITUTIONAL APOLOGETICS

Worrying about whether constitutionality detracts from justice may seem marginal to constitutional theory. At first glance, modern constitutional theory appears to devote little attention to Justice Frankfurter's concern, worrying instead about the notorious "counter-majoritarian difficulty"[2] or about how to apply particular clauses. The goodness of constitutionality is, one might think, taken for granted.

In fact, almost the reverse is true. I shall argue in this Part that the tension between constitutionality and justice goes unspoken, not because it is uniformly denied, but because it is widely assumed. For thirty years or so,[3] constitutional theory's principal subject has been how to cope with the self-proclaimed supremacy of unjust norms. Despite some splendid exceptions,[4] mainstream constitutional theory usually has assumed that the Constitution's interpreters must apologize for the Constitution. My analysis will show that the most vigorous debates within constitutional theory—for example, the debates about judicial activism and originalism—have been debates about what kind of apology will suffice.

A crucial observation helps to uncover the apologetic character of current constitutional thought: theories of judicial review dominate it. Sanford Levinson made this point nicely more than a decade ago in an essay reviewing Jesse Choper's *Judicial Review*

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2. The classic statement of that difficulty is Bickel's.

> [N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 19 (1962).

3. I am dating the problem to 1962. *See id.* However, one could also fix its origins differently. *See* United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Identifying a different beginning would not alter my argument.

4. *See infra* Part II.

and the National Political Process and John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review*.[5] Levinson began, "The first thing one should note about these two important books is their titles: both are books about judicial review, not analyses of the Constitution that inevitably happen to touch on the role of the courts."[6] As such, Levinson continued, the books inverted U.S. Supreme Court Chief Justice John Marshall's famous defense of judicial review. Chief Justice Marshall argued that the authority for judicial review flowed from the need to give effective institutional expression to a meaningful Constitution.[7] For much of modern constitutional theory, constitutional meaning instead flows from the principles that make judicial review authoritative.[8]

Levinson attributed this development to declining confidence in the Constitution's knowability: "it appears increasingly implausible to view judicial decisions as the simple transmission of messages garnered from the Constitution itself."[9] In related works, Levinson analyzed the indeterminacy of constitutional meaning by developing analogies to literary theory and theology.[10] His arguments suggested that obstacles to comprehending the Constitution arise from features it shares with other texts.

Skepticism about the Constitution's comprehensibility, however, also may have roots in characteristics special to the Constitution. In particular, it is not easy to explain why we treat the Constitution as authoritative. Democratic theory supplies no easy answer: even if we assume that democratic choice suffices to establish political supremacy, it does not follow that we should defer to a Constitution drafted and ratified through a discriminatory process by generations now long dead.[11] This difficulty interferes

5. Sanford Levinson, *Judicial Review and the Problem of the Comprehensible Constitution*, 59 TEX. L. REV. 395 (1981).

6. *Id.* at 395.

7. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

8. In an important new book about theories of judicial review, Sotirios Barber argues that this departure from Chief Justice Marshall's argument saddles most modern theories—conservative and liberal alike—with intractable difficulties. SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER ix–xi (1993).

9. Levinson, *supra* note 5, at 396.

10. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) [hereinafter LEVINSON, CONSTITUTIONAL FAITH]; Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123.

11. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980).

with interpretation. As Michael McConnell has observed, "Knowing *why* we read the Constitution helps us to decide *how* to read the Constitution. Form follows function."[12] Conversely, if we cannot say why constitutional interpretation is a good means for identifying norms of governance, then we will have a hard time saying what the Constitution means.

This point differs from the common claim that clashing values generate disagreements about constitutional meaning.[13] Americans obviously disagree about the purposes of government. These disagreements implicate both general questions, such as, "Should government respect the choices of the majority or the liberties of individuals?," and specific questions such as, "Should government regulate pornography?" Yet disputants on both sides of these disagreements may agree that fidelity to the Constitution serves no purpose except insofar as constitutional norms happen to coincide with those the disputants would respect anyway.[14] If so, disputants may find it difficult, if not impossible, to ascribe any purpose to, for example, the Equal Protection Clause, not because of disagreements about what equality is today or what equality was in 1867, but because of an inability to make sense of the practice of *constitutionalizing* norms, whatever those norms may be. Interpreting the Equal Protection Clause apparently requires us to do something different from simply deciding what counts as equality, but exactly how these two projects differ is extremely unclear. Even those who agree about what equality means may disagree about how to interpret the Equal Protection Clause. A consensus affirming, but not justifying, the supremacy of constitutional norms thus generates an interpretive practice that exacerbates the already indeterminate nature of political argument. Americans find themselves disagreeing, not only about what is right, but also about how the Constitution departs from what is right.

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12. Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 360 (1988).

13. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 10, at 72 ("What explains our contemporary uncertainty (some would say 'crisis') in regard to the Constitution is the assertion of fundamentally different values within the political realm."); MARK TUSHNET, RED, WHITE, AND BLUE 62 (1988) (noting that political contention generates linguistic discord).

14. Disputants might respect norms for nonconstitutional reasons even if the norms do not coincide with their own values. For example, they might endorse the norms on strategic or procedural grounds.

This problem affects the judiciary with special severity. Other branches often can exercise power without paying much attention to the Constitution. Not so the judiciary: even if the Constitution's point is unclear, the Constitution's status as supreme law makes it hard for the judiciary to ignore. What was for Chief Justice Marshall the principal justification for judicial review, namely, the judiciary's obligation to respect the Constitution, has become a serious obstacle to modern justifications for judicial review.

Modern theories of judicial review[15] are efforts to solve the problems that the Constitution's apparent purposelessness present. Such theories do two things. First, they set out an idealized conception of the judiciary's role. Second, they seek to specify the departures from that idealization that must be made as concessions to the Constitution's apparent defects. Some theories are optimistic; they depart from their ideal conception only in very limited ways. So, for example, Ely's *Democracy and Distrust* describes a judicial role consistent with democratic theory[16] and "closes off" apparently inconsistent provisions of the Constitution. Other theories—Michael Perry's is an example[17]—describe a rights-reinforcing role for the judiciary and explain away the apparent omission of some fundamental rights in the constitutional text.

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15. By "modern theories of judicial review," I mean those constitutional theories that reject Chief Justice Marshall's argument and invert it in the way Levinson described in his review of Choper and Ely. *See supra* notes 5–9 and accompanying text.

16. ELY, *supra* note 3, at 88–101.

17. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 102 (1982) (defending "noninterpretive review in human rights cases" on the ground that it is "a way of taking seriously . . . the possibility that there are right answers to political-moral problems").

It is arguable that a later book takes Perry's constitutional theory beyond the topic of judicial review. *See* MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 139 (1988) (defending "nonoriginalist" constitutional interpretation as a means for pursuing the "fundamental aspirations of the [American] political tradition."). For example, Perry articulates a distinct purpose for constitutionalizing political norms. *Id.* at 142 (describing the constitutional amendment as "a principal instrument with which the present can participate in [a] dialogic and critical encounter with . . . tradition"). Nevertheless, he refuses to consider why the Constitution is binding, *id.* at 286 n.49, admits that some constitutional aspirations may not be "worthwhile," *id.* at 134–35, and continues to focus on the role of judges. *Id.* at 279 n.1 (describing his theory as a "vision of constitutional *adjudication*") (emphasis added). Because Perry makes a case for judicial review that assumes the authority of imperfect constitutional norms, this later book seems to be an unusually sophisticated apology, rather than a justification, for the Constitution.

Some theories are less optimistic. Indeed, one school of constitutional thought operates pursuant to what we might call a "no pain, no claim" principle: only those constitutional theorists who ascribe painful consequences to constitutional fidelity can claim to offer genuine theories of constitutional meaning. The leading exemplar of this genre is Henry Monaghan's article, *Our Perfect Constitution*.[18] Monaghan's title is sarcastic. His point is to criticize commentators who maintain that "properly construed, the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens."[19] Monaghan concludes that "efforts . . . to overcome the discrepancy between the ideology fairly ascribable to the constitution and that dominant in our nearly twenty-first century, postindustrial liberal democracy . . . are seriously flawed."[20] Herbert Wechsler's famous article, *Neutral Principles*, is an important precursor to the "no pain, no claim" school.[21] Judge Robert Bork[22] and U.S. Supreme Court Justice Antonin Scalia[23] are prominent contemporary adherents.[24]

As a critique of other theories of judicial review, Monaghan's article is brilliant. His article—and his title—lay bare a curious structural feature of the debate about judicial review. Any theory of judicial review that honors constitutional authority without explaining it invites arbitrary, and hence undefinable, departures from whatever ideals the theory recognizes. Insofar as the Constitution's purpose remains mysterious, fidelity to the Constitution may require departures from whatever prescriptions one de-

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18. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

19. *Id.* at 358 (emphasis omitted).

20. *Id.* at 396.

21. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 13–15 (1959) (recognizing "neutrality" as a cardinal virtue of constitutional interpretation and praising Justice Curtis for his principled opposition to the Emancipation Proclamation).

22. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 6 (1990) (quoting Elizabeth Shepley Sergeant, *Justice Touched With Fire in* MR. JUSTICE HOLMES 206–07 (Felix Frankfurter ed., 1931)) (concurring with Justice Holmes that judges should not "do justice" because their job is "to apply the law").

23. *See* Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789, 1794–95 (1991) (arguing that within Justice Scalia's jurisprudence, "it literally becomes necessary to reach some results the judge knows are unjust").

24. For a critique of Judge Bork and Justice Scalia, see Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37 (1993).

rives from moral philosophy, democratic theory, or another source. At the same time, the inability to describe the Constitution's purpose interferes with efforts to describe what counts as fidelity to it. How can we make sense of an imperfect Constitution's supremacy?[25] Absent a justification for constitutional interpretation's role as a method for defining norms of governance, there is no Archimedean point between "enough" fidelity to text, history, and precedent on the one hand, and "enough" fidelity to political theory on the other.

The upshot of this insight is that any modern theory of judicial review—including Monaghan's own[26]—is vulnerable to damaging negative arguments of the sort Monaghan's article itself deploys. By tacitly conceding the tension between justice and constitutionality that so worried Justice Frankfurter, modern theories of judicial review doom themselves to failure. Long-standing controversies about values may or may not have right answers,[27] but the state of mainstream constitutional theory is considerably worse. Every modern theory of judicial review fails to make sense of constitutional practice, either because the theory fails to reconcile that practice with the objectives of good government or because the theory fails to mirror the gap between the Constitution and justice. Indeed, absent an answer to Justice Frankfurter, every theory of judicial review is subject to damaging criticism on both grounds.

Constitutional debate accordingly declines into a spiral of negative arguments. The preferred way to defend any particular position is by process of elimination: this theory must be correct

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25. *See* SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984) (focusing on this question). For discussion of Barber's argument, see *infra* Section II(D).

26. Monaghan implicitly concedes Justice Frankfurter's complaint by declining to justify the Constitution's authority. Monaghan says that the Constitution's supremacy needs no defense because it is "an incontestable first principle for theorizing about American constitutional law." Monaghan, *supra* note 18, at 383. Perhaps that assertion is true, but, as has already been observed, knowing *why* the Constitution is binding is useful (and perhaps essential) to knowing *what* it means, even if we have no doubts about *whether* the Constitution is binding. Monaghan nevertheless propounds an originalist view sympathetic to Ely. His argument escapes his own critique only by making assumptions at crucial junctures. *See, e.g., id.* at 375 (assuming that originalism was the best approach to interpretation of the Constitution around the turn of the century after the Founding); *id.* at 376 (assuming the authority of generations to bind their successors).

27. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 119–45 (1985) (optimistic); Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (skeptical).

because all others possess fatal flaws.[28] Theorizing reduces to "coherence games"—increasingly clever efforts to cover or recover the tension between constitutionality and justice—a tension that dooms every theory to internal contradiction.[29] Within the field that modern theories of judicial review define, there are no right answers and indeed may be only demonstrably wrong answers.

II. CONSTITUTIONAL JUSTIFICATION

Constitutional theory may stand on the verge of escaping its spiral of apologies. A growing number of constitutional theorists have become interested in justifying what Justice Frankfurter questioned: the importance of constitutionality as a norm for judging American politics.[30] This Part describes the justifications for constitutional supremacy suggested by four theorists: Bruce Ackerman, Ronald Dworkin, Lawrence Sager, and Sotirios Barber. These justifications do not exhaust the field, and better contenders may perhaps exist.[31] This Part's aim is merely to suggest how justifications should be judged and why additional justifications might be desirable.

A. *Ackerman and Dualist Democracy*

The most conventional justification for constitutional authority deems the Constitution binding because it is the product of dem-

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28. *Compare* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (arguing that process-based constitutional theories are wrong) *with* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991) (arguing that political process theories must be right, because alternative theories which have been put forth are weak).

29. Some years ago, Paul Brest noticed a similar symptom but diagnosed it as a different disease. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1105–09 (1981) (describing a contradiction between commitment to democracy and skepticism about the possibility that democratic institutions will act in a principled fashion).

30. For example, two noted scholars have recently called attention to the need to account for—rather than paper over—the Constitution's role. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6 (1991) (submitting a theory "better designed to capture the distinctive spirit of the American Constitution"); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 893–94 (1990) (commenting on the need to develop a satisfactory explanation for an "incorrigible Constitution" that "will not fit the discipline of the accounts commonly offered on its behalf").

31. For an especially provocative and original justification of the Constitution, published after this Article was largely completed, see WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION (1993).

ocratic decisionmaking. As has already been mentioned, this view faces a severe problem: it is not easy to say, from the standpoint of democratic theory, why a long-dead supermajority is superior to a contemporary legislative majority.[32] Bruce Ackerman has offered an imaginative solution to this problem. Ackerman distinguishes between two tiers of lawmaking: "higher-track" lawmaking, which occurs during periods of political excitement when the people govern themselves, and "lower-track" lawmaking, in which the people allow political institutions (including, for example, a President, Congress, and Supreme Court) to govern on their behalf. This distinction permits Ackerman to explain why democratic theory authorizes the Constitution to trump congressional majorities. The Constitution is the product of "higher-track" lawmaking, and so represents the people's decisions. Statutes do not—they are the product of mere "lower-track" lawmaking, carried out by agents.[33]

The appeal of Ackerman's solution depends upon the depth of one's commitment to democratic norms. As Ackerman himself points out, his strategy renders the people's choices binding without regard to their content. If the people, during a moment of heightened political activity, elect to constitutionalize the practice of religious persecution, then Ackerman would recognize that norm as constitutionally binding in the face of substantial legislative majorities.[34] There are, in other words, no fundamental rights or values that constrain the scope of higher-track lawmaking. If that judgment seems wrong as a matter of political theory,[35] we will have to look elsewhere to justify the Constitution's authority.

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32. Sager, *supra* note 30, at 900–09 (developing this argument at length).

33. ACKERMAN, *supra* note 30, at 6–7.

34. *Id.* at 14–15.

35. Several recent works discuss the possibility that the Constitution imposes substantive restrictions on the scope of amendments. For the most extensive discussion, see HARRIS, *supra* note 31, at 169–208; *see also* STEPHEN MACEDO, LIBERAL VIRTUES 182–83 (1990) (suggesting that amendments cannot override fundamental constitutional principles); JOHN RAWLS, POLITICAL LIBERALISM 238–39 (1993) (same); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754–57 (1980) (same); Jeffrey Rosen, *Was the Flag-Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1084–89 (1991) (discussing limitations that natural rights and the Ninth Amendment impose on the amendment process).

B. *Dworkin and Integrity*

Ronald Dworkin has explained the divergence between legal norms and moral standards by identifying a new value, which he calls "integrity." According to Dworkin, integrity—principled consistency over time—is a political virtue that stands beside justice and fairness.[36] The claims of integrity entitle legal norms, including constitutional norms,[37] to authority because integrity justifies departures from the demands of distributive justice, democratic theory, or other aspects of utopian political theory. Integrity makes fidelity to the past valuable for its own sake.[38]

Dworkin's argument makes a bold demand. It calls on us to recognize a new political value that supplements more traditional ones. Of course, integrity is not an entirely new virtue. We recognize principled consistency as a desirable feature of individual conduct.[39] However, we might view that consistency as valuable largely for instrumental reasons. Requiring people to honor the same principle in different circumstances is a way to ensure that they do not switch from one principle to another for reasons of personal convenience. Thus, integrity might be valuable because it serves ends loftier than self-interest, not because it is itself such an end. If so, fidelity to lofty ends occasionally will require a sharp break with a person's past, rather than consistency with it. Dworkin instead proposes that integrity is valuable for its own sake.[40] If we do not accept Dworkin's judgment on that score, integrity becomes nothing more than a name for the tension that Justice Frankfurter lamented.

C. *Sager and the Right Mix*

Lawrence Sager has proposed that the Constitution establishes a pragmatic mix between justice and participation.[41] Sager offers

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36. RONALD DWORKIN, LAW'S EMPIRE 166 (1986).

37. Unlike Ackerman's theory, Dworkin's theory does not focus on characteristics special to the Constitution. Dworkin develops the idea of integrity as part of a theory about law in general, but he includes interpretation of the Constitution within the scope of his theory. *Id.* at 355–99.

38. *Id.* at 167, 255.

39. *Id.* at 166.

40. *Id.* at 167, 255.

41. Sager, *supra* note 30, at 960 ("[A] pragmatic balance is struck between the powerful virtues of popular participation in the framing of the Constitution and the need to find good answers to the judgment-driven questions of fundamental political justice.").

two observations about the Constitution's role as a source for norms of governance. First, Americans treat the Constitution as about justice, rather than about their personal interests.[42] Accordingly, the Constitution reflects considered judgments about what is good. Sager identifies some reasons for thinking those judgments are, if not perfectly accurate, at least respectably so.[43] Second, constitutional drafting offers better opportunities for political participation than do other, perhaps more efficient, processes for selecting political norms. Political participation is valuable both for its own sake and because it enhances compliance with government norms.[44] These two observations permit Sager to justify constitutional authority by reference to a pragmatic mix. Constitutional norms may not be the best norms of governance, and constitutional government may not maximize popular participation, but, Sager suggests, the Constitution maximizes Americans' chances of achieving the best mix of these competing goals.

Sager's theory openly proclaims the judgments it asks us to share.[45] Whether the Constitution's mix of justice and participation satisfies us depends on how far we think the Constitution diverges from the best set of norms, how greatly we believe it favors political participation, and how highly we value political participation. Sager invites us to agree that the Constitution's participatory benefits compensate for the imperfections in the norms it generates. Unless we make that judgment, the tension between constitutionality and justice will remain.

D. *Barber and Simple Justice*

Sotirios Barber has expounded a different approach to justifying the Constitution. He has directly contested the gap between

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42. *See id.* at 934–36 (distinguishing "judgment-driven" and "preference-driven" grounds of decisionmaking).

43. *Id.* at 951–53.

44. Sager has written:

> [A] well-formed popular political process has the important symbolic virtue of affirming the polis's equal regard for its citizens, and it contributes in an important way to the formation and sustenance of a sense of community and to the engagement of citizens in the political affairs of their community.

Id. at 941–42.

45. *See, e.g., id.* at 944 (noting that explanations of constitutional authority require "the assistance of a pragmatic assessment of institutional competence"); *id.* at 947 (recognizing tension between "the virtues of popular political choice, on the one hand, and the virtue of making these controversial choices correctly, on the other").

constitutionality and justice that Justice Frankfurter described. According to Barber, constitutional supremacy is defensible only if the Constitution's norms conform to our present conception of the best norms by which we might govern ourselves.[46] His theory renders constitutional interpretation a continuing reassessment of constitutional authority.[47] Barber transcends the negative spiral described in the preceding Part by denying the Constitution's authority in the event that it departs from the norms Americans would choose for themselves today.

Barber's argument is the counterpoint to Monaghan's. It is a "no gain, no claim" theory: if the Constitution does not help us to secure the political goals we would pursue in the Constitution's absence, then the Constitution's claim to authority fails. This theory does not explain, however, how constitutional norms might coincide with justice except by virtue of an astonishing fortuity or why we should spend time reconciling constitutional norms to justice rather than simply reasoning about justice without recourse to the Constitution. For that reason, Barber's argument seems incomplete. It is most useful as a reminder of the standards against which constitutional justifications must be judged, not as a possible justification.

E. *Testing Justifications*

Evaluating justifications for constitutional authority requires standards different from those often applied to theories of judicial review. By resolving, rather than conceding, the tension between constitutionality and justice, constitutional justifications avoid the deep contradiction that ensures the incoherence of modern theories of judicial review. The "coherence games" that dominate competition between modern theories of judicial review are thus not good ways to judge constitutional justifications. Constitutional justifications must be compared to external criteria—in particular, as Barber reminds us, to our ideas about what the best American government would look like. The validity of a constitutional justifi-

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46. BARBER, *supra* note 25, at 57 (contending that constitutional authority presupposes a belief that "[t]he ways of the Constitution constitute our best current conception of the good society—our best understanding for now").

47. *Id.* at 60 ("[B]ecause the Constitution's ways must constitute our best conception of the good society in order for us to make sense of the Constitution as supreme law, a practice of continuing reaffirmation is essential to a constitutional state of affairs.").

cation is ultimately a matter of judgment, certainly not demonstrable and perhaps ineffable. Theoretical subtlety can clarify what judgments need to be made, but it cannot substitute for them.[48]

When judging various justifications, we should not presume that they are inconsistent with one another. As Sager's theory illustrates, constitutional authority may flow from a mixture of purposes not reducible to a single underlying ideal. It seems likely that any satisfactory justification of the Constitution will treat it as such a pragmatic mixture. Values related to participation, integrity, and democracy all may factor into that mix.

My aim, however, is not to judge the merits of the justifications set out in this Part. Those efforts simply provide the context for the argument set out here. My argument identifies an additional constitutional function that can contribute to the mix of functions justifying the Constitution's role. This function is to foster the prudent pursuit of justice. My claim is that the Constitution serves this purpose and that the Constitution's connection to prudence should influence our interpretation of it.

III. BICKEL'S INSIGHT AND HIS MISTAKE

A. *Bickel's Insight*

My argument is an adaptation, with an important twist, of Alexander Bickel's famous argument about prudence and constitutional theory. Bickel maintained that American government (indeed, any relatively democratic government committed to fundamental values) involved a "Lincolnian tension"[49] between principle and expediency.

> No society . . . can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden. But it is not true in our society that we are generally governed wholly by principle in some matters and indulge a rule of expediency exclusively in others. There is no such neat dividing line . . . . Most often, however, and as often as not in matters of the widest and deepest concern, such

48. *See generally* RONALD BEINER, POLITICAL JUDGMENT (1983) (comparing various theories of judgment); STANLEY ROSEN, THE LIMITS OF ANALYSIS 149–56 (1980) (discussing the relationship between intuition and analysis).

49. BICKEL, *supra* note 2, at 67–69.

> as the racial problem, both requirements exist most imperatively side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the immutable governing rule, is to affect the tendency of policies of expediency.[50]

Bickel's insight was that a democratic polity can pursue principle effectively only if it pursues it prudently. Statecraft will not vindicate a principle unless it manages eventually to secure long-term consent to that principle.

The point is not simply that questions about justice are hard, so that no institution will be able to impose its own view of what counts as principle. That observation alone is not a cause for regret if we believe that politics should be truly principled, rather than merely faithful to one institution's version of principle. Bickel recognized a more worrisome problem: because it is difficult to know whether any claim about justice is right or wrong, it is tempting to accept plausible arguments that merely rationalize our wants and experience without subjecting them to critical scrutiny. Even thoughtful people will occasionally suspend their reasoning unself-consciously and thereby permit interests and passions to sway their judgment. Public opinion is thus obdurate. Good arguments will not necessarily prevail over bad ones in a free exchange among people with a sincere, but embattled, commitment to justice.

Aristotle made the point as follows:

> [A]ll men lay hold on justice of some sort, but they only advance to a certain point, and do not express the principle of aboslute justice in its entirety. For instance, it is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal; but these partisans strip away the qualification of the persons concerned, and judge badly. And the cause of this is that they are themselves concerned in the decision, and perhaps most men are bad judges when their own interests are in question. Hence . . . inasmuch as both parties put forward a plea that is just up to a certain point, they think that what they say is absolutely just.[51]

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50. *Id.* at 64.
51. ARISTOTLE, POLITICS 211–13 (H. Rackham trans., 1977).

So, for example, when legal theorists hotly contest the appropriate scope of property rights, we would expect to see these disagreements reflected in public opinion. We also should expect public opinion to reflect people's attachment to what they own.[52] People reasonably believe that some of what they have is earned and recognize that the line separating earned from unearned property is hard to fix. They accordingly tend to draw it in ways that exaggerate their rights. Thus, to take a specific instance, even though a conservative nineteenth-century natural law theorist like Joseph Story could concede that inheritance is purely a matter of positive law,[53] Americans today righteously resist the imposition of high estate taxes.[54]

A principled policymaker must accommodate Americans' vigorous attachment to property rights when designing strategies to implement principles.[55] Bickel recognized this connection between principle and prudence. He saw that although constitutional decisionmaking must appeal to the people's sense of justice, it must also take into account that public opinion is obdurate in the way just described.

B. *Bickel's Mistake*

Bickel applied his insight about the obduracy of public opinion by developing a prudential theory of U.S. Supreme Court jurisdiction. He advised the Court to manipulate its docket so as to avoid confronting issues of principle at inconvenient moments or in unfavorable contexts.[56] Bickel believed that the Justices

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52. As Blackstone warned two centuries ago:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property . . . . Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.

2 WILLIAM BLACKSTONE, COMMENTARIES *2.

53. Joseph Story, *Natural Law*, *in* 9 ENCYCLOPEDIA AMERICANA 150, 156 (Francis Lieber ed., 1854).

54. *See, e.g.*, JENNIFER L. HOCHSCHILD, WHAT'S FAIR?: AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE (1981).

55. *Cf.* William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988) (describing the need for normative theories about takings to consider public attitudes toward property and regulation).

56. *See* BICKEL, *supra* note 2, at 111–98.

should make political judgments about what principled responsibilities the American people were ready to bear.

Bickel's jurisdictional proposal has two serious flaws, both of which Gerald Gunther pressed in response to him. First, judicial responsibility demands that judges enforce constitutional principles without regard to the possibility of resistance.[57] Second, judges may be poorly positioned to measure the depth of the opposition that Bickel asks them to consider.[58]

Gunther seems right on both counts. Nevertheless, these defects may be only symptoms of a deeper problem in Bickel's argument. Bickel failed to respect his mentor Justice Frankfurter's insight in *Barnette* that the Constitution's norms are already second-best by comparison to those that we might demand in a utopian regime. Politics conducted according to constitutional norms does not render government principle-ridden, because constitutional norms soften moral principle with democratic consent. Accordingly, the Lincolnian tension Bickel discerned does not require the compromises his avoidance techniques represent. There is compromise enough in the constitutional rules themselves.

If reconceived as a justification for constitutional principle, rather than as a limitation, Bickel's insight—that a democratic polity can pursue principle effectively only if it pursues it prudently—helps to answer Justice Frankfurter's concern. Bickel's theory is a reminder that, as long as sovereignty remains with the people, no moral or political principle will be secure unless it ultimately is able to secure long-term popular consent.[59] In the next two Parts, I consider why steadfast adherence to constitutional principle

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57. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10, 19 (1964).

58. *Id.* at 8.

59. Walter Berns also has used this concern about a "principle-ridden" society to answer Justice Frankfurter, but in a different way. Berns, following Hobbes, suggests that politics should divert people's attention from justice because disputes about justice inflame the passions and generate violent, destructive conflicts. It is accordingly better for Americans to pursue material satisfaction. WALTER BERNS, TAKING THE CONSTITUTION SERIOUSLY 171–80 (1987); Walter Berns, *Taking Rights Frivolously, in* LIBERALISM RECONSIDERED 51, 59–64 (Douglas MacLean & Claudia Mills eds., 1983). This theory permits Berns to demur to Justice Frankfurter's charge: "Frankfurter was right to think that a preoccupation with constitutionality tends to cause the people to identify it with wisdom—'to regard a law as all right if it is constitutional'—but he was wrong to complain about it." BERNS, *supra*, at 190. The theory proposed in this Article, by contrast, treats the Constitution not as a diversion from justice but as a useful guide for people committed to pursuing it.

might be the best means of vindicating moral and political principles in light of the need for consent from imperfect people.

IV. THE CONSTITUTION'S CORRESPONDENCE WITH PUBLIC OPINION

In this Part, I argue that constitutional norms represent American political opinion. In particular, I contend that constitutional norms are a good guide to convictions about justice that the American people hold. If that contention is correct, and if the American people abide by their own values to some extent, institutions enforcing constitutional principles may benefit from long-term public support. That conclusion suggests that constitutional interpretation is a prudent way to select norms of governance; institutions enforcing abstract moral principles instead of constitutional ones might find that public opinion fails to provide them with needed support.

Of course, the Constitution eases the Lincolnian tension in other ways, too. An institution enforcing constitutional norms may seek compliance from the people, not simply by reference to the goodness of the norms, but also on the ground that the people themselves approved the norm. As was indicated earlier, the Constitution's authority probably depends on a mixture of functions.[60] In this Part, however, I focus on the correspondence between constitutional norms and public values.

There is a straightforward juristic argument for this correspondence. The Constitution purports to be the work of "the People." It makes this claim in the present tense. If indeed there is such a thing as "the People of the United States," we might expect to learn something about this collectivity by careful inspection of an important work it authored. The Constitution thus appears to proclaim itself to be a guide to American beliefs.

That, however, only takes us back to square one. We can no more accept on faith the Constitution's word about its own authorship than we can the Constitution's word about its own supremacy.[61] We need an argument *about* the Constitution, rather than

60. *See supra* Section II(E).

61. Sotirios Barber has explored at length the conditions under which the Supremacy Clause can be interpreted as consistent with the purpose of the Constitution. *See* BARBER, *supra* note 25, at 39–62. This Article might be thought of as an attempt to supplement Barber's argument by asking how one might take seriously both the Supremacy

one drawn *from* the Constitution, to sustain belief in a connection between the Constitution and publicly held values. To analyze this problem, I will employ an artificial distinction between the moment when norms become incorporated into the Constitution and later moments when norms have long been a part of the Constitution.

A. *Incorporation*

Perhaps it is obvious that constitutional norms enjoy widespread public support when they become part of the Constitution. The supermajority specified by Article V's ratification procedure, for example, seems to guarantee a substantial correspondence between new amendments and public sentiment. Nevertheless, I wish to expand my claims beyond the formal constitutional document and to claim something stronger than simple support for constitutional norms. I accordingly offer three observations.

First, the Constitution is about justice. Americans regard it in that light.[62] As a result, Americans define their Constitution[63] in ways that are, as Sager has observed, "judgment-driven" rather than "preference-driven." They refer to an external standard, like justice, for judging political institutions, rather than to whatever people happen to want.[64] Recently incorporated constitutional norms are not simply norms that enjoy widespread public support; they are norms widely understood to describe what is good and just.

Second, constitutional language may imperfectly articulate a judgment. If the Constitution is indeed about justice, it has an external referent that is exceedingly difficult to describe. Good

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Clause and the Preamble's attribution of authorship.

62. *See, e.g.*, LEVINSON, CONSTITUTIONAL FAITH, *supra* note 10, at 10–16 (describing American veneration of the Constitution).

63. A terminological observation may be helpful. Article V amendments are the most familiar means by which Americans change what counts as the Constitution. There is, however, no consensus on whether the Constitution consists only of the constitutional document. *See id.* at 30–37 (distinguishing between the "protestant" and "catholic" definitions of the Constitution); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 81–85, 126–31 (1986) (same). It is thus possible that the American people could change the Constitution without changing the words in the document itself. The expansive phrase "define their Constitution" comprehends both formal amendment processes and any other political practices that change what the Constitution is, including the "unwritten" or "informal" constitution. *See infra* note 65.

64. Sager, *supra* note 30, at 934–35.

faith attempts to represent convictions about justice may go awry. People talking about justice will often feel they have described something important that they understand only imperfectly and can articulate only dimly. An attitude of this sort often may be implicit in the way Americans approach the problem of constitutional definition (including, for example, arguments about whether to adopt a particular amendment). Of course, that need not be the case. One might believe that some or all judgment-driven constitutional provisions are best understood as rules that should be clear, even if they govern in service of a more obscure standard.

Third, these observations, as well as the correspondence between newly incorporated norms and public opinion, apply with as much—and perhaps greater—force to the informal, or "unwritten," constitution.[65] No processes govern definition of the informal constitution. Article V's procedural connection between constitutional meaning and public opinion is lost, but it gives way to a more direct connection. The reason for deeming some tradition, speech, event, or idea a part of the informal constitution is a claimed connection to public values. A substantive definition of this sort binds the Constitution to public values more surely than does Article V's procedural proxy. Procedures may legitimate manipulative behavior by well-positioned factions; more substantive standards do not.

B. *Endurance*

Incorporation is the easier part of the argument. I hope that some readers will readily admit a connection between freshly incorporated norms and public opinion at the moment of incorporation. Even sympathetic readers, however, might doubt whether the connection endures for a hundred years or more beyond that mo-

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65. "Unwritten constitution" is the common term. *See* Christopher L. Eisgruber, *Property and the Unwritten Constitution*, 66 N.Y.U. L. REV. 1233, 1233–34 & n.1 (1990) (reviewing JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990)) (discussing the concept of the unwritten constitution and citing sources). Often, however, the "unwritten constitution" will manifest itself in written sources, such as Abraham Lincoln's *Gettysburg Address* or Martin Luther King, Jr.'s *I Have a Dream* speech. LEVINSON, CONSTITUTIONAL FAITH, *supra* note 10, at 35. What seems distinctive about such documents as sources of constitutional meaning is not the fact that they are written or unwritten, but the fact that they have not been subject to any formal ratification procedure. I accordingly think that the term "informal constitution" is more illuminating.

ment. This Section takes up that problem. I open with two observations, and then offer an interpretation of their significance.

The first observation is that there seems to be an American type or character. Although local pockets of insular mores and variations in the degree of assimilation exist, Americans across the country share a remarkable range of characteristics.[66] Despite deep changes to the regime and its people, one can still recognize the people whom Tocqueville described as American.

The second observation is that the existence of this American character may have constitutional origins. A venerable tradition in political philosophy maintains that constitutions shape the character of the people they govern.[67] A rich scholarly corpus has claimed such a connection between Americans and their Constitution.[68]

Together, these two observations offer a possible basis for believing that constitutional norms somehow are transmitted to the American people in a way that sustains the bond between constitutional norms and public values. If indeed the Constitution defines the character of the people who live under it, that is a reason for believing that constitutional norms will retain their affiliation with public values as the moment of incorporation fades.

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66. Martin Diamond, *Ethics and Politics: The American Way*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 75, 99 (Robert H. Horwitz ed., 3d ed. 1986) ("We form a distinctive being, the American, as recognizably distinctive a human product as that of perhaps any regime in human history. Something here turns out humanness in a peculiar American shape.").

Obviously, I do not wish to deny that Americans differ from one another. Americans may share a number of characteristics—for example, rationalism, materialism, righteousness, individualism, and contentiousness—while differing both in the degree to which they exhibit these characteristics and along other dimensions. Moreover, some American subgroups may have traits inconsistent with any particular specification of the "national type." My claim does not contest these important differences but only suggests that the commonalities are sufficiently substantial to warrant notice. For a mundane but revealing illustration of the consequences of these commonalities, see Stuart Elliot, *Advertising: A Relatively Gentle American Campaign for Pizza Is Still Too Hard-Sell for British Tastes*, N.Y. TIMES, Aug. 10, 1993 at D19 (discussing differences between American and British responses to ad campaigns).

67. Diamond, *supra* note 66, at 80 (summarizing Aristotle); *see also* 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 307–15 (Thomas Nugent trans., 1949) (noting how laws affect the manners, customs, and character of a free people).

68. *See, e.g.*, HARRIS, *supra* note 31, at 1–2, 73–83; Diamond, *supra* note 66, at 99–108; John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 333 (Richard Beeman et al. eds., 1987); Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 463 (1988).

Nevertheless, stating the two observations together does not tell us whether there is any connection between them. Identifying a mechanism that might explain how constitutions affect character is a daunting task. I do not pretend to have a satisfactory solution to this problem; in the interest of rendering the existence of such a mechanism plausible, I sketch a possible theory.

My proposal is that Americans adopt constitutional norms through a process that has four stages: institutional contact, self-consciousness, reflection, and articulation. The basic idea of the proposal is that people develop moral notions to rationalize their political experience. First, the vast majority of Americans have contacts with certain constitutional institutions. Second, people are self-conscious about the political aspect of these contacts. Third, people reflect about these political contacts. The existence of this third stage depends on a perhaps controversial claim about human nature, namely, that people thirst for ideas to make sense of aspects of their lives that seem imbued with moral meaning. They believe, in particular, that political relationships have moral significance, and they form moral notions to justify them. Fourth, people seek to articulate their reflections. Some people may lack the time or interest to give voice to their thoughts about politics. For this group (and it may be large), their reflections will remain tacit and perhaps inchoate. Nevertheless, the same desire for understanding that leads to reflection will incline people, in varying degrees, to search for expressions that fit the ideas they form. The Constitution, and the accompanying practices of constitutional definition and constitutional interpretation, provide an important means for doing so.[69]

I will examine this "phenomenology of citizenship" through five brief examples: voting, title; borders, religious ceremony, and debate. Before doing so, however, we should take note of a complication to which I adverted earlier. The distinction between incorporation and endurance is artificial. In particular, the Article V amendment procedure may be misleading insofar as it leads us to

69. Robert Nagel has also described a correspondence between tacit public opinion and constitutional meaning, but Nagel's model treats interpretation as a threat, rather than an adjunct, to constitutional meaning. *See* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 12–26 (1989) (contrasting interpretive and cultural meaning). I have previously critiqued Nagel's argument at length. *See* Christopher L. Eisgruber, *Disagreeable People*, 43 STAN. L. REV. 275 (1990) (reviewing Nagel's book).

believe that a precise moment of incorporation exists. The idea of articulation and the example of the informal constitution suggest how it is misleading. Norms may gradually enter or leave the Constitution as the arguments for including particular articulations grow stronger or weaker. That observation may be true even of norms that eventually receive (perhaps imperfect) articulation within a formally ratified provision. The concept of articulation thus bridges incorporation and endurance. Accordingly, the concerns of this Section and the preceding one will interact.

My first example is voting. Most Americans are aware of congressional, presidential, and local elections as processes in which they might participate, even if they do not in fact do so. That awareness is an institutional contact. The second stage, self-consciousness, is simple. People will be self-conscious about voting in the sense that I require if they regard it as part of their relationship with their government. The third stage, reflection, involves a more controversial claim. I propose that, in an effort to justify the practice of voting, people will tend to form a certain set of moral ideas about voting. For example, a broad franchise encourages an inference about the equality of persons; people view an equal voice in an election as a sign of equal worth.[70] This inference in favor of equality is especially compelling today, when reform has expanded the franchise, but it was also powerful when more discriminatory voting rules applied. Excluded groups could formulate a claim to inclusion by comparing their own competence to that of the most contemptible white male elector. Voting also may lead people to draw an inference favorable to rationalism. Because voters do not get additional power on the basis of education, respect for democratic voting practices seems to presuppose that each individual's reason is good enough to tackle unaided the problems of government.[71] The fourth stage, articulation, gives expression to these reflections. People may use constitutional concepts to voice the reflections that self-conscious contact with constitutional institutions prompts. Constitutional language, by a kind of "trickle down" process, may influence the range of concepts used even by those who do not seek out constitutional argument. People may respond to concepts like "one person, one vote" or

70. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 430–33 (J.P. Mayer ed. & George Lawrence trans., 1969).

71. *Id.*

"equal protection" even if they do not know the constitutional significance the words possess. The constitutional articulations of voting rights—including those incorporated in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments—in turn have practical implications that reinforce the institutional contacts.

My second example is title to property. People have contact with the institution of private property through ownership and exchange. They are self-conscious about the political character of title insofar as they recognize a role for legal forms in contract and inheritance and view their property as secure from government confiscation. Self-consciousness about property encourages people to reflect about property and, in particular, to form moral notions that justify it. For example, because private property exists in unequal distributions, people formulate ideas to distinguish among justified and unjustified inequalities.[72] Because private property establishes spheres of individual control, it induces people to value privacy. Finally, constitutional concepts, including ideas such as "compensation for a taking," "due process," and "freedom of contract," provide means for articulating these reflections.

My third example is contact with borders. No doubt most Americans have little sense of the complex jurisprudence governing the relationship among the states or between states and the federal government. Nevertheless, I suspect that most New Yorkers have some sense that New York cannot stop them from travelling to New Jersey; that their New York driver's licenses enable them to drive in New Jersey; and that New Jersey traffic regulations apply to them when they drive on New Jersey roads. They also are likely to have some sense that the United States has much greater control over the nation's borders than New York or New Jersey have over their own state borders. People will be self-conscious about the political character of these contacts. Indeed, borders are self-evidently political. The contacts accordingly prompt reflection. People conceive of state governments in ways that make sense of the features of state borders. The inability to exclude people and the need to respect the privileges of newcomers limit the purposes state government can serve. Once again, constitutional concepts, including both Commerce Clause jurispru-

72. NEDELSKY, *supra* note 65, at 205–07 (discussing connections between property and inequality).

dence and the Fourteenth Amendment's Citizenship Clause, provide a means to articulate these reflections.

My fourth example is official religious ceremony. Most Americans are no doubt unaware of the details of doctrinal debate about the Establishment and Free Exercise Clauses. Nevertheless, institutional contacts expose nearly every American to the norms these clauses represent. We may reasonably assume that few, if any, Americans regard the President of the United States as the *ex officio* leader of a "Church of the United States" or any other religious body. On the other hand, most Americans probably are not surprised that Christmas is a government holiday or that there is a White House Christmas tree—which is not to say they approve of these policies. Many Americans are aware that school prayer is controversial.[73] All of these encounters with government are easily recognizable as political. Because people are self-conscious about them, such encounters prompt reflections designed to make sense of the government's relation to religion. The secular character of the presidency invites a distinction between political and theological authority. The official Christmas holiday suggests the legitimacy of religious accommodation, and the controversy about school prayer encourages people to consider the limits of permissible accommodation. The Religion Clauses and the constitutional corpus of ideas about religious toleration provide means to articulate these reflections.

My final example is public debate, in particular, the debate that officials carry on amongst themselves and with dissenters. People hear speeches in which the President and Congress take issue with one another. That is an institutional contact with government. Although much debate about politics may impress people as the work of private individuals or enterprises, that is not so when the advocate holds public office. People will be self-conscious about the political character of the event; they will recognize the speech as a contact with government. As such, people reflect on its significance. There is a great difference between a government that answers its critics and one that represses them. Justifying that difference inclines people to value free and open

73. On the more specific question of how much people know about what the U.S. Supreme Court has done with respect to school prayer or other issues, see generally Walter F. Murphy & Joseph Tannenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985 (1990) (describing empirical research).

discussion. Constitutional concepts, ranging from the Speech or Debate Clause to the First Amendment to the "clear and present danger" test, provide means to articulate such reflections.

These five examples and the phenomenology they illustrate do not exhaust the ways in which constitutional norms pass from one generation to the next. To begin with, the examples grossly oversimplify. People's contacts with government institutions involve differing details. Do they know somebody who has run for office? Have they or their friends ever had property seized? Such experiences refine impressions of voting and title. Moreover, the inferences drawn from different institutions interact with one another in complicated ways: voting may encourage people to value equality, and property may lead people to value inequality.

Other mechanisms also contribute. Cass Sunstein and Akhil Amar have described how various constitutional institutions transmit norms.[74] I and others have written that official interpretations of the Constitution may affect public opinion.[75] Schools, literature, and journalism also play a role. Some norms reflected in the Constitution may owe their social vitality to institutions, like religious custom, that are relatively independent of the government. Other norms, such as those represented by *Miranda* warnings, may enter popular consciousness through the entertainment media.[76]

These mechanisms simply reinforce the point of the process I have described. The crucial claim is this: self-conscious contact with government institutions that have been formed pursuant to constitutional norms shapes the thought of Americans in ways that sustain the connection between those norms and the values Americans hold. The existence of such a connection, in other words, does not depend on a fanciful claim that most Americans regularly

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74. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1208–10 (1991) (observing that the Bill of Rights may educate the people); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1562, 1572–73 (1988) (describing how political participation educates the people and inculcates the characteristics of virtue, empathy, and community feeling).

75. *See* RALPH LERNER, THE THINKING REVOLUTIONARY 91–136 (1987) (discussing the U.S. Supreme Court's role in educating the public); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992) (same).

76. *See, e.g.*, Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579 (1989); Stephen Gillers, *Taking* L.A. Law *More Seriously*, 98 YALE L.J. 1607 (1989); Richard A. Posner, *The Depiction of the Law in* The Bonfire of the Vanities, 98 YALE L.J. 1653 (1989).

read the *U.S. Reports* or that they would recognize the Bill of Rights if presented with it.

V. THE NEED FOR THE CONSTITUTION

Those who grant the argument of the preceding Part will concede that fidelity to constitutional norms may be a prudent way to pursue moral norms. Constitutional norms may inaccurately represent the best set of ideals from a moral perspective, but the inaccuracies are useful ones. The mistakes are mistakes that Americans make when thinking about justice. Institutions that take such mistakes into account may have a better chance of securing public support and so of succeeding in the long-term.

Nevertheless, even those who grant this argument may think it fails to answer Justice Frankfurter's concern. To be sure, the argument narrows the gap between constitutionality and wisdom. One would have to be exceedingly optimistic, however, to think that it closes the gap entirely. So one might propose that the argument fails to make much headway toward justifying the Constitution. Couldn't one prudently pursue moral goals without ever getting involved in constitutional interpretation?

Part of the answer to that question lies in Sager's idea of a "pragmatic mix."[77] The Constitution may claim authority if its norms do not depart too far from the best norms and if it serves other purposes, such as preserving order or promoting political participation.[78] Institutions perform a variety of functions, and it is a mistake to look for a single variable to explain them. Our focus on one variable, namely, ensuring a prudent regard for the obduracy of public opinion, in this Article should not cause us to forget the impact of others. Nevertheless, I believe the variable at issue here is an especially important one and that it can do a bit more work than has been suggested so far. Accordingly, in this Part, I offer two reasons to believe that constitutional interpretation is likely to sponsor a better brand of politics than would be possible without it. First, better guides to public opinion may not exist. Second, constitutionalism protects Americans from their disposition to ignore the need for prudence.

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77. Sager, *supra* note 30, at 960.
78. *See supra* Section II(C).

A. *The Limitations of Opinion Polls*

At first glance, it might seem that only a rather quixotic historian could regard the Constitution as a good source of insight into what Americans believe today. Are we really to think that ideas from the past will tell us more about Americans today than we can learn simply by walking about in the present? Yet we should realize that this historicist strategy is not at all implausible. To begin with, we should keep in mind the aspect of public opinion that interests us. We are concerned not with the immediate reaction to political initiatives but with the sort of long-term obduracy[79] that might undermine support for an institution pursuing a program of constitutional justice. In light of our concern with such long-term obduracy, looking to the past in order to figure out what parts of public opinion endure is neither illogical nor unusual.[80]

We also should avoid shackling the Constitution unnecessarily to wooden views about it. Some components of American opinion, for the reasons described in the preceding Part, may indeed date back to the birth of the republic, but the Constitution is also capable of reflecting beliefs that are of very recent vintage. The informal constitution can "update" the written document. Even those who recognize the authority only of the formal Constitution may regard some of its provisions as "windows that let in a wider world."[81] Moreover, the goal of understanding public opinion will influence the way in which we interpret the Constitution's expansive language.[82]

There is thus nothing quixotic about using America's constitutional past to help us understand its present. Even so, one might

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79. *See supra* Section III(A).

80. For example, Garry Wills argues that Americans have adopted, for the most part, Lincoln's vision of America as articulated in the *Gettysburg Address*. GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 145–47 (1992).

History's utility as a window on the present may be more readily admitted in international settings, perhaps because we can accept the lessons of history without having to acknowledge that we miss the mark with our everyday personal observations about familiar circumstances. Thus, it is arguable that history better augured the ethnic strife that has torn apart the former Yugoslavia than did the quieter politics of more recent times. *Cf.* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1992) (tracing the comparative efficacy of Italian regional governments to centuries-old patterns of social and political behavior).

81. MURPHY ET AL., *supra* note 63, at 128.

82. For examples, see *infra* Part VI.

believe that there are much better means for investigating American public opinion. One option in particular will no doubt attract many readers. When people today think of public opinion, they think of polls. If you are worried about how the American people will react to some policy, why read the Constitution? Simply ask the people what they think! To many, polling seems to be the answer to any question about American beliefs. Such confidence is misplaced.

The shortcomings of political election polls should motivate some skepticism about polling's power. Voter behavior is especially well-suited to public opinion polling. The pollster wants to know how the respondent will answer a subsequent poll—the one that takes place in the voting booth. If public opinion polling can answer any question accurately, it should be able to answer that one. Nevertheless, even very sophisticated polls have a difficult time producing accurate information. They vary from week to week, and even from day to day. They underestimate support for some controversial candidates. Occasionally, large surprises result.[83]

These difficulties increase exponentially when we turn to the sort of beliefs that drive the Lincolnian tension in American politics.[84] An example illustrates the problem. Suppose that a federal judge believes that a town is avoiding its obligation to provide public housing for the poor. The judge is convinced that contempt sanctions against the town council are in order, with one caveat: the judge believes it would be wrong to impose the sanctions if doing so would provoke a backlash that, in the long-term, would severely damage the integrity of the federal judiciary and perhaps the federal government.[85]

If the argument of the preceding Part is correct, constitutional interpretation provides one way to assess whether the public reac-

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83. Lloyd Grove, *New Hampshire Confounded Most Pollsters; Voters Were a Step Ahead of "Tracking" Measurements*, WASH. POST, Feb. 18, 1988, at A1 (describing grossly inaccurate polls in the 1988 Republican presidential primary in New Hampshire); Richard Morin, *Behind the Numbers: Confessions of a Pollster*, WASH. POST, Oct. 16, 1988, at C1 (explaining sources of serious errors in candidate preference polls).

84. For a careful study of related problems, see Note, *"Ask a Silly Question . . . ": Contingent Valuation of Natural Resource Damages*, 105 HARV. L. REV. 1981 (1992) (noting shortcomings of opinion polls designed to measure how much people value natural resources).

85. This example draws in part upon the fact pattern in *Spallone v. United States*. 493 U.S. 265 (1990) (vacating, on equitable grounds, contempt sanctions against city council members who refused to comply with an order to build public housing).

tion would be so strong and so enduring as to warrant withholding the sanctions. The judge might engage in constitutional interpretation in order to determine whether constitutional norms preclude, or justify, the imposition of the planned sanctions. Do polls provide another way to take public opinion into account? If we could offer to do some surveying, what questions might the judge want us to ask?

We might ask people whether they agree that the city has an obligation to build public housing. Suppose that most people answer in the negative. What conclusions could we draw from such a survey? Could we assume that the electorate would put in office only persons sworn to resist a judicial mandate for public housing or would remove from office any officials who complied with it? We might, of course, add other poll questions, asking voters for their opinions about the proposed contempt sanctions or demanding to know whether they would remove officials who yielded to the judge. Yet voters might say they would remove the officials even if they had no intention to vote that way (the voters would have an especially strong temptation to respond insincerely if they thought their answers would influence judicial action). If they answer the questions sincerely, they might change their minds after they see the consequences of the judge's mandate and listen to arguments that counsel compliance. Would a public official who had run on an anti-judicial platform be subject to contempt sanctions? Would unelected civil servants be willing to pay a similar price for defiance? Would individual taxpayers do so if the judge's mandate encompassed their conduct? Would Congress respond to such aggressive decrees by restricting the jurisdiction of the courts? In all of these cases, it is easier to speak in favor of resistance than to pay the price for it. In some instances, moreover, the relevant public response extends not over months but over generations. Therefore, although surveys may tell us something useful about public opinion, any judgment about how opinion affects just policy turns heavily on how we interpret the facts we have.[86]

Perhaps we could overcome these difficulties if we could ask the poll question under the right circumstances—if we could some-

86. For similar arguments, see BARBER, *supra* note 25, at 48–49 (discussing the difficulties of interpreting polls about the death penalty); *see also* Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 5–6 (1970) (discussing the difficulties of judging the legacy of judicial regimes).

how get respondents to take it seriously, answer thoughtfully, and speak sincerely. Now we discover a surprising possibility. Constitutional argument may be as close to the relevant conditions as we can come. The reverence that Americans feel toward the Constitution and the assumption that constitutional norms are supreme and enduring all provide incentives for constitutional participants to represent their convictions about justice seriously, thoughtfully, and sincerely. In this sense, constitutional interpretation, rather than being a poor cousin to an opinion poll, might be an especially sophisticated sort of poll.

Nevertheless, the data from constitutional interpretation arrives packaged in opaque forms, such as phrases like "due process of law." We might wish for a poll that produces more conveniently targeted bits of information. Perhaps such a "values poll" is possible. The expense and difficulty of executing the relevant poll, however, count as practical arguments in favor of constitutional authority, even if a values poll is not strictly impossible.[87]

B. *The American Neglect of Prudence*

There is a second, entirely distinct, reason for valuing the Constitution as a source of prudent norms for governance. Americans tend to underestimate the need for prudence, and the Constitution's authority corrects for that tendency.

Tocqueville wrote perceptively about the character of American rationality. He pointed out, for example, how convictions about equality—convictions of the sort that people might derive from the democratic character of the franchise—make Americans inattentive to other people's opinions.

> [O]f all countries in the world, America is the one in which the precepts of Descartes are least studied and best followed. No one should be surprised at that.
>
> . . . .
>
> The continuous activity which prevails in a democratic society leads to the relaxation or the breaking of the links between generations. It is easy for a man to lose track of his ancestors' conceptions or not to bother about them.
>
> . . . .

87. *See* Note, *supra* note 84, at 1990–94.

> When it comes to the influence of one man's mind over another's, that is necessarily very restricted in a country where the citizens have all become more or less similar, see each other at very close quarters, and since they do not recognize any signs of incontestable greatness or superiority in any of their fellows, are continually brought back to their own judgment as the most apparent and accessible test of truth . . . .[88]

Tocqueville added a corollary:

> This American way of relying on themselves alone to control their judgment leads to other mental habits.
>
> Seeing that they are successful in resolving unaided all the little difficulties they encounter in practical affairs, they are easily led to the conclusion that everything in the world can be explained and that nothing passes beyond the limits of intelligence.[89]

In another passage, Tocqueville noticed how equality inclined people to believe in the indefinite perfectibility of humanity.[90]

Prudence requires slowing change out of deference to other people's opinions; otherwise, people will likely reject the best policy even if it is fairly presented and fully explained. Few virtues are less suited to American rationality, if Tocqueville's description of it is anywhere near the mark.

Tocqueville believed that the legal profession could correct for this and other problems in a democracy.[91] He offered, in particular, the following observations about the peculiarly undemocratic turn of mind that the Anglo-American common law induced:

> Both English and Americans have kept the law of precedents; that is to say, they still derive their opinions in legal matters and the judgments they should pronounce from the opinions and legal judgments of their fathers.
>
> . . . .

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88. TOCQUEVILLE, *supra* note 70, at 429–30.

89. *Id.* at 430.

90. Specifically, he stated:

> [W]hen men are jumbled together and habits, customs, and laws are changing, . . . then the human mind imagines the possibility of an ideal but always fugitive perfection.
>
> Every man sees changes continually taking place . . . . His setbacks teach him that no one has discovered absolute good; his successes inspire him to seek it without slackening.

Id. at 453.

91. *Id.* at 263–70.

> The first thing an English or American lawyer looks for is what has been done, whereas a French one inquires what one should wish to do; one looks for judgments and the other for reasons.
>
> If you listen to an English or American lawyer, you are surprised to hear him quoting the opinions of others so often and saying so little about his own, whereas the opposite is the case with us.
>
> A French lawyer will deal with no matter, however trivial, without bringing in his own whole system of ideas, and he will carry the argument right back to the constituent principles of the laws in order to persuade the court to move the boundary of the contested inheritance back a couple of yards.
>
> The English or American lawyer who thus, in a sense, denies his own reasoning powers in order to return to those of his fathers, maintaining his thought in a kind of servitude, must contract more timid habits and conservative inclinations than his opposite number in France.[92]

Here is soil rich for the cultivation of prudence—caution, a preference for the opinion of others, and skepticism about the validity of abstract systems of reasons.

Even as Tocqueville wrote, however, the legal profession was turning sharply toward rationalism.[93] In recent years, the trend has accelerated. American law schools (the profession will inevitably follow) have become increasingly French. Economists have invaded. Policy analysis reigns. Anthony Kronman has captured the change in an essay about Bickel's ideas.

> Lawyers in the common law tradition have always regarded prudence in the way Bickel did, as a virtue of an especially important sort, indispensable to the practice of their craft in all its registers, from the counseling and representation of individual clients to the governance of states. Until quite recently, this traditional view was so well-established that it required no defense, and those who have advocated a more rationalist view of politics have long considered the unreflective prudentialism of common law lawyers one of the principal obstacles to their programs of reform . . . .
>
> . . . .

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92. *Id.* at 267.

93. ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 199–204 (1984).

> Today, however, everything seems changed. In the past twenty years, and with increasing rapidity in the last ten, the rationalist spirit that Bickel associated with the contractarian tradition has come to dominate academic legal discourse to an extent that Bickel himself only partially anticipated. This new rationalism can be seen everywhere . . . . Today, prudence is an embarrassed virtue in a discipline that has always been hospitable to it. It is as if a fifth column had arisen within the law, and surrendered control of it to the rationalist forces that have for so long been pressing from without.[94]

The demise of the professional temperament Tocqueville attributed to American lawyers was probably both inevitable and desirable. A country that aspires "to decide . . . whether societies of men are really capable or not of establishing good government from reflection and choice"[95] cannot abide a ruling elite "indifferent to the substance of things, paying attention only to the letter, and which would rather part company with reason and humanity than with the law."[96] Nevertheless, the turn toward rationalism makes it likely that even the legal profession will underestimate the need for prudence when determining norms of governance.

To be sure, lawyers and other Americans notice the obstacles that public opinion puts in the way of policy. The problem is too large to miss. For example, the U.S. Supreme Court's reactions to school desegregation[97] and abortion[98] evince an awareness of the need to win public support for principled action. The devaluation of prudence shows up in impatience with this problem, not in ignorance of it. Didactic lectures[99] and technical improvisa-

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94. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1605–07 (1985).

95. THE FEDERALIST No. 1, at 1 (Alexander Hamilton) (Roy P. Fairfield ed., 1966).

96. TOCQUEVILLE, *supra* note 70, at 268. Tocqueville is discussing English lawyers, rather than English and American lawyers, in this passage; he may have been conscious of a growing difference between the professions in the two countries.

97. *See, e.g.*, Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 50–87 (1979) (discussing the U.S. Supreme Court's concern with resistance to its desegregation ruling); Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1920–30 (1991) (same).

98. *See, e.g.*, Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2812–16 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (analyzing the relation between *stare decisis* and popular support for judicial decisions).

99. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 24–26 (1958) (Frankfurter, J., concurring) (exhorting local officials to change local habits).

tions[100] recommend themselves to the Court as ways to avoid the subtle difficulties involved in interpreting public opinion.[101]

Under these circumstances, constitutional interpretation infuses governance with a useful dose of prudence. Constitutional argument executes a pre-commitment strategy:[102] it is a way that Americans "bind themselves to the mast" so as to avoid the temptations of abstract policy science.[103] By accepting constitutional authority, rationalists commit themselves not only to some well-defined set of norms but also to a mode for defining norms.[104] The Constitution compels interpreters to respect past opinions and so inculcates a historical and literary sensibility in a people easily seduced by the rationalist charm of quasi-mathematical disciplines like economics, physics, and analytic philosophy. As long as Americans have an abstract argument, like the one developed here, to justify the Constitution's authority, the constraints of constitutional interpretation will help to temper the American enthusiasm for abstraction in contexts in which that inclination would prove damaging.

Thus constitutional interpretation both replaces and surpasses the conservatism of the legal profession as a wellspring for prudence. It can coexist with democratic rationalism while simultaneously nurturing the prudent judgment essential to the vitality of republican government. Whether the Constitution in fact serves that purpose depends in part on whether interpreters approach the

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100. *Cf. Casey*, 112 S. Ct. at 2815–16 (recommending a special doctrine of *stare decisis* for politically divisive cases). *See generally* Tushnet, *supra* note 97, at 1928–29 (discussing the device of "all deliberate speed"); Hutchinson, *supra* note 97 (discussing the device of unanimity).

101. I have elsewhere commented at length on the Court's mode of addressing public opinion in *Brown* and subsequent cases. *See* Eisgruber, *supra* note 75, at 1014–28.

102. *See, e.g.*, JON ELSTER, ULYSSES AND THE SIRENS 88–96 (1979) (analyzing the value of precommitment devices for democratic government); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 215–40 (Jon Elster & Rune Slagsted eds., 1988) (same).

103. The classic example of a precommitment strategy is Ulysses's decision to bind himself to the mast to resist the call of the Sirens. ELSTER, *supra* note 102, at 36.

104. On precommitment to norms, see generally Holmes, *supra* note 102. Holmes describes how precommitment to constitutional rules defining offices may improve the quality of democratic deliberation. The rules defining the separation of powers, for example, create an intellectual division of labor among office holders with distinct perspectives. *Id.* at 228–30. I find Holmes persuasive, but his account of the American Constitution seems to me incomplete unless supplemented by the idea of precommitment to an explanatory form—namely, the textual, historical form of constitutional interpretation.

Constitution in a way respectful of its claim to be a source of prudent principles. The next Part considers how the constitutional objective defended here affects interpretation.

VI. APPLICATIONS

A. *General Considerations*

The last two Parts provide reasons to think that constitutional interpretation might surpass other strategies for selecting norms of governance. Constitutionalizing norms is a way to make prudence both possible, by sampling American opinion, and also likely, by compelling officials to take opinion into account. As a result, Americans will treat the Lincolnian tension of republican government more sensitively if they govern through constitutional norms rather than abstract social science. The Constitution's value as a source of prudent norms thus supplements the other possible justifications for constitutional authority canvassed in Part II. This justification, unlike some others (such as Ackerman's), makes the supremacy of the Constitution's norms dependent on their content—in particular, their relation to justice—rather than merely on the process that created them.

This argument has consequences for constitutional interpretation. The idea that the Constitution represents American opinions about justice allows us to conceive of the Constitution—both the formal document and its informal counterpart—in a particular way. We may regard the Constitution as a set of imperfect articulations of American understandings of justice. The modes of constitutional definition, including the Article V amendment process, may often involve efforts to produce good articulations, rather than to impose clear rules. We should read the Constitution in a way suited to this purpose. In McConnell's words, form should follow function.[105]

If interpreters regard the Constitution as an articulation of collective understanding, rather than as a contract or rule book, such an attitude will have a powerful impact on how they treat history and language. First, the range of historical arguments available to interpreters differs. The conception of constitutional authority proposed here treats constitutional provisions as expressions of an American sense of justice. Interpreters thus need not assume

105. McConnell, *supra* note 12, at 360.

that the drafters of a provision had the best insight into the provision's meaning. Perhaps they did, but that is not necessarily so. The drafters might have chosen the text of the provision, for example, on the basis of a felt sense of what the country believed, without being able to give any fuller explanation for the words they chose. Other observers, including politicians, poets, journalists, the clergy, and even philosophers, may be better sources of understanding. Sometimes, leaders who govern in the years preceding a constitutional amendment may understand a constitutional change better than those who framed the amendment that memorializes it—as is arguably the case with respect to Abraham Lincoln and the Fourteenth Amendment. Indeed, a constitutional provision might incorporate intuitions that even the most perspicuous contemporary observers only dimly understood.

Positivist approaches to constitutional interpretation, by contrast, favor a more exclusive focus on the intentions of those who draft and vote on the text of a provision. A positivist treats constitutional provisions as reports of its makers' choices rather than as references to ideas that precede constitutionalization and extend beyond it. If constitutional meaning depends purely upon procedural pedigree, it makes sense to scrutinize only the opinions of ratifiers and drafters, because the participants in the constitution-making process are most likely to know best what choices they made.

Second, the attitude that interpreters take to constitutional language must be sensitive to implications that follow from viewing the language as an imperfect articulation of an idea. Constitutional language may be allusive or figurative.[106] Although we might wish for more precise expressions, American ideas about justice may resist translation into technical terms. If the point of the Constitution were to preserve order, supply clear rules, or impress the will of one generation on its successors, then the interpretive freedom that flows from a literary attitude toward language might cripple the constitutional project. That is not so if the point of constitutionalization is to facilitate a prudent regard for public opinion by providing a textual representation of it.

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106. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1816) ("Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense.").

The next two Sections illustrate these interpretive strategies by examining topics related to the Fourteenth Amendment.[107] The first Section addresses the problem of constitutional history in the context of federalism issues. The second addresses the problem of constitutional language in the context of the Due Process Clause. These topics provide a rich context for application of the theory set out here because debates about federalism and due process implicate enduring political controversies. The changing relationship between national sovereignty and states' rights has been one of the defining features of American politics from the Founding to the present. The Due Process Clause has figured in constitutional arguments about slavery, economic liberties, and sexual autonomy. In areas so freighted with political conflict, the constitutional connection between prudence and principle becomes especially important.

B. *Constitutional History: Federalism*

The formal Constitution contains few express protections for state governments. Controversy about the nature and extent of state sovereignty nevertheless has been a persistent theme in constitutional interpretation. The U.S. Supreme Court's recent decision in *New York v. United States*[108] was a dramatic reminder that *Garcia v. San Antonio Metropolitan Transit Authority*[109] did not

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107. As Ackerman reminds us, the ratification of the Fourteenth Amendment cannot be reconciled with Article V procedures. *See* Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 500–03 (1989). For this reason, the Amendment provides a nice illustration of the complex interaction between endurance and incorporation. *See supra* Sections IV(A)-(B). For many Americans, the Amendment's roots in the Civil War impart a special force to the convictions it articulates. *See generally* WILLS, *supra* note 80 (describing how Lincoln's interpretation of the War altered Americans' self-understanding). At the same time, the Amendment obviously did not reflect southern values at the time of its adoption. In the South, and perhaps elsewhere, the endurance of the Amendment has produced stronger bonds between constitutional meaning and public values than existed at the "moment" of incorporation.

108. 112 S. Ct. 2408 (1992) (holding that the United States may not conscript a state government to act as its agent).

109. 469 U.S. 528 (1985) (finding that considerations of state sovereignty embodied in the Tenth Amendment do not impose judicially enforceable limits on congressional power). *Garcia* overruled National League of Cities v. Usery, 426 U.S. 833 (1976), which held that federal principles preclude Congress from regulating the working conditions of state employees performing traditional government functions. The *Garcia* dissenters predicted that the Court would eventually revisit—and reverse—the rule of *Garcia*. *Garcia*, 469 U.S. at 579 (Rehnquist, J., dissenting); *id.* at 588–89 (O'Connor, J., dissenting). In *New York*, however, Justice O'Connor, writing for the majority, did not question the

end the Court's long struggle with federalism principles. Nor is *New York* the Court's only sign of post-*Garcia* solicitude for state sovereignty. Today, the Supreme Court's protection of state power most often takes the form of "plain statement" rules in statutory interpretation cases[110] or a conservative attitude toward the expansion of individual liberties and civil rights.[111] These techniques preserve the influence of federalism concerns on judicial interpretation of the Constitution.

Viewing constitutional authority as dependent on the prudential merit of constitutional norms opens new windows on the federalism controversy. The Fourteenth Amendment's first sentence and its historical context acquire special importance. The sentence reads, "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."[112] To an interpreter interested in the Constitution's connection with American values, this sentence is striking. Unlike most provisions in the Constitution, it confers no power on, specifies no process for, and imposes no restriction on the government's branches. Instead, it recognizes a status. The Citizenship Clause resembles a pure affirmation of shared belief.[113]

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holding of *Garcia*. *New York*, 112 S. Ct. at 2417–19, 2429.

110. *See, e.g.*, Gregory v. Ashcroft, 111 S. Ct. 2395, 2399–406 (1992) (using a "plain statement" rule to protect federalism concerns by excluding state judges from coverage under the Federal Age Discrimination in Employment Act). For a thorough analysis of the relationship between constitutional interpretation and plain statement rules, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

111. *See, e.g.*, Freeman v. Pitts, 112 S. Ct. 1430, 1445 (1992) (finding national traditions of local autonomy in education to affect the appropriate administration of desegregation decrees); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425 nn.2–4 (1987) (collecting examples).

112. U.S. CONST. amend. XIV, § 1.

113. One could argue that the provision is essentially definitional, designed to clarify the Diversity Clause and the Naturalization Clause and to lay the groundwork for the Privileges and Immunities Clause. Nevertheless, Section 1 could have accomplished these goals with very different overtones. The following revised version of the Amendment is illustrative:

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

The Clause depreciates state citizenship. It implicitly asserts that the Constitution, the constitutive instrument for the federal community, has authority to define the composition of the state communities. Moreover, the rule it chooses makes state citizenship a mere incident of residence.

Does the history of the Clause help us to understand its nationalist overtones? The interpretive approach developed in this Article recommends that we take a particular attitude toward that history: we should search not for intentions special to the drafters and ratifiers of the Clause but for a shared American belief that the Clause might reflect. We may begin by examining the state of constitutional interpretation before enactment of the Amendment. Justice Field, dissenting in the *Slaughter-House Cases*,[114] observed that before the Civil War, lawyers and politicians alike debated whether there was any form of citizenship distinct from state citizenship. According to Justice Field, most people believed that U.S. citizenship, if it existed at all, existed only as a derivative of state citizenship. Justice Field called this "the opinion of [Senator John C.] Calhoun and the class represented by him,"[115] but the position was by no means peculiar to southern sectionalists. He recognized that Justice Curtis, a New Englander, adopted this view in his nationalist *Dred Scott* dissent, an opinion "generally accepted by the profession of the country as the one containing the soundest views of constitutional law."[116]

Justice Curtis's reasoning brings out the significance of the citizenship issue. His argument illustrates how constitutional thought at the time of the Civil War linked the ideas of citizenship and sovereignty.

> Laying aside . . . the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that

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This revised Amendment specifies the grounds for determining state citizenship under the Diversity Clause, guarantees citizenship to all native born and naturalized persons, and attaches privileges and immunities to the status of citizen. It does so, however, without introducing the concept of U.S. citizenship.

114. 83 U.S. 36 (1872) (holding that local ordinance granting a monopoly to one slaughterhouse did not violate the Privileges and Immunities Clause of the Fourteenth Amendment).

115. *Id.* at 94 (Field, J., dissenting).

116. *Id.* (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 564 (1856) (Curtis, J., dissenting)).

> the Constitution has recognised the general principle of public law, that allegiance and citizenship depend on the place of birth . . . . Add to this, that the Constitution was ordained by the citizens of the several States; that they were "the people of the United States," for whom and whose posterity the Government was declared in the preamble of the Constitution to be made; . . . the necessary conclusion is, that those persons born within the several States, who, by force of their respective Constitutions and laws, are citizens of the State, are thereby citizens of the United States.[117]

Justice Curtis added that "under the Constitution of the United States, each State has retained [the] power of determining the political *status* of its native-born inhabitants, and no exception thereto can be found in the Constitution."[118]

The crux of Justice Curtis's argument resides in two propositions: first, that the states are the sort of sovereign entities contemplated by "general principles of public law," and second, that "the people of the United States" are "the citizens of the several States." The states, on this theory, are political communities that pre-date the Constitution. They "retain" the power they then had to determine the status of their inhabitants. The states accordingly have the authority, inherent in sovereignty, to determine the citizenship of free persons born on their soil. The United States, not being a sovereign of the relevant kind, has no such power.

Read against this background, the Citizenship Clause redoubles in significance. The Clause inverted the relationship between state and federal sovereignty that the dominant strand of antebellum constitutional theory presupposed. It was now the national government that possessed the sovereign prerogative of defining citizenship. The states had no such power. The Clause, moreover, defined into existence "a people of the United States" distinct from "the citizens of the several States." The United States had acquired the authority to define itself as a community, and the states had lost it.

The Clause thus summarized a newly direct relationship between citizens and the national government and a newly mediated and derivative relationship between citizens and state governments.

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117. *Dred Scott*, 60 U.S. (19 How.) at 581–82 (Curtis, J., dissenting).
118. *Id.* at 585–86.

We may read it as the report of a fundamental change in American attitudes toward political institutions.

What is the significance of that change? We can gather some ideas from the other opinions in the *Slaughter-House Cases*. Three of the Justices—Miller, Bradley, and Swayne—dealt with the historical evidence in a way consistent with the approach recommended here. Rather than focusing on the intentions of the drafting bodies, their opinions analyzed the Amendment's meaning by reference to deep currents in public opinion. They regarded the Amendment as the culmination of changes that the Civil War had wrought in the nation's political identity.[119] They accordingly assumed that the Amendment's purposes faithfully reflected the War's meaning. Justices Bradley and Swayne made arguments that were especially explicit on this point. Justice Bradley wrote,

> The mischief to be remedied [by the Fourteenth Amendment] was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.[120]

Justice Bradley's suggestion that the Fourteenth Amendment "was an attempt to give voice to [a] strong national yearning" is precisely the sort of argument anticipated by the idea that the Constitution contains imperfect articulations of important aspects of American opinion. Justice Swayne, who declared the Amendment

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119. *See Slaughter-House Cases*, 83 U.S. at 67–73, 81–82; *id.* at 122–23 (Bradley, J., dissenting); *id.* at 124–25, 128–29 (Swayne, J., dissenting). The remaining opinion was Justice Field's, which all three of the other dissenters joined. The fourth dissenter, Chief Justice Chase, did not write an opinion of his own. Justice Field did not rely on cultural arguments. His historical arguments about the Fourteenth Amendment focused more narrowly on the reasons why Congress enacted the Amendment. *See id.* at 93 (Field, J., dissenting).

120. *Id.* at 123 (Bradley, J., dissenting).

to be a "new Magna Charta," was equally explicit in linking national identity to constitutional meaning. He said,

> These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members.[121]

Justice Miller also treated the war's meaning as relevant to the Amendment's but construed the war's significance more narrowly. He argued,

> The institution of African slavery . . . and the contests pervading the public mind for many years . . . culminated in . . . the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.
>
> In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict . . . . But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles.[122]

Justice Miller's reference to the "determin[ation]" of "those who had succeeded in re-establishing the authority of the Federal government" is, of course, a claim about the Framers' intent. Justice Miller nevertheless depicted the Amendment as part of an effort to constitutionalize a change that preceded the Amendment.

Justice Miller's opinion also included an argument responsive to the competing interpretation of the war offered by Justices Bradley and Swayne. He agreed that "jealousy" of the national government persisted from the Founding until the Civil War, when people "discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine

121. *Id.* at 128 (Swayne, J., dissenting).
122. *Id.* at 68.

and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government."[123] This discovery, Justice Miller admitted, increased the intellectual and political force of the argument for strong national government. However, he concluded that although "this sentiment" may have played some part in shaping the Reconstruction Amendments, "statesmen" resisted the "excited feeling growing out of the war" and continued to believe that "the existence of the States with powers for domestic and local government . . . was essential to the perfect working of our complex form of government."[124]

Interpreting the Citizenship Clause requires us to choose between the interpretations of history proffered by Justices Bradley and Swayne, on the one hand, and by Justice Miller, on the other. Justice Miller's argument has fared poorly among commentators.[125] Perhaps Justice Miller saw in the generality of the Amendment's language a sign that post-war respect for the national government was mere "excited feeling," rather than the sort of deep change that even the most ardent defenders of localism would have to accommodate. He might have regarded state government as so preferable to national government that he thought the newly developed nationalist sentiment should be accommodated as little as possible.[126] Either argument is legitimate within the interpretive framework pursued here, but neither seems particularly compelling today.

If we decide that Justices Bradley and Swayne provided the more persuasive account of the Fourteenth Amendment's history, a variety of consequences follow. Section 5 of the Fourteenth Amendment enables us to forge a link between the Citizenship Clause and congressional power. Section 5 confers on Congress the "power to enforce, by appropriate legislation, the provisions of this

123. *Id.* at 82.

124. *Id.*

125. For criticism of Justice Miller's opinion, see, for example, ELY, *supra* note 3, at 22–30 (arguing that the *Slaughter-House* decision is inconsistent with the language of the Citizenship Clause and the history of its drafting); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 163 (1988) (arguing that the decision is inconsistent with the intentions of the Amendment's drafters).

126. *See* Walter F. Murphy, Slaughter-House, Civil Rights, *and Limits on Constitutional Change*, 1987 AM. J. JURIS. 1, 9 (1987) (considering whether the *Slaughter-House* majority might have regarded the Fourteenth Amendment as an "unconstitutional constitutional amendment," inconsistent with higher-order constitutional values).

article."[127] Because the Amendment's provisions include the Citizenship Clause, we might understand Section 5 to grant Congress the power to bring about the relationship between the people and their government that the Citizenship Clause envisions. If one believes that citizenship entails a full and equal share in the benefits of republican government, then Section 5's grant of power to Congress is broad indeed. Congress would have the power necessary to give Americans the benefits government ought to provide to a free people—such as liberty, security and justice. That conclusion would be a good ground for rejecting one set of arguments in favor of state sovereignty: those that rest on claims about congressional incompetence.[128]

This argument hinges on two points. First, is the Citizenship Clause a provision requiring enforcement? Second, what does citizenship entail? The answer to these questions will depend on whether one accepts Justice Bradley's historical claim about the point of the Amendment as a whole. He called the Amendment

> an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guarantee of safety, and in which every citizen of the United States might [have] full enjoyment of every right or privilege belonging to a freeman, without fear of violence or molestation.[129]

This view of citizenship rules out the possibility that citizenship promises no more than a thin package of privileges or that it is a self-executing guarantee. If we are persuaded that Justice Bradley was correct, we will regard the Citizenship Clause and the Enforcement Clause as sufficient to generate an expansive congressional power, perhaps limited only by the need to respect individual rights and not by institutional considerations.

The idea that the Fourteenth Amendment reports a fundamental change in American political attitudes has other conse-

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127. U.S. CONST. amend. XIV, § 5.

128. This interpretation of the Enforcement Clause resembles that of Justice Harlan in The Civil Rights Cases, 109 U.S. 3 (1883). Justice Harlan, however, accepted the narrow purpose that the *Slaughter-House* majority ascribed to the Civil War and the Reconstruction Amendments, rather than the broader purpose Justice Bradley proposed. He accordingly found in the Enforcement Clause a power less comprehensive than the one my argument justifies. *See id.* at 43–62 (Harlan, J., dissenting).

129. *Slaughter-House Cases*, 83 U.S. at 123 (Bradley, J., dissenting).

quences. It alters the meaning of earlier enactments, such as the Tenth and Eleventh Amendments. We may find it reasonable to dismiss some implications of those amendments favorable to state sovereignty in light of the change announced by the Fourteenth. This conclusion involves no contradiction with the Tenth Amendment,[130] which is openly tautologous. If, after the Civil War, the Constitution conferred on the national government a comprehensive power limited only by the rights and powers of the people, then the Tenth Amendment, by its own terms, leaves nothing to the states.

The Eleventh Amendment is not a tautology.[131] Does the nationalist interpretation of the Fourteenth Amendment developed above remove the Eleventh Amendment's restrictions on federal jurisdiction? We might reasonably embrace such an interpretation. The Eleventh Amendment looks like a source of injustice, defensible only on positivist grounds. There is, however, a line of reasoning that might lead us to respect the states' immunity from suit. The nationalist inferences we drew from the Fourteenth Amendment's history do not entail the conclusion that the states have no authority to legislate. Although the states exercise power by grace of federal law and subject to congressional override, Congress will often prefer to eschew uniform rules and allow the states to be self-governing administrative units. We might believe that Congress is better able than the judiciary to determine whether the states, conceived as federal administrative units, should be immune from suit. We might also conclude, by interpreting the federal statutory scheme, that Congress has intended to make the states immune from suit except insofar as Congress has explicitly made them subject to suit. This argument, although it pays no homage to state sovereignty, results in a jurisprudence not far removed from that the U.S. Supreme Court now pursues.[132]

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130. The Tenth Amendment reads: "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." U.S. CONST. amend. X.

131. The Eleventh Amendment reads: "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." U.S. CONST. amend. XI.

132. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (finding that Congress may abrogate the states' Eleventh Amendment immunity when legislating pursuant to the Commerce Clause); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (finding that Congress may abrogate the states' Eleventh Amendment immunity when legislating pursu-

Nevertheless, we might equally well conclude that the judiciary should recognize federal jurisdiction over all suits against states. That conclusion may seem extreme, but it need not run afoul of any positivist strands in the Constitution's claim to authority. We need only understand the Fourteenth Amendment to have effectively repealed the Eleventh. The Fourteenth Amendment presumably supersedes any previously enacted provision inconsistent with it. The immunity that the Eleventh Amendment permits to the states may involve such an inconsistency because it presupposes a kind of sovereignty that the Fourteenth Amendment denies to the states.

One might controvert these conclusions about federalism on any number of grounds, both historical and normative.[133] What matters is the way they illustrate two consequences that flow from grounding constitutional authority in a correspondence between constitutional meaning and American political opinion. First, we are able to develop an array of distinctive interpretive arguments. In particular, the constitutional justification advanced in this Article licenses historical arguments that are independent of ratifiers' intentions. The justification conceives of the Constitution as tied to public opinion and so treats the Fourteenth Amendment as, at least in part, an effort to articulate deep aspects of public opinion that have an existence external to the amendment process. Making sense of the Fourteenth Amendment requires attention to its foundation in public belief, rather than to the intentions of those involved in the amendment process.

Second, this revised attitude toward historical argument rules out interpretive strategies that treat state sovereignty as axiomatic. One may not start by assuming that, for example, ours is "a federal system"[134] or that the national government is "a Government of enumerated powers."[135] These common justifications for re-

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ant to Section 5 of the Fourteenth Amendment); *see also* Atascadero State Hospital v. Scanlon, 473 U.S. 234, 246 (1985) (requiring a statute to contain an unequivocal statement of congressional intent to waive a state's Eleventh Amendment immunity in order to abrogate immunity).

133. *See* Amar, *supra* note 111, at 1426–27 (historical defense of federalism); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985) (normative defense of federalism).

134. *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2421 (1992) (quoting Tafflin v. Levitt, 493 U.S. 455 (1990) with approval); *Tafflin*, 493 U.S. at 458 ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government . . . .").

135. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 218 (1987) (O'Connor, J., dissent-

specting state sovereignty, like other claims about constitutional meaning, must derive from some judgment about what makes the Constitution authoritative. One might restore the force of these axioms by accepting—as the whole story or part of it—a process-based theory of justice like Ackerman's,[136] so that we could say that justice requires us to respect these axioms because the people chose them in a just way. Alternatively, one might accept the framework developed above but contest some of the historical and normative propositions deployed within it. The historicity of constitutional interpretation does not, however, itself render illegitimate arguments that reject state sovereignty's claim to constitutional recognition.

C. *Constitutional Language: Due Process of Law*

The doctrine of substantive due process has been perhaps the most controversial aspect of Fourteenth Amendment jurisprudence. Tracing constitutional authority to the prudential content of constitutional norms does not resolve that controversy. It does expand the field of argument, however, to include some new grounds for regarding the Due Process Clause of the Fourteenth Amendment as a general guarantee of liberty not limited to procedural rights.

Commentators have frequently disparaged the legitimacy of Supreme Court cases that use the Due Process Clause to protect substantive rights. These arguments generally have assumed two forms. One is a "plain meaning" argument, and has been made most memorably by John Hart Ely.

> [T]here is simply no avoiding the fact that the word that follows "due" is "process." No evidence exists that "process" meant something different a century ago from what it does now . . . . Familiarity breeds inattention, and we apparently need periodic reminding that "substantive due process" is a contradiction in terms—sort of like "green pastel redness."[137]

To some extent, the colorful flourish that concludes Ely's argument is unfair. "Due process of law" resists purely procedural

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ing) (stating that the United States "remains a Government of enumerated powers"); Oregon v. Mitchell, 400 U.S. 112, 128 (1970) (Black, J.) (referring to "our national government of enumerated powers"); *cf.* Younger v. Harris, 401 U.S. 37, 44 (1971) (referring to "Our Federalism").

136. *See supra* Section II(A).

137. ELY, *supra* note 3, at 18.

translations as well as substantive ones. The case against substantive constructions of the Due Process Clause would be stronger if it said "without fair process," or "without legal process," or simply "without due process," rather than "without due process of law," a combination that beefs up "process" in a way that common sense cannot easily decode.

Perhaps for this reason, the plain meaning argument against substantive applications of the Due Process Clause often travels with a "professional meaning" argument that mixes text and history to support a technical construction of the Clause. One version of that argument was made by Justice Curtis in *Murray's Lessee v. Hoboken Land & Improvement Company*.[138] Justice Curtis maintained that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta. Lord Coke, in his commentary on those words, says they mean due process of law."[139] Justice Curtis went on to conclude that, in order "to ascertain whether [a] process, enacted by congress, is due process," interpreters should refer to two sources: other provisions of the Constitution and "those settled usages and modes of proceeding existing in the common and statute law of England, . . . which are shown not to have been unsuited to [American settlers'] civil and political condition by having been acted on by them after the settlement of this country."[140]

The constitutional justification recommended here generates two novel interpretations responsive to both the plain meaning and the professional meaning arguments. The first argument is analytic: it divides the Clause into its constituent parts. The analytic argument diminishes the strength of the plain meaning argument by contesting the meaning of the word "law" in the Due Process Clause. As we have already noticed, the Clause does not simply require that "due process" be given before the government deprives somebody of life, liberty, and property; it adds the phrase, "of law." Under positivist conceptions of law, that addition does not much matter. Such conceptions make procedure integral to law's definition: law, including the Constitution itself, owes its status as law to the process by which it was enacted. The refer-

138. 59 U.S. (18 How.) 272 (1855).
139. *Id.* at 276 (Curtis, J., dissenting) (citation omitted).
140. *Id.* at 276–77.

ence to law thus does nothing more than compound the Clause's first reference to procedure.

The analytic argument takes issue with this procedural understanding of law. The argument draws some support from historical arguments that remind us that the meaning of the concept of law has long been contested. A tension between positivist and substantive sources for legal authority is manifest in, for example, Blackstone's definition of law.[141] Suzanna Sherry and Robert Cover, among others, have described the shape these disagreements have taken in the United States.[142] Historical arguments of this sort might have interpretive significance within a variety of constitutional theories, including Framers'-intent theories.

The interpreter who views the Constitution as an institution designed to assist the prudent pursuit of justice will have additional reasons to accord substantive significance to the phrase "of law." Those reasons flow from the use of the word "law" in the Supremacy Clause. The Clause declares that the Constitution itself "shall be . . . the supreme Law of the Land."[143] The constitutional justification proposed here maintains that the Constitution is authoritative because fidelity to it is a good practical means for pursuing justice. The Constitution is thus binding for substantive reasons—because it brings about justice—rather than purely procedural ones—because of the way it was enacted. That conception of the Constitution affects the concept of law, because the Constitution declares itself to be law. Unless we have some reason to distinguish the Due Process Clause's use of "law" from the Supremacy Clause's use of "law," the connection among law, the Constitution, and justice invests the Due Process Clause with substantive implications. Demanding that a process be "of law" is a way to demand that it have an appropriate connection to justice.

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141. Blackstone described law in the following manner:

> This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

1 BLACKSTONE, *supra* note 52, at *41

142. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 8-30 (1975) (discussing natural law heritage of American law); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 *passim* (1987) (describing relationship between the idea of constitutionalism and contested ideas of law).

143. U.S. CONST. art. VI, § 2.

We could flesh out the idea of an appropriate connection in a variety of ways, but we might conclude that a process could be "of law" only if it were likely to produce just outcomes.

This analytic strategy is a structural argument that the Constitution's self-reference reinforces. In some respects, it is a standard kind of interpretive argument. Its prospects for success improve, however, if we adopt a literary attitude toward constitutional language. Even if we interpret law to implicate substantive values, the Due Process Clause is far from the clearest or most precise statement of substantive protection for life, liberty, or property imaginable. This imprecision is not a problem within conceptions of constitutional authority that treat constitutional language as, among other things, an effort to articulate public beliefs not fully understood. If constitutional terms serve this expressive function, we should not be surprised that they lack the clarity we might hope to find in words designed only to prescribe rules for conduct.

Bonding constitutional content to the prudential quest for justice also generates a synthetic argument for substantive applications of the Due Process Clause, one that reads the phrase "due process of law" as an irreducible whole. This argument accepts Justice Curtis's claim that the meaning of "due process of law" depends on its association with Magna Charta. A literary attitude toward constitutional language permits us, however, to interpret the phrase by reference to Magna Charta's symbolic significance in the United States, rather than its technical application in England. We may, in particular, regard the Due Process Clause as a metaphor for the idea that written law can restrain sovereign power in the interests of individual liberty. The metaphor turns on the way in which Magna Charta has come to symbolize the idea of constitutional restraints. The synthetic argument contends that we should understand "due process of law" as standing in for the idea of Magna Charta. It then contends that Magna Charta, too, is a symbol for a larger idea, the idea of written restraints imposed on government power to secure individual liberty against unjust deprivations.

Justice Swayne may have appreciated this aspect of the Due Process Clause's meaning. His *Slaughter-House* dissent declared, "Fairly construed, [the Reconstruction] amendments may be said

to rise to the dignity of a new Magna Charta."[144] Although Justice Swayne construed the words "due process of law" in a limiting way, his reference to Magna Charta illustrates the point made in the preceding paragraphs. He did not mean that the Reconstruction Amendments were a new Magna Charta because they repeated the content of Magna Charta. On the contrary, his point was that they bore a connection to Magna Charta because they, like it, were the product of a bold effort to use writing to make the sovereign accountable for its use of power.

This strategy has a historical component. One could, for example, contest it by offering evidence that Magna Charta lacked the meaning I have ascribed to it or that the generations that authored the Fifth and Fourteenth Amendments did not appreciate the connection between "due process of law" and Magna Charta. The synthetic strategy, however, like the analytic one, also trades on an attitude toward constitutional language. Its success depends on the willingness of interpreters to regard constitutional language as a collection of metaphors rendered meaningful by their roots in American political ideas.

The analytic and synthetic strategies for interpreting the Due Process Clause both provide grounds for interpreting it to preclude unjust deprivations of life, liberty, and property, but neither entirely overcomes the textual critique of substantive due process. Even if the Clause draws its meaning from a connection between law and justice, or between due process of law and the idea of just restraints on government power, its procedural form distinguishes it from a plain statement that all unjust deprivations are unconstitutional. We learn something about Americans when we discover that they use the idea of law, or the idea of due process of law, to substitute for the idea of justice. Both expressions represent justice in a way that blurs the line between justice and procedural regularity. The Due Process Clause is thus a guarantee against injustice suitable only to a people reluctant to acknowledge the discrepancy between justice and procedural fairness.[145] This

144. *Slaughter-House Cases*, 83 U.S. 36, 125 (1872) (Swayne, J., dissenting).

145. According to the legal anthropologist Lawrence Rosen, "there is much to suggest that Americans share an extraordinary range of values in common, that many of their substantive shared conceptualizations are precisely procedural in nature, and that a closer look at both law and political culture would point in this direction." Lawrence Rosen, *Individualism, Community, and the Law: A Review Essay*, 55 U. CHI. L. REV. 571, 581 (1988).

prejudice in favor of procedure might limit the ways in which judges and others can effectively protect individual liberty against unjust deprivations.

Making constitutional authority dependent on the prudential merit of constitutional norms thus alters the set of arguments available to determine the scope of the Due Process Clause. On the one hand, arguments that only repeat that "process means process" or that stress the English antecedents of the Clause no longer have much force. On the other hand, recognizing a bond between public values and constitutional meaning also constrains those who view the Due Process Clause as a source of substantive rights. Within other substantive interpretations of the Clause, the text, precisely because of its conspicuous reference to process, functions as little more than a hook for arguments about privacy or autonomy. Instead, we have interpreted the Clause as indicative of a contested relationship between law and justice in American opinion. As such, it points debate about the breadth of judicial protection for individual rights toward the effects of that prejudice.

VII. CONCLUSION

This Article has attempted to answer Justice Frankfurter by reconciling justice and the text. Americans are right to care intensely about the Constitution's less-than-perfect norms, for constitutional norms and practices are an essential means for an imperfect people trying to do their imperfect best. More importantly, constitutional interpretation surpasses more abstract modes of defining norms because the Constitution reflects Americans' deep convictions about justice. Conforming to these convictions enables institutions to secure the long-term support they need in order to flourish. There may be few, if any, satisfactory alternatives to the Constitution for investigating public opinion, and the Constitution counteracts American tendencies that favor perfectionism and abstraction. The Constitution thus earns its authority by, among other things, infusing American politics with a needed dose of prudence.

This argument provides a reason to prefer the historically grounded enterprise of constitutional interpretation over other disciplines, even if philosophy—or economics, or some other abstract discipline—is in principle capable of producing objective, ahistorical right answers to moral and political questions. The

argument also has interpretive consequences, for knowing why the Constitution is binding makes it possible to read it intelligently. Two consequences follow from regarding the Constitution as composed of efforts to articulate American beliefs about justice. First, historical argument ceases to focus on the intentions of those involved in drafting and ratification. Second, textual argument treats constitutional language as figurative and allusive. Constitutional interpretation so conceived demands a historical and literary sensibility, rather than mere technical skill.

This understanding of the Constitution does not rule out any particular interpretive position. One could, for example, accept Ackerman's theory of dualist democracy without denying any proposition in this Article. One could thereby restore the force of positivist defenses of state sovereignty. Moreover, one could reach nearly any substantive result—including results favorable to state sovereignty or inimical to judicial protection of unenumerated rights—from within the interpretive framework that I recommend. The framework and its justification do not rule positions out of bounds; instead, they expand the field of argument. By doing so, they change the burden of persuasion significantly.

That change poses a significant challenge to theories—including both conservative theories like Robert Bork's originalism and liberal theories like Bruce Ackerman's "dualist democracy" or Ronald Dworkin's "law as integrity"—that treat past decisions as binding by virtue of their enactment. These process-based theories of constitutional authority depend on controversial judgments about what justice requires. In particular, there is nothing self-evident about the proposition that democratic theory requires us to subordinate the judgments of today's majorities to the judgments of dead supermajorities. We might reluctantly accept such a conclusion were it the only way we could explain our attachment to constitutional interpretation, but the idea that constitutional norms surpass others as guides to the prudent pursuit of justice permits us to respect the Constitution's authority on the basis of its content, rather than its democratic pedigree. As a result, interpreters must confront the authority of the past more directly. They must invoke their intuitions and values to judge the relative merits of content-based and process-based justifications for constitutional authority.

There are good reasons to resist the pull of process-based justifications. Such theories make a deep concession to the authori-

ty of the past. In principle, that concession might be entirely consistent with the pursuit of justice. Ronald Dworkin's distinction between concepts and conceptions[146] and Bruce Ackerman's distinction between lower- and higher-track politics[147] are both brilliant devices for elevating past principles above past practices. Such devices make it possible to criticize an unjust present in the name of a past that might have been thought even more unjust.

There is, however, reason to doubt the practical efficacy of these devices when they are coupled with constitutional theories that value the past independently of its utility as a means to understanding justice. Dworkin and Ackerman ask Americans to see the past's essence in values critical of past practice—in its justice, rather than its injustice. Self-interest or pessimism may tempt the Constitution's interpreters to the opposite conclusion.

Treating constitutional authority as dependent on the content of constitutional norms fortifies interpreters against that temptation. The constitutional justification developed here insists that we avoid separating justice and history.[148] The justification predicates the constitutional authority of the past on its utility as a guide to the best strategy for establishing justice today. This relationship provides an additional ground for interpreters to respect the insights that Dworkin and Ackerman describe: if we are not persuaded that the past is just, we must entertain the possibility that it does not bind us. That presumption in favor of justice may make the difference between a Constitution destined to shield established interests and a Constitution suited to "form a more perfect Union."[149]

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146. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134–136 (1977) (distinguishing between concepts and conceptions); DWORKIN, *supra* note 36, at 70–72 (reinterpreting this distinction).

147. ACKERMAN, *supra* note 30, at 6–7.

148. For further reflections on the importance of uniting, rather than separating, justice and history, see Eisgruber, *supra* note 24, at 63 (urging that originalism should be a means of pursuing justice, not an alternative to it).

149. U.S. CONST. pmbl.