

## CONSTRUCTED CONSTRAINT AND THE CONSTITUTIONAL TEXT

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### ABSTRACT

*In recent years, constitutional theorists have attended to the unwritten aspects of American constitutionalism and, relatedly, to the ways in which the constitutional text can be “constructed” upon by various materials. This Article takes a different approach. Instead of considering how various materials can supplement or implement the constitutional text, it focuses on how the text itself is often partially constructed in American constitutional practice. Although interpreters typically regard clear text as controlling, this Article contends that whether the text is perceived to be clear is often affected by various “modalities” of constitutional interpretation that are normally thought to come into play only after the text is found to be vague or ambiguous: the purpose of a constitutional provision, structural inferences, understandings of the national ethos, consequentialist considerations, customary practice, and judicial and nonjudicial*

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*precedent. The constraining effect of clear text, in other words, is partially constructed by considerations that are commonly regarded as extratextual. This phenomenon of constructed constraint unsettles certain distinctions drawn by modern theorists: between interpretation and construction, between the written and the unwritten constitutions, and between the Constitution and the “Constitution outside the Constitution.” Although primarily descriptive, this Article also suggests that constructed constraint produces benefits for the constitutional system by helping interpreters negotiate tensions within democratic constitutionalism.*

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## INTRODUCTION

Constitutional theorists are increasingly focused on the nontextual aspects of the U.S. Constitution. Recent work has addressed, for example, the existence in the United States of an “unwritten Constitution,”<sup>1</sup> and, relatedly, the ways in which historical events and precedent can create “constitutional constructions,” as distinct from interpretations of the constitutional text.<sup>2</sup> This effort to look beyond what is canonically regarded as the Constitution is also evident in theories of the “Constitution outside the Constitution,”<sup>3</sup> and in the consideration of unwritten “constitutional conventions.”<sup>4</sup> A common theme in these writings is the way in which various materials, which are sometimes called the “small-c” constitution, supplement, implement, or interact with the constitutional text, which is referred to as the “big-C” Constitution.<sup>5</sup> In developing this theme,

1. *See generally, e.g.*, AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008); Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797; Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935.

2. *See generally, e.g.*, JACK M. BALKIN, *LIVING ORIGINALISM* (2011); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39 (2010); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

3. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1–28* (2010); MARK TUSHNET, *WHY THE CONSTITUTION MATTERS 6–9* (2010). *See generally, e.g.*, Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

4. *See generally* Adrian Vermeule, *Conventions in Court 1* (Harvard Law Sch. Pub. Law Working Paper Grp., Paper No. 13–46), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2354491](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354491) (“In the United States, it has recently become clear that . . . conventions are essential to the operation of the U.S. constitutional regime, including the administrative state.”); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013) (“Constitutional theorists periodically (re)discover that the U.S. constitutional law is heavily based on conventions or unwritten political norms.”) [hereinafter Vermeule, *Conventions of Agency Independence*].

5. For discussions of the distinction between the “small-c” and the “big-C” constitutions, see, for example, ESKRIDGE & FERREJOHN, *supra* note 3, at 1–28; Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082–83 (2013); and Frederick Schauer, *Amending*

these writings generally treat the constitutional text as something analytically separate from whatever makes up the small-c constitution.

This Article, by contrast, focuses on the construction of the text itself in American constitutional practice. Under some accounts of constitutional interpretation, the text plays a minor role. On this view, interpreters may invoke the text rhetorically, but it does not constrain their claims about the Constitution.<sup>6</sup> These critical accounts can be contrasted with strictly textualist theories, which maintain that constitutional interpretation derives its authority from being firmly grounded in the written Constitution. Accordingly, textualists contend, the text must be—and often is—followed, at least when it is clear.<sup>7</sup>

This Article contends that neither account accurately describes American interpretive practice. Textualists are correct in maintaining that, when the constitutional text is perceived to be clear,<sup>8</sup> it operates as a meaningful constraint in interpretive practice—that is, it limits and shapes constitutional argumentation and thereby affects the available courses of action that will be considered constitutional. The perceived clarity of the text, however, is often partially constructed by that practice. More precisely, the perceived clarity of the text is not only a product of typical “plain meaning” considerations such as dictionary definitions and linguistic conventions. Rather, such perceived clarity can also be affected by a variety of other considerations, or “modalities,”<sup>9</sup> that are commonly thought to come

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*the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 156–57 (Sanford Levinson ed., 1995).

6. *See infra* Part I.A.

7. There is no canonical definition of textualism, and textualists vary in the kinds of considerations that they are willing to consider in discerning the meaning of a text. By “strict textualist,” this Article refers to approaches that are open to considering only a narrow range of materials when discerning the “plain meaning” of the text. As discussed in Part III.B.2, some modern variants of textualism are receptive to a broader range of interpretive materials than were earlier variants. Such receptivity reduces the gap between textualism and the account provided here. But textualists are unlikely to acknowledge that all of the modalities discussed in this Article are part of an appropriate textual analysis.

8. More precisely, the text operates as a meaningful constraint when it is perceived to be (i) clear, (ii) applicable, and (iii) comprehensive in the sense that it says all there is to say about a constitutional question. For ease of exposition, this Article refers to clear, applicable, and comprehensive text simply as “clear.”

9. *See infra* Part II.A.

into play only in resolving ambiguities in the meaning of the text.<sup>10</sup> These modalities include reasoning about the purpose of a constitutional provision, structural inferences, understandings of the national ethos, consequentialist considerations, customary practice, and precedent.<sup>11</sup>

After establishing this descriptive claim, the Article considers the implications of constructed constraint for theories of constitutional interpretation and change. Demonstrating that the clarity of the text is partially constructed by the full array of modalities of constitutional interpretation destabilizes the distinction between interpretation and construction, as well as other distinctions that theorists have drawn between the written and unwritten aspects of the Constitution. This Article also responds to potential objections to its account, including the objection that construction is simply the product of nontextual interpretive methodologies. Although methodological commitments might affect the nature and extent of construction in particular instances, this Article contends that the phenomenon is not reducible to particular methodological disputes. Even self-proclaimed textualists cannot help but engage in partially constructing the meaning of the constitutional text.

This Article concludes by sketching a normative defense of constructed constraint. This phenomenon, the Article suggests, is an important way in which interpreters of all sorts (including judges, government officials, and social movements) work out in practice the constitutive tensions between a commitment to the rule of law and a

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10. When this Article refers to “ambiguities” in the text, it does so in the loose way that the Supreme Court often does—that is, as a reference both to situations in which the applicability of the text to particular circumstances is unclear (what legal philosophers would term “vagueness”) and to situations in which the text could mean more than one specific thing (what legal philosophers would term “ambiguity”). See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010). Though the distinction between vagueness and ambiguity is important in some contexts, this distinction is not material for the account of constructed constraint presented here.

11. By focusing generally on participants in American constitutional practice, this Article abstracts from the particular ways in which specific participants—including citizens, social movements, academics, politicians, and judges—interact with the text. There are potential differences among these groups. For example, social movements may, as a general matter, be more willing to “work on” the text than judges. Exploring those differences is beyond the purposes of this Article, which instead emphasizes the similarity that all actors, to some important extent, partially construct a constraining text.

commitment to the Constitution's democratic responsiveness.<sup>12</sup> Relatedly, constructed constraint helps interpreters navigate a path between the “dead hand” problem (concerning the authority of constitutional provisions ratified long ago to bind current generations) and the countermajoritarian difficulty (concerning the legitimacy of having unelected judges override the choices of today's majorities based on judicial interpretations of these provisions). In negotiating these tensions, the practice in turn helps to legitimate the ongoing project of constitutional democracy, both inside and outside the courts.<sup>13</sup>

Part I begins by describing debates from the 1980s between critical theorists working in the area of constitutional law, who were skeptical about the constraining effect of the constitutional text, and other constitutional theorists who hypothesized that the text had a constraining effect, especially when it was perceived to be clear. Part I then describes two recent accounts of why the text might constrain—the “focal point” theory and the “legal fidelity” theory—and argues that neither theory takes adequate account of how the clarity of the constitutional text is itself partly constructed. Part II identifies instances in which participants in American constitutional practice employ other modalities of constitutional interpretation to partially construct a constraining—or unconstraining—text. It uses a variety of case studies to illustrate the phenomenon of construction of textual ambiguity or clarity: the first word of the First Amendment, the extension of equal protection principles to action by the federal government, state sovereign immunity, President Lincoln's suspension of habeas corpus, the creation of West Virginia, and presidential authority to make recess appointments.

Part III considers the implications of constructed constraint for constitutional theory and anticipates several potential criticisms of this account: that it is nonfalsifiable, that it reduces to disputes over methodology, and that it is all construction and no constraint. Part III also offers some preliminary generalizations about the difficult question of when construction, as opposed to constraint, is more or less likely to occur. Finally, this Part suggests some ways that the

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12. For a discussion of these tensions, see Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 25–33 (Jack M. Balkin & Reva B. Siegel eds., 2009).

13. *See infra* Part III.D.

practice of constructed constraint produces normative benefits for the constitutional system as a whole.<sup>14</sup>

### I. FROM WHETHER TO WHY THE TEXT MATTERS

This Part begins by describing scholarly debates in the 1980s, involving (among many other things) skepticism by certain members of the Critical Legal Studies (CLS) movement about whether constitutional interpreters feel constrained by the constitutional text. The CLS perspective appears to have receded since those debates, such that the focus today is less on whether interpreters feel constrained by the text and more on why they regard the text as binding. To illustrate this shift in the terms of the debate, this Part next considers two recent accounts of the role of the text—one by David Strauss and the other by Jack Balkin—both of which assume that clear text is experienced as a constraint, but which offer divergent explanations of why it constrains. As will be explained, both of these theories are rich and illuminating, but neither takes sufficient account of a core insight of the earlier CLS theorists—that a variety of extratextual considerations are likely to affect the perception of whether the constitutional text is clear. Because of this aspect of interpretive practice, the constraining effect of the text is itself partly constructed. One can appreciate this insight without concluding, as certain CLS theorists in the field of constitutional law appeared to believe, that there are no textually understood constraints on constitutional practice. (One can also appreciate this insight without necessarily endorsing the left-wing political ideology with which the CLS movement became associated.) As subsequent parts will show,

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14. The phenomenon of constructed constraint also arises in statutory interpretation. Although this Article touches on statutory interpretation in a few places, its focus is on the role of the constitutional text. Several considerations warrant such a focus, including the age of the Constitution, the difficulty of amending it, the dead hand problems raised by these facts, the countermajoritarian issues raised by judicial review, and the general “nature” of a written constitution (as opposed to a statute). See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget, that it is a *constitution* we are expounding.”). For a recent example of a statutory interpretation decision in which the Court relied on extratextual considerations in determining that the text was unclear, see *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (“In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—‘chemical weapon’—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism.”).

even if constraint itself is ultimately constructed, there are meaningful differences in degree among different kinds of construction.

A. *1980s Debates About Whether the Text Matters*

In the 1980s, there was an active and anxious debate about the role of the text in constitutional interpretation. This debate took place against the backdrop of the CLS movement, which (like the legal realist movement of an earlier generation, from whose insights it drew) was broadly skeptical of formalism in the law, including claims about the determinacy of legal texts.<sup>15</sup> The CLS movement was in turn influenced by the growing interest in textual interpretation during the 1970s in the areas of anthropology, philosophy, and literary theory, especially “hermeneutical” insights into the conditions that make interpretation possible.<sup>16</sup> Of particular significance to CLS scholars (and to some of their critics) was Hans-Georg Gadamer’s theory that all interpretation unavoidably involves a conversation between an interpreter and a text, so that any act of interpretation causes the text to merge with the objectives and perspectives of the interpreter.<sup>17</sup>

An early entrant into the 1980s debate about the constitutional text was the critical legal scholar Paul Brest. In an influential article, Brest coined the term “originalism” to refer to “the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.”<sup>18</sup> Brest critiqued that approach in part by noting that it could not explain

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15. For an introduction to the elements of CLS theory, see generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); see also Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516–37 (1991) (exploring the political aspects of, and political influences on, the CLS movement).

16. See LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 101–31 (1996) (documenting various influences on the CLS movement).

17. See generally HANS-GEORG GADAMER, TRUTH AND METHOD (1975). Looking back in 2000, Robin West wrote that “Hans-Georg Gadamer directly or indirectly set much of the agenda for the entire founding generation of critical legal scholars.” Robin West, *Are There Nothing but Texts in this Class? Interpreting the Interpretive Turns in Legal Thought*, 76 CHI.-KENT L. REV. 1125, 1125 (2000). Other important influences include the writings of the American literary theorist Stanley Fish and leading European “deconstructionist” philosophers such as Jacques Derrida.

18. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980). Brest targeted first-generation originalism, which tended to focus on the original intent of the Framers of the Constitution. By contrast, second-generation originalism, which prevails today, tends to focus on the original semantic meaning of the text of the Constitution. For an overview of the reasons behind and players responsible for this change in emphasis over time, see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378–82 (2013).

much of modern constitutional law. “[I]f you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law,” Brest memorably opined, “originalist sources [have] played a very small role compared to the elaboration of the Court’s own precedents. It is rather like having a remote ancestor who came over on the Mayflower.”<sup>19</sup>

More fundamentally, Brest criticized originalism by invoking “a hermeneutic tradition, of which Hans-Georg Gadamer is the leading modern proponent.”<sup>20</sup> This tradition, Brest explained, “holds that we can never understand the past in its own terms, free from our prejudices or preconceptions.”<sup>21</sup> Given this hermeneutic insight, Brest suggested, one ought to “appreciate the indeterminate and contingent nature of the historical understanding that an originalist historian seeks to achieve.”<sup>22</sup>

Having rejected originalism, Brest argued instead for a non-originalist approach, which would “accord the text and original history presumptive weight, but [would] not treat them as authoritative or binding.”<sup>23</sup> Brest offered as the “touchstone[] of constitutional decisionmaking” this “designedly vague criterion: How well, compared to possible alternatives, does the practice contribute to the well-being of our society—or, more narrowly, to the ends of constitutional government?”<sup>24</sup> That formulation was entirely unsatisfactory—and anxiety provoking—to traditional academic constitutional lawyers who, in the tradition of Herbert Wechsler,<sup>25</sup> Gerald Gunther,<sup>26</sup> and John Hart Ely,<sup>27</sup> sought to defend the idea that law was separable from politics.<sup>28</sup>

Like Brest, Mark Tushnet was critical of both originalism and textualism. Tushnet combined his critiques with skepticism about the perceived constraining effect of the constitutional text. In a 1983

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19. Brest, *supra* note 18, at 234.

20. *Id.* at 221.

21. *Id.* at 221–22.

22. *Id.* at 222.

23. *Id.* at 205.

24. *Id.* at 226.

25. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

26. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3–5 (1964).

27. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 54–55 (1980).

28. See KALMAN, *supra* note 16, at 108–10 (noting critical responses to Brest).

article, he provocatively wrote that “in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants.”<sup>29</sup> Noting that “[t]he significance of the claim . . . turns on the definition of ‘interesting,’” he asserted that “the claim holds even if an ‘interesting’ case is defined as one that some lawyer finds worthwhile to pursue.”<sup>30</sup> Tushnet expanded on this idea two years later in a critique of textualism in constitutional law. Writing in a symposium on interpretation, he argued that even purportedly clear constitutional provisions, like the minimum age requirement and the two-term limit for presidents, could be rendered contestable by resort to purposive construction or other textual provisions.<sup>31</sup>

Because there was no canonical CLS perspective, and because many CLS scholars did not focus on the constitutional text, it is unclear whether and to what extent Tushnet’s claim about the lack of textually perceived constraint was shared by others. In any event, the claim was criticized by non-CLS scholars. Fred Schauer argued, for example, that there were in fact “easy cases” in constitutional law, in part because of the linguistic clarity of the relevant constitutional text.<sup>32</sup> “[L]anguage can and frequently does speak with a sufficiently clear voice,” Schauer said, “such that linguistically articulated norms themselves leave little doubt as to which results are consistent with that command.”<sup>33</sup> As for Tushnet’s contention that any perceived textual clarity can disappear given the right set of facts, Schauer suggested that this “argument from weird cases” did not rebut his claim about easy cases.<sup>34</sup> That it may be “impossible to have an entirely clear constitutional clause,” Schauer wrote, “does not mean that there are no core cases in which an argument on one side would be almost universally agreed to be compelling, and an argument on

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29. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983).

30. *Id.* at 819 n.119.

31. Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686–88 (1985); see also Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985) (“It is possible the age thirty-five signified to the Framers a certain level of maturity rather than some intrinsically significant number of years. If so, it is open to argument whether the translation in our social universe of the clause still means thirty-five years of age.”).

32. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404 (1985).

33. *Id.* at 416.

34. *Id.* at 420.

the other side would be almost universally agreed to be specious.”<sup>35</sup> Tushnet responded by contending that when the political context changes, “the linguistic constraints on which Schauer relies disappear as well.”<sup>36</sup> Cases are “weird,” Tushnet claimed, only “until someone finds it worthwhile to pursue them.”<sup>37</sup>

The extent to which there was a genuine disagreement between Tushnet and Schauer turns in part on how broadly one reads their respective claims. Sanford Levinson, like Tushnet, denied “that any legal text, including the United States Constitution, can be viewed as a meaningful constraint on an adjudicator’s decision.”<sup>38</sup> But Levinson also cautioned against overreading Tushnet. “The brunt of Mark Tushnet’s remarks,” Levinson wrote, “is . . . that anything *can* be called into question, given the right political circumstances, including the presumably ‘clear’ requirement of the Constitution that every state have two Senators,” and he was unsure “whether Schauer genuinely disagrees.”<sup>39</sup> “As I understand him,” Levinson continued, “Tushnet does not argue that every single legal term is up for grabs at every moment, only that every term is *potentially* up for grabs should a clever lawyer, backed by a powerful client, find it useful in a given situation.”<sup>40</sup> As an example, Levinson argued that “even if the fourteenth amendment were not in the Constitution we could be confident that lawyers (and judges) would seize on allegedly more precise patches of text to achieve ends now served by reliance on it.”<sup>41</sup>

By contrast, the liberal political theorist Don Herzog critically described Tushnet as embracing “a freewheeling skepticism, a view in which any text can mean anything we want it to.”<sup>42</sup> Herzog rejected

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35. *Id.* at 422; see also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 191 (1986) (“No text is clear except in terms of a linguistic and cultural environment, but it doesn’t follow that no text is clear. The relevant environment, and its bearing on the specific interpretive question, may be clear.”).

36. Tushnet, *supra* note 31, at 688 n.24.

37. *Id.*

38. Sanford Levinson, *What Do Lawyers Know (And What Do They Do with Their Knowledge)? Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441, 441–42 (1985) [hereinafter Levinson, *What Do Lawyers Know?*]; see also Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 400–01 (1982).

39. Levinson, *What Do Lawyers Know?*, *supra* note 38, at 450–51.

40. *Id.* at 451.

41. *Id.* at 451–52.

42. Don Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609, 629 (1987).

what he regarded as Tushnet's apparent embrace of nihilism, even as characterized by Levinson. "It is not all that consoling," he wrote, "to think that things are up for grabs only when someone wants them to be."<sup>43</sup> Herzog rejected the "stark binary choice" posed by certain CLS writers whereby "either rules times facts equals decisions, or it is all up for grabs."<sup>44</sup>

Also recoiling at assertions of interpretive indeterminacy were scholars within the legal academy who sought to defend an active role for the judiciary in improving American society. A prominent example was Owen Fiss, who decried "a new nihilism"<sup>45</sup> and contended that the hermeneutic insights of other disciplines actually favored his traditionally liberal position. In his insistence that "[a]djudication is interpretation" and that "[i]nterpretation, whether it be in the law or literary domains, is neither a wholly discretionary nor a wholly mechanical activity,"<sup>46</sup> one can see the influence of hermeneutic insights on his thinking:

Viewing adjudication as interpretation helps to stop the slide towards nihilism. It makes law possible. We can find in this conceptualization a recognition of both the subjective and the objective—the important personal role played by the interpreter in the meaning-giving process, and yet the possibility of an inter-subjective meaning rooted in the idea of disciplining rules and of an interpretive community that both legitimates those rules and is defined by them.<sup>47</sup>

For Fiss, the impossibility of sealing off the reader from the text did not drown the law in indeterminacy. On the contrary, it held the power to save the law from the nihilism of an increasing number of legal scholars.

A few years later, Fiss would characterize the CLS movement "as a reaction to a jurisprudence, confidently embraced by the bar in the sixties, that sees adjudication as the process for interpreting and nurturing a public morality."<sup>48</sup> He indicted CLS scholars for rejecting "the notion of law as public ideal" and for instead proclaiming that

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43. *Id.*

44. *Id.*

45. See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740 (1982).

46. *Id.* at 739.

47. *Id.* at 750.

48. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 2 (1986).

“law is politics.”<sup>49</sup> Their basic problem, Fiss insisted, lay in refusing “to take law on its own terms, and to accept adjudication as an institutional arrangement in which public officials seek to elaborate and protect the values that we hold in common.”<sup>50</sup> Fiss saw a critical difference between CLS writers and both the feminists of his day and the legal realists of an earlier day: “Critical legal studies scholars want to unmask the law, but not to make law into an effective instrument of good public policy or equality. The aim of their critique is critique.”<sup>51</sup>

The 1980s debates about the role of the constitutional text eventually receded, as did the CLS movement more generally—although specialized offshoots of the movement persist, such as in the areas of feminist legal theory and critical race theory.<sup>52</sup> Today, most theorizing about the constitutional text assumes that interpreters experience some level of constraint, at least for those aspects of the text that are regarded as clear. The next Section considers two recent theories that attempt to explain why participants in the practice of constitutional interpretation view clear constitutional text as binding.

### *B. Two Recent Accounts of Why the Text Matters*

Today there are two primary accounts of why the constitutional text plays an important role in American interpretive practice: David Strauss’s focal point theory and Jack Balkin’s legal fidelity theory. Both of these accounts reject the critical perspective and accept that clear text is constraining, but they differ about why clear text has this effect. Importantly for present purposes, neither account focuses on the extent to which the perceived clarity of the text is itself

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49. *Id.*

50. *Id.*

51. *Id.* at 10. The legal philosopher Ronald Dworkin had a complex relationship to CLS during the 1980s. On the one hand, Dworkin’s understanding of “constructive” interpretation as “essentially concerned with . . . the purposes . . . of the interpreter,” RONALD DWORKIN, *LAW’S EMPIRE* 52 (1986), seems compatible with CLS claims about the subjectivity of judicial decisionmaking. On the other hand, CLS scholars were hostile to Dworkin’s thesis that “in most hard cases there are right answers to be hunted by reason and imagination.” *Id.* at viii–ix. He in return criticized those CLS scholars who “may want to show law in its worst rather than its best light, to show avenues closed that are in fact open, to move toward a new mystification in service of undisclosed political goals.” *Id.* at 275. This criticism was similar to Fiss’s charge that “[t]he aim of their critique is critique.” Fiss, *supra* note 48, at 10.

52. The current prominence of ideological explanations of Supreme Court decisionmaking is also consistent with certain CLS claims. *See generally, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

constructed. This Section describes and identifies some of the limitations of these accounts.

1. *Focal Point Theory.* David Strauss's book, *The Living Constitution*, provides a good explanation of the focal point theory of the importance of the constitutional text. In arguing for "common law constitutionalism," Strauss recognizes that constitutional interpreters must not purport to contradict the text of the Constitution.<sup>53</sup> Strauss accounts for the exalted status of the text by offering a "common ground justification."<sup>54</sup> His explanation is that the text performs a settlement function. It is sometimes "more important that things be settled than that they be settled right, and the provisions of the written Constitution settle things."<sup>55</sup> In Strauss's view, the text is treated as binding because of "the practical judgment that following this text, despite its shortcomings, is on balance a good thing to do because it resolves issues that have to be resolved one way or the other."<sup>56</sup>

Under Strauss's focal point account, "by and large, the text matters most for the least important questions."<sup>57</sup> For example, in commenting on the Supreme Court's decisions concerning the separation of powers, Strauss observes that the Court has relied on the text for technical issues, but has "acted more like a common law court" in more significant cases.<sup>58</sup> "When the stakes are high," Strauss claims, the settlement function of the text is less significant because "it is more important to settle the matter right."<sup>59</sup>

Notwithstanding his view that the text matters most when the issue matters least, Strauss stresses the awareness of participants in the constitutional practice that if the text became less sacrosanct, it would no longer serve as common ground, and all manner of settled

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53. See STRAUSS, *supra* note 2, at 103 (describing as "one of the absolute fixed points of our legal culture" that "[w]e cannot say that the text of the Constitution doesn't matter"). For earlier expressions of his views, see generally David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Common Law*].

54. See STRAUSS, *supra* note 2, at 111.

55. *Id.* at 102.

56. *Id.* at 105.

57. *Id.* at 110.

58. *Id.*

59. *Id.* at 111. Cf. Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 39 (1934) ("Where it makes no important difference which way the decision goes, the Text—in the absence of countervailing practice—is an excellent traffic light.").

questions would be up for grabs. “We do not ‘overrule’ the text,” Strauss explains, “because any such overruling would jeopardize the ability of the text to serve as a generally accepted focal point.”<sup>60</sup> Otherwise, disputes could “spin out of control and create serious social divisions.”<sup>61</sup>

There is undoubtedly some truth to the idea that constitutional text serves as a focal point. Indeed, the public has access to much of the text in a way that it does not for many other legal materials, such as the more than 550 volumes of Supreme Court precedent.<sup>62</sup> Even so, this account seems incomplete in several respects. As an initial matter, there is tension between Strauss’s claim that text generally matters only for the least important issues and his claim that participants in the constitutional system recognize that it would be problematic for the stability of the system to allow deviations. If the issue is unimportant, it is difficult to see how questioning it would produce serious social division or would lead to an unraveling of understandings on more important issues.<sup>63</sup> Furthermore, contrary to his claim that the text is relied upon as a constraint primarily for matters of low importance, the Supreme Court at times has invoked the text to invalidate major innovations in the distribution of authority between Congress and the president, such as the legislative veto in *INS v. Chadha*<sup>64</sup> and the line item veto in *Clinton v. City of New York*.<sup>65</sup>

Moreover, Strauss’s account does not seem to sufficiently distinguish the status of the text from that of certain other forms of constitutional authority. Judicial precedents, for example, may serve a

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60. Strauss, *Common Law*, *supra* note 53, at 911; *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376 (1997) (“Without a written constitution as a stabilizing force, there is a risk that too many issues needing at least intermediate term settlement will remain excessively uncertain.”).

61. STRAUSS, *supra* note 2, at 105.

62. *Cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public.”). On the other hand, the proverbial person in the street may know more about the rights protected in *Brown*, *Miranda*, and *Roe* than she does about much of the constitutional text.

63. *Cf.* Akhil Reed Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 198, 201 (2013) (noting tension between Strauss’s focal point account and his view of the minor role of the text).

64. *INS v. Chadha*, 462 U.S. 919 (1983).

65. *Clinton v. City of New York*, 524 U.S. 417 (1998).

focal point or settlement function that is similar to the function Strauss attributes to the text. Revisiting precedents that have long been deemed settled, like disregarding the text, “takes time and energy” and “can spin out of control and create serious social divisions.”<sup>66</sup> Indeed, given Strauss’s belief that most of the important aspects of modern constitutional law are not based on the text, the danger of unsettling the law would seem to be greater from questioning precedent than from questioning the text. The same can potentially be said of unwritten “constitutional conventions,” which, like text and precedent, can serve as an important focal point.<sup>67</sup>

In Strauss’s defense, the text may be a better focal point than judicial precedent, at least as a general matter. This is because the text is much harder to amend—and participants know this. To amend precedent, one must (at most) change the Court’s composition in a decisive and desired way. (This assumes, as seems accurate, that *stare decisis* is relatively weak in constitutional cases.) By contrast, textual amendments must run the Article V gauntlet. Over the course of American history, there have been many more changes in constitutional law through partisan entrenchment than through constitutional amendment.<sup>68</sup>

Even if the text is generally a better focal point than precedent, however, a focal point approach does not seem sufficient to distinguish the status of the two. No matter how much of a focal point function certain precedents perform, most constitutional interpreters deem it permissible, at least in principle, for the Court to revisit almost all of them (and for other interpreters to urge the Court to revisit them). By contrast, no portion of constitutional text is so regarded despite whatever focal point function it performs.<sup>69</sup> Rather, an amendment is deemed necessary to overcome text that is perceived to be clear. If the text were only a focal point, then it would be entitled only to presumptive weight (as the CLS scholar Paul Brest

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66. STRAUSS, *supra* note 2, at 105.

67. See Vermeule, *Conventions of Agency Independence*, *supra* note 4, at 1192.

68. See generally Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489 (2006) (discussing these changes); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *V.A. L. REV.* 1045 (2001) (same). Between 1789 and 2004, the Supreme Court overruled 208 constitutional precedents in 133 cases. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 9 (2008).

69. See Schauer, *supra* note 32, at 437 (noting that “precedents can be discarded if necessary in a way that textual language cannot”).

had argued<sup>70</sup>), and deviations from the text would be permissible if the stakes were high enough. Yet, as Strauss himself acknowledges, “one of the absolute fixed points of our legal culture is that we cannot do that.”<sup>71</sup> The reasons *why* the constitutional text is such a fixed point in the United States are difficult to determine, and any explanation would presumably need to engage with historical and sociological aspects of American constitutionalism. The key point for present purposes is that the text operates differently in American interpretive practice than does precedent.

A focal point explanation of the role of the constitutional text would also require a more detailed account than Strauss offers of the incentives of various interpreters to maintain the text as a focal point. Such an account, to be persuasive, would need to include an explanation of how participants overcome obvious collective action problems, both at a particular time and over time.<sup>72</sup> It may be that, *contra* Strauss, participants in the practice overcome collective action problems not simply for self-interested reasons, but also through a process of norm internalization that emphasizes the constraining quality of constitutional text that is deemed clear.<sup>73</sup>

In sum, no matter what the stakes, it is not an acceptable move in American constitutional discourse to argue that the constitutional text may lawfully be disregarded,<sup>74</sup> whereas it is an acceptable move

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70. See *supra* text accompanying note 23 (quoting Brest, *supra* note 18, at 205).

71. STRAUSS, *supra* note 2, at 103; see also Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 FORDHAM L. REV. 1435, 1446 (1997) (describing “a deep-seated cultural commitment to written constitutionalism in this country”); Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2016 (2012) (reviewing BALKIN, *supra* note 2, and STRAUSS, *supra* note 2) (“[T]he focal-point account of the Constitution does not fully capture the role the Constitution plays in American life.”); Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975, 994 (2009) (“Explanations of constitutional law as just a system of equilibria involving purely self-interested actors cannot account adequately for the law’s insistent claims to normative authority.”).

72. Collective action problems are ones in which individually rational conduct leads to collectively irrational results. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117, 135–44 (2010).

73. For discussions of the relationship between law and norm internalization, see generally, for example, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006), and Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000).

74. There have been occasional suggestions that necessity trumps the Constitution, particularly by interpreters with a relatively narrow view of the scope of federal power. See, e.g., Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 418 (Andrew A. Lipscomb ed., 1904) (“A strict observance of the written laws is

to argue that a judicial precedent (or nonjudicial precedent) should be overturned, even if it is well settled.<sup>75</sup> A common law approach seems unable to make sufficient sense of the special importance of the text in constitutional practice. The text is more than a common ground or convenience, and certain parts of it are not subject to change via common law methods. The text, when it is deemed clear, is characteristically regarded as binding law that may legitimately be changed only through a formal amendment. The socialization of lawyers and the public, as well as elite audience costs, seem to disallow open disregard of the constitutional text to a degree that seems distinct from other constitutional materials.<sup>76</sup>

Constitutional text seems special in other ways as well. For example, one feature of the role of the text in interpretive practice is that, as Michael Dorf has noted, it tends to crowd out freestanding claims of constitutional custom.<sup>77</sup> This is not an inevitable effect of having a legal text. Under international law, custom is a freestanding

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doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”). But such claims are rare. The effect of exigency on perceptions about whether the constitutional text is clear or ambiguous is explored in Part II.D.

75. One might object that the constitutional text is sometimes disregarded, as a practical matter, through judicial nonenforcement or underenforcement. For example, the Supreme Court has long held that Article IV, Section 4’s guarantee to each state of a republican form of government presents a political question and so may not be enforced by the judiciary. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). There is a difference, however, between judicial unwillingness to enforce the text because of perceived limits on judicial authority or capacity and affirmative endorsement of government action perceived to be contrary to the text. When the Court declines to enforce the text, it is not claiming that the text may lawfully be disregarded.

76. *Cf.* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 708 (2011) (“[I]t is an indisputable feature of constitutional practice that the text is taken to be authoritative within its domain. That domain is limited, but significant.”); *id.* at 709 (“More broadly, our commitment to the text creates a discursive requirement that all constitutional norms and arguments be couched as ‘interpretations’ of the big-C Constitution.”); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 384 (1981) (“For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration. It is our master rule of recognition, one initially so intended and understood and one which our ‘tradition’ in fact continues to perpetuate.”).

77. *See* Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69 (Matthew D. Adler & Kenneth Einar Himma eds., 2009). It is possible, however, that certain customary practices assume constitutional status as claims on the constitutional structure, which are asserted to supplement the text. For discussions of structural reasoning, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969), and PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION ch. 6 (1982).

source of law that can operate not only in conjunction with written treaty text, but even in opposition to it. For example, in the 2013 debate over possible military intervention in Syria, the British government claimed that the general ban on the use of force in the U.N. Charter had been modified (or was in the process of being modified) by a narrow customary exception for humanitarian intervention.<sup>78</sup> By contrast, a claim of customary override of the text is almost never made in U.S. constitutional discourse.<sup>79</sup>

In fact, even freestanding customary claims that do not contradict the text are unusual in the discourse. To take one example, the text of the Constitution is silent about whether the president may unilaterally terminate treaties (which require two-thirds senatorial consent in order to be ratified).<sup>80</sup> Substantial modern customary practice supports such unilateral presidential authority, and the Executive Branch unsurprisingly refers to it—but it does so as a purported “gloss” on the phrase “executive Power” in Article II,<sup>81</sup> not as a freestanding claim of customary constitutional law.<sup>82</sup> Strauss may miss some of these interpretive practices because his common law constitutional theory focuses on the courts, even as he makes passing reference to nonjudicial precedent. It seems likely, however, that the text can affect both what gets brought to the courts and how constitutional law develops outside the courts.<sup>83</sup>

Finally, the special nature of the constitutional text is implicitly reflected in certain debates in constitutional theory about constitutional change—for example, responses to Bruce Ackerman’s influential theory of “constitutional moments” as valid non–Article V

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78. See Chemical Weapon Use by Syrian Regime—UK Government Legal Position (Aug. 29, 2013), <http://i2.cdn.turner.com/cnn/2013/images/08/29/chemical-weapon-use-by-syrian-regime-uk-government-legal-position.pdf>.

79. See, e.g., AMAR, *supra* note 1, at xii (“[T]he written Constitution itself operates on a higher legal plane, and a clear constitutional command may not as a rule be trumped by a mere case, statute, or custom.”).

80. See U.S. CONST. art. II, § 2.

81. See U.S. CONST. art. II, § 1.

82. See Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI-KENT L. REV. 177, 192 (1988) (“[J]udges sometimes admit that constitutional interpretation is sensitive to historical evolution and that history adds a ‘gloss’ on the text. But they never admit to deriving the authority for their decisions from outside the constitutional text . . . .”); see generally Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 815–16 (2014).

83. Cf. Schauer, *supra* note 32, at 408–14 (looking beyond litigation for “easy cases” by noting, among other things, the many matters that are never pursued beyond the lawyer’s office).

amendments.<sup>84</sup> Critics of Ackerman's theory tend to be more comfortable with the idea of changing interpretations of an unchanging constitutional text (until properly amended via Article V) than they are with the idea of unwritten amendments to the text, even though the practical effect of the two may be similar.<sup>85</sup> This response appears to reflect a belief that, even if malleable, the constitutional text operates as a constraint on politics and that it will lose this characteristic if it can be amended informally.

2. *Legal Fidelity Theory.* Jack Balkin's book *Living Originalism* provides a different account of the constraining nature of the constitutional text. In arguing for "framework originalism," Balkin contends that the Constitution provides "an initial framework for governance that sets politics in motion."<sup>86</sup> Framework originalism is a mostly underdeterminate decisional approach. It requires fidelity to, and only to, the framework—to the original semantic meaning of "the rules, standards, and principles stated by the Constitution's text."<sup>87</sup> Balkin distinguishes his theory from "skyscraper originalism,"<sup>88</sup> which is what most people imagine when they imagine originalism. Skyscraper originalists make much greater demands on the present by requiring fidelity to original intentions, purposes, or expected applications, even when they purport to care only about semantic meaning.<sup>89</sup>

In Balkin's view, regarding oneself as bound by *more* than the framework renders one unable to explain the American constitutional tradition, including its greatest achievements. On the other hand, regarding oneself as bound by *less* than the framework leads to the difficulty presented by Strauss's account of common law

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84. See generally BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS (1998); BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

85. See generally, e.g., Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 (1994); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

86. BALKIN, *supra* note 2, at 3.

87. *Id.* at 3; see also *id.* at 45.

88. *Id.* at 21–23.

89. See *id.* at 104 ("[T]oday's original meaning originalists often view original expected applications as very strong evidence of original meaning . . . . Hence, even though conservative originalists may distinguish between the ideas of original meaning and original expected applications in theory, they often conflate them in practice.").

constitutionalism: viewing the text as a mere focal point does not explain its special role. As Balkin notes, “Once we recognize that precedents are focal points too, the focal-points theory does not really explain why courts cannot change the hard-wired rules of the Constitution through common law adjudication.”<sup>90</sup> Of course, a court may be concerned that an open disregard of the text would place greater strain on its legitimacy. As Balkin points out, however, “this simply raises the deeper question of why the public and politicians alike assume that we should not be able to change the constitutional text by common law methods of judicial decision.”<sup>91</sup>

Compared with Strauss’s living constitutionalism, Balkin’s framework originalism makes better sense of widely shared convictions about the constitutional text—namely, that like properly enacted statutes of long duration, it is binding law, so that one is not free to ignore it when it is regarded as clear.<sup>92</sup> Contrary to some CLS claims in the 1980s,<sup>93</sup> almost no one would be persuaded by a “purposive” (re)construction of the various clauses imposing age qualifications for federal offices—for example, a claim that someone under the age of thirty-five could be elected president as long as he or she had a certain level of maturity, or a claim that the age requirement is actually higher than thirty-five because, with increasing longevity, people tend to mature more slowly today. Of course, the text itself does not logically preclude such an argument—the text itself is just marks on a page.<sup>94</sup> Rather, the argument is unpersuasive because of a complicated and somewhat mysterious set of norms and assumptions that seem largely taken for granted in the American interpretive practice, such as the rule-oriented function of numbers in legal texts and the perceived desirability of having a

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90. *Id.* at 53.

91. *Id.* at 53–54.

92. See Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 810 (1982) (“A theory of constitutional language is incomplete if it does not recognize the way in which a text is authoritative—the way in which we treat the Constitution, but not, for example, the Declaration of Independence or the Mayflower Compact, *as law.*”); see also Neil S. Siegel, *Jack Balkin’s Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. 931, 947 (2013) (arguing that Balkin better accounts for these widely shared convictions about the text than does Strauss).

93. See *supra* note 31 and accompanying text.

94. Cf. Frank H. Easterbook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (“The philosophy of language, and most particularly the work of Ludwig Wittgenstein, has established that sets of words do not possess intrinsic meanings and cannot be given them . . . .”) (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL EXPLANATIONS* §§ 138–242 (1953)).

bright-line approach to issues like candidate qualifications. It may be possible to imagine highly unusual circumstances in which those norms and assumptions could be altered, but they would not change merely because “some lawyer finds [it] worthwhile to pursue” a different course of action.<sup>95</sup> (The conditions under which construction of the text is more or less likely are explored further in Part III.C.)

Similarly, as much as scholars like Sanford Levinson lament various structural features of the Constitution, they do not argue that we are free to ignore them—to abolish via statute, say, the Electoral College, the equal representation of the states in the Senate, or the president’s veto power. On the contrary, Levinson’s concerns spring from the recognition that, because the text is regarded as clear on these matters, he cannot responsibly advocate that ignoring clear text is consistent with legality.<sup>96</sup> (Whether this recognition is consistent with Levinson’s claims about textual indeterminacy during the 1980s is another question.<sup>97</sup>) Similarly, conservatives who complain about certain features of the constitutional text, such as the Seventeenth Amendment, assume that their only option is to persuade enough other Americans to amend the text formally.<sup>98</sup>

In accord with Balkin’s account, the reason these issues are not revisited is that the text is understood to settle them. The reason is not, as Strauss’s account suggests, that they are viewed as unimportant or that there is a tacit understanding that revisiting them would be harmful to the constitutional system. The text seems to matter even when the issues matter.

But Balkin’s account, too, has its limitations. The special role of the text in interpretive practice requires more of an explanation than the claim that “the text continues in force today because it is law.”<sup>99</sup> As Strauss notes, there are different conceptions of law, and although an authoritative text may be central under a “command conception”

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95. See Tushnet, *supra* note 29, at 819 n.119.

96. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 173 (2006) (suggesting constitutional amendments and a more general constitutional convention to revise the text); see also Rapaczynski, *supra* note 82, at 202 (“Vague as the seventh amendment may be, every lawyer knows that a judiciary reform akin to that adopted in Britain, which for all practical purposes abolished the jury in civil cases, could not pass muster in the United States, even in the face of very strong evidence that the present system is less accurate or more wasteful than the alternative.”).

97. See *supra* text accompanying notes 38–40.

98. See generally, e.g., MARK R. LEVIN, THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC (2013).

99. BALKIN, *supra* note 2, at 55.

of law (which envisions law as emanating from a central sovereign source), it is much less central to customary and common law conceptions.<sup>100</sup> More fundamentally, as the legal philosopher H.L.A. Hart explained, the extent to which particular materials are viewed as law turns on the relevant community's rules of recognition.<sup>101</sup> It may be correct to say, as Balkin does, that the American interpretive community views the constitutional text as a particularly sacrosanct form of law, but this observation does not itself explain *why* that is the case.

The particular role of the constitutional text in American interpretive practice (like other features of the practice) may be historically contingent, as H. Jefferson Powell has argued.<sup>102</sup> Relatedly, it is possible that constitutional text plays a less significant role in the interpretive practices of some countries than it does in the United States.<sup>103</sup> If so, then the role of the constitutional text does not follow automatically from the idea of fidelity to law, which many nations share—including nations like the United Kingdom, New Zealand, and Israel, which lack written constitutions.<sup>104</sup> Moreover, as noted above, international law has an extensive amount of written law (in the form of treaties), and yet it is understood that such written law can in theory be superseded by customary norms.<sup>105</sup>

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100. See STRAUSS, *supra* note 2, at 36–38.

101. See H.L.A. HART, *THE CONCEPT OF LAW* 94–99 (2d ed. 1994); see generally *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (applying the concept of the rule of recognition to U.S. constitutional law); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 33 (2000) (“Of course, any document can *claim* to be supreme law. Something more is needed to make it so. That something, according to legal positivists, is social convention.”).

102. See H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 6 (2005) (“Constitutional law is historically conditioned and politically shaped.”).

103. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1809–10 (2005) (“Many countries have had written constitutions that appeared on paper to meet high moral standards but that were ignored in practice or otherwise rendered meaningless through interpretation.”); David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 870 (2013) (defining “sham constitutionalism” as “[t]he failure to perform upon self-imposed, publicly proclaimed commitments”; attempting to measure empirically the robustness of this phenomenon; and finding that (among many other things) Africa and Asia are home to a substantial majority of the world’s sham constitutions).

104. See, e.g., Levinson, *supra* note 76, at 709 (“Some countries have a constitutional system that is based largely on unwritten conventions and not on a single, sanctified text. Other countries have official, parchment constitutions that are mostly or entirely ignored.”).

105. See *supra* text accompanying note 78. Nor does the existence of a written constitution compel an originalist approach to constitutional interpretation. See generally Andrew B. Coan,

There is another potential problem with Balkin's account that is even more salient for present purposes. Framework originalism, Balkin suggests, involves applying the original semantic meaning of the constitutional text. He explains that this enterprise produces results that are largely in accord with the convictions of Americans living today, rather than those long gone, because the semantic meaning of the text often sounds in principles or standards rather than rules. When applying the text, Balkin writes, post-Founding interpreters have in effect been delegated substantial discretion to flesh out the meaning of the Constitution in practice. This account, however, does not sufficiently consider the extent to which American interpretive practice stretches the text or adopts workarounds that render it less important.<sup>106</sup> Interpreters do not simply apply the semantic meaning of the text, and they do not necessarily take the text as given. To return to Balkin's metaphor of building out a preset framework, sometimes interpreters instead shift to an alternative foundation. Thus, whereas Strauss's account seems to give too little weight to the text, Balkin's account seems to give too much.

Indeed, Balkin's insistence that participants in the practice adhere to original semantic meaning is in tension with his recognition of the importance of citizens and social movements in constitutional development. Balkin's account seeks to explain "how the entire system of constitutional construction—including the work of the political branches, courts, political parties, social movements, interest groups, and individual citizens—is consistent with democratic legitimacy."<sup>107</sup> By describing citizens and social movements as engaged in "construction," Balkin assumes fidelity to the original framework, because construction, under his theory, takes place on the framework. The difficulty for Balkin's account is that successful social

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*The Irrelevance of Writtness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1067 (2010) (arguing that a comparative examination of the legal regimes in other countries establishes "that originalism is nothing like the dominant approach among large, well-functioning constitutional democracies").

106. See STRAUSS, *supra* note 2, at 106–11; see also Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503 (2009) (observing that when "[f]inding some constitutional text obstructing our ability to reach a desired goal, we work around that text using other texts—and do so without (obviously) distorting the tools we use").

107. See BALKIN, *supra* note 2, at 279.

movements may have little idea about, or interest in, the original semantic meaning of the constitutional text.<sup>108</sup>

For example, many political advocates for gun rights invoke the text of the Second Amendment, but they presumably know little or nothing about the original meaning of the Second Amendment. Likewise, many political advocates for gay rights invoke the text of the Equal Protection and Due Process Clauses, but they presumably know little or nothing about the original meaning of these clauses—let alone the equal protection component of the Fifth Amendment's Due Process Clause.<sup>109</sup> Notwithstanding such ignorance on questions of original meaning, the activities of these advocates and those of their adversaries have greatly affected the constitutional understandings that enter public discourse and, eventually, judicial decisions. Balkin's living constitutionalist theory of constitutional change can account for this phenomenon only if he insulates his living constitutionalism from his framework originalism, and only if he ties his living constitutionalism to the bare text—which social movements do know and routinely invoke—shorn of its original semantic meaning. To be descriptively accurate about the practice of American constitutional interpretation, in other words, Balkin must give up his originalism.

### C. *Omissions in the Present Debate*

Although Strauss's focal point theory and Balkin's legal fidelity theory both offer important insights about the role of the constitutional text, they also share an important limitation. Neither sufficiently acknowledges the extent to which the perceived clarity of the text is not only a product of traditional "plain meaning" considerations such as dictionary definitions and linguistic conventions, but can also be affected by considerations that are commonly thought to come into play only in resolving textual ambiguities. In this regard, these accounts are somewhat like those of the textualists and originalists whom CLS scholars critiqued in the 1980s, with the important difference that Balkin and Strauss view the

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108. See Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 394–95 (2007); Dorf, *supra* note 71, at 2043, 2055; Siegel, *supra* note 92, at 937–38.

109. See Siegel, *supra* note 92, at 938. For a discussion of the Supreme Court's extension of the equal protection guarantee to conduct by the federal government, see *infra* Part II.C.

text, even when clear, as resolving relatively little of significance to modern constitutional debates.<sup>110</sup>

This Article contends that it is important to investigate not only why American interpreters regard themselves as bound by constitutional text that they deem clear (which Strauss and Balkin seek to explain), but also what factors affect perceptions of textual clarity (which they do not pursue). The constitutional text is not merely a fixed structure to be built upon, to use Balkin's metaphor. Rather, the text is also something that is itself partly constructed and reconstructed. The next Part uses a variety of case studies to illustrate the phenomenon that this Article calls "constructed constraint."

## II. CONSTRUCTING TEXTUAL AMBIGUITY OR CLARITY

Participants in American constitutional practice typically agree that, when the constitutional text is clear, it is controlling. They often debate, however, whether the text is clear and, to the extent that it is not, what should be consulted in resolving textual ambiguities. What these debates obscure is that the perception of clarity or ambiguity is itself often affected by interpretive considerations that are commonly thought to be extratextual. In other words, the clarity of the constitutional text is partly constructed in American interpretive practice. To illustrate the construction of textual ambiguity or clarity, this Part presents a variety of case studies, some involving individual rights and others involving constitutional structure.<sup>111</sup>

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110. See also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1196 (1987) ("One reason we see relatively few arguments from the text is that the language of the Constitution, considered as a factor independent from the other kinds of argument familiar in constitutional debate, resolves so few hard questions.").

111. An analogous issue arises regarding the *Chevron* doctrine in administrative law. That doctrine is often described as having two steps. First, a court determines whether a statute that is administered by an agency is clear. If so, the court simply applies the statute, even if contrary to the agency's interpretation. If the statute is unclear, however, the court proceeds to the second step and considers whether the agency reasonably construed the ambiguous language in the statute. Some commentators have noted that, for purposes of step one, factors other than the semantic meaning of the text can affect the perception of textual clarity. See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2106 (1990) ("Whether there is ambiguity—the nominal trigger for deference under *Chevron*—is a function not 'simply' of text, but of text as it interacts with principles of interpretation, some of them deeply engrained in the legal culture or even the culture more generally."); cf. Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) (understanding *Chevron* not as involving two steps but as involving "a single inquiry into the reasonableness of the agency's statutory interpretation"). Of less relevance here, some

The suggestion that the clarity or ambiguity of the constitutional text is partially constructed by interpretive practice is consistent with some of the claims about interpretation made by CLS scholars in the 1980s, as discussed in Part I.A. But the phenomenon described in this Part, it should be emphasized, is one of constructed *constraint*. As the case studies show, for any given issue there are limits on the extent to which textual clarity is subject to extratextual construction. As discussed in Part III.B.3, moreover, a number of important constitutional provisions appear to be subject to construction only in the most extraordinary circumstances.

#### A. *Modalities of Constitutional Interpretation*

Philip Bobbitt, in his 1982 book *Constitutional Fate*, identified six “modalities” of constitutional argument that participants in American constitutional practice—from the time of the Marshall Court to the present—have invoked as authority to support their favored interpretations of the Constitution.<sup>112</sup> Bobbitt’s catalogue has proven enormously influential. For example, it has been taught in American law schools, either explicitly or implicitly, to generations of law students.<sup>113</sup>

In Bobbitt’s rendition, *textual* arguments rely on the language of the text of the Constitution, as well as the rules for interpreting constitutional texts (as opposed to other kinds of legal texts, especially statutes). *Historical* arguments appeal either to preratification history (such as debates over whether to ratify the Constitution) or to postratification history (such as arguments from tradition, historic governmental practices, or societal changes). *Structural* arguments examine the constitutional text (or a part of the constitutional text) as a whole, drawing inferences from the theory and structure of government created by the Constitution in order to discern how the constitutional system is supposed to function in

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commentators argue that there is now a “Step Zero” to determine whether the agency action falls within the domain of what *Chevron* covers. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2007) (“But in the last period, the most important and confusing questions have involved . . . *Chevron* Step-Zero—the initial inquiry into whether the *Chevron* framework applies at all.”).

112. See generally BOBBITT, *supra* note 77; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1993) (identifying and applying his six modalities of constitutional argument).

113. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 53–59 (5th ed. 2006) (using Bobbitt’s typology to identify the kinds of constitutional arguments invoked by Chief Justice Marshall in *McCulloch v. Maryland*).

practice. *Ethos* arguments tell a story about national identity; they typically take a narrative or historical form and ask whether a given interpretation of the Constitution exhibits fidelity to the meaning or destiny of the country, its deepest cultural commitments, or its national character. *Prudential* or consequentialist arguments identify the good or bad social consequences of an interpretation. *Precedential* arguments offer the existence of previous decisions, either of past political practice or past judicial rulings, as justifying a certain outcome in a later case.

As illuminating as Bobbitt's typology is, there are at least two reasons not to be strictly bound by it. First, Bobbitt's typology omits certain modalities. For example, invocations of the *purpose* of a constitutional provision warrant separate treatment because they are distinguishable from both the textual modality and the structural approach. Purposivism shares with textual interpretation a focus on particular constitutional provisions, but there can be tensions between "plain meaning" arguments and purposive arguments, as textualists are quick to point out.<sup>114</sup> In addition, purposivism shares with structural interpretation a concern with the proper functioning of the constitutional system, either in whole or in part, but purposivism is clause-bound in a way that structural argumentation is not.<sup>115</sup>

Second, Bobbitt groups together certain kinds of constitutional arguments that warrant being separated. Judicial and political precedent are both forms of precedential reasoning, but they are significantly different forms. With customary political branch practice, unlike U.S. Supreme Court precedent, a single prior action or decision generally does not warrant deference in constitutional interpretation. Instead, the search is typically for longstanding patterns of behavior by the political branches. Similarly, it is not obvious that preratification and postratification history are best

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114. See generally, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) [hereinafter Manning, *What Divides*].

115. There may be other modalities. For example, the Supreme Court sometimes has considered the authority typically possessed by nations in the international community when construing the constitutional authority of Congress or the president in foreign affairs. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) ("The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective.").

considered jointly and distinguished from textual argument. Originalists, for example, are likely to accept the former but not the latter as relevant to textual interpretation, especially if the postratification practice occurs long after the Founding.<sup>116</sup>

Whatever the right list, the modality of textual argumentation is typically considered distinct from the other modalities. Nontextual modalities can appropriately be considered, according to the orthodox view, only to resolve ambiguities in the text. The Supreme Court has endorsed this proposition in numerous decisions.<sup>117</sup> Moreover, when dissenting opinions invoke the proposition, the majority does not contest it; instead, the majority typically argues that the text is unclear or inapplicable.<sup>118</sup> The proposition that clear text is controlling has rhetorical power precisely because of the widely shared assumption that it is an essentially incontestable principle of American constitutional interpretation.

The examples below reveal, however, that this standard bifurcation between clear and unclear text tends to overlook an

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116. Some originalists may accept the proposition that postratification practices helped to “liquidate” certain ambiguities in the text of the Constitution. *See generally, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003). For a critical analysis of the concept of liquidation, see Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. (forthcoming).

117. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 8 n.7 (1957) (plurality opinion) (“This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning.”); United States v. Sprague, 282 U.S. 716, 731–32 (1931) (“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.”); Lake Cnty. v. Rollins, 130 U.S. 662, 670 (1889) (“[W]hen the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.”); Ogden v. Saunders, 25 U.S. 213, 302–03 (1827) (“If this provision in the constitution was unambiguous, and its meaning entirely free from doubt, there would be no door left open for construction, or any proper ground upon which the intention of the framers of the constitution could be inquired into: this Court would be bound to give to it its full operation, whatever might be the views entertained of its expediency.”). Similarly, in the Supreme Court’s recent recess appointments decision discussed below in Part II.F, no Justice suggested that extratextual considerations such as historical practice could trump clear text. Rather, the two coalitions disagreed about whether the text was clear and about the extent to which extratextual considerations should inform the interpretation of ambiguous text.

118. *Compare, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 (1996) (Souter, J., dissenting) (“[P]lain text is the Man of Steel in a confrontation with ‘background principle[s]’ and ‘postulates which limit and control.’”) (citations omitted), *with id.* at 69 (Rehnquist, J., majority opinion) (“The dissent’s lengthy analysis of the text of the Eleventh Amendment is directed at a straw man . . .”). *See also infra* Part II.F (discussing the Supreme Court’s decision in *Noel Canning*).

important aspect of American interpretive practice: the same considerations that are potentially relevant in resolving the meaning of ambiguous text can also affect the perceived clarity of the text in the first instance. Although it is not possible to determine the extent of this phenomenon through a limited series of examples, the ones discussed below reflect mainstream and significant areas of constitutional law. Moreover, each of these examples illustrates the influence of multiple modalities. As a result, it seems fair to conclude that the phenomenon described here, even if its precise frequency is uncertain, is an important and recurring feature of U.S. constitutional practice. To the extent that accounts of American interpretive practice fail to incorporate this phenomenon, they are incomplete.<sup>119</sup>

The examples that follow illustrate how a variety of modalities come into play, often in an interactive fashion, in constructing understandings about clarity and ambiguity in the constitutional text. Some of these examples involve the interpretation of specific words in

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119. This account bears some resemblance to Richard Fallon's "constructivist coherence" theory of constitutional interpretation, although the objectives and natures of the two projects are distinct. Fallon's theory aims "to supply a needed structure to decisionmakers struggling with difficult constitutional issues." Fallon, *supra* note 110, at 1269. Specifically, Fallon seeks to help decisionmakers solve "the commensurability problem"—that is, "the problem of how different kinds of constitutional argument are appropriately combined and weighed against each other within our constitutional practice." *Id.* at 1285. According to Fallon's influential theory, it typically is possible for constitutional interpreters to achieve "constructivist coherence," a Rawlsian reflective equilibrium in which the various modalities influence one another or, occasionally, cause reassessments, with the result that interpreters are able to come to rest on a particular outcome. When such an effort to achieve coherence fails, Fallon's theory calls for assigning "the categories of argument . . . a hierarchical order in which the highest ranked factor clearly requiring an outcome prevails over lower ranked factors." *Id.* at 1191. Fallon concludes that "the implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the framers' intent, constitutional theory, precedent, and moral and policy values." *Id.* at 1193–94. Because he wants to show how the commensurability problem can be solved, Fallon focuses on the substantial interrelatedness and interdependence among all of the different kinds of constitutional argument. By contrast, this Article does not attempt to solve the commensurability problem. Rather, its primary goal is to demonstrate the construction of textual clarity or ambiguity in particular. Relatedly, Fallon's theory is interpretive and therefore has both descriptive and normative elements. *See, e.g., id.* at 1233. By contrast, this Article is primarily descriptive. For an approach similar to Fallon's in the area of statutory interpretation, which draws from the philosophical insights of hermeneutics and pragmatism to describe and defend statutory interpretation as a form of practical reasoning, see generally William N. Eskridge, Jr. & Philip J. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

the Constitution. Others involve an interpretation of the scope or exclusivity of particular provisions.<sup>120</sup>

*B. Nonliteral Construction: The First Word of the First Amendment*

Construed literally, the text of the First Amendment seems directed at Congress alone: it provides that “Congress shall make no law . . . .”<sup>121</sup> It does not appear to be directed at the federal government generally, such as the Executive Branch, the treaty-makers, and the federal judiciary.<sup>122</sup> Not surprisingly, therefore, strict textualists read it in this restrictive fashion. In fact, Gary Lawson and Guy Seidman not only conclude that “the First Amendment by its terms does not apply to executive and judicial action,” but also argue that “[t]o read the First Amendment to apply to entities other than Congress is simply to abandon the enterprise of textual interpretation.”<sup>123</sup> Likewise, Nicholas Rosenkranz has urged that “precisely because, as a textual matter, the First Amendment is such an easy case, it presents the starkest counterpoint to conventional wisdom—which willfully ignores the subject of the First Amendment.”<sup>124</sup> Mark Denbeaux has made an originalist argument in support of the same conclusion.<sup>125</sup>

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120. The examples primarily, although not exclusively, involve the construction of ambiguity rather than clarity. It is more difficult to discern the construction of clarity because, by definition, those involved in the interpretive practice may not perceive that the text could have been interpreted otherwise. Consider, for example, the constitutional requirement that “[n]o person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.” U.S. CONST. art. II, § 1, cl. 5 (emphasis added). Because of the placement of the commas, this clause, if read literally, suggests that only individuals alive at the time the Constitution was adopted are eligible to be president. For purposive and consequentialist reasons, however, the clause never has been read that way. See generally Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995). For another example of the construction of textual clarity, see the discussion of Justice Scalia’s concurring opinion in *Noel Canning* in Part II.F.

121. U.S. CONST. amend. I.

122. The first word says “Congress,” not “the United States,” and the text elsewhere distinguishes the legislative power of Congress (see Article I, Section 8) from the enforcement power of the Executive (see the Take Care Clause of Article II, Section 3).

123. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 42 (2004) (footnote omitted).

124. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1210, 1250 (2010).

125. See Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1201 (1986) (“None of the various sources of relevant information provides any evidence to alter, vary, or contradict the plain meaning of the first word of the first amendment.”).

American constitutional practice, however, has always viewed the First Amendment as relevant to the conduct of the entire federal government, not just Congress. As far back as 1833, Circuit Justice Henry Baldwin observed that the First Amendment “wholly prohibits the action of the legislative or judicial power of the Union on the subject matter of a religious establishment, or any restraint on the free exercise of religion.”<sup>126</sup> More recently, the Court has taken for granted that First Amendment principles govern executive and judicial actions, both federal and state.<sup>127</sup>

Consider, for example, the famous *Pentagon Papers Case*,<sup>128</sup> which the Court decided in 1971. The Court there rejected on First Amendment grounds President Nixon’s request that a federal court enjoin the *New York Times* and the *Washington Post* from publishing what the Executive Branch deemed national security secrets regarding the conduct of the Vietnam War.<sup>129</sup> No federal statute was at issue; the case turned exclusively on the president’s request for a judicial prior restraint on speech. Even so, the Court viewed the First Amendment as controlling without so much as pausing to consider the potential import of the first word of the First Amendment. The Justices viewed the First Amendment as so clearly not limited to Congress that they did not even *see* the first word.<sup>130</sup>

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126. *Magill v. Brown*, 16 F. Cas. 408, 427 (C.C.E.D. Pa. 1837) (Baldwin, J.). As Jack Balkin notes, although *Magill* was “the earliest federal decision even to imagine that there was an issue,” it “simply assumed that the First Amendment applied to all branches of the federal government.” BALKIN, *supra* note 2, at 205; *see also* *Shrum v. City of Coweta*, 449 F.3d 1132, 1142 (10th Cir. 2006) (majority opinion of McConnell, J.) (“As this history shows, there was no intention to confine the reach of the First Amendment to the legislative branch.”).

127. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441–42 (1988) (subjecting the conduct of the U.S. Forest Service to scrutiny under the Free Exercise Clause); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (reviewing the denial of unemployment compensation by a state employment security commission for consistency with the First and Fourteenth Amendments); *Carroll v. President of Princess Anne Cnty.*, 393 U.S. 175, 185 (1968) (invalidating a prior restraint ordered by a state court); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (same).

128. *N.Y. Times v. United States*, 403 U.S. 713 (1971).

129. *Id.* at 714.

130. *See, e.g., id.* at 715 (Black, J., concurring) (“Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that *the First Amendment does not mean what it says*, but rather means that *the Government* can halt the publication of current news of vital importance to the people of this country.”) (emphasis added); Justice Douglas, *see id.* at 720 (Douglas, J., concurring), and Justice Brennan, *see id.* at 725 (Brennan, J., concurring), made similar statements. Nor did the dissenters (Burger, Harlan, and Blackmun) pause over the first word of the First Amendment.

Although the Court itself has not provided an explanation for its approach, legal scholars have defended it vigorously. For example, Akhil Amar writes that “[t]he First Amendment’s first word, ‘Congress,’ is now read as a synecdoche: The right of free expression applies against all branches of the federal government and rightly so.”<sup>131</sup> “If the president and federal courts cannot censor citizens even with the backing of a congressional law,” Amar reasons, “it would be odd to think that they can do so without such a law.”<sup>132</sup> “In essence,” Amar writes elsewhere, “the amendment declared certain preexisting principles of liberty and self-government—‘the free exercise of religion’ and ‘the freedom of speech, [and] of the press’—that implicitly applied against all federal branches (not just Congress) and all federal actions (not just laws).”<sup>133</sup> Underscoring the stakes, he adds that “a president today may not condition a pardon on a promise that the recipient will not join a particular church or will refrain from speaking out against the administration; nor may federal judges impose a religious test on courtroom spectators or bar them from publishing criticism of the judiciary.”<sup>134</sup>

Similarly, Jack Balkin argues that the reference to “Congress” in the First Amendment is a clear case of nonliteral usage—that it is “a synecdoche or metonym that stands for all of the lawmaking and law enforcement operations of the federal government.”<sup>135</sup> Alternatively, he argues that if “Congress” means only “Congress” as a matter of semantic meaning, then a structural principle of anticircumvention should be understood to supplement the text.<sup>136</sup> Like Amar, Balkin stresses some arresting consequences of reaching the opposite conclusion:

[T]erritorial legislatures and federal sheriffs could punish people for speaking out against the government or practicing their religion. Federal judges could issue prior restraints against books distributed in the nation’s capitol, federal post offices could refuse to deliver mail the president did not like, and the president, acting in his

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131. AMAR, *supra* note 1, at 34.

132. *Id.*; *see also id.* (“Limits on the less electorally accountable branches of the federal government follow *a fortiori* from those imposed on Congress.”).

133. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 316 (2005).

134. *Id.*

135. BALKIN, *supra* note 2, at 204–05.

136. *See id.* at 204.

capacity as commander in chief, could order all U.S. soldiers to pray to the same god for victory.<sup>137</sup>

Balkin does not see how any principle that would distinguish congressional censorship from judicial or executive censorship “makes sense either at the time of the founding or today, and a very long history of practice rejects the idea.”<sup>138</sup>

Putting aside the proper interpretation of the term “Congress” in the First Amendment, it is instructive to consider why American constitutional practice has never adopted the term’s literal meaning. Nothing in the literal meaning of the term seems unclear,<sup>139</sup> particularly given the definition of the term “Congress” in Article I, Section 1, as “consist[ing] of a Senate and House of Representatives.”<sup>140</sup> Instead, any lack of clarity appears to be driven by considerations sounding in constitutional purposes, structural and consequentialist considerations, longstanding practice, and extensive judicial precedent.<sup>141</sup> For example, no account of the basic objectives of the First Amendment—whether realizing collective self-governance, promoting public debate, protecting personal autonomy, or finding truth through a marketplace of ideas<sup>142</sup>—can explain why congressional speech suppression should often be prohibited but executive or judicial speech suppression should always be permitted. As a result, American interpretive practice has never purported to allow presidents and judges to act contrary to the basic purposes of

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137. *Id.*

138. *Id.*

139. Likewise, a literal reading of Article I, Section 3, appears to imply that the vice president may preside over his or her own impeachment. But that cannot be correct. *See* AMAR, *supra* note 1, at 3–22.

140. *See also supra* note 122 (noting additional reasons why the literal meaning of the word “Congress” in the First Amendment seems clear).

141. One might add an originalist argument, as then-Judge Michael McConnell did in *Shrum v. City of Coweta* in concluding that the Free Exercise Clause applies to executive action. *See* *Shrum v. City of Coweta*, 449 F.3d 1132, 1140–41 (10th Cir. 2006) (examining evidence concerning the intent of the drafters of the First Amendment); *id.* at 1142 (refuting Denbeaux, *see supra* note 125, at 1169–70). But given that the Supreme Court has not seemed interested in the original history, and given that few commentators would deem that history decisive, it is doubtful that a commitment to originalism explains the practice of reading “Congress” in the First Amendment nonliterally.

142. *See, e.g.,* ROBERT C. POST, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 268–89 (1995) [hereinafter CONSTITUTIONAL DOMAINS] (critically analyzing different theoretical accounts of the function of the First Amendment).

the First Amendment while prohibiting Congresses from doing so.<sup>143</sup> Indeed, exempting presidents and courts from the strictures of the First Amendment has been viewed as so fundamentally counterpurposive that most constitutional interpreters have followed Amar and Balkin in deeming the First Amendment not as ambiguous, but as clearly meaning the opposite of what it literally seems to say.

C. “Thinkability”: *Equal Protection and the Federal Government*

*Bolling v. Sharpe*<sup>144</sup> was one of four companion cases to *Brown v. Board of Education*,<sup>145</sup> which held that de jure racial segregation by states in public education violates the Equal Protection Clause of the Fourteenth Amendment.<sup>146</sup> All five cases involved racial segregation in public education. The Court disposed of *Bolling* separately, however, because it concerned segregation in the District of Columbia, which is a federal enclave for constitutional purposes, and the Equal Protection Clause by its terms applies only to states, not the federal government. Even so, the Court in *Bolling* invalidated racial segregation by the federal government as well.

As David Strauss observes, even though “*Bolling* has, at best, a very uncertain basis in the text of the Constitution,” the decision “has not only survived, but thrived.”<sup>147</sup> Nevertheless, the decision remains controversial among some commentators because of an alleged lack of support in the text of the Constitution and because of an

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143. Notably, even strict textualists identify workarounds to render their interpretations less disruptive of existing practice. *See, e.g.*, Rosenkranz, *supra* note 124, at 1272 n.253 (arguing that the Take Care Clause “reflects a principle of nondiscrimination (on the basis of speech and religion, among other things) in the execution of law”); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1061 (2011) (arguing that if free speech is a privilege or immunity of national citizenship, “it is protected more comprehensively at the state level than at the federal level,” and thus may include challenges to state executive or judicial action); *see also* Daniel J. Hemel, *Executive Action and the First Amendment’s First Word*, 40 PEPP. L. REV. 601, 604 (2013) (contending that “executive action that encroaches upon First Amendment freedom is either (a) action authorized by a statute, in which case the statute itself violates the First Amendment, or (b) ultra vires executive action that runs afoul of the Fifth Amendment’s Due Process Clause”). Such efforts to discern workarounds often seem sensitive to the same considerations that affect perceptions of textual clarity and thus can themselves be seen as part of the phenomenon of constructed constraint.

144. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

145. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

146. *Id.* at 495.

147. David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1541 (2013) (reviewing AMAR, *supra* note 1); *see also* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (citing *Bolling* with approval); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201 (1995) (same).

observation that Chief Justice Warren made at the end of his short opinion: “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”<sup>148</sup> This statement has been read to suggest that extralegal considerations took precedence over constitutional principle.<sup>149</sup>

It is of course possible that the Court was simply ignoring or overriding the constitutional text without saying so. It is worth noting, however, that the Court began its analysis with the text, invoking the Due Process Clause of the Fifth Amendment.<sup>150</sup> Moreover, rather than asserting that this clause contains an equal protection component, as the opinion is commonly interpreted today, the Court appeared to conduct a substantive due process analysis.<sup>151</sup> Writing for the Court, Chief Justice Warren reasoned that “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive,” and that “discrimination may be so unjustifiable as to be violative of due process.”<sup>152</sup> Turning to the case at hand, he concluded that “[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”<sup>153</sup> This language is plausibly read to reflect substantive due process reasoning.<sup>154</sup>

In support of both the result in *Bolling* and the Court’s reliance on the Due Process Clause, Jack Balkin has offered an originalist argument that “due process already includes ideas of equal

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148. *Bolling*, 347 U.S. at 500.

149. See, e.g., Kenneth L. Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 546 (1977) (noting that the reasoning in *Bolling* “lay the Court open to the charge that what it found ‘unthinkable’ was the political implication of a contrary decision, rather than an anomaly of constitutional principle”).

150. See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

151. Although the Court and commentators have read *Bolling* as “finding” an equal protection “component” in the Due Process Clause of the Fifth Amendment, Lawrence Lessig observes that “[n]o such ‘component’ was ever ‘found’” in *Bolling*. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409 (1995).

152. *Bolling*, 347 U.S. at 499.

153. *Id.* at 500.

154. For a discussion of how the substantive due process analysis in *Bolling* could be seen as building on suggestions in earlier decisions, see generally Karst, *supra* note 149.

protection.”<sup>155</sup> Many legal scholars, however, are skeptical that *Bolling* can be justified on originalist grounds.<sup>156</sup> Regardless of who has the better of this historical argument, it seems unlikely that any Justice, including the self-identified originalists Antonin Scalia and Clarence Thomas, “would permit the federal government to segregate schools in the District of Columbia, even though the only applicable constitutional provision is the Due Process Clause of the Fifth Amendment, which was ratified at a time when the Constitution contemplated slavery.”<sup>157</sup>

Other commentators have supported the result in *Bolling* but not the Court’s reliance on the Due Process Clause. They have offered a variety of textual sources for the right declared in *Bolling*. For example, Bruce Ackerman has relied on the Citizenship Clause of Section One of the Fourteenth Amendment,<sup>158</sup> and Mark Graber has pointed to the Privileges or Immunities Clause of that same section.<sup>159</sup> John Hart Ely invoked, among other things, the Ninth Amendment.<sup>160</sup> Taking a more holistic approach, Akhil Amar has relied on a combination of the Preamble, Article IV’s Guarantee Clause, Article I’s bans on federal and state titles of nobility and bills of attainder, and the Reconstruction Amendments, all of which (he argues) forbid the federal government from stigmatizing people because of who they are as members of an inferior caste.<sup>161</sup> According to Amar, “In light of

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155. BALKIN, *supra* note 2, at 252.

156. See, e.g., STRAUSS, *supra* note 2, at 130 (describing “[t]he principle [declared in *Bolling*] that the federal government may not discriminate” based on race as “one that neither the text of the Constitution nor the original understanding can support”); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 2, 72, 131 (2005) (leveraging originalism’s inability to justify *Bolling* as a reason to reject constitutional “fundamentalism”); Brest, *supra* note 18, at 233 (stating that he “cannot think of a plausible argument against th[e] result [in *Bolling*]—other than the entirely correct originalist observation that it is not supported by even a generous reading of the fifth amendment”).

157. Post & Siegel, *supra* note 12, at 30; see also Fallon, *supra* note 103, at 1823 (“Justices of all substantive persuasions have felt entitled not only to uphold *Bolling* but also to expand upon its commitments.”). Some commentators, however, have argued that *Bolling* was wrongly decided. Most notably, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 84 (1990) (criticizing *Bolling* as “social engineering from the bench”).

158. Bruce Ackerman, *Ackerman, J., Concurring, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 100, 114–16 (Jack M. Balkin ed., 2001).

159. Mark A. Graber, *A Constitutional Conspiracy Unmasked: Why “No State” Does Not Mean “No State”*, 10 CONST. COMMENT. 87, 87 (1993).

160. See ELY, *supra* note 27, at 33; see also, e.g., MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 146 (1994) (defending *Bolling* based on the Ninth Amendment).

161. AMAR, *supra* note 1, at 143–45.

all these constitutional clauses, all these structural considerations, and all this historical evidence, *Brown* and *Bolling* were not just correct but *clearly* correct.”<sup>162</sup>

In sum, neither the Court nor most commentators have concluded that the federal government is free to discriminate on the basis of race without constitutional limit, even though the text of the Equal Protection Clause clearly does not apply to the federal government. Instead, some judges and commentators have invoked doctrinal or originalist reasoning in viewing the text of the Due Process Clause as compatible with the result in *Bolling*. Other commentators have invoked different portions of constitutional text to justify the result in the case. For interpreters in the first category, nontextual modalities of constitutional interpretation inform their judgment that the text of the Due Process Clause can support the result in *Bolling*. For interpreters in the second category, the clarity of the text of the Due Process Clause remains unaffected by other modalities of interpretation, but other constitutional text is deemed sufficient to support the result.

What about Chief Justice Warren’s reference to the “unthinkable”? Read charitably, one way of understanding this statement is that the Court considered some combination of structural, consequentialist, purposive, and ethos considerations as relevant to determining what was a permissible interpretation of the text. Structurally, for example, it may seem odd that the same Congress that is charged with enforcing the guarantees of the Civil War Amendments against the states (including the right declared in *Brown*) would be free to ignore those very guarantees. It remains odd even if one can come up with (contestable) reasons why the federal government and the states are differently situated with respect to their relative likelihoods of violating minority rights.<sup>163</sup>

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162. *Id.* at 145. For a recent originalist account that supports Amar’s view, see generally Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493 (2013).

163. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522 (1989) (Scalia, J., concurring) (“A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory.” (citing THE FEDERALIST NO. 10 (James Madison))). The Court abandoned any such distinction in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

In addition, there is little doubt that the Court in *Brown* and *Bolling* was committing itself to a certain conception of the American ethos—to the meaning and destiny of the country.<sup>164</sup> Allowing the federal government to engage in practices of racial subordination was incompatible with that conception. The Warren Court took a significant gamble because its racially egalitarian conception of the American ethos conflicted with the dominant understanding in an entire region of the nation.<sup>165</sup>

Whatever one may think of the various modalities of constitutional argument that the Court and commentators have invoked to justify (or, in rare instances, to condemn) *Bolling*, the decision illustrates the more general phenomenon that the constitutional text can be experienced as both constructed and constraining. Almost everyone who has considered whether the result in *Bolling* can be justified has attempted to find a way to connect what is morally desirable with the constitutional text. On the one hand, considerations of what the text can reasonably support appear themselves to be affected by this normative judgment. On the other hand, there seems to be a perception that the ability to work with the text is limited. For this issue, the shared acknowledgment that the text is not infinitely malleable causes some commentators to mine constitutional history, others to try to find text that is more suitable, still others to engage the Constitution holistically and structurally, and a remaining few to conclude that constitutional law has run out.<sup>166</sup>

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164. See Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167, 169 (1987) (suggesting that the authority of the U.S. Constitution flows in important part from its status as the embodiment of Americans' "fundamental nature as a people," their national "ethos," which "is sacred and demands our respectful acknowledgement").

165. See, e.g., ROBERT C. POST, *Theories of Constitutional Interpretation*, in CONSTITUTIONAL DOMAINS, *supra* note 142, at 23, 43 ("The Court's embrace of the value of racial equality could have been a misreading of the national ethos; indeed the Court's gamble was intensely controversial and came close to failing precisely because the ethos was in fact so divided.").

166. Another example of construction involving the Fifth Amendment concerns the meaning of the word "person." The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Although the privilege against self-incrimination has long been understood to protect only natural persons and not corporations, *Hale v. Henkel*, 201 U.S. 43, 75 (1906), the guarantee of due process has long been understood to protect corporations, *Noble v. Union River Logging R.R.*, 147 U.S. 165, 176 (1893). Because both the Self-Incrimination Clause and the Due Process Clause expressly protect "person[s]," the Court must have been using modalities other than the plain meaning of the word "person" to distinguish the two clauses.

D. *What Clear Text Does and Does Not Cover: The Eleventh Amendment*

Sometimes textual clarity or ambiguity concerns what the text does and does not cover—that is, whether the text says all that there is to say about a certain matter, or whether interpreters should not draw such a negative inference. Adopted in 1795, 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.”<sup>167</sup> Although this amendment is the central textual support for the immunity of U.S. states from private lawsuits, it appears to apply only to suits brought by out-of-state residents and foreign citizens. Nevertheless, for more than one hundred years, the Supreme Court has held that states possess significant immunity from suits brought by their own citizens, and that state sovereign immunity applies in federal question as well as diversity cases. Since the 1990s, the Court has adopted a particularly expansive conception of this immunity. Regardless of the merits of the Court’s position, however, it is oversimplified to claim, as some critics have, that the Court has “been fighting the words of the [E]leventh [A]mendment,”<sup>168</sup> or that its decisions “contradict the unambiguous limitations of the Eleventh Amendment’s text,”<sup>169</sup> or that “the [E]leventh [A]mendment is universally taken *not* to mean what it says.”<sup>170</sup>

The seminal decision holding that state sovereign immunity is broader than what is suggested by the text of the Eleventh Amendment is *Hans v. Louisiana*,<sup>171</sup> in which a resident of Louisiana sued the state to recover unpaid interest on state bonds, arguing that the state had violated the Contracts Clause.<sup>172</sup> Responding to the contention that the Eleventh Amendment is limited to suits by out-of-state residents and foreign citizens, the Court acknowledged that the

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167. U.S. CONST. amend. XI.

168. Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1342 (1989).

169. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1476 (1987). Amar, however, regarded the text of the Eleventh Amendment as the beginning, not the end, of his analysis. *See id.* at 1484.

170. Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1977).

171. *Hans v. Louisiana*, 134 U.S. 1 (1890).

172. *Id.* at 1.

text “does so read.”<sup>173</sup> But the Court said that reading this language literally would create an “anomalous result” whereby federal question jurisdiction would be disallowed in cases brought by noncitizens, but allowed in cases brought by citizens.<sup>174</sup> In attempting to avoid this result, the Court did not purport to disregard the text. Instead, it hypothesized that, rather than representing an effort to codify the constitutional law of sovereign immunity, the text was a specific response to the Supreme Court’s decision in *Chisholm v. Georgia*,<sup>175</sup> in which the Court had controversially construed the Article III judicial power as extending to suits brought against states by out-of-state residents.<sup>176</sup>

Ever since *Hans*, the Court has recognized a doctrine of state sovereign immunity that is more robust than the text of the Eleventh Amendment suggests. The Court has held, for example, that states enjoy immunity in admiralty actions, even though the text of the Eleventh Amendment refers only to suits in law and equity.<sup>177</sup> It has also held that states are entitled to immunity when sued by foreign nations or Indian tribes, even though such suits are not mentioned in the Eleventh Amendment.<sup>178</sup> More dramatically, the Court held in 1996 that Congress generally lacks the authority to override state sovereign immunity, including in cases that do not fall within the terms of the Eleventh Amendment.<sup>179</sup> In addition, the Court has held

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173. *Id.* at 10.

174. *Id.*

175. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

176. *Id.* at 420. Several Justices in *Chisholm* emphasized that Article III expressly extends the judicial power to “controversies . . . between a State and citizens of another State.” *See, e.g., id.* at 431.

177. *See, e.g., Ex parte New York*, 256 U.S. 503, 511 (1921).

178. *See, e.g., Blatchford v. Native Village of Notak*, 501 U.S. 775, 788 (1991); *Monaco v. Mississippi*, 292 U.S. 313, 332 (1934).

179. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (concluding that Congress may not abrogate state sovereign immunity using its powers under Article I, Section 8). The Court has held that Congress has some authority to override state sovereign immunity when acting under Section 5 of the Fourteenth Amendment. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity as applied to the fundamental right of access to the courts); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (holding that to remedy and deter violations of equal protection, Congress had authority under Section 5 to enact a provision of the Family and Medical Leave Act requiring employers to provide unpaid family leave to men and women); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that the Eleventh Amendment is “necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment”). It has also held that Congress has some authority to override immunity pursuant to its Article I power to regulate bankruptcy, notwithstanding the suggestion

that, even though the Eleventh Amendment speaks only to the judicial power of the federal courts, state sovereign immunity applies in state courts and federal administrative agencies.<sup>180</sup>

The Court has explained that it has “understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.”<sup>181</sup> A variety of other textual provisions, the Court has claimed, confirm that states “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”<sup>182</sup> Under the Court’s account of the Founding, the states entered the Union as sovereigns, and, although they gave up some attributes of sovereignty, they did not (for the most part) relinquish their immunity from private lawsuits. The original Constitution, under this view, did not grant the national government authority to override the immunity attribute of sovereignty, and it did not give the federal courts the authority to hear private suits against unconsenting states.<sup>183</sup> *Chisholm*, the argument runs, incorrectly held otherwise with respect to the Citizen–State Diversity Clauses of Article III, and the Eleventh Amendment corrected that mistake without limiting the more general background attribute of state sovereign immunity. Thus, the Court has claimed, “To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity since the discredited decision in *Chisholm*.”<sup>184</sup>

Notably, although the dissenting Justices in these cases have accused the majority of disregarding the text, they have argued for something other than the most literal reading of the Eleventh Amendment. Because the Eleventh Amendment refers to “any suit in law or equity,” the most literal reading of the text would, as noted above, bar federal court jurisdiction over federal question suits brought by out-of-state residents but not by in-state residents, a result

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in *Seminole Tribe* that none of Congress’s Article I powers was sufficient for this purpose. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006).

180. *See* *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743, 769 (2002); *Alden v. Maine*, 527 U.S. 706, 754 (1999).

181. *Blatchford*, 501 U.S. at 779.

182. *Alden*, 527 U.S. at 715.

183. *But cf. Cent. Va. Cmty. Coll.*, 546 U.S. at 373 (“Insofar as orders ancillary to the bankruptcy courts’ *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States’ sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity.”).

184. *Alden*, 527 U.S. at 730.

that seems to make no sense from a structural or purposive perspective. As a result, and because the language of the Eleventh Amendment tracks the language of the Citizen–State Diversity Clauses of Article III, the dissenting Justices have contended that the Amendment should be interpreted as “simply repeal[ing] the Citizen–State Diversity Clauses of Article III for all cases in which the State appears as a defendant.”<sup>185</sup> This approach is attentive to the wording of the Eleventh Amendment, but not as attentive as the “plain meaning” theory of the Amendment, which would disallow the exercise even of federal question jurisdiction in a suit against a state by an out-of-state citizen. Accordingly, like the Justices in the majority, the dissenting Justices have read the Eleventh Amendment purposively.<sup>186</sup> They have simply differed with the majority over whether the Amendment should be understood as a comprehensive approach to state sovereign immunity, an issue that turns in part on one’s view of the relevant history.<sup>187</sup>

The modern Supreme Court’s claim about the original understanding of state sovereign immunity is obviously contestable, and it has been sharply disputed by dissenting Justices and numerous commentators. Some scholars have also disagreed on methodological grounds with the Court’s purposive approach to understanding what

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185. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 109–10 (1996) (Souter, J., dissenting); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 289 (1985) (Brennan, J., dissenting) (“[T]he [Eleventh] Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of action brought in federal courts.”). For commentary endorsing the diversity theory, see, for example, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1035 (1983), and John J. Gibbons, *Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2005 (1983).

186. Even though he has supported a broader approach to immunity based in part on longstanding precedent, Justice Scalia (a self-proclaimed textualist) has acknowledged that if immunity were limited to the terms of the Eleventh Amendment, the diversity interpretation would be the best reading of the Amendment. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that if the text of the Amendment were comprehensive, “it would unquestionably be most reasonable to interpret it as providing immunity only when the *sole basis* of federal jurisdiction is the diversity of citizenship that it describes”).

187. For an argument that the literal text of the Eleventh Amendment made sense when written, see Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1818 (2010). For arguments that the literal text should be followed regardless of whether it seems to make sense, see Marshall, *supra* note 168; Manning, *What Divides*, *supra* note 114, at 75; and Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 65 (1989).

the text of the Eleventh Amendment does and does not do.<sup>188</sup> For the analysis here, the key point is not whether the Court is right—and most scholars, it should be noted, disagree with the Court—but what the example shows about the role of the constitutional text in making arguments about who is right.

This example shows how the perceived clarity of the constitutional text can operate on more than one level. That is, the perceived clarity of the text can turn on what it says, *and* it can turn on whether it says all that there is to say.<sup>189</sup> The Court has not disputed that the text covers only suits by out-of-state residents and foreign citizens, or that it applies only to suits in the federal courts. But, because of a mix of historical, structural, purposive, and consequentialist considerations, the Court has rejected the view that the Amendment is best read as a comprehensive provision, as opposed to a targeted response to *Chisholm*. In other words, the Court has rejected the negative inference that the Eleventh Amendment operates as a ceiling on the extent of the states' immunity from suit.

#### *E. The Crises of the Civil War*

Another modality that can affect perceptions of textual clarity or ambiguity concerns the likely consequences of adopting one interpretation or another, a consideration that can become especially significant during times of crisis. Two episodes from the Civil War, one involving President Lincoln's suspension of habeas corpus and the other involving the creation of the state of West Virginia, illustrate this point.

1. *Lincoln and Habeas Corpus*. The Constitution provides, in Article I, Section 9, that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>190</sup> Because this Suspension Clause is located in Article I, which focuses on Congress, and because of structural concerns about Executive Branch aggrandizement through individual detentions, it is generally assumed that only Congress has the authority to suspend the writ. For example, in the

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188. See generally, e.g., Manning, *What Divides*, *supra* note 114.

189. Cf. generally Easterbrook, *supra* note 94 (analyzing the question of what a legal text covers).

190. U.S. CONST. art. I, § 9, cl. 2.

Supreme Court's 2004 "war on terror" decision in *Hamdi v. Rumsfeld*,<sup>191</sup> all nine Justices appeared to share this assumption, despite otherwise disagreeing substantially about the issues of presidential power presented in that case.<sup>192</sup> At the outset of the Civil War, however, President Lincoln authorized the military to suspend the writ without any action by Congress, which was out of session (during a time in history when congressional recesses were lengthy<sup>193</sup>). His action might be seen as a disregard of clear constitutional text, as informed by the constitutional structure, in the name of exigency. Support for such an interpretation could be found in the famous rhetorical question that Lincoln posed to Congress several months later: "[A]re all the laws, *but one*, to go unexecuted, and the Government itself go to pieces, lest that one [concerning habeas] be violated?"<sup>194</sup>

The example is in fact more complicated than that. Lincoln's principal argument concerning the suspension of habeas corpus was not that he needed to disregard one law in order to save other laws, but rather that he had not violated any law at all. Immediately after posing his rhetorical question, Lincoln stated that "it was not believed that this question was presented."<sup>195</sup> It was not presented, he maintained, because he believed that his actions were justified by a constitutional argument that engaged the text:

[T]he Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed that the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.<sup>196</sup>

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191. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

192. *See id.* at 525 ("Only in the rarest of circumstances has Congress seen fit to suspend the writ. . . . At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law."); *id.* at 562 (Scalia, J., dissenting) ("Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I."); *id.* at 592–94 (Thomas, J., dissenting) (appearing to assume that only Congress may suspend the writ).

193. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1498 (2005).

194. Abraham Lincoln, *Message to Congress in Special Session*, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

195. *Id.*

196. *Id.* at 430–31.

Regardless of whether this argument is ultimately persuasive, it seems at least legally plausible in light of the circumstances that Lincoln faced. These circumstances included not only open insurrection by a number of states, but also a military threat to the nation's capital itself.<sup>197</sup>

More generally, if suspension of the writ will sometimes be necessary when responding to an invasion or rebellion, as the Constitution appears to assume, such a necessity presumably could arise when Congress was out of session and when it was infeasible for Congress to assemble with sufficient speed to address the matter. If so, it is not clear why the Constitution would preclude what would otherwise be a necessary response in these circumstances, particularly when the clause is written in the passive voice. This sort of reasoning shows how purposive and consequentialist arguments can potentially combine with textual considerations to make what might otherwise seem to be clear about the constitutional text somewhat less clear.

The habeas example also shows, however, that even in the context of an emergency threatening the very existence of the nation, the president and others took the constitutional text seriously. Lincoln felt obliged to explain how his actions accorded with the text, and there was a robust debate during the Civil War about whether his argument was persuasive.<sup>198</sup> It is also worth noting that no other president has attempted to suspend the writ—not even President George W. Bush after the September 11, 2001 attacks, despite making otherwise robust claims about executive authority. Accordingly, even

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197. See Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in PRESIDENTIAL POWER STORIES 93, 101–03 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009); see also DANIEL FARBER, LINCOLN'S CONSTITUTION 163 (2003) (“[A]lthough the constitutional issue can hardly be considered free from doubt, on balance Lincoln’s use of habeas in areas of insurrection or actual war should be considered constitutionally appropriate, at least in the absence of any contrary action by Congress.”).

198. For a list of pamphlets and other materials published on the question during the War, see the appendix to Sydney G. Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POL. SCI. Q. 454, 485–88 (1888); see also JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118 (1926) (“Perhaps no other feature of Union policy was more widely criticized nor more strenuously defended . . .”). For a thorough canvassing of the public debate over the legality of suspension, see MARK E. NEELY, JR., LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR 62–113 (2011). Lincoln’s argument was rejected by Chief Justice Taney, based in part on the location of the Suspension Clause in Article I. See *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861). For a detailed account of the case, see generally BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS (2011).

though the clarity of the Suspension Clause may not be fully independent of purposive, structural, and consequentialist considerations, the text nevertheless appears to constrain, both inside and outside the courts. The phenomenon, again, is one of both construction and constraint.

2. *The Creation of West Virginia.* Before the Civil War, politics in Virginia had long been defined by a competition for power between the slave-rich eastern counties politically centered at Richmond and the slave-poor western counties centered at Wheeling.<sup>199</sup> Unsurprisingly, this geographically identifiable cleavage in Virginia politics structured the intrastate dispute over secession from the Union in 1861. Whereas most Virginians emphatically supported secession after the Southern attack on Fort Sumter, Virginians in the northwest counties emphatically opposed secession.<sup>200</sup> In May, delegates from twenty-five of the northwest counties met at an initial convention in Wheeling and voted to ask Richmond to approve the creation of a new state.<sup>201</sup> They took more aggressive action once a state constitutional convention adopted an “Ordinance of Secession” and Virginians voted overwhelmingly to secede during the spring of 1861. After Union forces from Ohio crossed the river at Wheeling and Parkersburg and moved east into the mountains with help from local militia, delegates from thirty-nine counties held a second convention in Wheeling.<sup>202</sup> John Carlile there proposed that the government of Virginia be reorganized. Existing state officeholders, he reasoned, were no longer entitled to hold their positions because they were trying to secede.<sup>203</sup>

The convention delegates debated how to arrange the separation—specifically, whether the northwest counties should secede from Virginia or should instead re-form the government of Virginia. Carlile argued that secession was not a constitutionally available option in light of Article IV, Section 3, which provides that “no new State shall be formed or erected within the Jurisdiction of

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199. See HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT 282 (2013); D.W. MEINIG, 2 THE SHAPING OF AMERICA: A GEOGRAPHICAL PERSPECTIVE ON 500 YEARS OF HISTORY 481 (1993).

200. GILLMAN ET AL., *supra* note 199, at 282–83.

201. MEINIG, *supra* note 199, at 481–82.

202. *Id.* at 482.

203. GILLMAN ET AL., *supra* note 199, at 283.

any other State; . . . without the consent of the Legislatures of the States concerned as well as of the Congress.”<sup>204</sup> Agreeing with Carlile’s argument from the constitutional text, the convention delegates declared that their objective was not “to create a State, but to save one.”<sup>205</sup>

The delegates may have been particularly attuned to the constitutionality of their actions because they were accusing the secessionists in Virginia of violating the Constitution and so did not themselves want to be seen as doing the same thing. Instead of ignoring the text, they developed a two-part plan that they deemed consistent with it. First, the convention would re-form the government of Virginia. This one true government of Virginia would be called “The Restored Government of Virginia.” Second, the convention would seek Congress’s consent to create a new state out of Virginia’s northwest counties.<sup>206</sup>

And that is what the convention delegates did. Francis Pierpont was named the new governor, and delegates from the convention became the new state legislators.<sup>207</sup> In July 1861, the delegates met at the new capital, Wheeling, the geographic center of the separation movement. There they filled various state offices and elected two U.S. Senators, John Carlile and Waitman Willey.<sup>208</sup> The U.S. Senate recognized all of them as the legitimate representatives of Virginia.<sup>209</sup> Subsequently, a popular election was held on the formation of a new state, which the citizens approved by a ratio of almost twenty-four to one.<sup>210</sup> They also ratified a new state constitution by an overwhelming margin.<sup>211</sup>

Acting with dispatch, the legislature of this Unionist Virginia authorized the creation of a new state—“West Virginia”—within its territory, as required by Article IV, Section 3.<sup>212</sup> Congress, whose

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204. U.S. CONST. art. IV, § 3. For extended consideration of whether the semicolon in this clause means that states may never be created from territory within an existing state, see Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 332–95 (2002). The authors conclude that, although the text is ambiguous, the original understanding supports the constitutionality of forming new states in this situation. *Id.* at 395.

205. MEINIG, *supra* note 199, at 482.

206. *Id.*; GILLMAN ET AL., *supra* note 199, at 283.

207. GILLMAN ET AL., *supra* note 199, at 283.

208. *Id.*

209. *Id.*

210. *Id.* The vote was 18,489 to 781. *Id.*

211. *Id.*

212. *Id.*

consent was also required by the constitutional text, debated the West Virginia bill during June and July 1861 and imposed a condition precedent: to obtain admission, the citizens of the new state would first have to amend the proposed state constitution to provide for the eventual abolition of slavery.<sup>213</sup> In December 1862, President Lincoln signed the enabling act that imposed this condition. Half a year later, in June 1863, he issued a proclamation recognizing the admission of West Virginia into the United States.<sup>214</sup> Finally, “having completed this bit of legal legerdemain the federal government of Virginia shifted its headquarters to Alexandria.”<sup>215</sup>

Whereas Confederate President Jefferson Davis approved the secession of Virginia from the Union, he condemned as “insurrection, revolution and secession” the creation of West Virginia out of the territory of Virginia.<sup>216</sup> Lincoln, by contrast, vehemently condemned Virginia’s secession as lawless,<sup>217</sup> but he heartily approved of West Virginia’s creation. Lincoln began by arguing that the creation of West Virginia was consistent with the textual requirement of Virginia’s consent. “A body claiming to be [Virginia’s] Legislature has given it’s [*sic*] consent,” he noted, and “[w]e can not well deny that it is such, unless we do so upon the outside knowledge that the body was chosen at elections, in which a majority of the qualified voters of Virginia did not participate.”<sup>218</sup> It is universal practice, Lincoln further observed, “to give no legal consideration whatever to those who do not choose to vote,” which in this situation he contended would include by implication those who had decided to engage in open rebellion against the Union.<sup>219</sup>

Lincoln also argued that the acceptance of West Virginia as a state was “expedient at this time.”<sup>220</sup> He acknowledged that “[t]he

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213. *Id.*

214. *Id.*

215. MEINIG, *supra* note 199, at 482.

216. JEFFERSON DAVIS, 2 *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 306 (1881).

217. GILLMAN ET AL., *supra* note 199, at 283.

218. Abraham Lincoln, *Opinion on the Admission of West Virginia into the Union*, in 6 *COLLECTED WORKS OF ABRAHAM LINCOLN* 26, 26 (Roy P. Basler ed., 1953).

219. *Id.* at 27. *See also* Kesavan & Paulsen, *supra* note 204, at 325 (“The legal fiction of Virginia’s consent to the creation of West Virginia follows logically as a sound conclusion from the sound premises that secession is unlawful and that the federal government has the power to recognize a lawful, alternative State government where rebellion has displaced the lawful, loyal, republican regime of a State with a traitorous government.”).

220. Lincoln, *supra* note 218, at 27–28.

division of a State is dreaded as a precedent,” but he claimed that “a measure made expedient by a war, is no precedent for times of peace.”<sup>221</sup> He concluded by observing that “there is . . . difference enough between secession against the constitution, and secession in favor of the constitution.”<sup>222</sup> Whereas John Carlile had interpreted the language of Article IV, Section 3, and adopted a workaround, Lincoln appears to have been gesturing toward an interpretation of the Constitution as a whole—to what he referred to as “the spirit of the Constitution and the Union.”<sup>223</sup> On this reading of Lincoln’s words, distortions of the text in the service of preserving the Constitution when its existence is threatened are less legally problematic than distortions of the text that aim to destroy the Constitution. Rather than rest only on formalist grounds, as others have done,<sup>224</sup> Lincoln confessed that stretching the text may sometimes be required to enable the constitutional project—including the unstretched text itself—to survive.

Accordingly, Lincoln can be seen as having made two arguments regarding the creation of West Virginia, just as he did with respect to his suspension of the writ of habeas corpus at the outset of the Civil War. First, he argued that the constitutional text was satisfied when considered in context. Second and alternatively, he suggested that sometimes constitutional text that seems relatively clear will be viewed as less than clear if the exigency is great enough. Once again, one can see how the clarity or ambiguity of the text is partly constructed by the very interpretive modalities that it constrains.

#### F. *Recess Appointments*

The above examples highlight the potential influence of perceived purposes, structural inferences, conceptions of the national ethos, and consequentialist considerations in determining the clarity of the constitutional text. For a number of reasons, longstanding customary practice can also affect the perception of textual clarity.<sup>225</sup> The stakes are likely to be higher in this context because of

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221. *Id.* at 28.

222. *Id.*

223. *Id.* at 27.

224. *See generally* Kesavan & Paulsen, *supra* note 204 (offering an originalist analysis of the meaning of Article IV, Section 3).

225. *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 430–32, 455–61 (2012).

expectation interests that have developed as a result of such practice.<sup>226</sup> The existence of longstanding practice might also be viewed as carrying with it latent Burkean wisdom or at least a suggestion of workability.<sup>227</sup> In addition, most interpreters feel some obligation to align interpretations with most practice, especially if the practice seems unlikely to change—for example, where there is unlikely to be judicial review, or where courts are unlikely to believe that they have the institutional capacity or democratic legitimacy to overturn the practice.<sup>228</sup> This felt obligation probably stems from a number of psychological and jurisprudential considerations. Interpreters may desire to be relevant and influential, which may require that their assessments of the law be realistic. Of more theoretical significance, they may sense that the legitimacy of law requires some correspondence between the claims that it makes and the reality of its operation.<sup>229</sup>

A recent example of the influence of customary practice on constitutional interpretation is the Supreme Court's 2014 decision in *NLRB v. Noel Canning*.<sup>230</sup> In that case, the Court interpreted the phrase “the Recess” in the Recess Appointments Clause of Article II, Section 2,<sup>231</sup> as allowing the president to make recess appointments not only during the breaks between annual sessions in the Senate but

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226. *See id.* at 425.

227. *See id.* at 426; *see also* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 408 (2006) (defending an approach to constitutional interpretation that emphasizes “the need to develop law with close reference to established practices and traditions”).

228. *See* Bradley & Morrison, *supra* note 225, at 429–30, 456.

229. *Cf.* DWORKIN, *supra* note 51, at 66 (“The justification need not fit every aspect or feature of the practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.”); LON L. FULLER, *THE MORALITY OF LAW* 81 (1964) (discussing the importance of “congruence between official action and the law”). This does not mean that interpreters invariably align their perception of the clarity of the text with practice. For an important instance in which the Supreme Court concluded that longstanding governmental practice was inconsistent with clear text, *see INS v. Chadha*, 462 U.S. 919 (1983). In *Chadha*, the Court held that a “legislative veto” provision was unconstitutional because it violated the Presentment Clause of the Constitution, *id.* at 945, which requires that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.” U.S. CONST. art. I, § 7, cl. 2. The Court so concluded notwithstanding a substantial modern practice of including legislative veto provisions in regulatory statutes.

230. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). For additional discussion of this decision, *see* Bradley & Siegel, *supra* note 116.

231. *See* U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

also during substantial breaks within the annual sessions.<sup>232</sup> The Court next interpreted the phrase “vacancies that may happen” in the Clause as allowing the president to make recess appointments even for vacancies that occur before a recess.<sup>233</sup> The Court also held, however, that in order for a break in Senate business to trigger the president’s recess appointments authority, the Senate must be out of session longer than three days and, absent extraordinary circumstances, at least ten days.<sup>234</sup> Furthermore, the Court reasoned that “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”<sup>235</sup>

In reaching these conclusions, the Court relied heavily on customary practice, as well as on its view of the purpose of the Recess Appointments Clause. As a background proposition, the Court announced that, because the issues in the case “concern[ed] the allocation of power between two elected branches of Government,” it would place “significant weight upon historical practice.”<sup>236</sup> In interpreting the phrases “the Recess” and “vacancies that may happen,” the Court then invoked historical practice, especially modern practice, in support of a reading of the Clause that permits broad presidential authority to make recess appointments.<sup>237</sup> The Court also argued that this broad reading was supported by the Clause’s purpose of ensuring that the Executive Branch would continue to function effectively when the Senate was unable to consider nominations for Executive Branch positions.<sup>238</sup> Historical practice and purposive considerations also informed the Court’s determination of the length of time required for a break in Senate business to constitute a “recess” for purposes of the Clause.<sup>239</sup>

The majority premised its reliance on these nontextual modalities on the claim that the text of the Recess Appointments Clause was ambiguous.<sup>240</sup> The Court thus appeared to accept the

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232. *Noel Canning*, 134 S. Ct. at 2567.

233. *Id.*

234. *Id.* at 2566–67.

235. *Id.* at 2574.

236. *Id.* at 2559 (emphasis removed).

237. *See id.* at 2561–64, 2570–73.

238. *See id.* at 2561, 2564, 2568.

239. *See id.* at 2566–67.

240. *See id.* at 2561 (“The constitutional text is thus ambiguous.”); *id.* at 2568 (“The question is whether the Clause is ambiguous.”); *id.* at 2577 (“We believe that the Clause’s text, standing alone, is ambiguous.”).

proposition, emphasized by Justice Scalia in his concurrence in the judgment, that clear text is controlling, regardless of other considerations.<sup>241</sup> During the oral argument in the case, Justice Scalia repeatedly asked the solicitor general whether clear constitutional text could ever be trumped by longstanding practice.<sup>242</sup> Although the solicitor general answered affirmatively, he also emphasized that it would be “extremely unlikely” for longstanding practice to develop in a way that is contrary to clear text.<sup>243</sup> Unlike the solicitor general, no Justice in *Noel Canning* suggested that practice (or any other considerations) could prevail over clear text.<sup>244</sup>

In part of its analysis, however, the Court articulated a thin understanding of ambiguity, allowing ready invocation of extratextual considerations. Critically for present purposes, this thin understanding seems itself to have been prompted in part by extratextual considerations.

The Court plausibly concluded that the plain meaning of the phrase “the Recess” was linguistically ambiguous because the phrase could mean either the single break between yearly sessions of the Senate or any substantial break in Senate business. Even so, the Court gave significant weight to considerations of purpose and historical practice to confirm its claim that the phrase does not refer only to intersession recesses. As the Court explained:

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President’s recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word “recess” to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done

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241. See, e.g., *id.* at 2617 (Scalia, J., concurring in the judgment) (“What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice.”).

242. See Transcript, *NLRB v. Noel Canning*, No. 12-1281, at 6–8 (Jan. 13, 2014), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-1281\\_3d9g.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_3d9g.pdf).

243. See *id.* at 8.

244. In his dissent in *Chadha*, Justice White emphasized the longstanding practice of legislative vetoes but did not claim that such practice could override clear text. Instead, he argued that there was a “silence of the Constitution on the precise question.” *INS v. Chadha*, 462 U.S. 919, 977 (1983) (White, J., dissenting). In particular, White reasoned that the Presentment Clause applies to exercises by Congress of “original lawmaking authority,” and that “[t]he power to exercise a legislative veto is not the power to write new law without bicameral approval or Presidential consideration.” *Id.* at 979–80. This distinction between disregarding the text and concluding that the text does not address a particular issue also characterizes the Supreme Court’s approach to the Eleventh Amendment. See *supra* Part II.D.

nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to “great weight in a proper interpretation” of the constitutional provision.<sup>245</sup>

It is even easier to see the influence of extratextual considerations on the Court’s finding of ambiguity for the phrase “vacancies that may happen.” As the Court acknowledged, “the most natural meaning” of the word “happen” as applied to the word “vacancy” is that the vacancy must occur during the recess.<sup>246</sup> The Court insisted, however, that this was “not the only possible way to use the word,” because “happen” may also mean “exist.”<sup>247</sup> The Court then concluded that the purpose of the Clause and historical practice supported the broader reading. These extratextual considerations were relevant, the Court said, because there was “some linguistic ambiguity.”<sup>248</sup> If the Court’s understanding of the practice and the purpose of the Clause had not been contrary to the most natural meaning of the phrase, however, it seems unlikely that the Court would have described the text as ambiguous. But, as the Court stated, it was unwilling to “render illegitimate thousands of recess appointments reaching all the way back to the founding era.”<sup>249</sup>

Justice Scalia’s concurrence, by contrast, argued that the relevant text was clear, and that it supported a substantially narrower recess appointments authority. Just as the majority’s perception of ambiguity seems to have been influenced by extratextual considerations, however, so too was Justice Scalia’s perception of clarity. Throughout his concurrence, and not merely in response to the majority’s contrary arguments, Scalia emphasized what he understood to be the purpose of the Clause, which was to operate as “a tool carefully designed to fill a narrow and specific need,”<sup>250</sup> while “preserv[ing] the Senate’s role in the appointment process.”<sup>251</sup> In light of this purpose, Scalia perceived that the Clause clearly prohibited the use of recess appointments to avoid senatorial opposition to appointees, even though such use has been characteristic of modern

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245. *Noel Canning*, 134 S. Ct. at 2573 (quoting *The Pocket Veto Case*, 279 U.S. 655, 690 (1929)).

246. *Id.* at 2567.

247. *Id.*

248. *Id.* at 2573.

249. *Id.* at 2577.

250. *Id.* at 2592 (Scalia, J., concurring in the judgment).

251. *Id.* at 2597.

practice. “The need [that the Clause] was designed to fill no longer exists,” he wrote, “and its only remaining use is the ignoble one of enabling the President to circumvent the Senate’s role in the appointment process.”<sup>252</sup>

One can also discern in such statements, as well as certain statements in the majority opinion, the subtle but pivotal role of structural and ethos considerations in influencing each coalition’s perception of textual ambiguity or clarity. At a time when Americans are divided over whether it should be less or more difficult for the federal government to function in various ways, Justice Breyer, writing for the majority, invoked the authority of Alexander Hamilton for the proposition that “the vigour of government is essential to the security of liberty.”<sup>253</sup> Scalia, in contrast, portrayed the structural provisions of the Constitution as “reflect[ing] the founding generation’s deep conviction that ‘checks and balances were the foundation of a structure of government that would protect liberty.’”<sup>254</sup> In *Noel Canning*, Breyer’s and Scalia’s perceptions about the ambiguity or clarity of the Recess Appointments Clause appeared to reflect in part their hopes and fears about federal power.

### III. IMPLICATIONS, OBJECTIONS, AND BENEFITS

As the previous Part illustrated, constructed constraint is the phenomenon by which constitutional text that is perceived to be clear both constrains American interpretive practice and is constructed by that practice. This Part begins by identifying the implications of constructed constraint for several concepts in modern constitutional theory: “constitutional construction,” the “unwritten Constitution,” and the “Constitution outside the Constitution.” This Part then examines three possible objections to the theory of constructed constraint: that it is nonfalsifiable, that it reduces to disputes over methodology, and that it is all construction and no constraint. Next, this Part offers some generalizations about when the constitutional text is more or less likely to be subject to construction. Finally, this Part concludes by identifying certain benefits that the practice of constructed constraint helps to produce for the constitutional system.

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252. *Id.* at 2598.

253. *Id.* at 2577 (quoting THE FEDERALIST NO. 1 (Alexander Hamilton)).

254. *Id.* at 2593 (Scalia, J., concurring in the judgment) (quoting *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)).

A. *Implications for Modern Constitutional Theory*

Recent work relating to the nontextual aspects of U.S. constitutionalism can be understood as efforts to better address two enduring issues in constitutional theory. The first is the tension between the “dead hand” problem and the countermajoritarian difficulty. The dead hand problem concerns the present authority of constitutional provisions approved long ago by people who are in many ways unrepresentative of current generations.<sup>255</sup> The countermajoritarian difficulty concerns the legitimacy of having unelected judges override the choices of today’s majorities based on their interpretations of these provisions.<sup>256</sup> When addressing one of these issues, interpretive theories often have trouble with the other. Originalist theories, for example, have a better answer to the countermajoritarian difficulty than they do to the dead hand problem. Variants of living constitutionalism, by contrast, have the opposite strengths and weaknesses.<sup>257</sup>

The second issue in constitutional theory that is addressed by recent work on the extratextual Constitution is the need to account for the reality of constitutional change absent formal written amendments. One response to this perceived need has been to expand the understanding of what qualifies as constitutional law. The thought is that doing so might reduce pressures to formulate theories of constitutional change absent Article V amendments. The most prominent such theory to which scholars are responding is Bruce Ackerman’s submission that the Constitution can be amended as a result of certain “constitutional moments.”<sup>258</sup>

This Article now considers several distinctions that theorists have drawn, at least in part, to address these two issues.

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255. See, e.g., Brest, *supra* note 18, at 225 (“Even if the adopters freely consented to the Constitution, . . . this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone.”).

256. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”). Much scholarship in law and political science questions Bickel’s claim that the Court is a countermajoritarian institution, at least in any long-term sense. See generally, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

257. See Michael C. Dorf, *The Aspirational Constitution*, 77 *GEO. WASH. L. REV.* 1631, 1656, 1661–70 (2009); see also POST, *supra* note 165, at 42–43.

258. See generally 1 ACKERMAN, *supra* note 84, and 2 ACKERMAN, *supra* note 84; see also *supra* text accompanying note 84.

1. *Constitutional Construction*. In recent years, a number of theorists have distinguished between “constitutional interpretation” and “constitutional construction.”<sup>259</sup> It is not clear that all of these theorists have precisely the same concepts in mind when they make this distinction. In general, though, they use the terms to distinguish between constitutional determinations that are closely linked to the text (which they call “interpretation”) and those that supplement the text (which they call “construction”). For example, political scientist Keith Whittington—a leading proponent of the distinction between interpretation and construction—explains that interpretation “takes the text as its touchstone,” whereas construction does not “deal[] so explicitly and obsessively with the terms of the document itself.”<sup>260</sup>

Randy Barnett has elaborated on this distinction. As he explains, construction takes place primarily when the text is unclear:

Where the semantic meaning of the text provides enough information to resolve a particular issue about constitutionality, applying it will require little, if any, supplementation, and construction will look indistinguishable in practice from interpretation. That each state is entitled to two Senators requires little construction to apply. But however much information is contained in the text of the Constitution, there is not always enough information to resolve a particular issue without something more.<sup>261</sup>

Construction, Barnett writes, is principally for situations in which there is not enough information “contained in the text.”<sup>262</sup> Lawrence Solum agrees that practitioners are in “the construction zone” when the constitutional text is “vague or irreducibly ambiguous.”<sup>263</sup>

Jack Balkin, in setting out his theory of “framework originalism” that is described in Part II.B, similarly relies on the distinction

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259. This distinction is associated with a strain of scholarship called the “new originalism.” See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011); Solum, *supra* note 2, at 467–68.

260. WHITTINGTON, *supra* note 2; see also Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 119–20 (2010) (“Interpretive practice is supplemented through a process of constitutional construction. . . . Construction picks up where interpretation leaves off.”).

261. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67 (2011).

262. For a somewhat similar account of the distinction, see Solum, *supra* note 2, at 457.

263. Solum, *supra* note 2, at 467–68; see also Whittington, *supra* note 260, at 120–21 (defining “the realm of construction” as the space in which “the Constitution as written cannot in good faith be said to provide a determinate answer to a given question”).

between interpretation and construction. Under Balkin's account, the constitutional text establishes the basic framework of governance upon which participants in constitutional debates can build. Balkin expressly distinguishes the "ascertainment of the meaning" of the text from the activity of constitutional construction, which he says involves "arguments from history, structure, ethos, consequences, and precedent."<sup>264</sup> Constructions, as Balkin further explains, "exist to fill out and implement the text."<sup>265</sup>

By contrast, this Article understands the authoritative meaning of the constitutional text as being determined by a process of constructed constraint. This understanding of the text unsettles the distinction between interpretation and construction to the extent that defenders of this distinction aspire to describe constitutional practice—and not just to prescribe how practice should unfold. The considerations that are relevant to construction do not merely supplement the determination of the meaning of the text, and they do not come into play only when the text is unclear. Rather, they also affect the threshold assessment of whether the text is unclear. Construction, in other words, not only takes place on top of the textual framework, but also partially determines the framework itself. Accordingly, it is artificial to separate constitutional interpretation from the "construction zone."

One attraction of the idea of "constitutional construction," as these theorists use the term, is that it makes originalism descriptively more accurate of existing practice. In particular, by acknowledging the phenomenon of constitutional construction, originalists have accepted the insight—emphasized by critics of originalism—that the Constitution sometimes enacts broad principles or standards rather than specific rules, and that in these situations the semantic meaning of the text does not—because it cannot—resolve concrete cases.<sup>266</sup> This concession is too strong for some originalists.<sup>267</sup> The theory of constructed constraint suggests, however, that originalists have conceded too little ground, not too much. Participants in interpretive

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264. BALKIN, *supra* note 2, at 4.

265. *Id.* at 54; *see also* Whittington, *supra* note 260, at 121 ("[C]onstitutional constructions are built within the boundaries, or to use Jack Balkin's phrase, within the framework, of the interpreted Constitution.").

266. Colby, *supra* note 259, at 731.

267. *See generally, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

practice characteristically feel bound by constitutional text that they deem clear, but their perception of its clarity is often not determined primarily—let alone exclusively—by its original semantic meaning.

2. *America's Unwritten Constitution.* The 1970s was a time of increasing debate between “interpretivist” and “noninterpretivist” approaches to the Constitution.<sup>268</sup> This debate was triggered in part by the Supreme Court’s 1973 decision in *Roe v. Wade*.<sup>269</sup> Two years later, Thomas Grey published a provocative article entitled *Do We Have an Unwritten Constitution?*<sup>270</sup> Grey contended that, in addition to enforcing the written Constitution, courts properly had the “additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution.”<sup>271</sup>

Grey’s account was partly descriptive. In arguing that courts were already playing such a role, Grey recited a number of examples in which the Supreme Court’s constitutional decisions seemed to him to have at most a limited grounding in the text. “The dominant norms of decision,” he argued, “are those large conceptions of governmental structure and individual rights that are at best referred to, and whose content is scarcely at all specified, in the written Constitution—dual federalism, vested rights, fair procedure, equality before the law.”<sup>272</sup>

Critics of Grey included not only textualists, but also a group of scholars (including Owen Fiss) whom Grey would subsequently call

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268. In 1980, John Hart Ely wrote that

we are likely to call the contending sides “interpretivism” and “noninterpretivism”—the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.

ELY, *supra* note 27, at 1.

269. *Roe v. Wade*, 410 U.S. 113 (1973).

270. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

271. *Id.* at 706.

272. *Id.* at 708. For additional writings by Grey relating to the unwritten Constitution, see Thomas C. Grey, *Origins of the Unwritten Constitution*, 30 STAN. L. REV. 843 (1978); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) [hereinafter Grey, *Scripture*]; and Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211 (1988). For a more recent argument that conservative Justices are invoking forms of unwritten constitutional law, such as in the area of state sovereign immunity, see Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 291 (2001).

“rejectionists.”<sup>273</sup> These scholars, according to Grey, maintained that “judges are always interpreting the constitutional text, but [that] this is not the kind of significant constraint on judicial activism that textualists think it is—the text, if read with an appropriately generous notion of context, provides as lively a Constitution as the most activist judge might need.”<sup>274</sup> As a result, these scholars rejected the need for any division between interpretive and noninterpretive aspects of constitutional doctrine; for them, it was all interpretive, even when one included (for example) the Warren Court’s expansive approach to certain constitutional rights.

Debates over the “unwritten Constitution” are now being revived in the wake of the publication of Akhil Amar’s important book *America’s Unwritten Constitution*.<sup>275</sup> Notwithstanding its title, much of Amar’s book presents sophisticated arguments designed to show that the constitutional text, properly read, supports various well-accepted features of constitutional law, including some features that have been thought to have little connection to the text. In this sense, the book is more about the written than the unwritten Constitution, and is akin to the approach of the “rejectionist” critics of Grey’s defense of the unwritten Constitution. As David Strauss argues in reviewing Amar’s book, “[T]he theme [of the book] is that what might appear to be an unwritten constitutional practice—one with a tenuous connection to the text—actually has a secure basis in the text itself, as long as you pick and choose the right clause and read the text the right way.”<sup>276</sup> Perhaps unsurprisingly in light of his common law approach to constitutional law, Strauss is critical of this theme. In his view, Amar’s strenuous efforts to connect constitutional doctrine to the text obscure the descriptive and normative importance of nontextual considerations in the development of constitutional law.

The account of constructed constraint offered in this Article corroborates the proposition, emphasized by rejectionist critics of Grey and illustrated by Amar’s approach, that American interpretive practice does not readily acknowledge a freestanding unwritten Constitution. Even if their efforts may not be as energetic as Amar’s,

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273. See Grey, *Scripture*, *supra* note 272, at 2; see also Fiss, *supra* note 45.

274. Grey, *Scripture*, *supra* note 272, at 2.

275. See AMAR, *supra* note 1.

276. Strauss, *supra* note 147, at 1560. An exception is Amar’s chapter on the “institutional constitution,” in which he discusses the importance of governmental practice in informing the powers of Congress and the president, while also noting that such practice “rarely goes against the canonical document.” AMAR, *supra* note 1, at 335.

interpreters typically try hard to connect their constitutional arguments to the text.<sup>277</sup> At the same time, constructed constraint confirms the insight of Grey, Strauss, and others that much of importance in constitutional law cannot be found *in* the text. It is instead partially constructed from extratextual considerations. Even Grey and Strauss, however, distinguish sharply between clear and unclear text, and their support for an unwritten Constitution is focused on the latter category.<sup>278</sup> Constructed constraint, by contrast, emphasizes that extratextual considerations can also be important in determining which portions of text are clear and which are unclear. Thus, the account of constructed constraint differs somewhat from both the rejectionist and unwritten Constitution perspectives, even while it recognizes that both perspectives capture important aspects of American constitutional practice.

3. *The Constitution Outside the Constitution.* Another distinction, developed most recently by Ernest Young and anticipated by Karl Llewellyn,<sup>279</sup> is between the Constitution and the “Constitution outside the Constitution.”<sup>280</sup> Young correctly notes that some of the functions typically ascribed to constitutional law, such as organizing the government and conferring individual rights, are often performed in the United States by nonconstitutional materials, such as federal statutes. In arguing that such “extracanonical norms” should be considered part of American constitutional law, Young contends that these norms can be at least as entrenched—that is, as “difficult to alter”—as other, well-accepted aspects of constitutional law.<sup>281</sup> For example, Young notes plausibly that the statutory right to retirement benefits under the Social Security Act is less likely to be

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277. See *supra* Part I.B; see also Sachs, *supra* note 1, at 1801 (“[A]s it happens, our social conventions don’t acknowledge any ‘unwritten Constitution’—at least not right now, and not in those terms.”).

278. See, e.g., Strauss, *supra* note 147, at 1535 (“The text obviously answers some important questions without any recourse to what might be called an unwritten Constitution: the length of the President’s term in office and how many senators each state has, for example.”); Grey, *supra* note 270, at 706 (acknowledging that “the Constitution is a written document, expressing some clear and positive constraints upon governmental power”).

279. See generally Llewellyn, *supra* note 59 (distinguishing between “the working Constitution” and the “Document”).

280. See Young, *supra* note 3, at 473. For an endorsement of this idea, see TUSHNET, *supra* note 3, at 6–8.

281. Young, *supra* note 3, at 413.

substantially changed in the coming years than the constitutional right to an abortion or the constitutional right to burn the American flag.<sup>282</sup>

This concept of the “Constitution outside the Constitution” is valuable because it forces attention to what lies behind the use of the term “constitutional,” especially if this term is applied to materials that are not directly connected to the constitutional text. As Young suggests, moreover, a broader understanding of what counts as constitutional law might reduce pressures to formulate theories of how the “big-C” Constitution can change absent a formal amendment—such as Bruce Ackerman’s theory of “constitutional moments.”<sup>283</sup> As discussed earlier, Ackerman’s theory, though controversial, aims to reconcile what appear to be significant changes over time in U.S. constitutional law with the existence of a written Constitution that is purportedly unchanging until amended. Adopting a broader conception of “the Constitution” is an alternative approach.

Notwithstanding these virtues, there are potential difficulties with enlarging the boundaries of constitutional law in this manner. To justify the enlargement, Young emphasizes how nonconstitutional law can become entrenched, and he notes that “entrenchment may be all that sets the canonical Constitution apart from the rest of our legal system.”<sup>284</sup> When Young describes laws like the Social Security Act as “entrenched,” he is referring to “the likelihood of fundamental change.”<sup>285</sup> But the likely durability of a law or norm (such as the Social Security Act) does not by itself show that it is difficult to alter; it might just show that there is little desire to alter it.<sup>286</sup> It can also be hazardous to hypothesize that particular nonconstitutional laws or norms are entrenched. For example, writing in 2007, Young reasonably suggested that the filibuster in the Senate was entrenched.<sup>287</sup> We now know that Senate Democrats dramatically curtailed it in 2013.<sup>288</sup>

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282. *Id.* at 427.

283. *Id.* at 455–56.

284. *Id.* at 426 (emphasis omitted).

285. *Id.* at 427.

286. See Levinson, *supra* note 76, at 702. For discussion of various possible meanings of entrenchment, see Primus, *supra* note 5, at 1137–38.

287. Young, *supra* note 3, at 427–28.

288. See Jeremy W. Peters, *Senate Vote Curbs Filibuster Power To Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1. Although the filibuster is a longstanding procedure designed to protect minority interests in the Senate, it is not mandated by the constitutional text. The lack of

More fundamentally, when Young describes the entrenchment of nonconstitutional law, he is referring to *political* entrenchment—that is, the difficulty of overcoming “powerful constituencies.”<sup>289</sup> As he seems to acknowledge elsewhere, however, political entrenchment does not fully capture what is typically meant in American interpretive practice by the entrenchment of constitutional law. To many observers, a fundamental aspect of constitutional law is that it is *legally* entrenched—meaning that it is not viewed as subject to change by the usual majoritarian processes for altering law.<sup>290</sup> Instead, it is generally acknowledged that changes in constitutional law can occur both with an Article V amendment of the text and without it—most notably, through new Supreme Court interpretations. There is also some recognition that a longstanding accretion of practice might change constitutional law,<sup>291</sup> especially for issues (such as separation of powers questions) that are unlikely to be decided by the courts.<sup>292</sup> But constitutional law is otherwise thought to be legally entrenched against alteration through the normal political process.<sup>293</sup> This sort of legal entrenchment does not exist for the materials that Young identifies as the “Constitution outside the Constitution.” No one argues, for example, that Congress is legally precluded from altering or repealing the Social Security Act—and, in fact, Congress has

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a textual hook in this instance appeared to make it easier for Democrats to change the practice in response to charges that Republicans were abusing it. Senate Majority Leader Harry Reid argued, for example, that “[t]he Founding Fathers never had any place in the Constitution about filibusters or extended debate.” Burgess Everett, *Harry Reid: Actively Weighing “Nuclear Option”*, POLITICO (Nov. 19, 2013, 6:57 PM), <http://www.politico.com/story/2013/11/harry-reid-filibuster-nuclear-option-100074.html>.

289. Young, *supra* note 3, at 427.

290. Whereas Young’s conception of constitutional entrenchment is too permissive, others seem too restrictive. In discussing the entrenchment of constitutional law, Richard Primus refers to the proposition that “[c]onstitutional rules can be changed only through the process described in Article V.” Primus, *supra* note 5, at 1089. This conception of entrenchment is more restrictive than the prevailing understanding in American interpretive practice. As a consequence, Primus must conclude that constitutional law does not always have this characteristic of entrenchment. *See id.* at 1100. Similarly, Primus lists the availability of judicial review as an element of constitutional law. *Id.* at 1089. Because it may not be, however, he must note as part of his unbundling that constitutional law is not always associated with judicial review. *Id.* at 1115, 1117–18.

291. For a discussion, see generally Bradley & Siegel, *supra* note 116.

292. *See generally* Bradley & Morrison, *supra* note 225 (detailing the reliance on historical practice to help resolve separation of powers questions).

293. *See, e.g.,* Dorf, *supra* note 77, at 89 (declining to include certain norms within the category of constitutional law “[i]f the relevant officials thought that, even absent special circumstances, they could amend one of these norms”).

altered the Act a number of times by raising the age qualifications to receive benefits.<sup>294</sup>

The theory of constructed constraint further complicates the idea of the “Constitution outside the Constitution.” As previously discussed,<sup>295</sup> the constitutional text has special attributes in American interpretive practice that distinguish it from other legal materials. In particular, it is almost never regarded as a legally acceptable move to argue for legislative (or other) disregard of the text. By contrast, even if it would be politically unpopular, it is a legally acceptable move to argue for legislative override of politically entrenched statutes (or other entrenched norms like the filibuster). No one argues, for example, that it would be unconstitutional to privatize Social Security. In other words, the phrase “the Constitution outside the Constitution” changes the meaning of the term “Constitution” from the first usage to the second in a way that elides critical differences in meaning and implications for constitutional practice.

In addition, there are strong pressures in American interpretive discourse to tie constitutional arguments to the text. As Richard Primus notes, “It is a normal dynamic of American constitutional interpretation that people struggle to close the gap between the text and the set of rules that are recognized as entitled to supremacy, entrenchment, and judicial review.”<sup>296</sup> These pressures do not apply, however, to the “Constitution outside the Constitution.” To return to the example of Social Security benefits, they may be entrenched, but no one argues that these benefits are required by the constitutional text. Such an argument, moreover, would almost certainly be rejected by a court.

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294. Young makes clear that, even though he is categorizing various nonconstitutional norms as part of “the Constitution outside the Constitution,” he is not claiming that they have the same legal status as norms that are conventionally regarded as being part of the Constitution. *See, e.g.*, Young, *supra* note 3, at 454 (“When I say that constitutional functions are often performed by ‘ordinary’ laws, I do not mean to suggest that such laws cease to be ‘ordinary’ by virtue of those functions.”). This concession indicates that Young’s attempt to provide a broader account of “the Constitution” is made possible only by changing the meaning of the term.

295. *See supra* text accompanying notes 66–85.

296. Primus, *supra* note 5, at 1106; *see also* Dorf, *supra* note 77, at 75 (describing how interpreters in American constitutional practice seek to connect their arguments to the text of the Constitution); Strauss, *supra* note 147, at 1534 (“In American constitutional law, every claim about what the law requires must, in some way, be connected to the text of the written Constitution.”) (reviewing AMAR, *supra* note 1).

The above complications arise as a result of the “constrained” part of constructed constraint. The “Constitution” *inside* the “Constitution” constrains in a way that the “Constitution” outside the “Constitution” does not. The “constructed” side of constructed constraint further complicates the project of the “Constitution outside the Constitution.” Part of the goal of Young’s project, as noted above, is to broaden the scope of the “small-c” Constitution and thereby insulate the “big-C” Constitution from the need to accommodate constitutional change absent changes in the text,<sup>297</sup> a need that theories like Ackerman’s account of “constitutional moments” seek to meet.<sup>298</sup> Because the constitutional text is partially constructed, however, the big-C Constitution cannot be insulated in the manner attempted by the “Constitution outside the Constitution.” The determination of what is covered by the big-C Constitution is itself partially constructed, and the very considerations that will suggest the need for change are also likely to affect the construction. Regardless of its ultimate persuasiveness, Ackerman’s theory takes some account of the partial construction of the constitutional text, and his theory is one possible way to impose normative limits on this process.

#### *B. Objections to the Theory of Constructed Constraint*

This Section addresses three potential criticisms of the theory of constructed constraint. The first is that the descriptive account of practice offered by constructed constraint is nonfalsifiable. The second is that interpretive methodology will overwhelm the other factors that this Article has suggested are relevant to constructed constraint. The third is that American interpretive practice evidences only construction, not constraint. We consider each criticism in turn.

1. *Is the Theory Falsifiable?* One potential objection to the theory of constructed constraint is that it is nonfalsifiable. What would it take, someone might reasonably ask, to show that American interpretive practice is *not* constrained by perceptions of textual clarity, or that the perceived clarity of the text is *not* partially constructed by extratextual considerations? Regardless of whether falsifiability is a relevant concept when assessing the merits of particular approaches to interpretation, it does seem relevant when

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297. Young, *supra* note 3, at 456–57.

298. See generally 1 ACKERMAN, *supra* note 84 (setting forth the theory of “constitutional moments”).

assessing claims, such as those made here, that purport to *describe* interpretive efforts. For example, it would be uncontroversial to label as “false” the descriptive claim that constitutional interpreters in the United States routinely consult astrology in making interpretive claims. By contrast, it would be controversial to describe as “false” normative theories of interpretation, such as variants of originalism or living constitutionalism.

As an initial matter, a theory can be informative even if it is difficult to verify. Such a theory can, for example, provide a useful way of understanding certain aspects of human behavior and institutions. In any event, this Article is not intended to be an empirical study given the limited number of case studies that it discusses, and given the limited nature of its central claim. The Article purports to describe an important part of the practice of American constitutional interpretation; it does not purport to describe a phenomenon that always or inevitably occurs. This Article’s burden, therefore, is simply to show that constructed constraint does occur in materially important ways. This claim will be falsified only if it is shown that the phenomenon never occurs or occurs only in marginal or trivial cases.

Although such falsification would be difficult, it would not be impossible. Regarding the proposition that the constitutional text is experienced as a constraint in American interpretive practice, there are at least two claims that could be addressed by empirical study. The first has to do with acceptable forms of constitutional argument, and the second has to do with the realities of constitutional practice.

First, this Article has claimed that it is almost never regarded as an acceptable move in constitutional discourse to argue for a disregard of the constitutional text, even though it is an acceptable move to argue for a disregard of other materials, such as precedent and customary practice. It is possible to imagine evidence that would undermine this claim. For example, in debates in 2011 and 2012 over the extension of the debt ceiling, there were occasional calls for a disregard of constitutional text suggesting that only Congress could accomplish the extension, although they do not appear to have been taken seriously.<sup>299</sup> Similarly, during the Supreme Court argument in

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299. Many constitutional law commentators have concluded that the president lacks the unilateral authority to raise the debt ceiling in light of the Constitution’s specific assignment to Congress of the power “[t]o borrow [m]oney on the credit of the United States.” U.S. CONST. art. I, § 8, cl. 2. See, e.g., Erwin Chemerinsky, *The Constitution, Obama and Raising the Debt*

*Noel Canning*, the solicitor general suggested that longstanding practice might trump clear text,<sup>300</sup> but neither the majority nor the dissent endorsed the argument.

Second, this Article has claimed that interpreters who favor a particular outcome sometimes regard the constitutional text as an obstacle to the achievement of that outcome. In the debate over the extension of the debt ceiling, for example, there appeared to be a widespread perception that the text was an obstacle to unilateral executive action, and the president made public statements to this effect. Although interpreters sometimes devise workarounds in the face of text that is deemed constraining (something that can be seen as another element of the “constructed” part of constructed constraint), this Article has further claimed that this very effort reveals the text to be having an effect, and that workarounds are neither always available nor always as efficacious as direct textual support. Though potentially difficult to obtain, evidence of internal political branch or judicial deliberations could undermine this claim if it showed that interpreters did not take the text seriously or perceived that effective workarounds were routinely available.

Describing what it would take to falsify the construction component of constructed constraint is more challenging. This Article has claimed that American interpretive practice is not strictly textualist in that, when applying the text and determining whether it is clear, the practice often takes account of extratextual factors, such as the perceived purpose of the text, the constitutional structure,

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*Ceiling*, L.A. TIMES (July 29, 2011, 11:41 AM), <http://opinion.latimes.com/opinionla/2011/07/erwin-chemerinsky-on-why-obama-cant-raise-the-debt-ceiling.html>; Laurence H. Tribe, Op-Ed., *A Ceiling We Can't Wish Away*, N.Y. TIMES, July 8, 2011, at A23. To the extent that others have questioned this conclusion, it has almost always been on the ground that some other portion of constitutional text might empower the president to raise the debt ceiling, such as the provision in Section 4 of the Fourteenth Amendment providing that “[t]he validity of the public debt of the United States, authorized by law, . . . shall not be questioned.” U.S. CONST. amend. XIV, § 4. See, e.g., Adam Liptak, *The 14th Amendment, the Debt Ceiling, and a Way Out*, N.Y. TIMES, July 24, 2011, <http://www.nytimes.com/2011/07/25/us/politics/25legal.html>. A few commentators have suggested that the constitutional text does not matter and that the president should act simply on the basis of the national interest. See, e.g., Eric A. Posner & Adrian Vermeule, Op-Ed., *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES, July 22, 2011, <http://www.nytimes.com/2011/07/22/opinion/22posner.html>. But this position has not enjoyed much support. Indeed, notwithstanding even the textual arguments made in support of presidential power, President Obama ultimately decided that he lacked unilateral authority to act. See David Jackson, *Obama Says He Can't Raise Debt Ceiling on His Own*, USA TODAY (July 22, 2011, 5:30 PM), <http://content.usatoday.com/communities/theoval/post/2011/07/obama-speaks-at-university-of-maryland/1#.VG9WXYvF98E>.

300. See *supra* notes 242–43.

claims about the American ethos, consequentialist considerations, and customary practice. Some textualists would likely concede this point as an empirical matter, even in arguing that the practice should be changed. For those who would object on empirical grounds, it may seem difficult to know what to look for in terms of falsifiability. We know that there is *Bolling*, which achieved the morally right result in part through construction. But where does one look to find the opposite of *Bolling*—that is, where does one look for cases in which interpreters eschew construction even though it would help them to achieve a preferred result?

The task is made more difficult, to reiterate, by this Article's embrace of only *partial* construction. Given this qualification, some unspecified number of textual applications that are inconsistent with extratextual considerations would not falsify the thesis. For example, it would not falsify the thesis to show that interpreters apply the text concerning two senators per state notwithstanding their belief that the consequences are undesirable.

All that said, there may be ways to make an empirical analysis tractable. It would likely undermine the "constructed" component of this Article's thesis if it could be shown that, when making claims about the text, interpreters routinely ignore the extratextual considerations described in this Article. Of course, the relevant interpreters would need to be defined, as would the critical adverb "routinely" in the above formulation. These are significant obstacles, but they should not be disabling if in fact there are many instances of constitutional interpretation that focus only on the semantic meaning of a constitutional provision.

*2. Is Construction Reducible to Methodology?* Another potential objection to the account provided here concerns the role of constitutional methodology. One might object that methodology, not the different modalities of constitutional interpretation, is in fact the central variable. Strict textualists, the argument might run, will not be open to considering the other extratextual factors described in this Article, in which case these factors will not affect their perceptions of textual clarity. By contrast, interpretive methodologies that are open to extratextual considerations will naturally take account of them. Methodology, on this view, is the gatekeeper of construction.

The examples in Part II tend to rebut this contention. In those examples, Justices, presidents, advocates, and academics have not typically divided over methodology. Textualist-oriented Justices in

particular have not usually dissented from these acts of construction. For example, neither most textualists nor nontextualists have argued for limiting the First Amendment to Congress, and they have accepted *Bolling*'s reverse incorporation doctrine.<sup>301</sup> Moreover, the textualist Justices have endorsed a vision of state sovereign immunity that goes well beyond the text of the Eleventh Amendment.<sup>302</sup>

In effect, this Article claims that even self-identified textualists in constitutional interpretation often cannot help themselves: they, like adherents to other interpretive methodologies, partially construct a constraining text. To be sure, textualists may occasionally respond differently than nontextualists to the various extratextual considerations. Rather than generously interpret the textual provision in question, for example, they may search harder for alternative text (such as the Take Care Clause or the Due Process Clause) to support a particular result (such as the refusal to limit the First Amendment to Congress). Such efforts, which are common among textualist scholars,<sup>303</sup> often appear to be inspired by the same purposive, structural, ethos, consequentialist, or practice-based concerns whose relevance they may purport to deny. What textualists typically will not do is ignore those considerations altogether. As noted in Subsection 1, this claim is subject to potential falsification. If it is correct, however, then methodology will not as a practical matter control whether the constitutional text is subject to construction.

The embrace by “new textualists” of purposive and consequentialist considerations is evident in the area of statutory interpretation. For example, in *Reading Law: The Interpretation of Legal Texts*, Justice Antonin Scalia and legal lexicographer Bryan Garner reject the “plain meaning” approach to statutory interpretation that predominated during the early twentieth century.<sup>304</sup> Rather than presume that the meaning of statutes is often

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301. *See supra* Part II.B–C (discussing the applicability of the First Amendment to the entire federal government and the applicability of equal protection principles to the federal government).

302. *See supra* Part II.D. Textualist Justices have also supported the Court’s “anti-commandeering” principle, which prohibits Congress from requiring states to enact, administer, or enforce a federal regulatory program, even though such a principle is not evident in any constitutional text. *See* *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 149 (1992).

303. *See supra* note 143 (noting instances of such efforts).

304. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 53 (2012) (“Any meaning derived from signs involves interpretation, even if the interpreter finds the task straightforward.”); *see, e.g., Caminetti v. United States*, 242 U.S. 470,

obvious just from the statutory language itself, Scalia and Garner stress that such language must be understood in context—that “textual meaning” is to be determined “[b]y convention.”<sup>305</sup> “Neither written words nor the sounds that the written words represent have any inherent meaning,” they observe.<sup>306</sup> “Nothing but conventions and contexts cause a symbol or sound to convey a particular idea.”<sup>307</sup>

For Scalia and Garner, “This critical word *context*” includes “the *purpose* of the text, which is a vital part of its context.”<sup>308</sup> They thereby make clear that textualists, too, consider statutory purposes,<sup>309</sup> even as they reject resort to legislative history by insisting that “the purpose is to be gathered only from the text itself, consistently with the other aspects of its context.”<sup>310</sup> Scalia and Garner also claim that the context of statutory language “embraces . . . a word’s historical associations acquired from recurrent patterns of past usage, and . . . a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance.”<sup>311</sup> They further include within their idea of “context” substantive canons such as constitutional avoidance, even though these canons appear to leave significant room for interpretive discretion and are “based on judicial-policy considerations alone.”<sup>312</sup>

Reviewing the book, Judge Richard Posner criticized Scalia and Garner’s prescription that judges “look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.”<sup>313</sup> Posner stressed their failure to follow their own instructions, marveling at “[t]he remarkable elasticity of Scalia and Garner’s methodology,” and claiming that they display a “lack of a consistent commitment to textual originalism.”<sup>314</sup>

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485 (1917) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise.”).

305. SCALIA & GARNER, *supra* note 304, at xxvii.

306. *Id.*

307. *Id.*

308. *Id.* at 33.

309. *Id.* at 56 (“The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does.”).

310. *Id.* at 33 (emphasis omitted).

311. *Id.*

312. *Id.* at 31.

313. Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012, at 18, 23–24 (quoting SCALIA & GARNER, *supra* note 304, at xxvii).

314. *Id.* at 18.

Margaret Lemos, in her review, similarly observed that “this is not your grandmother’s textualism,”<sup>315</sup> and that over time “the divide between textualism and its competitors has narrowed substantially.”<sup>316</sup> This narrowing of the divide is another reason why methodology is unlikely to predominate over the other considerations that are relevant in discerning textual clarity. Such a narrowing is also consistent with one of the themes of this Article, which is that the disagreement between textualism and broader interpretive approaches is less pronounced than is commonly thought.<sup>317</sup>

3. *Is There Only Construction, Not Constraint?* A third potential objection is that there is no middle ground between construction and constraint. The practice relating to the constitutional text that this Article attempts to capture, it might be argued, actually consists only of construction, as some critical legal scholars suggested during the 1980s.<sup>318</sup> Consistent with this objection, the examples discussed in Part II can reasonably be described as reflecting more construction than constraint.

There is an important sense in which this objection is true. The constitutional text is, to reiterate, just marks on a page; it follows that textual meaning, ultimately, is entirely constructed one way or another. This insight, however, takes one only so far. Something can

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315. Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 858 (2014) (book review).

316. *Id.* at 859; see also Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2028 (2005) (“Gone largely unnoticed in the battles between [textualists and others] during the past quarter century is the fact that both sides in the debate agree upon almost everything when it comes to statutory interpretation.”). *But see* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120 (2009) (contending that “not only do the rival interpretive methods remain distinct, but the fundamental tenets of textualism cause the gap between interpretive methods to *widen*, not narrow, with time”).

317. As observed earlier, see *supra* note 7, the greater the variety of materials that textualists consider to be part of a defensible textual analysis—including whatever they deem to be part of the “context” of the text—the closer they will be to doing expressly what this Article suggests is often done implicitly. Textualists, however, are unlikely to agree that all of the modalities discussed in this Article are part of a defensible textual analysis. As an account of American interpretive practice, therefore, there is a divide between almost any version of textualism and the theory of constructed constraint set forth in this Article. This is true even if the divide is not as great as is typically characterized. As for which account is descriptively more accurate, it is worth bearing in mind that descriptive accuracy turns on the actual roles that are played by the various modalities, not on what particular interpreters assert those roles to be. For example, the fact that a self-identified textualist Justice declares that “the clear text” trumps historical practice or consequentialist considerations does not show that what he or she is calling clear text is independent in fact from those other modalities.

318. See *supra* Part I.A.

be constructed and yet still constrain. A brick wall is constructed, but it still hurts to run into it.<sup>319</sup>

The key question is not whether the constraining effect of the constitutional text is constructed in some fashion—it is. Instead, the critical question concerns the nature of the constraint. There is a potentially significant difference in degree between situations in which the constraints arising from widely shared understandings about language and textual context permit little additional construction absent the most fanciful hypothetical circumstances, and situations in which interpretive meaning largely results from additional construction. It may be difficult, of course, to draw a line between the two—that is, between what is considered a “textual” matter and what is considered extratextual. Different interpreters will likely draw the line differently. But it is at least possible to talk of examples falling near one or the other end of the spectrum.

Consider, for example, the Twenty-Second Amendment, which provides (among other things) that “[n]o person shall be elected to the office of the President more than twice.”<sup>320</sup> Before this amendment, there was a strong unwritten norm against presidents serving a third term, based in part on the precedent established by George Washington.<sup>321</sup> Nevertheless, some presidents (such as Ulysses S. Grant and Theodore Roosevelt) considered deviating from the norm,<sup>322</sup> and Franklin Roosevelt did run for a third and then a fourth term. After the Twenty-Second Amendment, however, no one

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319. See, e.g., Rapaczynski, *supra* note 82, at 177 (“The fact that no text by itself constrains interpretation . . . does not mean that interpretation is unconstrained; only that constraints operate within a particular context in which the text is interpreted.”); *id.* at 199 (“[I]nterpretation is a practice that takes place in some social context, and in that context there are always some more or less definite limits on what can pass as a competent move within that practice.”).

320. U.S. CONST. amend. XXII.

321. See JAMES ALBERT WOODBURN, *THE AMERICAN REPUBLIC AND ITS GOVERNMENT* 115 (1903) (“[I]t may now be said to be a part of the unwritten constitution that no President is eligible to a third term.”). *But cf.* HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 99 (1925) (“The usage, if usage it may be, is not so firmly established as absolutely to deter an ambitious man from making the venture.”).

322. See generally MICHAEL J. KORZI, *PRESIDENTIAL TERM LIMITS IN AMERICAN HISTORY* 42–78 (2011) (detailing these attempts); Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 580–85 (1999) (discussing the views of several presidents on seeking a third term and the failed efforts by others to do so).

seriously contemplates having a president seek election for a third term.<sup>323</sup>

Moreover, even though certain features of the Constitution are heavily criticized, almost no one thinks that, legally, these provisions can simply be disregarded. Examples include the Electoral College method of electing presidents,<sup>324</sup> the requirement that the president be a “natural born Citizen,”<sup>325</sup> and the provision requiring two senators per state.<sup>326</sup> Presidential candidates who receive an Electoral College majority are widely accepted as having been legitimately elected, even when they place second in the popular vote, despite the fact that such a result may be difficult to defend as a matter of political morality.<sup>327</sup> Likewise, it was widely believed that a constitutional amendment would be required for Governor Arnold Schwarzenegger of California, a naturalized citizen, to become president.<sup>328</sup> And the requirement of two senators per state—no matter how great the difference in population between, say, California and Idaho—is particularly striking given how otherwise deeply entrenched is the judicially fashioned constitutional norm of one person, one vote.<sup>329</sup> The constitutional text has defeated application of this principle to the Senate.

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323. See, e.g., Schauer, *supra* note 32, at 414 (“The parties concerned know, without litigating and without consulting lawyers, that Ronald Reagan cannot run for a third term . . .”). But see Tushnet, *supra* note 31, at 687 (hypothesizing a situation in which this prohibition might be disregarded). Hypothesizing an unlikely scenario in which the text would be disregarded does not show that the text is unconstraining. Rather, it shows only that the text is not infinitely constraining. Cf. Schauer, *supra* note 32, at 422 (“The *non sequitur* . . . is the move from the proposition that language is not perfectly precise to the proposition that language is useless.”).

324. U.S. CONST. art. II, § 1.

325. *Id.*

326. U.S. CONST. art. I, § 3.

327. Although the Electoral College has some defenders, it has been widely criticized and is unpopular with the public, and there have been numerous proposals either to eliminate it via amendment or to adopt a workaround. See, e.g., Alexander Keyssar, *Do Away with the Electoral College*, N.Y. TIMES (July 8, 2012, 10:01 PM), <http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/visiting-the-constitution-do-away-with-the-electoral-college>.

328. See, e.g., Kirk Semple, *Schwarzenegger Backs Amendment To Allow Immigrant Presidents*, N.Y. TIMES, Feb. 23, 2004, at A14.

329. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Baker v. Carr*, 369 U.S. 186, 237 (1962).

C. *When Construction Is More or Less Likely*

Part II illustrated, through a series of examples, the partial construction of the constitutional text in American constitutional practice. It did not attempt to theorize when construction is more or less likely to occur. There is cause for caution in attempting to offer any such account, because the phenomenon may be sufficiently contingent to defy *ex ante* specification. Even so, some generalizations, even if admittedly speculative, may be useful.

First, there is substantial variation in the linguistic precision of the constitutional text, and such precision is likely to influence the extent to which the modalities of interpretation will affect perceptions of clarity and ambiguity. Whether a search is “unreasonable,”<sup>330</sup> for instance, or whether a punishment is “cruel and unusual,”<sup>331</sup> is substantially less linguistically precise than the requirement that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>332</sup> As Jack Balkin has explained, the Constitution consists of a mix of rules, standards, principles, and silences with different levels of specificity and precision.<sup>333</sup>

Second, perceptions about consequences—including arguments resting on ideological, moral, or policy values—seem to play a particularly significant role in motivating and executing construction, but the practice is not simply reducible to consequentialism. On the one hand, interpreters are unlikely to construct away from what Richard Fallon has called the “first-blush” interpretation of the text unless they have concerns about the consequences associated with this interpretation.<sup>334</sup> In addition, “arguments of value infuse arguments and influence conclusions within other categories,”<sup>335</sup> such as whether to read a precedent narrowly or broadly or what inferences to draw from the institutional relationships established by the Constitution. On the other hand, it is also likely that perceptions about consequences are themselves affected by other modalities, such as purpose, structure, and ethos.

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330. U.S. CONST. amend. IV.

331. U.S. CONST. amend. VIII.

332. U.S. CONST. art. I, § 9.

333. See BALKIN, *supra* note 2, at 39.

334. Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 689 (2014). Fallon’s subject is statutory interpretation, but the idea of the “first-blush” meaning of a legal text is also useful in the context of constitutional interpretation.

335. Fallon, *supra* note 110, at 1238.

Third, the first-blush interpretation is more likely to hold if the constitutional provision relates to certain processes of government rather than to substantive outcomes such as rights. For example, governmental process provisions that concern the qualifications and method of election for federal offices tend to be “stickier” in general because they are needed for coordination so that actors can achieve their first-order objectives. Such provisions, in other words, *enable* democratic politics; they do not simply *limit* democratic politics. Moreover, other political actors typically have ample incentive to enforce them.<sup>336</sup>

Fourth, construction seems particularly unlikely for numeric constitutional provisions. Numbers permit—or, at least, are perceived to permit—less linguistic argumentation than prose, and so tend to be stickier in American interpretive practice. For example, even though the age requirements and the specified term lengths for the presidency and Congress will negatively affect particular candidates and office holders, there are no serious efforts to read the requirements purposively or to otherwise challenge assumptions about how the requirements should be computed. This is not to say that numerical provisions are always clear. Nor do we mean to suggest that there is no scenario under which the meaning of an otherwise clear numerical provision could become unclear. The point, rather, is that it would take very unusual circumstances in order for this to happen.

Fifth, construction is especially unlikely to occur when historical practice lines up in the same direction as typical plain meaning considerations. At least in that situation, historical practice seems to have an entrenchment effect.<sup>337</sup>

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336. Even though the Court is unlikely to disregard constitutional text that it perceives to be clear, this does not mean that it will necessarily exercise judicial review to address what it deems a deviation from clear text. *See supra* note 75. Especially for certain issues relating to the processes of government, the Court may conclude that the deviation presents a nonjusticiable political question. *See, e.g., Nixon v. United States*, 506 U.S. 224, 288–89 (1993) (applying the political question doctrine). *But cf. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (describing the political question doctrine as a “narrow exception to th[e] rule” that “the Judiciary has a responsibility to decide cases properly before it”).

337. Thus, for example, whatever its normative appeal, interpreters are unlikely to adopt Matthew Stephenson’s suggestion that the Constitution be read to treat Senate inaction on appointments of principal officers as sufficient consent for purposes of the Appointments Clause, given that such an approach would have to overcome widespread perceptions of the meaning of the text that align with longstanding historical practice. *See* Matthew C. Stephenson, Essay, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013). As noted earlier, the opposite is not necessarily true. That is,

*D. Benefits of the Practice*

So far, this Article has attempted to describe an important feature of the role of the constitutional text in American interpretive practice; it has not sought to assess the normative implications of that feature. The Article has emphasized description over prescription in the belief that an accurate understanding of a social practice is both valuable in itself and an essential prerequisite to sound evaluation of the practice. With the Article's descriptive account of constructed constraint in hand, this Section now sketches a normative defense of the practice.

The practice of constructed constraint can be evaluated from two different points of view—from the external perspective of the analyst of the constitutional system, and from the internal perspective of the judge or practitioner. The internal perspective can be further divided into the individual and the systemic points of view.<sup>338</sup> The individual perspective can be held by the faithful participant in constitutional practice—the citizen, politician, or judge who both makes claims on the Constitution and who seeks to comply in good faith with the Constitution. The systemic perspective evaluates a social practice from the standpoint of the constitutional system as a whole, not from the perspective of particular participants and their choice of conduct within the system. The systemic perspective asks, for example, whether a practice produces system goods. Such goods enhance the functioning of the constitutional system by improving its ability to accomplish its purposes, including by negotiating conflicts among different purposes.<sup>339</sup>

Constructed constraint is primarily a descriptive account of part of U.S. constitutional practice from the external perspective, not a normative theory of how interpreters should decide particular constitutional questions from the internal, individual perspective. For example, constructed constraint neither validates nor condemns any of the interpretive positions taken by participants in the historical or

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historical practice that is perceived to be at odds with traditional plain meaning considerations does not inevitably result in construction. *See supra* note 230.

338. *See* BALKIN, *supra* note 2, at 328 (“In evaluating a constitutional and political system, we can focus our normative judgments on what individuals in a system should do within the system or on how the system operates as a whole.”); *see also* Siegel, *supra* note 92 (evaluating the individual and systemic perspectives from which Balkin reasons).

339. *See* BALKIN, *supra* note 2, at 328 (“Sometimes we should focus on improving individual behavior, but sometimes the system is the proper focus.”); *id.* at 328–29 (describing the individual and systemic perspectives).

contemporary debates used as examples in this Article—whether over the meaning of “Congress” in the First Amendment, the creation of West Virginia, or President Obama’s recess appointments. The theory itself cannot determine the proper balance between construction and constraint regarding any particular constitutional question. Nor can it determine what materials should inform construction in any given case. To take one of the modalities discussed in Part II, the effect of a consideration of consequences on constitutional construction will depend on the interpreter’s view of what consequences are relevant, the likelihood of their occurrence, and whether they are good or bad. The theory of constructed constraint cannot resolve such questions.<sup>340</sup>

Constructed constraint does, however, act as a counterpoint to certain theories of constitutional interpretation *to the extent that they purport to account for actual practice*. In particular, this Article contends that constructed constraint is a descriptively better account of an important part of constitutional practice than approaches that, as a general matter, conceive of the text either as highly constraining or as not constraining at all. For example, strict versions of constitutional originalism and textualism seem unable to explain the construction and reconstruction of the constitutional text in which interpreters have engaged over the course of American history. At the same time, the constraint element of constructed constraint also rules out approaches that dismiss the possibility, let alone the constraining effect, of constitutional text that is perceived to be clear. The possibility of textually perceived constraint may help to explain why eminent constitutional scholars today, such as Strauss and Balkin, agree that clear text binds and differ only in the explanation that they offer for this phenomenon. This possibility may also help to explain why certain prominent constitutional scholars, such as Balkin, Tushnet, and Levinson, do not write today about constitutional questions in the way that they did in the 1980s. In particular, they now seem more interested in text, history, and doctrine than they were in

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340. This Article primarily offers an external, descriptive account of an important part of constitutional practice; it does not suggest that participants in the practice should reason publicly in terms of constructed constraint. A distinct question is whether participants should be more aware of the phenomenon of constructed constraint. One virtue of a greater awareness is that participants would thereby gain a better appreciation of what they are—and are not—disagreeing about.

the earlier period. One might say that the Big-C crits have become little-c crits.<sup>341</sup>

If the normative implications of constructed constraint are limited from the individual perspective, these implications are more significant from the perspective of the constitutional system as a whole. From the systemic perspective, a key question is how the system functions over time to manage the constitutive tensions between the different values that are typically associated with constitutionalism. On the one hand, constitutionalism is widely thought to entail fundamental legal limits on politics, which help to make possible the rule of law by restraining the exercise of governmental power.<sup>342</sup> On the other hand, it is also widely recognized that the rule of law itself has political foundations.<sup>343</sup> It follows that constitutionalism also requires some measure of democratic responsiveness—some popular participation in the fashioning of constitutional limits.<sup>344</sup> Mindful of this dimension of constitutionalism, presidents have often stressed the need for the Constitution to keep up with the times.<sup>345</sup>

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341. Consider, for example, the contrast between Balkin's *Living Originalism* and his critical and postmodern legal scholarship during the 1980s and early 1990s. *See, e.g.*, Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986); Jack M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831 (1991); Jack M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992); *see also* Sanford Levinson, *Jack Balkin as the Picasso of Constitutional Theorists*, 2012 U. ILL. L. REV. 711, 712–13 (analogizing the shift in Balkin's approach to shifts in the style of Pablo Picasso).

342. *See* Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY, 633, 642 (1990) (describing the rule of law as “a crucial and historically rare mode of restraint on power by law”); Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 213 (1979) (arguing that the idea of the rule of law requires the government and the governed to “be ruled by the law and obey it”).

343. *See, e.g.*, Carla Hesse & Robert Post, *Introduction to HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 13, 20 (Carla Hesse & Robert Post eds., 1999) (“[T]he relationship between the governed and the governors necessary to sustain the rule of law . . . consists of specific practices that reflect trust and tacit social understandings.”); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 966–67 (2008) (arguing that the ability of the governed to recognize the law as their own helps to maintain the relationship of trust that sustains the rule of law).

344. *See, e.g.*, BALKIN, *supra* note 2, at 72 (“Nevertheless, mere conformity to professional discourse and professional practices is not sufficient for the Constitution to be democratically legitimate. It is not enough for the Constitution-in-practice to be law. It must also be our law. It must ultimately be responsive to the public's values.”).

345. *See, e.g.*, WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (1908) (“[T]he Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age.”); *see also* FRANKLIN DELANO ROOSEVELT, *The Constitution of the United States Was a Layman's Document, Not a Lawyer's*

There is relatively little tension between these two elements of constitutionalism—restraint and responsiveness—when the constraints imposed by the Constitution facilitate democratic decisionmaking, such as by structuring and facilitating democratic politics, as discussed in the previous section.<sup>346</sup> There is also relatively little tension between them when practices of popular sovereignty reinforce constitutional limits, such as by promoting a democratic political culture of respect for the Constitution.<sup>347</sup> In particular cases, however, constitutionalism and democracy can be in tension. Such tensions and conflicts lie at the heart of many debates in constitutional law, from gun rights to same-sex marriage, and from abortion to health care reform. A basic question in such cases is the extent to which the Constitution should be understood as restraining or responding to popular commitments.

Robert Post and Reva Siegel have coined the phrase “democratic constitutionalism” to describe the paradoxical relationship between these two aspects of constitutionalism—“to express the paradox that constitutional authority depends on both its democratic responsiveness and its legitimacy as law.”<sup>348</sup> “Americans,” they write, “want their Constitution to have the authority of law, and they understand law to be distinct from politics.”<sup>349</sup> Moreover, “[t]hey understand that the rule of law is rooted in professional practices that

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*Contract* (Sept. 17, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 363 (Samuel I. Rosenman ed., 1941) (“[F]or one hundred and fifty years we have had an unending struggle between those who would preserve this original broad concept of the Constitution as a layman’s instrument of government and those who would shrivel the Constitution into a lawyer’s contract.”).

346. See also, e.g., ELY, *supra* note 27 (articulating a democracy-promoting theory of judicial review).

347. Cf. ROBERT C. POST, *Between Democracy and Community: The Legal Constitution of Social Form*, in CONSTITUTIONAL DOMAINS, *supra* note 142, at 189, 192 (stressing that even the constitutional value of individual self-determination “depends on the maintenance of appropriate forms of community life”—specifically, “community institutions designed to inculcate this value”). Mandatory public education in the United States is a prime example of such a community institution. *Id.*; see also Abraham Lincoln, *Address Before the Young Men’s Lyceum of Springfield, Illinois*, in 1 COLLECTED WORKS OF ABRAHAM LINCOLN 108, 112 (Roy P. Basler ed., 1953) (desiring that obedience to the Constitution and laws “become the *political religion* of the nation,” and that “the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars”).

348. Post & Siegel, *supra* note 12, at 27. For Post and Siegel’s initial, more elaborate development of the theory of democratic constitutionalism, see generally Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

349. Post & Siegel, *supra* note 12, at 27.

are distinct from popular politics.”<sup>350</sup> Even so, Post and Siegel stress, if the public comes to view the Supreme Court’s interpretation of the Constitution as wholly unresponsive to popular commitments, then “the American people will come in time to regard it as illegitimate and oppressive, and they will act to repudiate it as they did during the New Deal.”<sup>351</sup>

How, then, can the Constitution “function as our fundamental law, as the limit and foundation of politics, and yet remain democratically responsive”?<sup>352</sup> Political commitments may become constitutional law in various ways. First, Article V amendments are rare but have not been impossible over the course of American history. Second, electoral politics results in acts of constitutional interpretation and institution building by the political branches, as well as the appointment of Justices and judges.<sup>353</sup> Third, the public may engage in efforts to change social norms, whether through social movement advocacy, litigation, or both. Fourth, norm contestation may also occur through the rhetoric of presidents and other influential politicians.<sup>354</sup> “To succeed in changing social norms,” Balkin observes, “may be as powerful as changing judges and politicians, for it alters the underlying sense of what is reasonable and unreasonable for governments to do. It shifts political and professional discourse about what is off-the-wall and on-the-wall in making claims on the Constitution.”<sup>355</sup>

Constructed constraint illuminates both the limits and the potential of non–Article V pathways of constitutional change. The fact that interpreters feel bound by clear constitutional text enables the Constitution to partially insulate itself from these pathways. But the ability of interpreters to work with the text renders the

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350. *Id.* at 27–28.

351. *Id.* at 28; *see also id.* at 25–26 (observing that “important aspects of American constitutional law evolve in response to substantive constitutional visions that the American people have mobilized to realize,” and that “these responsive features of the law help sustain the Constitution’s authority in history”).

352. *Id.* at 28; *see also* BALKIN, *supra* note 2, at 71 (“The democratic legitimacy of the Constitution depends on the people’s belief that their Constitution and their government belongs to them, so that if they speak and protest and make their views known over time, the constitutional constructions of courts and the political branches will eventually respond to their political values and to the issues they care about most.”).

353. *See generally* Balkin & Levinson, *supra* note 68 (articulating their theory of partisan entrenchment through judicial appointments).

354. *See* BALKIN, *supra* note 2, at 70–71; Post & Siegel, *supra* note 12, at 28.

355. BALKIN, *supra* note 2, at 71.

Constitution more democratically responsive, animating the text with the values and needs of the people whom the text purports to govern.<sup>356</sup> In other words, constraint empowers the Constitution to discipline politics, and the construction of constraint vivifies constitutionalism by infusing it with popular commitments.

In negotiating tensions within constitutionalism between restraint and responsiveness, constructed constraint attends to the two enduring issues in constitutional theory that were noted in Part III.A: the dead hand problem and the countermajoritarian difficulty. The constraint element of constructed constraint helps to ameliorate the countermajoritarian difficulty by framing and channeling judicial discretion in constitutional adjudication. The construction part of constructed constraint enables interpreters to reduce the dead hand problem in practice by facilitating constitutional change, not only through judicial decisionmaking, but also outside the courts—and not only through written or unwritten constitutional amendments, but also through working with the text that they already have.

#### CONCLUSION

Recent scholarship has explored whether and why participants in American interpretive practice feel bound by constitutional text that they perceive to be clear. Other work has asked how the text can be built upon by other materials. This Article, by contrast, has suggested that it is important to take account of the extent to which the perceived clarity of the constitutional text is itself constructed. The clarity of constitutional text is partially constructed, this Article has explained, because over time, interpreters work on or around the very text to which they feel bound.

The model of constructed constraint offered here navigates between strict textualist accounts of the constitutional text and critical accounts that regard the text as unconstraining. By deemphasizing the distinction between clear text and extratextual considerations, the idea of constructed constraint also unsettles the relationship between interpretation and construction, between the written and unwritten constitutions, and between the Constitution and the “Constitution

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356. Cf. Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1474 (2007) (arguing that the distinction between constitutional law and politics creates the possibility of the rule of law, but that the uncertain and shifting boundaries of the distinction help to legitimate the law by infusing it with popular commitments).

outside the Constitution.” As a normative matter, the practice of constructed constraint is an important way in which interpreters work out the potential tensions within democratic constitutionalism between fidelity to the rule of law and responsiveness to popular ideals.