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# Is the Constitution Special?

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# IS THE CONSTITUTION SPECIAL?

Christopher Serkin† & Nelson Tebbe‡

*"[W]e must never forget, that it is a constitution we are expounding." If there was such a danger when Chief Justice John Marshall wrote those words, there is none today. Americans regularly assume that the Constitution is special, and legal professionals treat it differently from other sources of law. But what if that is wrongheaded? In this Article, we identify and question the professional practice of constitutional exceptionalism. First, we show that standard arguments from text, structure, and history work differently in constitutional law. Second, we examine the possible justifications for such distinctive interpretation among lawyers, and we find them mostly unconvincing. Neither entrenchment, nor supremacy, nor democratic legitimacy sets the Constitution apart from other sources of law in a way that supports interpretive exceptionalism. In fact, the best argument for the practice is simply that the Constitution is regarded as unique—that it occupies a privileged place in American culture and political mythology. But even if that status can justify applying some specialized methods to the document, it cannot explain every markedly divergent practice that we see among contemporary legal professionals. In the conclusion, we reveal one normative motivation for the project. All too often, constitutional argument is deployed in ordinary politics as a kind of trump, with the purpose and effect of shutting down policy debate. Legal professionals contribute to this tactic when they craft rarified interpretive methods without justification. Demythologizing constitutional law undercuts its use as a political blunderbuss.*

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### INTRODUCTION

"[W]e must never forget, that it is a *constitution* we are expounding."<sup>1</sup> That admonition from Chief Justice John Marshall has become gospel for American lawyers. It has been called "the single most important utterance in the literature of constitutional law."<sup>2</sup> And the idea it stands for, that constitutional interpretation is an exceptional enterprise, is now taken for granted by legal professionals. If there was a danger of forgetting the specialness of the Constitution when Chief Justice Marshall wrote those words, there is none currently.

But what if that is a mistake? In this Article, we identify and examine the practice of constitutional exceptionalism among mainstream lawyers, judges, lawmakers, and academics. We put forward two principal arguments. First, we show that constitutional law is in fact subject to special interpretive methods as compared to other sources of law, such as statutes and common-law precedents. Take for example historical arguments based on a law's enactment. Constitutional discourse regularly invokes original intent or meaning, and interpreters can find the history dispositive.<sup>3</sup> The role of history in statutory interpretation is different. While legal professionals will

<sup>1</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>2</sup> FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 534 (Philip B. Kurland ed., 1970).

<sup>3</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (purporting to adopt original understanding of Second Amendment); *People v. Nutt*, 677 N.W.2d 1, 6 (Mich. 2004) ("Our goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers."); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (justifying originalism on the positive ground that constitutional practice, in fact, makes original meaning "the ultimate criterion for constitutional law"); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) ("Originalism regards the discoverable meaning of the Constitution at

sometimes look to legislative history to discern the meaning of a statute, drafters of statutes receive nothing like the deference given to framers like James Madison or Alexander Hamilton. This is the most obvious but by no means the only way in which history is used differently.<sup>4</sup>

Textual interpretation likewise looks markedly different in the constitutional setting. The text written by the framers ends up mattering less than the text of statutes, perhaps to the surprise of laypeople. We support that claim below. But our basic point is more general and less contentious, namely that the practice of interpreting constitutional language is distinct from interpreting other sources of law. Overall, what varies is not necessarily the *scope* of each discourse (e.g., whether historical argument is included within the set of accepted moves in both areas) but rather its *shape*—that is, how persuasive a way of arguing is seen to be within the domain. The shape of interpretive argument sets constitutional law apart from statutory law and the common law in ways that have not been fully catalogued before.

Does this observed constitutional exceptionalism make sense? In fact, and this is our second main argument, there are few compelling reasons to interpret the Constitution differently from statutes, regulations, common law precedents, and other sources of law. When people seek to justify that practice—if they think about it at all—they are likely to cite a few characteristics of the Constitution as support. They can be expected to say, for one, that it represents a binding precommitment that is immune to majoritarian change through the normal legislative process. Statutes can always be amended or repealed, and the common law can be supplanted by legislation, but the Constitution can be altered only through Article V, which is famously unworkable as a practical matter.<sup>5</sup> In fact, however, the Constitution is more ordinary in this regard than it might initially seem, both because it is malleable as well, and because other sources of law can be equally entrenching. As one of us has argued, entrenchment exists along a spectrum,

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the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”).

<sup>4</sup> For others, see *infra* subpart I.B.

<sup>5</sup> See U.S. CONST. art. V; see also R. B. Bernstein, *Preface* to CONSTITUTIONAL AMENDMENTS, 1789 TO THE PRESENT, at xiv (Kris E. Palmer ed., 2000) (“Of the more than 10,000 constitutional amendments proposed in Congress since 1789, 33 (about one-third of one percent of the total number proposed) have emerged from Congress; of those, 27 (about one-fourth of one percent of the total number proposed) have become part of the Constitution.”).

and the Constitution is not necessarily more fixed in practice than all other sources of law.<sup>6</sup> Consider which is more likely: that the death penalty will be found to be unconstitutional, or that rent control will end in New York City. Rent control is sticky to a degree that many constitutional provisions are not, and it is not anomalous in that regard. Even some aspects of the common law are surprisingly immune to regular democratic change. The public trust doctrine, most famously, can prevent a state government from alienating property, even if the entire electorate demands a sale.<sup>7</sup> While the Constitution entrenches, then, it does not do so uniquely.

Another possible rationale is that the Constitution is specially legitimated. It deserves exceptional interpretive treatment because it was drafted and ratified through a procedure designed to ensure that it enjoyed widespread public support. But this, too, cannot be quite right. Other laws have similar claims to overwhelming popular assent, from the Judiciary Act of 1789, to the Sherman Antitrust Act, to major civil rights acts of the Second Reconstruction.<sup>8</sup> Even more importantly, the Constitution's claim to special democratic legitimacy requires ignoring the inconvenient fact that more than half of the adult population was ineligible to ratify the original Constitution. Democratic flaws have characterized important amendments as well.

So neither entrenchment over time nor ratification by the people clearly separates out the Constitution. Nor do other leading candidates for uniqueness isolate the Constitution in a way that warrants special interpretive practices.<sup>9</sup> Some might immediately respond that the Constitution is different from other sources of law in another way, namely that it was written using broad terms so that it could endure well beyond the typical life of a statute. But we question that rationale, too.<sup>10</sup> Think for example of the Administrative Procedure Act and the Sherman Antitrust Act. While those laws share several features with the Constitution—they are not only broadly worded but enduring and widely accepted—good lawyers would not

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<sup>6</sup> Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 882 (2011).

<sup>7</sup> *Id.* at 883.

<sup>8</sup> See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014) (arguing that the civil rights laws of the 1960s have landmark status and constitutional significance). *But cf.* *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (invalidating Section 4 of the Voting Rights Act of 1965).

<sup>9</sup> See *infra* subpart II.C (supremacy) and subpart II.D (moral perfectionism).

<sup>10</sup> See *infra* subpart II.A (form and subject matter).

interpret them by citing the intentions of their sponsors, the way they regularly rely on the views of Madison or Hamilton to interpret the Constitution. In fact, there is little about the Constitution that explains professional practices.

One reason for special treatment is more promising than the others, namely that Americans commonly *regard* the Constitution as exalted. That rationale might seem circular—the Constitution is special because citizens view it as special—but it is better understood to refer to an aspect of the political culture that is incontrovertible. People do think about our basic law differently: they venerate it. Viewed in historical perspective, the Constitution's universal popularity is actually remarkable, particularly given the deep divisions that otherwise characterize contemporary America.<sup>11</sup> Few other aspects of the nation's political or cultural life draw the same kind of consensus. Perhaps that alone can explain how the document is treated.

On closer inspection, however, even the Constitution's revered status falls short of justifying every kind of interpretive and argumentative approach that we see in practice. Largely, that is because its place within American mythology is relatively independent of its content, and has much more to do with its symbolic functions. Citizens can and do invoke the document's authority ritualistically while arguing for a range of divergent substantive interpretations.<sup>12</sup> Cultural *authority* does not yield interpretive *argument* in any simple way. In sum, while we do not reject the possibility that, in theory, a hallowed place in American politics and history could justify certain interpretive moves, we do not believe this rationale can explain all aspects of the distinctive constitutional methodologies that are deployed in everyday legal practice.

To help make that point, we develop a framework for analyzing justificatory failure: we ask whether there are gaps be-

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<sup>11</sup> Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335, 337 (2015). Other scholarship similarly highlights the relative novelty of constitutional exceptionalism. Philip Hamburger argues that at the time of the founding, judges did not think of "judicial review" as a special category. Judges "mad[el] [constitutional] decisions in the same way they made any other decisions—in accord with the law of the land." PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 17–18 (2008); see also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 129–30 (2013) (arguing that the framers applied substantially similar interpretive methods to the Constitution and to statutes).

<sup>12</sup> Richard Primus, *Why Enumeration Matters*, 114 MICH. L. REV. (forthcoming 2016) (manuscript at 8) (on file with authors) (describing constitutional invocations as "continuity tenders" that are largely symbolic).

tween the Constitution's *attributes*, its claims to *authority*, and the peculiar interpretive *arguments* that apply to the document. By attributes, we mean characteristics or features that set the document apart from other sources of law. By authority, we mean claims to obedience that the Constitution makes on government actors. And by arguments, we mean interpretive moves that seek to fix the meaning of the document based on text, structure, history, and the like. Here, we are focused on the last of these—constitutional argument—and on whether its distinctive forms can be justified. The framework helps us to isolate and interrogate common justifications of special constitutional argument based on its attributes and forms of authority. As it turns out, those justifications are far less convincing than many assume.

This Article may be the first to interrogate constitutional exceptionalism, but it builds on a nascent strain in constitutional theory. For example, Richard Primus has argued that the criteria that determine whether a rule enjoys constitutional status should be unbundled, so that not every rule we think of as constitutional must share all the attributes commonly associated with that status.<sup>13</sup> Others have questioned the distinctive procedural or remedial rules that courts apply in constitutional cases,<sup>14</sup> or they have debated the differences between constitutional and statutory interpretation without examining the common law.<sup>15</sup> This Article goes further than the existing scholarship, addressing the distinctiveness of constitutional argument in a way that is comprehensive and foundational. To be sure, some may object by arguing that we have missed a constitutional trait that does, in fact, justify a distinct interpretive practice. We think not, but we invite such a criticism precisely because it takes seriously our objection—so far ignored in professional circles—that uniquely constitutional arguments must be justified by distinctive constitutional attributes. We canvass the leading candidates and find them mostly lacking.

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<sup>13</sup> Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1083 (2013); see also ACKERMAN, *supra* note 8 (arguing that certain civil rights statutes have constitutional status).

<sup>14</sup> See generally Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 694–712 (2013).

<sup>15</sup> Compare Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 22–45 (2004) (defending the differences between statutory and constitutional interpretation), with William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (critiquing those differences).

Part I makes the case that the Constitution is in fact treated as special. It shows how the text is comparatively unimportant in constitutional law, how originalism differs from interpretation based on legislative history, how structural argument takes a different form in statutory interpretation, and how *stare decisis* oscillates in each setting. It also examines metainterpretive arguments designed to mediate among these appeals to text, structure, and history, and it contends that, here too, the constitutional versions of such arguments are exceptional. Part II then tests the proposition that the differences we observe are insufficiently justified by the Constitution's attributes and claims to authority, including its form and subject matter, its entrenchment, its democratic legitimacy, its supremacy, and its ostensible normative perfectionism. Part II also considers whether the Constitution might be set apart in a polythetic way by a distinctive cluster of characteristics, rather than by one differentiating attribute. Finally, we address the Constitution's place in American politics, culture, and society. Again, we think this last feature presents the strongest argument for constitutional exceptionalism but that it falls short of a full justification.

In the conclusion, we reveal one motivation for the project. Today in American politics, the Constitution too often functions as a kind of trump. Political actors feel that evoking higher law will overwhelm all manner of careful policy arguments by their opponents, or force them to escalate their rhetoric to match. Constitutional law, in short, is deployed as a conversation stopper. That move can work partly because of the Constitution's mythological status among legal professionals. If lawyers viewed the Constitution as law, subject to interpretation that is not different in kind from what they apply to other legal sources, that would weaken efforts to deploy the document to squelch deliberation in ordinary politics, at least at the margins, and it would promote genuine conversation about what the American Constitution should require of citizens and their government. While our motivation for framing the question therefore has a normative dimension, we bracket the broader question of what should follow from our argument. Our primary aim is to unsettle the contemporary consensus around constitutional exceptionalism.



## I

## CONSTITUTIONAL EXCEPTIONALISM

Legal actors in America typically assume that the Constitution is special, and they treat it accordingly. They argue over its meaning—that is, they interpret it as law—in ways that are distinct from the way they talk about statutory and common law. While exceptions undoubtedly appear, our aim in this Part is to characterize the norms of lawyerly argument. We are seeking to capture the implicit rules that govern the working culture of American law. That does not involve taking a position in debates between, say, originalists and living constitutionalists. Rather, it entails showing whether and how arguments from both sides carry authority among constitutional interpreters.

According to a widely accepted typology, only a few types of interpretative argument are recognized as persuasive within actual constitutional practice. In a classic work, Philip Bobbitt showed that appeals to text, history, structure, precedent, prudentialism, and constitutional ethos all carry authority.<sup>16</sup> He argued that his list was exclusive. Other arguments—like those drawing on theology, aesthetics, or random chance—do not count as authoritative.<sup>17</sup> Likewise, Richard Fallon identified a similar set of interpretive strategies that he perceived to be accepted in constitutional practice.<sup>18</sup> And Robert Post argued that all legitimate interpretation of the Constitution can be classified as either doctrinal, historical, or what he called responsive.<sup>19</sup>

Almost all of these modes of constitutional argument have analogues in statutory and private law.<sup>20</sup> And yet, as we will show in this Part, there are significant differences. Moreover, higher-order strategies for mediating conflicts among these

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<sup>16</sup> Bobbitt's six modalities of constitutional argument are: textual, structural, historical (by which he meant something close to originalist), doctrinal, prudential, and ethical. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991); PHILIP BOBBITT, *CONSTITUTIONAL FATE* 7 (1982).

<sup>17</sup> BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 16, at 6.

<sup>18</sup> Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987).

<sup>19</sup> Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 19 (1990).

<sup>20</sup> Cf. Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 482–83 (2013) (applying modalities of constitutional interpretation to statutes).

recognized forms of interpretation also diverge, as we will show before concluding this Part.<sup>21</sup>

A few preliminary clarifications are in order. First, our objective is to characterize conventional legal interpretation in a variety of settings. This necessarily involves generalizations. The goal, in our terminology, is to capture the broad shape of legal interpretation in different settings, and not all of the details. Our focus is therefore less on cutting-edge legal scholarship that pushes interpretive boundaries (although we discuss it where appropriate) and more on the heartland of legal argument. We frequently refer to the intuitions and typical attitudes of lawyers and legal professionals. We are interested in the kinds of interpretive moves that are likely to appear in briefs and judicial opinions, and that inform conventional understandings of law. We naturally rely on legal scholarship, too, but our attention in this descriptive Part is trained on the mainstream and not on the outliers.

Second, we maintain that the Constitution is the right unit of analysis, even while we acknowledge that there might be exceptions. That is, lawyers generally think of the Constitution as an interpretive category to which they apply the same set of (special) arguments, although there may be exceptions that take the form of particular provisions that are more like statutes or common-law rules.<sup>22</sup> Conversely, we recognize that some statutory provisions may be analyzed like constitutional provisions, but we again take these to be uncommon.<sup>23</sup> Whether our intuition here is correct is not amenable to any

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<sup>21</sup> But see LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 221–22 (2008) (“Our view—and we believe it is the ordinary view—is that interpreting a constitution is not different in any material way from interpreting a statute.”). Alexander and Sherwin’s argument, however, operates at a higher level of generality than ours, and its purpose is to persuade readers to prioritize authorial intention in both contexts. Accordingly, there is less tension between our claims in this Part than it might seem.

<sup>22</sup> Richard Primus, for example, has recently argued that not all constitutional provisions are equally constitutional. See Primus, *supra* note 13. His work is important in part because it is novel, and so we neither adopt nor reject his perspective here when we set out conventional constitutional practice.

<sup>23</sup> Here we do not mean to refer to statutes that incorporate constitutional terms by reference. Those are easy to assimilate to our model because they simply import constitutional terms and techniques. Think for example of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012), or the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012), both of which explicitly seek to revive older constitutional jurisprudence, giving it statutory force. But see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014) (stating that “nothing in the text of RFRA as originally enacted suggested that the statutory phrase ‘exercise of religion under the First Amendment’ was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment”).

easy empirical test, but we believe it characterizes mainstream practice, and we trust that readers will find our characterization of the shape of legal argument familiar.

Third, we do not foreclose here the possibility that specific constitutional provisions, statutes, or common-law principles should be subject to specific forms of interpretation for distinct normative reasons. The rule, for example, that remedial statutes should be liberally construed may be justified by special characteristics of such statutes.<sup>24</sup> Likewise, we can at least imagine arguments for interpreting particular constitutional provisions based on their distinctive histories, characteristics, and purposes.<sup>25</sup> We take no position on that here. Our argument operates on a larger scale: that the Constitution *as a whole* is subject to special interpretive moves that are not justified by characteristics or attributes of the Constitution *as a whole*.

Fourth, we bracket state constitutions in this Article. Our reason for making this choice reinforces the intuition motivating our broader argument. While there is some ongoing debate in the literature, most observers agree that state constitutions are importantly different from the federal Constitution because, for example, they are written differently,<sup>26</sup> they are easier to amend,<sup>27</sup> and they usually do not contain grants of power (like those found in the federal counterpart) but only limit states' inherent police power.<sup>28</sup> These differences have caused some commentators to ask whether state constitutions are even "constitutional" as conventionally understood.<sup>29</sup> Instead of answering that question, we elide it altogether. However, we note that when commentators even formulate an inquiry in these terms, they are implicitly adopting the view that constitu-

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<sup>24</sup> See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937-40 (1992).

<sup>25</sup> Cf. Primus, *supra* note 13 (arguing for treating different provisions differently for the purpose of determining whether they count as constitutional).

<sup>26</sup> See Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. 837, 839 (2011) (pointing out that Alabama's constitution is over 350,000 words long, as compared to the 8700 words in the federal Constitution).

<sup>27</sup> *Id.*

<sup>28</sup> See Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1045-46 (2011); see also Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 360 (2011) ("The federal government, of course, can act only pursuant to its enumerated powers, while states have the police power and can act unless prohibited.").

<sup>29</sup> See James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1029 (1993); Landau, *supra* note 26.

tional interpretation is somehow distinct. Whether and how state constitutional practices resemble federal constitutional practices is an interesting and important issue, but it does not affect our argument.

As a fifth and final point, we anticipate and address a possible objection to our claim in this Part. A reasonable person could read through our analysis and conclude that constitutional law is not special, but just different. For that person, the three sources of law that we highlight—constitutional, statutory, and common law—simply have distinct features that require different sorts of interpretive arguments. Constitutional discourse differs from the other two in just the same way as they differ from each other. Although that reading is possible, we draw a different conclusion from this Part, especially when it is considered together with Part II. We believe that constitutional interpretation is indeed special, and not just different, for two related reasons. First, the gaps are particularly wide between interpretive arguments, on the one hand, and the Constitution's attributes and claims to authority, on the other. As we will show in Part II, the strongest justification comes from the Constitution's cultural status—that is, from the perception of specialness itself—yet even that rationale is not completely satisfying. Second, constitutional interpretation is regarded by professionals as exceptional. Imagine legal actors encountering a new source of law—akin to agency regulation in the late nineteenth century.<sup>30</sup> Our sense is that they would not look to constitutional law for an interpretive model. They would analogize instead to statutory or common-law interpretation. That thought experiment concretizes the intuition that constitutional practice works not just differently but in an exceptional way that is unique and limited to constitutional interpretation.

At the end of the day, however, our argument is fundamentally about the mismatch between the distinctive features of constitutional argument and the Constitution's attributes and claims to authority. That mismatch persists whether interpretations of the Constitution are special in a rarified sense or simply different. A reasonable person could therefore disagree with this aspect of our diagnosis and still embrace the ultimate

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<sup>30</sup> We bracket interpretation of regulations in this Article for reasons of space, focusing instead on statutes and the common law as the core comparators, but we acknowledge its importance. See generally Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 360 (2012) (endorsing distinctive interpretation of regulations).

argument. In the rest of this Part, we lay out the differences in interpretive argument that set constitutional discourse apart from argumentation about other laws.

### A. Text

One of the easiest places to spot constitutional exceptionalism is in textual interpretation. In practice, the text of the Constitution actually matters less than the text of statutes, and the wording of common-law documents matters least of all.

At first blush, none of this is the least bit obvious. After all, courts and commentators often claim that the process of interpreting text is the same whether the text is found in the Constitution or a statute.<sup>31</sup> Justice Antonin Scalia, for example, has directly embraced this interpretive symmetry in his academic writing: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."<sup>32</sup> And a majority of the Court embraced that view in *Heller*, where it reasoned that the textual structure of the Second Amendment should be interpreted just like the text of "other legal documents of the founding era."<sup>33</sup>

Moreover, *if* texts are to be treated differently, one might think that constitutional text would be taken more seriously than statutory language. If law is seen as a command given by an authority, and constitutional law a command by the highest authority, then its words should carry disproportionate force.<sup>34</sup> The text of the Constitution demands a kind of adherence or even allegiance that other sources of law cannot compel. Yet comparing the reality of constitutional and statutory interpre-

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<sup>31</sup> See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 383 (1990) (arguing that statutory interpretation is "fundamentally similar" to constitutional interpretation); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION, 23-25 (Amy Gutmann ed., 1997) (endorsing the use of textualism in both statutory and constitutional contexts).

<sup>32</sup> Scalia, *supra* note 31, at 38; see also Stack, *supra* note 15, at 15 (discussing a "convergence of constitutional and statutory interpretation").

<sup>33</sup> *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (comparing the textual structure of the Second Amendment to that of other contemporaneous laws).

<sup>34</sup> David Strauss explains that one account of law sees it as an order from a boss: it is binding on us because it issues from a person or entity with authority to command. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 36-37 (2010). If that is right, then you might expect the command of a more authoritative source to carry greater authority.

tation demonstrates that this intuition has it exactly backwards.<sup>35</sup>

Consider, as just one example, the interpretation of the phrase “public use” in the Fifth Amendment. The Takings Clause has been interpreted as imposing a number of limitations on government power, one of which is that the government may only take private property for a public use.<sup>36</sup> “Public use,” in other words, imposes a substantive limit on government power. This, however, is not what the constitutional text actually says, considered on its own terms. Jed Rubenfeld has raised this “small matter of the constitutional text” and has pointed out that the provision requiring that private property “shall not ‘be taken for public use without just compensation’ . . . .” does not read “shall not be taken *except* for public use *and* not without just compensation.”<sup>37</sup> Looking closely and seriously at the Constitution’s text, the phrase “public use” does not appear to impose an independent constraint on government action, but instead appears to define those categories of “takings” for which compensation is actually due.<sup>38</sup> For Rubenfeld, those categories are limited to takings for actual use, as opposed to mere limitations on use.<sup>39</sup> No court has embraced this aspect of Rubenfeld’s argument, and indeed none seems even to have wrestled with the actual text of the Takings Clause with the same degree of seriousness.<sup>40</sup> The meaning of the public use clause is well settled despite its apparent tension with the language of the Fifth Amendment.

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<sup>35</sup> See, e.g., *id.* at 33–34 (predicting that in most cases “the text of the Constitution will play, at most, a ceremonial role” and contrasting statutory cases, where arguments “usually focus on the precise words of the statute”). For enlightening examples, see Primus, *supra* note 12 (manuscript at 14–15).

<sup>36</sup> See *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

<sup>37</sup> Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1119 (1993) (quoting William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 591 (1972)).

<sup>38</sup> See *id.* at 1119–20. In fairness, Rubenfeld does not claim that his interpretation is the only possible one, only that it is the most natural. “The point is not that no reader of English could construe the Fifth Amendment as takings doctrine construes it, nor that a more natural reading of the Constitution’s grammar is necessarily dispositive. But surely there is value in reading our Constitution with, not against, its textual grain.” *Id.* at 1119.

<sup>39</sup> See *id.* at 1119–20.

<sup>40</sup> A number of courts have relied on other aspects of Rubenfeld’s argument. See, e.g., *Hoeck v. City of Portland*, 57 F.3d 781, 788 (9th Cir. 1995) (holding that demolition of a building did not constitute a taking because the property was not taken for an actual public use); *Customer Co. v. City of Sacramento*, 895 P.2d 900, 921 (Cal. 1995) (recognizing the “function performed by the just compensation clause in preserving the autonomy of individuals against the government by restraining the government’s motive to take over their private property for its own ends and uses”).

Equally striking examples come immediately to mind. Courts and lawyers simply ignore the plain text of the Constitution when they apply the Equal Protection Clause to the federal government despite the fact that by its terms it only constrains the states.<sup>41</sup> The text of the First Amendment refers only to "Congress,"<sup>42</sup> and yet it is routinely thought to apply to enforcement by the executive branch as well—for example, in overbreadth cases.<sup>43</sup> Article III requires juries for all criminal trials except impeachment,<sup>44</sup> and yet bench trials are common with the defendant's consent.<sup>45</sup> You might even think of the Establishment Clause, which actually says nothing about the separation of church and state and instead prohibits only laws "respecting an establishment of religion."<sup>46</sup> Although of course the text is capacious enough to include a separationist principle, our point is that many lawyers, like many citizens, might be surprised to learn that the phrase "separation of church and state" does not appear anywhere in the document. That is how distant the text remains from quotidian lawyering.

Not that such engagement with constitutional text is impossible or unilluminating. Nicholas Rosenkranz has demonstrated that attention to the grammatical "objects" and "subjects" of the Constitution can generate provocative doctrinal consequences at odds with some contemporary constructions of constitutional provisions.<sup>47</sup> The fact that rigorous attention to constitutional text marks out such a distinctive approach to constitutional interpretation highlights its relative rarity in professional practice.<sup>48</sup> Constitutional interpretation

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<sup>41</sup> U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). This phenomenon, called reverse incorporation, is well known and even justified as constitutional law, but it has little or no basis in the text of the Constitution itself. See Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 976–77, 989 (2004).

<sup>42</sup> U.S. CONST. amend. I.

<sup>43</sup> See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1253–57, 1253 n.166 (2010).

<sup>44</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>45</sup> See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277–78 (1942) (holding that a defendant may consent to waiving the constitutional right to a jury trial); Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1542–43 (2006) (noting that 27% of federal felony cases that went to trial from 1998 to 2002 were bench trials).

<sup>46</sup> U.S. CONST. amend. I.

<sup>47</sup> See Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1006–07 (2011); Rosenkranz, *supra* note 43, at 1210.

<sup>48</sup> But see David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 688–92 (2012) (paying such attention to constitutional text by "parsing the punctuation marks of the Constitution").

often strays so far from the text that readers can be confident of only one thing when reading a constitutional provision: it is almost certain *not* to mean precisely what it says.<sup>49</sup>

The contrast with statutory interpretation is striking. Close reading of statutory text is, of course, commonplace. Courts frequently focus on grammatical structure.<sup>50</sup> They interpret verbs according to the placement of a modifier within a sentence,<sup>51</sup> and they engage in careful analysis of the significance of punctuation.<sup>52</sup> In addition to familiar canons of construction, like *expressio unius est exclusio alterius*<sup>53</sup>—which applies also to constitutional interpretation—courts have developed more precise ones to deal with textual interpretation, like “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>54</sup>

Admittedly, even with such close attention, statutory text still often does not resolve the outcome of specific legal disputes.<sup>55</sup> Statutory canons of construction conflict with each

<sup>49</sup> This distinctive approach to interpretation is key to the distinction theorists are now drawing between the “big-C Constitution,” the written one, and the “small-c constitution,” the set of entrenched norms and rules that gets articulated in court precedents, official practices, institutional structures, and so on. See STRAUSS, *supra* note 34, at 34–35; Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 700–01 (2011). This lower-case constitutionalism is the one that does most of the work in actual cases.

<sup>50</sup> See, e.g., *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 884 F. Supp. 2d 127, 141–42 (S.D.N.Y. 2012) (“The ‘after due notice and opportunity for hearing’ clause is set off by commas and immediately precedes the words ‘issue an order withdrawing approval,’ indicating that the ‘notice’ clause modifies the ‘issue an order’ clause and not the findings clause.”).

<sup>51</sup> See, e.g., *United States v. Liranzo*, 729 F. Supp. 1012, 1014 (S.D.N.Y. 1990) (citing W. STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 30 (3d ed. 1979) (interpreting a modifier to apply to the verb closest to it)).

<sup>52</sup> See, e.g., *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167, 176 (2d Cir. 2011) (defining “underwriters” with reference to “the fact that the distribution requirement [in the statute] is set off from the two antecedent activities by a comma”); see also Lance Phillip Timbreza, Note, *The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation*, 24 QUINNIPIAC L. REV. 63, 67 (2005) (discussing how the Supreme Court has developed “Punctuation Doctrines” for statutory interpretation).

<sup>53</sup> “[T]o express or include one thing implies the exclusion of the other, or of the alternative.” *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>54</sup> See *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 474 (4th Cir. 2011) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) for the *ejusdem generis* principle).

<sup>55</sup> One of us wrote a student note on the word “the” in a statute, identifying a circuit split over an ambiguous referent. Christopher Serkin, *The Offense: Interpreting the Indictment Requirement in 21 U.S.C. § 851*, 98 MICH. L. REV. 827,



other and can become mere instrumental tools for an outcome-driven court.<sup>56</sup> But despite the very difficult problems at the edges, courts generally pay close attention to statutory language and find that it often determines the outcome of cases. They very rarely actively flaunt the plain meaning of the text, and then only after elaborate justifications and explanations for doing so.<sup>57</sup>

For practitioners and consumers of judicial opinions, this observation is largely banal and is exemplified in *Lamie v. United States Trustee*.<sup>58</sup> There, recent changes to the Bankruptcy Code eliminated awards of attorney's fees except for attorneys appointed under another provision of the Code.<sup>59</sup> The plaintiff, however, argued that this reflected a drafting error, and that a critical phrase had been unintentionally omitted from the new statutory provisions.<sup>60</sup> The plaintiff's argument relied both on a comparison with the predecessor statute, which was nearly identical and included the language in question, and with the grammar of the new statute, which appeared incorrect without the missing language.<sup>61</sup> The Court, however, refused to find any ambiguity and relied solely on the text itself. The Court reasoned that "[t]he statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue."<sup>62</sup> It concluded "[t]his is not a case where a 'not' is missing or where an 'or' inadvertently substitutes for an 'and.' The sentence may be awkward; yet it is straightfor-

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831-36 (1999) (examining whether "the offense" referred to the present or a previous indictment).

<sup>56</sup> See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 405 (1950); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 276 (1985) ("[F]or every canon one might bring to bear on a point there is an equal and opposite canon. This is an exaggeration; but what is true is that there is a canon to support every possible result.").

<sup>57</sup> See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458-59 (1892) (departing from Congress's use of the term "alien" who is "perform[ing] labor or service of any kind" to exclude a member of the clergy because of historical evidence showing that legislators did not intend to include such laborers).

<sup>58</sup> 540 U.S. 526 (2004).

<sup>59</sup> See 11 U.S.C. § 330(a)(1) (2000) ("[T]he court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 . . . ."); *Lamie*, 540 U.S. at 529-31.

<sup>60</sup> See *Lamie*, 540 U.S. at 533.

<sup>61</sup> See *id.* The list of permissible awardees is missing a final conjunction. To be grammatically correct, as written, the awards should be made to "an examiner [or] a professional person employed under section 327 or 1103." The lack of the critical "or" suggests that the list was intended to continue.

<sup>62</sup> *Id.* at 534.

ward.”<sup>63</sup> The analysis begins and ends with the words of the statute.

Empirical study, to the degree that it exists, confirms the importance of textual considerations in statutory interpretation. Even where courts have not adopted textualism as such, with its insistence on the exclusivity (or necessary priority) of textual considerations over others, they continue to emphasize actual wording more than do courts confronting constitutional issues. For example, Nicholas Zeppos finds that in the Supreme Court “text is often the starting point for resolving statutory cases,”<sup>64</sup> that the average decision cites text more commonly than any other source,<sup>65</sup> and that textual sources dominate over both historical authorities<sup>66</sup> and “dynamic” considerations like practical concerns and social forces.<sup>67</sup> This matches Jonathan Molot’s sense that there is in fact a consensus among courts that text should be given great weight in statutory interpretation, and that context matters even if disagreement persists on the narrower questions of what evidence should be relevant and how relevant it should be.<sup>68</sup> Similarly, Abbe Gluck’s empirical study of statutory interpretation among state high courts found that there is a surprising consensus in favor of “modified textualism,” according to which the text of statutes has disproportionate significance even if it does not control interpretation to the degree that pure textualists would

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<sup>63</sup> *Id.* at 535. *But see* *King v. Burwell*, 135 S. Ct. 2480, 2493–96 (2015) (correcting ambiguity in text of Affordable Care Act). *King* is ultimately consistent with our argument that the text is paramount in statutory interpretation. The Court reasoned that its approach, in the face of “inartful drafting” is to “do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Id.* at 2492 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)).

<sup>64</sup> Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1106 (1992).

<sup>65</sup> *See id.* at 1114.

<sup>66</sup> *See id.* at 1104, 1119 (finding after an empirical study that textual sources dominate over historical sources); *id.* at 1118 (finding that legislative history is not used to override clear textual language); *cf.* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History?: Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 229 (2006) (finding, after an empirical study of Supreme Court cases on workplace law, that legislative history has declined over time as an important factor, and attributing the decline to the influence of Justice Scalia).

<sup>67</sup> *See* Zeppos, *supra* note 64, at 1119.

<sup>68</sup> *See* Jonathan T. Molot, *Exchange: The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006).

like.<sup>69</sup> If attention to text is prevalent among high courts, you would expect it to be even more common among lower courts interpreting statutory provisions for the first time.

Despite claims of interpretive symmetry, then, constitutional text is viewed as less of a constraint than statutory text in deciding ultimate meaning. This observation is not intended to take a position in the longstanding battle between textualists and purposivists within the field of statutory interpretation.<sup>70</sup> Even strong purposivist theories such as Eskridge's dynamic approach<sup>71</sup> make the text determinative in many cases.<sup>72</sup> What separates camps of statutory interpretation is not whether textual considerations are important in many cases but rather exactly how important they should be.<sup>73</sup> Our observation here is more mundane and much more routine than the nuanced debates that have occupied scholarship in the area: there is broad agreement among lawyers and judges that statutory interpretation should begin with the text of the statute in a process that approaches the words with interpretive sophistication and seriousness.<sup>74</sup> What remains contested, and strongly so, is the appropriate role of extratextual authority, like legislative history.<sup>75</sup> That is an important debate, yet exploring the role of textual interpretation only at the margins

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<sup>69</sup> Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010).

<sup>70</sup> See, e.g., *id.* at 1762–64 (reviewing debate); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–77 (2006) (same); Molot, *supra* note 68, at 2–5 (same).

<sup>71</sup> See Gluck, *supra* note 69, at 1764 n.47 (citing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 125 (1994)).

<sup>72</sup> See Eskridge, *supra* note 15, at 1483 (making it clear that “[w]hen the statutory text clearly answers the interpretive question, therefore, it normally will be the most important consideration,” and noting that history comprises “the next most important interpretive consideration”); see also Molot, *supra* note 68, at 3, 29–30, 43 (noting that contemporary versions of purposivism agree with textualists on the importance of textual sources).

<sup>73</sup> See Molot, *supra* note 68, at 3 (“[N]onadherents and adherents of textualism alike place great weight on statutory text and look beyond text to context . . .”).

<sup>74</sup> See *id.* at 3 (acknowledging differences between textualists and purposivists, especially concerning the use of legislative history, but emphasizing that a consensus exists on the great importance of text and the relevance of context, however defined). The classic case prioritizing statutory text is *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990), where Judge Easterbrook persuaded the court to read a statute literally, despite the fact that the result made little sense and over the objection of Judge Posner. See Lawrence M. Solan, *Statutory Interpretation, Morality, and the Text*, 76 BROOK. L. REV. 1033, 1042–43 (2011) (discussing the case).

<sup>75</sup> See Molot, *supra* note 68, at 3.

can gloss over the more prosaic observation that the text controls statutory interpretation to an extent that is not generally true of constitutional interpretation.<sup>76</sup>

Neither does our argument require us to deny that *some* bits of statutory text are treated similarly to *some* constitutional provisions, particularly where the statute is broadly worded or where the constitutional provision is specific. The Sherman Antitrust Act, for instance, prohibits every “restraint of trade,”<sup>77</sup> while Article II requires that the President be thirty-five years old,<sup>78</sup> to take two well-known examples. We will argue that other modes of argument set apart interpretation of even these provisions—no lawyer would emphasize the opinions of the individual framers of the Sherman Act, for instance. Yet even thinking just about textual interpretation, these exceptions do not alter the general fact that constitutional text is comparatively less important.

Interpreting the text of common-law authorities works differently still, although less differently than one might suppose. It is tempting to think that textual interpretation in the common law is, at its core, fundamentally distinct from interpreting the text of other sources of law, but this risks missing important similarities. After all, judicial rulings today almost always consist of written opinions subject to subsequent interpretation. That was not always true. In its origins, the common law was largely unwritten.<sup>79</sup> And historically, the common law was more a custom of rules discernible only through the actual outcomes of legal disputes.<sup>80</sup>

Today, however, written opinions of the common law are subjected to at least a similar kind of textual scrutiny as other sources of law.<sup>81</sup> This is different from the observation that the

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<sup>76</sup> That scholars now commonly distinguish between “interpretation” of the Constitution’s semantic meaning and “construction” of doctrine around that meaning highlights the relative irrelevance of constitutional text for both doctrine and outcomes. See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010).

<sup>77</sup> 15 U.S.C. § 1 (2012).

<sup>78</sup> U.S. CONST. art. II, § 1.

<sup>79</sup> See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1190–1204 (2007) (describing origins of the common law).

<sup>80</sup> See *id.* at 1192–93 (discussing how systems of precedent require only institutional memory, possessed in medieval England by a small group of judges and barristers who relied on their memories of decisions).

<sup>81</sup> See *id.* (tracing that change). Attention to the text of judicial opinions is particularly interesting and complex when the court is authorized to develop common law either by the Constitution or by a statute. See, e.g., U.S. CONST. amend. VII (preserving a right to a jury trial in civil cases “according to the rules of

common law has become increasingly codified during the twentieth century.<sup>82</sup> The point, instead, is that the texts of judicial opinions themselves now have the force of law through stare decisis (discussed in subpart I.D below) and that judicial opinions are taken seriously as texts for purposes of interpreting what the law is. Lower courts in particular parse carefully the text of controlling authorities in their jurisdictions.<sup>83</sup>

This observation should again be familiar to all lawyers who have spent time poring over past cases to look not only for the outcome but for courts' articulation of common-law principles, because those descriptions then have the force of law in subsequent cases. Any area of the common law will demonstrate this point, but property offers some particularly good examples. Consider the Alabama Supreme Court's rule that "the measure of damages [in trespass cases] is the difference in the value of the land before and after the trespass."<sup>84</sup> That rule carries through a line of Alabama Supreme Court cases, from *Brinkmeyer v. Bethea*<sup>85</sup> to *Borland v. Sanders Lead Co.*<sup>86</sup> until the precise language is then quoted and used, in 2007, to reject a claim for remediation damages resulting from trespass.<sup>87</sup> This means, in many cases, that courts do not need to derive rules from whole cloth, or construe rules anew from long lines of cases, but can instead quote language from a leading case and apply it to the facts at hand.

Of course, there is always a chance that the process goes wrong, and rules articulated at one time are repeated but distorted at another. Consider, for example, the common-law rule that people cannot own dead bodies.<sup>88</sup> This principle has had important doctrinal consequences for conversion claims re-

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the common law"); FED R. EVID. 501 ("The common law . . . governs a claim of privilege . . ."); cf. Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 868 (2012) (noting that precedent has particularly strong effect in statutory cases not only with respect to designated "common law" statutes such as the Sherman Antitrust Act but generally).

<sup>82</sup> See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 83-85 (1999 ed.) (describing how the Restatements have acted as a codification of American common law).

<sup>83</sup> See, e.g., Widiss, *supra* note 81, at 870 (noting "the general consensus that the Supreme Court is less constrained by precedent than lower courts").

<sup>84</sup> *Brinkmeyer v. Bethea*, 35 So. 996, 997 (Ala. 1904) (quoting 3 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 36 (John Houston Merrill ed., 1888)).

<sup>85</sup> *Id.* This history, and the original attribution, is described in *Poffenbarger v. Merit Energy Co.*, 972 So. 2d 792, 795 (Ala. 2007).

<sup>86</sup> 369 So. 2d 523 (Ala. 1979).

<sup>87</sup> *Poffenbarger*, 972 So. 2d at 801.

<sup>88</sup> See Mark Pawlowski, *Property in Body Parts and Products of the Human Body*, 30 LIVERPOOL L. REV. 35, 36 (2009).

garding cell lines, among others.<sup>89</sup> The rule is well ensconced in property. Its origins, however, appear to come from a misreading of a very early case. While opaque and contested, one very early articulation of the rule appears to come from the 1614 *Haynes's Case*.<sup>90</sup> There, a grave robber was caught stealing sheets off three corpses. The court ruled that the theft was from the person who had wrapped the corpses in the sheets and not from the corpses themselves, because "property of the sheets remain in the owners, . . . for the dead body is not capable of it."<sup>91</sup> That court, in other words, was articulating the rule that a corpse is incapable of owning property. According to one historical account, courts (mis)interpreted the language of that original case to mean that a corpse cannot *be* property.<sup>92</sup> The point is simply this: the articulation of common-law rules comes through the language of judicial opinions, language that in turn is subject to the same kinds of interpretive tools and pitfalls as constitutional or statutory interpretation.

It is, therefore, sensible to compare textual interpretation of the common law with textual interpretation of statutes and the Constitution. The enterprise is not as fundamentally distinct as one might have supposed. But that does not mean that the enterprise is undertaken in the same way in the context of the common law. Indeed, the *shape* of its textual interpretation is quite different from other sources of law. Yes, judicial opinions—the "text" of the common law—are written. But they are controlling not as text *qua* text but instead as a description or explication of some deeper, unwritten legal principle.<sup>93</sup> For this reason, it is routine and uncontroversial for a court to

<sup>89</sup> See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 488–90 (Cal. 1990); see generally REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2d ed. 2011) (describing researchers' treatment of one woman's cell line and the legal issues it implicates).

<sup>90</sup> This account comes from Kenyon Mason & Graeme Laurie, *Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey*, 64 MOD. L. REV. 710, 713–14 (2001); see also Pawlowski, *supra* note 88 (noting that the rule may be based on a misunderstanding of *Haynes's Case*).

<sup>91</sup> *Haynes's Case* (1614) 77 Eng. Rep. 1389, 1389; 12 Co. Rep. 113, 113.

<sup>92</sup> Mason & Laurie, *supra* note 90, at 714.

<sup>93</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 248 (1990) ("Because of its conceptual character, common law is unwritten law in a profound sense. Indeed, a common law doctrine is no more textual than Newton's universal law of gravitation is. The doctrine is inferred from . . . judicial opinions, but the doctrine is not those opinions or the particular verbal formulas in them . . ."); STRAUSS, *supra* note 34, at 38 ("[A]ccording to the common law approach, you cannot determine the content of the law by examining a single authoritative text or the intentions of a single entity."); see also John Gardner, *Some Types of Law*, in *COMMON LAW THEORY* 51, 55 (Douglas E. Edlin, ed., 2007) ("Even where interpre-

paraphrase or reframe a prior court's language. Of course, that happens with statutory text, too; courts sometimes paraphrase it to make it more accessible or intelligible, and subsequent courts may defer to that paraphrase.<sup>94</sup> But when it comes to the common law, subsequent articulations can have parity with the "original" statement of a rule or principle, which exists independent of any decision *as text*.<sup>95</sup>

More generally, too, lawyers treat the text of judicial opinions differently from the text of statutes. Courts' writing is not subjected to the same kind of careful grammatical parsing that attends statutory interpretation, and it would be strange indeed to apply canons of construction, like *expressio unius est exclusio alterius*, to a judicial opinion. Interpreters of the common law understand that courts are engaged fundamentally in the process of justification through historical narrative, and while courts' output constitutes the content of the law—in a very real sense—the text itself should be treated with less reverence than statutory commands.<sup>96</sup> Partly, of course, this has to do with the nature of precedent and the underlying authority and legitimacy of the various institutions—legislatures versus courts versus the constitutional convention—but the text itself is treated differently as well.

True, interpreters will sometimes focus on a court's articulation of the elements of a legal standard, asking, for example, whether some requirements are conjunctive or disjunctive. They look, in other words, at differences between "and" and "or," and the order of application of certain rules. That is especially likely when lower courts, or lawyers litigating in them, interpret the meaning of binding opinions from higher courts in the same jurisdiction. But these are the exceptions that illumi-

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tation of the law in the statute requires interpretation of intervening case law, the legislative text remains the primary object of interpretation . . .").

<sup>94</sup> Interestingly, as we explain in greater detail below, court interpretations of statutory language are said to have extraordinarily strong precedential authority, and the text of those decisions is sometimes parsed with great care. See *infra* text accompanying note 154.

<sup>95</sup> This actually has a greater resemblance to constitutional interpretation than to statutory interpretation. The meaning of "public use" in the Takings Clause, for example, now comes primarily from citations to previous cases identifying a separate "public use" requirement than from the text of the Clause itself. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 480–84 (2005); see also *supra* text accompanying notes 38–40 (describing the meaning of "public use").

<sup>96</sup> Gardner claims that case law is fundamentally different from other sources of law in this respect and that it resembles customary law more than statutory law. See Gardner, *supra* note 93, at 67 ("Case law, unlike legislated law, is not made by being articulated. It is made by being used in argument.").

nate our underlying claim that the text of judicial opinions is not treated with the same reverence as other sources of law.

Ultimately, the observation here should feel familiar to anyone who has ever engaged in the practice of serious legal interpretation: the text of the Constitution is interpreted differently than the common law and statutory text. And, perhaps curiously, constitutional interpretation falls generally in the middle, with courts bound more by constitutional language than by common-law judicial opinions but less than by statutory text.

### B. History

Historical arguments also work differently in constitutional law. That difference is implicit in ordinary legal practice, which regards legislative history as one thing and the history of the founding or the Reconstruction amendments as another thing altogether. In this subpart, we substantiate the peculiarity of historical argument in constitutional law.

In particular, we press two claims. First, Justice Scalia, a leading figure among “new originalists,” spurns subjective intent in both settings, but he replaces it with historical evidence of original meaning only in constitutional cases, relying almost exclusively on textual arguments when it comes to statutes. To the extent that originalists follow suit, they usually draw on wider, contemporaneous social meanings in constitutional law but not in statutory interpretation. This amounts to constitutional but not legislative originalism, whatever adherents may say to the contrary. Second, arguments from the enactment history, when they do appear, work differently in each setting. History may actually matter *less* in constitutional interpretation, both because it focuses primarily on historically prominent individuals and because it focuses on particular founding moments and not others.<sup>97</sup> We take those two observations in turn and then turn to the very different role of history in common-law analysis.

The constitutional originalism that dominates today relies on history in a particular way. Roughly speaking, first-wave

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<sup>97</sup> Moreover, courts’ uses of both legislative and constitutional history have been plagued by difficulties. See, e.g., Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1106–12 (2013) (showing that the Court’s history of the anticommandeering rule is flawed); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 908 (2013) (examining statutory drafting and problematizing reliance on it by courts).



originalism focused on the subjective aims of the framers, while today's "new originalism" privileges only the "original meaning" of the Constitution's text.<sup>98</sup> History guides interpretation in both forms of constitutional originalism, but it does so differently. New originalists purport to place no independent weight on the views of the framers. They reject subjective intent for two principal reasons. First, they argue that the drafters' subjective views cannot claim democratic legitimacy.<sup>99</sup> Second, they believe that only fixing the meaning of the text in an objective way, by reference to public meanings, can protect rule-of-law values like predictability and impersonality against the whims of contemporary constitutional actors—especially unelected judges.<sup>100</sup>

Justice Scalia, arguably the most prominent new originalist, also rejects reliance on subjective intent in statutory interpretation, and for similar reasons.<sup>101</sup> He believes that determining the intentions of groups is methodologically difficult, if not philosophically incoherent, and he worries that the exercise cannot produce determinate results capable of constraining interpreters.<sup>102</sup> Again, indeterminacy threatens both democracy and the rule of law. He therefore rejects intentionalism in both statutory and constitutional settings.<sup>103</sup>

Despite the professed consistency of new originalism, however, a form of constitutional exceptionalism in fact prevails when it comes to concrete cases. When Justice Scalia is deciding cases, he tends to rely heavily on drafting history for constitutional interpretation but not for statutory interpretation. Even statutes from the founding era appear simply as texts without historical context. William Eskridge has noticed this

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<sup>98</sup> Lawrence B. Solum, *Legal Theory Lexicon 071: The New Originalism 2* (Feb. 24, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2223663> [<https://perma.cc/F7VT-JAGL>].

<sup>99</sup> For a challenge to this conventional way of understanding the connection between constitutional authority and constitutional interpretation, see Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 610–11 (2008).

<sup>100</sup> See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 167 (2008) (describing the primacy of these two arguments for originalism).

<sup>101</sup> See, e.g., Scalia, *supra* note 31, at 16–23, 29–37.

<sup>102</sup> For discussions of the difficulty of determining legislative intent, see generally Scott W. Breedlove & Victoria S. Salzmann, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause*, 53 BAYLOR L. REV. 419, 441–54 (2001); Colloquium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925, 925–1183 (1978); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212–23 (1970).

<sup>103</sup> Scalia, *supra* note 31, at 38.

difference and presented it as a puzzle: Why do critics of intentionalism draw so heavily (and famously) on constitutional history but not on statutory history?<sup>104</sup>

Eskridge offers the example of *Church of the Holy Trinity v. United States*.<sup>105</sup> When he is discussing that case in academic writing, Justice Scalia criticizes the majority for relying on legislative history to interpret the meaning of an 1885 statute.<sup>106</sup> He believes, *inter alia*, that relying on legislative history leaves too much leeway for contemporary interpreters who use that latitude to marshal evidence for their preferred reading. That harms both democracy and rule-of-law values, so he urges judges to focus instead on statutory text.<sup>107</sup>

Scalia's approach to constitutional interpretation is similarly antisubjectivist, but there he believes that historical evidence of textual meaning is crucial. For example, in *Printz*, Justice Scalia determined the meaning of the Tenth Amendment by reference to historical sources, chief among them *The Federalist*.<sup>108</sup> Eskridge concludes that this contrasting use of history "can be generalized" and "has been typical of Scalia's jurisprudence."<sup>109</sup> Think for instance of Scalia's opinion for the Court in *Heller*, where contextual history of the Second Amendment plays an important role (along with other modalities of interpretation).<sup>110</sup> To the extent that new originalists follow his lead, they will predictably invoke contextual history for constitutional text but not for statutes. Historical argument will virtually drop out of the latter, leaving a relatively pure form of textualism.

Furthermore, where historical evidence does appear, it works quite differently in constitutional and statutory law. In fact—and surprisingly—the genuine historical record appears

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<sup>104</sup> William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301 (1998); see also Brudney & Ditslear, *supra* note 66, at 222 (finding, after an empirical study of workplace cases, that reliance on statutory history has declined during the Burger and Rehnquist courts, and attributing that decline to the influence of Justice Scalia as well as Justice Clarence Thomas).

<sup>105</sup> 143 U.S. 457 (1892).

<sup>106</sup> Scalia, *supra* note 31, at 29–30; see also Eskridge, *supra* note 15, at 1304 (describing Scalia's argument).

<sup>107</sup> Scalia, *supra* note 31, at 22–23.

<sup>108</sup> *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (discussing "[r]esidual state sovereignty" expressed in the Tenth Amendment by citing to *The Federalist*).

<sup>109</sup> Eskridge, *supra* note 104, at 1305; see Campbell, *supra* note 97, at 1106–07 (critiquing the *Printz* Court's history of the founding era).

<sup>110</sup> See Sara A. Solow & Barry Friedman, *How to Talk About the Constitution*, 25 YALE J.L. & HUMAN. 69, 75–76, 78 (2013) ("Real judges aren't originalists or living constitutionalists, or any other 'ists' either.").

to matter less in constitutional interpretation. This is evident in two different ways: lawyers disproportionately refer to iconic founding-era framers of the Constitution while their treatment of legislative history is more comprehensive, and they attach only selective significance to historical instances of constitution making, whereas their invocations of legislative history are more methodical and consistent.

Even though new originalists deny it, they seem to dwell disproportionately on sources that speak to the subjective intent of prominent framers, who are also major figures in American revolutionary history more generally. Jamal Greene has pointed out that framers like Madison and Hamilton play a large role in the historical argumentation of new originalists.<sup>111</sup> Framers like Oliver Ellsworth do not. That is true even though new originalists distinguish themselves from first-wave originalists precisely (or largely) by eschewing reliance on subjective intent. Citations to *The Federalist* and Max Farrand have increased, not decreased, since the rise of the new originalism, for what that is worth.<sup>112</sup> Within those sources, evidence from iconic figures like Madison and Hamilton are emphasized over material from less renowned figures.<sup>113</sup> Moreover, and importantly, originalists rely on this material not just as evidence of original meaning but as *independent* authority. Consider the fact that citations to evidence that arguably bears just as directly on original meaning—such as antifederalist writing—have *not* increased.<sup>114</sup> Those writings should be as relevant to original meaning as the writing of the federalists but they are invoked far less often. Apparently, they are viewed less authoritatively because their authors do not loom as large in Americans' historical imagination.<sup>115</sup> Observed patterns of argument, in short, do not support the idea that only historical evidence of semantic meaning matters in constitutional interpretation among new originalists.

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<sup>111</sup> Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1686–87 (2012).

<sup>112</sup> *Id.* at 1691.

<sup>113</sup> To take only the most recent example, Justice Scalia's dissent in the Defense of Marriage Act decision cites *The Federalist* five times—four times to Madison and once to Hamilton—and eschews other historical evidence altogether. *United States v. Windsor*, 133 S. Ct. 2675, 2698 (twice), 2703, 2704 (twice) (2013) (Scalia, J., dissenting).

<sup>114</sup> *But see* Eskridge, *supra* note 104, at 1318 (questioning the relevance of the views of lawmakers on the losing end for figuring out the meaning of the text that is eventually enacted).

<sup>115</sup> Patrick Henry is arguably an exception to this generalization that antifederalists include few figures of contemporary cultural salience among their ranks.

Relatedly, their attention to authors does not carry over to the interpretation of statutes. There is no comparable sense among lawyers that the sponsors of congressional acts should have extraordinary influence over how contemporary lawyers understand those statutes. Legislative history features committee reports and other materials that do not privilege the views of the senators or congresspeople who proposed or drafted a particular measure. For example, the Religious Land Use and Institutionalized Persons Act (RLUIPA) is a powerful statute whose legislative history has been closely examined to shed light on its meaning.<sup>116</sup> Yet the views of Senator Edward Kennedy, who championed the law, are not thought to carry force, except insofar as they might have shaped the views of other lawmakers.<sup>117</sup> That is, they bear no *independent* authority.

Constitutional originalism tends to undervalue history in another way, as well. Mainstream researchers who use legislative history usually do so methodically, uncovering and combining through whatever historical evidence of Congress's intent is available.<sup>118</sup> They may vary their use of legislative history depending on the statute, with statutes that are older and more frequently litigated requiring less resort to legislative history because of intervening precedent,<sup>119</sup> and they may be selective among bits of evidence, citing those that support their position and ignoring others, but they do not ignore entire periods of history that are somehow thought to be less authoritative.<sup>120</sup> By contrast, constitutional originalism is much less evenly distributed among eras. For example, far less attention is paid to the history of the Reconstruction Amendments than to the circumstances surrounding enactment of the original document and the Bill of Rights. Greene has shown that drafters like John Bingham—who has been called the “James Madison of

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<sup>116</sup> 42 U.S.C. §§ 2000cc-2000cc-5 (2012); *see, e.g.*, Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 10 (2009) (mentioning Kennedy's view of a particular issue).

<sup>117</sup> *See* Serkin & Tebbe, *supra* note 116, at 10–18 (surveying Senator Kennedy's views as part of a general survey of approaches to RLUIPA).

<sup>118</sup> *See, e.g.*, JULIA TAYLOR, CONG. RES. SERV., LEGISLATIVE HISTORY RESEARCH: A BASIC GUIDE 2–11 (2011) (describing the process of legislative history research).

<sup>119</sup> *Cf.* Brudney & Ditslear, *supra* note 66, at 224–25 (arguing, based on empirical evidence, that reliance on statutory history is greatest when a provision is young, before court precedent or agency interpretation has become fixed).

<sup>120</sup> *Cf. id.* at 224 (finding, after an empirical study of workplace cases, that use of legislative history varies according to the age of the statute but presenting no findings on variations according to eras of history).

the Fourteenth Amendment"<sup>121</sup>—are largely ignored.<sup>122</sup> Whatever the theory, history in fact works quite differently in legal practice.

So far in this subpart, we have been comparing the uses of history in constitutional and statutory law. What about the common law? The comparison to constitutional interpretation is again revealing.

The common law's relationship to historical meaning and interpretation is surprisingly complex. After all, the common law is—in a very real sense—a description of what courts have done in the past.<sup>123</sup> Interpreting the common law is inherently historical in a way that interpreting the Constitution or statutes is not. The common law's history is its very source of authority.<sup>124</sup> But this is a particular kind of historical interpretation that often has no use for a comprehensive historical record. Indeed, despite the common law's status as history, early common-law thinkers viewed it as importantly ahistorical, and recognized as valid only those common-law doctrines that dated back to time immemorial—i.e., that were prehistorical.<sup>125</sup> For them, it was the fact of the historical line of cases that determined the content of the common law, and not an analysis of what judges thought they were doing, how the law was understood at the time, or any other historical analysis. Under conventional views of common-law interpretation, there is little opportunity to ask about the personal biographies or belief systems of early common-law judges, or about the historical context for the underlying dispute.

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<sup>121</sup> Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, at 68 OHIO ST. L.J. 1509, 1533 (2007) (citing *Adamson v. California*, 332 U.S. 46, 73–74 (1947) (Black, J., dissenting)).

<sup>122</sup> See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979–80, 1000–01 (2012).

<sup>123</sup> See, e.g., Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 581 (2006); see also Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 602 ("In a system of law that adheres to the doctrine of stare decisis, it is impossible to understand the law as it is today without understanding the law as it has been in the past." (footnote omitted)).

<sup>124</sup> See Meyler, *supra* note 123 ("The theory of obligation produced by English thinkers of the common law . . . had emphasized historicity as the source of the authority of the common law.").

<sup>125</sup> See *id.* at 570 (quoting John Adams as describing the common law as consisting only of rules "used time out of mind, or for a time whereof the memory of man runneth not to the contrary" (John Adams, Letter to the Printers, BOS. GAZETTE, Feb. 1, 1773, reprinted in 3 THE WORKS OF JOHN ADAMS 540 (Charles Francis Adams ed., 1851))).

The waning of legal formalism has changed the common law's relationship to its own history, to be sure. Legal rules are no longer deployed mostly through abstract categories but instead are discussed and interpreted by reference to their function and purpose. Legitimate interpretive moves therefore include analogizing or distinguishing prior cases based on changes in the world. A rule that made sense at one time—like the capture rule for finback whales—can be distinguished on grounds that modern property should not incentivize killing whales, and that in any case technology has evolved past the bomb lance.<sup>126</sup>

Still, the ultimate interpretive enterprise is not to understand what a particular judge, at a particular time, intended by his or her opinion. That history, while potentially fascinating as a focus for academic study, is not generally a valid basis for legal interpretation. For example, the ancient and famous case *Pierson v. Post*<sup>127</sup> has been the subject of sustained historical treatment in recent years. Development of the historical record has, in turn, revealed information about the beliefs and jurisprudence of the justices, complex class conflicts at the heart of the case, and even the long-lost case roll (effectively, the original record of the litigation).<sup>128</sup> This is all interesting, and indeed some of it makes for a gripping read. But it, too, does not change the legal interpretation of the case, even as it radically alters the historical meaning. As Professor James Krier incisively summarizes:

[Stuart Banner has written] that 'the important thing about *Pierson v. Post* is no longer the abstract legal principle for which it might or might not stand. The important thing is the story of the fox.' I hope he doesn't mean what he seems to say. Filling out the story of the fox, at least as it has been done thus far, has the pedagogical virtues [of greater enjoyment for students and instructors], but little more.<sup>129</sup>

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<sup>126</sup> See *Ghen v. Rich*, 8 F. 159, 162 (D. Mass. 1881).

<sup>127</sup> 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

<sup>128</sup> See Bethany R. Berger, *It's Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1136–40 (2006) (explaining how the differing backgrounds of the justices may have influenced their beliefs); James E. Krier, *Facts, Information, and the Newly Discovered Record in Pierson v. Post*, 27 LAW & HIST. REV. 189, 189 (2009) (discussing the discovery of the lost judgment roll); Andrea McDowell, *Legal Fictions in Pierson v. Post*, 105 MICH. L. REV. 735, 753–57 (2007) (discussing the conflicts between hunters and farmers in England over foxhunting).

<sup>129</sup> Krier, *supra* note 128, at 190–91 (footnote omitted) (quoting Stuart Banner, *21st Century Fox*, 27 L. & HIST. REV. 188 (2009)).

But imagine, for a moment, that enterprising historians found a previously undiscovered trove of James Madison's writing, offering new insights into his views of property. We can safely surmise that the writing would not be relegated to entertaining first-year law students and deepening the historical record but would be invoked to aid in the project of interpreting the Takings Clause. This is a dramatic difference.

For another example, consider that when Justice Harry Blackmun's papers were released, they offered new insights into his and other justices' thinking about the content and interpretation of their opinions.<sup>130</sup> Professor David Achtenberg has argued, based on the Blackmun papers, that limits on section 1983 claims in *Monell v. Department of Social Services* were based on broader concerns about limiting the phrase "under color of law."<sup>131</sup> This is an interesting and plausible argument, but it is essentially off limits to a lawyer in court arguing about the meaning of the phrase.<sup>132</sup>

In sum, historical argumentation in constitutional law is special. New originalists who eschew subjective intent often replace it with historical argument in constitutional interpretation but not in statutory interpretation, which tends to be textualist. And if we compare how historical argument actually does work in both contexts, we notice that it matters differently in constitutional law. Not only does much originalist argument highlight individual framers, even in the hands of those who purport to consult only original meaning, but it also selects out a few founding moments that carry unusual authority in the American imagination rather than systematically surveying contextual evidence of original meaning surrounding each and every constitutional provision. And finally, contextual history plays almost no role in the common law. Generalizations are dangerous, of course, but these characterizations of historical argument should be recognizable to those familiar with the everyday practice of law.

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<sup>130</sup> See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005).

<sup>131</sup> See David Jacks Achtenberg, *Frankfurter's Champion: Justice Powell, Monell, and the Meaning of "Color of Law,"* 80 *FORDHAM L. REV.* 681, 682 (2011).

<sup>132</sup> Note that this is true regardless of whether Justice Blackmun was ultimately interpreting statutes or the Constitution. Our point is that lawyers cannot interpret common-law doctrines that develop around legal texts by reference to the history surrounding a given precedent, even if they can argue from the history of the underlying statute or constitutional provision.

### C. Structure

Arguments from structure bear an authority in constitutional law that they do not enjoy in other legal domains. In fact, they seem to play a different role in statutory interpretation, even in the few places one might expect to find them working similarly—namely, where statutes establish and empower governmental institutions.

By structure, we mean to refer not to the organization of the text itself but instead to the organization of government institutions that it creates and regulates.<sup>133</sup> As Bobbitt described it, structural argumentation “infer[s] rules from the relationships that the Constitution mandates among the structures it sets up.”<sup>134</sup> Chiefly, the structures that generate constitutional rules are the separation of powers, meaning the allocation of authority among branches of the federal government, and federalism, meaning the distribution of power among federal and state governments. Structural arguments undergird familiar rules surrounding legislative vetoes,<sup>135</sup> commandeering under the Tenth Amendment,<sup>136</sup> executive privilege,<sup>137</sup> limits on the President’s removal power,<sup>138</sup> and other key doctrines. Such rules cannot be satisfactorily rooted in the text alone, nor in original meanings, nor in precedent (at least initially). Structural argumentation therefore plays an important role within constitutional law as it is actually practiced.

A canonical example is *McCulloch*, the source of Chief Justice Marshall’s famous endorsement of constitutional specialness.<sup>139</sup> There, Marshall relied almost entirely on structural reasoning when he concluded that Maryland could not tax the Second Bank of the United States, a branch of which was located in the state.<sup>140</sup> As Bobbitt notes, Marshall declined to identify any particular textual provision to support

<sup>133</sup> Sometimes textualists refer to the “structure” of a statute to help discover its meaning, but that is a distinct use of the term—it refers to the architecture of the text rather than to the governmental structures that the law sets up. See Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1109–10 & n.22 (describing that usage).

<sup>134</sup> BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 16.

<sup>135</sup> *INS v. Chadha*, 462 U.S. 919, 945–58 (1983).

<sup>136</sup> *Printz v. United States*, 521 U.S. 898, 918–25 (1997); *New York v. United States*, 505 U.S. 144, 175–77 (1992).

<sup>137</sup> *United States v. Nixon*, 418 U.S. 683, 706–08 (1974).

<sup>138</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602, 627–28 (1935).

<sup>139</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

<sup>140</sup> BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 16, at 15 (“*McCulloch v. Maryland*, the principal foundation case for constitutional analysis, relies almost wholly on structural approaches.”).



the conclusion nor did he offer arguments from the history of the framing. Instead, he reasoned that if a state could tax a federal entity like the bank, that would not only threaten the existence of the bank but also impose costs on people not represented in the state legislature.<sup>141</sup> Bobbitt notes that *McCulloch*, though canonical, is not anomalous in relying on structural reasoning, for “[t]here are many recent, celebrated examples of this form of argument to be found in the cases of the US Supreme Court.”<sup>142</sup>

Another leading example is *Humphrey’s Executor*, where the Court upheld a limitation on the President’s ability to remove members of the Federal Trade Commission (FTC) based on a structural analysis of the FTC’s place in the separation of powers scheme.<sup>143</sup> The Court reasoned that the FTC was created to perform important legislative and judicial functions in addition to executive ones, and therefore it could not be characterized as a mere “arm or an eye” of the President.<sup>144</sup> Structural arguments are familiar in constitutional law. They work very differently, however, in statutory law.

At first, it might seem obvious or even circular to say that structural argument does not appear outside constitutional law—after all, the Constitution alone constitutes government. It appears to be uniquely foundational in that way. Because structural ways of talking trade on that feature, they are properly distinctive.

On reflection, however, the intuition turns out to be faulty. Statutes, too, can constitute and regulate government institutions—including entities that are critically important for contemporary political, social, and economic life. A prime example is the Administrative Procedure Act (APA).<sup>145</sup> That law, considered together with statutes that set up specific agencies, organizes public entities and determines how they may exercise governmental power, including lawmaking, adjudication, and enforcement. It therefore has been called a constitution for the administrative state.<sup>146</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* Think for instance of *United States v. Nixon*, where the Court roots its holding on executive privilege virtually exclusively in structural concerns. 418 U.S. at 708 (noting that the “privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers”); see also BOBBITT, CONSTITUTIONAL FATE, *supra* note 16, at 74–92 (citing cases).

<sup>143</sup> *Humphrey’s Executor*, 295 U.S. at 627–28.

<sup>144</sup> *Id.* at 628.

<sup>145</sup> 5 U.S.C. §§ 551–59 (2012).

<sup>146</sup> See Bill Araiza, *Regulatory Changes: Concluding Thoughts*, PRAWFSBLAWG (Dec. 6, 2011, 8:58 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/12/>

Similarly, governments of U.S. territories are constituted by statutes in a straightforward way. Congress exercises its plenary power over federal entities to establish and structure governments for territories such as the U.S. Virgin Islands, the Mariana Islands, American Samoa, and so forth.<sup>147</sup> These statutes function as constitutions—people commonly refer to Guam’s “Bill of Rights,” for example<sup>148</sup>—but as a formal matter they are ordinary congressional acts subject to ordinary amendment by the vote of a simple majority.<sup>149</sup>

One might expect courts to interpret statutes that constitute government entities in this way by deploying structural forms of argument. And sometimes, that does seem to happen. A strong candidate is *Heckler v. Chaney*, where the Court held that agency decisions about whether to enforce a statutory command are presumptively unreviewable by courts.<sup>150</sup> Much of the opinion does turn on structural considerations. Justice William Rehnquist offered three reasons for the holding: First, agency decisions on enforcement often turn on special expertise, not only over the substantive issue but also over the extent and best uses of the agency’s own resources. Second, an agency decision to stay its hand does not usually involve the coercive power over individuals’ rights that is the usual domain of courts and, conversely, an agency decision to enforce will provide a focus for court review of agency action. And third, an agency’s enforcement decision bears some resemblance to a decision by a prosecutor to pursue a criminal indictment, something that has traditionally been left within the exclusive

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regulatory-changes-concluding-thoughts.html [http://perma.cc/4WSC-5PCX] (calling the APA “a skeletal constitution for the administrative state”); see also Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986) (“My thesis is a simple one: the APA is more like a constitution than a statute.”). The National Security Act may share similar features. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69–70 (1990) (arguing that the “national security constitution” is comprised largely of framework statutes like the National Security Act).

<sup>147</sup> See U.S. CONST. art. IV, § 3, cl. 2 (granting Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”); Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 680–82 (2013) (explaining that although Congress retains plenary power over the territories, since the 1950s Congress has authorized the territorial governments of Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa, and the Mariana Islands to pass local laws).

<sup>148</sup> See, e.g., *Guam v. Guerrero*, 290 F.3d 1210, 1217 (9th Cir. 2002).

<sup>149</sup> See 48 U.S.C. §§ 1421a–b (2012).

<sup>150</sup> 470 U.S. 821, 831 (1985). We thank Hillel Levin for pointing us to this case.

province of the executive branch.<sup>151</sup> Yet the Court does not let these structural reasons stand alone. It concludes by saying that the tradition of leaving enforcement decisions to agency discretion is supported by such good reasons that the Court does not believe that Congress intended to alter that tradition.<sup>152</sup>

Ultimately, then, *Heckler* turns directly on an argument about congressional intent and only indirectly on structural reasoning. Providing a backstop in legislative intent seems to be common in statutory interpretation. Yet it is missing from constitutional argument, where structural reasoning can and often does stand on its own. Perhaps that is why *Heckler*'s structural argumentation—however provisional—is actually quite unusual. More commonly, courts interpreting statutes, including statutes that constitute governmental entities, base their rulings exclusively or primarily on text and legislative intent.<sup>153</sup>

It is possible that the structural reasoning in such cases is actually driving the analysis, with the intent-based conclusion added only to satisfy a formalistic notion that Congress's will must control the interpretation of statutes. But that possibility, even if correct, actually strengthens our point. The fact that courts feel it necessary to anchor their reasoning in legislative intent marks a difference between constitutional and statutory argument.<sup>154</sup> Our sense is that, first, structural reasoning sometimes stands entirely alone in constitutional law in a way that we believe it rarely does in statutory law and, second, invocations of constitutional text are oftentimes even more

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<sup>151</sup> *Id.* at 831–32. One commentator characterizes *Heckler* as a case that is fundamentally about judicial deference to administrative decisions regarding resource allocation. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 12 (2008). That amounts to a more specific structural argument but is entirely consistent with our general claim. *Heckler* is discussed most often in connection with judicial review of agency inaction, a question that is orthogonal to our point. See, e.g., Lisa S. Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1664–75 (2004); see also Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 385–86 (2014).

<sup>152</sup> *Heckler*, 470 U.S. at 832.

<sup>153</sup> For discussion of textualist interpretation of statutes, see *supra* notes 50–57 and accompanying text. For discussion of legislative intent-based interpretation of statutes, see *supra* notes 97–117 and accompanying text.

<sup>154</sup> Of course, this sometimes happens in constitutional argument as well—the Court will offer a textual hook for reasoning that is essentially structural. See BOBBITT, CONSTITUTIONAL FATE, *supra* note 16, at 75 (noting cases in which a text is offered, but where “structural argument is doing the real work of resolving the issue”); *id.* at 84–85 (same). And to that degree, structural argument in the two contexts may look similar.

talismanic in constitutional cases concerning structure. Think of the utterly inconsequential role of the text of the Tenth Amendment in cases like *National League of Cities v. Usery*,<sup>155</sup> or the fig-leaf functions of the First and Fourteenth Amendments in decisions to incorporate the right to free speech against the states.<sup>156</sup> By contrast, even the leading cases for structural understandings of statutes ultimately lean on congressional intent in a way that seems significant, if sometimes formalistic.

Moreover, and perhaps more importantly, the structural reasoning in *Heckler* and similar cases is not mainly statutory but instead it infers rules from *constitutional* structures. Although the opinion interprets a statute, the reasoning in *Heckler* actually concerns whether a decision regarding enforcement should be taken by the executive branch—which includes the agency—or by the courts.<sup>157</sup> In other words, the case does not involve a court making inferences about the meaning of a statute from the structures of government constituted by the statute. Ultimately, its inferences concern the Constitution itself, and they therefore count as examples of familiar structuralism in constitutional discourse, and not as an analogous form of statutory argument.

*Chevron* is another prime example of the singularity of constitutional structuralism. There, the Court arguably grounded its famous rule of deference to administrative agencies not by inferring that rule from the structures that Congress had established but by reference to Congress's intent to delegate gap-filling authority to the agency.<sup>158</sup> Here, too, structural argu-

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<sup>155</sup> 426 U.S. 833, 844–46, 851 (1976); see BOBBITT, CONSTITUTIONAL FATE, *supra* note 16, at 75 (offering the case as a paradigmatic example of structural reasoning).

<sup>156</sup> BOBBITT, CONSTITUTIONAL FATE, *supra* note 16, at 80 (endorsing Charles Black's structural understanding of incorporation in CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 43 (1969)).

<sup>157</sup> *Heckler*, 470 U.S. at 832 (concluding that "an agency's decision not to take enforcement action should be presumed immune from judicial review").

<sup>158</sup> The *Chevron* Court focuses on Congress's "express delegation" of interpretive power, not on an inference from administrative structures that Congress erects:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

mentation about the basic architecture of the administrative state does not seem to provide an *independent* way of talking. Moreover, *Chevron*—like *Heckler*—arguably is at root an ordinary separation of powers case: it concerns whether executive or judicial officials should have a particular power, namely the ability to issue an authoritative reading of a statute.<sup>159</sup>

Another setting where you might expect to find structural reasoning is where Congress sets out governance structures for federal territories, as we have said. And it is possible to find some talk of structure there—but it, too, turns out to be constitutional and not statutory.

In one illuminating case, the Guam Supreme Court had interpreted the free exercise provision of the Guam Bill of Rights to provide greater protection than what was afforded under the parallel national constitutional provision.<sup>160</sup> The Ninth Circuit was tasked with deciding whether the territory's high court had the power to extend greater protection to citizens under the Guam religious liberty provision, in the way that a state high court would have authority to interpret its state constitution, or whether instead the Guam Supreme Court had to adopt the meaning of the national Free Exercise Clause as determined by Article III courts.<sup>161</sup> The Ninth Circuit concluded that because the Guam Bill of Rights was a federal statute, it ultimately was subject to interpretation by national courts.<sup>162</sup> At first, its reasoning did not seem to turn on the intent of Congress in passing the territorial free exercise provision. Instead, it held that

Guam is a federal instrumentality, enjoying only those rights conferred to it by Congress, and its "Bill of Rights" is a federal statute. Not even a sovereign State may interpret a federal statute or constitutional provision in a way contrary to the interpretation given it by the U.S. Supreme Court. We are powerless to delegate authority to the Supreme Court of Guam to interpret matters of federal law in a manner other than that provided by the federal judiciary.<sup>163</sup>

This reasoning is identifiably structural—based neither on text, nor on congressional intent, nor on precedent. Of course, the court might have been unaware of the distinction and

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*Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (footnote omitted).

<sup>159</sup> *Id.*

<sup>160</sup> *Guam v. Guerrero*, 290 F.3d 1210, 1213 (9th Cir. 2002).

<sup>161</sup> *Id.* at 1215.

<sup>162</sup> *Id.* at 1215–16.

<sup>163</sup> *Id.* at 1217.

might, if pressed, have fallen back on an argument from intent,<sup>164</sup> but that language is missing from the opinion. The reasoning we have is structural.

On closer inspection, however, *Guerrero* could fairly be read as an opinion about *national* governmental structures, and therefore not an example of independent structural reasoning in statutory interpretation, but rather an instance of structural reasoning in constitutional interpretation itself. After all, the decision seems to rest, ultimately, on an understanding of the federal judiciary and its relationship to both Congress and the states, including state high courts and state constitutions. If that is correct, then *Guerrero* does not provide a clean example of structural reasoning in statutory interpretation.

All of this brings us to the conclusion that structural arguments work differently in constitutional and statutory interpretation. Structural reasoning may play a role in statutory interpretation, but usually one that is subordinate to intent-based argument, and usually with ultimate reference to constitutional structures themselves. In short, the distinctiveness of constitutional structuralism reflects argumentative exceptionalism. It cannot be justified by an argument that only the Constitution erects structures of government because statutes sometimes do that as well.

Turning to the common law, no one ever thinks to make structural arguments in ordinary legal practice, of course, and that is our main point. No real analogue to structural argument in constitutional law really exists. It is not even clear what would count as a structural argument in the context of the common law. After all, the common law does not constitute public institutions; it does not create the structures of government that then drive legal interpretation. The common law has no role in that process.

But stepping back, the common law is often concerned with its own structural question: whether to delegate decision making to parties or to courts. And there, intriguingly, structural arguments do appear in common-law interpretation. This is particularly clear in the choice between property and liability

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<sup>164</sup> For example, in a case cited by the *Guerrero* court, *South Porto Rico Sugar Co. v. Buscaglia*, 154 F.2d 96 (1st Cir. 1946), the court came to the same result by reference to congressional intent rather than structural considerations. *Guerrero*, 290 F.3d at 1217 ("When Congress by the ['Puerto Rico Bill of Rights'] enacted for Puerto Rico provisions similar to those contained in our 'Bill of Rights' it intended them to have the same purport as the like provisions of our Constitution." (quoting *Buscaglia*, 154 F.2d at 100)).

rules.<sup>165</sup> When protecting legal entitlements, courts must often choose between damages or injunctive relief. Traditionally, that choice was made formalistically and doctrinally.<sup>166</sup> More recently, however, scholarship has reframed the decision to focus on the relative strengths of courts versus private markets.<sup>167</sup> Protecting legal entitlements through a damages remedy gives courts the power to value them, while protecting them with a property rule allocates that authority to the parties themselves. According to these accounts, the choice of remedy should depend on the relative institutional advantages of courts and private bargaining. Where transaction costs and other market failures are likely to impede efficient bargaining around a legal entitlement, courts should award damages instead.<sup>168</sup>

It is not much of a stretch to analogize this reasoning to structural arguments in constitutional law. Both focus on the structural character of institutions—here, courts versus markets—and adopt legal rules consistent with those structures. At least at a general level, choosing between property and liability rules amounts to a kind of structural choice that drives common-law argument.

Despite this deep and quite surprising similarity, structural argument in constitutional law remains distinct. The relevant structures in the common law are not constituted by the common law. And the significance of those institutions' characteristics is not determined by the common law but only in reference to some additional normative commitments—here, to welfarist accounts that seek to maximize wellbeing by allocating resources to the parties that value them the most. In other words, observations about the relative competence of markets and courts rely at least implicitly on their effectiveness at achieving an independent goal: allocating resources efficiently. Structural argument in constitutional law is freestanding and

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<sup>165</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

<sup>166</sup> See, e.g., *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217, 219 (Tex. Civ. App. 1973) (balancing equities to choose between injunctive relief or damages).

<sup>167</sup> Modern scholarship reframing the question in terms of institutional competence includes, for example, Calabresi & Melamed, *supra* note 165, at 1110. See also Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 L. & CONTEMP. PROBS. 73, 78 (1997) ("When markets can price goods at lower transaction costs than courts, prohibitions provide a more efficient structure for transactions than liability.").

<sup>168</sup> This is a straightforward application of the Coase Theorem, which posits that in the absence of transaction costs, parties will bargain to the efficient outcome. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8, 15 (1960).

need not depend on independent commitments outside the structure of the Constitution itself.

It is fascinating to find a resemblance to structural argument in the common law, but the resemblance does not ultimately undermine our central claim that structural reasoning in the constitutional sense remains unique. We will spell out the implications of this discovery in Part II, when we consider possible justifications for the distinctiveness that we see in constitutional discourse.

#### D. Precedent

The role of precedent in interpreting different sources of law is at once more straightforward and more slippery. It is straightforward because the differences are relatively well documented. It is slippery because the role of precedent remains an ongoing source of high-stakes controversy.

There can be no real dispute that constitutional and statutory interpretation evolve analogously to the common law, through the ongoing process of judicial interpretation. The law is thought to be like a kind of palimpsest, where the underlying text is painted over with layer upon layer of subsequent interpretation, each of which must be examined to see the complete picture.<sup>169</sup>

Given most people's sense that the Constitution is especially entrenching, it is perhaps surprising that precedent in constitutional interpretation is singularly weak.<sup>170</sup> At least as a descriptive matter, predicting the application of a constitutional rule requires consulting the constitutional text, but also—and even more importantly—those Supreme Court cases interpreting the constitutional text—the added layers of judicial gloss. The full entrenching power of the Constitution, then, depends on how binding those judicial decisions are on future courts. And here there is a relatively clear hierarchy in the force of precedent in legal interpretation, with constitutional precedent at the *bottom*. As one commentator recently summarized: "Cases interpreting statutes . . . receive stronger-than-normal stare decisis effect. Cases interpreting the

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<sup>169</sup> Richard Fallon refers to the combination of constitutional text and stare decisis as "constitutional practice." See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1118–20 (2008).

<sup>170</sup> See, e.g., Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399, 399 (2008) ("When we ask what the Constitution is, . . . Americans tend to focus exclusively on entrenchment.").



Constitution, by contrast, receive weaker-than-normal stare decisis effect. . . . The baseline of normal stare decisis effect is apparently reserved for cases developing the federal common law.”<sup>171</sup> This is particularly true of the Supreme Court itself but it also captures practices among lower courts.<sup>172</sup> The rationale for strong stare decisis in the context of statutory interpretation is the ability of Congress to overturn the Court’s decision through statutory amendment. Congressional silence therefore can count as a form of acquiescence.<sup>173</sup> The fact that the Constitution is so difficult to amend means, under this reasoning, that courts should be—and in fact are—more willing to reverse course when they decide that a prior interpretation was wrong.<sup>174</sup>

Today, however, there is significant disagreement over the appropriate role of precedent in constitutional interpretation. A number of theorists—primarily originalists—have argued that precedent should have no role in constitutional interpretation.<sup>175</sup> If the text of the Constitution—interpreted “properly” through recourse to original meaning—compels an outcome in a particular case, then the existence of intervening precedent should be irrelevant.<sup>176</sup> In characterizing the argument, Professor Fallon writes: “When one casts off the blinkers and

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<sup>171</sup> Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321 (2005). Barrett argues that lower courts, like the Supreme Court, have embraced the rule that super-strong precedential effect attaches to interpretations of statutes. *Id.* at 318, 327–28; see also Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1867 (2008). The observation was articulated most powerfully in William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

<sup>172</sup> See Barrett, *supra* note 171, at 327–28 (arguing that lower courts, like the Supreme Court, have embraced the rule of heightened precedential effect for interpretations of statutes); Widiss, *supra* note 81, at 870–71 & n.45 (describing both empirical studies and doctrine supporting the super-strong statutory precedent rule among lower courts as well as the Supreme Court).

<sup>173</sup> See ALEXANDER & SHERWIN, *supra* note 21, at 229 (“In the statutory area, following precedent is not terribly problematic given the ability of the legislature to overturn mistaken judicial precedents through ordinary legislation.”); Barrett, *supra* note 171, at 322 (same). Barrett also identifies a related justification based on separation of powers principles that can be set aside here. *Id.* at 323.

<sup>174</sup> The Supreme Court has overturned previous constitutional decisions on numerous occasions. See *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)); *Lawrence v. Texas*, 539 U.S. 558, 561 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>175</sup> See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994).

<sup>176</sup> See, e.g., Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 11 (2011) (“Stare decisis presents problems for textualist jurists because it allows the Supreme Court to apply its precedents as rules of decision

thinks hard, how could adherence to judicial precedents that deviate from the supreme law possibly be anything other than treason to the Constitution?"<sup>177</sup> Recognizing how far the results of this reasoning deviate from normal and accepted constitutional practice, a number of theorists have sought to justify *stare decisis* on other grounds.<sup>178</sup> Others have taken the deviation as grounds to reject the argument outright.<sup>179</sup> But there remains a live controversy whether precedent has any place in constitutional interpretation.

On the other hand, David Strauss has fully embraced the role of precedent in constitutional law. He argues that evolution through the common-law process provides a principled way of mediating between the competing pressures of entrenchment and evolution, and so provides real legitimacy for constitutional interpretation.<sup>180</sup>

We need take no stand on this long-simmering controversy. In fact, the very existence of the controversy reinforces our observation that precedent operates uniquely in the constitutional context. There is no similar hand wringing around the use of precedent for statutory interpretation, even if a subsequent court thinks that the earlier court misinterpreted the law or that conditions have subsequently changed. One needs to look no further than the odd baseball exemption to the Sherman Antitrust Act to see the role of statutory precedent in action.<sup>181</sup> And, of course, no one would consider objecting to the role of precedent in the evolution of the common law, where precedent is the common law. Precedent is least important in constitutional interpretation.

#### E. Metainterpretation

So far, we have examined how particular types of interpretive arguments work differently in constitutional interpreta-

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even when they deviate from proper textualist interpretations of the Constitution.").

<sup>177</sup> Fallon, *supra* note 169, at 1110.

<sup>178</sup> See, e.g., Mitchell, *supra* note 176, at 11 (arguing that *stare decisis* allows the Court to avoid decision costs of revisiting previously decided questions); Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1731 (2010) (noting that by relying on originalist precedent, judges can avoid reevaluating every constitutional issue).

<sup>179</sup> See, e.g., Fallon, *supra* note 169, at 1118.

<sup>180</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

<sup>181</sup> This is a common example. See Barrett, *supra* note 171, at 319 & n.5 (citing Thomas Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 731 (1999)).

tion. In this subpart, we ask a metaquestion: What happens when recognized types of arguments point in different directions? What if, for example, the plain meaning of the text contradicts the intent of the lawmaker or the purpose of the law? Are there rules capable of resolving such conflicts? And do any such rules in constitutional law differ from those in statutory and common-law argumentation?

Our argument in this subpart will be that although similar answers to these questions are *present* in both constitutional and other practice settings, the *predominant* approaches actually differ discernibly. Courts and lawyers performing statutory interpretation conventionally look to the text in combination with the law's purpose, which can be defined and detected in various ways. In constitutional law, by contrast, this text-plus-purpose approach is not dominant. Rather, lawyers consult the full range of authoritative guides to interpretation, including precedent, structure, ethos, and prudence in addition to text and purpose or history. There is a question about how to resolve conflicts among these sources, but referring to text and purpose alone is not the prevalent answer.

Before laying out that argument step by step, we want to acknowledge that most often the metaquestion does not present itself. Richard Fallon, writing in the constitutional context, argued in a classic paper that interpretive arguments usually converge, probably because they allow for enough leeway for a lawyer or judge to argue persuasively that they point in the same direction.<sup>182</sup> This is an observable feature of legal practice.

However, even if convergence is the general rule on the ground, divergence does occur on the edges, and there some method of choosing among interpretive arguments must be found. One conceptual possibility is *singularism*, which privileges one interpretive approach over all others. Originalism is perhaps the best-known example—it excludes or subordinates interpretive considerations other than historical intent or meaning.<sup>183</sup> John Hart Ely's representation reinforcement the-

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<sup>182</sup> Fallon, *supra* note 18, at 1189.

<sup>183</sup> Scalia's originalism is "faint-hearted" precisely insofar as it recognizes other sorts of arguments as persuasive, at least some of the time. Solow & Friedman, *supra* note 110, at 71. And an important recent strain of originalism is singularist only with regard to "interpretation," meaning the semantic content of the text, but is more open when it comes to "construction," meaning the implementation of that text in the context of actual legal disputes. Solum, *supra* note 76, at 95-96.

ory has been called an instance of singularism.<sup>184</sup> Nicholas Rosenkranz's theory is perhaps another, grounded as it is in textual considerations that trump other arguments, such as those from structure and precedent.<sup>185</sup>

Although constitutional singularism is available as a conceptual matter, it is not customary in legal practice, where interpretive *pluralism* prevails instead. Nonoriginalism claims as a great strength that it better matches existing constitutional culture, in which arguments from text, structure, history, and so forth coexist and count as persuasive.<sup>186</sup> Bobbitt and Fallon have offered classic descriptions of that pluralist culture.<sup>187</sup> Proposals to manage the diverse forms of interpretation that we see in practice range from Jack Balkin's living originalism<sup>188</sup> to Strauss's common-law constitutionalism,<sup>189</sup> to Robert Post and Reva Siegel's democratic constitutionalism<sup>190</sup> and beyond.<sup>191</sup>

Pluralistic perspectives on constitutional interpretation all must show how conflicts among interpretive authorities should be resolved.<sup>192</sup> Fallon believes that in practice legal actors reg-

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<sup>184</sup> See Fallon, *supra* note 18, at 1209 (claiming that Ely's theory fits within the rubric of interpretivism, which privileges only "arguments from text and the intent of the framers").

<sup>185</sup> See Rosenkranz, *supra* note 43, at 1210. It is striking that Rosenkranz offers no argument for privileging his brand of textualism over any of its rivals.

<sup>186</sup> But see Baude, *supra* note 3, at 2369 (arguing that the law does in fact prioritize originalism and that other modes of interpretation are only law insofar as they are rooted in original meaning).

<sup>187</sup> Barry Friedman and Sara Solow recently have endorsed the view that interpreting the Constitution according to text, history, structure, precedent, and other factors is customary among lawyers and judges. Solow & Friedman, *supra* note 110, at 76. Solow and Friedman call this method of interpreting the Constitution "ordinary constitutional interpretation" and argue that it characterizes customary practice among lawyers and judges. *Id.* at 70; see also Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 436 (2001) (describing pluralism in constitutional interpretation).

<sup>188</sup> JACK M. BALKIN, *LIVING ORIGINALISM* 341–42 n.2 (2011) (endorsing and adapting Bobbitt's account of the modalities of constitutional interpretation).

<sup>189</sup> Strauss, *supra* note 180.

<sup>190</sup> Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25 (Jack M. Balkin & Reva B. Siegel eds., 2009).

<sup>191</sup> Primus, *supra* note 100, at 175, 183–84 (adapting Bobbitt's modalities to a "toolkit" approach that asks when each one is appropriate).

<sup>192</sup> In fact, very few constitutional theorists contest this descriptive claim—abstracting from actual practices yields interpretive pluralism. See Fallon, *supra* note 18, at 1189 ("With only a few dissenters, most judges, lawyers, and commentators recognize the relevance of at least five kinds of constitutional argument . . . ." (footnote omitted)). Disagreement springs up when people consider the further question of whether the actual use of these types implies their legitimacy. See, e.g., Primus, *supra* note 100, at 183 (disagreeing with Bobbitt's legitimacy claim).

ularly—and properly—prioritize arguments according to an implicit hierarchy of constitutional authority.<sup>193</sup> Text is regarded as most authoritative, followed by history, structure, precedent, and so forth in rank order.<sup>194</sup> Others, such as Bobbitt and Post, question the existence of an implicit hierarchy. They point to cases in which courts have disregarded that ordering—without any weakening of persuasiveness or legitimacy. For them, prioritizing interpretive moves will be a matter of “judgment” (Post’s term) or “conscience” (Bobbitt’s).<sup>195</sup> These are descriptive claims as well as normative ones. Bobbitt and Post believe that legal actors select among competing interpretive arguments, both actually and appropriately.<sup>196</sup>

How does this situation compare to legal practice and theory in the context of statutory interpretation? There, too, singularism is sometimes promoted as a normative matter. Legal actors have promoted theories that privilege text,<sup>197</sup> subjective legislative intent,<sup>198</sup> purpose,<sup>199</sup> or contemporary public meaning.<sup>200</sup>

Yet it is widely recognized, as it is in constitutional interpretation, that multiple interpretive arguments carry authority on the ground. According to Eskridge, for example, several sources legitimately bear on statutory interpretation, and they are organized into a hierarchy that ranges from the most authoritative and concrete to the least authoritative and most abstract. Those sources include statutory text, specific and general legislative history, legislative purpose, evolution of the statute, and current policy (sometimes also called pragmatism).<sup>201</sup> Eskridge’s theory of dynamic statutory interpretation urges legal actors to embrace this pluralism and to recognize that the interplay of arguments and institutions can result in a

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<sup>193</sup> Fallon, *supra* note 18, at 1194.

<sup>194</sup> *Id.*

<sup>195</sup> BOBBITT, CONSTITUTIONAL FATE, *supra* note 16, at 168; Post, *supra* note 19, at 35; see also Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1765 (1994) (describing Post and Bobbitt’s theories of constitutional interpretation).

<sup>196</sup> BOBBITT, CONSTITUTIONAL FATE, *supra* note 16, at 94; Post, *supra* note 19, at 26–27.

<sup>197</sup> See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 69 (1994).

<sup>198</sup> See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005) (describing the dominance of intentionalism among judges).

<sup>199</sup> See Levin, *supra* note 133, at 1110 (describing purposivism).

<sup>200</sup> See, e.g., *id.* at 1105 (advocating a “contemporary meaning and expectations approach”).

<sup>201</sup> See Stack, *supra* note 15, at 15 (discussing ESKRIDGE, *supra* note 71, at 56, and Eskridge & Frickey, *supra* note 31, at 353).

system of statutory interpretation that is both democratically responsive and stable over time.<sup>202</sup>

In sum, both statutory interpretation and constitutional interpretation feature a pluralistic practice, accompanied by theories that either embrace that complexity or resist it in favor of a singularism that promises greater determinacy.

So far, the structures of legal discourse in the two domains seem to parallel each other. Yet it is our contention that they actually diverge in fascinating ways. Consider first that although singularists are active in both settings, some of the very same people who promote one source of authority in constitutional interpretation advocate for something different when it comes to statutory law. For example, Justice Scalia, as we have already described, prefers to resolve problems of constitutional understanding by reference to original meaning. And he explicitly promotes a similar approach to statutory law.<sup>203</sup> Yet he practices a purer form of textualism when it comes to statutory law—one that ignores legislative history as part of the relevant historical context for arriving at original meaning, even though he is happy to refer to the writings of Madison or Hamilton in constitutional cases, if only to support original meaning, ostensibly.<sup>204</sup>

Turning to the more prevalent practice of pluralism, it is revealing to ask which methodology is dominant in each setting, rather than whether it operates at all within the set of accepted arguments. To take that approach is to ask not about the *scope* of each discourse—whether, say, intentionalism is included within the set of accepted moves in both areas, a question that would yield answers that would be clear but not particularly illuminating—but rather to ask about the *shape* of each discourse—how persuasive a way of arguing is seen to be in that domain. To adopt this perspective is to focus on the prevalence and persistence of an argument, in other words, rather than simply on whether it ever appears as acceptable.

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<sup>202</sup> See *id.* at 18.

<sup>203</sup> “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.” Scalia, *supra* note 31, at 38.

<sup>204</sup> See ESKRIDGE, *supra* note 71, at 34, 230–34 (claiming that for textualists like Scalia and Easterbrook, “the beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language”); Gluck, *supra* note 69, at 1762 (noting that textualism is “associated most closely with Justice Scalia’s legisprudence”); Levin, *supra* note 133, at 1110 (calling Scalia “the judicial avatar of textualism”).

From that perspective, it is fair to say that nonoriginalism prevails in actual constitutional interpretation, both on the Court and among other legal actors. This is so even if "living constitutionalism" represents a minority strain within constitutional scholarship. Stepping back and characterizing the way that lawyers actually work, text, structure, and history all matter in constitutional interpretation, and meanings in fact are understood to shift over time in response to social and political forces as well as institutional dynamics. Pure forms of textualism and originalism, on the other hand, are rarely seen.<sup>205</sup> This is a conventional account of positive law, even if its desirability is the subject of impassioned scholarly disagreements.

In statutory interpretation, by contrast, arguments from text and purpose predominate.<sup>206</sup> Lawyers conventionally consult the text of a provision first, along with its place within the statute's broader textual architecture. If ambiguity remains, they look to the statute's purpose.<sup>207</sup> This practice does not amount to pure textualism, which allows other sources to be considered only if the words are ambiguous. However, the text does enjoy some authoritative priority for lawyers, followed by (or along with) its legislative purpose. We think this is true even though there is considerable debate over what should count as legislative purpose and what evidence should be probative of that purpose.<sup>208</sup> Candidates include legislative intent evidenced by legislative history, objective intent perhaps supported by extrinsic historical evidence of social meanings, purpose in the sense of Hart and Sacks's legal process theory, and so forth. Prior decisions have particularly strong force in the statutory field, but only with regard to particular language once

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<sup>205</sup> See Solow & Friedman, *supra* note 110, at 75-77 (arguing that the *Heller* decision, although the best available example of originalism in the Supreme Court, actually employs the full range of constitutional arguments).

<sup>206</sup> For empirical support, see *supra* text accompanying notes 42-49.

<sup>207</sup> See Gluck, *supra* note 69 (describing a common practice of "modified textualism" among state high courts); see also *id.* at 1830 ("[M]ost judges now agree that text trumps nearly all of the time . . ."). On the movement among Supreme Court Justices away from legislative history and toward text, see Brudney & Ditslear, *supra* note 66; Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 354, 357, 373 (1994).

<sup>208</sup> See ESKRIDGE, *supra* note 71, at 25-28 (noting that because "[s]ome statutes are little else but back-room deals," "actual or even conventional" legislative purpose is difficult to recover).

it has been construed, and not with regard to interpretive methodology.<sup>209</sup>

To see this point even more clearly, consider the relationship of Eskridge's dynamic statutory interpretation to mainstream argument. That theory is countercultural, as Eskridge himself acknowledges. His contention that statutory interpretation should more closely mirror actual constitutional interpretation has critical punch precisely because (or to the degree that) the culture of statutory interpretation has developed differently.<sup>210</sup> Formalistic appeals to text and purpose are more common in statutory contexts than are pluralistic appeals that privilege institutional dialogue and shifting democratic dynamics.<sup>211</sup> Eskridge recognizes the relative rigidity of statutory interpretation when he says "[n]either constitutional nor common law interpretation is viewed as just an exercise in discovering original intent" and when he asks "[w]hy should statutory interpretation, our third main source of law, be conceptualized as an originalist enterprise?"<sup>212</sup>

Admittedly, Eskridge defends his theory partly as a positive account of the actual operation of interbranch dialogue over statutes.<sup>213</sup> Even if he is correct about that, however, the fact remains that mainstream lawyers do not understand themselves to be engaging in dynamic statutory interpretation, and consequently they do not articulate their approach to statutory interpretation that way.<sup>214</sup> Rather, they see themselves as carefully applying the dominant text-plus-purpose interpretive methodology.

No mainstream lawyer would perceive the practice of constitutional law that way. There, although the wording of the text is important, it arguably matters less than it does elsewhere in law, as we have said.<sup>215</sup> Moreover, although purpose is almost universally regarded as relevant to constitutional de-

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209 See *supra* subpart I.D (discussing precedent); see also Gluck, *supra* note 69, at 1766 (noting that interpretations of statutory language enjoy "super strong" precedential effect, but that the Supreme Court does not give prior methodological choices any deference).

210 See ESKRIDGE, *supra* note 71, at 2 (noting that statutory interpretation has a "more distinguished intellectual history" than constitutional interpretation).

211 See *id.* at 9.

212 *Id.* at 6.

213 See *id.*

214 See *id.* at 9 (noting that "the 'original intent' and 'plain meaning' rhetoric of American statutory interpretation scholarship and decisions treats statutes as static texts and assumes that the meaning of a statute is fixed from the date of enactment" and contrasting dynamic statutory interpretation to that rhetoric).

215 See *supra* subpart I.A.



cision making, it does not play the dominant role that it does in legislative doctrine. Everyone understands that the role of original intent or meaning is controversial in interpretation of the Commerce Clause or the First Amendment.<sup>216</sup> Constitutional politics, relatedly, play a much more open and accepted role in constitutional interpretation than do statutory politics in litigation over legislation.

Common-law interpretation is also less pluralist in practice than constitutional interpretation. There is, in fact, a trivial sense in which common-law interpretation is uniquely singular in its interpretive methodology: it discerns legal rules from the outcome in earlier cases.<sup>217</sup> But as any lawyer knows, the process of common-law reasoning involves analogizing and distinguishing those prior decisions, and it is in that interpretive act that pluralism again appears.<sup>218</sup> What makes another case an appropriate analogue? What are appropriate bases for distinguishing precedent?<sup>219</sup>

Common-law reasoning relies upon explicit or, often, implicit claims about the purpose of the common-law rule at issue. This means focusing sometimes on its formalistic doctrinal contours, its moral underpinnings, its consequential benefits, or other normative commitments.<sup>220</sup> These different considerations are not mutually exclusive, and legal reasoning often encompasses more than one. It may start, for example, with the historical evolution of a doctrine, before turning to the equity and potential consequences of a rule's application. Ulti-

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<sup>216</sup> See, e.g., Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765, 784 (2013) (noting that scholars have criticized the Court's invocation of originalism to support the *Citizens United* decision).

<sup>217</sup> See generally ALEXANDER & SHERWIN, *supra* note 21, at 64 ("Texts on judicial reasoning, as well as judges themselves, often maintain that the primary decision-making method of the common law is reasoning by *analogy*."); LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005) (explaining the process of analogical reasoning).

<sup>218</sup> This account of the singularism of common-law interpretation is also too parsimonious. A number of scholars have identified a breadth of interpretive moves in standard common-law reasoning. See, e.g., POSNER, *supra* note 93, at 39, 71, 86; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 64 (1985); see also ALEXANDER & SHERWIN, *supra* note 21, at 31 ("[T]here are two plausible models of common-law reasoning, and only two.").

<sup>219</sup> See ALEXANDER & SHERWIN, *supra* note 21, at 68–69 ("To reason that [two cases] should be decided alike, [one] must determine that they are *importantly* similar, and to reason that they are *importantly* similar, [one] must refer to some general proposition that links [the facts or contexts together].").

<sup>220</sup> See *id.* at 70–71.

mately, then, singularism dominates the overall form of common-law interpretation, but its application tends towards pluralism.

In sum, constitutional argument is distinctive not only within each form of interpretive argument or source of authority but also on a higher level of abstraction, with regard to overarching approaches to managing these forms and sources. Most importantly, pluralism tends to look different in different legal settings, with constitutional lawyers practicing it rather freely, statutory lawyers looking more restrictively to statutory text supplemented by legislative purpose, and common-law lawyers adopting pluralistic methods in marshaling relevant precedent. Although these are differences of emphasis rather than inclusion or exclusion, they separate different legal discourses in discernible ways.

## II

### JUSTIFYING CONSTITUTIONAL EXCEPTIONALISM

Is there something about the Constitution that could make sense of the extraordinary interpretive forms that we have been describing? Does it have characteristics or claims to authority that make it so different from statutes or the common law that it should have a special legal discourse with its own accepted moves?

To most lawyers, the answer seems obvious. Of course the Constitution is different—it is unique, in fact. Only one law is supreme in the sense that it trumps all others, only one law is as difficult to amend and thus has persisted as consistently over time, only one law enjoys an extraordinary democratic mandate, only one law is written in such lofty and abstract terms that express principled commitments, and only one law was drafted by prominent figures from American history like James Madison and Alexander Hamilton. That a document with these characteristics should draw its own methods of interpretation is thought to be commonsensical.

Yet once those assumptions are interrogated, questions begin to arise. Is the Constitution really the only law that is entrenched against meaningful change in our system? Does it really enjoy democratic legitimacy not bestowed on other laws? Is no other law written in abstract terms that express deep commitments of principle? And even if the Constitution is alone in its supremacy, does that status justify the interpretive moves that lawyers apply to that law and no other?

Thinking clearly about these questions requires examining the relationships between constitutional *attributes*, *authority*, and *argument*. Some attributes that set the Constitution apart may not contribute convincingly to its authority. That the document is written in abstract terms, for instance, may not lend it additional weight. And the fact that the law is supreme in its legal authority may not provide a reason why it should be subject to different forms of argument.<sup>221</sup> Relationships between these concepts are looser than even astute lawyers customarily appreciate.

Paying attention to these distinctions, among others, we argue below that the justifications for constitutional specialization in legal argument are less forceful than most people commonly assume. The Constitution has a number of attributes that might seem to justify interpretive exceptionalism. Again, these include its form and subject matter, its entrenchment, its supremacy, and its perfection. In fact, however, those attributes do not set the Constitution apart from other sources of law both because they exist elsewhere and because they do not characterize the Constitution itself as much as people think.

The Constitution also has unique-seeming claims to authority rooted in its democratic legitimacy and its status in legal culture. The former is again unpersuasive as a description of the Constitution's authority. Only the latter turns out to hold up to close scrutiny, but it is oddly circular. The Constitution is exalted because people believe it to be—because it occupies a lofty place in the American cultural imagination. Even that attribute, while it does distinguish the Constitution, may have trouble justifying the special forms of interpretive argument that we see in legal practice.

The distinction between constitutional attributes and constitutional authority is admittedly porous. Supremacy, for example, is an attribute of the Constitution. But supremacy may also be a source of the Constitution's authority; its status requires fealty in ways that are distinct from other sources of law and in ways that affect interpretive choices. Ultimately, our analysis does not depend on distinguishing cleanly between attributes and sources of authority. The goal is to examine the

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<sup>221</sup> See Samaha, *supra* note 99 (interrogating the relationships between constitutional authority and argument). But see Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 153, 157 (Larry Alexander ed., 1998) ("[T]he principles of constitutional interpretation depend in part on the theory of constitutional authority.").

various possible justifications for interpretive exceptionalism, whatever their character. When, for example, we reject supremacy as a reason for interpreting the Constitution differently from other sources of law, we do so regardless of whether it is viewed as a constitutional attribute or a source of constitutional authority. Nevertheless, the distinction between attributes and authority provides a useful conceptual frame for considering (and questioning) different reasons for treating the Constitution as special.

### A. Form and Subject Matter

The most obvious constitutional attribute is also the easiest to reject as a justification for interpretive exceptionalism, and that is its form and specific content. As Chief Justice Marshall observed, the Constitution is distinct because it does not have the "prolixity of a legal code."<sup>222</sup> It speaks in broad terms, invoking general principles like "[f]ull faith and credit,"<sup>223</sup> "necessary and proper,"<sup>224</sup> "cruel and unusual punishment[ ],"<sup>225</sup> "equal protection,"<sup>226</sup> and "due process of law."<sup>227</sup> It might then seem that the interpretive methodology should be different for the Constitution because it takes a different form.

In fact, however, the Constitution is less distinct than casual observers might think. For one thing, many constitutional provisions do, in fact, exhibit legal prolixity.<sup>228</sup> While the most familiar provisions are couched in broad terms, much of the Constitution is detailed and mechanical. And, conversely, much ordinary statutory law is itself written broadly and lacks the wordiness of other legal codes. The Sherman Act, for example, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to

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<sup>222</sup> Chief Justice Marshall's famous admonition is preceded by an explanation that a constitution cannot have "the prolixity of a legal code" and be understood by the public. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>223</sup> U.S. CONST. art. IV, § 1.

<sup>224</sup> *Id.* art. I, § 8.

<sup>225</sup> *Id.* amend. VIII.

<sup>226</sup> *Id.* amend. XIV.

<sup>227</sup> *Id.* amend. V, XIV.

<sup>228</sup> See, e.g., *id.* art. I, § 7 ("Every 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; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.").

be illegal.”<sup>229</sup> The Act does not define “restraint of trade” and it offers no more textual guidance than constitutional phrases like “equal protection” and “due process of law.” Other statutes are similar.<sup>230</sup> Congress often delegates authority to administrative agencies by writing broadly.

The bottom line: some constitutional provisions have the detail of a legal code, and some codes the generality of a constitution. It is therefore difficult to justify a practice of interpretation that treats constitutional interpretation as categorically different.<sup>231</sup> Can anyone imagine the Sherman Antitrust Act being interpreted like the Constitution—with reverential deference to its framers, for instance?

Perhaps, though, it is not the form but the subject matter of constitutional provisions that sets them apart. Equal protection, due process, citizenship, and the like are aspirational concepts. They are meant as evocative guides more than technical rules. But this claim, too, does not hold up to scrutiny for precisely the same set of reasons. While some of the Constitution’s most powerful protections have this kind of aspirational quality, much of the rest of the document plays in a more mundane field.<sup>232</sup> More importantly, the Constitution does not have a monopoly on aspirational provisions. Many congressional statutes address similar concepts, and even provide broader and more powerful protection than the Constitution itself.<sup>233</sup>

In sum, while some constitutional provisions are expressed differently from many statutes, and address bigger or at least

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<sup>229</sup> 15 U.S.C. § 1 (2012).

<sup>230</sup> See, e.g., 18 U.S.C. § 1341 (2012) (defining “mail fraud” to include a “scheme or artifice to defraud”); *id.* § 1346 (2012) (extending mail fraud statute to conduct depriving another of “the intangible right of honest services”); see also RICHARD A. POSNER, *HOW JUDGES THINK* 5 (2008) (noting that the Supreme Court has called the Sherman Act a “common-law statute” because of its open-ended language (quoting *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007))); Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 253–63 (2010) (discussing the interpretive challenge of vague federal criminal law statutes); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 260–65 (2002) (same).

<sup>231</sup> It is partly for this reason that Richard Primus argues for differentiating between provisions in the Constitution and not treating them all as equally constitutional. See Primus, *supra* note 13.

<sup>232</sup> See, e.g., U.S. CONST. art. II, § 1 (“[N]either shall any person be eligible to [be President] who shall not have attained to the Age of thirty five Years . . .”).

<sup>233</sup> See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601–19 (2012) (prohibiting de facto discrimination in housing, whereas the Equal Protection Clause prohibits only de jure discrimination); see also *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525–26 (2015) (affirming that FHA prohibits discriminatory impacts).

more aspirational concepts than much statutory law, these do not justify categorically different approaches to constitutional interpretation. Not all constitutional provisions have the character of the Equal Protection Clause, for example, and some statutes do.

### B. Entrenchment

Another obvious-seeming justification for the Constitution's interpretive exceptionalism is its entrenching quality—that is, its ability to bind the future and its relative insusceptibility to change through the normal majoritarian political process. While people have long debated the desirability of entrenchment, few dispute that the Constitution's commands carry weight into the future like no other source of law.<sup>234</sup> But they should. More considered reflection quickly reveals both that other acts of government can be extremely entrenching and that the Constitution itself is surprisingly amenable to change.

Under one traditional view, entrenchment is a binary status that, when attached to ordinary law, renders the law invalid. It is a core principle of democracy that one legislature cannot make policy choices binding on a future legislature. An attempt to do so is entrenching and therefore impermissible, and a subsequent legislature can avoid enforcement of the earlier government's decision.<sup>235</sup> Under this view, the Constitution is not just different; it is unique. It is the only law that is permissibly entrenched against future change by ordinary means.

In fact, however, this binary view of entrenchment misapprehends legal commitments in the real world. As one of us has argued, entrenchment exists on a spectrum, and many activities a government routinely undertakes can entrench policy choices into the future.<sup>236</sup> A government that enters into a long-term lease or procurement contract, grants a franchise, or settles litigation through a consent decree will create binding legal obligations in the future.<sup>237</sup> Likewise, a government that

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<sup>234</sup> See, e.g., JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 10–11 (2001); Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1331 n.3 (2010) (citing sources); see also Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 22 (1934) (describing “highly probable permanence” as the *sine qua non* of constitutionality).

<sup>235</sup> See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 465 (1837).

<sup>236</sup> See Serkin, *supra* note 6.

<sup>237</sup> See *id.* at 892–96.

conveys away conservation easements, incurs debt, or alienates important assets will constrain the policy choices available to future legislatures.<sup>238</sup> These commitments, admittedly, do not all look like “law.” Nevertheless, as a preliminary matter, these categories of government action demonstrate the breadth of entrenching decisions governments can make.

There are, however, other more subtly entrenching forces that can convert “ordinary” law into all-but-immutable policy choices. Indeed, an ordinary law can also become entrenched simply through the passage of time. The Judiciary Act of 1789 is a statute as amenable to change as any law, but only in theory. In reality, the law has become such an important strand in the warp of our political system that it, too, is all but immune from normal democratic change.<sup>239</sup> Nor do laws need to be of such ancient vintage to have that effect. The Sherman Antitrust Act, the Civil Rights Act of 1964, and the Administrative Procedure Act are also here to stay. Admittedly, not every law becomes entrenched simply through the passage of time or the accretion of habit. Some, instead, become out of date. Others never really take hold in the same way as these examples. But that does not change our underlying and ultimately modest claim that the Constitution is not uniquely entrenched.

Path dependence is a distinct but related dynamic by which laws that establish, for example, important bureaucratic institutions become difficult to change because of vested interests and administrative inertia.<sup>240</sup> Or, more generally, a law can also be politically entrenched if it creates enduring special interest groups with a significant vested stake in the law’s preservation.<sup>241</sup> An obvious example is rent regulation in New York City. Tenants in rent-controlled apartments have a tremendous financial incentive to preserve the legal status quo. Those high per capita financial stakes, coupled with the organiza-

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<sup>238</sup> For a discussion of conservation easements, see Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U. CHI. L. REV. 341, 342 (2010).

<sup>239</sup> See Wythe Holt, “To Establish Justice”: Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1479 (noting the “remarkable strength and durability of the Judiciary Act of 1789”).

<sup>240</sup> See, e.g., Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332, 332 (1985) (defining path dependence as a characteristic of economic change according to which “important influences upon the eventual outcome can be exerted by temporally remote events, including happenings dominated by chance elements rather than systematic forces” and applying the concept to entrenchment of the QWERTY keyboard).

<sup>241</sup> See Daryl J. Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 413–23 (2015) (describing the process by which laws become politically entrenched).

tional advantages that come with relatively small special interest groups, make rent control a kind of third rail in New York City politics.<sup>242</sup> Even though economists have roundly criticized rent regulation's distorting effects on the New York City housing market,<sup>243</sup> and even though it is perennially under attack,<sup>244</sup> rent control is not going anywhere. Importantly, those political dynamics are a byproduct of the law itself, which created valuable vested interests. There are numerous examples at the federal level as well, where the political dynamics created by a law or regulatory regime make the law extremely resistant to change.<sup>245</sup>

Moreover, for all the talk by courts and commentators that statutory interpretation is backstopped by the legislature's power to change the law, Congress in fact seldom takes up the gauntlets that courts frequently throw down. Congress itself is not purely majoritarian. Filibuster rules in the Senate, together with the more general dynamics of bicameralism, mean that supermajorities are often required for most "ordinary" legislative change.<sup>246</sup> At the very least, Congress is not in the habit of taking up minor course corrections, and even unexpectedly major changes in courts' interpretation of a given law will not regularly trigger a congressional response. The supposed flexibility in statutory law is often theoretical only. Statutory practice, in the real world, gives interpreters great latitude to shape laws' application without meaningful congressional oversight. The notional ability of Congress to change the underlying statute in the face of an objectionable interpretation is therefore less important in reality than people often claim.

The story with common-law doctrines is somewhat more complicated because many are subject to legislative override

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<sup>242</sup> See, e.g., NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 61 (2001) (describing attributes of special interest group power). The actual political dynamics in New York are complicated because landlords would seem to have similar characteristics. Nevertheless, there is no doubt that rent regulations remain firmly entrenched.

<sup>243</sup> See Adam Davidson, *The Illusion of Control*, N.Y. TIMES MAG., July 28, 2013, at 14–15.

<sup>244</sup> See Manny Fernandez, *In a Campaign to Raise Rents, an Attempt to Humanize Landlords*, N.Y. TIMES, June 23, 2009, at A22.

<sup>245</sup> Grazing rights are a good example. See, e.g., Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721, 762 n.191 (1993) ("President Clinton . . . learned the difficulty of abolishing the under-market aspect of the grazing program, when political pressure forced him to withdraw his proposal to raise the fees under the program to market values.").

<sup>246</sup> The debates over health care demonstrate that both sides view any resulting legislation as very difficult to change again in the future.



through the normal political process. From the abolition of the fee tail in the 1790s to the statutory repeal of the rule against perpetuities in some states,<sup>247</sup> even long-standing rules are subject to change through ordinary legislation. But not all are. The best-known example is the public trust doctrine. Property held in trust for the public—traditionally, submerged lands, but today other property as well<sup>248</sup>—cannot be alienated or otherwise encumbered, even through the normal democratic process. If a legislature tries to sell off such land, a subsequent legislature can have the sale undone.<sup>249</sup>

The public trust doctrine is admittedly unusual in this regard but other common-law doctrines are entrenched for the same reason as some statutory law: they have become too much a part of our common-law culture to change. Specific performance for land sale contracts or bona fide purchaser protection in contracts are effectively permanent. Of course, there can be lots of play in the joints of even core common-law doctrines. Privity of contract has been extended dramatically over the last fifty years, as have concepts of duty and proximate cause.<sup>250</sup> Indeed, it is in its very nature that the whole of the common law bends and shifts over time. This flexibility is thought to be its greatest strength. But all those changes should not disguise the equally significant truth that core aspects of each of these doctrines will not change easily or soon. While exceptions may arise to property's traditional right to exclude, the basic concept of trespass is firmly embedded in our legal and political culture.<sup>251</sup>

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247 See DEL. CODE ANN. tit. 25, § 503(a) (2014) (statutory repeal of rule against perpetuities in Delaware); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 12–13 (1977) (“South Carolina and Delaware had abolished entail in 1776, and by the end of the eighteenth century virtually all of the new American states had eliminated [the fee tail] . . .”); see also Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 305–07 (2015) (describing the abolition of the fee tail).

248 See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 7–14 (2007).

249 See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–53 (1892) (describing and applying the public trust doctrine).

250 See, e.g., W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1890 (2011) (noting that most courts have rejected Cardozo's relational view of duty).

251 Nor is protection against change limited only to political will or legal tradition. Today, federal courts may even police the ability of state courts to change state common law too dramatically. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010); see also Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 568–75 (2012).

Again, the argument here is not that the entirety of the common law is entrenched against change in the same way as the Constitution but simply that aspects of the common law are similarly immune to change. There is, in other words, no in-kind difference in the entrenching character of the Constitution from other sources of law.

Just as importantly, the Constitution itself is less entrenched than people commonly assume. Of course, the Constitution can, in fact, be amended, and has been seventeen times since the initial ten amendments in the Bill of Rights.<sup>252</sup> But the most significant source of legal change comes through the practice of constitutional law more generally. Whether it is constitutional protection for same-sex marriage, property rights, criminal defendants' rights, or states' rights, the meaning of constitutional provisions is constantly changing, and sometimes quite dramatically. Certainly, Article V amendment is not always necessary, even for rules that once were thought to require formal amendment to be changed.<sup>253</sup>

Nor are interpretive changes independent of the normal political process, at least when broadly construed. Popular constitutionalism recognizes that courts—even the Supreme Court—seldom stray far from public opinion. Sometimes the Supreme Court is slightly ahead of the wave of public opinion, and sometimes slightly behind, but it is almost always carried by the same tide.<sup>254</sup>

Some might object that the argument here is circular. We are critiquing the entrenchment-based justification for special constitutional argumentation by observing that the Constitution is not especially or uniquely entrenching. But of course, interpretation itself is largely responsible for constitutional change. Therefore, the objection might run, we cannot fairly critique the entrenchment justification for special constitutional argument by pointing to the evolutionary outcome of that argument. Interpreters take license with the text precisely because it is so hard to amend, on this view.

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<sup>252</sup> See U.S. CONST. amend. XVII.

<sup>253</sup> See Primus, *supra* note 13, at 1101 ("Prior to the twentieth century, well-socialized American lawyers might have thought that, unless the Constitution were amended, constitutional law could not possibly authorize Congress to enact pervasive economic regulations, to delegate broad power to administrative agencies, or to prohibit racial discrimination in privately owned businesses. All those things turned out to be possible without amendments.").

<sup>254</sup> See Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 981–83 (2004).

This objection is understandable but mistaken. Our depiction of constitutional change is utterly independent of a commitment to any particular form of constitutional argument like living constitutionalism. In fact, constitutional change is a reality for both conservatives and liberals alike. The form of that change may be different. New originalists, for example, may couch their strategies in historical discourse but the resulting evolution in constitutional meaning is impossible to deny. The Second Amendment means something different today than it did two hundred years ago, as does the notion of equality and due process of law.<sup>255</sup> This is true regardless of the particular form of interpretive argument that is being deployed.

So the Constitution is less entrenched than people sometimes assume, and the process of constitutional evolution is not qualitatively different from the process of any legal change. When the Supreme Court newly interprets "equal protection" to include women, it is not doing anything inherently different than when it expands the definition of "restraint of trade."

More fundamentally, too, the difficulty of the Article V amendment process generates, if anything, conflicting interpretive impulses. On the one hand, the Constitution's relative rigidity may well militate in favor of greater interpretive flexibility. From the perspective of living constitutionalists, the Constitution's rigidity is an infirmity to be overcome. Dead-hand control is inherently antidemocratic unless interpretive flexibility can ensure that the Constitution remains responsive to today's needs. On the other hand, however, the difficulty of formally amending the Constitution might counsel for greater reverence. Interpretation, in this view, should be exceptionally conservative, to honor this constitutional design. Anything else is, to borrow a well-turned phrase, "antientrenchment and therefore anticonstitutional."<sup>256</sup>

In a very real sense, then, current constitutional debate involves an overarching question about how entrenching the Constitution should be. But the fact of this debate reveals—at the very least—that constitutional meaning *does* change. The frequency and extent of those changes demonstrate that constitutional meaning is not uniquely or even unusually fixed.

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<sup>255</sup> See, e.g., Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1401 (2009) (arguing that originalism leaves plenty of room for constitutional change in practice and is, therefore, "conservatives' living constitution"); see also BALKIN, *supra* note 188, at 103–04, 280–81 (arguing that the shift from original intent and original understanding to original meaning becomes a form of living constitutionalism).

<sup>256</sup> ALEXANDER & SHERWIN, *supra* note 21, at 226.

Here, again, the Constitution is more continuous with ordinary law than people generally believe, and the formal differences that exist do not generate particular interpretive approaches or outcomes.

### C. Supremacy

If the Constitution's exceptionalism cannot be justified by its entrenchment, what about its status as supreme law? This is one attribute that undeniably sets the document apart. It means that the Constitution prevails over all other law when conflicts arise. A familiar decision rule generates this attribute. And only one source of law can claim that status, by definition.

A stronger version of this argument holds that the Constitution is not only supreme in the sense of a simple decision rule but in the further sense that it is "basic" or "fundamental" law—or, to use exactly the opposite special metaphor, it is "higher" law. According to this version, the Constitution articulates principles that are more foundational (or lofty) than the values embedded in ordinary statutes and common-law doctrines. Supremacy can be thought of as a form of authority, in other words, as well as an attribute.

On either of these versions, some might plausibly argue that the Constitution's supremacy properly drives special forms of interpretive argument. Lawyers should understand that the Constitution is doing something different from ordinary law, and they should interpret it accordingly. That is one way of understanding Chief Justice Marshall's admonition.<sup>257</sup> Constitutional rules establish a framework of governmental powers and individual rights that works differently from laws operating within that framework, and they should be construed in that light.

An initial question about this way of thinking is whether the supremacy attribute in fact isolates the Constitution. As we have seen, the text actually can be trumped by convictions that are deeply held and widely shared. In fact, this has happened repeatedly. To use the example we have referred to before, equal protection rules apply against the federal government despite the text of the Fifth Amendment. When language like that runs up against strong values like the idea that the District of Columbia should not be able to segregate its public schools on the basis of race, it yields.<sup>258</sup> Of course, courts

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<sup>257</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>258</sup> See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

finesse that fact by calling the new, unwritten rule constitutional, but that begs the question by simply attaching a label to whatever law in fact is supreme. As another example, think of the rule that presidents may only serve for two terms. Although supreme today, in the sense that no political actor would think to violate it, and although supreme earlier in American history after it was established by President George Washington, the rule was not supreme in 1940, when President Franklin D. Roosevelt ran for a third term successfully.<sup>259</sup>

Even if that (admittedly controversial) contention is put to one side and the Constitution is indeed taken to be supreme, the more difficult question is what follows for interpretive argument. Consider first the thin version of the supremacy argument, according to which supremacy works as a simple decision rule. Why should a rule like that yield interpretive strategies that are as dramatically distinct as those that actually characterize legal practice? After all, there are lots of decision rules scattered throughout law—think of *Chevron* or conflicts rules—and yet they are construed in ordinary ways. Philip Hamburger has argued, based on historical evidence, that judges and lawyers at the time of the founding simply resolved conflicts between the Constitution and statutes in exactly the same way that they resolved conflicts between any two sources of law, without the concept of “judicial review” or any special interpretive arguments.<sup>260</sup>

Consider now the thicker version of the supremacy argument, for which principles like equal protection or enumerated powers are foundational and therefore should be read differently from routine rules. This is an argument from authority. We have already argued that certain commitments grounded in statutes or common-law doctrines are equally foundational in this sense. Commitments enshrined in statutes that came out of the Second Reconstruction—for example, section 1983—are also written in lofty language and rightly thought to be fundamental to American political life and to American citizenship.<sup>261</sup> The right to vote does not have the status of higher law, and it is not subject to special interpretive moves, and yet it is equally basic to our society. So supremacy in this thicker

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<sup>259</sup> See Primus, *supra* note 13, at 1099–1100 (discussing that example).

<sup>260</sup> HAMBURGER, *supra* note 11.

<sup>261</sup> See Eskridge, *supra* note 104, at 1317 (“Although some statutes such as the Sherman Act and section 1983 are open-textured like the Constitution, most are relatively detailed.”).

sense does not seem to be doing the justificatory work we are looking for in this Part.

In sum, even if supremacy is an *attribute* that does set apart constitutional law from other sources, and even if it represents a form of *authority*, its connection to distinctive interpretive *argument* is open to question. Certainly, its function as a decision rule cannot do much to justify its interpretive exceptionalism. Its status as basic or higher law comes closer, but even that characteristic runs up against the observation that some statutory law also speaks in terms of profound principle. Supremacy may give constitutional lawyers and scholars a sense that their work is important, but it does little to explain why they speak so strangely.

#### D. Perfectionism and Antiperfectionism

Could it be argued that what separates the Constitution from other sources of law has to do with a normative evaluation? Perfectionists would argue that the Constitution is particularly attractive, at least once it is properly construed.<sup>262</sup> It reflects not only extraordinary democracy but also extraordinary wisdom. Evidence of that wisdom is that it has persisted for so long, indicating not only that its framers and ratifiers had foresight but also (and relatedly) that it has proven worthy of public endorsement through several generations and under historical conditions that have differed wildly. But again, it is not popularity itself that drives this particular argument for distinctiveness, but excellence.

Antiperfectionists agree that what distinguishes the Constitution is normative, but they believe that such a consideration cuts in exactly the opposite direction—that the document is particularly blameworthy rather than particularly praiseworthy. On this view, the Constitution has characteristics that are variously seen to be (1) especially flawed, either because they are undemocratic or unwise in some other way, (2) not unusually flawed but unusually consequential because of the Constitution's legal and political importance, or (3) not unusually flawed but unusually entrenched against improvement.<sup>263</sup>

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<sup>262</sup> See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374–81 (1981); Mark Tushnet, “*Our Perfect Constitution*” Revisited, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 131, 131–33 (Peter Berkowitz ed., 2005).

<sup>263</sup> See Monaghan, *supra* note 262, at 357–58.

A recent wave of scholarship questions the widespread assumption that the Constitution is worthy of high regard as a matter of political morality.<sup>264</sup> Generally, this literature argues that aspects of American government are undemocratic—think of the Senate or the Electoral College—or that they do not work particularly well under contemporary conditions—think of bicameralism or the permissibility of partisan gerrymandering. These critics do not usually argue that the Constitution is *uniquely* blameworthy. Yet their arguments could be deployed by antiperfectionists to that end.

We doubt that either of these positions can be maintained. It would be surprising if the Constitution were found to be either specially praiseworthy or specially blameworthy as a matter of political morality. Of course, it may be the case that framers like James Madison were people of uncommon wisdom and that the document reflects that wisdom.<sup>265</sup> Yet members of that generation enacted statutes as well, some of which are still good law today, and those presumably reflect the same sort of competence. Moreover, it is likely that there are at least some other statutes in effect today that are the products of political leaders with similar levels of ability. Conversely, to the degree that the Constitution is flawed—something we think is obvious but culturally underappreciated—it shares that feature with many other laws. Neither attractiveness nor repulsiveness is likely to be a distinctive *attribute* of the Constitution.

Moreover, even if perfectionism or antiperfectionism turned out to be accurate, it is not clear what would follow for interpretive *argument*. Should a bad constitution be construed so that it does as little harm as possible—something like Dworkinian theory as damage control—or should its flaws be highlighted, so that efforts to amend it are empowered—in the spirit of legal positivism? More specifically, can either perfec-

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<sup>264</sup> See generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (arguing that many of the Constitution's provisions promote either unjust or ineffective government); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012) (arguing that in order to progress, we should treat the Constitution as inspiration, not as a set of commands).

<sup>265</sup> See Kent Greenawalt, *The Original Understanding of the Establishment Clause*, in NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 352 (T. Jeremy Gunn & John Witte, Jr. eds., 2012) (arguing that the framers' wisdom provides a reason to value original intent). But see WALTER M. MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON 205 (1963) (noting that Garrison called the Constitution a "covenant with death and an agreement with hell").

tionism or antiperfectionism justify any of the distinctive moves that we argued in Part I characterize actual legal practice?

Possibly, perfectionism is connected to the relative disregard for the text that we have described. But the connection is not a causal one: it is not that normative approval drives looser attention to the text but rather that interpretive freedom is a mechanism for realizing perfectionism itself—a method for guaranteeing the text's attractiveness, not a consequence of that characteristic. So described, this move is a means for achieving the Constitution's specialness and not an independent justification for that specialness. It could be driven by an altogether different consideration—such as a belief that the document is unusually entrenched and therefore must be liberally construed if normative ends are to be achieved (or disasters avoided).

Another possibility is that the document's excellence drives distinctive types of historical argument. But this, too, is far from obvious. In fact, originalism claims as one of its chief virtues that it operates independent of any assessment of the law's desirability and that it thereby protects the rule of law.<sup>266</sup> And as actually practiced, originalism appears to operate less on an assumption that the entire document is normatively attractive and more with the view that certain parts of the Constitution are worthy of preservation—especially parts drafted by prominent framers. And that is not a judgment that should separate it from other laws drafted by those historical figures.

Our main conviction, however, is that neither perfectionism nor antiperfectionism hold as normative evaluations that can distinguish the Constitution from other sources of law. We think it is significant in this regard that no prominent scholar has taken such a position, to our knowledge. And even if the Constitution is distinctively praiseworthy or blameworthy, it is hard to see how either of those attributes drives the particular types of interpretive argument that we charted in Part I.

#### E. Democratic Legitimacy

Thirty-five years after the Constitution was ratified, James Madison wrote that “the guide in expounding [the Constitution]” should be “the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the

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<sup>266</sup> See Whittington, *supra* note 3, at 602.



legitimate Constitution.”<sup>267</sup> Two claims in this passage are widely accepted even today: first, that the Constitution’s authority is grounded in its democratic character, and second, that this claim to legitimacy should drive contemporary understanding of the document and implementation of its provisions as law.<sup>268</sup> Madison’s approach connects claims about constitutional attributes, authority, and argument. Commerce Clause or equal protection law is distinctive because of its democratic mandate, it is authoritative because of that earlier moment of popular agreement, and it should be understood and implemented accordingly.

Our focus is not so much on the merits of this approach but, as always, on its distinctiveness. In this subpart, we evaluate two varieties of the argument for constitutional exceptionalism based on democratic legitimacy: that the Constitution was ratified in an earlier moment of history by a supermajority of citizens, and that it continues to enjoy overwhelming popular support today.

1. *Original democratic authority.*—One could understand the first claim as contractarian: the Constitution carries legal authority because of popular agreement at the time of ratification.<sup>269</sup> Article V sets out processes of proposal and ratification that define the legal conditions under which a law can claim constitutional status, and those conditions are designed to guarantee a certain level of supermajoritarian support.<sup>270</sup> So passing through the procedures of Article V gives the text not only legal legitimacy but also popular or democratic legitimacy. Once established at the moment of ratification, that legitimacy then carries forward until a subsequent moment of repeal, and it rightly binds both future governments and future majorities, measured in the ordinary way.<sup>271</sup> Furthermore, no other law in

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<sup>267</sup> Letter from James Madison to Henry Lee (June 25, 1824), *reprinted in* JAMES MADISON: WRITINGS 803, 803 (Jack N. Rakove ed., 1999).

<sup>268</sup> See Samaha, *supra* note 99, at 610 (describing how Madison’s contractarianism theory is accepted today and that a theory of authority drives the interpretation).

<sup>269</sup> See *id.* (identifying this contractarian claim).

<sup>270</sup> See MCGINNIS & RAPPAPORT, *supra* note 11, at 2 (arguing that originalism is defensible because it protects constitutional understandings that were enacted under supermajority rules); see generally Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809 (2015) (reviewing McGinnis & Rappaport).

<sup>271</sup> Ackerman’s theory counts as contractarian in this way, even though it is not focused on Article V, because it grounds the Constitution’s legitimacy in moments of higher lawmaking that then differentiate higher law from ordinary law until subsequent moments of constitutional change. It differs, however, insofar as it allows conceptual space to declare similarly authoritative statutes and other

the U.S. system is subject to these elevated requirements for passage or amendment. And the argument concludes by connecting these moments of extraordinary lawmaking with contemporary interpretive discourse, saying that the document should be understood in a way that faithfully follows the historical moment in which it was adopted by the people.

This first contractarian version is subject to several objections. One is the simple point that ratification has not always guaranteed supermajoritarian support as we would understand it today. In 1789 and 1791, of course, the group of people eligible to vote was restricted in ways that we would today call grossly undemocratic: according to characteristics of race, gender, and class.<sup>272</sup> If the original document could claim legitimacy at the moment of its ratification, then, it was a legal and not a democratic type of authority. And, as Bruce Ackerman has famously argued, the Fourteenth Amendment was ratified in a way that cannot be said to have followed Article V in any straightforward sense.<sup>273</sup> Whether a supermajority of states would have ratified the Reconstruction Constitution without outside pressure is open to serious question. These are all familiar problems with a contractarian approach to the Constitution's democratic authority.

Moreover, it is quite possible that some nonconstitutional laws were enacted with similar levels of support by the people. If so, they could claim a similar quantity and quality of democratic authority that should drive similar interpretive moves today (although admittedly they would not have the same legal authority). Think for instance of Ackerman's account of passage of the New Deal settlement's major elements—social security, entitlement-based health care programs, labor laws, and other basic building blocks of the administrative state.<sup>274</sup> All of these claimed levels of support at the time they were

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laws as "constitutional" if they enjoy similar support. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742–52 (2007) (assessing the possibility that the Civil Rights Act of 1964 and other major achievements of the Second Reconstruction enjoy constitutional status).

<sup>272</sup> See Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 420 (1989) ("Slaves and even free blacks, women, and persons without sufficient property, were not eligible to vote.").

<sup>273</sup> BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME 2: TRANSFORMATIONS 99–120 (1998). But see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 364–80 (2005) (critiquing the argument that the Fourteenth Amendment was enacted in a manner that violated Article V).

<sup>274</sup> BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME 1: FOUNDATIONS 47–57 (1991) (describing mounting support for New Deal legislation during President Roosevelt's first term and then decisive support at the time of his reelection in 1936).

enacted that rivaled those of constitutional amendments.<sup>275</sup> President Roosevelt ran on the strength of his legislative program, and he won reelection in 1936 by a record margin.<sup>276</sup>

Another difficulty with the contractarian view is that it may not be a convincing account of legitimacy at all. Even if the Constitution can claim to have been adopted in a way that was extraordinarily democratic at the time—in other words, even if this is a unique *attribute*—that is not a convincing account of why the document should be regarded as having unusual *authority* today. The chief objection to contractarianism in contemporary scholarship is the dead hand problem. Why should adoption by a (counterfactually properly constituted) supermajority at some time in the past give the Constitution power to trump ordinary political majorities today? After all, no one alive today voted for any provision of the Constitution. Is there a good reason to give past majorities, or even supermajorities, a veto over today's law?<sup>277</sup> If the Constitution were easy to amend, this objection would have less force—people today could simply amend or repeal provisions that had lost popular support. But because the Constitution is hard to change formally, even by extraordinarily large supermajorities, the dead hand problem is difficult to overcome. Some other argument for its special authority must be found.

2. *Contemporary popular support.*—Another possibility is that the Constitution enjoys a unique level of popular support today. This argument is based on contemporary political conditions. Although we live in an era that many people perceive as unusually polarized politically and culturally, the Constitution seems to garner admiration and adherence from virtually all facets of American society.<sup>278</sup> We will return to this fact as a cultural phenomenon below. For now, we treat it as a political reality. On this account, the Constitution's extraordinary popularity lends it distinctively powerful authority, and

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275 *Id.* at 311 (calling the democratic support of the founding-era Federalists and Reconstruction Republicans "quite modest" in comparison to the electoral support won in 1936).

276 *Id.* at 48 (emphasizing the importance of a "clear victory" in 1936 for communicating a mandate to Congress—and to the Court); ACKERMAN, *supra* note 273, at 310 (calling the 1936 election "the greatest victory in American history" for "Roosevelt and the New Deal Congress").

277 Of course, the dead hand argument can be directed at nonconstitutional laws as well. See Samaha, *supra* note 99, at 609 (noting this feature). But that only further reduces its claim to special status. Our point here is that this particular claim to the Constitution's (special) democratic authority runs into the dead hand problem, not that other laws might not run into it as well.

278 See Rana, *supra* note 11, at 337.

that in turn mandates (or at least justifies) special interpretive arguments.

Yet of course, there are serious problems with this claim as well. An initial problem is that its support today seems almost entirely independent of its content. Think for example of the Electoral College, which has problems that have become widely appreciated, especially after the election of 2000, which nearly caused a constitutional crisis and which was “resolved” only by the Supreme Court in *Bush v. Gore*.<sup>279</sup> It is also hard to imagine that a supermajority of Americans would vote to continue the Senate, with its countermajoritarian design. Article V itself has obvious problems that should doom it in the eyes of Americans who have considered them. And yet all of these provisions would be subject to the sorts of interpretive moves that characterize constitutional discourse, as we argued in Part I.

Moreover, some statutes and common-law rules can boast equivalent or superior levels of popularity. Even if the Civil Rights Act of 1964 was more controversial at the time it was adopted, it became a foundational part of American law. It is impossible to imagine the legal regime without a federal rule against employment discrimination on the basis of race or gender, or without protection against discriminatory exclusion from public accommodations like restaurants, hotels, or theaters. Protections like these are now considered basic to citizenship, understood as full membership in the political and social community.<sup>280</sup> That sense could change, but meanwhile it remains consequential. Similarly, statutes that extend voting rights to the public are now properly regarded as basic, even though (or because) the Constitution does not provide a right to vote in crucial contests like presidential elections and local political contests. It is not difficult to think of additional examples of nonconstitutional laws that rival constitutional ones in their contemporary popularity.<sup>281</sup>

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<sup>279</sup> 531 U.S. 98, 110–11 (2000).

<sup>280</sup> See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237–42 (2001) (describing how the Civil Rights Act of 1964 has become a “super-statute” and has “entrenched its norm into American public life”); Ackerman, *supra* note 271, at 1750 (arguing that the Civil Rights Acts of 1964 and 1965 have constitutional status).

<sup>281</sup> This is not limited to rights. Laws that protect wetlands and bald eagles have worked their way into the background expectations of most Americans. While the precise content of environmental laws remains subject to fierce debate, few people today believe that bald eagle hunting should be a permitted sport. But see Johnny Kelly, *American Bald Eagle Shot Dead in Mississippi, Hunters Arrested*, EXAMINER (Dec. 22, 2012, 3:57 PM), <http://www.examiner.com/article/american-bald-eagle-shot-dead-mississippi-hunters-arrested> [<http://perma.cc/>

So democratic authority defined as contemporary support from the people is not even a unique attribute of constitutional provisions, let alone a source of unique authority. Therefore, it should not be able to drive targeted strategies of interpretive argument.

But can it still provide a different type of authority, if the Constitution overall garners greater popularity than any statute or common-law rule? Perhaps it can. Yet it is hard to see how that would provide a reason to adopt special interpretive strategies as to particular provisions. In other words, that sort of general authority does not translate directly, or even particularly well, into interpretive strategies that are currently directed toward every constitutional provision, no matter how broadly acclaimed.<sup>282</sup>

That observation can be generalized. Democratic legitimacy is a kind of authority theory for the Constitution, of which there are of course others. Think for instance of claims that the Constitution is normatively optimal or just desirable in one way or another. Or the entrenchment attribute that we have considered could be imagined as an authority theory, if stability in some Burkean sense can be understood as grounding a claim to legitimacy or authority.<sup>283</sup> Any of these could drive a claim to unique constitutional legitimacy or authority. We would be skeptical of any such claims because nonconstitutional laws could almost certainly be found that were equally attractive or equally stable. Yet even if authority theories could provide the basis for claims to uniqueness, they might have difficulty driving the interpretive practices we argued exist in Part I. That is because, as Adam Samaha has argued, "with respect to the Constitution, it is difficult to find any authority theory that is both persuasive and logically connected to interpretive method."<sup>284</sup> Samaha was not writing about constitutional exceptionalism in this passage, but his observation helps us to establish that the connection between constitutional authority and constitutional interpretation is fraught and there-

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R2JJ-PHCRJ] ("There is one less American bald eagle flying around to represent as the country's national symbol after hunters shot one dead in Mississippi earlier this month. . . . [Two people] were being charged in connection with the illegal killing of an American bald eagle . . .").

<sup>282</sup> This kind of support shades into cultural veneration, which we address below in subpart II.G.

<sup>283</sup> For a discussion of Burkean theory's emphasis on tradition as a source of authority, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 648-56 (1994).

<sup>284</sup> Samaha, *supra* note 99, at 611. But see Raz, *supra* note 221, at 157-69 (arguing for connection between authority and interpretation).

fore will have trouble justifying contemporary lawyerly discourse.

#### F. Polythetic Specialness

Usually, when people want to figure out whether something is unique, they look for a single characteristic that sets it apart from everything else that might seem similar. So far in the argument, we have been using something like this monothetic approach to identify distinguishing characteristics that might justify constitutionalism. But maybe the Constitution is special in a different way. Maybe what sets it apart is that no other source of law has this *combination* of characteristics. Biologists have recognized a polythetic approach to classification of life forms; sharing a sufficient cluster of characteristics is enough to identify members of a classification—say, a species or genus—rather than a single unifying attribute that all members share and that is shared by no nonmembers.<sup>285</sup> From the natural sciences, polythetic approaches have spread into the social sciences and humanities.<sup>286</sup>

Constitutional scholars might think about their subject that way—they might argue that no other source of law boasts this particular combination of attributes. Others take something quite like a polythetic approach when they argue that legal rules should be classified as “constitutional” if they display a sufficient quantity (or the right combination of) features. These are features normally associated with the classification as a whole, no one of which is necessary or sufficient alone to qualify a legal rule as part of higher law.<sup>287</sup>

In some sense, it is obviously true that the Constitution displays a combination of characteristics not shared by any other source of law. If that were not the case, it would not be possible to speak meaningfully of constitutional law at all. No other source of law claims to be amendable only through Article V procedures, can trump every other source of law in the event of a conflict, enjoys near-universal respect, and so on. Yet that claim is as unilluminating as it is correct. To agree to it is simply to affirm that we can talk about the Constitution and know what it is that we are talking about.

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<sup>285</sup> See JONATHAN Z. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN 4–5 (1982).

<sup>286</sup> See *id.* at 4 (applying the approach to the definition of religion).

<sup>287</sup> See Primus, *supra* note 12 (manuscript at 1–5).

Yet perhaps it is possible, in a more profound way, to argue that the combination of attributes—entrenchment, supremacy, and the rest—combine to legitimize special interpretive arguments in a way that no one feature can on its own. This would be a polythetic approach not just to classification but also to justification. On this theory, the combination of entrenchment and supremacy makes sense of, say, inattention to the text or unique forms of structural reasoning. We can imagine how this might work: entrenchment is one thing, but entrenchment plus supremacy is particularly powerful and demands rethinking how we normally approach the text of a law or inferences from the structure of government that it erects.

One trouble, of course, is that not every provision of the Constitution combines even the attributes thought essential to status as “constitutional,” and yet they all are subject to the special interpretive moves that we identified in Part I. Even if this strong form of the argument is controversial, it doubtless is much less controversial that there is a mismatch between whatever combination of features is thought to qualify a rule as constitutional under a polythetic approach and the widespread interpretive specialness that lawyers observe in practice.

Taking just the most obvious examples, the Equal Protection Clause is supreme but not entrenched in its meaning, as the Supreme Court’s ruling in *Obergefell v. Hodges*<sup>288</sup> has shown by changing the substantive rights of same-sex couples to marry. That provision is both supreme to state law, including state constitutional law, and fully capable of keeping up with nationwide politics, even ones that have changed as quickly and as sweepingly as those surrounding same-sex marriage.<sup>289</sup> And the Privileges and Immunities Clause is arguably entrenched but not supreme—it has functionally been written out of the Fourteenth Amendment since Reconstruction.<sup>290</sup> Moreover, several statutes have turned out to be both

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288 135 S. Ct. 2584, 2604–05 (2015).

289 See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE x-xii (2013) (describing the rapid, almost unprecedented speed of success for the gay rights movement).

290 See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75–81 (1873); see also *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999) (holding that the Privileges and Immunities Clause protects rights of newly arrived state citizens to the same privileges and immunities as other citizens of the state, such as rights to welfare benefits). Of course, this decision could be cited as evidence that the meaning of the clause has indeed changed, but overall the Privileges and Immunities Clause is remarkable for its entrenchment, not its flexibility. So far, *Saenz* has turned out to be an outlier, not the harbinger of reinvigoration.

entrenched against attack and supreme as against state law.<sup>291</sup>

Overall, then, we see little evidence that a polythetic approach to the Constitution can produce a justification for specialized interpretation that somehow does more work than individual rationales, considered separately. That would take an alchemy that remains obscure to us. And revealingly, no theorist has made such an argument. We think any such effort would be unavailing.

### G. Constitutional Culture

The strongest justification for the way lawyers think and talk about the Constitution trades on its place in American culture, politics, and society. Without a doubt, the Constitution occupies a distinctive place in American self-conceptions. It serves as a signifier of the political community and of membership in that community. It provides a locus for rituals that affirm the American narrative of revolution, slavery, civil strife, industrial transformation, world wars, the civil rights movement, and continuing progress toward democracy and equal liberty. In short, the Constitution provides both a central symbol and the authoritative text for American legal mythology. Therefore, when a political actor invokes the Constitution, the claim not only supports whatever substantive position that person may be advocating but also performs a ritual function of marking the actor's identity as a patriotic member of the political community and of shoring up the idea of that community itself.

Our argument here has a circular quality—we are saying that the Constitution is special precisely insofar as it is *thought* to be special by participants in the culture of the nation. But to the extent that social meanings have a reality that is separate from the will of any particular individual, even though they are socially constructed, the contention we are examining has force. Lawyers direct special interpretive moves toward the Constitution because it is venerated, and that is true independent of whether a particular jurist dissents from that view. Reverence for the Constitution is a fact independent of any

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<sup>291</sup> To take just one example, consider preemption by the Sherman Antitrust Act. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("In determining whether the Sherman Act pre-empts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause.").



individual's evaluation of that status, even though it is historically contingent.

Justifying lawyerly argument on the basis of cultural status requires a connection between popular and professional discourses. Presumably, the idea is that American culture includes as one of its features an elevated status for the Constitution, and a popular conception like that—in which lawyers participate as ordinary citizens—helps to account for special argumentation among professionals.<sup>292</sup> Beyond that, the cultural justification need not take a more particularized position on the relationship between popular and professional discourses, a relationship that is complex and somewhat obscure.<sup>293</sup> It need only establish that lawyers participate in, and to some degree are influenced by, a cultural complex in which the Constitution is aligned with other deep features such as national identity, patriotism, American exceptionalism, a conception of progress, and the like.

Originalism's appeal comes as much from its resonance with the special place of the Constitution in national myth and ritual as it does from any theoretical arguments that it has offered in its support or even from political support for its assumed outcomes in cases.<sup>294</sup> Jamal Greene is surely right that certain features of originalism in practice—its privileging of the subjective intent of founders like Madison and Hamilton, on the one hand,<sup>295</sup> and its relative inattention to either the original meaning or the original intent of the Reconstruction Amendments, on the other<sup>296</sup>—are both inconsistent with the purported fidelity of the new originalism to original meanings and also readily explainable if what carries authority is the Constitution's mythic status, and the special place of iconic

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<sup>292</sup> Conceivably, the Constitution has a status in professional culture that is entirely independent of its place in the lay worldview, but that seems unlikely to us.

<sup>293</sup> Cf. Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 358 (2011) (describing “two related but distinct conversations, one popular and the other professional” while acknowledging that “the precise relationship between them is mysterious”).

<sup>294</sup> See *id.* at 411–12 (finding, based on empirical data, that support for originalism is predicted by several attitudes, including support for the rule of law, endorsement of conservative political outcomes, and cultural location as indicated by moral traditionalism and economic libertarianism); *id.* at 412 (emphasizing the authors' conclusion that cultural factors are significant predictors of originalist views). William Baude has recently offered a version of this same argument. See Baude, *supra* note 3, 2366.

<sup>295</sup> See Greene, *supra* note 111, at 1685.

<sup>296</sup> See Greene, *supra* note 122, at 978–79.

framers in American legal mythology.<sup>297</sup> One way to make sense of this is to draw on the distinction between interpretation and construction, and to say that original meaning matters to the former but not to the latter, where the Constitution's authority in the culture becomes paramount.<sup>298</sup> Another (compatible) way is to see that originalists are leveraging the Constitution's distinctive place in American traditions.

Of course, nonoriginalists also trade on the Constitution's cultural authority. They habitually look to constitutional law and politics as privileged sites of progressive reform, even while recognizing that constitutional law has a checkered record of delivering on its egalitarian potential, to say the least.<sup>299</sup> This presents a puzzle—why should progressives continue to turn to constitutional law despite many disappointments?—but it is one that can be solved by recognizing that adherents of the so-called living Constitution, like originalists, recognize and deploy the special authority that the document and the doctrine surrounding it carry in the national psyche.

So the Constitution is in fact special in its cultural mythology. This is a statement about constitutional *authority*, among other things. What follows for interpretive *argument* by lawyers?

Remarkably little, as it turns out. Authority has less to do with argument than many suppose, as we have argued generally, and it underdetermines interpretation here as well. After all, the Constitution's status in American legal mythology is relatively independent of its content and has much more to do with its symbolism and ritual functions. That is why both liberals and conservatives can pay homage to the document, bolstering its cultural authority, while disagreeing markedly about its legal content and political ideology. While the Constitution may not be an entirely empty signifier, its significance as a national icon surely does not specify its legal substance—it does so neither as a political matter nor among legal professionals. Authority does not yield argument in any simple way.

Perhaps there are smaller-scale consequences for interpretation, however. For instance, it is possible to argue that the Constitution's cultural resonance, combined with the difficulty

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<sup>297</sup> See Greene, *supra* note 111, at 1696; Greene, *supra* note 122, at 980.

<sup>298</sup> See Greene, *supra* note 111, at 1684.

<sup>299</sup> Cf. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2054 (2012) (reviewing BALKIN, *supra* note 88; STRAUSS, *supra* note 34) (warning progressive political actors not to succumb to the "cult of constitution worship" without realizing the danger of shoring up an "undead Constitution" (quoting LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 9 (1955))).

of amendment, counsels the looser approach to text that we see in practice, as compared to statutory interpretation. Or perhaps those same features suggest that lawyers should treat precedent in the area differently from how they treat decisions interpreting statutes or the common law. Or maybe its cultural status even explains the existence of structural argumentation in constitutional law and not in other places where you might expect it.

We think arguments like these could possibly succeed. Conceivably, the Constitution's central place in American legal mythology could translate into distinctive interpretive moves. Additional work would be necessary to discover just where and how much this is the case.

What seems clear to us, however, is that this one feature of higher law cannot possibly justify the sharply divergent modes of understanding that lawyers in fact direct toward Article I, the Bill of Rights, the Reconstruction Amendments, and every other discrete provision. Overinclusiveness plagues that effort.<sup>300</sup> Many provisions of the Constitution do not participate in the document's overall standing in American culture and politics, and yet they are routinely subject to the same sort of legal methodologies applied to its more iconic provisions. Think for instance of the Fifth Amendment grand jury right, the Sixth Amendment's unanimity requirement for criminal juries, or the Seventh Amendment's jury guarantee for civil cases, none of which has been regarded as fundamental enough to be incorporated against the states.<sup>301</sup> Or think of the Contracts Clause.<sup>302</sup> Preemption doctrine is another terrific example.<sup>303</sup> In all of these areas, there is a gap between cultural authority and the interpretive practices of legal professionals that we outlined in Part I. We think this point should resonate intuitively.

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<sup>300</sup> Underinclusiveness also is a problem, arguably, because several artifacts of the national culture carry authority that is comparable to that of the Constitution, including especially the Declaration of Independence, but also arguably the Gettysburg Address and the separation of church and state passage from Jefferson's *Letter to the Danbury Baptists*. Yet these documents are not legal, so they do not challenge the Constitution's claim to special status among sources of law.

<sup>301</sup> U.S. CONST. amends. V, VI, VII; see also *Andres v. United States*, 333 U.S. 740, 748 (1948) (holding that unanimity in jury verdicts is required where the Sixth Amendment applies); Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 160 (2012) (noting that none of these provisions have been incorporated against the states).

<sup>302</sup> U.S. CONST. art. I, § 10.

<sup>303</sup> See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000) ("[C]ourts have treated the Supremacy Clause chiefly as a symbol—a rhetorical expression of federal dominance, but a provision with little practical content of its own.").

tively with most lawyers—the Constitution’s elevated cultural status has little to do with how the document gets handled in courtrooms and briefs, and it is difficult to articulate any convincing connection.

That is not to say, again, that connections could not be made. But the chance that they will yield precisely the ways of working that are observed among contemporary lawyers and no others strikes us as exceedingly small. Once again, the relationship between authority and argument seems to be better characterized by disjuncture than by correlation, let alone causation.

### CONCLUSION

Why should it matter whether lawyers construe the Constitution differently from other sources of law? What would change if our understanding were accepted, and would any such change be salutary? Although our analysis of constitutional exceptionalism has value on its own terms, we reveal in this conclusion one motivation for the project that is more practical.

All too often, the Constitution functions as a blunt weapon in ordinary politics. People invoke it hoping that it will have nuclear force, obliterating whatever policy arguments have been offered on the other side.<sup>304</sup> And oftentimes it does have remarkable power to shut down conversation, or to force the opposition to escalate its own rhetoric to match the constitutional level. Because of the Constitution’s authoritative status in mainstream America, that strategy also can work to stifle the voices of marginalized citizens.

One part of why this tactic works, when it does, is because of the cultural authority that we described in the last subpart. Political actors invoke America’s basic law because of the weight it carries not just as a technical legal matter but in society more generally. One interesting consequence is that constitutional argument in ordinary politics is often merely symbolic and unrelated to the Constitution’s content. For example, virtually none of the heightened firearm regulations that were proposed in the wake of shootings in Newtown, Connecticut, would have violated the Second Amendment under

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<sup>304</sup> Cf. Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 651 (1999) (describing one case where constitutional arguments were used to “evade responsibility” for hard political choices).

controlling doctrine, despite strong rhetoric to the contrary.<sup>305</sup> Even Justice Scalia, writing for the Court, contemplated regulation of weapons that are high powered, concealed, used in sensitive places, and so forth.<sup>306</sup>

Part of why the tactic of constitutional exaggeration works—again, to the degree that it does—is that invocations of the Constitution trade on, or leverage, legal argumentation. Political actors gain support from the standing of the Constitution among lawyers who accept the idea that the Constitution is distinctive, and distinctively authoritative, as a source of law. Professional usage helps to make constitutional law politically potent. Like a loaded gun left lying around, constitutional law can be taken up by political actors and discharged as a blunderbuss.

It is not entirely quixotic to think that lawyerly practices can be altered in their treatment of the Constitution, even if it would be much more difficult to change American thinking more generally on the matter. And if we are right that the exceptionalism of constitutional argument among legal professionals is not adequately supported by any of the reasons that they would give, then they might be persuaded to treat constitutional law more like other law in interpretive argument. Interpretive pluralism would be openly embraced and would be seen to work in much the same way in constitutional, statutory, and common-law contexts. That would help to demythologize the Constitution, at least among trained lawyers, and it would undercut the ability of other political actors to use the instrument for pure political warfare. It would help to lower the stakes of political argumentation around a range of core issues in contemporary American politics. That might be an improvement.

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<sup>305</sup> See Ed O'Keefe & Philip Rucker, *Gun-control Overhaul Is Defeated in Senate*, WASH. POST (Apr. 17, 2013), [https://www.washingtonpost.com/politics/gun-control-overhaul-is-defeated-in-senate/2013/04/17/57eb028a-a77c-11e2-b029-8fb7e977ef71\\_story.html](https://www.washingtonpost.com/politics/gun-control-overhaul-is-defeated-in-senate/2013/04/17/57eb028a-a77c-11e2-b029-8fb7e977ef71_story.html) [<https://perma.cc/BG5C-92Z4>] ("The president lashed out at the National Rifle Association for having 'willfully lied' about the background-check proposal to stoke fear among gun rights supporters that Congress would violate their Second Amendment rights . . .").

<sup>306</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (limiting protection to weapons in common use); *id.* at 626 (allowing restrictions on concealed weapons, sensitive places, felons and the mentally ill, and conditions on commercial sale); *id.* at 632 (allowing regulation of gun storage). But see *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (striking down an Illinois law that was the nation's only complete ban on concealed weapons).