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The Constitution as Based on the
Consent of the Governed—Or,
Should We Have an
Unwritten Constitution?

At least twice in the last quarter century, well-known legal scholars have answered critics of the Supreme Court's modern fundamental rights decision making by posing what appears to be a descriptive question: "Do We Have an Unwritten Constitution?"¹ In one case, the question is given an explicitly affirmative and historical response: It is alleged that the founders of the 1787 Constitution, despite claims to the contrary, did not intend the Constitution to be an "interpretive" document. On this view, the founding generation understood the Constitution as giving binding effect to "principles" of unwritten law that established individual rights, garnered from either the natural law by which government, and hence law, was justified, or to the unwritten rights that were recognized under the English constitution.²

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¹ See, e.g., Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 107 (1989); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975). In fairness to him, although Michael Moore poses a seemingly descriptive question, leaning perhaps on the well-known preceding title, he fully acknowledges that "the enterprise of answering the question is a normative one." Moore, *supra*, at 107. Even so, Moore's emphasis is on the subject of constitutional interpretation; I conceive the issue as concerning constitutional interpretation, but also as concerning the issue of designing and drafting constitutions.

² See generally Grey, *supra* note 1. As Professor Schauer has observed, in drafting *Roe*, although Justice Blackmun listed "a number of possible textual sources for the right [of privacy]," he "did not find it necessary to determine definitively which

The two major proponents of this reading of the Constitution also brought a new force and power to another historical claim: the *written* Constitution itself, specifically in the text of the Ninth Amendment, reportedly called for authoritative decision makers to look beyond the text of the written Constitution and implement a body of unwritten rights.³ In fact, it was precisely this reading of the Constitution, and the apparent acceptance of the idea of an unwritten constitution, that senators relied upon in justifying the rejection of the nomination of Robert Bork to the Supreme Court.⁴

of those sources was dispositive.” Frederick Schauer, *Constitutional Invocations*, 65 *FORDHAM L. REV.* 1295, 1297 n.8 (1997) (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973)). Grey’s thesis in support of a “noninterpretive” approach to constitutional decision making was embraced by a significant number of constitutional law scholars. See, e.g., Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127 (1987); Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 *N.Y.U. L. REV.* 278 (1981); David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 957 (1979). And Grey offered additional support for the historical thesis as well. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978) [hereinafter Grey, *Origins*]; Thomas C. Grey, *The Original Understanding and the Unwritten Constitution* [hereinafter Grey, *Original Understanding*], in *TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 145 (Neil L. York ed., 1988).

³ See, e.g., Grey, *supra* note 1, at 716 (stating that “[t]he Ninth Amendment is the textual expression of this idea [of higher law] in the federal Constitution”); Sherry, *supra* note 2, at 1161-67; see also CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* (1995); 1 *THE RIGHTS RETAINED BY THE PEOPLE* (Randy E. Barnett ed., 1989); 2 *THE RIGHTS RETAINED BY THE PEOPLE* (Randy E. Barnett ed., 1993); Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 *HARV. C.R.-C.L. L. REV.* 95 (1987); Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 *CORNELL L. REV.* 231 (1975); Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 *B.U. L. REV.* 1 (1968). Advocates of extra-textual judicial review, however, acknowledge that we have come to feel an obligation to grab on to text to warrant human rights decision making. So today we are more likely “to read normative content into such general phrases in the Constitution as ‘due process’ and ‘equal protection’ in order to prevent legislative infringement on individual rights the judges deem fundamental.” Grey, *Origins*, *supra* note 2, at 844 n.8.

⁴ See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 *COLUM. L. REV.* 1215, 1216-17 n.9 (1990) [hereinafter McAfee, *Original Meaning*]. When he visited my constitutional law class, Senator Paul Simon offered Bork’s “ignorance” of the original purpose of the Ninth Amendment as the central justification for his rejection as a nominee. The irony, of course, is that “text” and “history” were being used to justify an approach to the Constitution that releases interpreters from a commitment to either one, as the “sovereignty” of the Constitution’s makers was used to warrant an approach that substitutes modern courts as decision makers for those who embodied decisions in the text of the Constitution.

Beyond the historical response to contemporary objections to the modern Court's role, another view is that these decisions can be justified only "in the context of a theory of interpretation."⁵ Here the answer is in the negative, as we are said to have a written constitution; but there remains the question as to how it is best understood. On this view, the way to justify modern fundamental rights decision making, the sort ordinarily conceived as "noninterpretive" or extra-textual, is to see such decisions as effective ways to make sense of the authoritative text we call the Constitution.⁶ Even if "the grand clauses of the Constitution possess greater vagueness than do most statutes,"⁷ we ought to be wary of equating this vagueness with a running out of "meaning" based on the lack of "authorial intentions" or "linguistic conventions."⁸ We need to see, in short, that meaning often depends more on the reality we are describing than to any stipulation to which author and audience may subscribe.⁹

The problem, says Moore, lies in the Constitution's use of terms that are "vague." Given that traditional theories of meaning presume that meaning is associated with the conventions, intentions, or beliefs of the users of language, or of their audience, it appears that vague constitutional terms lack effective meaning because "the speaker or the audience wouldn't know what to say about its application to a particular case."¹⁰ The key breakthrough, for Moore, is a recognition that "[t]he meaning of most words used in a natural language such as English is not a function of convention, intention, or belief,"¹¹ for, to use his example, "[s]omeone may be dead (or alive) even if conventional definitions or examples of 'death' do not resolve the matter or they resolve the matter wrongly."¹² If one is committed to the idea

⁵ See Moore, *supra* note 1, at 110; see generally RONALD DWORIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter FREEDOM'S LAW]; SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER (1993).

⁶ Thus Moore tells us that, under an appropriate and fitting theory of constitutional interpretation, "it is not at all misleading or dishonest to claim that the only authoritative text ('law') for any legitimate decisions, even *Roe v. Wade*, is the written document itself." Moore, *supra* note 1, at 123 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

⁷ *Id.* at 130.

⁸ *Id.* at 130-31.

⁹ *Id.*

¹⁰ *Id.* at 127.

¹¹ *Id.*

¹² Moore, *supra* note 1, at 128.

that there is a moral reality that we can know,¹³ it becomes unproblematic, according to Moore, to develop “a theory of interpretation that constrains judicial judgment about the meaning of a text as vague as the due process clause,” for the difference “between ‘liberty,’ in the fourteenth amendment, and ‘freedom of speech’ or ‘free exercise’ of religion in the first amendment, is surely a matter of degree.”¹⁴

In fact, a number of advocates of an essentially open-ended “moral” reading of the Constitution believe that the terminology employed by advocates of the “unwritten” Constitution confuses central issues of constitutional interpretation.¹⁵ Thus, advocates of unwritten constitutionalism often equated judicial efforts at implementation with “noninterpretive” judicial review inasmuch

¹³ For skepticism about whether courts are likely to be successful at discerning the requirements of the moral reality that is thought to inform our constitutional order, see generally STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998).

¹⁴ Moore, *supra* note 1, at 123. It perhaps reflects a certain innocence on my part, but I confess that I began this process some years ago thinking that we were addressing what was in fact mainly a legitimately descriptive question. The question was whether an “originalist” method of constitutional interpretation accurately described the reality of our constitutional order, and I took the argument as being centrally about whether it was cogent and meaningful to speak of collective intent at all, given the difficulties involved with summing up the intentions of those who drafted the Constitution. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213-17, 222-34 (1980); Thomas B. McAfee, *Reed Dickerson’s Originalism—What It Contributes to Contemporary Constitutional Debate*, 16 S. ILL. U. L.J. 617, 625-30 (1992) [hereinafter McAfee, *Reed Dickerson’s Originalism*]. For an analysis of whether the concept of looking for “original intent” was hopelessly indeterminate, see Thomas B. McAfee, *Originalism and Indeterminacy*, 19 HARV. J.L. & PUB. POL’Y 429, 429 (1996) [hereinafter McAfee, *Indeterminacy*] (stating that “[p]erhaps the most universal objection to originalism is that it is impossible”). For discussion of whether an “originalist” approach to constitutional interpretation could be reconciled with the reality of our constitutional decisions and practice and the doctrine of precedent, see Grey, *supra* note 1, at 712-14, and Thomas B. McAfee, *Brown and the Doctrine of Precedent: A Concurring Opinion*, 20 S. ILL. U. L.J. 99 (1995). I am increasingly convinced, however, that there is no method of constitutional interpretation free of problems. Moreover, the central question is the normative one: What are the gains and losses to being bound by decisions made by people at an earlier time whose decision making cannot be guaranteed directly to produce the best and most just society?

¹⁵ See, e.g., RONALD DWORIN, *A MATTER OF PRINCIPLE* 35 (1985); Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177 (1988); see also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 164-65 (1999). Even Professor Grey acknowledged that in his initial article he “blurred together textualism and originalism under the rubric of ‘interpretivism.’” Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT. L. REV. 211, 212 n.2 (1988).

as “methods that employed natural law, contemporary morality, or fundamental rights philosophy were seen as drawing from outside the text and thus were not truly interpreting the text itself but supplementing it with external principles in order to reach judicial decisions.”¹⁶ It is fair to say that in recent years we have seen a shift of focus “from whether to interpret the Constitution to defining what ‘the Constitution’ is and how best to interpret it.”¹⁷ Those who reject the noninterpretivist label contend that “we do not have an unwritten constitution because we do not need one; the written constitution we do have gives judges all the room for activism that is required.”¹⁸

It is useful, however, to embrace continuity in describing basic differences we have in giving effect to the Constitution, especially if particular ways of communicating help us convey and understand what is at stake. The individual who originated the term “non-interpretivist” to describe judicial review implementing the unwritten constitution, for example, continues to believe that the best approach to constitutional interpretation is not “textualist,” but is properly characterized as “supplemental.”¹⁹ In his view, “much American constitutional adjudication, including but not limited to decisions under due process liberty and the right of privacy, involves the interpretation of an unwritten and essentially common law constitution, which supplements the primarily authoritative and essentially statutory written one.”²⁰ Whatever terminology is used, it is important that we realize that “common law constitutionalists propose to use the cultural authority of the text Constitution to legitimize the existence of an unwritten constitution in which judges and other government officials create constitutional meaning and norms.”²¹

There is little room for doubt that this notion of constitutional interpretation reflects the modern American belief that the meaning of the Constitution is appropriately altered as we gain

¹⁶ WHITTINGTON, *supra* note 15, at 164.

¹⁷ *Id.* at 165.

¹⁸ Grey, *supra* note 15, at 212. Grey has called such theorists “rejectionists,” in that “they reject the distinction between written and unwritten sources of constitutional law.” *Id.* at 212 n.3.

¹⁹ *Id.* at 211.

²⁰ *Id.*

²¹ HERMAN BELZ, *A LIVING CONSTITUTION OR FUNDAMENTAL LAW?: AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE* 246 (1998). The result is that “judicial policy making is protected and privileged by identification with the written Constitution.” *Id.* at 249.

increased understanding of the relationship citizens have with their government. Advocates of a moral reading of the Constitution generally believe that “the framers of the Constitution believed in unwritten higher law principles” and saw courts as “authorized to enforce natural rights and expound doctrines not found in the written Constitution.”²² The courts’ commission to implement principles of natural law, on this view, evidences the founding generation’s desire that the Constitution be an embodiment of a social contract where the people bargained for a government that would “protect” their “inalienable” natural rights.²³ An assumption is that this form of constitutionalism involves “gradual, interpretive, and informal vehicles of change” and that such change, being “more easily corrected as a method of constitutional revision,” is “preferable to the Article V amendment process.”²⁴

This Article will assess these efforts at justifying the modern Court’s role.²⁵ In offering this evaluation, we will analyze historical and normative questions to review both what our constitutional order has been, and should be, about.²⁶ A thesis is that, whether it is labeled unwritten constitutionalism or not, under

²² *Id.* at 232.

²³ See, e.g., Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. ILL. U. L.J. 267, 267-68 (1992) [hereinafter McAfee, *Social Contract Theory*].

²⁴ BELZ, *supra* note 21, at 247.

²⁵ For prior works offering a different perspective on the historical issues, see generally THOMAS B. McAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY—THE FOUNDERS’ UNDERSTANDING* 10 (2000); Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747 (2001) [hereinafter McAfee, *Legal Enforceability*]; Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. 501 (1995) [hereinafter McAfee, *Substance Above All*]; Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the “Unwritten Constitution” Thesis*, 61 U. CIN. L. REV. 107 (1992) [hereinafter McAfee, *Prolegomena*]; McAfee, *Original Meaning*, *supra* note 4; see also Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); LESLIE FRIEDMAN GOLDSTEIN, *IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY* (1991); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of “Unwritten” Individual Rights?*, 69 N.C. L. REV. 421 (1991).

²⁶ While addressing these topics may seem like “old news” to some, given that the debate over Judge Bork, to use an obvious example, occurred well over ten years ago, a prominent American constitutional historian has more recently suggested that “[m]ore perhaps than at any time in the twentieth century,” American constitutional law “is characterized by tension between these theoretical models,” the ideas of written and unwritten constitutionalism. BELZ, *supra* note 21, at 11.

the open-ended fundamental rights approach to constitutional analysis that many would embrace, “the text of the Constitution” is “a rhetorical symbol used to persuade the public of the legitimacy of judicial policy making.”²⁷ Indeed, unwritten constitutionalism becomes a way to link such a judicial role to the historical American commitment to popular sovereignty. Judges play the central role because they were given this role by those who drafted and ratified the Constitution.²⁸

Apart from the “historical” nature of some of the arguments advanced to defend the Court, it seems reasonably clear that even though we are not universally committed to being bound by an original understanding, some of our focus will need to be historical. We are trying to enlarge our understanding of the American system; one way to do that is to understand what those who designed it, as well as those who have lived with it, did in making sense of the system. Even when our task is basically “descriptive” in character, the answers we seek do not fall out automatically. Just the task of determining what our constitutional practice and dominant thoughts about constitutionalism have been is a tricky business, and it is not clear that answering these basically descriptive questions will supply us with the correct answer to the normative question that stands at the center of the debate. The result is that we must never forget that our ultimate concern relates to the question of the direction in which we should go and is therefore normative. This Article is an attempt to address these ultimate “oughts” of our constitutional order.

I

THE VALUE OF A “WRITTEN” CONSTITUTION

As Justice Paterson wrote:

It is difficult to say, what the constitution of *England* is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humour or political caprice.” In contrast to England where “there is no written constitution,” and therefore, “nothing visible, nothing real, nothing certain,” America has its constitution reduced to written exactitude and

²⁷ *Id.* at 10.

²⁸ *Id.* Another goal of this paper is to challenge the idea that criticism of such decisions should “be dismissed as a partisan attack on an independent judiciary.” *Id.*

precision.²⁹

And Richard Kay added:

Every other actor in the polity is subject to restraints created and enforced by the state. However, the state, as the holder of legislative power, is itself subject to no constraint but that of the constitution. The constitution must, then, be understood as a protection for every potential subject of state authority—individuals, families, and groups.³⁰

A. *The Founders' Views and the Message Embodied in Their Text*

There is no room for doubt that those who gave us the Constitution believed in the importance of the written Constitution; they thought it was important enough to make it one of the first priorities after declaring independence to put their state constitutions in writing.³¹ This decision reflected not only years of dealing with written instruments of government, but equally the fact that the lack of constitutional text was perceived as one of the failures of the English constitution. For the Americans, “revolt supplied an extralegal remedy for the perceived tyranny visited upon them.”³² A purpose of putting their constitutions in writing, then, was to make possible the permanent fixing of the terms by which the people were to be governed.

As they made the transition to adopting the Federal Constitu-

²⁹ WHITTINGTON, *supra* note 15, at 52 (quoting Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795)). The founding generation believed that one of the problems was precisely that “[b]eing unwritten, the British constitution consisted of a tradition of practice, general understandings, and occasional declarations.” *Id.* at 50. A framer of one of the first constitutions adopted, the Pennsylvania Constitution, stated that “[t]o deduce our rights from the principles of equity and justice and the Constitution, is very well; but equity, justice, are no defence against power.” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 293 n.56 (1969).

³⁰ Richard S. Kay, *American Constitutionalism*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 16, 21 (Larry Alexander ed., 1998) [hereinafter *PHILOSOPHICAL FOUNDATIONS*].

³¹ In fact, late in 1775 the Continental Congress instructed the states to establish independent governments by drafting constitutions. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 100 (1988). Consequently, in the first two years following independence “eleven states drafted new constitutions, and one of these states, South Carolina, drafted two.” DANIEL FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 15 (1990). On the central relevance of the American experience with written instruments, and its role in dictating the move toward written constitutions, see MCAFFEE, *supra* note 25, at 9-12.

³² MCAFFEE, *supra* note 25, at 10.

tion, they adopted the text we know as the Supremacy Clause, which declared the Constitution as the supreme law of the land.³³ Although the text they ratified could have been more explicit about judicial power, the adoption of judicial review was the correct interpretation of the text of the Constitution.³⁴

The founders believed, moreover, that they had advanced the cause of meaningfully defining and limiting government by the device of a written constitution.³⁵ It has been argued that “[t]he documentary text . . . expresses in modern form the view of classical philosophy” that by putting it in writing we could preserve wisdom “beyond the demise of the wise founder.”³⁶ Indeed, in

³³ Sherry, *supra* note 2, at 1147-50 (observing that the supremacy of the Constitution itself, as opposed to federal legislation, was not added to the Supremacy Clause until August 23, 1787). As Julius Goebel has observed, by the Supremacy Clause laws repugnant to the Constitution were “excluded from the imperative of obedience,” and the clause “was directed equally at any law-making body and at all judges, the ultimate arbiters of enforcement and of enforceability.” JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 239 (1971).

³⁴ For a small sampling of the works showing that the founding generation would hardly have been surprised by the reading of judicial review as an important feature of the new Constitution, see McAFFEE, *supra* note 25, at 62-66; BELZ, *supra* note 21, at 24-25 (finding that “[n]ot explicitly stated but implied in the judicial article was the idea that the superior force of the Constitution depended on its application and interpretation by the courts”); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 69-74 (1985); RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* (1969); McAfee, *Prolegomena*, *supra* note 25, at 164-69; and William Van Alstyne, *The Idea of the Constitution as Hard Law*, 37 *J. LEGAL EDUC.* 174, 177 (1987). Historically, an important contribution of American constitutional law was its effective establishment of a higher law “in the technical sense that it cannot be abrogated or changed by normal legislative procedure.” Gerald Stourzh, *Fundamental Laws and Individual Rights in the 18th Century Constitution*, in *THE AMERICAN FOUNDING—ESSAYS ON THE FORMATION OF THE CONSTITUTION* 159 (J. Jackson Barlow et al. eds., 1988). This creation of a special category of legal norms that the British constitution lacked was accomplished by giving the higher law roots in a document that proceeded from the people—the fountain of all political power. In thus reducing the higher law (whether “fundamental law” or philosophical “natural law,” if distinguished at all) to positive constitutional law—what German authors call “Positivierung des Naturrechts” (“transforming natural law into positive law”)—America put into political practice what had been only a dissenting theory and revolutionary doctrine as to British constitutionalism.

³⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803). Professor Richard S. Kay has referred to two “defining features of American constitutionalism,” one of them being that the way of “confining [government’s] exercise to proper uses” is “the promulgation and enforcement of positive law.” Kay, *supra* note 30, at 19. The American constitution-makers, says Kay, were “convinced of the unique effectiveness of written law.” *Id.* at 40 (emphasis added).

³⁶ BELZ, *supra* note 21, at 5 (quoting WILLIAM G. ANDREWS, *CONSTITUTIONS AND CONSTITUTIONALISM* 26 (3d ed. 1968)); see also *id.* at 20 (quoting BENJAMIN

the framers' minds the transition to a written constitution marked the change to imposing meaningful limits on government.³⁷ In *Marbury*, Justice Marshall reminded us that “[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.”³⁸

A critical element in all of this was the idea that part of “the genius of a written constitution lies precisely in its *legal* character; unlike the more ethereal and elusive constitutions of countries such as England, our written and legal Constitution can be enforced just like other legal instruments such as statutes or contracts.”³⁹ The significance of the Constitution as an object for interpretation “is closely linked to the Constitution’s status as a legal text, and that status itself has been an important part of the

FLETCHER WRIGHT, *CONSENSUS AND CONTINUITY, 1776-1787*, at 10 (1958) (stating that the English constitution was seen as “ultimately existing in men’s minds and premised on the idea that ‘thinking makes it so,’” whereas America’s constitutions “rested on the idea of ‘saying makes it so,’ or at least the hope that putting something in writing so it can be authoritatively consulted makes it easier to achieve specified ends”).

³⁷ In the framers’ minds, it was clear that “[t]he difference between premodern and modern constitutionalism was that the former was mainly customary and only incidentally documentary, while the latter was mainly documentary and incidentally customary.” BELZ, *supra* note 21, at 3. According to one modern historian, “[t]he great benefit of having a documentary constitution, it was believed, was to make practicable the enforcement of principles, norms, and rules limiting government. A customary or unwritten constitution, consisting of convention, practice, and usage, was thought to be not a real constitution because it was not enforceable against government.” *Id.*

³⁸ 5 U.S. (1 Cranch) at 176. It has been observed that “[i]n the three pages of Marshall’s opinion in which he lays out his core argument for judicial review, he refers to the specifically written nature of the U.S. Constitution no less than eight times, including describing the reduction of constitutions to writings as ‘the greatest improvement on political institutions.’” WHITTINGTON, *supra* note 15, at 240 n.39. This was also the basis for justifying judicial review as advocated in *The Federalist*, as well as other leading voices supporting judicial review during the period leading to the ratification of the Constitution. The “constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.” *THE FEDERALIST* No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* BELZ, *supra* note 21, at 250; McAFFEE, *supra* note 25, at 58-66; Kay, *supra* note 30, at 27-28.

³⁹ SMITH, *supra* note 13, at 47; *see also* Van Alstyne, *supra* note 34, at 180 (contrasting American Constitution with many that “are simply not ‘law’ as we understand it in the United States” and hence lack “cash value” and may simply “vanish in the night”). Even an advocate of a broad judicial power to implement fundamental rights has acknowledged that *Marbury*’s defense of judicial review was “permeated with reliance on the ‘writtenness’ of the Constitution.” Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1, 14 (1984).

argument for judicial review.”⁴⁰ For example, by contrast to our Federal Constitution, the declarations of rights that were part of written constitutions of the states were stated in terms of what government “should” do; consequently they “were treated as hortatory rather than legally binding.”⁴¹

Even in an era of skepticism about the value of a historical and written constitution it remains true that “the basic pattern of American constitutionalism” is “one of *conflict within consensus*.”⁴² Even if we do not like the limits the Constitution imposes, we accept them because we have come to value the larger system of government the Constitution embodies.⁴³ This is at least in part because modern Americans accurately perceive that “[t]he founding required rational discussion, deliberation, compromise, and choice; consent, concurrence, and mutual pledging,” and the result was a government that took its written constitution seriously and paid attention to “substantive principles of natural rights, consent, and limited and balanced power.”⁴⁴ A result has been that “constitutional scholars from John Marshall to John Ely have focused on and attached great significance to the fact that American constitutions are written documents.”⁴⁵ In general, though, even self-described textualists look at more than just the text—rather, they “seek to braid argu-

⁴⁰ Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1101 (1989).

⁴¹ BELZ, *supra* note 21, at 21. This approach to such provisions was consistent with intent of their drafters, given that they were stated as principles and did not use mandatory language. McAfee, *Legal Enforceability*, *supra* note 25, at 754-78.

⁴² MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 29 (1986).

⁴³ See BELZ, *supra* note 21, at 6.

⁴⁴ *Id.* at 37.

⁴⁵ Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171 (1992). Indeed, the centrality of the text seems to be the most fundamental constitutional question that divides those who explicitly advocate an “unwritten” constitution on historical grounds from those who advocate the same results by using constitutional text. See, e.g., Moore, *supra* note 1, at 113 (stating that “no one should wish to defend a non-text-based view of constitutional law”); *id.* at 123 (“[Justice Hugo] Black’s constitution—the one he was so fond of pulling out of his pocket—is our only Constitution.”). But even among those who rely on the text as justifying open-ended constitutional decision making, there is a tendency to read the historical materials as revealing a decision in favor of this outcome. See, e.g., BARBER, *supra* note 5, at 157-60, 171-78; Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67 (1988); Moore, *supra* note 1, at 137-38 (arguing that a court “attempting to discover what ‘liberty’ means in the fourteenth amendment—either by itself or as incorporating the unenumerated rights of the ninth amendment—is not necessarily engaged in an impossible task”).

ments from text, history, and structure into an interpretive rope whose strands mutually reinforce.”⁴⁶

*B. The Views of Advocates of the “Historical”
Unwritten Constitution*

Modern advocates of the unwritten constitution on historical grounds, however, have argued that although we read Justice Marshall to say that the Constitution’s “writtenness” is what gives it its paramount authority,⁴⁷ a “textual constitutionalist” judge⁴⁸ has adopted a “profoundly positivist attitude towards fundamental law” that “is a relatively modern invention.”⁴⁹ While it is indisputable that Marshall believed in supplementing the written Constitution with what he deemed principles of unwritten fundamental law, he also gave the concept of a written constitution a central role in justifying the doctrine of judicial review. This is why a number of modern scholars, most notably Professor Grey, have called our attention to the Supreme Court’s opinion in *Calder v. Bull*,⁵⁰ precisely because its emphasis on unwritten principles can be sharply contrasted with *Marbury*’s emphasis on the written Constitution and the sovereign power of the people.⁵¹ It is useful to recognize, however, that the framers

⁴⁶ Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 31 (2000). This is why, understood in this way, textualism “is woven into the fabric of conventional constitutional interpretation.” *Id.* at 34.

⁴⁷ *Id.*

⁴⁸ A “textual constitutionalist” has been defined as “any judge who relies on the written Constitution as the sole source of fundamental law, whatever method of interpretation is used to elucidate that most impenetrable document.” Sherry, *supra* note 2, at 1171 n.188.

⁴⁹ Sherry, *supra* note 45, at 171. Sherry concludes that “[t]extualism is not an inevitable concomitant of a written constitution, and it is not a reflection of our earliest national heritage.” *Id.* at 222. Interestingly, however, the recent debate on the subject of constitutional and legal interpretation supplies a decidedly mixed picture about the merits of the assumption that text plays a critical role in the interpretive process. See, e.g., Schauer, *supra* note 2, at 1295-98. And, of course, the arguments favoring the most expansive readings of the individual rights guarantees of the Constitution typically rely most heavily on the nature of the constitutional text. See *infra* notes 57-99 and accompanying text.

⁵⁰ 3 U.S. (1 Dall.) 386 (1798).

⁵¹ See Grey, *Original Understanding*, *supra* note 2, at 708; see also GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 455-57 (13th ed. 1997). Gunther and Sullivan concluded that “Marshall’s rationale for judicial authority in *Marbury v. Madison* helped assure that Iredell’s position, not Chase’s, would emerge as the dominant one: a justification for judicial review that relied so heavily on the implication of a written constitution probably found it more congenial to justify any invalidations on the bases of explicit constitutional restraints.” *Id.* at

were not merely positivists,⁵² but were perceptive enough to recognize that the value of having a written constitution could all too readily be lost by the very process of interpretation.⁵³ Jefferson wrote that “[o]ur peculiar security is possession of a written constitution. Let us not make it a blank paper by construction.”⁵⁴

Yet modern advocates of the historical “unwritten Constitution” thesis have offered us this precise alternative.⁵⁵ Their concern is that if the written Constitution is taken seriously, it might block a judge’s attempt to do justice. Finding that early Virginia courts drew “upon a rich tradition of natural rights,” Professor Sherry concludes that “they combined reason, history, and judg-

456-57. Modern advocates of unwritten constitutionalism would undoubtedly insist that the distinction is more formal than substantive and suggest that unwritten principles have continued to play a significant role, albeit not as clear and explicit a one as might have occurred. There is no question, however, that the rationale for judicial review articulated in *Marbury*, and defended at length in *The Federalist*, No. 78, played a critical role in developing the thought that courts had a central role to play in the drama of our constitutionalism. See McAFFEE, *supra* note 25, at 49-50, 61-66.

⁵² During the ratification struggle, for example, advocates of a bill of rights contended that “a constitution does not in itself imply any more than a declaration of the relation which the different parts of the government bear to each other, but does not in any degree imply security to the rights of individuals.” Letter to the Massachusetts Convention (Jan. 29, 1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST 106, 108 (Herbert J. Storing ed., 1981). There is no question that ratification-era proponents of a bill of rights believed that natural rights had to be secured in civil law to be constitutional rights. See McAfee, *Prolegomena*, *supra* note 25, at 128-34; Hamburger, *supra* note 25, at 908, 930-37.

⁵³ There is little room for doubt that prominent framers of our Constitution and Bill of Rights, including James Madison and Thomas Jefferson, justified a written bill of rights partly on the basis of the “legal check” that “it puts into the hands of the judiciary.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 620, 620 (1971); see also McAfee, *Prolegomena*, *supra* note 25, at 164-69; McAfee, *Legal Enforceability*, *supra* note 25, at 769-71. This is at least one reason that the text of the Ninth Amendment has loomed so large in the “unwritten Constitution” debate; if that text supports the concept of looking for rights beyond the text, non-textualists can claim a sanction for their views in the text of the Constitution itself (as well as in statements by Jefferson and Madison favoring judicial review to protect constitutional rights). Otherwise, the enforcement of unenumerated rights generates limitations on government without the “legal check” of the text of the Constitution to lend support to the project.

⁵⁴ Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 17, 1803), quoted in Kay, *supra* note 30, at 28.

⁵⁵ Unwritten constitutionalism presents us with an “agenda for additional, ungrounded judicial activism that is even less encumbered than the current—and often strained—excessive efforts to do good.” William Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 YALE L.J. 207, 216 (1981).

ment to grapple with the issues that came before them.”⁵⁶ Even though modern courts might not address or resolve these issues in precisely the same way, Sherry concludes that “their commitment to doing justice might be worth emulating.”⁵⁷ The critical point about the unwritten constitution was that it opened the door to giving decisive weight to judges’ views of “‘the fundamental laws of England,’ the ‘law of nations,’ Magna Carta, ‘common right and reason,’ ‘unalienable rights,’ and ‘natural justice.’”⁵⁸ The main idea of unwritten constitutionalism for today, then, is to read the text of the Constitution we have as a grant of power to judges to enforce ideas of justice and natural rights without the limitations or restrictions that some would read from the text.

By contrast, traditionally we have looked to the “balances of constitutional text” as a means “to retain the choices and compromises written into the Constitution by the people.”⁵⁹ A governing assumption is that we should not “look past the Constitution to a larger and prior moral commitment.”⁶⁰ A related starting point is that

[j]udges gain their authority by their institutional obligation to enforce the law established by the people against the representatives of the people, not by possessing special insight into the nature of the moral universe or by being situated so as to expand democratic values at the expense of existing representative institutions.⁶¹

On this view, the attempt to pursue a moral constitution in disregard of the written text “would represent a fundamental usurpation by the judiciary of powers not granted to it under the Constitution and a perversion of the constitutional enterprise.”⁶²

Some have contended for unwritten principles that *supplement* the text of the written document, while others have argued for a view of unwritten principles that *supplant* the written Constitution—at least to the extent that there is any conflict.⁶³ But it is

⁵⁶ Suzanna Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, 53 ALB. L. REV. 297, 326 (1989).

⁵⁷ *Id.*

⁵⁸ *Id.* at 300.

⁵⁹ WHITTINGTON, *supra* note 15, at 44.

⁶⁰ *Id.*

⁶¹ *Id.* at 46.

⁶² *Id.* at 47.

⁶³ See MCAFFEE, *supra* note 25, at 19-24; *cf.* Moore, *supra* note 1, at 115. In my own work, for example, I have separated the work of Tom Grey, as one who ac-

unclear that the distinction makes any ultimate difference.⁶⁴ Even if the text of the Constitution serves as an express barrier that prevents recognition of some fundamental rights, if it remains true that the Ninth Amendment secures the entirety of the human rights that moral thought supplies, to the extent that the text of the Constitution does not expressly prevent it, we still have effectively made the written Constitution “a blank paper by construction.”⁶⁵

At least as critically important is that the “freedom” given to judges by unwritten constitutionalism could as easily lead to judicial decisions undercutting our freedoms as it could to decisions expanding that freedom.⁶⁶ The classic historical example is the Supreme Court decision in the *Slaughter-House Cases*.⁶⁷ In that

knowledges that the Constitution as originally drafted authorized the institution of human slavery, from that of Suzanna Sherry, who says that under the early state constitutions most of the framers denied the authority of the people to amend the Constitution in a way that violates natural rights. See, e.g., McAFFEE, *supra* note 25, at 3, 19-24.

⁶⁴ The point is that whether one looks to a perceived moral reality or to one’s perception of what has become fundamental to the American people, there is nothing unequivocal, in the text or otherwise, to tell someone when it is time to stop. Even Professor Dworkin, who makes no specific claim that the founders sought to constitutionalize natural rights, and who emphasizes the text’s role in justifying a moral reading of the Constitution, contends that “the best explanation of the differing patterns of [judges’] decisions lies in their different understandings of central moral values embedded in the Constitution’s text.” FREEDOM’S LAW, *supra* note 5, at 2. The question is necessarily centered on whether the “general principles of liberty that are embedded in the Constitution’s abstract language and in the Court’s past decisions” prohibits anti-abortion legislation. *Id.* at 127; cf. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1270 (1997) (concluding that Dworkin thus insists “that text, history, and unwelcome precedent must be interpreted at a sufficiently abstract level that they do not interfere with the judge’s ability to make the Constitution ‘the best it can be’”). The consequence is that, as Professor McConnell observes, “in all of Dworkin’s writings I am unable to discover an actual, important, controversial case in which ‘fit’ ever precluded the Dworkin of Right Answers from having his way.” *Id.*

⁶⁵ For a sampling of the constitutional issues that are raised by such a prospect, see McAffee, *Substance Above All*, *supra* note 25, at 510-13; Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, in THE BILL OF RIGHTS IN THE MODERN STATE 433, 445-46 (Geoffrey R. Stone et al. eds., 1992); and R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?*, 4 S. CAL. INTERDISC. L.J. 463 (1995).

⁶⁶ Creative judicial review on behalf of judicially discovered and imposed rights has been described as the equivalent of “flight without instruments.” Van Alstyne, *supra* note 55, at 212 (quoting CHARLES L. BLACK, DECISION ACCORDING TO LAW 73 (1981)).

⁶⁷ 83 U.S. (16 Wall.) 36 (1872).

now-infamous decision, the Court “effectively banished from the Constitution” the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment.⁶⁸ But it did so on the basis of a reading of the text that was not implausible on its face and, which Charles Fairman, a leading historian, found was supported by Thomas Cooley, an individual whose textualism was characterized as the “product of an eminently respectable mind, free from any captivation of fancy.”⁶⁹

In an article published over a decade ago, I cited works by leading constitutional law scholars of the past fifty years rejecting the Court’s narrow *Slaughter-House* interpretation and determined that “the conclusion reached by all these scholars is unassailable when the provision is read in historical context, even though the text is ambiguous.”⁷⁰ That article also reviewed the powerful evidence that supports the proposition that the Privileges or Immunities Clause “was probably the clause from which the framers of the Fourteenth Amendment expected most.”⁷¹ The problem, of course, was that the correct understanding of the provision raised significant questions about federalism and judicial power, at least to the mind of Justice Miller, the author of the opinion. The net result was that a Supreme Court justice used underlying concerns about the “potential mischief” that could result from the alternative reading to warrant a clear misconstruction of the text.⁷² Thus, one can conclude that “Justice Miller acted illegitimately in construing the clause contrary to the overwhelming evidence as to its intended meaning than I ever could be that his decision as to federalism and judicial power concerns was illegitimate as lacking judicial statesmanship.”⁷³

⁶⁸ John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1414 (1992). Compare Amar, *supra* note 46, at 123 n.327 (concluding that Court “basically read the [Privileges or Immunities Clause]—the central clause of Section 1!—out of the Amendment” and that “no serious modern scholar—left, right, or center—thinks this a plausible reading of the Amendment”), and EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 72 (1934) (stating that “the Court virtually erased the ‘privileges and immunities’ clause from the amendment in deference to the federal principle”).

⁶⁹ 6 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1370 (1971).

⁷⁰ Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 283 (1986) [hereinafter McAfee, *Constitutional Interpretation*].

⁷¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 22 (1980).

⁷² See McAfee, *Constitutional Interpretation*, *supra* note 70, at 286.

⁷³ *Id.* at 287.

There is a general lesson here for those who wish to learn it. Under an unwritten constitution, there is nothing to stop judges from imposing their own conceptions of justice and rights, including excessively narrow ones—even if their constructions are unacceptable to most Americans and the fundamental rights recognized have never been deemed fundamental by them. Professor Michael McConnell writes:

If rights are wrongly conceived, they can be as inimical to justice, and even to liberty, as any recognition of state power. Enforcement of the unenumerated right to own slaves precludes emancipation. Enforcement of the unenumerated right of freedom of contract precludes minimum wage laws. Enforcement of the unenumerated right to abort overrides the right to life. Enforcement of the right to voluntary associations to control their own membership makes it more difficult for the community to eradicate race and sex discrimination. Enforcement of children's rights against parental control conflicts with parents' right to control the family. The point is not that any or all of these rights are wrongful, but that the recognition of unenumerated rights is likely to conflict with plausible assertions of right on the other side.⁷⁴

This is why a “justice-seeking reading of the document does not warrant an interpreter to invent his own theory of justice and call it ‘the Constitution,’” but calls for searching for “the American People’s particular sense of justice as embodied in the unfolding words, deeds, and spirit of the Constitution and its Amendments.”⁷⁵ The reason we have a constitutional text, after all, is to give us the opportunity to decide, and to implement our

⁷⁴ Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 103-04 (1988). This is why the “federal judiciary’s complicity in the turn-of-the-century’s system of racial oppression should serve as a warning of the political possibilities once an unwavering focus on the Constitution’s terms and purposes is lost.” WHITTINGTON, *supra* note 15, at 174; accord Amar, *supra* note 46, at 38 (concluding that the “judges generally underenforced the document-supported rights of blacks and women while overenforcing various nondocumentarian claims of rich and powerful interests”). For a similar warning about the potential effect of a Court that feels unleashed from the bounds of the text, see Forrest McDonald, *The Bill of Rights: Unnecessary and Pernicious*, in *THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED* 387 (Ronald Hoffman & Peter J. Albert eds., 1997).

⁷⁵ Amar, *supra* note 46, at 54. This is why it is an extremely orthodox view to suggest that the Constitution “may have its own theory of justice,” and to suggest further that it is *that* theory “that is to govern” rather than a system of ideal justice that might be apprehended by the Constitution’s interpreter. William Van Alstyne, *Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court*, 72 IOWA L. REV. 1281, 1289 (1987).

decision, as to the moral claims that are sufficiently fundamental to warrant demanding special justification for any intrusion. A decision to be governed by an unwritten constitution is thus a decision to give up on the rule of law as a constitutional ideal:

What is ultimately at stake is the rule of law, understood in the down-to-earth conception of John Adams and other founders—the ideal of being governed, to the extent practicable, by preestablished rules rather than by occasional, and possibly arbitrary, human edicts. Some may be drawn to natural law constitutionalism by the hope of grounding our fundamental law in objective moral truth, but the discretion they would grant could easily point us away from morality and law.⁷⁶

*C. The Views of Advocates of the “Textualist”
Unwritten Constitution*

Ironically enough, however, despite the charge that unwritten constitutionalism, or its equivalent, discounts the importance of constitutional text, it is fair to say that constitutional text plays a central role in justifying an expansive judicial role. As Professor Schauer has observed:

Dworkin grounds his argument for a moral reading of the Constitution in the premise that such a reading is mandated by specific features of *this* constitutional text, its “broad and abstract language” in particular. That Dworkin’s argument is substantially a textual one is apparent not only from his frequent references to textual features such as “exceedingly abstract moral language” and a textually patent “general principle,” but also from the example he features, one that distinguishes between the Equal Protection Clause, which Dworkin argues invokes moral argument, and the Third Amendment, which for Dworkin does not.⁷⁷

Thus the Equal Protection Clause, according to Dworkin, uses

⁷⁶ MCAFEE, *supra* note 25, at 534.

⁷⁷ Schauer, *supra* note 2, at 1299. Dworkin thus concludes that “[c]onstitutional politics has been confused and corrupted by a pretense that judges (if only they were not so hungry for power) could use politically neutral strategies of constitutional interpretation.” FREEDOM’S LAW, *supra* note 5, at 37. Thus, judges “try to hide the inevitable influence of their own convictions even from themselves, and the result is a costly mendacity.” *Id.* Accordingly, Professor McConnell observes that Dworkin “claims that historical approaches to interpretation are ‘substitutes for fidelity,’ which ‘ignor[e] the text of the Constitution.’” McConnell, *supra* note 64, at 1269-70; see also SMITH, *supra* note 13, at 78 (finding that “Dworkin’s attention flows almost entirely to those provisions which, precisely because they lack definite legal content, can only be understood, he thinks, as expressing ‘broad and abstract principles of political morality’—principles whose ‘scope is breathtaking’”) (quoting FREEDOM’S LAW, *supra* note 5, at 78, 73).

a text that puts “its interpreters into the equality business” and, given its nature, “the text unavoidably puts these implications into the morality business as well.”⁷⁸ Moreover, while he is clear that “[t]he American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle,”⁷⁹ Dworkin is equally clear that he “is relying substantially on the language of the text to demarcate the clauses that generate a moral reading and those that do not.”⁸⁰

Most students of the history, however, find it extremely doubtful that the constitutional founders set out to grant such power to constitutional interpreters. Dworkin’s textual theory uses modern theories of law and language “that were quite foreign, indeed probably would have been incomprehensible, to the framers of the Bill of Rights and the fourteenth amendment.”⁸¹ Moreover, the framers’ “well-documented suspicion of judicial activism and discretion makes it quite unlikely that they would have sanctioned the sort of freewheeling judicial interpretation Dworkin’s view implies.”⁸² And when the text of the Constitution is read to insist that we take it as an open-ended moral document, it makes “demands—multiple, repetitive, shifting, and sometimes inconsistent.”⁸³ It has been observed that despite “the mechanical tone of formulaic opinions, the palpable range of choice inherent in the formulae communicates, not objectivity, but power without responsibility.”⁸⁴ It is hardly surprising, then, that Lawrence Tribe, no advocate of judicial restraint, has argued the “text of

⁷⁸ Schauer, *supra* note 2, at 1299-1300. Thus for Dworkin, “constitutional rights are those rights that a philosopher-god would announce if called on to make the Constitution the morally, legally, and politically best constitution it could be.” Jed Rubenfeld, *Legitimacy and Interpretation*, in *PHILOSOPHICAL FOUNDATIONS*, *supra* note 30, at 194, 219.

⁷⁹ *FREEDOM’S LAW*, *supra* note 5, at 8.

⁸⁰ Schauer, *supra* note 2, at 1301. Thus, according to Schauer, “[f]or Dworkin it appears that the presence of the abstract language of moral principle within the text is both a necessary and a sufficient condition for a moral reading of any clause containing such language.” *Id.*; see also SMITH, *supra* note 13, at 84; Robin West, *Integrity and Universality: A Comment on Ronald Dworkin’s Freedom’s Law*, 65 *FORDHAM L. REV.* 1313, 1313 (1997).

⁸¹ MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 31 (1988).

⁸² GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION* 74-75 (1992).

⁸³ SMITH, *supra* note 13, at 122.

⁸⁴ ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* 147 (1989); see also Farber, *supra* note 40, at 1093 (concluding that, after reviewing indeterminacies that plague most interpretive methodologies, “[t]he original understanding of the ‘higher law’ may be even more elusive than that of more specific constitutional language”).

the Constitution can be read to justify just about any decision and so can safely be ignored.”⁸⁵

In fact, it is often contended that those who ratify a constitution, and the legislatures that enact most laws, “possess only a very limited sort of supremacy, inasmuch as they speak to us only through the legislative instrument and their task is completed when the statute is enacted.”⁸⁶ Many have thus assumed that “textualism amounts to noninterpretivism” because “general and vague language effectively grants an open-ended discretion that permits modern interpreters to adapt the Constitution to the evolving needs of society.”⁸⁷ But it is important to remember that “the reason we give effect to constitutional or statutory language is because of the authority we give to the intentional act that gave that language the force of law.”⁸⁸

If we do, we will also realize that

[t]he language of the [Constitution] is to be read not as barren

⁸⁵ SMITH, *supra* note 13, at 123 (quoting Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235 (1995)).

⁸⁶ McAfee, *Reed Dickerson's Originalism*, *supra* note 14, at 625. Indeed, I have noted “[w]hat is frequently posited is an absolute conflict between ‘textualist’ and ‘intentionalist’ approaches to interpreting the Constitution; whereas textualism honors the instrument through which the legislature or constitutional adopters must speak, intentionalism seeks to honor the will of those empowered to establish law.” *Id.* at 625-26. The application of a principle that places all its focus on the writing as “to both statutes and constitutions has been labeled ‘textualism’ in the United States.” Richard S. Kay, *Constitutional Chronology*, 13 RATIO JURIS 31, 40 (2000). But when the text is used as justification for a highly moral reading of the Constitution, it raises the question, why doesn’t the Constitution just say, “‘Do Justice?’” Larry Alexander, *Introduction to PHILOSOPHICAL FOUNDATIONS*, *supra* note 30, at 1, 10. And why is anything less than a text that provides such a strong stand even binding? It is thus common for advocates of a strongly moral reading to contend that we are to be guided by the text, but “‘only broadly,’” and to still wind up stating the justification “that would be made by a historicist, not by one who endorses justice-seeking constitutionalism.” *Id.* Such advocates provide us with the Constitution’s history, but leave us wondering why.

⁸⁷ McAfee, *Reed Dickerson's Originalism*, *supra* note 14, at 627. Despite the frequency with which such claims are made, a contrasting vision is as often stated. *E.g.*, Paul F. Campos, *A Text Is Just a Text*, 19 HARV. J.L. & PUB. POL’Y 327, 330 (1996) (suggesting that “despite the obscurantist theology of modern judicial review, the Constitution’s text is not full of nebulous generalities calling out for interpretive solidification at the hands of berobed jurisprudential philosophers and their academic hangers-on”).

⁸⁸ McAfee, *Reed Dickerson's Originalism*, *supra* note 14, at 629. Furthermore, “[w]e all know that the role of legislatures, as well as constitutional adopters, is not simply to ‘pass statutes’ or to ‘adopt constitutions,’ but to establish principle and policy, and that we honor their words because we recognize their authority to do so.” *Id.*

words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed?⁸⁹

Even though we are focused on the words employed in the text, we read them in context, which “comprises those elements shared by the speaker and her intended audience on which the speaker can rely to help make her meaning clear.”⁹⁰ We recognize that most constitutional provisions, like most statutory provisions, are designed “to change the law to correct some problem the prior law didn’t adequately address.”⁹¹ The most fundamental questions for determining constitutional meaning, then, become those set forth in *Heydon’s Case*,⁹² which included “what was considered to be the defect in the prior law,” and how the constitutional provision “goes about remedying that defect.”⁹³ But if we acknowledge that the power of the text comes from its having been authoritatively adopted, “it follows that the principles never adopted by the people cannot be authoritative, even if they have some linguistic plausibility.”⁹⁴ A related conclusion is that “to apply an unintended meaning is no different from introducing a principle that has no textual basis whatsoever.”⁹⁵

So the central question that must be raised to advocates of unwritten constitutionalism on interpretive grounds is whether the text will give us the critical guidance we need to determine when the Constitution is giving an essentially open-ended moral directive. Several specific examples will be helpful. Perhaps the most obvious example of a seemingly open-ended, vague constitutional guarantee is the Ninth Amendment. By its terms, the Amendment prohibits a construction that would “deny or dispar-

⁸⁹ *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring).

⁹⁰ Patrick J. Kelley, *Objective Interpretation and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory*, 1 NEV. L.J. 112, 133 (2001).

⁹¹ *Id.* at 135.

⁹² 76 Eng. Rep. 637, 638 (Ex. 1584).

⁹³ Kelley, *supra* note 90, at 136.

⁹⁴ Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1528 (1989); see also Kay, *supra* note 30, at 31.

⁹⁵ McConnell, *supra* note 94, at 1528. Professor McConnell thus suggests that “[t]he only difference between the unintended meaning and the extratextual principle is verbal happenstance.” *Id.* This is why there is an obvious connection between the modern emphasis on textualism and revisionism; if one is not inclined to honor the decisions made at an earlier time, focusing on the “invitation” of the language becomes a natural strategy. See Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

age” other rights “retained by the people,” in addition to those already enumerated in the Constitution.⁹⁶ If the Amendment is taken as referring to so-called “unenumerated” rights, somehow similar to those already specified elsewhere in the text, it is difficult to imagine a provision that would more directly call on constitutional interpreters to engage in freestanding constitutional analogizing to existing textual provisions—a formula for establishing unenumerated rights as fundamental constitutional rights.⁹⁷ The largest number of advocates of the “unenumerated rights” construction, of course, have taken the Amendment to be an invitation to interpreters to enforce the rights perceived to be part of “moral reality” that grants to humans inalienable natural rights.⁹⁸

But if this standard modern reading of the Ninth Amendment makes a certain sense out of the text, it is clear that it rests just as decisively on the exploitation of a basic ambiguity. The text of the Ninth Amendment refers to other rights “retained by the people.”⁹⁹ While this language could refer to implied limitations on the powers granted the proposed federal government, in addition to the express limits specified in the Bill of Rights, it is also true that the “other rights ‘retained by the people’” could simply allude to the many rights and interests over which the people did not convey power to control when they granted limited, specifically enumerated powers to the new federal government in Arti-

⁹⁶ U.S. CONST. amend. IX.

⁹⁷ This sort of view leads rather naturally to seeing the Constitution as “a sustained project to define and maintain the proper relationship between government and its citizens.” Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 263 (1988) [hereinafter Sager, *Ninth Amendment*]. Professor Sager perceives a big difference between his “pragmatic-justice” account of the Constitution and its ordinary perception, focused on the power of self-government residing in the people, which Sager says describes the Constitution as “merely a rather unusual statute.” Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 415 (1993). A question worth pondering, however, is whether courts can legitimately construe a statement of general principle favoring human rights as a limitation on government power that supplies “determinate and dichotomous answers to questions of legal authority.” WHITTINGTON, *supra* note 15, at 6; *see also* McAfee, *Legal Enforceability*, *supra* note 25, at 792-94.

⁹⁸ For a sampling of those sources holding such a view, see *supra* note 3.

⁹⁹ U.S. CONST. amend. IX; *see generally* McAfee, *Social Contract Theory*, *supra* note 23.

cle I of the Constitution.¹⁰⁰ In justifying the decision not to include a bill of rights, Madison explained that “the Constitution is a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government.”¹⁰¹

As reflected in Madison’s statement, defenders of the Constitution were afraid that inclusion of a bill of rights would undercut the enumerated powers scheme as a device for securing individual rights and lead to the inference that “the residuum was thrown into the hands of the government.”¹⁰² The Federal Constitution was contrasted with the constitutions of the states because, under them, the people had “invested their representatives with every right and authority which they did not in explicit terms reserve.”¹⁰³

Under the proposed Federal Constitution, by comparison, the people had “retained” as rights all that they had not granted as powers to the federal government. The implied rights reading of the Ninth Amendment requires us to presume something contrary to the assumption of its advocates—that there were inherent rights in the federal system, but not in the constitutional systems of the states. But those defending the Constitution did not assume that there were any inherent rights in the federal system because they did not need to; the people’s rights stemmed from the obvious implications of a limited grant of federal powers.¹⁰⁴ The existence of an extremely plausible alternative read-

¹⁰⁰ Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 *TEMP. L. REV.* 61, 68 (1996) [hereinafter McAfee, *Critical Guide*].

¹⁰¹ 1 *ANNALS OF CONG.* 438 (Joseph Gales ed., 1789), reprinted in BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 114 (1955).

¹⁰² *Id.*, reprinted in PATTERSON, *supra* note 101, at 114. Madison raised the particular fear that an inference of a bill of rights might well be that all rights omitted from the bill “were intended to be assigned into the hands of the [g]eneral [g]overnment.” *Id.* at 439, reprinted in PATTERSON, *supra* note 101, at 115. Clearly, however, Madison did not believe that this would be the inference drawn from the enumerated powers scheme without the addition of a bill of rights.

¹⁰³ James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 *DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 167, 167 (Merrill Jensen ed., 1976) [hereinafter *DOCUMENTARY HISTORY*]. By contrast, under the proposed Federal Constitution, because of the enumerated powers scheme, “the reverse of the proposition [found in the state constitutions] prevails, and everything which is not given, is reserved.” *Id.* at 167-68.

¹⁰⁴ See 4 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 149 (2d ed. 1996) [hereinafter *ELLIOT’S DEBATES*] (James Iredell, North Carolina Ratifying Convention, July 28, 1788) (arguing that under a “general legislature, with undefined powers,” such as

ing of the text itself suggests that the answer as to the nature of the provision in question will be derived from the history rather than from the text.¹⁰⁵ At the very least, the text itself will not provide us with the answer to the question we seek to resolve.¹⁰⁶

If the noted textual ambiguity is resolved by looking to natural rights to infer the rights impliedly “retained” by the people, as advocated by modern proponents of unenumerated rights, it would also make sense to apply the provision so as to limit state power, given that we are presuming that this was a decision to “vest these rights in the people, rather than in any government.”¹⁰⁷ But if the Ninth Amendment is read as limiting state

those that existed in the states, “a bill of rights would not only have been proper, but necessary” because it would have “operated as an exception to the legislative authority in such particulars”; by contrast, the implication of adequate rights reserved to the people under the Constitution is because the proposed federal government will have “powers of a particular nature, and expressly defined”). The alternative reading of the Ninth Amendment’s text would link the reference to rights “retained by the people” with the natural rights assumptions of social contract political theory. For a useful analysis of the issues raised, see McAfee, *Social Contract Theory*, *supra* note 23, at 296-305.

¹⁰⁵ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 123-24 (1998) (concluding that “the amendment’s legislative history strongly supports an enumerated-powers, federalism-based reading” and that its purpose was to prevent an inference “from the mere enumeration of a right in the Bill of Rights that implicit federal power in fact exists in a given domain”); McAfee, *Critical Guide*, *supra* note 100, at 64 n.16 (citing sources that reject the unenumerated rights reading of the Ninth Amendment). This much is at least acknowledged implicitly in the many works that have sought to contend that the historical context supports the unenumerated rights reading. See sources cited *supra* note 3. Compare MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* 65 (1994), with McAFEE, *supra* note 25, at 171. See also Schauer, *supra* note 2, at 1303 n.32 (noting that “[w]hile in substantial conflict with the text, the non-moral reading of the Ninth Amendment may have some historical support”); BASSHAM, *supra* note 82, at 184 n.21 (describing my work as providing a “powerful critique” of the more “liberal” reading); Van Alstyne, *supra* note 55, at 212 (describing reliance on the Ninth Amendment as basis for recognizing new rights “without a shred of historical evidence or other support”).

¹⁰⁶ This is precisely why those who have adopted a more restricted reading of the Ninth Amendment have not showed any lack of respect for constitutional text. I, for one, was powerfully influenced in support of the unenumerated rights reading by ELY, *supra* note 71, at 34-41; it was a careful review of the text, in light of the context in which it was uttered, that persuaded me that an alternative reading of the text was more plausible.

¹⁰⁷ Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, in 1 *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 3, at 291, 335. This conclusion would be powerfully reinforced as well if the reference to other rights retained by the people referenced the rights the people “retained” under the inalienable rights doctrine of social contract theory. A substantial group of scholars have read the Ninth Amendment as applying by its terms to limiting the powers of the states. See, e.g., Charles L. Black Jr., “*One Nation Indivisible*”: *Unnamed Human*

governments,¹⁰⁸ the already existing wedge between this view of the Constitution and the views held by Thomas Jefferson—needless to say, an important figure, particularly in the coming forth of the Bill of Rights¹⁰⁹—become an unbridgeable gap.

In 1819 and 1820, the nation experienced the crisis of the Missouri Compromise. In the midst of this crisis, it was clear to Jefferson that the threatened rejection of Missouri's bid for statehood unless it abandoned its slave system or opened its borders to free blacks represented a violation of the original federal bargain and threatened to undermine Missouri's sovereign power to determine its own domestic affairs.¹¹⁰ Jefferson may well have been a natural rights thinker, but there is little doubt that he was also a "states' rights" thinker who in 1787, as well as 1820, would have put states' rights ahead of natural rights in the context of resolving any clash of values.¹¹¹ We have every reason to believe that the framers of the Constitution would not have purposely

Rights in the States, 65 ST. JOHN'S L. REV. 17, 29 (1991); Bennett B. Patterson, *The Forgotten Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 3, at 107, 114-20; Norman G. Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787, 806 (1962).

¹⁰⁸ The limits on government found in the Federal Bill of Rights were not viewed historically as having any application to state governments. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833); Douglas W. Kmiec & Stephen B. Presser, THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 725 (1998) (finding "little doubt" that "the Court is correct on this point, as a glance at any of the better histories of the period will confirm").

¹⁰⁹ *See, e.g.*, McAfee, *Legal Enforceability*, *supra* note 25, at 769-71 (describing impact of Jefferson's views on the "legal check" a Bill of Rights might bring in influencing Madison's drafting of the amendments).

¹¹⁰ PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 185 (1997).

¹¹¹ Interestingly, although modern scholars have ridiculed what they took as a "federalism" reading of the Ninth Amendment, given that the text itself refers to "rights," in August of 1789, while the nation considered whether it ought to adopt the Bill of Rights, William L. Smith endorsed the Ninth and Tenth Amendments on the grounds that "they will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them." Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 273, 273 (Helen E. Veit et al. eds., 1991) [hereinafter DOCUMENTARY RECORD]. The feared danger was that Congress may "by a strained construction of some power embarrass us very much." *Id.*, *reprinted in* DOCUMENTARY RECORD, *supra*, at 273. The practice of running together the purposes of the Ninth and Tenth Amendments was standard and usual. *See* DOCUMENTARY RECORD, *supra*, at 267 (describing proposal of Roger Sherman that ran together what became the Ninth and Tenth Amendments); 2 SCHWARTZ, *supra* note 53, at 911-12 (setting forth proposal of New York ratifying convention that combined Ninth and Tenth Amendments into a single provision).

left the door open to a finding of unenumerated rights that undercut the sovereignty of the states.¹¹²

Even apart from the history indicating that a federalism-based reading was almost certainly intended by those who drafted and ratified the Ninth Amendment, it seems highly probable that the Amendment would have been viewed as at most stating an agreed-upon principle, but not as stating enforceable limits on governmental power. A recent, important work on the theory of constitutional interpretation offered these observations:

In order for the text to serve as law, it must be rulelike. In order to be a governing rule, it must possess a certain specificity in order to connect it to a given situation. Further, it must indicate a decision with a fair degree of certainty. Such certainty and specificity need not be absolute, but the law does need to provide determinate and dichotomous answers to questions of legal authority. In order for the Constitution to be legally binding, judges must be able to determine that a given action either is or is not allowed by its terms. Similarly, the Constitution is binding only to the extent that judges do not have discretion in its application. Although the application of the law may require controversial judgments, the law nonetheless imposes obligations on the judge that are reflected in the vindication of the legal entitlements of one party or another. For the Constitution to serve this purpose, it must be elaborated as a series of doctrines, formulas, or tests. Thus, constitutional interpretation necessarily is the unfolding of constitutional law. Debates over constitutional meaning become debates over the proper formulation of relatively narrow rules.¹¹³

The framers may have believed in natural rights, but the security offered by their Bill of Rights was limited to “those that experience had shown were suitable for constitutional protection, and they were secured by inclusion in a legally enforceable bill of rights.”¹¹⁴ By and large, those who framed the American Constitution avoided adopting anything “so general that it can scarcely form the basis of any action to challenge governmental restrictions upon liberty.”¹¹⁵ Unlike those who have fought revolutions

¹¹² See generally Thomas B. McAfee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 NEV. L.J. 138 (2001).

¹¹³ WHITTINGTON, *supra* note 15, at 6.

¹¹⁴ Bernard Schwartz, *Experience Versus Reason: “Beautiful Books and Great Revolutions”*, in *THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED* 421, 422 (Ronald Hoffman & Peter J. Albert eds., 1997).

¹¹⁵ *Id.* at 423. The American framers thus avoided the adoption of a principle that “may serve as the foundation for a system of political philosophy, but it can

to vindicate broad ideals that all too often have not been translated into meaningful accomplishments, the American revolutionaries avoided centering their issues on principles “too general to be made the basis of judicial decision in specific cases.”¹¹⁶

If we move beyond the historical question of the intended meaning of the Ninth Amendment, and the Court’s reliance on the Ninth Amendment to bolster its modern holdings on the right of privacy, there is strong support for the view that in 1997 “the *Roe* era came to an end.”¹¹⁷ In *Washington v. Glucksberg*,¹¹⁸ the Court appeared to squarely reject the “moral philosophic” approach to discovering and defining unenumerated fundamental constitutional rights.¹¹⁹ This is an especially noteworthy development inasmuch as the only plausible historical claims that the Ninth Amendment was intended to secure unenumerated fundamental rights are ones that link it to the natural rights thinking that characterized the social contract theory that was predominant at the time of the framing of the Constitution.¹²⁰ Concluding that such rights must be either textually based or be “objectively, ‘deeply rooted in this Nation’s history and tradition,’”¹²¹ the Court was clear that its task was to determine what the people deemed fundamental, and not what the Justices are persuaded *should be* fundamental.

scarcely be the basis by itself for legal protection of specific personal rights and liberties.” *Id.* at 424.

¹¹⁶ *Id.* at 424.

¹¹⁷ Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666. Indeed, other commentators had previously noted that, well prior to the Court’s decision in *Glucksberg*, the Ninth Amendment “had vanished.” ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 323 (1991).

¹¹⁸ 521 U.S. 702 (1997).

¹¹⁹ McConnell, *supra* note 117, at 669. The Court itself emphasized that

[t]he right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the right to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.

Glucksberg, 521 U.S. at 725.

¹²⁰ For those supporting this reading of the history, see the sources cited *supra* note 3. For one critical response to this view, see McAfee, *Social Contract Theory*, *supra* note 23, at 296-305.

¹²¹ *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

The Court thus clarified that the right of privacy is not an open-ended right to personal autonomy, and “it appears that, for the moment at least, the Ninth Amendment has no role to play.”¹²² “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”¹²³ Professor McConnell’s analysis is especially helpful:

The traditionalist approach adopted in *Glucksberg* differs sharply from the moral philosophic approach not just in its substance but in its intellectual style. The moral philosophic approach is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions. For example, the Ninth Circuit’s argument for recognizing a right to assisted suicide was based on the assertion that this right is encompassed within a supposed right of each individual “to make the ‘most intimate and personal choices central to personal dignity and autonomy.’” The traditionalist approach, by contrast, is inductive and experiential. Rather than reasoning down from abstract principles, it reasons up from concrete cases and circumstances. It can be seen as the conservative heir to legal realism: cautious, empirical, flexible, skeptical of claims of overarching theory.¹²⁴

A second example illustrates the limits of text as a guide to determining constitutional provisions requiring essentially unlimited moral analysis. Professor Michael Moore relies on the Due Process Clause as an example of a text supplying a term that is vague because it calls for interpreters to decide the scope of “liberty.”¹²⁵ And the difference “between ‘liberty,’ in the fourteenth amendment, and ‘freedom of speech’ or ‘free exercise’ of religion in the first amendment, is surely a matter of degree.”¹²⁶ But John Hart Ely has found “that the text is manifestly opposed to the substantive reading of the clause that undergirds the right of privacy.”¹²⁷ While it is true that Professor Tribe, to use a promi-

¹²² ALDERMAN & KENNEDY, *supra* note 117, at 323. As the “Court has moved away from any kind of consensus on the right of privacy,” it quite clearly has moved “even farther away from any resolution about the meaning of the Ninth Amendment.” *Id.*

¹²³ *Glucksberg*, 521 U.S. at 727.

¹²⁴ McConnell, *supra* note 117, at 672.

¹²⁵ See, e.g., Moore, *supra* note 1, at 123, 127-31; *supra* note 6; *supra* note 14 and accompanying text.

¹²⁶ Moore, *supra* note 1, at 123.

¹²⁷ McAfee, *Constitutional Interpretation*, *supra* note 70, at 291 (citing ELY, *supra* note 71, at 18-19). By its terms, the clause prohibits the deprivation of the

ment example, has argued that “the textual point of departure for the doctrine is the explication of the concept of ‘law’ that is required prior to substantive deprivations,”¹²⁸ it is reasonably clear that Tribe’s argument “establishe[d] at most an apparent ambiguity that is more plausibly resolved in favor of Ely’s construction,” and in my view “the historical evidence supports the thesis that substantive due process was a judicial invention that informally amended the meaning of the text.”¹²⁹ Whatever the merits of the historical evidence, it is fairly clear that the text of the Due Process Clause itself does not tell us whether we are invited or required to bring a moral analysis to bear in giving effect to the provision in question.¹³⁰

The final example is presented by the Equal Protection Clause of the Fourteenth Amendment. Professor Dworkin recommends

interests in question only where there is a lack of adequate (“due”) process; history suggests that it is appropriately referred to as the “due process” clause rather than as the “life, liberty or property” clause.

¹²⁸ McAfee, *Constitutional Interpretation*, *supra* note 70, at 291 (citing Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1066 n.9 (1980)).

¹²⁹ *Id.* at 291-92. This conclusion is lent strong support by an article that confronts the text of the Due Process Clause in the context of the balance of the Constitution’s text as well as the best historical evidence. See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 *V.A. L. REV.* 493, 525-34 (1997); BASSHAM, *supra* note 82, at 73-74. Indeed, Professor Harrison documents that there is a historical connection between the concepts of substantive due process and the historical claim that there was intended to be an unwritten Constitution. See Harrison, *supra*, at 548-50. But even if we could justify a doctrine of substantive due process as a construction of the text of the Due Process Clause, under a “structural vested rights reading,” *id.* at 553, another step is required to warrant the creation of an implied fundamental rights doctrine inasmuch as there would still need to be an explanation of how it is that such rights have the ability to “trump other public interests that fundamental rights are deemed to have.” McAfee, *Constitutional Interpretation*, *supra* note 70, at 293. The present author has not seen an attempt to justify this next step in the analysis, and text and history would seem to preclude it. See Harrison, *supra*, at 553 (concluding that “[i]f substantive content means the reading adopted in . . . *Roe*,” it is fair to say “that the Due Process Clause of the Fifth Amendment could not possibly have had what would today be called substantive content”).

¹³⁰ Even a modern advocate of unenumerated rights has concluded that “the very phrase ‘substantive due process’ teeters on self-contradiction,” and hence “provides neither a sound starting point nor a directional push to proper legal analysis.” Amar, *supra* note 46, at 123; see also *id.* at 122-23 (describing recent unenumerated rights case as “invoking the nonmammalian whale of substantive due process, a phantasmagorical beast conjured up by judges without clear textual warrant”); CHARLES BLACK, JR., *A NEW BIRTH OF FREEDOM 3* (1997) (describing substantive due process as “paradoxical, even oxymoronic”). Professor Black is also not known as an opponent of unenumerated rights.

consideration of “different elaborations of the phrase ‘equal protection of the laws,’ each of which we can recognize as a principle of political morality that might have won [the framers’] respect,” and then an evaluation of “which of these it makes most sense to attribute to them, given everything else we know.”¹³¹ As Professor McConnell wrote, “So far, so good.”¹³² But in short order, Professor Dworkin confronts the possibility that the Equal Protection Clause stated “only the relatively weak political principle that laws must be enforced in accordance with their terms, so that legal benefits conferred on everyone, including blacks, must not be denied, in practice, to anyone.”¹³³ Finding that this reading is implausible as a matter of history, he concludes that the framers “declared a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.”¹³⁴

But Professor McConnell accurately observes that “[t]his is a textbook example of what logicians call the fallacy of black-and-white reasoning” inasmuch as it falsely posits “that there are only two alternatives,” and then purports “to prove one by disproving the other.”¹³⁵ In his review article, McConnell offers several middle-ground principles that can be reconciled with the breadth of language employed in the Equal Protection Clause without going all the way to Dworkin’s “equal concern” principle.¹³⁶ Ac-

¹³¹ FREEDOM’S LAW, *supra* note 5, at 9.

¹³² McConnell, *supra* note 64, at 1281.

¹³³ FREEDOM’S LAW, *supra* note 5, at 9. There is in fact little room for doubt that the core meaning of the guarantee of equal “protection” of the laws was to assure the same enforcement (or “protection”) of laws for members of the Black race as that enjoyed by those who had not been slaves. See McAfee, *Reed Dickerson’s Originalism*, *supra* note 14, at 648 n.112; David P. Currie, *The Constitution in the Supreme Court: Limitations on State Power 1865-1873*, 51 U. CHI. L. REV. 329, 353-54 (1984). This was a right that was assured to all members of society under social contract theory as a compensation for foregoing the right to self-help in enforcing (and judging) one’s own rights. It was also a right that had been denied to Blacks not only by slave laws, but also by the laws (and practices) adopted in the South after the Civil War.

¹³⁴ FREEDOM’S LAW, *supra* note 5, at 10; accord BARBER, *supra* note 5, at 68 (suggesting that Dworkin argues “for moral philosophy so effectively that all sides should have accepted it as a commonplace by now”).

¹³⁵ McConnell, *supra* note 64, at 1282.

¹³⁶ *Id.* at 1282-84. Professor McConnell suggests as possibilities a rule of “strict formal equality,” *id.* at 1282, without race being used at all; a rule of absolute equality as to a limited category of rights; a rule prohibiting “special legislation,” with all its Jacksonian permutations; and a rule against “caste legislation” based upon an “anti-subordination” theory. See generally John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 CONST. COMMENT. 243 (1996). However,

ording to McConnell, “there are not two, but at least three alternative approaches” to making sense of the Equal Protection Clause. We can (1) follow the framers’ expectations, including their thoughts about the “specific applications” of constitutional language; (2) follow the “moral and political principles” they intended to express; or (3) follow the text in a way that best implements our understanding of their abstract, moral language.¹³⁷ Relying on the example of “interpreting” the political thought of Aristotle in a scholarly paper, McConnell argues that a modern scholar would be better off following the second rather than the third approach.¹³⁸

McConnell’s analysis reflects why there is still a debate over an “unwritten” constitution. Whatever label is used, it seems reasonably clear that those who would “interpret” the Constitution as recommended by Professor Dworkin would be far more focused on deriving the best moral answers to difficult and vexing moral questions than on understanding what those who drafted the Constitution were trying to convey. It may be that Professor Dworkin or someone else can satisfy thoughtful Americans that those who gave us the Fourteenth Amendment were empowering judges and other authoritative interpreters to decide the implications of a commitment to the general, abstract value of political

Dworkin’s adoption of an open-ended moral reading to replace an admittedly limited reading begins with the assumption, Professor McConnell suggests, that there is no logical basis for assuming constitutional provisions should be read at the highest level of generality.” McConnell, *supra* note 64, at 1283; *see also* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 47 (1997) (noting advocacy of a doctrine of a living constitution, “a ‘morphing’ document that means, from age to age, what it ought to mean”).

¹³⁷ McConnell, *supra* note 64, at 1284-85. If we take the approach recommended by Professor McConnell, it may be in part because many now recognize that the argument that constitutions and statutes should be read “in their current context, rather than original, frequently rests on the false assumption that the original context refers only to specific contemplated results rather than the general meaning of the text as understood in light of the relevant linguistic, social, and historical setting.” *See* McAfee, *Reed Dickerson’s Originalism*, *supra* note 14, at 647 n.110. This is why a noted expert on statutory construction, Professor Reed Dickerson, joined the criticism of a decision interpreting a statute enacted prior to women’s suffrage that limited the right to serve on a jury to eligible voters as not permitting women to serve on a jury even after being extended the right to vote. Dickerson argued that the court erred in thinking that the legislative “intent” to exclude women from jury service prevailed over the clearly expressed intent to equate the conditions of jury service with the qualifications for voting. *Id.* I wrote: “A great deal of criticism of originalism in constitutional interpretation rests on this same fallacy.” *Id.*

¹³⁸ *See* McConnell, *supra* note 64, at 1285.

equality that would now be embodied in the Constitution; but most Americans would require more than a bare text to warrant them in reaching this conclusion.

II

THE IMPORTANCE OF THE DOCTRINE OF POPULAR SOVEREIGNTY

In his speeches during the ratification debates, James Wilson stressed that “the nature and kind of that government, which has been proposed for the United States, by the late convention [is] in its principle purely democratical.”¹³⁹

According to the Declaration [of Independence], the self-evident truth that all men are created equal in their inalienable rights poses an end and standards for government (“to secure these rights”); it shows the necessity of government (“governments are instituted among men”); and it identifies the source of government’s authority (“deriving their just powers from the consent of the governed”). These self-evident principles set the bounds of the debate on what form of government should be adopted. That the best form of government is not also self-evident reflects the fact that these principles offer somewhat contradictory political guidance.¹⁴⁰

A. *The Founders’ Views as Embodied in Constitutional Text*

The Constitution begins with the words “We the People,” and the significance of its having been adopted by the people who comprised the states, and not by the state governments who were the parties to the Articles of Confederation, was not lost on the people who debated the merits of the Constitution in deciding whether to ratify.¹⁴¹ Justice Marshall probably speaks well for

¹³⁹ Thomas L. Pangle, *The Philosophic Understandings of Human Nature Informing the Constitution*, in *CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, MARXISM, FREUDIANISM, PRAGMATISM, EXISTENTIALISM* 9, 37 (Allan Bloom ed., 1990) [hereinafter *CONFRONTING THE CONSTITUTION*].

¹⁴⁰ David F. Epstein, *The Political Theory of the Constitution*, in *CONFRONTING THE CONSTITUTION*, *supra* note 139, at 77, 78.

¹⁴¹ It was, for example, a standard objection to the Constitution that it spoke for “the people” rather than the states. See, e.g., McAfee, *Legal Enforceability*, *supra* note 25, at 759 n.43. Patrick Henry, one of the Constitution’s staunch opponents, for example, objected that the Constitution referred to the people “instead of, *We, the States*,” from which he drew the inference that this is “one great consolidated National Government of the people of all the States.” See *SOURCES AND DOCUMENTS*

the majority of the framers when he asserts that “[t]he government proceeds directly from the people; is ‘ordained and established,’ in the name of the people,” and they “were at perfect liberty to accept or reject it.”¹⁴² We hear of the “higher law” background of the American Constitution, but we sometimes pay too little attention to the manner by which this “background” entered for foreground, which was by being given roots in a document that proceeded from the people—who were assumed by the founders to be the fountain of all political power.¹⁴³ The American Constitution has been described as “[a] WHOLE PEOPLE exercising its first and greatest power—performing an act of SOVEREIGNTY, ORIGINAL, and UNLIMITED.”¹⁴⁴

The doctrine of popular sovereignty, moreover, became crucial to defending various decisions made in Philadelphia.¹⁴⁵ It is fair to say that as the Constitution’s proponents defended the decision to create a new form of government, the Constitution’s provision for popular ratification, and its creation of an extended republic on the base of popular representation, they placed renewed emphasis on the plenary power of the people to change their forms of government at will.¹⁴⁶ Indeed, if the founding generation was committed to the idea of a written Constitution, they gave at least equal weight to the power of the people to establish constitutions.¹⁴⁷

ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 309 (Samuel Eliot Morison ed., 1965).

¹⁴² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 103-04 (1819).

¹⁴³ 1 CORWIN ON THE CONSTITUTION 117 (Richard Loss ed., 1981).

¹⁴⁴ WOOD, *supra* note 29, at 535.

¹⁴⁵ It has been accurately observed that “[d]riven by the necessity of the hostility of the state legislatures and by theoretical and political concerns to ground the new federal constitution in the authority of the people, the Philadelphia Convention both represented and contributed to the implementation of popular sovereignty through the mechanism of popular convention.” WHITTINGTON, *supra* note 15, at 124.

¹⁴⁶ See, e.g., 2 DOCUMENTARY HISTORY, *supra* note 103, at 383 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787). As Iredell argued in North Carolina, “[t]hose in power are [the people’s] servants and agents; and the people, without their consent, may new-model their government whenever they think proper.” 4 ELLIOT’S DEBATES, *supra* note 104, at 9 (James Iredell, North Carolina Ratifying Convention, July 24, 1788).

¹⁴⁷ It has been observed that, for the founding generation, “[t]he right to share equally in this decision [on the form, organization and powers of the government instituted to secure the rights of all] is the most important human right because government is the means by which all other rights are secured.” Walter Berns, *The Constitution as Bill of Rights*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 50, 58 (Robert A. Goldwin & William A. Schambra eds., 1985).

James Wilson contended that popular sovereignty “is a power paramount to every constitution, inalienable in its nature, and indefinite in its extent.”¹⁴⁸ He affirmed that “[i]n all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal and which is therefore called absolute, supreme, and uncontrollable.”¹⁴⁹ But Wilson was restating what had been a standard view among those who had implemented constitutions since 1776.¹⁵⁰ Indeed, it is clear that this sovereign power was viewed as so fundamental because it was the basis of the colonies’ claimed authority to declare their independence from England.¹⁵¹

The argument for judicial review was premised on the superior authority of the people, as sovereign, to the authority of their “agents” who, as government officials, were bound by the terms of the written Constitution. The premise of the argument is that it is the duty of judges to interpret and implement the fundamental law adopted by the people. If we start with the “noninterpretive” premise that judges may properly limit government based on principles of justice never articulated before, we have abandoned in effect the whole concept of separation of powers. The 1780 Massachusetts Constitution provided that “the judicial shall never exercise the legislative and executive powers, or either of them” so that “it may be a government of laws and not of men.”¹⁵² If the practice of legal interpretation renders this provi-

¹⁴⁸ 2 DOCUMENTARY HISTORY, *supra* note 103, at 349 (James Wilson, Pennsylvania Ratifying Convention, Nov. 24, 1787).

¹⁴⁹ *Id.* at 348 (James Wilson, Pennsylvania Ratifying Convention, Nov. 24, 1787).

¹⁵⁰ Leslie Goldstein observes that eight of the fourteen state constitutions adopted between 1776 and 1780 included paraphrases of the idea of the people’s right to “alter or abolish” their “form” of government. GOLDSTEIN, *supra* note 25, at 73-74.

¹⁵¹ See, e.g., MAIER, *supra* note 110, at 86-90. A county in Maryland asserted that “the People have the indubitable right to reform or abolish a Government which may appear to them insufficient for the exigency of their affairs.” *Id.* at 87. For additional insight on the founders’ commitment to the idea of popular sovereignty, see McAfee, *Substance Above All*, *supra* note 25, at 519 n.56.

¹⁵² MASS. CONST. of 1780, pt. 1, art. XXX, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888, 1893 (Francis N. Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS]. Compare N.C. CONST. of 1776, reprinted in 5 STATE CONSTITUTIONS, *supra*, at 2787, 2787 (providing that “the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other”), VA. CONST. of 1776, reprinted in 7 STATE CONSTITUTIONS, *supra*, at 3812, 3813 (providing that “the legislative and executive powers of the State should be separate and distinct from the judiciary”), *id.*, reprinted in 7 STATE CONSTITU-

sion literally invalid, in that legal construction sometimes requires the interpreter to make choices with the effect of “making,” rather than merely “interpreting,” law, one would hope that such cases would at least be exceptional rather than typical. Recognition of an “unwritten” constitution, by contrast, simply abandons the project of “interpreting” the written Constitution to “discover” the requirements of an underlying moral reality.

*B. The Theory Underlying the Doctrine of Popular
Sovereignty: Does It Make Sense in the Twenty-
First Century?*

The American constitutional order is best understood as an experiment in collective self-rule.¹⁵³ “At root, a theory of popular sovereignty is a version of a theory of democracy.”¹⁵⁴ This is why the Constitution “opens with a ringing pronouncement of its democratic mandate.”¹⁵⁵ It begins by telling us “why we should sit up and take notice—why, indeed, the document deems itself supreme.”¹⁵⁶ Given the Constitution’s commitment to popular self-government, it hardly matters whether “[w]hat We the People have said in the document makes more sense than what the Justices have said in the doctrine.”¹⁵⁷

But it is critical to be aware that a paradox is necessarily involved. It is tempting to think the Declaration of Independence’s linkage of the legitimacy of government to the “consent of the governed” implies commitment to majoritarian decision making as to every issue about the role of government, or at least every

TIONS, *supra*, at 3812, 3815 (providing that the “legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other”), and GA. CONST. of 1777, art. I, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 777, 778 (providing that the “legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other”).

¹⁵³ It has been persuasively argued that “[t]he first freedom of self-governing people is not, therefore, the freedom of speech. It is the freedom to write: to give oneself a text. A fully self-governing people must be the author of its own constitution.” Rubinfeld, *supra* note 78, at 218. On the theme of self-government, see BELZ, *supra* note 21, at 12.

¹⁵⁴ WHITTINGTON, *supra* note 15, at 127.

¹⁵⁵ Amar, *supra* note 46, at 34.

¹⁵⁶ *Id.* As Amar observes, precisely because the Constitution “comes from the People . . . ordinary decisions by ordinary government officials, including judges, occupy a lower level.” *Id.*

¹⁵⁷ *Id.* at 94.

important issue. But there is no question that one of the strategies of our constitutional order has been to establish rules of law that limit the authority of democratically elected, and supported, bodies.¹⁵⁸ At the very least, this demands that we have a closer look at the idea that we should have government by consent.¹⁵⁹ To be “governed” meaningfully, American constitutionalism assumes, is to forego the collective right to immediately make decisions according to one’s sense of the “merits” of competing values that logically would bear on the decision.¹⁶⁰ The assumption is that we “rule” ourselves more meaningfully and effectively if we proceed by the adoption of rules that will be used to make more immediate decisions.¹⁶¹

As Larry Alexander has observed, undoubtedly “much of the resistance to original intent theories of constitutional law is really resistance to all practical authority.”¹⁶² The moment we adopt a rule that “binds” us all until it is authoritatively changed, we have in some sense undercut the idea of being controlled only by the “consent” of the governed, inasmuch as a majority may favor the result that is contradicted by the rule.¹⁶³ One cannot view such a

¹⁵⁸ See Rubinfeld, *supra* note 78, at 195 (suggesting that “[b]y purporting to bind the sovereign popular will tomorrow, the Constitution violates the very principle of self-government on which it stakes its claim to legitimate authority in the first place”).

¹⁵⁹ For advocates of “contemporary” ratification, which means courts attempting to discern what interests have been established as fundamental over time, “the choice is between being ruled by the dead hand of the past or the living present.” Murray Dry, *Federalism and the Constitution: The Founders’ Design and Contemporary Constitutional Law*, 4 CONST. COMMENT. 233, 234 (1987).

¹⁶⁰ The whole idea that we might be governed by decisions made in the past rather clearly creates an issue of constitutional legitimacy and cries out for “a confrontation with the constitutional problem of time.” Rubinfeld, *supra* note 78, at 209. We thus need an account of how a two-hundred-year-old text “could possibly exert legitimate authority over democratic majorities in the future.” *Id.* at 211.

¹⁶¹ As Rubinfeld acknowledges, “[i]f the Constitution’s purchase on legitimacy depends on its conformity with present majority will, the price of attaining this legitimacy would be constitutionalism itself.” *Id.* at 197. “Written constitutionalism,” America claims, “denies the desirability (and perhaps the possibility) of self-government at any given time. It rather embraces the struggle for self-government over time.” *Id.* at 214. In the minds of its framers, though, there is no question that the Constitution’s greatest achievement for mankind was its resolution of “the problem of his capacity for self-government.” CORWIN, *supra* note 68, at 8 (quoting James Madison).

¹⁶² Larry Alexander, *Originalism, or Who Is Fred?* 19 HARV. J.L. & PUB. POL’Y 321, 324 (1996), *see also* Alexander, *supra* note 86, at 6 (the “problem of rule-following” is “paradoxical” because we act on the belief that we “have good moral reasons to posit fixed rules that claim preemptive authority over our moral reasoning”).

¹⁶³ This is why the challenge is not just to constitutional rules that can only be

decision as self-government unless one is willing to equate “government” with submitting to a self-imposed rule and, to that extent, giving up the power to make a fresh determination on the merits of a question. Yet we take the view that subjecting oneself to such rules may well be in an individual’s interest—and, indeed, may supply the essence of self-government. If that is true of all rules enacted by democratic legislatures, it is that much more true when a super-majority vote is required to change the rule.¹⁶⁴

There is no question that traditional constitutionalism, conceived of in significant part as limiting the power of majorities to rule immediately as a device to secure freedom,¹⁶⁵ is as likely to run afoul of preferences of “conservative” advocates of democracy, as it is to disappoint “liberal” advocates of nonoriginalist judicial activism.¹⁶⁶ But as Professor Ely observed, as to consti-

changed by super-majorities, and sometimes decades after being initially established. It is really to the idea, even for an individual, of agreeing to be bound by any rule that might vary from one’s current best judgment. Thus Professor Dickerson wrote of interpreting statutes:

To the [scholars] who believe that it is more wholesome to meet the needs of the future than to honor the dead past, we may reply that, because legislation is almost always pointed to the future, intended future results cannot be assured unless the historical event that an enactment immediately becomes is later honored by the courts. This means honoring the legislative past. To do otherwise would substitute the courts for the legislature in the lawmaking process.

REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 130 (1975).

¹⁶⁴ Our tendency is to push aside the “wills of the Framers,” or “better yet” have their wills “equated with reason, which is of course reason as we now see it.” Alexander, *supra* note 162, at 324. It is very tempting to think that this impulse against constitutional rules concerns the time between the adopting of the Constitution and the act of construing it. But the clash of wills, and the temptation to resist another’s rule, is virtually always present.

¹⁶⁵ “Constitutional constraints and mechanisms of judicial review may be viewed, then, as precautions that responsible rights bearers have taken against their own imperfections.” Jeremy Waldron, *Precommitment and Disagreement*, in *PHILOSOPHICAL FOUNDATIONS*, *supra* note 30, at 271, 274; *see also id.* at 275 (relying on such metaphors as Ulysses being bound to the mast, or a smoker hiding his cigarettes, to understand the concepts of precommitment and self-government).

¹⁶⁶ *See, e.g.*, Lino A. Graglia, *It’s Not Constitutionalism, It’s Judicial Activism*, 19 *HARV. J.L. & PUB. POL’Y* 293, 294 (1996) (arguing against perceived elitism of modern judicial activism, considering that “[t]he unhappy truth is that there is nobody here but us, and therefore there is no alternative to majority rule except minority rule” and that “[m]inority rule necessarily designates some individuals as politically superior to others”). For additional commentary on this tendency for “minimalism” rooted in deference to democratic decision makers to slip into infidelity to constitutional text and values, *see* Thomas B. McAfee, *The Augustan Constitution and Our*

tutionalism in its traditional conception, “the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.”¹⁶⁷ And despite the democratic shortcomings of the founding period, it remains true, as Professor Amar has reminded us, that the “performative act of ordainment is *at the time* the most democratic and inclusive act in world history, and is so understood by those doing it.”¹⁶⁸

There is, then, an inevitable tension within American constitutionalism between the inclination to rule by majority will and the recognition that an acceptable individual freedom requires a form of self-government that qualifies our commitment to majoritarianism.¹⁶⁹ In addition, there is at least as large a paradox in the recognition that each individual’s attempt to maximize the protection given to natural (or moral) human rights, by joining a constitutional order, appears to demand renouncing the right to make an individualized moral determination about the merits of an apparent conflict between a claim of moral right and the requirements of a given law.¹⁷⁰ We were driven to constitutionalism because we perceived the need to identify appropriate limits to civil government’s powers, in favor of human rights; but we also know that our society in fact holds fundamental disagreements about the appropriate limits to civil power. Professor Alexander correctly perceives our constitutional order as centrally the mutual acceptance “as authoritative certain methods for resolving the uncertainty.”¹⁷¹

Disappointing as it may seem to modern advocates of unwrit-

Natural Rights Tradition: Is There a Conflict?, 4 S. CAL. INTERDISC. L.J. 693, 701 (1995).

¹⁶⁷ ELY, *supra* note 71, at 8; *see also* Grey, *supra* note 1, at 705 (finding that under traditional interpretive approaches, “when a court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: ‘[w]e didn’t do it—you did’”).

¹⁶⁸ Amar, *supra* note 46, at 35. The framers are, notwithstanding their shortfalls, “radical revolutionary republicans . . . who are going further than anyone has ever gone before.” *Id.* at 36.

¹⁶⁹ As Professor Alexander observes, the “problem is not just one of constitutionalism; it is *the* problem of law,” inasmuch as it “does not depend upon whether the practical authority is a majority or a minority, or whether it is contemporaneous or is separated from us by 200 years and a lot of cultural change.” Alexander, *supra* note 162, at 324.

¹⁷⁰ *Id.* at 326 n.17.

¹⁷¹ *Id.* For a great deal of thoughtful commentary, of relevance to contemporary constitutional theory, on the difficulties of justifying political authority and the moral obligation of individuals to obey the law, see *THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL WRITINGS* (William A. Edmundson ed., 1999).

ten constitutionalism, the American founders were mainly anxious to move us away from what they perceived as an almost total lack of effective limitations on government.¹⁷² But it was not their intention to give constitutional interpreters the central role. Assuming that most difficult questions of legal policy would be resolved in the political process, they looked only to supplement structural features of our constitutional order to assure individual constitutional rights.¹⁷³ Professor Smith is right on the mark when he observes that “[i]nstead of idealism and abstract principle, the original Constitution was a technical document devoted largely to institutional structure and procedure.”¹⁷⁴ The Constitution, as John Patrick Diggins pointed out, “‘was deliberately designed in mechanistic rather than in moral terms so that after its enactment it would as a system function apart from human agency.’”¹⁷⁵

There is an acute awareness that, though we may aim for the best, as reflected in the Constitution’s Preamble, we must take a non-ideal human nature as a given in designing a government for humans.¹⁷⁶ This is why, even though he is charged with inconsistency with the ideals of the framers, the central figure of early

¹⁷² Strangely enough, there is no question that the framers of the Federal Constitution believed that the unwritten nature of the English constitution had contributed to a process of avoidance of the substantive values once thought to be embodied there. See, e.g., McAfee, *Substance Above All*, *supra* note 25, at 516; McAfee, *Social Contract Theory*, *supra* note 23, at 273-74.

¹⁷³ Thus the principle draftsman of the Federal Bill of Rights, James Madison, set out to propose only “a moderate” set of revisions, to secure “those safeguards which [the people] have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power.” 1 ANNALS OF CONG. 433 (Joseph Gales ed., 1789), *reprinted in* PATTERSON, *supra* note 101, at 109. Thus it is clear that, of the many amendments proposed by various state ratifying conventions, he “consciously omitted a significant number of non-structural popular and individual rights proposals.” McAfee, *Substance Above All*, *supra* note 25, at 524 n.66.

¹⁷⁴ SMITH, *supra* note 13, at 36; see also Van Alstyne, *supra* note 34, at 177 (concluding that “the mechanics of the Constitution—dominate the text of the Constitution, up to and including the provisions in article V of four different ways by which even amendments themselves may be made”).

¹⁷⁵ SMITH, *supra* note 13, at 46.

¹⁷⁶ This is precisely why the “amending process is thus a difficult one which requires supermajorities and reflects the federal nature of the U.S. Constitution.” JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS 1 (1994). It is also why the “only currently applicable stated limit on the amending process” is the one “providing that states shall not be deprived of their equal representation in the Senate without their consent.” *Id.*

American constitutionalism should perhaps be Justice James Iredell. In rejecting Justice Chase's call for reliance on natural law-based limitations on government,¹⁷⁷ even if not included in the written Constitution, he contended that there is no fixed standard for judges to use to determine violations of natural law.¹⁷⁸ Justice Iredell was aware of why we live in such a pluralistic society in the first place.

Iredell's view "implies a community of citizens who may be committed to moral beliefs and values—but to very different and perhaps contradictory moral beliefs and values."¹⁷⁹ He did not doubt that there were natural rights, and he supported protecting them in the Constitution; but he also understood that, as a general charge, resolving issues of morality is "too complicated for the Court, or anyone else for that matter, to articulate in a manner at all consistent with what we demand of the Court in its justifications for its actions."¹⁸⁰ Iredell would concur in the modern formulation that "[n]oninterpreting the only Constitution we are in fact expounding," whether because one is disgruntled with its limited wisdom or because some provisions are genuinely intractable, is not an impressive enterprise."¹⁸¹

C. *The Views of Modern Unwritten Constitutionals*

1. *Advocates of the "Historical" Theory of the Unwritten Constitution*

Those who advanced the claim that the founding generation believed in an unwritten Constitution put themselves in a more awkward position for defending basic constitutional theory than

¹⁷⁷ As a general matter, Professor Amar seems on the mark in asserting that "Chase is hardly the most surefooted guide to the document." Amar, *supra* note 46, at 99.

¹⁷⁸ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-99 (1798) (Iredell, J., concurring); see also ELY, *supra* note 71, at 48-54.

¹⁷⁹ Steven D. Smith, *Moral Realism, Pluralistic Community, and the Judicial Imposition of Principle: A Comment on Perry*, 88 Nw. U. L. REV. 183, 189 (1993). In such a society, the sort of "community" involved in a constitutional order "will be based in large measure on compromises, truces, tacit forbearances, and mutual accommodations. If someone insists on extracting from this community anything in the nature of a 'public philosophy,' that philosophy will almost surely be composed of gracious but ambiguous and even empty affirmations and of strategic silences." *Id.*

¹⁸⁰ Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 Nw. U. L. REV. 436, 442 (1993).

¹⁸¹ William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 232 (1983).

they acknowledge.¹⁸² Though they appear to share with traditionalists the view that the authority of the Constitution stems from its adoption by the people, as they were represented in state ratifying conventions, their substantive constitutional views effectively contradict the claim.¹⁸³ For example, Professor Sherry claims that the rights referred to by the Ninth Amendment are the rights people held without such a text, derived from natural law and the reason that animated thinking about rights under the unwritten English constitution.¹⁸⁴ But it is not just the content of the rights that is derived from such substantive reasoning; it is their very claim to holding the status of an enforceable principle that limits governmental power. Indeed, Professor Sherry takes the view that these rights were so fundamental in nature that the sovereign people lacked the power to cede them to government—even in their written constitution.¹⁸⁵ This is why modern advocates of the “historical” unwritten Constitution, if they are consistent, take the position that “the collective sovereignty of the people—such as that which ordained the Constitution—is limited.”¹⁸⁶

¹⁸² For example, Professor Grey acknowledges that “[e]ven if judicial development of an unwritten constitution is good for a country and fits an appropriate theory of the judicial function, each legal system retains the choice whether to grant so impressive a power to its judges.” Grey, *Origins*, *supra* note 2, at 847. But if courts may properly implement basic human rights that even “the people” cannot concede to government because they are inalienable, one is left to wonder how the choice *not* to grant such a power can even be made. There are many of us, for example, who believe that such a judicial power was never granted in this country, but this does not seem to influence those who think courts should hold such power.

¹⁸³ Long ago, Professor Grey acknowledged that “it remains to be shown that an acceptance of noninterpretive judicial review was consistent with” the framers’ emphasis on “the theory and rhetoric of popular sovereignty.” *Id.* at 893. It is my position that noninterpretive judicial review is inconsistent with genuine popular sovereignty, and that it is consistent has still not been shown.

¹⁸⁴ See Sherry, *supra* note 2, at 1130-34.

¹⁸⁵ *Id.* at 1134 (state declarations of rights stated “the inherent natural rights which formed an integral and unalterable part of the broader fundamental law”); see also DAVID RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 220 (1989) (concluding that founders believed that “rights are not given by the Constitution,” but that republican constitutions reserved to the people “the wide range of inalienable human rights that could not, in principle, be surrendered to the state”); McAFFEE, *supra* note 25, at 19-24, 122-27; McAfee, *Substance Above All*, *supra* note 25, at 506-07.

¹⁸⁶ Harry V. Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 360 (1987). It is this idea that there are limits in our constitutional system to what even the sovereign people can do that prompts Professor Sager to doubt that “majoritarianism” supplies the best foundational account of the Constitution’s individual rights project.

As soon as one takes the position that the sovereignty of the people is limited substantively, you begin to drift toward what is ultimately stark confusion.¹⁸⁷ The classic example is the contemporary argument that the attempt to amend the Constitution to permit the regulation or prohibition of flag burning is to run afoul of limits imposed by the Ninth Amendment. To burn a flag is to engage in free speech, and it is an inalienable natural right—one of the sorts of rights protected by the Ninth Amendment.¹⁸⁸ Trying to reconcile this constitutional theory with a premise of popular sovereignty, its proponent contended that such an amendment “could have been enforced only if it had denied explicitly that speech is a natural right.”¹⁸⁹ On this view, the people hold constitutional authority to decide that flag burning is not the exercise of an inalienable natural right, but lack the authority to deny what they confess is an inalienable natural right.¹⁹⁰ But if the Ninth Amendment secures the right to burn a flag, because doing so is to exercise an inalienable natural right—and, indeed, if our Ninth Amendment theory is that some rights are “inalienable” and are not given up by their mere omission from constitutional text—one wonders why it should make any difference what “the people” think about whether flag-burning exercises a right or whether the right is “inalienable.”¹⁹¹

In moral and political theory, the idea of inalienable natural rights limits the legitimate authority of the people.¹⁹² But if the

The Ninth Amendment shows, he believes, that the Bill of Rights must be seen as part of a larger project in political morality rather than as “disembodied acts of capricious will that somehow gained widespread support.” Sager, *Ninth Amendment*, *supra* note 97, at 258-59.

¹⁸⁷ The material that appears in this article relating to the idea of a “limited” sovereign, appears also in McAfee, *Legal Enforceability*, *supra* note 25, at 779-83.

¹⁸⁸ Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 *YALE L.J.* 1073 (1991).

¹⁸⁹ *Id.* at 1074.

¹⁹⁰ This supplies an example of what Professor Smith has described as “regulatory reason” that has slipped into “constitutional sophistry.” SMITH, *supra* note 13, at 84-124. For a more preliminary treatment of the confusion this approach reflects and encourages, see McAfee, *Social Contract Theory*, *supra* note 23, at 281 n.40.

¹⁹¹ One might just as well treat an amendment prohibiting flag-burning as implicitly rejecting the thesis that flag-burning is the exercise of the right of free speech—or at least the rejection of the idea that this particular exercise of speech activity fits into what is appropriately deemed the exercise of an “inalienable” right.

¹⁹² See, e.g., Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent”*, 15 *HARV. J.L. & PUB. POL’Y* 965, 988 (1992) (concluding that “[b]y their own understanding, [the American people] had every right to which [the laws of nature and nature’s God] entitled them, but no right to anything to which those self-same laws did *not* entitle them”).

founders asserted the existence of inalienable rights, they were at least as emphatic that the power of sovereignty is unlimited.¹⁹³ Consequently we can take the Constitution as declaring authoritatively the views of an unlimited sovereign people on the applicability of a particular right, or we can view the people's powers as substantively limited by an "inalienable" right—but we cannot have it both ways.¹⁹⁴ The 1776 Pennsylvania Declaration of Rights said that "all men are born equally free and independent, and have certain natural, inherent, and inalienable rights."¹⁹⁵ The same Declaration stated that "the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal."¹⁹⁶ The founders viewed the Constitution as an exercise in collective self-government. They would also have viewed it as securing the rights the people held and deserved.¹⁹⁷ It would take almost two centuries before accounts would place securing rights even ahead of the

¹⁹³ See, e.g., 2 DOCUMENTARY HISTORY, *supra* note 103, at 362 (James Wilson, Pennsylvania Ratifying Convention, Nov. 24, 1787) (asserting that right of popular sovereignty is the people's inalienable right, of "which no positive institution can ever deprive them"); McAFFEE, *supra* note 25, at 14-15, 134-37. For a modern scholar who has taken such statements as precluding the possibility of a substantive limit on the people's power of amendment, see John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENT. 373, 382 (1985) (concluding that to "empower the courts to void amendments overturning judicial decisions would surely threaten the notion of a government founded on the consent of the governed").

¹⁹⁴ An attempt has been made to find a "middle ground" that does not deny the possibility of an "unconstitutional" amendment, but would limit such a conclusion to amendments utterly "incompatible with the assumed remainder of the Constitution." R. George Wright, *Could a Constitutional Amendment Be Unconstitutional?*, 22 LOY. U. L.J. 741, 764 (1991). But even Professor Wright's conclusion is pointedly offered "without any reliance on natural law." *Id.*

¹⁹⁵ PA. CONST. OF 1776, *reprinted in* 5 STATE CONSTITUTIONS, *supra* note 152, at 3081, 3082.

¹⁹⁶ *Id.*

¹⁹⁷ While the theme of securing personal rights animated the pressure to add a bill of rights to the Constitution, the debate over the inclusion of a listing of rights reflected a recognition that the goal was to strike the right balance between personal rights and government's needs. The purpose was "'to provide for the energy of government on the one hand, and suitable checks on the other, to secure the rights of particular states, and the liberties and properties of the citizens.'" Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 100 (1998) [hereinafter McAfee, *Federal System as Bill of Rights*] (quoting Letter from Roger Sherman & Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 471, 471 (John P. Kaminski & Gaspare J. Saladino eds., 1981)).

people's power to make fundamental decisions about their government.¹⁹⁸

The only way to harmonize the founders' commitment to popular sovereignty and inalienable rights is to fully recognize the institutional implications of one's decision.¹⁹⁹ A decision to render unenumerated rights enforceable at the highest level of generality is a decision to be ruled by judges.²⁰⁰ Even if we pay appropriate lip service to the idea that those who adopted the Constitution had authority to establish fundamental law, this will make little difference if we also find that they delegated effective authority for establishing governing norms to constitutional interpreters—which, of course, in this country means the courts.²⁰¹

The result would not be that we would live our lives protected by natural law. At a practical level, we would live our lives under

¹⁹⁸ See, e.g., McAfee, *Critical Guide*, *supra* note 100, at 93-94 (citing additional sources); Sager, *Ninth Amendment*, *supra* note 97, at 263. Some of this new emphasis on "rights talk" reflects the need to counter what has become a modern inclination to feel and express concerns about various "anti-democratic" features of our constitutional order—including the doctrine of judicial review. *But see* Van Alstyne, *supra* note 181, at 224 (contending there is the need to recognize, and accept, "that the institution of judicial review is anti-democratic").

¹⁹⁹ For documentation of the importance attached to popular sovereignty by the framers, see McAFFEE, *supra* note 25, at 125-27, 172-73, and McAfee, *Substance Above All*, *supra* note 25, at 519 n.56. It is critical, in any event, to recognize that "our choice is not between natural right and majoritarian rule," but "one set of human institutions and another, none of which is infallible." McConnell, *supra* note 74, at 96.

²⁰⁰ As has been frequently noted, the temptation to adopt a view of judicial supremacy, recognizing a power to amend by construction, stems in part from the difficulty involved in amending the Constitution. See, e.g., Brest, *supra* note 14, at 236 (concluding that "the formal process of amendment is too cumbersome to bear sole responsibility for constitutional change"); VILE, *supra* note 176, at 2 (observing that "[t]he difficulty of adopting amendments and the paucity of amendments that have been added to the national Constitution have undoubtedly contributed to the development of other means of peaceful constitutional adaptation"). But this is an area in which a delicate balance must be struck. Nothing would diminish a constitution's capacity to supply legal limitations as quickly as its gaining a reputation for "the relative ease with which it can be altered." Van Alstyne, *supra* note 34, at 181. And nothing may have contributed to the difficulty we now face in passing amendments more than the Supreme Court's own tendency "to spin out additional, mutating 'meanings' from existing clauses to maintain the contemporaneity of the (now unalterable) Constitution." Van Alstyne, *supra* note 181, at 218.

²⁰¹ See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1096 (1981) (finding that normative theories advocated by modern scholars are vulnerable to criticism "based on their indeterminacy, manipulability, and, ultimately, their reliance on judicial value choices that cannot be 'objectively' derived from text, history, consensus, natural rights, or any other source").

judges' views about the requirements of natural law. And yet commentators have noted that in modern cases raising the most challenging political-moral questions—especially those on abortion, homosexuality, and the right to die—the treatment of the core moral questions has been unenlightening at best.²⁰² Moreover, contrary to widely held assumptions, the workload of the Court and its deliberative process confirms that it is an unlikely place to center hopes for meaningful and systematic moral dialogue.²⁰³ We also tend to assume that more rights invariably translates into more freedom, which can only be good.²⁰⁴ But it seems clear that the rights of some may be purchased at the cost of great harm to the community as a whole; government does not typically circumscribe rights solely for its own benefit, but because it believes there is sufficient justification to think the qualification will promote the public good. In short, “[i]t is hardly clear why a collective decision in the past that a right is inalienable must control a current collective decision that it is not inalienable.”²⁰⁵

As Professor Soper has recognized, under a system in which judges feel free to implement natural law, “the system remains positivist in the most significant sense, with the judge simply serving as the sovereign in place of the legislature.”²⁰⁶ Those who framed the Constitution thought that sovereignty rested in the people. Consequently “[d]epartures from the document—amendments—are to come from the People, not from the High Court,” because otherwise “we are left with constitutionalism without the Constitution, popular sovereignty without the People.”²⁰⁷ Even if we see the Constitution’s purpose as being to protect rights, or to “establish justice,” we would be better off in the long run to also recognize the sovereignty of constitution-makers.

The easiest way to harmonize all of this is to read the Ninth Amendment and “inalienable rights” clauses consistently with

²⁰² See, e.g., McConnell, *supra* note 94, at 1536-37.

²⁰³ *Id.* at 1537.

²⁰⁴ See Lino A. Graglia, *Judicial Review, Democracy, and Federalism*, 1991 DET. C. L. REV. 1349, 1350-51 (stating that rights are not “costless benefits,” but serve to create new benefits to some interests while diminishing others; trade-offs “are necessarily involved”).

²⁰⁵ Wright, *supra* note 194, at 746.

²⁰⁶ Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2415 (1992).

²⁰⁷ Amar, *supra* note 46, at 84.

the framers' intentions. The question is not simply whether a right should be understood to be "inalienable," but whether there was sufficiently widespread agreement that it should be secured by the written Constitution as a limitation on government power enforceable by the courts.²⁰⁸ The framers did not equate constitutional and "inalienable" rights and they were able to distinguish moral and legal claims.²⁰⁹

Sooner or later, we will have to decide which is more fundamental—the right to make decisions about government or the right, in some instances, to be free of government. We have to do this sort of thing all the time, making particular decisions without being guided by specific rules that clearly dictate outcomes. For example, courts have been given a firm and final authority to interpret the Constitution, but that does not (in theory, at least) prevent the Senate from determining that a member of the Supreme Court has behaved so abusively in administering his office and interpreting the Constitution that impeachment, conviction, and removal from office is warranted. The possibility of abuse of power did not prevent the founders from contemplating a system of judicial review, but the unlikelihood of serious judicial abuse of power did not keep them from providing for the power to impeach judges if such abuse was forthcoming. The possibility that even impeachment authority might be abused tells us little about whether the framers believed the balance of risks justified their decision to grant it. Similarly, the people of the United States either held constitutional authority to permit the institution of slavery, with all its tragic consequences, or they did not; it would not make any difference whether they recognized that slavery denied inalienable natural rights or rationalized a different view of the institution.

For the founding generation the authority of the people to decide fundamental questions about government, including what rights government officials might not intrude upon, would have

²⁰⁸ Modern theorists who posit overarching moral and political theories in which constitutional rights fit "tend to ignore the character of the Constitution as a series of complex compromises loosely knit, and only precariously held together over time." Laurence H. Tribe, *The Idea of the Constitution, A Metaphor-morphosis*, 37 J. LEGAL EDUC. 170, 172 (1987).

²⁰⁹ For a more complete critique of reliance on the Ninth Amendment as a justification for a general search for inalienable, natural rights, see McAfee, *Substance Above All*, *supra* note 25.

been axiomatic.²¹⁰ “Both the existence of a written constitution and the specification of a supermajority to amend it are indicative of the continuing locus of sovereignty in the people themselves.”²¹¹ Moreover, a “constitution is in its very essence amendable.”²¹² If popular sovereignty is taken seriously, it follows that “[w]hat makes a fundamental law constitutive by this account of the constitutional enterprise also makes it amendable.”²¹³ On this view, “[t]he authority of the constitutional order, and thus its bindingness for all that goes on under it, is vested in the proposition that it could be other than what it is.”²¹⁴ Consequently, “[c]onstitutional amendability is necessary for constitutional interpretability,” given that the “possibility of amendment inescapably implies precisely the boundedness of the constitutional order at any time.”²¹⁵

2. *Advocates of the “Interpretive” Unwritten Constitution*

To the extent that advocates of “interpretive” open-ended constitutionalism accept the historical claims advanced by those who contend that text and history demand that we look beyond constitutional text,²¹⁶ they wind up at the same place as the more historically-oriented unwritten constitutionalists on the matter of popular sovereignty. The tendency in both cases is to pay appropriate lip service to the idea that those who adopted the Constitution had authority to establish fundamental law. But in fact, they delegated effective authority for establishing governing norms to constitutional interpreters—which, of course, in this country means the courts. In theory at least, advocates of the “historical” thesis have suggested that the founding generation drew an important distinction between individual rights, which were subject to analysis as part of the “unwritten” Constitution,

²¹⁰ For a criticism of the modern view that the founding generation would have viewed some rights as beyond the power of the people to amend, see McAFFEE, *supra* note 25, at 19-24, 122-27.

²¹¹ WHITTINGTON, *supra* note 15, at 130.

²¹² WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 178 (1992). An implication is that “Article V cannot be used to make an irrevocable amendment.” Christopher Bryant, *Stopping Time: A Very Different and “Irrevocable” Thirteenth Amendment* 40 (2002) (unpublished manuscript) (on file with author).

²¹³ HARRIS, *supra* note 212, at 164-65.

²¹⁴ *Id.* at 165.

²¹⁵ *Id.*

²¹⁶ See *supra* text accompanying note 45 (citing works by “interpretive” open-ended constitutionalists who appear to accept claims of advocates of unwritten constitutionalism on historical grounds).

and provisions that allocated governmental power.²¹⁷ Depending on the theory one adopted for interpreting provisions allocating governmental power,²¹⁸ you could justify historically a less creative approach.

Among advocates of the “interpretive” unwritten Constitution, there is occasional acknowledgment that “the Constitution originates in an act of deliberate public choice and remains subordinate to that authority”; consequently, it is clear that it “cannot fully embody reason in public affairs.”²¹⁹ That being said, however, advocates of the interpretive unwritten Constitution make it clear that they reject any view that “it is the majority that is the source of rights and other political values, not nature or some authority higher than the majority.”²²⁰ But the assumption of our constitutional order is precisely that “the people” made a decision that certain rights and other political values deserved the security of constitutional protection; if the framers were committed to natural rights and other political values, they were at least as committed to the idea that the decision to give those values the weight of constitutional status was a decision that had to be made by the people as a sovereign whole.

Advocates of the “interpretive” unwritten Constitution thus become constitutional textualists, arguing that generally worded guarantees are properly read as reflecting the assumption of a moral reality that might progressively be understood more adequately. What unwritten constitutionalists seem to forget is that “the founders did not seek to govern us from beyond the graves,” but “to secure for us the right to govern ourselves.”²²¹ Thus “[b]y accepting the authoritativeness of the Constitution, we accept our right to devise a new constitution and incidentally become authors of the old.”²²² What this means in practice is that

²¹⁷ See McAFFEE, *supra* note 25, at 19-20.

²¹⁸ The best evidence we have is that the founding generation saw the project of interpreting the Constitution largely in originalist terms, so that would be the logical place to begin. See, e.g., SMITH, *supra* note 13, at 47 (the founders’ project was “inherently originalist in its basic orientation”); BASSHAM, *supra* note 82, at 70 (“The available evidence indicates quite clearly that while the framers disagreed about which form of originalism judges should adopt, there was general agreement that nonoriginalist modes of adjudication were improper.”).

²¹⁹ BARBER, *supra* note 5, at 64.

²²⁰ *Id.* at 11.

²²¹ WHITTINGTON, *supra* note 15, at 144; see also Richard S. Kay, *Book Review*, 10 CONN. L. REV. 801, 805 (1978).

²²² WHITTINGTON, *supra* note 15, at 144.

there is “agreement among diverse parties with real and separate interests,” and that the agreement reflects the “capacity to compromise and to make trade-offs” far more than an ability to exist “as a single unitary social organism.”²²³

III

THE COMMITMENT TO A CONSTITUTION OF FIXED NORMS

Effective limits on government cannot be subject to unpredictable change. If I request you to behave according to rules 1, 2, and 3 but conceal the content of those rules until you transgress them, I cannot hope to influence your conduct to conform to the model I have in mind. Limited government requires that at a particular point in history the limits are decided upon and remain relatively fixed. At the least, change in the limits must be prospective. It was this idea which caused the founders of the government to insist with such emphasis on a *fixed* constitution as the surest security for liberty.²²⁴

Samuel Adams contended that “vague and uncertain laws, and more especially constitutions, are the very instruments of slavery.”²²⁵

A. *The Founders’ Efforts*

In the period leading to the American Revolution, the colonists “complained that their constitutions were subject ‘to a *perpetual mutability*.’”²²⁶ The framers understood that limited government “presupposes the articulation and preservation of knowable, stable, limiting rules.”²²⁷ One of the founders’ goals in drafting constitutions became the establishment of knowable, and fixed, rules.²²⁸ It is natural that it would, for part of “[t]he concept of a written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize and must

²²³ *Id.* at 149.

²²⁴ Kay, *supra* note 221, at 805.

²²⁵ 3 THE WRITINGS OF SAMUEL ADAMS 262 (Harry Alonzo Cushing ed., 1968).

²²⁶ WHITTINGTON, *supra* note 15, at 237 n.20 (quoting JACK P. GREENE, PERIPHERIES AND CENTER 54 (1986)).

²²⁷ Kay, *supra* note 221, at 805.

²²⁸ See, e.g., *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (concluding that inasmuch as the Constitution “is a written instrument, its meaning does not alter” that “which it meant when adopted it means now”); Kay, *supra* note 30, at 17 (concluding that constitutionalism reflects a judgment “that effective constitutional limits require the promulgation of fixed rules”).

not do what it forbids”; it follows that “[a] *priori*, such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function.”²²⁹

The framers recognized that the goal of preserving political freedom would be furthered by clear rules. In their minds, “[a]ny particular exercise of power is less threatening if it occurs within preexisting known limits.”²³⁰ “[A] constitutionally defined government with extensive granted powers is, in some ways, less dangerous than a weak government whose powers are not defined by prior law.”²³¹ It became commonplace to quote Montesquieu: “Political liberty consists in security, or at least, in the opinion we have of security.”²³²

The founders were aware that an implication of their commitment to knowable, fixed rules would be an inflexibility that might on occasion result in “suboptimal public responses to change.”²³³ With this inflexibility would come greater security. The central purpose of the written constitution was “to reduce uncertainty and create stability,” providing “something tangible to which the judiciary could refer in recalling the legislature to basic principles.”²³⁴ Even though government response to perceived needs might be less flexible, the risk of unpredictable action that threatened freedom would be reduced. A “written constitution, properly construed, serves as a reminder and a barrier, constraining politics within a relatively narrow range of deliberately chosen rights, powers, and institutions.”²³⁵

*B. The Views of Modern Unwritten Constitutionalists on
“Historical” Grounds*

A premise of historically grounded unwritten constitutionalists

²²⁹ WHITTINGTON, *supra* note 15, at 56 (quoting PHILIP KURLAND, *WATERGATE AND THE CONSTITUTION* 7 (1978)).

²³⁰ Kay, *supra* note 30, at 22.

²³¹ *Id.* Professor Kay powerfully observes that:

Our picture of the totalitarian state is associated with the surprise knock on the door that can come on any day at any hour, by the threat of punishment for the violation of standards of conduct that were different or unknown before enforcement, with official behavior that is uncontrolled by any preexisting patterns or restraints. This kind of existence is like a journey, full of dangerous obstacles and risks, undertaken in total darkness.

Id. at 23.

²³² *Id.*

²³³ *Id.* at 24.

²³⁴ WHITTINGTON, *supra* note 15, at 60.

²³⁵ *Id.* at 53.

is that natural law-based individual rights limitations on government power were not conceived to be subjected to the flexibility of positive law constitutional change. The assumption is that such rights are so fundamental as to be inalienable and are therefore beyond the reach of even the sovereign people. Apart from the historical responses to such claims that have already been elaborated,²³⁶ it is theoretically odd that the popular sovereign would lack the authority to amend the Constitution so as to surrender an “inalienable” right, but would have authority to grant federal courts the power to establish or disestablish such rights as enforceable limitations. If Justice Marshall’s claim that judges are bound to enforce the fundamental law of the written Constitution inevitably produced controversy, one can imagine the response to the claim that judges are bound generally to enforce the unwritten law of nature. And if judicial review has generated some controversy from its beginnings, even when the Court is purporting to require compliance with written law, the modern Court’s claim of a right to enforce non-interpretive conclusions about the requirements of nature has yielded a firestorm of controversy.²³⁷

It is critical to realize that “the doctrine of the living constitution is vacuous because there can be no agreement on the guiding principle of the constitutional evolution that the doctrine posits.”²³⁸ As a consequence, we wind up with a theoretical limit on the power even of the sovereign people, in the form of “unalterable” and “inalienable” rights, and yet even these rights are subjected to the prospect of being recognized or not depending on the insight of members of the Supreme Court. This is why the “written constitutionalism of the founding” had “an antievolutionary purpose,” under which every question of government power and individual rights does not become “an open question.”²³⁹

The assumption that individual rights guarantees are part of an unalterable fundamental law, moreover, presumes that the distinction between individual rights guarantees and mere structural

²³⁶ For a criticism of the modern view that the founding generation would have viewed some rights as beyond the power of the people to amend, see MCAFEE, *supra* note 25, at 19-24, 122-27.

²³⁷ For an extremely useful analysis of the modern Court’s efforts at giving effect to the concept of unenumerated fundamental rights as limitations on government power, see SMITH, *supra* note 13.

²³⁸ BELZ, *supra* note 21, at 250.

²³⁹ *Id.*

provisions will be clear and relatively obvious. But this has never been true. Both the Virginia and Massachusetts state constitutions of revolutionary America included provisions requiring separation of powers in their Declarations of Rights.²⁴⁰ And Justice Marshall was almost certainly correct, even though the decision generated some controversy even in its day, in holding on structural grounds that the limitations in the Bill of Rights did not apply to the states.²⁴¹ Modern unwritten constitutionalism falls into the same trap that a good deal of modern constitutional thought has fallen into. As Professor Amar has so eloquently elaborated, it required the modern era for us to arrive at the point where we could hear the claim by a leading scholar that “the assertion that federalism was meant to protect . . . individual constitutional freedoms . . . has no solid historical or logical basis.”²⁴²

Fundamental decisions about personal human rights, as well as questions about governmental authority, including basic questions about the power to balance the needs of the larger community and the claims of individuals, require thoughtful consideration by a constitution’s framers. Either can involve difficult and subtle questions about competing claims and interests as well as a consideration of who is most likely to give them appropriate weight. Imagine finding yourself in the position that judicial freedom to consider underlying policy questions turned on the nature of your constitutional claim. Imagine, for example, making the claim that a President lacked constitutional authority to commit us to war—a challenge by a draftee to the Vietnam War, as an example. A modern “unwritten” constitutionalist on “historical” grounds would have to acknowledge that it was a claim about the allocation of power, not an individual rights claim, even though the evidence shows that the framers were trying to “chain the dog of war”—presumably to avoid needlessly sending Americans to fight and die.²⁴³

Or imagine an individual claiming on federalism-based

²⁴⁰ See McAFFEE, *supra* note 25, at 25 (noting this as “a fact which reflects the framers’ recognition of the connection between governmental structure and the preservation of liberty”).

²⁴¹ See AMAR, *supra* note 105, at 33, 128.

²⁴² JESSE H. CHOPER, *JUDICIAL REVIEW AND THE POLITICAL PROCESS* 244 (1980), *quoted in* AMAR, *supra* note 105, at 129.

²⁴³ See generally FRANCIS WORMUTH & EDWIN FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986).

grounds that Congress lacked the authority to compel service by means of a formal military draft.²⁴⁴ While Sherry does not provide much help on what canons of interpretation she would employ in cases concerning the allocation of government power, the claimant would presumably be limited by the decision embodied in the text of the Constitution.²⁴⁵ On the other hand, one challenging a restriction on their decision about obtaining an abortion would be free to contend that legal restrictions violated their moral rights, quite apart from any decision ever made by the sovereign or embodied in any text. If the Supreme Court ever adopted the unwritten Constitution expressly, it would have quite a job on its hand to explain its freedom in some cases but not in others.

C. *The Views of Modern “Interpretive”
Unwritten Constitutionals*

Based on either the text itself, or occasionally on the development of precedent, some contend that we do simply have an “unwritten” Constitution in the sense that elaborating constitutional law involves the Supreme Court in the process of law creation. A consequence is that “in the writings of prominent constitutional scholars . . . the original Constitution virtually disappears” as the focus is placed on elaborating individual rights principles that are taken as calling for creative construction.²⁴⁶ A question raised is whether there is a remedy to be had in amending the Constitution, or whether there is really such a need.

The need is arguably presented by the willingness of commentators to wrest the founders’ words to move away from a Constitution of fixed meaning. For example, a statement made by Edmund Pendleton has been used to support the unenumerated rights interpretation of the Ninth Amendment. In opposing the proposed Bill of Rights, Pendleton said: “Again is there not danger in the Enumeration of Rights? May we not in the progress of things, discover some great and Important [right], which we don’t now think of?”²⁴⁷ The statement is used to support not only an

²⁴⁴ See, e.g., Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493 (1969).

²⁴⁵ For some help on the underlying constitutional issues, see McAfee, *Constitutional Interpretation*, *supra* note 70, at 288 & n.79, and McAfee, *Indeterminacy*, *supra* note 14, at 432-34.

²⁴⁶ SMITH, *supra* note 13, at 53.

²⁴⁷ Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), *re-*

unenumerated rights interpretation of the Ninth Amendment, but to support the idea that the protected rights might legitimately evolve over time. But the statement is taken out of context.

In fact, Pendleton first asserts that the peoples' rights are best protected on "the Broad and sure ground of this Principle—that the people being Established in the Grant itself as the Fountain of Power, retain every thing which is not granted."²⁴⁸ Then, after raising the concern that important rights might not be included in the proposed Bill of Rights, he observes that "[t]here the principle may be turned upon Us, and what is not reserved, said to be granted: If therefore Gentlemen think something should be done, it would seem to me more proper to do as Massachusetts proposes—Declare the Principle—as more safe than the Enumeration [of rights]."²⁴⁹ His point is clearly that a listing of rights jeopardizes the basic theory of the Federal Constitution, based on the scheme of protection of rights through limited and enumerated powers, and not that a listing of rights might generate rigid positivism in construing the Constitution.

The net result is that we now have a Constitution that continues to be construed by the Supreme Court as issuing it a general power to determine whether governmental entities have crossed some open-ended line and violated the moral rights of citizens. The "good news," if you want to call it that, is that the Court has shown a moderate amount of self-restraint in determining when that line has been crossed.²⁵⁰ In addition, it is fair to say that the Court has not been subjected to a careful scrutinizing on the underlying issue inasmuch as most of its misunderstanding has been promoted by individuals who are among our most thoughtful legal scholars.²⁵¹ If the Court has erred, it has made mistakes that have been with us almost from the beginning, and we ought to be sympathetic with the view that the Court "should not be held to

printed in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 530, 532-33 (David John Mays ed., 1967).

²⁴⁸ *Id.* at 532.

²⁴⁹ *Id.* at 533.

²⁵⁰ See, e.g., *supra* notes 117-23 and accompanying text.

²⁵¹ BELZ, *supra* note 21, at 239 (stating that "[i]n American law schools there seems to be an inexhaustible supply of partisans of judicial governance"). What is striking, however, is that most of the views expressed are "systematically opposed to popular self-government," notwithstanding that popular sovereignty is one of the underpinnings of our constitutional order. *Id.* at 240.

an excessive standard of certainty.”²⁵²

Even though the “adoption of a written constitution can be understood as establishing a fixed rule that does not change over time except through written amendment and a fundamental law capable of providing judicial instruction,”²⁵³ the interpretive process is bound to be a human one that will not automatically yield correct results. The need for constitutional amendment, or other strong responses, would require a just conclusion that the courts are so strongly predisposed to an unwritten Constitution that they will not listen to effective argument making the case that it cannot be reconciled with the Constitution as an exercise in meaningful self-government. But if anything is clear, it is that “[t]here is no war between text and intent, and one may quite comfortably be a ‘textualist’ who is seeking the text’s originally intended meaning by examining the text in a relevant context.”²⁵⁴ The main point “is to keep the balance true: we want to implement the will of the people acting through their agents, but it is only the will they embody in the written Constitution that is authoritative.”²⁵⁵

CONCLUSION

Our goal is not to have members of the Supreme Court “simply look to what they or their predecessors have declared fundamental in self-absorbed opinions” but to embrace “a more attractive and document-supported approach.”²⁵⁶ When it is all said and done, those who advocate a fairly traditional view of what it means to interpret the Constitution are simply asking courts to remember that “the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.”²⁵⁷

²⁵² WHITTINGTON, *supra* note 15, at 61.

²⁵³ *Id.*

²⁵⁴ McAfee, *Reed Dickerson’s Originalism*, *supra* note 14, at 644.

²⁵⁵ *Id.*

²⁵⁶ Amar, *supra* note 46, at 124.

²⁵⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

