The Aspirational Constitution

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I. Introduction

Prima facie, a constitution burdens rather than benefits future generations by limiting their political freedom to choose policies that, in their judgment, best serve their interests. Accordingly, Thomas Jefferson thought that all laws ought to sunset with each generation,[1] and even constitutionalists with less radically democratic views worry about the dead hand problem.[2] To be sure, to the extent that a constitution simply establishes ground rules for social cooperation—by, for example, setting the terms of office for various elected officials—the benefits it confers can readily justify the costs it imposes. However, constitutions in general—and the American Constitution in particular—contain language that goes much further by, among other things, enshrining rights.

What justifies constitution writers in including rights in constitutional provisions that are difficult to amend? One standard answer, expressed with typical piquancy by Justice Scalia, is the fear that, over time, societies may "rot."[3] In this view, the prudent constitution writer entrenches society's best true values against subsequent decline.

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1 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 5 THE WRITINGS OF THOMAS JEFFERSON, 1788–1792, at 121 (G.P. Putnam & Sons ed., 1895) ("Every constitution then, and every law, naturally expires at the end of 19 years," a period during which, according to actuarial tables of the day, half the population turns over.).

2 *See, e.g.*, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1045–49 (1984) (grappling with "the intertemporal difficulty" posed by constitutionalism).

3 Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40–41 (Amy Gutmann ed., 1997).

The antibacksliding conception of constitutional rights is widespread, and not just among conservatives like Justice Scalia. Consider how liberals speak of the "Great Writ" of habeas corpus,[4] or of the right to freedom of speech.[5] These guarantees, they say, were included in the Constitution precisely to prevent backsliding.

Yet the antibacksliding justification for constitutional rights is problematic because rot is in the eye of the beholder. Many of the values and practices we in the twenty-first century cherish might well have been understood as decadent or worse by our forebears who adopted and amended the Constitution. What entitles one generation of Americans to entrench against simple majoritarian change those values and practices it deems fundamental, but that a later generation may find unnecessary or affirmatively retrograde?

The conventional answer is that majoritarian passions periodically flare, and when they do, democracy can devolve into mob rule, potentially paving the way for lasting tyranny. Constitutional rights, and indeed many other constitutional provisions, prevent the worst abuses in these dangerous periods. Accordingly, in times of commitment to society's fundamental values, great patriots entrench the society's timeless values in constitutional provisions that will be useful when the commitments inevitably waver.

In this account, constitutional rights are indeed a gift that one generation bestows on future generations, rather than a curse: those who entrenched constitutional rights were protecting us from ourselves. We need not worry about the subjectivity of rot, according to this story, because the rigorous supermajoritarian process required for

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4 *See* Boumediene v. Bush, 128 S. Ct. 2229, 2244 (2008). Justice Kennedy wrote for the Court, stating:

> The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

Id. Those readers who object that Justice Kennedy is not a liberal should feel free to look instead to the similar argument in Justice Brennan's opinion for the Court in *Fay v. Noia*, 372 U.S. 391, 402 (1963) ("Of course standards of due process have evolved over the centuries. But the nature and purpose of habeas corpus have remained remarkably constant.").

5 *See* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

the adoption or amendment of constitutional provisions ensures that only society's deepest commitments make their way into the Constitution.

This is a nice story, but is it true? Not necessarily. Although the United States has not (yet) devolved into permanent tyranny, our constitutional rights have not prevented excesses when passions flared. For example, as Geoffrey Stone notes, in each of the six periods when fear bred repressive impulses, "the United States went too far in sacrificing civil liberties."[6] However, even if we assume that constitutional rights have tamped down the worst abuses, this hardly shows that the prevention of backsliding is the only purpose, or even the main purpose, of constitutional rights.

This Article questions the view that constitutional rights generally entrench deep values against future backsliding. Constitutional rights sometimes work that way, but, in important respects, the American experience has been quite different. Constitutional rights are typically established as the culmination of a struggle to change the status quo, rather than to enshrine well-accepted fundamental values.[7] For example, the Nineteenth Amendment, which granted women the right to vote, did not take a preexisting shared norm of sex equality and entrench it against later backsliding. Rather, it changed a norm of patriarchy[8] and was so successful that it has arguably become unnecessary.

The antibacksliding account of constitutional rights is incomplete in another respect. Sometimes the enshrinement of constitutional rights succeeds almost immediately, but rights (and other constitutional provisions) can also lay dormant for decades, until a later generation discovers them. Perhaps our most cherished constitutional principles—those enshrined in the First and Fourteenth Amendments—fall into this latter category.[9] Such constitutional provisions may be best understood, at least in retrospect, as aspirations for future change, rather than as a hedge against such change.

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6 GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 13 (2004) (listing the near-war with France in 1790, the Civil War, World War I, World War II, the Cold War, and the Vietnam War as the six periods).

7 To put the point slightly differently, the U.S. Constitution "has transformative elements" along with "preservative" elements. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 68 (2001).

8 *See infra* Part III.B.

9 *See, e.g.*, West Virginia v. Barnette, 319 U.S. 624 (1943) (protecting symbolic speech); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding a right to marital privacy in the "penumbras" and "emanations" of specific provisions of the Bill of Rights, made applicable to the states via the Fourteenth Amendment).

To be clear, I am not saying that no portion of the Constitution can be understood as serving an antibacksliding function. Some constitutional provisions may in fact work that way, or at least that may be part of what some constitutional provisions do. Given the prominent role that change-oriented and aspirational constitutional provisions have played and are likely to continue to play, however, we need to supplement the antibacksliding view with another justification if we are to answer the charge that constitutionalism merely handcuffs the future to serve the past.

What, then, justifies one generation in entrenching its aspirations for change in constitutional language, rather than authorizing simple majoritarian processes? Acknowledging the possibility that the right answer may be "nothing"—i.e., the possibility that constitutionalism, as practiced in the United States and other roughly democratic polities, may be inconsistent with the demands of the best theory of political morality—this Article sketches a justification for the practice of "aspirational constitutionalism."

In a nutshell, this Article argues that aspirational constitutional rights do not burden later generations with the values of earlier generations because the values only become realized if the later generation decides to make them its own. Thus, for example, the Reconstruction Amendments started to become a reality in the 1950s and 1960s because American society by that time had begun to value racial equality. If we think of an aspirational constitutional provision as a kind of message in a bottle from the past, we need not worry about the dead hand problem because we are the ones who decide whether to break open the bottle and live by its message. Indeed, to a large extent, we are also the ones who say what that message is.

Supplementing the antibacksliding view of constitutional rights with the aspirational view has jurisprudential consequences. Antibacksliding leads rather naturally to originalism in constitutional interpretation.[10] If you think a constitutional provision is meant to prevent society from falling below a certain minimum threshold, then you will want to look to the time of adoption to ascertain where that threshold lies.

By contrast, original meaning is less relevant in interpreting aspirational constitutional provisions for two reasons. First, as an aspiration, the goals of the authors of the relevant constitutional text often

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10 *See* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw. U. L. Rev. 383, 385 (2007).

will not have been realized at the time of its adoption. Second, and more fundamentally, even where it is relatively easy to identify what the framers and ratifiers of the text regarded as the evils at which the text aimed, those evils may not be the same as the ones that the later generation, deciding to make the provision effective, regards as the text's principal targets. In other words, if the real "authors" of an aspirational constitutional provision are the members of the later generation that make it their own, then the relevant meaning of the provision's text is the latter-day meaning, not the original meaning of those who adopted it as an aspiration. Thus, if originalism fits well with the antibacksliding view of constitutional rights, the interpretive method associated with a "living Constitution"[11] is a better fit for aspirational provisions.[12]

Aspirational rights are still not out of the woods, however, for if the decision to live by the past's message in a bottle is taken in the present, the effect of that decision will be felt in the future as well. Time 1 does no offense to Time 2 when Time 1 writes a provision by which Time 2 decides to live. But in doing so, Time 2 binds the still-later generation of Time 3, who are now saddled with Time 2's constitutional understandings that Time 3 cannot undo by simple majoritarian processes.

To put the point in a concrete example, the American people circa 1868 did not make most abortions legal; that decision was made in 1973 when the Supreme Court decided *Roe v. Wade*.[13] For Americans living in 1973, *Roe*, whether correct or not, was legitimate under the theory of living constitutionalism that this Article expounds. But

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11 *See, e.g.*, Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1463 (2001) ("Living constitutionalism" posits that "fidelity to original constitutional principles means that their scope of application must evolve with the underlying changes in society.").

12 Throughout this Article, I take for granted that views about the justification for constitutional provisions at least have the potential to inform views about their proper interpretation. However, when I say that the antibacksliding view leads naturally to originalism, I do not mean that it *necessarily* leads to originalism. More broadly, I do not contend that a theory of constitutional legitimacy logically entails any particular theory of interpretation, but only that "certain authority theories are sometimes relevant to interpretive method." Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 636 (2008). That said, the arguments for connecting antibacksliding to originalism, and for connecting aspirational provisions to living constitutionalism, are sufficiently strong that I am prepared to say that here we have circumstances in which authority theory is relevant to interpretive method. Relevance, to be sure, is not necessarily dispositive relevance. Thus, even for antibacksliding provisions, other considerations might lead us to conclude that, all things considered, originalism is not appropriate, or not appropriate in some contexts.

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

suppose now that a solid majority of Americans circa 2009 think that abortion should be illegal, or think that states should have the power to make it illegal. What justified Americans (through their Supreme Court) in 1973 in effectively amending the Constitution, thus making it very difficult for later Americans to outlaw abortion? This Article gives at least three answers to this question.

First, although countermajoritarian rights cannot be justified on the assumption that people who came earlier had better values than those who came later, they can potentially be justified on the ground that, at all times, majoritarian politics undervalues rights. John Hart Ely's notion of representation-reinforcement offers one familiar explanation of how that systemic failure can justify a limited form of judicial review.[14]

Richard Fallon's recent defense of judicial review—which treats the courts as roughly akin to a third legislative chamber—provides a second account.[15] This defense of judicial review is, very broadly speaking, libertarian. It assumes that, at least in some areas, the risks of overregulation are greater than the risks of underregulation. In the United States (although not in all countries), judicial review empowers judges to strike down but not to adopt regulations, and thus tilts the playing field against regulation.

A third answer questions the premise of the inquiry by explaining that stare decisis has not traditionally played a substantial role in constitutional law: the Supreme Court typically overturns those precedents it deems very much out of step with contemporary conditions or sentiments.[16]

Taken together, the foregoing arguments provide a plausible justification for our existing constitutional practice. This Article, however, is less concerned with justifying the practice than with illuminating it. Whether or not constitutional rights, or the particular constitutional rights that the American courts enforce, can be justified, we would do well to understand what they are and what they do. So long as we labor under the illusion that the exclusive function of constitutional rights is to prevent backsliding, we will be unable to

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14 *See infra* Parts II, V.

15 *See infra* Part V.

16 A fourth answer (which I shall not explore further in the body of this Article in light of my third answer) would treat stare decisis in constitutional law as a form of structural provision that makes up in stability what it sacrifices in majority rule. In this view, adhering to the constitutional decisions of past generations on questions of rights is not different in kind from adhering to past generations' decisions on matters of governance.

evaluate arguments about what rights we should have and how we should interpret the rights we do have.

The balance of this Article proceeds in four parts. Part II explains why constitutionalism poses a prima facie threat to future generations, why structural provisions can nonetheless be normatively justified, and why the antibacksliding justification for constitutional rights is at least plausible in some contexts.

Part III describes the limits of the antibacksliding justification. Focusing on three episodes in the American experience, it shows how the proponents of new constitutions and constitutional amendments typically aspire to reform the legal status quo, not entrench it, even if they use entrenchment as the chief mechanism of reform. Part III also explains how constitutional provisions often have an aspirational dimension and that the reforms they aim to achieve may not come to pass for generations.

Part IV offers a tentative normative defense of aspirational constitutionalism. It explains why aspirational constitutionalism does not simply involve an earlier generation imposing its normative views on a later one. This Part also develops an account of the Supreme Court as roughly reflecting contemporary attitudes and values at any given time.

Part V turns to jurisprudence. It explains that a shift from the antibacksliding account of constitutional rights to the aspirational account entails a shift from originalism to some form of living constitutionalism and a corresponding shift in the burden of justification. Instead of overcoming the dead hand problem, judicial enforcement of aspirational rights must overcome—or at least grapple with—the countermajoritarian difficulty.

This Article concludes by locating these observations within a growing body of academic literature that maps the appropriate respective domains of originalist and nonoriginalist methodology.

II. The Prima Facie Threat

Why would people who themselves believe in democracy bequeath to their descendants a constitution that limits future generations' ability to act on the basis of simple majority rule? One reason is to facilitate democracy itself by providing a stable structure within which it can operate. Clear and difficult-to-amend rules about such matters as whether to have a parliamentary or presidential system (or something in between), whether to have a unitary or federalist system (or something in between), how legislative and executive officials are

chosen and the length of terms of office, and the voting rules in the legislature, are not simply impediments to majority rule. Rather, they constitute the government, and if they work well, they benefit future generations by creating a useful, stable framework within which to debate, fashion, and implement policy.

All reasonably complex systems of governance need ground rules. To be sure, it is possible to make the ground rules themselves amendable by simple majority vote, as in England under the traditional view that the Queen in Parliament can make any law.[17] However, even the English system is conventionally said to operate under an "unwritten constitution," a set of quite stable rules that, while changeable in principle by a simple majority vote in Parliament, have acquired a more fundamental status.[18] To the extent that a customary norm inhibits legislators from changing the unwritten constitution except in the most extraordinary circumstances, an unwritten constitution in a system of de jure parliamentary supremacy may be understood as entrenched de facto. But even in a system with a formally entrenched written constitution, entrenchment need not be understood as simply a limit on the freedom of action of those who operate under it. Just as a corporate charter opens up possibilities to a business enterprise even as it limits the freedom of corporate managers to act—by, for example, imposing on them fiduciary duties to shareholders[19]—so too we may regard a constitution as, on net, possibility opening rather than possibility foreclosing.

The point is not simply that constitutional entrenchment increases welfare. We could imagine an entrenched constitution that conferred absolute power on a very wise queen and her very wise descendants. From the standpoint of utility, this monarchical constitution could be seen as a gift to, rather than a curse upon, future generations, if it turned out that the royal line made better policy than the people's representatives would if left to their own devices. In that

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17 *See* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39–40 (10th ed., Macmillan 1961, reprinted 1965) (1885) ("[T]he Queen, the House of Lords, and the House of Commons . . . acting together [can] be . . . described as the 'Queen in Parliament,' and constitute Parliament . . . [;] Parliament thus defined has . . . the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.").

18 F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1723–1828, at 68 (1994).

19 *See, e.g.*, John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1635 (1989).

case, however, the monarchical constitution would be a gift because democracy itself would be a curse.

The argument from stability, by contrast, is consistent with democratic premises. Entrenching rules about electoral districts or terms of office is useful precisely because it facilitates democratic self-rule. It saves time by freeing succeeding generations to debate substantive policy questions rather than having to constantly fight over ground rules. Entrenched structural rules also can preserve democracy against prospective tyrants. A system of government in which the elected head of the government's term is not fixed—and in which there are no clear rules governing who, if anybody, can call an election—is a system that could readily devolve into dictatorship.

That is not to say, of course, that all entrenched structural provisions enhance democracy. Some obviously do not. The Senate is the clearest example in the United States.[20] It deviates wildly from the principle of one-person-one-vote, giving California and Wyoming the same number of Senators despite a population ratio of over seventy to one.[21] Further, the irrelevance of population to Senate representation is not merely entrenched in the Constitution in the sense that it would require an amendment to change it; the Senate is effectively permanently entrenched, because Article V forbids depriving any state of its equal suffrage in the Senate without its consent.

We might nonetheless regard the structural provisions of the Constitution as, on net, a democratic boon if we thought that without the Senate the Union would not have been achieved. How to tally up the costs and benefits of the Constitution we have, relative to what we would have had in the counterfactual world in which the 1787 Convention failed, depends on rank speculation. Maybe the U.S. Constitution is as democratic as it could possibly have been, although even if we were to accept this Panglossian conclusion, that would not render the Senate itself democracy-enhancing. In any event, my goal here is not to demonstrate the democracy-enhancing nature of any particular provision of the U.S. Constitution, the Constitution as a whole, or any specific constitution. I mean only to explain how it is possible that the structural provisions of a well-crafted constitution could enhance de-

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20 *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 50–51 (2006).

21 U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/index.html (find "State" in drop-down menu, then click "Go") (last visited June 18, 2009) (listing, *inter alia*, 2006 estimates of the populations of California and Wyoming).

mocracy precisely by limiting the political freedom of those who live under it.

Just as entrenched structural constitutional provisions can be defended as democracy-enhancing, constitutional rights can also be defended on the same grounds. Most famously, John Hart Ely argued for a "representation reinforcing" view of judicial review, in which provisions like the First Amendment's protection for freedom of speech and the press, as well as the application of the Equal Protection Clause to establish the one-person-one-vote principle, facilitate rather than impede democracy.[22] Such provisions and doctrines set fair ground rules for the process of democratic participation rather than policing the outputs of democracy, and so can be readily fit into the structural template.

One can quibble with the characterization of Ely's approved method as "process theory." Certainly one key component of it—heightened judicial scrutiny of laws that discriminate against racial minorities—was focused on outputs of the democratic process, rather than inputs (albeit because of what Ely saw as a flaw in the process itself). I shall return to Ely's account below, but for now, let us simply concede to Ely and his followers that many constitutional rights and doctrines interpreting constitutional rights can be understood as democracy-enhancing in the way that structural provisions can be. Still, some constitutional rights have a more directly substantive character.

Take for example, the Eighth Amendment's ban on "cruel and unusual punishments."[23] This is quite plainly a limit on the outputs of the democratic process.[24] The same is true of the Second Amendment, now officially understood to be a limit on legislative efforts to restrict firearms possession.[25] The point is even clearer in foreign constitutions, which frequently provide express protection to such substantive values as privacy[26] and dignity.[27] Ely thought that substantive

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22 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

23 U.S. CONST. amend. VIII.

24 For his part, Ely gamely attempts to characterize the Eighth Amendment as a manifestation of the principle of equal protection, because the people who impose punishment and those who suffer it tend to come from different social and economic classes. *See* ELY, *supra* note 22, at 97, 173–76.

25 *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008) ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.").

26 *See, e.g.*, A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 59 (Hung.); S. AFR. CONST. 1996 art. 14; C.E. art. 18 (Spain).

values generally do not belong in constitutions,[28] but constitution writers around the world and, I would argue, here at home,[29] have tended to disagree. We can perhaps stretch our notions of democracy to characterize some borderline cases—such as protection of trial by jury—as establishing a framework for democracy. But, to accommodate all of the substantive work that bills of rights commonly do, we need to supplement our structural argument with a different justification for constitutional rights, or else concede that entrenched substantive rights simply constrain future generations.

The entrenchment of some substantive rights could be justified on the ground that they induce beneficial reliance. Especially in the developing world, but even in the developed world, investors want guarantees against confiscation of their property as a condition of their investment. By entrenching provisions like the Takings Clause of the Fifth Amendment—as well as the protections of the rule of law more broadly—constitution writers and amenders ensure investors that the winds of political fortune will not blow away their investments.

But even setting aside Ely-style rights of political participation and protection for property rights, we still need a justification for the entrenchment of other substantive rights, such as those protected by the Second and Eighth Amendments. That is where, according to conventional wisdom, the antibacksliding justification fits in. It asserts that democracy is vulnerable to devolution into mob rule, which can then give way to tyranny. To prevent such backsliding in times of crisis, wise statesmen and stateswomen frame constitutions with structural mechanisms to prevent mob rule, and with rights provisions to be employed by the judiciary to check the worst excesses of the mob mentality. Put more poetically by James Madison in Federalist No. 51, the argument goes as follows:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige

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27 *See, e.g.*, A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 54 (Hung.); S. AFR. CONST. 1996 art. 10; C.E. art. 10 (Spain).

28 *See* ELY, *supra* note 22, at 98–101.

29 *See, e.g.*, Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 15 (2001) (observing that the U.S. Constitution embeds and embodies substantive values).

> it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[30]

Note that when Madison penned these words, the "auxiliary precautions" he had in mind were nearly all structural ones, principally involving the breaking up of power among different levels and branches of government.[31] Bills of rights, he and many other Framers originally thought, were mere "parchment barriers."[32] However, Madison was eventually persuaded—or at least forced to act upon the view—that a bill of rights could usefully supplement structural barriers.[33] Indeed, we might even classify judicial review as itself just another structural obstacle to mob rule. Those who would infringe liberty in times of crisis (or at any time) must reckon not only with the cumbersome lawmaking process of Article I, but also with the possibility of judicial invalidation of their handiwork.

But if the practice of judicial review can be justified as a structural protection against tyranny, what justifies the constitution-writing generation or the constitution-amending generation in deciding which substantive values to protect against backsliding? Why should an earlier generation have the power to decide that changes deemed desirable by a later generation constitute rot rather than progress?

To make the matter concrete, consider a hypothetical example based on the Fourth Amendment. Although the language of the Fourth Amendment does not literally require the government to obtain a warrant before performing a search, it has been read by the Supreme Court to so require, subject to a rather large number of exceptions.[34] To simplify, though, let us suppose that the Fourth Amendment stated, in so many words, that government officials may not search or seize a person, his home, or his property unless a neutral magistrate has found that there is at least a one-in-four chance that the search or seizure will yield evidence of crime. (The one-in-four figure is arbitrary, so feel free to substitute different odds.) Now suppose that several hundred years after the adoption of the Fourth Amendment, a new and deadly brand of criminal arises. To combat

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30 THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

31 *See id.* at 319–20.

32 THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS 330, 332 (1996).

33 *See* RAKOVE, *supra* note 32, at 333–34.

34 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (holding that "school officials need not obtain a warrant before searching a student who is under their authority."); Hester v. United States, 265 U.S. 57, 58–59 (1924) (establishing the "open fields" exception).

the new criminals, the people want to give the police the power to conduct searches and seizures if there is even a one-in-ten chance that the search or seizure will yield evidence of crime. Is there any good reason to think that the framing generation's selection of a one-in-four threshold should trump the later generation's conclusion that changed circumstances and, perhaps, a changed valuation of the relative importance of privacy and security, justify a lower threshold?

The answer, according to the antibacksliding view, is "maybe." With respect to some kinds of issues, an astute observer of history will note, human beings tend to lose sight of their most fundamental values for relatively brief periods. In this account, a bill of rights functions much like the command of Ulysses to his soldiers to bind him to the mast so that he does not yield to the Sirens' song.[35] Ulysses at Time 1 fears that Ulysses at Time 2 will make a rash decision to the detriment and regret of Ulysses thereafter.

The factual assumptions underlying this conception of constitutional rights operating as a kind of "Ulysses contract" seem correct, at least broadly speaking and for some rights. If we focus on freedom of speech, for example, we see that Americans' faith in that principle has wavered repeatedly, with wartime passions the main cause.[36] One could reasonably conclude that this pattern of repression-followed-by-regret justifies far-sighted constitution writers and amenders in entrenching just those rights that society is likely, from time to time, to sacrifice to its later regret.

To be sure, knowing just which rights fit this pattern is no small task, even with a substantial track record. It may well be true that prior sacrifices of the freedom of the press and free speech were, in retrospect, overreactions, but that does not necessarily mean that all such future sacrifices would be overreactions. To use another example, many commentators—including those with civil libertarian bona fides—suggested after the terrorist attacks of September 11, 2001, that the potentially existential threat posed by terrorists armed with weap-

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35 *See* HOMER, THE ODYSSEY 276 (Robert Fagles trans., Penguin Books 1996) ("I told my shipmates, . . . 'I alone was to hear [the Sirens'] voices, . . . / but you must bind me with tight chafing ropes / so I cannot move a muscle, bound to the spot, / erect at the mast-block, lashed by ropes to the mast. / And if I plead, commanding you to set me free, / then lash me faster, rope on pressing rope.'"); *see also* JON ELSTER, ULYSESS UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–174 (2000) (using this metaphor for constitutional commitment).

36 *See* STONE, *supra* note 6, at 12–13 (citing restrictions during the near-war with France in the 1790s, the Civil War, World War I and the first red scare that followed it, World War II, the Cold War, and the Vietnam War).

ons of mass destruction might warrant a departure from the time-tested formula "better ten guilty go free than one innocent be unjustly convicted."[37] In general, constitutional provisions enshrining some particular notion of fairness or liberty based on past experience assume that, in relevant respects, the future will be like the past. Sometimes it will not be.

Still, a constitution writer or constitution amender need not be right all the time. If there is some mechanism for ensuring that, more often than not, constitutional rights protect just those interests that societies under pressure tend to devalue to their later regret, then the founding or amending generation can take comfort in knowing that its handiwork truly does benefit posterity. And it can plausibly be argued that a rigorous supermajoritarian process for constitutional adoption and amendment is just the right mechanism. It ensures that only the society's deepest, most important, values work their way into constitutional rights, where they remain as a hedge against the times when people temporarily lose sight of them.

That, at any rate, is the antibacksliding theory. Yet, as the next Part argues, this justification, even if valid, at most accounts for only some constitutional rights.

III. Not Rot, but Change

The antibacksliding view of constitutional rights casts writers and amenders of constitutions as far-sighted statesmen and stateswomen, looking to protect their posterity against the periodic excesses of democracy. That they may well be, at least sometimes, but given the social movements and political capital it typically takes to affect constitutional change, it would be surprising if those who sought constitutional change were not primarily concerned about their present circumstances. Moreover, the concern of those who seek constitutional change is usually, well, *change*. Even if some movements seek to change existing constitutional arrangements so as to entrench an already-existing status quo, surely most aim to change existing legal arrangements and to entrench the change. That certainly was the goal of the original Constitution as a whole, which dramatically altered the status quo ante under the Articles of Confederation, and, as this Part

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37 *See, e.g.*, Pam Belluck, *A Nation Challenged: Civil Liberties; Hue and Murmur over Curbed Rights*, N.Y. TIMES, Nov. 17, 2001, at B8 (quoting the present author, who stated that "[t]he traditional way we balance these things is with the maxim, 'It's better that 10 guilty men go free than one innocent man be in jail.' I think people are a little nervous about applying that maxim where the 10 guilty men who are going to go free could have biological weapons.").

argues, changing the status quo was the goal of most subsequent constitutional amendments protecting individual rights.

Consider three leading American examples, which I shall take in reverse chronological order: the Nineteenth Amendment, the Reconstruction Amendments, and the Bill of Rights. Each of these momentous constitutional changes was focused, in significant measure, on changing the legal status quo, rather than, or in addition to, entrenching the status quo against future backsliding.

A. The Nineteenth Amendment

The ratification of the Nineteenth Amendment in 1920 was the culmination of a movement for women's suffrage dating back to the middle of the nineteenth century.[38] However, this was no mere effort to protect against future retrenchment. Immediately prior to the adoption of the Nineteenth Amendment, women lacked full voting rights in a majority of states.[39] The point of the Nineteenth Amendment was to *give* women the vote, not to ensure that it not be taken away in a future crisis, although, of course, that is a consequence of its constitutional entrenchment.

The aspects of the Nineteenth Amendment that affect future generations are quite minor in comparison with the change it accomplished immediately. Consider a thought experiment. Suppose that women's suffrage had been accomplished through state-by-state reform, just as state-by-state reform led to the abolition of property qualifications for voting. If the franchise had been extended to women in this way, the Constitution would now contain no express prohibition on sex discrimination in voting, just as it contains no express prohibition on property qualifications for voting.[40] Let us also put aside the possibility of interpreting equal protection (or, in the case of the federal government, due process) to cover the same ground as the actual Nineteenth Amendment. Suppose further, however, that ex-

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38 *See* Elizabeth Cady Stanton, Declaration of Sentiments and Resolutions, Seneca Falls (July 19, 1848), *in* FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 76, 77–79 (Miriam Schneir ed., 1972) ("He has never permitted her to exercise her inalienable right to the elective franchise."); *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951 (2002) ("Women began seeking the right to vote under the federal Constitution during the drafting of the Fourteenth Amendment but did not secure recognition of this right until ratification of the Nineteenth Amendment over a half century later.").

39 *See* Holly J. McCammon et al., *How Movements Win: Gendered Opportunity Structures and U.S. Women's Suffrage Movements, 1866 to 1919*, 66 AM. SOCIOL. REV. 49, 49 (2001).

40 The Twenty-Fourth Amendment, adopted in 1964, forbids poll taxes but does not speak to property qualifications. U.S. CONST. amend. XXIV, § 1.

cept for these counterfactual hypotheses, American history since 1920 had unfolded more or less in the same way that it did in our actual world. Now ask what would happen if a state or even a small village were to propose restricting the franchise to men. Surely the proposal would go nowhere, and anyone supporting it would pay a steep political price. In 2009, the Nineteenth Amendment is wholly superfluous in guaranteeing women the right to vote.

That is not to say that the Nineteenth Amendment is superfluous in all respects. Although the text of the amendment focused narrowly on voting, at the time of its proposal and ratification it was widely believed by supporters and opponents alike that legal change regarding who could vote would usher in change in the social relations between men and women.[41] Today, the Nineteenth Amendment's principal import—indeed its only practical import—may well be as a textual marker for the proposition that sex-based classifications are constitutionally problematic.[42]

The antibacksliding view of constitutional rights cannot account for provisions adopted with the goal of affecting immediate legal change because the antibacksliding view posits that constitutional rights entrench values about which there is deep, longstanding consensus but which may be vulnerable in times of crisis. The antibacksliding view also cannot account for constitutional provisions that, like the Nineteenth Amendment, come to have continuing relevance primarily through reinterpretation. Whatever historical credit we owe early twentieth century suffragists for inspiring the women's movement of the 1970s, it was the acts of participants in the latter movement that precipitated the reinterpretation of the Fourteenth Amendment through the lens of the Nineteenth. To put the point starkly, Ruth Bader Ginsburg (as legal advocate) and Justice William Brennan (as author of the plurality opinion in *Frontiero v. Richardson*[43]), rather than Congressman John Bingham, are the real framers of the constitutional right to sex equality, even though Ginsburg and Brennan used the constitutional provision that Bingham sponsored. Likewise, the Americans who more or less accepted at least formal equality of the

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41 *See* Siegel, *supra* note 38, at 951 (arguing that the framers and opponents of the Nineteenth Amendment viewed the question of women's suffrage as having broad implications for social relations between men and women).

42 *See* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 979 (2002) ("[T]he Constitution's commitments to equality in voting are tied up with and implement its commitment to equality in general.").

43 Frontiero v. Richardson, 411 U.S. 677 (1973).

sexes in the 1970s and 1980s, rather than the Americans who voted for their state legislators in the 1860s, are its real ratifiers.

B. Reconstruction and the Fourteenth Amendment

We see the same pattern with respect to the Fourteenth Amendment proper. Its principal immediate object was to ensure that Congress would have sufficient authority to enact civil rights legislation, in particular, the 1866 Civil Rights Act, which had been passed over the veto of President Johnson. Johnson's veto message asserted the Act's unconstitutionality,[44] and given the composition of the Supreme Court at the time, there was reason to believe that, absent the new authority conferred by Section Five, the Justices would invalidate the Act. To be sure, Reconstruction Republicans were also concerned that the recently freed slaves or their descendants would, at some future time, be subject to discrimination, and thus Section One of the Fourteenth Amendment is a self-executing guarantee that entrenches against future backsliding much of the substance of the 1866 Civil Rights Act.[45] Still, the immediate goal of the Fourteenth Amendment was the displacement of the Black Codes *then in force*.

Unlike the Nineteenth Amendment two generations later, the Reconstruction Amendments were relatively unsuccessful in achieving their immediate object. After federal troops were withdrawn from the states of the former Confederacy as part of the settlement of the contested election of 1876, Jim Crow was established throughout the South, and African Americans were once again largely disenfranchised.[46]

The Reconstruction Amendments did not lie dormant, to be sure. Despite the Supreme Court's statement in the *Slaughter-House Cases*[47] that the Reconstruction Amendments were principally addressed to the grievances of African Americans,[48] and despite occasional invocations of the Fourteenth Amendment by the Supreme

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44 Andrew Johnson, *President Johnson's Veto of the Civil Rights Act, 1866*, *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 405ff (James D. Richardson ed., 1897), *available at* http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf.

45 *See* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 269 (2005) (noting that, according to Representative Thaddeus Stevens, "[o]ne of the amendment's purposes . . . was to prevent a future Congress from repealing the protections afforded to citizens by the Civil Rights Act").

46 *See* David Herbert Donald, *Uniting the Republic, 1860–1877*, *in* 1 THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE 587, 716–21 (4th ed. 1992).

47 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

48 *See id.* at 71–72.

Court in response to those grievances,[49] for most of the next six and a half decades, the principal role assigned by the Court to the Fourteenth Amendment was that of guarantor of private property and the liberty of contract.[50]

Beginning roughly around the end of World War II, the courts and Congress became increasingly receptive to the arguments made by civil rights activists under the rubric of the Fourteenth Amendment. Crucially, however, these arguments were not simply a revival of the original understanding of Reconstruction. On the most important issue, the best evidence we have indicates that most of the framers and ratifiers of the Fourteenth Amendment thought it did *not* bar de jure racial segregation.[51] Even within the civil rights community, the decision to challenge Jim Crow directly was controversial, and most importantly for our purposes, it was a decision taken in the middle of the twentieth century, rather than during Reconstruction.

Thus, as with sex equality, the true framers of the principle of racial equality we now associate with the Equal Protection Clause were not members of the Reconstruction Congress. In this instance, the framers were people like Charles Hamilton Houston, Thurgood Marshall, and Earl Warren. The ratifiers were the American people who, after a period of sectional, and in some sense national,[52] resistance, came to accept the mandate of *Brown v. Board of Education*[53]—perhaps because that mandate was itself softened from an integration norm to a narrower antidiscrimination norm.[54] Whether the antidiscrimination view is true to *Brown* is not my concern here.[55] The important point is that the success of the civil rights movement in the twentieth century—however partial—was a juris-generative ac-

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49 *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 636 (1950); Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

50 *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 26 (1915); Lochner v. New York, 198 U.S. 45, 64 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 591–92 (1897).

51 *See* Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2337–43 (1995) (reviewing OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 (1993)).

52 White resistance to the mandate of *Brown* surfaced in Boston, Detroit and other Northern cities as soon as it became clear that racial segregation was not limited to the South. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 721–23 (1974) (resolving remedial issues in litigation over segregation in Detroit).

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

54 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767–68 (2007).

55 For my views on this question, see Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2002, art. 2, at 5, http://www.bepress.com/ils/iss2/art2.

complishment. In substantial measure, it created an equality norm; it did not merely preserve one.

To recognize that the vision of racial equality in *Brown* is a twentieth rather than a nineteenth century vision is not to deny that it was shaped by decisions taken during the earlier period. *Brown* is, in an important sense, a fulfillment of the promise of the Equal Protection Clause, even if it was not exactly what Americans circa 1868 thought or expected the promise to mean.

To put the point in terms of a debate about equality in particular, equality is not an "empty" idea.[56] Of course, any notion of like treatment of similarly situated persons requires a value-laden conception of what amounts to like treatment and who are similarly situated. But that only tells us that equality is an open-ended concept, not an empty one. We would not readily confuse the concept of equality with, for example, the concepts of treason, war, or property. What each of these concepts entails is contested, but our language is sufficiently determinate that we can distinguish between these concepts. Congress may declare war on a foreign sovereign; a "declaration of equality" on a foreign sovereign would be a non sequitur.

It is easy to understand why a social justice movement would wrap itself in the mantle of extant constitutional language. The movement thereby casts its call for change as simply the fulfillment of a legal commitment already made. And in an important sense, doing so is not mere propaganda. Especially in the case of constitutional rights whose core purpose has been unfulfilled—as was certainly true of the Fourteenth Amendment in the middle of the twentieth century—the leaders of a social movement can argue that contemporary society owes a debt to the past. But, at least as a descriptive matter, we can say that the decision whether to discharge that debt rests with the contemporary society and its elites, not the dead hand of the past.

The next Part sketches a normative justification of this pattern of early inscription of open-ended constitutional language followed by later elaboration of its meaning. For now, though, let us consider one more suite of examples.

C. The Bill of Rights

Like the Nineteenth and Reconstruction Amendments, the Bill of Rights was mostly intended by its authors and ratifiers to address a

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[56] *But see* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 577 (1982) ("[E]quality is an entirely formal concept . . . with no substantive content of its own.").

pressing immediate concern. Anti-Federalists and others feared that the structural safeguards of the original Constitution might prove inadequate to check the power of the new federal government. Having recently fought a revolution against a remote central government, the people assembled in their respective ratifying conventions in critical states insisted on protection against the very abuses they identified most with the regime of George III. To be sure, the Bill of Rights entrenched what were (or were at least seen as), in many respects, ancient liberties of Englishmen. But the concern of those who made its inclusion the price of ratification was not that in some distant future the society might rot; their concern was that the new and untested government they were creating would tyrannize them in their own lifetimes, perhaps even in the very near future.[57]

These were not wholly unfounded fears, as events would soon demonstrate. The Sedition Act was enacted and employed less than a decade after the ratification of the First Amendment, which proved largely useless in blocking it.[58] Vice President Jefferson and Bill of Rights author Madison attempted to rally public opinion against the Alien and Sedition Acts through the Virginia and Kentucky Resolutions, but their battle cry fell largely on deaf ears.[59] Neither the courts nor the People yet had the stomach for another revolution, even if the federal government had exceeded its constitutional bounds.

Thus, the Reconstruction pattern was presaged by the Bill of Rights. Provisions that were meant to protect against an immediate threat were largely ignored for decades. No federal statute would be held by the Supreme Court to violate any provision of the Bill of Rights until 1857, when, in *Dred Scott v. Sandford*,[60] the Court relied on the Fifth Amendment's Due Process Clause, insofar as it protected slave owners' property in their slaves, to invalidate the Missouri Compromise.[61] The Court did not hold that a federal statute violated the First Amendment until 1965,[62] although somewhat earlier the Court

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57 *See* RAKOVE, *supra* note 32, at 322–23.

58 *See* Kurt L. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 438, 444–52, 458 (2007).

59 *Id.* at 438; Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 161 (1948).

60 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

61 *See id.* at 450, 452.

62 *See* Lamont v. Postmaster Gen., 381 U.S. 301, 305, 307 (1965).

had invalidated state laws for violating freedom of speech as applied through the Fourteenth Amendment.[63]

In short, the Bill of Rights was not adopted for the purpose of preventing backsliding, nor has it been used that way. Like the most important rights provisions that would follow, it was adopted primarily to change the legal status quo, and also like (some of) those later rights provisions, it both failed in that immediate object and would eventually take on new meanings given it by subsequent generations. To stick with the provision about which there is now the broadest consensus, modern free speech doctrine is a modern creation. The English, colonial, and Revolutionary experience may have informed the original text, but the current doctrine is principally a response to the Red Scare of the early twentieth century, to Nazism and Fascism abroad and McCarthyism at home in the middle of the twentieth century, and, to a lesser extent, to political correctness at the end of the twentieth century.[64] At most, it implements a vague aspiration of the founders, rather than preserving a value as they lived it.

IV. Justifying Aspirational Constitutionalism

The antibacksliding view of constitutional rights comes with its own ready response to the dead hand problem. In this view, constitutional rights are entrenched by those who know the dangers of majoritarian excess, and act preemptively to curtail those excesses. When, at a later time, the mob seeks to cast aside entrenched constitutional rights, the courts (and perhaps other actors) stand firm, preventing the people from taking actions that they would later regret.

We can grant that this is a powerful answer to the dead hand problem, where it applies, but our survey of the American constitutional experience shows that constitutional rights more commonly entrench open-ended values that may be ignored for generations and whose meaning is supplemented or almost fully supplied decades later. Because the antibacksliding justification will not work for such "aspirational" rights, we must find a different justification, or else acknowledge that constitutional rights succumb to the dead hand problem. This Part proposes to justify aspirational constitutional rights by

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63 *See* Near v. Minnesota, 283 U.S. 697, 707 (1931) ("[T]he liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."); Fiske v. Kansas, 274 U.S. 380, 387 (1927) (reversing a criminal syndicalism conviction).

64 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).

treating them as, at least initially, the product of roughly democratic processes.

What justified the first Congress in saddling us with a right to free speech or the Reconstruction Congress in saddling us with the Equal Protection Clause? One answer would be the substantive justice of the principles of freedom and equality. No constitutional democracy worthy of the name could deny such basic principles of justice. Yet this answer is incomplete if offered as a justification for constitutional rights in general. Constitutions, including the American Constitution, permit the entrenchment of rights provisions that are both more specific and, for just that reason, more controversial, than freedom and equality. For example, one would be hard pressed to argue that the Third Amendment's prohibition on peacetime quartering of troops or the Seventh Amendment's guarantee of a jury trial in civil cases is a principle of universal justice.

We must therefore be prepared to say—as I am prepared to say—that no persuasive normative account of constitutional rights could function completely independently of the content of those rights. The most democracy-protective procedures for adopting constitutional rights could still lead to the adoption of silly or downright pernicious rights. Accordingly, any procedural justification for constitutional rights will have to be supplemented by a substantive account that justifies the particular constitutional rights entrenched.

That said, because of the dead hand problem, constitutional rights also stand in need of procedural justification. Given the possibility that the values of Generation 2 will not be the values of Generation 1, what justifies Generation 1 in entrenching its values in constitutional rights, other than the always-contestable judgment that Generation 1's values are superior to the values of Generation 2?

The antibacksliding answer will apply only where the relevant provision targets no more than particular dangers of democratic excess known to Generation 1. As we saw in Part III, however, most constitutional rights do not function as hedges against rot. They seek legal change and often entrench open-ended values that come to be filled in by later generations.[65]

Yet that phenomenon itself suggests an answer to the dead hand problem. Because the real content of provisions like the Equal Protection Clause and the First Amendment is typically supplied decades, or even centuries, after they are written, the later generation, when it

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65 *See supra* Part III.

decides to fill in the content of open-ended constitutional rights, makes its own decision about its own values. It is not, in any strong sense, bound by the decisions of the original framers and ratifiers of the relevant constitutional provision.

This answer, however, in turn raises at least three important questions, to which the balance of this Part now turns. First, given the relative indeterminacy of constitutional rights, why should Generation 1 bother adopting them? Second, given that the courts define the scope of these rights, in what sense does the latter-day content reflect the values of Generation 2, rather than the values of elites of Generation 2? And, third, what is Generation 2's or its elites' justification for entrenching its interpretation of the language chosen by Generation 1 against changes by the still-later Generation 3?

A. Message in a Bottle

Is there any good reason for the people of Generation 1 to frame and ratify a constitutional right that will not be given determinate content for many decades, and then only by people living in different circumstances and with different values? That may not be the right question. As discussed above in Part III, the framers and ratifiers of constitutional rights rarely focus primarily on the long view in this way. They propose and adopt constitutional rights to affect an immediate change in the legal status quo. Sometimes they succeed, as with the Nineteenth Amendment's successful and essentially immediate extension of the franchise to women.[66] Sometimes they succeed in part, at least for a time, as with the Fourteenth Amendment's validation of the Civil Rights Act of 1866.[67] And sometimes they fail, as with the First Amendment's inability to stop the Sedition Act of 1798.[68] In each instance, however, the long-term impact of the relevant constitutional right as a kind of side effect of the provision is evident.

Still, if the framers and ratifiers of a constitutional right were only interested in making and consolidating legal change for their own era, there would generally be no reason to write in broad strokes. In fact, seekers of constitutional change sometimes follow this course. The specificity of the Nineteenth Amendment probably explains why, except in the writings of academics,[69] it has not been treated as a broader source of sex equality norms.

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66 *See supra* Part III.A.

67 *See supra* Part III.B.

68 *See supra* Part III.C.

69 *See* Dorf, *supra* note 42, at 967–68; Siegel, *supra* note 38, at 951–53.

Other constitutional provisions, however, are written in broader terms, and at least the most sophisticated of their framers and ratifiers must have understood that these provisions would be interpreted in new ways by later generations. Why bother to express an open-ended aspiration?

One possible answer might focus on the near term. Specific language can be more readily evaded where the target of that language finds some way to violate its spirit but not its letter. The recent debate over waterboarding provides an example. In February, 2008, two members of Congress proposed a bill that would have specifically forbidden waterboarding.[70] Some who objected to this proposal noted that the general legal prohibitions on torture and cruel, inhuman, and degrading treatment already forbid waterboarding.[71] Moreover, the very idea of listing specific forbidden practices in this context would likely be futile: forbidding waterboarding could readily lead to the substitution of orange juice for water or, more likely, to all manner of creative torments.[72] To be sure, specific language could be backstopped by a catchall that makes clear that the list is not meant to be exclusive, but then one would be depending on the catchall to do the work

Thus, the use of general language to capture a wide set of meanings need not be a device by which the adopters of constitutional rights aim at putting long-term aspirations in a Constitution. It could simply be an anti-evasion measure aimed at the immediate future. Still, might there be reasons to couch constitutional rights in general language for long-term aspirations (even if these aspirations are subsidiary to a more immediate focus on avoiding evasion)?

We can turn that question around by asking why the people of one time should care about their distant descendants in any respect. After a sufficiently long period of time, any given individual will either have no living descendants or will have contributed a miniscule amount of DNA to a very large proportion of the surviving population. Yet people care about these wholly or almost entirely unconnected followers, probably out of some combination of the vain quest

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70 *See* H.R. 5460, 110th Cong. (2008).

71 *See, e.g.*, Dan Eggen, *Cheney's Remarks Fuel Torture Debate; Critics Say He Backed Waterboarding*, WASH. POST, Oct. 27, 2006, at A9 (reporting view of human rights lawyers that waterboarding is torture).

72 The specific proposal of Congresswoman Eshoo would have covered "orange juice boarding," as it would have defined waterboarding as "any form of physical treatment that simulates drowning or gives the individual who is subjected to it the sensation of drowning." H.R. 5460 § 1(a).

for immortality, altruism, and sentimentality. In any event, we do not ordinarily think it suspect for people to bequeath their worldly possessions to charitable organizations or institutions—such as foundations and universities—whose missions and beneficiaries will change enormously over the long run. If it is rational (or at least understandable) for people to care about the welfare of their distant and barely related descendants, or about how their money is used after they are gone, it is also rational (or at least understandable) to care about the perpetuation of their values through law.

The crucial point, however, and what permits the effort to occupy a middle space between futility and overreaching, is the partial indeterminacy of the relevant legal norms. I unfairly constrain my great-great-great-grandchildren if I bequeath my property to them with all manner of restrictions on their behavior (assuming that the bequest is enforceable). I do those same great-great-great-grandchildren no harm, but also confer upon them no benefit, if I give them completely indeterminate advice, of the form, say, of "always do the right thing." But suppose I advise my descendants to "value education" or to "avoid cruelty in dealing with other sentient beings." Assuming some reasonable measure of stability in language, these concepts will be understood to convey some, albeit open-ended, meanings. If and when my distant descendants choose to follow my advice, they will be both honoring my advice and following their own judgment.

This theme underwrites the expressly aspirational language of some recently adopted constitutions. Consider, for example, Articles 26, 27, and 29 of the South African Constitution, which, respectively, provide for rights to: housing; health care, food, water, and social security; and education.[73] Articles 26 and 27 come with the caveat that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of each right.[74] The notion of "progressive realization" accepts that the implementation of these positive rights depends both on scarce resources and complex policy judgments that are, at least in the first instance, better suited to the legislature than to the courts.

Lawrence Sager has long argued that the American Constitution is likewise best construed to obligate legislative officials to afford certain positive rights, and that view may have much to recommend it.[75]

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73 S. Afr. Const. 1996 arts. 26–27, 29.

74 *Id.* arts. 26–27.

75 For the fullest elaboration of this idea, see Lawrence Gene Sager, Justice in Plain Clothes: The Theory of American Constitutional Practice 6–7 (2004) (suggesting that

Here, however, I wish to invoke the notion of progressive realization at a higher level of generality. The idea that the content of rights will be fleshed out over time is built into all rights, including the negative rights that characterize the American Constitution and that we think courts are competent to enforce in the first instance. Just as the framers and ratifiers of the 1996 South African Constitution were leaving to future development the contours of the rights to housing, health, and education, so the framers and ratifiers of the American Fourteenth Amendment left to future development the contours of due process and equal protection. It is not clear that this was their intended goal, but if it was, it was hardly an irrational goal.

B. Democracy and Courts

Nonetheless, there is an obvious and crucial difference between, on the one hand, my homespun example of the advice from a great-great-great-grandparent and the South African guarantees of progressive realization, and, on the other hand, the function of constitutional rights in the American system. In legal systems with judicial review, it is not the analogous figures to descendants themselves—that is, elected legislators—who decide how to fill in the content of the constitutional rights, but third parties—that is, the courts. To put the point in the familiar language of constitutional theory, the aspirational Constitution solves the dead hand problem only by generating the countermajoritarian difficulty.

Nonetheless, that shift is itself important, for it calls attention to the fact that judicial review is, over the long run, substantially less countermajoritarian than constitutionalism itself. Whatever the policy-preference differences between, on the one hand, Congress and state legislatures and, on the other hand, the judges and Justices on the federal bench, those differences pale in comparison to the policy-preference differences between legislators today and the framers and ratifiers of constitutional provisions adopted in 1791 or 1868. Just to focus on two obvious differences, in 1791, whether to permit slavery was a contested policy question, and in 1868, whether to forbid women from voting or serving on juries was a contested policy question. For all the talk of "culture wars" and red states versus blue states, the differences between conservatives and liberals in 2009 mask consensus on a wide range of issues[76] that were hotly contested—or about which

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"claims for constitutional justice are, in the first instance, the obligation of popular political institutions, not the courts").

76 *See* MORRIS P. FIORINA ET AL., WHAT CULTURE WAR?: THE MYTH OF A POLARIZED

the consensus was exactly opposite—when most of our constitutional rights were adopted.

For example, in a pair of 2007 cases from Seattle and the Louisville area, conservative and liberal Justices disagreed sharply over how to apply the antisegregation principle of *Brown v. Board of Education*.[77] But everyone unquestioningly accepted the legal and the moral authority of *Brown* itself.[78] That unremarked agreement marks a huge shift from the nineteenth century, when separate-but-equal was not merely an acceptable policy view but the law.[79]

To be clear, I am not here propounding a narrative of inevitable moral progress. The point is, rather, that values change over time. Meanwhile, our mechanism for selecting judges and Justices (nomination by an elected President and confirmation by an elected Senate) is sufficiently democratic to ensure that people with views that are wildly outside of the mainstream—people who want to return to slavery, say, or to bar women from serving on juries—simply will not be nominated or confirmed to judgeships.

Indeed, the principal structural risks of our judicial selection system mostly cancel each other out, leaving the Court fairly close to the center of public opinion on most issues. Judges tend to skew conservative simply because of life tenure. Typically appointed in middle age or later,[80] judges serve until late in life, and so tend to overly represent the values of the older generation in the work of the courts. To the extent that changes in values are generational, this effect will

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AMERICA (2d ed. 2005) (marshalling data to show that American public opinion is not sharply polarized on most policy questions).

77 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (pitting the five most conservative Justices against the four most liberal Justices on the question whether the Constitution permits the use of racial classifications by a school district voluntarily seeking to increase the racial integration of its public schools).

78 *See id.* at 2765, 2800–01 (both Chief Justice Roberts, writing for the Court, and Justice Breyer, writing in dissent, invoke *Brown* to support their respective positions).

79 *See* Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

80 President George W. Bush was perceived as trying to shape the Court for years to come by selecting "young" Justices. *See, e.g.*, David Westphal, *Supreme Court Nominee: Bush's Pick May Be His Legacy*, STAR TRIBUNE (Minneapolis), July 20, 2005, at 11A. Yet at the time of their appointments, John Roberts and Samuel Alito were, respectively, fifty and fifty-five years old. *See* Richard W. Stevenson, *Hearings Delayed: Bush Declares His Pick Offers 'Natural Gifts as a Leader*,' N.Y. TIMES, Sept. 6, 2006, at A1 (noting Roberts's age at time of appointment); Neil A. Lewis & Scott Shane, *Bush Picks U.S. Appeals Judge to Take O'Connor's Seat*, N.Y. TIMES, Nov. 1, 2005, at A1 (noting Alito's age at time of appointment). Clarence Thomas was the youngest recent appointee at the time he joined the Court at the age of forty-three. Even he was quite clearly middle-aged. *See* Linda Greenhouse, *Bush Picks a Wild Card*, N.Y. TIMES, Jul. 2, 1991, at A1 (noting Thomas's age at time of appointment).

tend to make the courts a trailing indicator of social attitudes. At the same time, however, judges come from the professional class, and in particular, the lawyer class, which will tend to make them side, in Justice Scalia's memorable phrase, "with the knights rather than the villeins."[81] Of course, there are conservative lawyers, as well as liberal ones, and Republican administrations in recent years have been doing a good job of finding them when they tried.[82] But, on the whole, public opinion among the legal profession skews liberal.[83] Taken together, the age of judges and the fact that they are lawyers roughly leave the courts near the center of public opinion.

This two-factor model no doubt vastly oversimplifies matters, but the bottom line is certainly accurate. American courts are not especially countermajoritarian. Legal scholars such as Barry Friedman and Michael Klarman have recently explained what political scientists have known for some time—over the long haul, courts reflect rather than frustrate public opinion.[84] It is too crude to say simply that "th' supreme coort follows th' iliction returns,"[85] but it is downright naïve to think that the Supreme Court can or will consistently stand up to strongly majoritarian forces.

This Article does not offer a defense of judicial review as practiced in the United States (or anywhere else). The argument presented here is much narrower. I began with the worry that constitutional rights, insofar as they entrench the values of the past, unfairly constrain contemporary democratic decisionmaking. In responding to this dead hand problem, I noted that constitutional adjudication does not usually protect rights specified in the past; instead, it protects rights that living Americans value. This in turn raised a different problem: why should the courts, rather than more directly accountable

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81 Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

82 *See* Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices "Evolve" and Others Don't?*, 1 HARV. L. & POL'Y REV. 457 (2007).

83 *See, e.g.*, LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES (Terence C. Halliday & Lucien Karpik eds., 1997) (asserting that lawyers are among the most potent agents of global liberal politics).

84 *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580 (1993) (arguing "that most normative legal scholarship regarding the [supposedly countermajoritarian] role of judicial review rests upon a descriptively inaccurate foundation"); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) (arguing "that the Court's capacity to protect minority rights is more limited than most justices or scholars allow"). For a useful collection of citations, see Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 440 n.68 (2005).

85 FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

political bodies, be the ones to translate American values into constitutional rights? The partial answer here is not that courts are ideally suited to this task, but that when they do perform it, they are channeling contemporary values. Judicial review, in other words, is not nearly so undemocratic as we might think that constitutionalism itself is. One could agree with all of this and still think that the best institutional design would assign the role of enforcing the Constitution to Congress or state legislatures.[86]

C. Stare Decisis

If the practice of judicial review does not render constitutional rights inconsistent with generational self-government when rights are judicially recognized, there will nonetheless be a problem in the future. When the Supreme Court gives concrete meaning to an open-ended constitutional right by, for example, holding that the First Amendment protects hate speech or that the Fifth and Fourteenth Amendments protect abortion, that decision not only binds the people then alive; it also becomes entrenched against future change except by constitutional amendment or overruling. The Supreme Court that renders the decision may be broadly reflective of the values of its time. However, as time passes, public opinion may diverge from the ruling, and yet the judicial decision still controls. In short, stare decisis in constitutional law creates its own dead hand problem.

Upon examination, however, this problem proves virtually nonexistent because in both theory and in practice, stare decisis is not especially powerful in constitutional law. Precisely because of the difficulty of constitutional amendment, the Court has formally stated that considerations of stare decisis are less powerful in constitutional cases than in statutory cases.[87] And even the limited force stare decisis officially does receive in constitutional cases overstates its actual impact. Statistical analysis of judicial behavior finds that stare decisis plays almost no meaningful role in the actual outcomes of Supreme Court cases.[88] Even if one thinks, as I do, that the so-called "attitudi-

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86 Of course, one could well have other worries about institutional design, starting with the grossly disproportionate weight that the Senate gives to the votes of residents of small states. *See* LEVINSON, *supra* note 20, at 49–62.

87 *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991). For a critical assessment of the Court's claimed practice, see Lee J. Strang & Bryce G. Poole, *The Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. REV. 969, 969 (2008).

88 *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999) [hereinafter SPAETH & SE-

nal" model of judicial decisionmaking can sometimes mislabel legal considerations as attitudes,[89] or otherwise mistranslates legal claims into empirically testable claims, one can hardly conclude that stare decisis is a strong constraint in constitutional adjudication. Thus, there is no eventual dead hand problem posed by judicial recognition of constitutional rights.

That conclusion in turn has implications for the question whether activists in a political movement should bother to seek constitutional change in the first place. In an intriguing essay, David Strauss suggests that constitutional amendments are largely irrelevant because constitutional change often occurs without formal amendment and because formal amendment sometimes results in little change.[90] Although Strauss may well be right about the big picture, the weakness of stare decisis in constitutional adjudication suggests at least one potential difference between constitutional change by formal amendment and constitutional change by judicial interpretation. The former, more formal sort of change, is more deeply entrenched.

Consider the Equal Rights Amendment ("ERA"), which was approved by Congress in 1972 but failed to acquire sufficient state ratifications to become part of the Constitution.[91] As Strauss notes, much of the substance of the ERA nonetheless became effective because

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GAL, MAJORITY RULE]; Jeffrey A. Segal and Harold J. Spaeth, *The Influence of* Stare Decisis *on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996) [hereinafter Segal & Spaeth, *The Influence of* Stare Decisis]. To say that stare decisis has at most a slight direct impact on outcomes in constitutional cases is not to deny that it can have subtler effects. *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008) (applying a multi-factor approach); Jack Knight & Lee Epstein, *The Norm of* Stare Decisis, 40 AM. J. POL. SCI. 1018 (1996) (finding some evidence of a norm of precedent-following). For a rejoinder, see Jeffrey A. Segal & Harold J. Spaeth, *Norms, Dragons, and* Stare Decisis*: A Response*, 40 AM. J. POL. SCI. 1064, 1064 (1996). It is worth noting that Spaeth and Segal may actually overstate the impact of stare decisis over the long run. Their methodology tests whether Justices who dissented from an initial decision later followed that decision. *See* SPAETH & SEGAL, MAJORITY RULE, *supra*, at 23, 35–40. Wholly apart from legal obligations, there may well be strategic reasons why a Justice, who is interested in reciprocal respect for cases in which she is in the majority, would adhere to decisions from which she dissented. *See, e.g.*, Knight & Epstein, *supra*, at 1021. Yet, even with this factor in play, Spaeth and Segal found that stare decisis played little or no role in how Justices voted. *See* SPAETH & SEGAL, MAJORITY RULE, *supra*, at 315; Segal & Spaeth, *The Influence of* Stare Decisis*, supra*, at 984–87. Because Justices long dead cannot reciprocate respectful treatment of their precedents, there is even less reason to suspect that a Justice would adhere to stare decisis for much older decisions.

89 *See* Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 513 (2007).

90 *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001).

91 *See id.* at 1476.

around the same time that the states were failing to ratify it, the Supreme Court interpreted the Fourteenth Amendment's Equal Protection Clause to forbid most forms of sex discrimination.[92] But now suppose that social attitudes were to change sufficiently that patriarchy again became a politically acceptable position, and that the proponents of patriarchy succeeded in gaining a majority on the Supreme Court. Given the weakness of stare decisis, it would be much easier for such Justices to say that the cases construing the Equal Protection Clause to bar most official sex discrimination were mistaken (perhaps on the ground that they failed to accord sufficient weight to the original understanding) than it would be for those same hypothetical patriarchal Justices to say that the ERA (had it passed) were a dead letter.

Accordingly, proponents of constitutional change who want to prevent backsliding—and sometimes that is at least one goal—may do better to seek actual formal changes to the constitutional text. That will not, of course, guarantee that a future generation (or even the current generation) will honor the amendment, but it likely will provide more protection than change accomplished through interpretation. The Supreme Court lacks the formal power to "overrule" an actual constitutional text in the way it can overrule an earlier interpretation.

V. Jurisprudential Consequences

The antibacksliding view of constitutional rights leads rather naturally to something like originalism in constitutional interpretation. If the goal of a constitutional right is to prevent society from falling below a rule or standard entrenched by its framers and ratifiers, then one would want to know what that rule or standard was thought to be at the time of its adoption.

To be sure, there may be sound reasons why, even on the antibacksliding view, judges should not be thoroughgoing originalists. Perhaps circumstances have changed so much that the framers' and ratifiers' concrete expectations provide little or even the wrong sort of guidance in deciding what counts as backsliding. Then too, there are multiple versions of originalism,[93] and so the judge will have to decide what kind of originalist to be. There are even a considerable number

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92 *See id.* at 1476–78.

93 *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. (forthcoming 2009) (GWU Law School Public Law Research Paper No. 393, 2008), *available at* http://ssrn.com/abstract=1090282.

of legal scholars who claim that much of what used to be thought to be living constitutionalism can in fact be reconciled with originalism.[94]

Still, whatever academics may think counts as the "best" form of originalism, when I say that the antibacksliding conception of constitutional rights leads naturally to originalism, I simply mean that it leads to something like what the Supreme Court practices when it purports to seek the Constitution's original meaning, as nicely illustrated by Justice Scalia's majority opinion in *District of Columbia v. Heller*[95]: the notion that at the time a right was enshrined in the Constitution, its canonical text had a widely understood meaning, and that regardless of changed attitudes, changed linguistic practices, or changed social or material circumstances, that meaning remains reasonably stable over time.[96] According to the form of originalism I have in mind, if the people of the founding generation thought that the Second Amendment entailed a right to keep a loaded pistol on the nightstand, then that is what the Second Amendment entails today. We (or our elected representatives) may regard handguns as a menace, but the founding generation regarded just that attitude as the menace and would have considered our dependence on organized police and a standing army as a sign of rot.[97]

My point is not that the *Heller* Court correctly interpreted the Second Amendment, even assuming originalist premises. Nor is my point that there is wide agreement on those premises even among people who call themselves originalists. Instead, I mean to call attention to the prima facie plausibility that a certain form of originalism derives from the antibacksliding conception of constitutional rights.

But what happens when courts interpret constitutional rights that do not rest on antibacksliding justifications? If antibacksliding rights appear to lead to originalism, to what method of constitutional interpretation do aspirational constitutional rights lead?

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94 Four leading versions are RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007) ("The choice between original meaning and living constitutionalism . . . is a false choice."); and Lawrence B. Solum, *Semantic Originalism* 165–74 (Illinois Public Law Research, Paper No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244.

95 Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) (referring to "meanings . . . known to ordinary citizens in the founding generation").

96 *See, e.g.*, *id.* at 2791 ("The 18th-century meaning [of "Arms"] is no different from the meaning today.").

97 *See id.* at 2822 ("[I]t is not the role of this Court to pronounce the Second Amendment extinct.").

Originalists who treat constitutional rights as universally concerned with preventing backsliding tend to regard statements by nonoriginalists about discerning society's fundamental values as just so much cover for the imposition of their own values.[98] Yet once we understand that aspirational constitutional rights take their meaning from decisions of later generations to redeem and define the adopting generation's open-ended promises, the rhetoric of the evolutionists begins to look more sincere. Evolutionist rhetoric typically points to *society's* values evolving, rather than pointing simply to the values the judge himself holds. The Supreme Court's Eighth Amendment jurisprudence makes the point starkly by focusing on "the evolving standards of decency that mark the progress of a maturing society."[99] Although the Justices admit that an Eighth Amendment decision includes an element of their own subjective moral judgment,[100] that is hardly the only, or even the leading, element of the calculus. For example, two recent cases have been notable for the Court's effort to provide objective external indicia of society's rejection of capital punishment for the mentally retarded and juveniles, respectively.[101]

Indeed, even when judges frankly admit that they are applying their own values to open-ended constitutional rights, the account of aspirational constitutionalism set forth above provides them with support precisely because of who they are. Who better to say what open-ended terms like "equal protection" or "cruel and unusual punishments" have come to mean than people who have been nominated by the President and, after screening for professional qualifications, character, and broad ideological acceptability, confirmed by the Senate?

The obvious answer to that question is, of course, the people's elected representatives themselves—that's who better. Accordingly,

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98 Chapter 9 of Robert Bork's 1990 book, *The Tempting of America*, is a prime example. One after another, Bork frogmarches Alexander Bickel, John Hart Ely, Laurence Tribe, various other academics, and Justice William Brennan across the pages of his book. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 187–221 (1990). Attributing varying degrees of dishonesty and obtuseness to the targets of his critiques, Bork's central claim rests on the originalist premises he defends throughout the book. Bork claims the Constitution is binding law because it was adopted by a supermajoritarian process that thereby imbued it with legitimate authority; the people who adopted the Constitution and its amendments adopted the original public meaning of the terms in which it was written rather than any subsequent meanings that might be attached to those words; and therefore, for judicial review to be legitimate, it must enforce the original public meaning, rather than some evolutionary conception of meaning.

99 Trop v. Dulles, 356 U.S. 86, 101 (1958).

100 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 563 (2005).

101 *See id.* at 564; Atkins v. Virginia, 536 U.S. 304, 313–17 (2002).

evolutionists rarely say that the democratic pedigree of judges better qualifies them than legislators to interpret society's basic values. So far as representativeness is concerned, elected officials almost certainly have a comparative advantage relative to judges. Thus, defenders of evolutionary judicial review typically offer an account that focuses attention on the comparative advantages that judges have.

The best-known such account is John Ely's representation reinforcement, discussed above in Part II. The core notion is that certain rights—such as the right to vote or the rights to freedom of speech and the press—are necessary to ensure that government truly does represent the people, while other rights—such as the right not to be repeatedly singled out for disproportionate burdens on the basis of racial prejudice—correct systemic process failures of majoritarianism.[102]

Interestingly, Ely did not offer his process theory as evolutionary *per se*. Presumably, he would have defended it as appropriate in 1880 no less than in 1980. Yet Ely's theory attracted various critiques to the effect that it was considerably more value-laden than he acknowledged.[103] Where did those values come from? Some of Ely's critics would say from Ely himself,[104] but a better answer would probably be from the society around him. Broadly speaking, Ely sought to justify the work of the Warren Court.[105] That work in turn did not spring full-blown from the conscience of Earl Warren, but reflected (and then influenced) the social movements of its time—none more so than the civil rights movement.[106] And the civil rights movement, as I noted above, can be—and in fact was—conceived as redeeming the long-overdue (if open-ended) promise of the Reconstruction Amendments.[107]

It is thus no wonder that since Ely developed his theory in the 1970s it has been applied in ways that were not on the table when he wrote. Ely had the moral foresight to argue that homosexuality ought to be treated as a suspect classification,[108] but six years after the publi-

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102 *See* ELY, *supra* note 22.

103 *See generally* Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237 (2005); *see also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

104 *See* Brian Boynton, *Democracy and Distrust after Twenty Years: Ely's Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 417 (2000).

105 *See id.* at 418.

106 *See supra* Part II.B.

107 *Id.*

108 *See* ELY, *supra* note 22, at 163.

cation of *Democracy and Distrust*, the Supreme Court upheld a law authorizing criminal prosecution for consensual sodomy as applied to a same-sex couple.[109] It would be another seventeen years before that decision was overturned.[110] Two things happened between *Bowers v. Hardwick* in 1986 and the *Lawrence v. Texas* in 2003. First, there was generational change on the Court (although notably, the youngest Justice at the time, Clarence Thomas, dissented in *Lawrence*).[111] And second, social attitudes changed.

Justice Sandra Day O'Connor's shifting stance is indicative of the change in social attitudes. She joined a majority opinion in *Hardwick* that was positively dismissive of the argument that laws banning sodomy could be likened to laws restricting sexual relations between (heterosexual) married couples.[112] The *Hardwick* majority opinion also suggested, albeit in procedural terms, that the prosecution of heterosexual couples for violation of Georgia's sodomy prohibition might be unconstitutional where prosecution of Hardwick for same-sex sodomy was permissible.[113] Yet Justice O'Connor maintained in a separate concurrence in *Lawrence* that her vote to reject the due process claim in *Hardwick* was consistent with her vote to accept an equal protection claim in *Lawrence*.[114] We can assume that she sincerely believed the two decisions were consistent, but if so, that is almost certainly because she was unaware of how much her own attitudes towards homosexuality had softened in just the same way that wider social attitudes had softened in the intervening period.

Using Justice O'Connor as an example of the Court's evolution in tracking social attitudes may gild the lily somewhat, because Justice O'Connor, perhaps more than any other modern Justice, tended to vote at or close to the center of public opinion.[115] But even if we focus on the Court as a whole, it is easy to see how the Court's conception of which groups need protection against the tyranny of the majority

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109 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

110 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

111 *Id.* at 586.

112 *Hardwick*, 478 U.S. at 191 (seeing "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other").

113 *See id.* at 188 n.2.

114 *See Lawrence*, 539 U.S. at 579.

115 *See* Barry Friedman, William Howard Taft Lecture, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1302 (2004) ("observing that the median Justices on the present Court," that is, Justices Kennedy and O'Connor, "seem consciously attuned to public opinion" and noting that "[e]xtrajudicially, Justice O'Connor has been quite explicit in pointing out that in the long run it is public opinion that accounts for change in politics, and in judicial doctrine.").

tracks evolution in social attitudes.[116] It is hardly accidental that the Court found special constitutional protection appropriate for African Americans before women, and for women before gays and lesbians, given that the wider society followed the same course.

Generalizing from the example of Ely's process theory, we could say that any plausible account of judicial enforcement of aspirational constitutional rights will have two key features. First, its substance will be drawn from contemporary values. Second, it will attempt to justify empowering courts to override legislators.

One further example, which can stand in for others as well, will make the point. In response to Jeremy Waldron's spirited critique of judicial review,[117] Richard Fallon has recently defended judicial review on both outcome-based and procedural grounds.[118] To oversimplify, Fallon argues that judicial review is valuable as a check on legislative excess in much the same way that bicameralism and the possibility of a presidential veto are: adding an additional impediment to legislation makes it that much harder for the legislature to violate rights. Locating that check in the courts rather than, say, a third legislative chamber, makes sense (or, as Fallon somewhat more weakly claims, is at least defensible) because:

> [E]ven if courts cannot be shown to be better than legislatures at resolving disputed rights questions, courts are likely to have a distinctive perspective, involving both a focus on particular facts and a sensitivity to historical understandings of the scope of certain rights, that would heighten their sensitivity to some actual or reasonably arguable violations that legislatures would fail to apprehend.[119]

On its face, Fallon's argument would seem to be a better fit for the antibacksliding view of constitutional rights than for aspirational rights. The "sensitivity to historical understandings of the scope of certain rights" suggests that judicial review is needed to stop legislatures from knowingly violating rights. Upon examination, however, Fallon's argument works as well for aspirational rights.

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116 *See* Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CAL. L. REV. 791 (2002).

117 *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

118 *See* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008).

119 *Id.* at 1710.

Echoing Hamilton's claims in Federalist No. 78,[120] Fallon's argument assumes that, *ceteris paribus*, legislation poses a greater threat to fundamental rights than the absence of legislation,[121] and thus that the threats to liberty and equality from judicial acquiescence in legislation are greater than the threats to liberty and equality from judicial overreaching. If this assumption is true, then we have an argument for the institution of judicial review that does not depend on how the courts spell out the particular content of liberty and equality.

Whether such an argument is persuasive is another question. We can grant that a constitutional system with judicial review and open-ended constitutional language will do a better job at protecting rights—whatever their content—than a system lacking judicial review. But that does not necessarily show (nor does Fallon claim that it necessarily shows) that the system with judicial review is better overall. The sacrifice of positive liberty (in Berlin's sense[122]) may make the cost of protecting rights too dear. Fallon acknowledges as much in considering *Lochner*[123] and the broader phenomenon of constitutional rights being used to thwart humane policies,[124] and one is tempted to add that a constitutional regime sacrifices positive liberty whenever the courts exercise the power of judicial review, even if the invalidated policy is not especially humane or wise. Still, the objection here appears to be an objection not to judicial review with aspirational rights but an objection to judicial review as such, or even to constitutional rights without judicial review, insofar as conscientious legislators will sometimes feel constrained by constitutional rights to reject policies they think otherwise justified, all things considered.

To return to the main point, Fallon's tentative defense of judicial review appears at first blush to be tied to the antibacksliding conception of rights. But in fact it works equally well (or equally poorly) for aspirational rights (and that fact should hardly be surprising, given that Fallon is no originalist[125]). Like Ely's account, Fallon's account

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120 THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

121 *See* Fallon, *supra* note 118, at 1710 ("I have assumed that legislative action is more likely to violate fundamental rights than is legislative inaction.").

122 *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND 191, 203–06 (Henry Hardy & Roger Hausheer eds., 1997).

123 Lochner v. New York, 198 U.S. 45 (1905).

124 *See* Fallon, *supra* note 118, at 1711–12.

125 *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008) (arguing on grounds traceable to H.L.A. Hart that contemporary acceptance, rather than long-ago ratification, grants the Constitution authority and that originalist methods are justified only insofar as they are currently accepted).

marries the notion of elaboration of rights over time[126] to a defense of assigning this task to judges rather than elected officials.[127]

Although many constitutional rights are better described as serving an aspirational function than as serving an antibacksliding function, the pervasiveness of the antibacksliding conception can lead courts to employ originalist methods of interpretation where other approaches might be better suited. *Heller* is an instructive example. As noted above,[128] Justice Scalia's majority opinion is strongly originalist.[129] Yet, as the dissent illustrates, the original understanding of the Second Amendment is hotly contested territory.[130] Nor is it easy to deny that there is a strong *contemporary* social and political movement espousing the view that individuals have a right to private possession of firearms for self-defense and hunting (some people in this movement also value firearms as tools in an insurrection against a possible tyrannical federal government). Taking account of the contemporary nature of this movement would have led the *Heller* Court to make principled and pragmatic nonoriginalist arguments for a right of armed self-defense, either as a matter of substantive due process or as a reinterpretation of the Second Amendment. As I have argued elsewhere,[131] such arguments are hardly frivolous. The Court's failure to make them seems ultimately traceable to ideology more than anything else: the Justices most likely to be persuaded by the normative argument that serious gun control infringes individual rights are also just those Justices most inclined towards originalism.

There may be a further reason why the argument for a constitutional right to armed self-defense has mostly been couched in originalist rather than evolutionary terms. Recall that judicial recognition of aspirational rights requires some explanation for why the courts, rather than elected officials, are best positioned to make the relevant

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126 *Cf.* Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 57 (1997) ("[T]o *implement* the Constitution successfully . . . the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely.").

127 Christopher Eisgruber offers a closely related but less tentative defense of judicial review than Fallon proposes, arguing that the disinterestedness that follows from life tenure enables federal judges to make "a distinctive contribution to a political system that might otherwise be overly sensitive to the people's desires at the expense of their values." CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 6 (2001).

128 *See supra* notes 95–96 and accompanying text.

129 *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2787–2822 (2008).

130 *See id.* at 2822–79 (Stevens, J., dissenting).

131 *See* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000).

judgment. To put the point as crudely as possible, the movement for a personal right of armed self-defense has been disproportionately white, male, and rural.[132] Judging by the importance that Presidential candidates place on hunting photo-ops and identifying with gun enthusiasts,[133] far from needing judicial protection, this constituency has been quite able to take care of itself in the political arena. It is therefore difficult to see how one might justify judicial recognition for constitutional gun rights on representation-reinforcement or related grounds.

Difficult but not impossible, as *Heller* itself illustrates. In explaining why the application of the District's handgun ban to the home violates the Second Amendment, Justice Scalia includes the point that "it is easier to use for those without the upper-body strength to lift and aim a long gun."[134] He thereby hinted at an equal protection argument: some women, the physically disabled, and other vulnerable individuals (such as children?!) would be disadvantaged by the handgun ban. This equal protection concern plays a more prominent role in academic and public defenses of the right to personal possession of firearms, where it is supplemented by the contention that African-Americans living in crime-ridden cities that are inadequately policed are in special need of handguns.[135]

Whether the arguments for judicial enforcement of a right to armed self-defense are in fact persuasive when couched in terms of equal protection concerns is a question beyond the scope of this Article. For now my point is simply that the *Heller* Court failed to recognize the degree to which the claim that there is a personal right of armed self-defense in the Constitution is a modern claim, standing in need of a modern justification for judicial recognition and enforce-

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132 *See* Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 FORDHAM L. REV. 549, 552 (2004).

133 In the 2008 Presidential campaign, the most memorable line came from Joe Biden, who told people at a rally that he had two shotguns (one of which he inaccurately referred to as a Beretta) and suggested that he might shoot his running mate were the latter to try to take these weapons away. *The Election Campaign: Heard on the Stump*, ECONOMIST, Sept. 27, 2008, at 38. Meanwhile, some substantial portion of the appeal of the other major party vice presidential candidate, Sarah Palin, apparently stemmed from her support of gun rights. Noam N. Levey, *Election 2008: The Republicans—GOP Tries to Shake off Hangover*, L.A. TIMES, Nov. 6, 2008, at A12.

134 *Heller*, 128 S. Ct. at 2818.

135 *See*, *e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 361 (1991) (suggesting, after canvassing the historical relation between firearms possession and race, "that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them").

ment. The claim that James Madison would have regarded the D.C. gun control law as a sign of rot should not have been enough.[136]

VI. Conclusion

Even for nonoriginalists, original understanding is relevant to constitutional interpretation. For recently enacted constitutional provisions, the original meaning is the current meaning.[137] Even for very old constitutional provisions, the original understanding can be a useful starting point in identifying the concerns animating an otherwise ambiguous text.[138] So too, the old style of originalism—with its focus on the ideas of Madison, Hamilton, and the other giants of the founding generation—can be instructive simply because these men were farsighted visionaries with special expertise in the American Republic.[139]

Nonetheless, thoroughgoing originalism can be justified neither on the foregoing grounds nor on the ground that the whole point of a constitution is to prevent backsliding, for that is not the whole point of a constitution. To be sure, some constitutional rights, or at least some aspects of some constitutional rights, may be justified on antibacksliding grounds.[140] The Equal Protection Clause surely forbids backsliding to the point of reinstating the Black Codes.[141] But given the breadth of its language and the forward-looking rather than backward-looking nature of the project of constitutional change, that is not all of the work the Equal Protection Clause does. And everyone agrees that it does a lot of other work, even if there is disagreement about precisely what that other work is.[142]

This Article has offered justifications for the practice of aspirational constitutionalism and sketched the implications of that practice. My aims are interpretive rather than purely prescriptive. I would not necessarily quarrel with someone who concluded that, on reflection, constitution writers and amenders should only inscribe those rights that they are very sure need protection against periodic excesses of

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136 *Cf. Heller*, 128 S. Ct. at 2787–822.

137 *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 169 (2008).

138 *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1798–800 (1997).

139 *See id.* at 1800–03.

140 *See supra* Part II.

141 *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178–82 (2001) (capturing this idea nicely in discussing the "paradigm cases" that animated constitutional provisions).

142 *See supra* Part IV.

the mob, and that they should include sufficiently detailed language to rule out future growth in the meaning of the constitutional rights they adopt. That would not be a fair description of the actual Constitution of the United States or of any constitutional democracy of which I am aware, however. Real constitutions include aspirational rights. Most nonoriginalist methods of interpretation come to grips with that fact. Originalism does not.