Unoriginal Textualism

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Abstract

The burgeoning debates about constitutional interpretation show no signs of abating. With surprisingly few exceptions, however, those debates involve a contrast between textualism understood as some form of originalism, on the one hand, and various varieties of less textually focused living constitutionalism on the other. In conflating textualism with originalism, however, the existing debates ignore the possibility of a nonoriginalist textualism—a textualism tethered not to original intent and not to original public meaning but instead to contemporary public meaning—public meaning now. This Article explains the plausibility of just such an "unoriginal" textualism and argues that it might serve the guidance and constraint functions of a constitution better than any of the alternatives now on offer.

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INTRODUCTION

The Constitution of the United States is very old. And very short. And very difficult to amend.

Each of these observations is true to the point of banality. But when taken together they form the background for generations of debate about American constitutional interpretation. More importantly, the age, brevity, and virtual unamendability of (most of) the text of the Constitution of the United States has combined to flatten the theoretical terrain, excluding from serious consideration an interpretive option that would be more obvious were the constitution newer, longer, and more easily amendable. That option—textualism without originalism—is the focus of this Article.

Existing debates about constitutional interpretation routinely contrast some variety of "living Constitution" constitutionalism with some variety of originalism. Under the living Constitution cluster of theories, interpretation of the Constitution should take account of the shifting and evolving nature of the world and the problems it throws at us, consequently allowing interpretations to change with changes in the background social, political, economic, and institutional considerations against which constitutional interpretation takes place.[1] But under the originalist cluster, the meaning of the Constitution is "fixed" at the time that the relevant language becomes part of the

[1] Prominent examples include STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 33–34 (2005); DAVID A. STRAUSS, THE LIVING CONSTITUTION 1–5 (2010); William J. Brennan Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985) (stressing the "adaptability" of the Constitution to "current problems and current needs"); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467, 2478 (1990) (noting the importance "of breathing life into a document originated by those long dead"); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). Although the term "living Constitution" dates at least as far back as HOWARD LEE MCBAIN, THE LIVING CONSTITUTION 3, 11 (1927), the modern usage of the phrase is commonly associated with then-Justice William Rehnquist, who was against it, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), but nevertheless provided a useful recapitulation of the origins of the phrase and of the idea. *See id.* at 693–94. And see generally the critique of the Rehnquist article in John Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011 (1983).

Constitution.[2] For a long time, this fixity of meaning at the time of adoption was thought to come from the intentions at the time of those who wrote or adopted the relevant language.[3] In recent decades, however, original intent originalism has been largely supplanted by original meaning originalism, according to which the source of constitutional meaning is located in the conventional or public—and, occasionally, technical—meaning of the language at the time of enactment.[4] In other words, original public meaning originalism is concerned not with what the authors, drafters, framers, or ratifiers intended, but with the meanings at the time of what they *said*.

Both original meaning originalists and original intent originalists purport to be, and are typically labeled as, textualists.[5] Because living

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2 *See generally* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); *see also* Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 291–92 (2020) (summarizing the fixation thesis). And note as well Joseph Story's observation that we "have a fixed, uniform, permanent construction . . . not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426 (5th ed. 1905). Some originalists distinguish between interpretation and construction, thus loosening the hold that original meaning may have on the decision of actual controversies. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458–67 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*], but whether that distinction, if sound—*see* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 109 (2021)—sacrifices too much of the impetus for originalism is a question I am happy to leave to internecine debates among originalists.

3 In addition to Rehnquist, *supra* note 1, prominent explanations and endorsements of original intent originalism include RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Larry Alexander, *Originalism, or Who is Fred?*, 19 HARV. J.L. & PUB. POL'Y 31 (1996); Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* L. & INTERPRETATION 357, 360–63 (Andrei Marmor ed., 1995); Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 BYU L. REV. 715; Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709–10 (2009); Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464–65 (1986).

4 *See infra* Sections I.C–.D.

5 *See, e.g.*, Lillian R. BeVier, *Some Reflections on Justice Scalia*, 84 U. CHI. L. REV. 2163, 2163 (2017); Stephanos Bibas, *The Limits of Textualism in Interpreting the Confrontation Clause*, 37 HARV. J.L. & PUB. POL'Y 737, 737, 740 (2014); Leah M. Litman, *New Textualism and the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138, 141 (2019); John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1355 (1998); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 676 (2019); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1532 (2011); Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1148 (1998). For resistance to the conflation of originalism with textualism, see Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269, 269 (2013) (arguing that nonoriginalist textualism better promotes a "respect for liberty"); Ilya

constitutionalism is understood as taking the actual text of the document less seriously,[6] one or another variety of originalism is considered to be, at least by its adherents, the approach most faithful to the idea of having a canonical written constitution. Commitment to the text is consequently assumed to entail a commitment to some form of originalism.[7]

This ubiquitous juxtaposition of living constitutionalism (or anti-originalism, if you will) with textualism as originalism is curious, however, because it omits an important possibility. If we were dealing with statutes and not the Constitution, textualism might be understood as committed to interpretation on the basis of what the relevant statutory language means *now*, not to what that language meant at some point in the past,[8] and not to what the drafters of that language in-

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Somin, *"Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy?*, 100 Nw. U. L. Rev. 1827, 1851–52 (2006) (reviewing Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005)). And for the simple claim that textualism *is* based on contemporary meaning, a claim that precedes the modern debates about originalism, *see* Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7, 26–32 (1982) (describing "textual argument" as legal argument "drawn from a consideration of the present sense of the words of the provision").

6 The living constitutionalists of a few decades ago were quite explicit about their rejection of textual constraint, a point often made in the name of "noninterpretivism." *See* Michael J. Perry, The Constitution, the Courts, and Human Rights 10–11 (1982); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703, 705 (1975). More recently, see the descriptive account and normative endorsement in David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 5 (2015).

7 *See, e.g.*, Ilan Wurman, A Debt Against the Living: An Introduction to Originalism 132 (2017). By contrast, Andrew Coan argues that nothing about constitutional interpretation follows from the fact of having a written constitution. Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. Pa. L. Rev. 1025 (2010). To the contrary, I argue here that some variety of textualism does follow from the Constitution's writtenness, but that what follows is not necessarily, and not desirably, an originalist version of textualism. In saying "follow," however, I do not deny Cass Sunstein's claim that the very idea of interpretation does not logically or conceptually entail one or another theory of interpretation. Cass R. Sunstein, *There is Nothing that Interpretation Just Is*, 30 Const. Comment. 193 (2015). Rather, I argue only that the normative arguments for a written constitution also provide the normative basis for contemporary meaning textualism.

8 *See* Muscarello v. United States, 524 U.S. 125, 128, 139 (1998) (relying on contemporary sources for definition of "carry" in a statute enacted in 1968); *see also, e.g.*, New Process Steel, L.P. v. NLRB, 560 U.S. 674, 684 (2010) (using 1989 and 2009 dictionaries to reaffirm ordinary meaning of word enacted in a 1947 modification of a 1935 statute); Conroy v. Aniskoff, 507 U.S. 511, 514 (1993) (implicitly using "plain meaning" of language enacted in 1940 in concluding that the language in 1993 was "unambiguous, unequivocal, and unlimited"); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. Ill. L. Rev. 1103. I say "might" in the text because there are some opinions, contra *Muscarello*, *New Process Steel*, and *Conroy*, that—in using dictionaries to determine plain or public meaning—use dictionaries con-

tended.[9] In the context of constitutional interpretation, however, originalism of one sort or another as an account of textualism—indeed, as pretty much the *only* account of textualism—seems to have emerged from the fact that the Constitution is very old, with most of its importantly contested provisions having become part of the Constitution in 1787, 1791, or 1868. Without this overlay of ancientness, debates about constitutional interpretation would likely resemble debates about statutory interpretation, with adherents of so-called plain meaning interpretation engaged in intellectual combat with adherents of so-called purposivism.[10]

The goal of this Article is to suggest that the existing debates about constitutional interpretation have neglected to take sufficiently seriously the constitutional counterpart of the plain meaning position in statutory interpretation. In statutory context, most lawyers, judges, and commentators recognize at least the respectability and arguably the dominance of the idea that statutes should be interpreted according to the plain or public meaning of their language now, and not at the time of enactment.[11] When the inquiry shifts to the language of the Constitution, however, this position becomes virtually invisible, largely on account of, to repeat, the age of the most important items

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temporaneous with the statutory enactment. *See, e.g.*, Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1755 (2019) (Alito, J., dissenting); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1772 (2020) (Alito, J., dissenting) (using 1964, the date of enactment of the Civil Rights Act of 1964, as the touchstone for textual meaning). And Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269–71 (2020), argues for what she calls a "formalistic textualism" that takes account of text, but not extratextual purpose, and assumes that the "formalistic" meaning of the text is the meaning at the time of enactment.

9 *See Conroy*, 507 U.S. at 519 (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."). For extensive accounts of modern textualism's anti-intentionalism in statutory interpretation, see generally Grove, *supra* note 8; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017).

10 For a thorough overview of these debates, *see generally* CALEB NELSON, STATUTORY INTERPRETATION 299-362 (2011). *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), *with* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005).

11 *See supra* note 8. Insofar as there is a view that the textual meaning of a statute should be determined by reference to the time of enactment and not to the time of interpretation, see Aaron v. SEC, 446 U.S. 680, 696 n.13 (1980) (using a 1934 dictionary in 1980 to determine plain meaning of a term enacted in 1934). This Article can be taken as arguing, *a fortiori*, against that position in statutory interpretation as well as in constitutional interpretation. And in debating the application of the eighteenth-century Alien Tort Statute, the opinions of the various justices make reference both to contemporaneous and to more contemporary sources of meaning but without settling on which should be controlling. *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1941 (2021).

of American constitutional text. But perhaps we have too quickly rejected the position we can call *contemporary meaning textualism*. Of course, the meaning of language changes over time, and no one would seriously claim that the guarantee of a "Republican Form of Government" in Article IV[12] protects the constitutional supremacy of the contemporary Republican Party, or that the power of the United States, under the same section and upon request from a state, to protect a state against "domestic Violence"[13] has anything to do with what the phrase "domestic violence" is *now* widely understood to mean. But these phrases are the exceptions, and most of the document can be nonconfusingly read by someone armed only with the tools of contemporary language usage, leaving aside the techniques of historical excavation. The aim of this Article is thus to challenge the too-easy conflation of textualism with originalism, to develop the idea of nonoriginalist textualism that emerges out of rejecting this conflation, and to suggest, albeit more tentatively, that contemporary meaning textualism may both explain a considerable amount of existing constitutional interpretive practice and provide a normatively attractive alternative to any of the positions now the subject of the debates about constitutional interpretation.

I. The Textual Moorings of Modern Originalism

It is rarely a bad idea to survey the terrain before exploration begins. And although such a survey of the terrain of theories of constitutional interpretation risks wasting both trees and the time of many readers, it can nevertheless assist in precisely situating the nature of the claims made here. And with that disclaimer out of the way, let the survey begin.

A. It All Started with McCulloch

Generations of undergraduates, including the author of this article, were first introduced to *McCulloch v. Maryland*[14] in undergraduate constitutional law classes as the locus of Chief Justice Marshall's ominous warning "[t]hat the power to tax involves the power to destroy."[15] Then we arrived at law school, took the law school version of

12 "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive . . . against domestic Violence." U.S. Const. art. IV, § 4.

13 *Id.*

14 17 U.S. (4 Wheat.) 316 (1819).

15 *Id.* at 431.

the course in constitutional law, and discovered that the aspect of *McCulloch* that had been featured in undergraduate courses—the concern about state taxation of federal entities—had been demoted to the far less important topic of intergovernmental immunities.[16] *McCulloch*'s importance, in the law school framing of the decision, was located principally not in ideas about intergovernmental immunities, but instead in the seemingly more important topic of congressional power and the constitutional limitations upon it. And in considering this aspect of the reframed *McCulloch*, the class paused, if we were fortunate, to consider the deeper meaning of "we must never forget, that it is a constitution we are expounding."[17]

At least from Chief Justice Marshall's perspective, this cryptic phrase is widely understood to imply not only that constitutions were different from ordinary legislation, but also that a large part of this difference resided in a constitution's vagueness and consequent flexibility.[18] As a result, Marshall in *McCulloch* is often taken as the founding parent of the very idea of a "living constitution."[19] A constitution,

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16 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 454 (3d ed. 2009) (mentioning *McCulloch* in one sentence on the dormant commerce clause); JESSE H. CHOPER, MICHAEL C. DORF, RICHARD H. FALLON JR. & FREDERICK SCHAUER, CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS (13th ed. 2019) (devoting two short paragraphs to federal immunity from state taxation, including one sentence on this aspect of *McCulloch*); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 61 (7th ed. 2013) (containing nothing on state taxation of the federal government, but quoting the "power to destroy" language in the principal treatment of the case); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 75, 294 (18th ed. 2013) (mentioning *McCulloch* in the few sentences in the book on federal immunity from state taxation).

17 *McCulloch*, 17 U.S. at 407 (emphasis omitted). For elaboration and analysis of this phrase, see MARK R. KILLENBECK, *M'Culloch v. Maryland*: Securing a Nation 7–8 (2006); Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 702–07 (2016).

18 *See* Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. STATE U. L. REV. 259, 279 (2013); Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 376 (2013) (attributing to Marshall the idea of an "elastic" Constitution); Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 162–63 (2012) (reviewing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) & JACK M. BALKIN, LIVING ORIGINALISM (2011)) (distinguishing two possible meanings of flexibility in Chief Justice Hughes' use—in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)—of the Marshall quote).

19 *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 11 n.25 (1998) (crediting Marshall with having given "living constitutionalism its mantra"); R. Randall Kelso, *Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. MIA. L. REV. 112, 138 (2017) (attributing "support for a living constitution model" to Marshall).

and thus this Constitution, is, under this understanding of Marshall's view, a broad framework, with the details to be worked out over time in light of changing circumstances, values, and problems. And the task of working out these details was to be left to the courts, especially the Supreme Court.

Perhaps surprisingly to the contemporary reader, this model of how the Constitution was to be understood and interpreted was widely accepted and rarely challenged in the century and a half following *McCulloch*. Although there were plainly sharp divisions among the justices (and commentators) in the latter part of the nineteenth century and the first half of the twentieth, such divisions were only occasionally expressed as differences about interpretive principles or approaches.[20] When Oliver Wendell Holmes vehemently objected to the Court majority's decision in *Lochner v. New York*,[21] for example, the debate was about the role of the Court in a democracy and not about how a particular text should or should not be interpreted.[22] And so too in the 1930s, when controversies over the constitutionality of New Deal and related state social legislation again sharply divided the Court, but with little attention on either side of that divide to the general principles by which a written constitution should be interpreted.[23] The debates were about substance and not about interpretation, and certainly not about theories of interpretation. Indeed, even *United States v. Carolene Products Co.*,[24] whose footnote four[25] was to be-

20 This is emphatically not to claim that issues of constitutional interpretation were not widely discussed in the founding era. *See generally* Saul Cornell, *President Madison's Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era*, 89 FORDHAM L. REV. 1761 (2021); Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 L. & HIST. REV. 821 (2019); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. REV. 751 (2009). My claim here, a claim that is at most peripheral to the principal claims of this Article, is only that explicit attention to modern-style interpretive debates was rarely seen in the Supreme Court cases from the middle of the nineteenth century to the middle of the twentieth, and rarely seen as well in the commentary about those cases.

21 198 U.S. 45 (1905).

22 *See id.* at 74–75 (Holmes, J., dissenting).

23 *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (rejecting Commerce Clause challenge to NLRB power); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (accepting Commerce Clause challenge to wage and hour restrictions on the coal industry); Nebbia v. New York, 291 U.S. 502 (1934) (rejecting substantive due process challenge to price control in the milk industry); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (upholding substantive due process challenge to ice business regulation).

24 304 U.S. 144 (1938).

25 *Id.* at 152 n.4.

come a central source for at least one view about constitutional interpretation,[26] attracted little dissent at the time over the interpretive principles it presupposed.

B. Enter the Warren Court

The relative lack of explicit attention to constitutional interpretive principles that had existed for multiple generations shifted dramatically with the Warren Court's entry onto the scene. Although *Brown v. Board of Education*[27] and *Miranda v. Arizona*[28] were perhaps the most visible examples, numerous Warren Court decisions overturned previous precedents,[29] recognized rights that previous courts had rejected,[30] and heralded an era that its critics labeled "activism" in their milder moments[31] and "usurpation"[32] or "tyranny"[33] when they were being less guarded. But now, almost for the first time, the criticized decisions were charged not only with being wrong as a matter of constitutional policy, as with Holmes's dissent in *Lochner*, but also with having made interpretive mistakes in interpreting a written document.[34] And although some of the comparatively new focus on interpretation surrounded discussions of *Brown* and various criminal procedure and voting rights decisions,[35] it was not until the 1970s,

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26 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–77 (1980) (understanding the *Carolene Products* footnote as being largely about the importance of political participation).

27 347 U.S. 483 (1954).

28 384 U.S. 436 (1966).

29 *E.g.*, Baker v. Carr, 369 U.S. 186, 208–09 (1962) (holding legislative apportionment challenges justiciable and distinguishing *Colegrove v. Green*, 328 U.S. 549 (1946)); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (holding exclusionary rule applicable to states and overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

30 *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel); Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (right to appointed counsel).

31 *See, e.g.*, WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 118 (1961); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1208–09 (2009); Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1462 (2004).

32 *See, e.g.*, Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO STATE L.J. 611, 636 (1983) (quoting G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 239 (1982)).

33 *See, e.g.*, CARROL D. KILGORE, JUDICIAL TYRANNY 14 (1977).

34 *See, e.g.*, BERGER, *supra* note 3, at 18; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31 (1959).

35 Although most references to "constitutional interpretation" in the 1950s and 1960s turn out to be about the substance and not the methodology of constitutional decisionmaking, notable exceptions include, most famously, Wechsler, *supra* note 34, and THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION (1956); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J.

technically no longer the Warren era, that questions of interpretation became as prominent as they now are.

The principal impetus for this change of focus was *Roe v. Wade*,[36] although some of the change can be seen in interpretive debates surrounding the sex discrimination decisions as well.[37] Now, almost for the first time, the criticisms of court decisions to which the critics objected were explicitly framed in the language of constitutional interpretation rather than broader constitutional policy.[38] Typically, the Court was accused of having ignored the intentions of the drafters,[39] and the responses sounded in *McCulloch* or simply acknowledged and defended a mode of constitutional decisionmaking that was unashamedly nontextual and nonintentional.[40]

During the period in which the battle lines were drawn between intentionalism and noninterpretivism, the text played little more than a supporting role. Although what we might call "weak intentionalism" maintained that the original intentions of the drafters were determinative only when the text was unclear,[41] the more common "strong intentionalism" viewed the text not as a self-standing source of constitutional authority, but instead merely as evidence of original in-

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319 (1957); Paul G. Kauper, Professor of Law, Univ. of Mich. L. Sch., Supreme Court: Trends in Constitutional Interpretation (June 6, 1958), *in* 24 F.R.D. 155 (1959); Benjamin F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599 (1962). And note the 1956 observation that "[i]t is too much to say that what was actually contemplated by the framers of a constitutional text fixes its meaning for all time." Charles Fairman, *Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 87 (1956).

36 410 U.S. 113 (1973).

37 *Compare* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (defending the sex discrimination decisions as interpretively legitimate), *with* Craig v. Boren, 429 U.S. 190, 217 (1976) (Burger, C.J. dissenting) (criticizing heightened scrutiny for sex discrimination as lacking "independent constitutional basis").

38 "[T]he abortion cases . . . rekindled the debate about the legitimacy of noninterpretive review more than any other constitutional decisions of recent times." Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 351 (1981); *see generally* Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); Symposium, *Judicial Review Versus Democracy*, 42 OHIO STATE L.J. 1 (1981).

39 *See, e.g.*, Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374–81 (1981) (defending reliance on original intent); *see also* sources cited *supra* note 3.

40 *See* sources cited *supra* note 6; *see also generally* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); David A.J. Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979).

41 *See, e.g.*, Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 450 (1996) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)) (arguing that recourse to original intent is necessary because of indeterminate constitutional language).

tent.[42] Typically, the text was acknowledged as perhaps the best evidence there was of original intent, but some strong intentionalists nevertheless argued that unmistakable evidence of original intent could trump even clear text inconsistent with that intent.[43]

What characterized this period therefore was the relative absence of a group of strong textualists. The text was not overly important for the Marshallian living constitutionalists, but nor was it even for the intentionalists, for whom the text was, in one way or another, subservient to the thoughts and plans of the people who had written the text.

C. And Then There Was Justice Scalia

When Justice Antonin Scalia arrived at the Supreme Court in 1986, his views about the interpretation of legal texts were already well formed by his career as an academic, as a member of multiple administrative agencies, and, most importantly, as a judge in the court with the most concentrated experience of statutory interpretation, the United States Court of Appeals for the District of Columbia Circuit.[44] And as an experienced—and opinionated—practitioner of the art of statutory interpretation, Justice Scalia came to the Court with strongly positive views about the importance of legal texts and equally strongly negative views about the relevance of legislative history or legislative intentions in interpreting those texts.[45]

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42 John Hart Ely, not himself a strong intentionalist in the sense described in the text, nevertheless viewed the text as evidence of original intent and not of independent authority, observing "that the most important datum bearing on what was intended is the constitutional language itself." ELY, *supra* note 26, at 16 (emphasis omitted). And for a critique of viewing the text in this evidentiary way, as opposed to the text being independently authoritative and not merely evidence of something else, see Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 808–12 (1982).

43 *See especially* BERGER, *supra* note 3; Raoul Berger, *A Political Scientist as Constitutional Lawyer: A Reply to Louis Fisher*, 41 OHIO STATE L.J. 147, 162–67 (1980). A valuable analysis in statutory context is Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

44 *See, e.g.*, *What Made Antonin Scalia Influential*, TIME (Feb. 13, 2016, 6:15 PM), https://time.com/4220692/antonin-scalia-biography/ [https://perma.cc/4MYD-V8TT].

45 *See* SCALIA, *supra* note 10, at 29–41. Justice Scalia's views are also embodied in, for example, Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in the judgment); Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment); Conroy v. Aniskoff, 507 U.S. 511, 518–19 (1993) (Scalia, J., concurring in the judgment); Begier v. IRS, 496 U.S. 53, 68–70 (1990) (Scalia, J., concurring in the judgment); Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring). For commentary, see, for example, NELSON, *supra* note 10, at 299–361; William N. Eskridge Jr., *The*

Because most—actually almost all—federal regulatory statutes are not nearly as old as the important and contested parts of the Constitution, questions about the interpretation of federal statutes typically involved, at the time that Justice Scalia entered the fray, one of two problems. One was the problem of how to interpret an indeterminate—usually for reason of vagueness—statute (or regulation) whose language did not answer the question at hand. And the other was how to deal with a linguistically determinate statute or regulation whose literal interpretation seemed to produce an odd, counterintuitive, immoral, or otherwise suboptimal result. Examples of the former—the problem of vagueness—include questions about interpreting the prohibition on "contract[s], combination[s,] . . . or conspirac[ies] in restraint of trade or commerce" in the Sherman Antitrust Act[46] and on "any device, scheme, or artifice to defraud" in Rule 10b-5[47] promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934.[48] And the latter—the problem of awkward or embarrassing precision—is illustrated by *Yates v. United States*,[49] in which the literal language of the Sarbanes-Oxley Act of 2002 criminalizing the destruction or concealment of "any record, document, or tangible object" to obstruct a federal investigation,[50] appeared to encompass the acts of Mr. Yates in throwing a small grouper back into the ocean in order to avoid prosecution for taking an undersized fish—that fish being the "tangible object" under the statute.[51]

The traditional way that courts have dealt with both of these problems—the problem of statutory indeterminacy and the problem of determinate statutory texts yielding embarrassing results—was to consult the legislative history and to make the decision most consis-

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New Textualism, 37 UCLA L. REV. 621, 650–56 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

46 15 U.S.C. §§ 1–2; *see* Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1220 (2021); Derrian Smith, Note, *Taming Sherman's Wilderness*, 94 IND. L.J. 1223, 1229 (2019).

47 17 C.F.R. § 240.10b-5 (2020).

48 15 U.S.C. § 78j(b).

49 574 U.S. 528 (2015).

50 18 U.S.C. § 1519.

51 More famous but less amusing than *Yates* is *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), addressing the question whether an heir who had murdered the testator could inherit under the testator's will. As both the majority and the dissent in *Riggs* recognized, the applicable New York statute, the Statute of Wills, was not at all vague in relevant part, and appeared clearly to allow the murdering heir to inherit. But whether to follow the clear text to its uncomfortable conclusion was exactly what divided the court. For more extensive discussion, see RONALD DWORKIN, LAW'S EMPIRE 15–20 (1986); NELSON, *supra* note 10, at 5–26; FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 33–35 (2009).

tent with what the enacting legislature had intended, or, based on extrapolating from the legislative history, what the enacting legislature would have done had they been confronted with the problem at hand.[52] But Justice Scalia would have none of it. Believing that legislative history was often itself indeterminate, that items in the legislative history were often inserted after the fact by individual legislators, and that, most importantly, only the enacted text had received the assent of the legislature, he refused to be controlled—or even much guided—by legislative intent in any form, insisting that the text and the text alone should be the guide to statutory interpretation.[53]

For Justice Scalia, this approach carried over to the domain of constitutional interpretation. As with his views about evidence of legislative intention in statutory interpretation, Justice Scalia believed that evidence of the intentions of drafters, framers, or ratifiers had no place in interpreting the written constitution. All that was ratified, he insisted, was the text and nothing but the text, and what we might know about the thoughts of James Madison, for example, was simply irrelevant, as were what we might learn from Madison's notes, or the notes of anyone else.[54]

But Justice Scalia also believed—the "also" is crucial, as we shall see—that the idea of a living Constitution was pernicious, and that the whole point of a constitution (and indeed of law itself) was to allow a polity or its representatives at one time to bind that polity in the future, regardless of what that future polity might believe or desire and regardless of what might seem best at some future time.[55] And because Justice Scalia believed both that the present should be bound by the past and that evidence of past intentions was not authoritative in interpreting a text, he was led to the conclusion[56] that the meaning of the text *when it was ratified* was the meaning that constrained future generations and future interpreters.[57]

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52 NELSON, *supra* note 10, at 231–417.

53 *See supra* note 45.

54 *See id.*; *see also* District of Columbia v. Heller, 554 U.S. 570, 589–91 (2008) (Scalia, J.) (interpreting the words of the Second Amendment); Crawford v. Washington, 541 U.S. 36, 53–57 (2004) (Scalia, J.) (interpreting the Confrontation Clause of the Sixth Amendment); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 Nw. U. L. REV. 923, 926 (2009). And for a skeptical view of both the soundness and the influence of Justice Scalia's views, see Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 153–65 (2016).

55 *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

56 Yes, the locution is mostly counterfactual. Justice Scalia rarely followed the lead of others when he disagreed.

57 *See supra* note 45.

D. And so . . .

The point of the foregoing recapitulation, in addition to general framing and background, is to emphasize, first, that the very idea of a written constitution does not preclude a flexible and expansive interpretation of that written constitution, as Chief Justice Marshall and many living constitutionalists since have stressed. Second, that a commitment to being bound by the past is consistent with (but does not logically entail) the original-intent-originalism that prevailed implicitly for many generations and explicitly in the 1950s, 1960s, and 1970s. And third, that understanding textualism as originalism (or vice versa) emerges from the conjunction of two different premises: the importance, contra the so-called noninterpretivists, of the written text as an authoritative text, and the importance, contra the living constitutionalists, of being bound by decisions made in the past.

Once we understand, however, that the contemporary conjunction, and therefore the conflation, of originalism and textualism is contingent and not necessary, and involves the conjunction of two distinct premises, we can expose the possibility of another approach. This approach is suppressed by contemporary formulations, and its plausibility is the focus of this Article. It is an approach that treats the text as genuinely authoritative[58] and constraining, as against both the living constitutionalists and the original intent originalists. It also treats the meaning of the text as the meaning at the time of interpretation – now – as against the original-meaning-originalists. Explaining and justifying that approach will occupy the remainder of this Article.

II. On the Possibility of a Nonoriginalist Textualism

A. The Very Idea of Public Meaning

Is it even possible to interpret a very old document according to the contemporary meaning of language written long ago? Intentionalists of one sort or another would say no, insisting that it is impossible to interpret language without knowing the communicative intentions of those who first wrote that language.[59] Given that the whole point of

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58 "Nothing but the text itself was adopted by the people." 3 Joseph Story, Commentaries on the Constitution of the United States § 406 (4th ed., 1873).

59 *See, e.g.*, Larry Alexander, *Connecting the Rule of Recognition and Intentionalist Interpretation: An Essay in Honor of Richard Kay*, 52 Conn. L. Rev. 1513 (2021); Larry Alexander, *Simple-Minded Originalism*, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 87–98 (Grant Huscroft & Bradley W. Miller eds., 2011); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is Impossible*, 41 San Diego L. Rev. 967 (2004); Richard S. Kay, *Original Intentions, Standard*

language is to communicate thoughts, propositions, ideas, and so on from speaker, or writer, to listener, or reader, we might think that understanding language requires understanding the content that the language is intended to communicate.[60]

But if we thought that, we would be mistaken. Given that we are not mind-readers, we learn about the thoughts—and intentions—of others by the language they use. And the language they use is accessible to us because our ability to understand what others are saying, and thus what others want us to understand, depends on the existence of conventions—shared understandings—of what certain words, phrases, sentences, and grammatical structures mean, even if we have never heard the particular sentence before.[61]

Imagine, for example, that the shells wash up on the beach and by coincidence wind up in a pattern that looks like C–A–T.[62] I daresay that most of us, seeing this pattern, would immediately think of cats—and not dogs, walruses, hamburgers, or smartphones. And that is because, and only because, the pattern of the shells resembles what we

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Meanings, and the Legal Character of the Constitution, 6 CONST. COMMENT. 39 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226 (1988).

60 Sources cited *supra* note 59. *See generally* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 1 (2012); Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 231 (2011).

61 On the existence and nature of conventions of language that transmit meaning independent of the intentions of particular language users—*utterance meaning*, as philosophers put it—on particular occasions, see PETER JONES, PHILOSOPHY AND THE NOVEL 183–84 (1975); Palle Leth, *Utterance Interpretation and Actual Intentions*, 31 AXIOMATHES 279 (2021); DAVID LEWIS, *Languages and Language*, *in* PHILOSOPHICAL PAPERS 163, 166 (1983); JOHN R. SEARLE, *Literal Meaning*, *in* EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS 117 (1979); Eike von Savigny, *Sentence Meaning and Utterance Meaning: A Complete Case Study*, *in* MEANING, USE, AND INTERPRETATION OF LANGUAGE 423 (Rainer Bäuerle, Christoph Schwarze & Arnim von Stechow eds., 1983). And for precisely this claim in the context of constitutional interpretation, see Connie S. Rosati, *Alexander's "Simple-Minded Originalism," in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 153 (Heidi M. Hurd ed., 2019). In this Article I intentionally talk of utterance meaning and not of sentence meaning, although the two are related. Sentence meaning is largely acontextual, but utterance meaning, still not speaker's meaning, is the meaning that is derived from certain words or sentences in the larger linguistic context in which they are uttered. Consider, for example, John Marshall's argument in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 387–88 (1819), that the presence of the phrase "absolutely necessary" elsewhere in the Constitution implied that the unmodified word "necessary" in the Necessary and Proper Clause meant something other than absolutely necessary. The implication came from the text alone, and not from anything about intentions, but the text that produced the implication was broader than simply one sentence. And on the sense of utterance meaning used here, see generally Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 LINGUISTICS & PHIL. 509, 515 (1992).

62 The example is self-plagiarized from Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 527–28 (1988).

have conventionally called the letters "C," "A," and "T," and because these letters, again conventionally, when arranged in this order, are understood to represents cats.

The important feature of this example is that no one[63] has intended anything. Language has a conventional meaning whose conventional status gives the components of that convention a speaker-independent and intention-independent existence, making it possible for us to associate the conventionally extant symbols with what it is that the symbols are conventionally understood to stand for. This, as it is technically described, is an *utterance meaning*, or perhaps the narrower idea of a *sentence meaning*, but both exist apart from *speaker meaning*, that is, what a speaker intends (or means, in a different sense of "mean") to communicate.[64] Typically, of course, speakers communicate, and thus make listeners aware of what they intend to communicate, by the use of utterance meaning, but what a speaker intends to do with an utterance meaning no more makes an utterance meaning the speaker meaning than using a saw turns a carpenter into a saw. Saws are tools that enable carpenters to do things, but saws exist independently of carpenters and independently of what carpenters may use them to do on particular occasions. And so too do utterance meanings enable speakers to communicate thoughts, ideas, propositions, and so on, even as those utterance meanings exist independently of speakers and independently of what speakers may use them to do on particular occasions.

The idea of an utterance meaning is thus the basic building block of any "public meaning" theory of legal interpretation, and not only the contemporary public meaning account I offer here. Original public meaning originalists, following in the wake of Justice Scalia's transformation of originalism from original intent originalism to original public meaning originalism,[65] presuppose that constitutional language had intention-independent meanings in 1787, 1791, and 1868, to take the three most important "original" dates.[66] And in order to presuppose this, original public meaning originalists necessarily must accept the idea of utterance meaning. They must accept, apart from questions

63 At least assuming the absence of an all-powerful God who has nothing better to do with her, his, or its time.

64 *See supra* note 61, and specifically the discussion of the distinction between utterance meaning and sentence meaning.

65 *See supra* Section I.C.

66 These being the dates of the original Constitution, the Bill of Rights, and the Fourteenth Amendment, respectively. U.S. CONST. art. VII; Transcription of the 1789 Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution; U.S. CONST. amend. XIV.

about how we know what that public meaning was, that there is such a thing as public meaning, that public meaning is created by conventions of language, and that it is possible to interpret that public conventional meaning without relying on the intentions—the mental states—of those who wrote, approved, or ratified that language. Accordingly, the account I offer here rests on common ground with almost all contemporary originalists, a group that rejects speaker's meaning in favor of public meaning. Of course, original public meaning originalists argue that it was the public meaning then and not now that matters, but that claim presupposes that there is such a thing as public meaning, that it is distinct from the intentions of the users of the language whose interpretation is at issue, and that such public meaning is—certainly in theory, and often in practice—ascertainable to a usable degree.

B. A Word About "Public"

In describing the idea of intention-independent utterance meaning, I have been casually describing it, consistent with usage in contemporary constitutional theory, as "public" meaning. But this is too casual. The basic idea is not that the meaning is necessarily public in some grand sense, although it might be. Rather, the idea is that utterance meaning derives from the linguistic conventions of a linguistic community. That linguistic community, however, need not be the public at large. It might be a nontechnical subset of the public at large, as with the way in which the sandwiches described as "heroes" or "subs" in much of the United States are known as "grinders" in New England, and the way in which the same New Englanders use the word "frappe" to designate the soda-fountain drink that much of the rest of the United States knows as "milkshakes" or, rarely, as "ice cream sodas." But when one New Englander uses the word "grinder," another New Englander will typically know what she is referring to, just because of what that word means in their shared linguistic community.

More commonly, and certainly more relevantly to this Article, many linguistic communities are professional or technical. Although inhabitants of Vermont and New Mexico are not members of the same geographic subcommunity (or sub-subcommunity) of the community of English speakers, and thus use different words to describe a meat and cheese sandwich on a long roll, Vermont physicians are members of the same, and overlapping, subcommunity as New Mexico physicians. Both Vermont and New Mexico physicians therefore use words like "asthenia" and "hydroxyapatite" that have utterance meanings

clear to them but largely unknown to those outside their nongeographic linguistic subcommunity.

The relevance of this here is that lawyers and judges, just like physicians and New Englanders, are members of a linguistic subcommunity. Consequently, legal instruments containing phrases such as "reverter," "bill of attainder," and, perhaps, "letters of marque and reprisal" can have meanings known to lawyers and judges but largely unknown to the larger community of English speakers. The issue of legal technical language has profound implications for many approaches to constitutional interpretation,[67] but I do not want to get ahead of things. For now, the only point is that the idea of public meaning, and the commitment to intention-independent utterance meaning that it necessarily incorporates, does not exclude the possibility of "publics" smaller than the entire population, and encompasses only those who are members of a linguistic subcommunity smaller than the population at large

C. Two Objections Considered

1. The Argument from Context

A common response to the idea that there can be self-standing linguistic meaning is that what we believe to be meaning derived solely from the words, phrases, or sentences, in fact presupposes some context. Even my ability to think "cat" when I see the C–A–T array of shells on the beach presupposes a world in which that association comes from speakers having a shared idea of the context in which they are speaking, even if that context is not actually present here. The entire idea of literal meaning, so the argument continues, presupposes some context in which the language is used.[68]

At some level the argument is plainly right. But recognizing that there must be at least some presupposed context for the idea of utterance meaning to work does not mean that the understood context cannot be widely shared in much the same way that conventional semantic meanings are shared.[69] When at the dinner table I say,

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67 *See generally* McGinnis & Rappaport, *supra* note 20; John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018); Schauer, *supra* note 2; Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015). And on legal technical language more generally, see especially Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEVELAND STATE L. REV. 271 (1989).

68 This is the basic thrust of the argument of Larry Alexander, among others. *See* Alexander, *supra* note 59.

69 *See* SEARLE, *supra* note 61.

"Please pass the salt," no one would understand me to be asking the person nearest the salt to stand up and throw the salt across the room in the manner of a quarterback "passing" a football. And if you simply say "yes" when I ask you if you know what time it is, you demonstrate that you are an outlier to a conventional linguistic usage shared by all or virtually all of the members of our linguistic community. Accordingly, when I say that utterance meaning is "acontextual" and that utterance can communicate and be understood acontextually, I express in shorthand form the idea that language meaning for members of a linguistic community is a function of the contextual assumptions of all or most of the members of that linguistic community. That being so, it follows that language meaning, although admittedly dependent on context in this larger sense, nevertheless can and does exist independently of the particular context of a particular utterance.[70]

2. The Argument from Contextual Enrichment

Although the idea of context itself cannot undercut the idea of conventional utterance meaning, the more serious challenge, not wholly unrelated to the argument from context, is based on the idea that most communications involve not only bare semantic content—acontextual utterance meaning—but also pragmatic (in the technical sense) or contextual enrichments or other modifications that depend on more particular contexts.[71] Consider, for example, what is technically called "conversational implicature."[72] When I say, "Are you having dessert?" and you respond, "I'm on a diet," your literally nonresponsive answer is understood as "no" by virtue of an understood implication. Or if I tell my class, truthfully, that Professor Jones, my colleague and their professor, is sober today, I have not only made an accurate statement about Jones today but also implied an inaccurate one about Jones on other days. The implication of my observation is that I would have observed this, and reported on it, only if it was in

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70 *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

71 The idea is attributable to the philosopher Paul Grice. *See generally* H.P. GRICE, STUDIES IN THE WAY OF WORDS (1989); H.P. Grice, *Utterer's Meaning and Intentions*, 78 PHIL. REV. 147 (1969); H.P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957). For subsequent explication, see 3 SYNTAX AND SEMANTICS: SPEECH ACTS (Peter Cole & Jerry L. Morgan eds., 1975); Wayne A. Davis, *Implicature*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2019), https://plato.stanford.edu/archives/fall2019/entries/implicature/ [https://perma.cc/K5GY-TMJG].

72 *See* sources cited *supra* note 67.

some way remarkable.[73] I have thus implied, falsely, that there are days on which Jones is not sober.

In a constitutional context, therefore, the point of one possible objection to making much of utterance meaning by itself is that even if most constitutional provisions do have a conventional semantic utterance meaning, that meaning only captures some of what the drafters wanted to convey.[74] Consider, for example, *Crawford v. Washington*[75] and the raft of ensuing Supreme Court decisions[76] seeking to interpret and apply the Sixth Amendment requirement that defendants be afforded "the right . . . to be confronted with the witnesses against [them]."[77] The word "confront" appears to have an ordinary and accessible meaning, and so too does the word "witnesses." But in order to determine the full original meaning of the entire clause, Justice Scalia for the *Crawford* majority was required to, or believed he was required to, determine what that phrase fully meant, in context, in 1791. And for that he looked at various historical sources, not, he insisted, to determine what the drafters or ratifiers of the Bill of Rights intended in 1791, but to determine what the phrase was understood *fully* to mean at that time.[78]

But suppose that Justice Scalia had not engaged in this historical contextualization. Although he recognized that multiple interpretations might have been possible,[79] he still might have been able to understand what the words "confront" and "witness" meant in ordinary English in 1791, or even what they meant in technical lawyer's English at the time. And in doing so, he might have been able to reach a conclusion, not unlike the one he actually reached, based solely on the utterance meaning of the words involved, leaving aside any possible contextual enrichments.

Much the same applies to those, most prominently John Hart Ely, who would reject the idea that there is any substantive component at all in the guarantees of "due process" in the Fifth and Fourteenth

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73 As the philosopher John Searle puts it: "No remark without remarkableness." JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 144–45 (1969).

74 *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 288–93 (2017) [hereinafter Solum, *Originalist Methodology*]; Solum, *Originalism and Constitutional Construction*, *supra* note 2, at 465–66.

75 541 U.S. 36 (2004).

76 *See, e.g.*, Ohio v. Clark, 576 U.S. 237 (2015); Michigan v. Bryant, 562 U.S. 344 (2011); Davis v. Washington, 547 U.S. 813 (2006).

77 U.S. CONST. amend. VI.

78 *Crawford*, 541 U.S. at 42–62 ("We must therefore turn to the historical background of the Clause to understand its meaning.").

79 *Id.* at 42–43.

Amendments.[80] For Ely and others,[81] the word "process" is about procedure, and only procedure, and was so understood not only now but also in 1791 and 1868. And although again various contextual enrichments may enable us (or may enable original public meaning originalists) to determine the *full*, or at least "full-er" meaning of that term at the time of enactment, or at any other time, we cannot say that the unenriched text has *no* utterance meaning. That meaning might be *sparse*, as it is said,[82] but sparse is different from nonexistent. Indeed, recent events regarding the process for electing the President of the United States have highlighted the point, because the controversies and conflicts arising out of the 2020 election have almost entirely focused on the sentences and phrases in the Constitution alone and about what those phrases require. Whether it be the procedures in Article II and in the Twelfth Amendment that establish and govern the Electoral College,[83] or the dates specified in the Twentieth Amendment,[84] the electoral events that commenced on November 4, 2020, and culminated in the inauguration on January 20, 2021, were noteworthy in part for the amount of attention paid to the sparse and unenriched text of the Constitution as well as to the sparse and unenriched text of the various statutes enacted by Congress in accordance with the constitutional text.[85] Recent events have thus made clear, if it was not already clear, that the argument from contextual enhancement cannot plausibly be understood as maintaining that unenriched interpretation is impossible. At best the argument supports the conclusion that unenriched interpretation—sometimes rid-

80 ELY, *supra* note 26, at 18. *But see* Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 253–57 (2016) (arguing that "substantive due process," although redundant, is not self-contradictory).

81 *See* Monaghan, *supra* note 39, at 364.

82 *See* Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1939 (2013).

83 U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. amend. XII.

84 *Id.* amend. XX, §§ 1–2.

85 *See* ELIZABETH RYBICKI & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL32717, COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION, INCLUDING OBJECTIONS BY MEMBERS OF CONGRESS (2020). The full history of the 2020 election and its aftermath has yet to be written, but a relatively comprehensive account, one which refers to the unenriched text of the Constitution, is Maggie Haberman & Annie Karni, *Pence Said to Have Told Trump He Lacks Power to Change Election Result*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html [https://perma.cc/PA3L-GFSS]; and most recently, and most comprehensively, see generally VICTORIA F. NOURSE, THE IMPEACHMENTS OF DONALD TRUMP: AN INTRODUCTION TO CONSTITUTIONAL INTERPRETATION (2021).

ing under the banner of "plain meaning"[86]—is sometimes or often incomplete. But that does not defeat the idea that even an incomplete interpretation is often sufficient to answer the questions raised under it. Incomplete interpretation, even if sometimes not optimal, is both possible and often satisfactory.

D. On the Possibility of Contemporary Public Meaning Textualism

What emerges from the foregoing is the conclusion that a textualism not tethered to original public meaning is, at the very least, possible. Indeed, this conclusion should not be surprising to today's original public meaning originalists. If they can accept that there was a public meaning in 1787 or 1791 or 1868, then they are committed to accepting that there can be a public meaning in 2022. And if those same original public meaning originalists can accept that the public meaning of more than 200 years ago is accessible to them, then, again, they cannot avoid accepting that the public meaning of 2022 is accessible to the interpreters of 2022.

The only plausible objection to the possibility—and, to repeat, at least for now, the possibility only—of a contemporary public meaning textualism would be some variety of intentionalism. If it is simply impossible to interpret language without reference to the communicative intentions of the users of that language, then a contemporary public meaning textualism can never get off the ground. But then neither can original public meaning textualism. And intentionalism as a theory of language fails for the reasons detailed above, with the shells on the beach example illustrating the basic point. Any plausible intentionalism, just as with any plausible intention-based theory of language generally, must accept that even intentions can only be conveyed by the deployment of conventional understandings—conventional meanings. Original public meaning originalism avoids the slide into pure original intentions originalism only by accepting, and properly so, the existence of intention-independent meaning. Such meaning may be sparse, but sparse is not nothing. The question then is whether intention-independent contemporary meaning can be, as it is with respect to statutory interpretation, a respectable and possibly desirable approach to constitutional interpretation. Having established, hopefully,

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86 *See, e.g.*, Chiafalo v. Washington, 140 S. Ct. 2316, 2330 (2020) (Thomas, J., concurring in the judgment); Ramos v. Louisiana, 140 S. Ct. 1390, 1402 n.47 (2020) (plurality opinion of Gorsuch, J.); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 842 (2015) (Roberts, C.J., dissenting).

that such an approach is possible, the question then turns to whether it is desirable.

III. The Constraining Constitution

A. *The Nature and Costs of Constitutional Constraint*

Constitutions, and especially written constitutions, do many things. Most obviously, they *constitute*. They establish governments, and in doing so they do more than regulate preexisting institutions and preexisting behavior. Rather, constitutions create institutions that would otherwise not exist.[87] The Constitution of the United States, for example, creates the institution of Congress,[88] the institution of the Presidency,[89] the institution of the Supreme Court,[90] and many other institutions besides.[91]

In addition to creating the institutions of government, and thus creating government, constitutions also serve important settlement functions. In the face of actual or potential disagreement about how governments should operate and what, substantively, they should do, constitutions settle, even if not permanently, many of these disagreements by taking the matters about which people disagree off the table.[92] Although there are plausible arguments, for example, that a country operates best when it is organized largely centrally and vertically—as in France[93]—the U.S. Constitution, in constituting states with independent powers, simply removes the basic question of federalism—or not—from consideration, even as of course there remain disagreements around the edges.[94] And although, again, a plausible

87 On the distinction between constitutive and regulative functions, and constitutive and regulative rules, see Searle, *supra* note 73, at 33–42.

88 U.S. Const. art. I, § 1.

89 *Id.* art. II, § 1.

90 *Id.* art. III, § 1.

91 For example, the electoral college, *id.* art. II, § 1, the State of the Union address, *id.* art. II, § 3, and a constitutional convention for amending the Constitution, *id.* art. V.

92 *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997) (explaining and justifying the value of settlement for settlement's sake); Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 Geo. J.L. & Pub. Pol'y 475, 479–80 (2016) (same); Roderick M. Hills, Jr., *Mistaking the Window-Dressing for the Window*, 91 Judicature 146, 146–47 (2007) (reviewing Kermit Roosevelt III, The Myth of Judicial Activism: Making Sense of Supreme Court Decisions (2006)) (same); Strauss, *supra* note 6, at 55 (same); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. Ill. L. Rev. 1847, 1865 (same).

93 *See* Ralph Nelson, *The Federal Idea in French Political Thought*, 5 Publius 7 (1975).

94 Even the most expansive views about national power, for example, accept that the states have a degree of independent governing authority that cannot be overridden by the national government. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (upholding federal

case might be made for requiring defendants in criminal cases to testify and be subject to cross-examination in open court,[95] the Fifth Amendment renders otherwise conceivable disagreements about the very idea of a privilege against self-incrimination beyond discussion.[96] In these and many other ways, having a constitution, and especially a written one with the entrenchment that writing engenders,[97] settles many of the matters about which we might otherwise disagree.

Less concretely, constitutions also serve various symbolic or communicative functions.[98] The virtues of a constitution as rallying cry, manifesto, rhetorical device, symbol of the nation, or public statement of shared values are often overstated,[99] but they are not nonexistent.[100] And even if the symbolic *effect* of a constitution may not be as great as sometimes asserted, there can be little doubt that constitutions are often *intended* to have that effect and are drafted and celebrated with that goal in mind.

Of equal importance to the foregoing (and other) functions, however, constitutions are instruments of constraint.[101] And although the

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power to regulate seemingly local loansharking); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding application of Civil Rights Act of 1964 to largely but not completely local businesses); Wickard v. Filburn, 317 U.S. 111 (1942) (allowing national regulation of in-state activities that, when aggregated, had national effects).

95 The case was often made, with characteristic vitriol, by Jeremy Bentham. *See* Michael A. Menlowe, *Bentham, Self-Incrimination and the Law of Evidence*, 104 L.Q. REV. 286 (1988).

96 *See* U.S. CONST. amend. V.

97 *See* SCHAUER, *supra* note 70, at 68–72; Strauss, *supra* note 6, at 55.

98 *See, e.g.*, Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75, 76 (2011) (noting the symbolic importance of the U.S. Constitution); Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); Aliza Plener Cover, *Archetypes of Faith: How Americans See, and Believe in, Their Constitution*, 26 STAN. L. & POL'Y REV. 555 (2015); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 17–18 (1984) (describing the Constitution as "a sacred symbol"); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937); Sanford Levinson, "*The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123; Laura Valentini, *On the Value of Constitutions and Judicial Review*, 11 CRIM. L. & PHIL. 817 (2017).

99 For admirably deflationary views about the symbolic, communicative, or rhetorical value of constitutions and judicial decisions enforcing them, see generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (challenging claims that the Constitution and Supreme Court opinions can change public opinion); Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739 (1997) (arguing that the Constitution's linguistic indeterminacy substantially undercuts its symbolic effect).

100 As an empirical study of the phenomenon has concluded, see generally Larry R. Baas, *The Constitution as Symbol: Patterns of Meaning*, 8 AM. POL. Q. 237 (1980); Larry R. Baas, *The Constitution as Symbol: The Interpersonal Sources of Meaning as a Secondary Symbol*, 23 AM. J. POL. SCI. 101 (1979).

101 *See* Richard H. Fallon Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975 (2009).

long-term goal of constitutional constraint might be to keep bad officials from doing bad things, the principal way in which this is accomplished is by keeping all officials, including good ones, from doing certain things, even when those things are good things done for good purposes.[102] In other words, a constitution not only keeps bad officials from doing bad things, but also keeps good officials from doing good ones in the service of larger or longer-term values.[103]

A number of concrete issues and cases will make this point clearer. Consider, for example, the protection under the First Amendment of truly awful people saying truly awful and potentially dangerous things. Clarence Brandenburg suggesting to his fellow Klansmen that acts of "revengeance" against African-Americans and Jews might be necessary is one prominent example,[104] and so too with the homophobic statements of the Reverend Fred Phelps and his compatriots at the Westboro Baptist Church,[105] the puppy torturers whose profit-making films were protected in *United States v. Stevens*,[106] and the encouragers or enablers of sexual violence whose encouragements almost always lie well within the domain of constitutionally protected speech.[107]

Much the same, and just as obviously, applies to the various protections afforded to defendants in criminal cases. The protections of the Fourth, Fifth, and Sixth Amendments plainly (and properly) produce the acquittal, dismissal, or nonincarceration of people who are genuinely guilty, for fear, wisely, of excessive empowerment of police, prosecutors, and other law enforcement arms of the state.[108] But as

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102 *See id.* at 980.

103 *See* Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689, 1694 (2017) [hereinafter Schauer, *The Annoying Constitution*] (arguing that self-constraint is problematic in enforcing long-term constitutional values in the face of short-term seemingly good policies); Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1895 (2013) (arguing that coercion is necessary to uphold second-order constitutional constraints).

104 Brandenburg v. Ohio. 395 U.S. 444 (1969) (per curiam). "African-Americans" is not the term that Clarence Brandenburg used.

105 *See* Snyder v. Phelps, 562 U.S. 443, 448–49, 460–61 (2011).

106 *See* 559 U.S. 460, 472 (2010).

107 *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332–34 (7th Cir. 1985) (holding unconstitutional a restriction on nonobscene sexually subordinating and sexual-violence-encouraging speech).

108 *See, e.g.*, Nix v. Williams, 467 U.S. 431, 443 (1984) (upholding Fourth Amendment rights of an "obviously guilty" defendant); Linkletter v. Walker, 381 U.S. 618, 650 (1965) (Black, J., dissenting) (acknowledging that the Fourth Amendment makes it more difficult to convict the guilty); Trupiano v. United States, 334 U.S. 699, 709 (1948) (noting that the Fourth Amendment protects the guilty as well as the innocent); Twining v. New Jersey, 211 U.S. 78, 91 (1908) (recog-

with the First Amendment cases, the effect of recognizing and upholding the rights even of guilty defendants is to impose short-run public interest costs in the name of long-run public interest or individual-rights benefits. In the service of long-term benefits, the protections of the Fourth, Fifth, and Sixth Amendments constrain law enforcement even when it operates in good-faith pursuit of the guilty. And properly so.

The constitutional demand of public interest (or general welfare) sacrifice in the name of larger and deeper constitutional values is not only about individual rights. State governors and legislators seeking to provide competitive advantages to local (and, sometimes, genuinely indigenous[109]) businesses are often not doing so for corrupt or self-interested reasons, but, nevertheless, dormant commerce clause doctrine frequently impedes these officials in their well-meaning and public interest-focused efforts.[110] So too with separation of powers at the federal level, where bipartisan efforts to adapt a government structure designed in 1787 to the realities of twentieth and twenty-first century governance may run afoul of the way in which the Constitution often prohibits even the most benign and well-meaning of such efforts.[111]

B. The Targets of Constitutional Constraint

If at least one of the chief purposes of the Constitution is thus to constrain even well-meaning officials pursuing genuinely public interested policies, then we must ask just how this constraint can be operationalized. One possibility, of course, is that the officials who are to be constrained should be considered free to pursue such public interested policies, with the courts then available to declare such policies unconstitutional. In his proposed speech regarding the so-called gold clauses,[112] and in an actual letter in the wake of the Supreme Court

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nizing that the Fifth Amendment provides "shelter to the guilty"); Moore v. Czerniak, 534 F.3d 1128, 1195–96 (9th Cir. 2008) (Bybee, J., dissenting) (lamenting Sixth Amendment's freeing of a "plainly guilty" defendant).

109 *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984) (invalidating protectionist tax designed to protect indigenous Hawaiian pineapple wine producers).

110 *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 583–88 (1997) (striking down refusal to extend tax exemption for nonprofits to nonprofits operated principally for the benefit of nonresidents); Hughes v. Oklahoma, 441 U.S. 322, 338–39 (1979) (invalidating state effort to preserve state natural resources for state residents); S. Pac. Co. v. Arizona, 325 U.S. 761, 781–82 (1945) (holding that safety-motivated railroad restriction placed unconstitutional burden on interstate commerce).

111 *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944–46 (1983) (invalidating one-house veto even when the product of bipartisan congressional approval).

112 The so-called gold clauses, pursuant to which a creditor could demand payment in gold,

decision invalidating the National Industrial Recovery Act,[113] President Franklin Roosevelt urged just such a strategy, telling Congress that it was their job to enact the legislation that it thought best served the public interest, leaving it to the Supreme Court to decide whether that legislation violated the Constitution.[114]

The same approach, not surprisingly, seems to appeal to modern-day members of Congress. When Congress overwhelmingly passed the Flag Protection Act of 1989,[115] only weeks after the Supreme Court's decision in *Texas v. Johnson*,[116] the members could not have helped but know that the legislation was doomed from the outset to constitutional invalidation.[117] So too with efforts to prohibit virtual child pornography[118] and to release the police from the alleged shackles of *Miranda v. Arizona*.[119] In all of these instances the legislation was predictably invalidated, yet there is no evidence that any member of Congress lost any votes for departing from clear Supreme Court precedent in coming out against flag burners, child pornographers, and criminals of all stripes.

These examples all involved public officials essentially disregarding patently applicable Supreme Court decisions. Whether those on-all-fours decisions were actually controlling—binding—on Congress or on the executive branch is hugely contested, and judicial departmentalists would see little amiss with a state of affairs in which members of Congress decided according to its own constitutional judgment even in the face of applicable Supreme Court decisions.[120] But if, to

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were declared unenforceable in Executive Order 6102. President Roosevelt prepared his speech on the assumption that this Executive Order would be invalidated, but the Supreme Court upheld its constitutionality, and the speech was never delivered. *See* Perry v. United States, 294 U.S. 330 (1935); Nortz v. United States, 294 U.S. 317 (1935); Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240 (1935).

113 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

114 *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 26 (18th ed. 2013).

115 Pub. L. No. 101–131, 103 Stat. 777.

116 491 U.S. 397, 399 (1989) (invalidating on First Amendment grounds the Texas prohibition on desecrating the American flag).

117 As indeed transpired. *See* United States v. Eichman, 496 U.S. 310 318–19 (1990) (invalidating the Flag Protection Act of 1989 as unconstitutional viewpoint discrimination).

118 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 254–56 (2002) (invalidating those provisions of the Child Pornography Prevention Act of 1996 that prohibited material not using images of actual children).

119 Dickerson v. United States, 530 U.S. 428, 432 (2000) (overturning congressional statute aimed at overturning *Miranda v. Arizona*, 384 U.S. 436 (1966)).

120 So-called departmentalists, a politically eclectic group including Abraham Lincoln, Franklin Roosevelt, Ronald Reagan's Attorney General Edwin Meese, and Professors Steven Calabresi and Sanford Levinson, maintain that each branch—department—of government is le-

the contrary, Supreme Court decisions ought actually to constrain nonjudicial officials more broadly than simply constraining the actual parties to those decisions, then the flag-burning, child pornography, and *Miranda* scenarios exemplify situations in which the second-order constraints on first-order policy or political decisions have gone largely unenforced, or at least belatedly enforced, and thus in which the goals of a constraining constitutional order are frustrated. When the very officials who are to be constrained have the authority to interpret the meaning of the constraints on them, it should come as little surprise that those officials will typically find that they are not in fact constrained.[121]

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gitimately entitled to make its own judgments of constitutionality, and thus that the Supreme Court's determinations of constitutionality bind only the judicial branch. For full-throated defenses of departmentalism, see, iconically, Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); *see also* Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw. U. L. REV. 269 (1993); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713 (2017); Kevin C. Walsh, *Originalist Law Reform, Judicial Departmentalism, and Justice Scalia*, 84 U. CHI. L. REV. 2311 (2017). And for equally full-throated defenses of so-called judicial supremacy, see *Dickerson*, 530 U.S. at 428; Cooper v. Aaron, 358 U.S. 1 (1958); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). More nuanced positions, qualifiedly recognizing the arguments for both departmentalism and judicial interpretive supremacy, include Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105 (2004); Richard H. Fallon Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487 (2018); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004). And on the closely related controversies about what is often called "popular constitutionalism," compare Larry D. Kramer, *We the Court*, 115 HARV. L. REV. 4 (2001), with Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

121 *See* Schauer, *The Annoying Constitution*, *supra* note 103, at 1703–04. Self-interested or self-empowering interpretation is but an application of the well-studied phenomenon of *motivated reasoning*—that is, the tendency of people to perceive the factual world in a way that reflects their normative preferences. The initial insight and research on motivated reasoning is Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990). Subsequent elaborations and explanations include Peter H. Ditto, David A. Pizzaro & David Tannenbaum, *Motivated Moral Reasoning*, 50 PSYCH. LEARNING & MOTIVATION 307 (2009); Keith E. Stanovich & Richard F. West, *Natural Myside Bias is Independent of Cognitive Ability*, 13 THINKING & REASONING 225 (2007); Keith E. Stanovich, Richard F. West & Maggie E. Toplak, *Myside Bias, Rational Thinking, and Intelligence*, 22 CURRENT DIRECTIONS PSYCH. SCI. 259 (2013). And for an application of motivated reasoning to constitutional decisionmaking, see generally Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

As a descriptive matter, however, things tend to be different when the constitutional text is clear. Presidents do not run for third terms, even when they are popular at the end of their second term, and that is because the clear language of the Twenty-Second Amendment prohibits them from doing so.[122] Candidates for President who win the popular vote nationally accept, even if grudgingly, the mechanism of the Electoral College.[123] Those who are nineteen years old are never denied the right to vote because of their age, at least after the adoption of the Twenty-Sixth Amendment.[124] And rarely are presidential pardons of the undeserving legally challenged, the textually explicit pardon power being so textually unlimited.[125]

All of this suggests that, as a descriptive matter, the Constitution is understood to speak in many of its clauses directly to those it seeks to constrain.[126] But it does so most effectively when it speaks most clearly. This phenomenon has not been lost on contemporary constitutional drafters, who tend to avoid the kinds of "majestic generalities"[127] that characterize much of the United States Constitution, opting instead for longer and more detailed documents that can provide more guidance and more constraint by speaking not to courts, or at least not only to courts, but instead to those officials the documents actually seek to guide and constrain.[128]

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122 U.S. CONST. amend. XXII, § 1.

123 The presidential elections of 1888, 2000, and 2016 being the clearest examples. *See* Jerry Schwartz, *They Lost the Popular Vote but Won the Elections*, AP (Oct. 31, 2020), https://apnews.com/article/AP-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb [https://perma.cc/Z63S-YHF2].

124 U.S. CONST. amend. XXVI, § 1.

125 *See* U.S. CONST. art. II, § 2, cl. 1; United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) (noting unlimited nature of pardon power); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (same). Recent entries in the long list of unreviewable and unreviewed pardons of the undeserving include Bill Clinton's pardon of Marc Rich and Donald Trump's pardon of Charles Kushner. *See* E.J. Dionne Jr., *Bill Clinton's Last Outrage; The President's Defenders Feel Betrayed by His Pardon of Marc Rich*, BROOKINGS (Feb. 6, 2001), https://www.brookings.edu/opinions/bill-clintons-last-outrage-the-presidents-defenders-feel-betrayed-by-his-pardon-of-marc-rich/ [https://perma.cc/TZ5Z-XKSF]; Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone and Charles Kushner*, N.Y. TIMES (Jan. 17, 2021), https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html [https://perma.cc/8CSQ-BE8F].

126 Strauss, *supra* note 6, at 12 (although arguing that the constitutional text does little work in litigated cases, recognizes that "some issues are so conclusively settled by the text that they are never litigated").

127 Fay v. New York, 332 U.S. 261, 282 (1947).

128 *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1652–58 (2014) (comparing United States and other national constitutions in length and detail); Christopher W. Hammons, *Was James Madison Wrong? Rethinking*

C. *On Constraint and Interpretation*

The examples described above provide some evidence for the conclusion that officials appear willing to accede directly to constitutional constraints when those constraints speak clearly and precisely but not when constitutional constraint is embodied in the vague clauses that produce so much conflict and litigation. Perhaps much—and arguably most—of the Constitution of the United States therefore turns out to be a poor vehicle for directly constraining and guiding officials without the intervention of the courts. The constitutional text as it exists is often so vague in its language and so gap-laden in its coverage as to be particularly ineffective in performing at least one of its major functions. But it is, to put it mildly, too late in the day to do something about that state of affairs, even assuming that it would be good to try to start over or propose wholesale revision, which it would not be.

Given the nature of the text that we do have, there remains the possibility that interpretive strategies can compensate for the deficiencies of the existing text. One of these strategies, albeit not one that is the principal focus of this Article, is rule-promulgation by interpretation. Although it is fashionable in some circles to make fun of the Supreme Court when it offers its detailed prescriptions through three- and four-part tests,[129] those tests often do via interpretation what a more detailed constitution would do directly. Few police officers, for example, are uncertain about what to say to custodial suspects about their rights, and that lack of uncertainty emerges from the regulation-like clarity of the Supreme Court's instructions in *Miranda v. Arizona*,[130] instructions that in the Court's opinion tell officers under most circumstances what to say, whom to say it to, and when to say it.[131]

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the American Preference for Short, Framework-Oriented Constitutions, 93 AM. POL. SCI. REV. 837, 845–46 (1999) (same for American state constitutions).

129 *See, e.g.*, Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 98–99 (1993) (criticizing the "medieval earnestness" of detailed Supreme Court opinions); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 169 (1985) (arguing that the "formulaic style" of opinions is "obtrusively elaborate" and "cumbersome"). And for a defense of what Horwitz and Nagel criticize, see Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 316; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

130 384 U.S. 436 (1966).

131 *Id.* at 467–73.

Miranda and an annoyingly small number of other cases[132] are, however, largely about the Supreme Court's outputs. But if we refocus our attention from outputs to inputs, we find ourselves back where we started—with the question of what to use in interpreting the Constitution—in interpreting a text whose language is often so vague as to give virtually no guidance to the interpreters. But when formulated in this way, the question of what to use in interpreting the Constitution can only be answered satisfactorily if we direct our attention to the vital but too-often-ignored question of just who it is that is doing the interpreting.

Overwhelmingly, the literature on constitutional interpretation takes as its paradigm interpreter a Supreme Court Justice, or, sometimes, the Supreme Court collectively.[133] Occasionally, that literature recognizes that judges other than Supreme Court Justices also interpret the Constitution.[134] And sometimes there is even acknowledgment that certain agencies and offices, the Office of Legal Counsel most prominently, also must interpret the Constitution.[135] But rarely is very much attention paid to members of Congress,[136] state legislators, city council members, police officers, prosecuting attorneys, and teachers in public schools, among many others, who must also interpret the Constitution. Does not the Constitution also speak to them? In the 2019 Term, after all, the Supreme Court decided a mere fifty-

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132 The two-part test for sex discrimination, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–26 (1982); Craig v. Boren, 429 U.S. 190, 197–200 (1976), the three-part test for obscenity, Miller v. California, 413 U.S. 15, 24–25 (1973), and the four-part test for commercial advertising, Cent. Hudson Gas & Elec. Co. v. Publ. Serv. Comm'n of N.Y., 447 U.S. 557, 561–66 (1980), fall far short of *Miranda* in directly apply-able clarity, but they do structure the inquiry in a way that the constitutional language they interpret does not.

133 *See* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459 (2012) (lamenting the "[Supreme] Court-centered account" that dominates the writing about constitutional interpretation).

134 *Id.* (describing lower court constitutional interpretation as the "forgotten stepchild of constitutional theory"). To the same effect, see Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 307–08 (2005); Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 772 (1993).

135 Among too-few sources, see generally Johnsen, *supra* note 120; Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 167 U. PA. L. REV. 1783 (2019).

136 There is, of course, a large literature arguing that Congress and the executive branch should have the power to interpret the Constitution unencumbered by Supreme Court decisions. *See* Johnsen, *supra* note 120. But that literature tends to say little if anything about just how those branches ought to exercise that power.

nine cases on the merits with full opinions after briefing and oral argument.[137] And although obviously a much larger number of constitutional cases is decided by other federal courts and by state courts, the notion that there is no constitutional law and thus no constitutional constraint unless and until some particular controversy has been adjudicated by a court seems not only cumbersome and inefficient, but in some tension, to say the least, with the idea that federal, state, and local officials have an obligation to follow the Constitution.[138]

The foregoing conclusion is in need of further elaboration. More specifically, the initial claim here, a claim I hope is not controversial, is that rule systems, and *a fortiori* specific rules, can tell their addressees what those addressees may, must, or must not do. The addressees may choose not to obey, or they may obey for fear of punishment or other sanctions, or they may obey because they have internalized the rules or the rule systems, but they are still the direct addressees—the audience, or the targets—of individual rules and of systems of rules, unmediated by official or institutional interpreters. This observation is hardly surprising. After all, most drivers stop at most "stop" signs most of the time without waiting for a court to adjudicate whether their particular act of stopping is or is not encompassed by this sign in this place at this time. And although the Internal Revenue Service might wish that the rate of tax compliance were even higher than it is, the rule system that we know as tax law tends, again, to operate more or less effectively without constant judicial intervention.

A useful contrast with the previous examples might come from the way in which refereed or umpired sports and games typically operate. At least at organized competitive levels, the umpires or referees are there to make a decision about *every* play, or pitch, or shot, or whatever. The apocryphal umpire who said "they ain't nothin' [until] I call[] 'em,"[139] said something important about baseball, and, con-

137 *See The Supreme Court, 2019 Term, The Statistics*, 134 HARV. L. REV. 610, 619 (2020).

138 The argument that there is no law, or at least no constitutional law, unless and until a court has decided the issue has a surprising and disturbing presence. When Senator Patrick Leahy in 2011 objected that a proposed voluntary pay cut by members of the Senate would violate the Twenty-Seventh Amendment, Senator Barbara Boxer countered with the argument that because no court had decided the issue, the Twenty-Seventh Amendment did not constrain. *See* Josiah Ryan, *Dem Senator Slams Dem Colleague's Measure as Unconstitutional*, HILL FLOOR ACTION BLOG (Mar. 1, 2011), https://thehill.com/blogs/floor-action/senate/84108-dem-senator-slams-dem-colleagues-measure-as-unconstitutional/ [https://perma.cc/X26M-C6FE]. And for other examples, see Frederick Schauer, *Official Obedience and the Politics of Defining "Law,"* 86 S. CAL. L. REV. 1165, 1171 n.24 (2013).

139 The quoted sentence is the punch line of the oft-repeated story of the three umpires, originally in Hadley Cantril, *Perception and Interpersonal Relations*, 114 AM. J. PSYCHIATRY 119,

versely, something equally important about law. In law, unlike in baseball, we do not have roving judges observing the entirety of our behavior and adjudicating our every act as lawful—or not. Rather, law operates by virtue of the way in which legal rules purport to control behavior independent of adjudication and independent of authoritative interpretation.

If the conclusions in the previous paragraph are even close to being correct, then it follows that in important ways the Constitution speaks, or ought to speak, not only to judges but also directly to those whose behavior the Constitution purports to control and constrain. It ought to speak to a President who is deciding whether some profitable private arrangement with a non-U.S. business is or is not the kind of "emolument" prohibited by Article I of the Constitution.[140] It ought to speak to a prosecutor or police officer wishing to know whether the use of an out-of-court statement requires allowing the defendant to "confront" the maker of the statement, as required by the Sixth Amendment.[141] It ought to speak to members of Congress attempting to follow the Constitution in determining their roles in dealing with impeachment and with trials of impeachments,[142] as well as the limits of their powers to disqualify or expel their members.[143] It ought to speak to a judge adjudicating a demand for a jury trial in a civil case arising under a statute enacted by Congress in 1933.[144] And so on. And on. And on.

An important feature of these, and countless other examples, is that often there is no Supreme Court decision dealing with the question, and there is often neither the time nor the resources for the constrained official to try to figure out what some word, phrase, or sentence was publicly understood to mean in 1787, or 1791, or 1868.

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126 (1957). As the story goes, one umpire says that some pitches are balls and some are strikes, and he calls them as they are. The second umpire says that some are balls and some are strikes, and he calls them as he sees them. And then the third umpire says, "they ain't nothin' 'till I calls 'em." *Id.* at 126.

140 For a sample of the litigation raising the emoluments question during the Trump Administration, none of which reached the merits, see Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178, 184 (2d Cir. 2019), *remanded with instructions to dismiss as moot*, Trump v. Citizens for Resp. & Ethics in Wash., 141 S. Ct. 1262 (2021); Blumenthal v. Trump, 949 F.3d 14, 16 (D.C. Cir. 2020); District of Columbia v. Trump, 930 F.3d 209, 211 (4th Cir. 2019).

141 *See supra* notes 75–77 and accompanying text.

142 *See supra* note 85 and accompanying text.

143 *Cf.* Powell v. McCormack, 395 U.S. 486, 548 (1969) (holding that the House of Representatives' power to exclude was limited to the qualifications stated in the Constitution).

144 *See* Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 68 F. Supp. 3d 486, 498 (S.D.N.Y. 2014) (holding that the Seventh Amendment required a jury trial for a claim under § 11 of the Securities Act of 1933 but not for a claim under § 12(a)(2)).

As a result, if it is important that the Constitution constrain officials, and if it is important that it do so even in the absence of litigation, then it follows that it is equally important that those whom the Constitution seeks to constrain be able to understand the Constitution directly. And although, for all practical purposes, the Constitution's irremediable vagueness may make such an aspiration a fantasy for many of the document's most consequential provisions, it does not do so for all of them. And for those words and phrases that do have relatively determinate meanings, the constraint function can be served only if we understand the Constitution to mean now what its language means *now* to its addressees. This is textualism, but it is not the textualism of meanings from a century and a half to more than two centuries ago. It is the textualism of the text now, and thus of the text's meaning now. It is the textualism that tells Congress how to count the votes of the presidential electors without having to engage in extensive historical research, just as it is the textualism that does the same for the Senate in determining how to conduct an impeachment trial,[145] for the prosecutor deciding whether to present evidence coming from a witness not present for trial,[146] and for any official seeking to determine what the Constitution requires under circumstances in which no court has yet authoritatively adjudicated the issue.

The argument for contemporary meaning textualism therefore is the argument from guidance. The most obvious manifestation of that guidance function comes when the Constitution constrains even well-meaning officials from doing what they would otherwise be inclined to do on policy or political grounds, but the guidance function is not limited to constraining. As the examples of counting electoral votes and determining impeachment procedures illustrate, guidance is applicable even when constraint, in the sense of second-order constitutional constraints on first-order policy preferences, is not at issue. But whether constraining or just instructing, the Constitution, as with any other law, is likely to operate most efficiently and effectively when its addressees know what the law requires without the intervention of the courts. If we think that "stop" signs work best when motorists stop simply because the sign tells them to, then we can imagine the same dynamic, at one or several removes, for the Constitution. And if we believe that, then we should accept the value of a constitution that

145 *See* Nixon v. United States, 506 U.S. 224, 237–38 (1993) (refusing, on political question grounds, to review Senate determination that a Senate committee, and not the full Senate, could be empowered to hear the evidence in the trial of a judicial impeachment).

146 *See supra* text accompanying notes 75–77.

can, in theory and even sometimes in practice, guide in much the same way as the "stop" sign guides. And for this guidance to be effective, the guiding document must speak the same language as those it addresses. Contemporary meaning textualism is based on the idea that only if we understand the language of the Constitution as it means now can those who seek guidance now know what the Constitution requires of them.[147]

D. Does It Matter?

To recapitulate, the claim here is that interpreting the Constitution according to its public meaning at the time of interpretation is the approach to constitutional interpretation that best serves the constraining and guiding functions of a constitution. These constraining and guiding functions are chief among the principal reasons—perhaps *the* principal reasons—for having a constitution, and especially a written constitution, in the first place. Although a constitution in a weak sense is a prerequisite for having what we can understand as a government and what we can understand as a state, the chief *raison d'être* for having a single written constitution, as opposed to the largely unwritten constitutions that exist, most prominently, in the United Kingdom, New Zealand, and Israel, is that written constitutions, by virtue of their writtenness, more effectively impose second-order constraints on the first-order policy or political preferences of officials.[148] Although an unwritten but internalized rule or norm or principle might constrain, the very fact that unwritten rules lack a canonical formulation makes it easy for those who are allegedly constrained to understand the constraining rule in such a way as to soften or eliminate the constraint. When there is a canonical formulation, however, such self-empowering reformulation is far less possible. Accordingly, written

147 My argument for contemporary meaning textualism is thus to be distinguished from the very different argument for a very similar conclusion in Bell, *supra* note 5. Bell argues that the legitimacy of constitutional governance depends on the consent of the governed now and such consent requires a populace that can now understand what they are consenting to. And he argues, further, that seeing the Constitution in this way is liberty enhancing. My argument here for constraint on and guidance of officials is, by contrast, agnostic as to whether such guidance or constraint increases or decreases the liberty of citizens. My argument is from the functions of a written constitution, but it is no more and no less than that.

148 Second-order constraints on first-order policy decisions are an application of the basic idea, chiefly attributable to Joseph Raz, of exclusionary reasons—reasons that exclude other reasons, and thus, reasons that exclude what would otherwise be good reasons from consideration. Joseph Raz, Practical Reason and Norms 37–45 (2d ed. 1990); *see also* Joseph Raz, The Authority of Law (1979); Schauer, *Is Law a Technical Language?*, *supra* note 67; Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 Ethics 5 (1999).

constitutions recognize that both officials and the public have great political and psychological difficulty in subjugating their first-order preferences to less immediate values of both process and substance.[149] Written constitutions take advantage of the very rigidity of a writing to make it more difficult for officials to interpret a constraining rule so as to eliminate the constraint. Understanding the Constitution as speaking directly and clearly to officials is accordingly an important adjunct to the role of a constitution as guiding and constraining those officials. And doing so requires understanding constitutional language in terms of contemporary meaning—how the constraining text is understood by the constrained officials at the time of constraint—and not in terms of what historical research might reveal.

Constitutional constraint is thus likely to function best when constrained officials can directly understand what they may not do. But that conclusion invites the question whether preferring contemporary meaning textualism to original meaning textualism better facilitates that understanding. In other words, does preferring contemporary meaning textualism to original meaning textualism make a difference, and, if so, how much? At this point in the inquiry, however, we need to distinguish between outcome difference and methodological difference, and I will address each of these in turn.

Outcome difference is a straightforward idea. Will using one method—here, contemporary meaning textualism—produce different outcomes than using another—here, original meaning textualism? But it is far from obvious that the differences are substantial. In some instances, there will indeed be differences. If "dollars" meant something different in kind, and not just in value, in 1791 than it does now, as Lawrence Solum has suggested,[150] then the "twenty dollars" criterion

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149 *See supra* note 121. The issue, as Professor Daryl Levinson felicitously puts it, is whether officials and the public have preferences for law *qua* law as opposed to substantive preferences for what the particular content of particular laws happens to be. Daryl Levinson, *The Inevitability and Indeterminacy of Game-Theoretic Accounts of Legal Order*, 42 L. & SOC. INQUIRY 28 (2017). As should be apparent from this Article, I have my doubts, as does Levinson, about the strength of those preferences, either for officials or for the public to whom they are typically responsive. *See* Frederick Schauer, *Preferences for Law?*, 42 L. & SOC. INQUIRY 87 (2017); Frederick Schauer, *How (and If) Law Matters*, 129 HARV. L. REV. F. 350 (2016); Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83 (2012). And although it should also be apparent that I lament this state of affairs, Thoreau would have applauded. "It is not desirable to cultivate a respect for the law, so much as for the right." Henry David Thoreau, *On the Duty of Civil Disobedience* (1849), *reprinted in* WALDEN AND "CIVIL DISOBEDIENCE" 222, 223 (1980).

150 Solum, *Originalist Methodology*, *supra* note 74, at 281–82 (pointing out that "dollar" in 1791 referred to a Spanish silver dollar and not to anything resembling modern paper money).

in the Seventh Amendment's guarantee of a jury trial in civil cases in federal courts will be different under a contemporary meaning approach than under an original meaning approach. And perhaps, but only perhaps, the original public meaning of "the freedom . . . of the press" meant something different in the era of the largely local print press than it does in the contemporary world of electronic press and social media.[151]

But these examples, although not an exhaustive list, seem to be exceptions. In most cases the differences between original public meaning and contemporary public meaning will turn out to be inconsequential. Some of that inconsequentiality is a function of particular concrete words and phrases meaning pretty much the same thing across the centuries. We may debate about the scope of application of the Article III and Sixth and Seventh Amendment rights to a jury trial,[152] between 1787 or 1791 and now. Much the same can be said about almost all the legislative procedures in Articles I and II, such that now, as in 1787, it is clear that bills imposing taxes must originate in the House of Representatives,[153] that impeachments are commenced in the House and then tried in the Senate,[154] that the date of a presidential election is for Congress to determine.[155] So too with the power of Congress to create the lower federal courts,[156] the procedures for amending the Constitution,[157] the method of creating new states,[158] and on and on and on. With respect to the basic operation of government, little of how the Constitution reads now is different from how it would have been read when first written or adopted.

Let me emphasize what the foregoing paragraphs do *not* claim. Most importantly, they do not claim that the Constitution is always

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151 *See* Sonja R. West, *The "Press," Then & Now*, 77 OHIO STATE L.J. 49 (2016) (comparing modern electronic and social media with the press as it was understood at the time of adoption of the Press Clause).

152 The right to trial by jury in criminal cases is guaranteed both in Article III ("The Trial of all Crimes . . . shall be by Jury . . . ." U.S. CONST. art. III, § 2) and the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." *Id.* amend. VI), and in civil cases by the Seventh Amendment for "Suits at common law, where the value in controversy shall exceed twenty dollars." *Id.* amend. VII. Unlike almost all of the other provisions of the Bill of Rights, the right to trial by jury in civil cases has not been held to be incorporated within the protections of the Fourteenth Amendment against *state* interference. *See* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916).

153 U.S. CONST. art. I, § 7.

154 *Id.* art. I, §§ 2–3.

155 *Id.* art. II, § 1.

156 *Id.* art. III, § 1.

157 *Id.* art. V.

158 *Id.* art. IV, § 3.

clear, or even that the Constitution is usually clear. The document abounds with vagueness, and even the occasional ambiguity. Those indeterminacies are not and cannot be resolved by the text alone. Nothing in the text can tell us what is or is not an unreasonable search and seizure,[159] or which punishments are cruel,[160] or what forms of interstate transactions or interstate effects qualify as "[c]ommerce . . . among the several States" to determine the limits of congressional power.[161] But these indeterminacies exist in the text as originally written, and nothing in the difference between how that text would be understood as text in 1787, 1791, or 1868 and how it is understood now either creates or ameliorates the indeterminacy. The word "commerce" or the phrase "commerce among the several states" *means*, as a linguistic matter, the same thing now as it did in 1787.[162] And if interpreting that vague phrase in 1787, or in 1819 (the year that *McCulloch* was decided), involved different political and constitutional values from those that hold sway now, those differences, however we might characterize them, are not linguistic. In the same fashion, filling in the contours of Fourth Amendment unreasonableness or Eighth Amendment cruelty was no different as a linguistic matter in 1791 or 1868 than it is now, even if the moral and policy considerations involved in that filling have changed.

The import of the lack of substantial linguistic shift, or "drift," as it is sometimes put,[163] for most of the language of the Constitution supports the conclusion that understanding the linguistic dimension of constitutional interpretation would not vary substantially with substituting contemporary meaning textualism for original meaning textualism. From a purely semantic sense we might say therefore that original public meaning textualism is "intensionally"[164] equivalent to contemporary meaning textualism for the overwhelming bulk of constitutional questions. That equivalence still leaves much work to be done, but it is the same kind of work in 2022 as it was in 1803—the date of

159 *Id.* amend. IV.

160 *Id.* amend. VIII.

161 *Id.* art. I, § 8, cl. 3.

162 *See* John Harrison, Unoriginalism (Dec. 22, 2020) (unpublished manuscript) (on file with author).

163 EDWARD SAPIR, LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH 157–82 (1921).

164 Not "intentionally," but "intensionally," in the sense that philosophers distinguish intension from extension. *See* David J. Chalmers, *On Sense and Intension*, 16 PHIL. PERSPS. 135 (2002); Nicholas Rescher, *The Distinction Between Predicate Intension and Extension*, 57 REVUE PHILOSOPHIQUE DE LOUVAIN 623 (1959).

Marbury v. Madison[165]—even if the products of that work vary dramatically.

When we turn from applications to methods, however, things appear very different. The very idea of contemporary public meaning textualism is itself agnostic among the various ways in which interpreters might determine the content of contemporary public meaning. They might, as they have traditionally done in cases of statutory interpretation, rely on their own knowledge or intuitions as competent speakers of the language in which the relevant legal document is written.[166] Or they might rely on dictionaries, understood as compilations of actual usage at the time of compilation.[167] More scientifically, they might use the various modern "big data" techniques that ride under the banner of "corpus linguistics."[168] But regardless of the methods used, the target of the interpretive inquiry is the same—how is the relevant language likely to be understood now by its expected addressees?

When contemporary meaning is the target, the entire nature of the interpretive enterprise changes, even if the results of that inquiry may be less dramatic than we might have suspected. For judges, and especially for judges not blessed with the benefits of three or four law clerks, a law library whose staff is available for research, and a barrage of information-laden amicus briefs, the interpretive task becomes quite different. In other words, for judges other than the Justices of

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165 5 U.S. (1 Cranch) 137 (1803).

166 *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 739 (2020) (discussing collective, linguistic, and individual intuition).

167 *See* Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1722–24 (2017); Muscarello v. United States, 524 U.S. 125, 127–28 (1998); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 495 (2013); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994); Tobia, *supra* note 166, at 730; Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437–40 (1994).

168 *See* Wilson v. Safelite Group, Inc., 930 F.3d 429, 440–43 (6th Cir. 2019); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828–35 (2018); James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 27–29 (2016); Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J.F. 57, 58–59 (2016); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1643–45; Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 289–90 (2019). But if I am correct in arguing that contemporary meaning textualism is more usable by those who are to be constrained by the Constitution, then methods such as corpus linguistics, as opposed to consultation of one's own linguistic knowledge or even consultation of a dictionary, would be inconsistent with this virtue of relatively easy usability.

the United States Supreme Court, the process of interpretation under a contemporary public meaning approach will involve those judges acting, it might be said, as judges and not as amateur historians.

The methodological differences between original meaning textualism and contemporary meaning textualism are even more apparent if we look not at judges when they are interpreting the Constitution but instead at nonjudicial officials—the ones whose actions are genuinely the direct object of constitutional constraint. Perhaps the difference between judges and nonjudicial officials might be of little consequence to those with a strong view of judicial interpretive supremacy, for under an assumption of judicial interpretive supremacy nonjudicial officials are still expected to defer to the courts in determining the scope of constitutional constraint.[169] The difference between original public meaning and contemporary public meaning would, however, be very important from a departmentalist perspective.[170] If nonjudicial officials are entitled and perhaps even encouraged to engage in their own constitutional interpretation without deferring to the interpretations of courts, then an approach to constitutional interpretation that is actually usable by such officials has much to recommend it. Although it is at least (slightly) realistic to suppose that judges will have the time, resources, and support to engage in the historical research that any form of originalism requires, it is bizarre to imagine that the same holds true not only for members of Congress and members of the state legislatures, but for the host of everyday city councilors, administrative officials, enforcement officers, and all of the others whose actions are subject to constitutional constraint. For these officials, contemporary meaning textualism at least holds out the promise of them both feeling and being constrained. Yet if they were to understand themselves as being constrained only by what those words meant generations or literally centuries ago, the likelihood that they will impose second-order constitutional constraints on their own first-order policy or political preferences, small as it is, will become even smaller.

The foregoing focus on what we might call *direct*—i.e., not mediated by judges—constitutional constraint highlights the major virtue

169 On the contrast between judicial interpretive supremacy and so-called departmentalism, see *supra* text accompanying note 120.

170 *See id.* On the other hand, and as both Tara Grove and John Harrison have suggested to me, if contemporary meaning is often highly similar to 1787, 1791, or 1868 meaning, then contemporary meaning might be valuable as a reliable evidentiary guide, even for an originalist, to original meaning.

of a contemporary public meaning textualism. More than a focus on historical meaning that requires the interpreter to engage in historical inquiry, a focus on contemporary meaning requires the interpreter only to do what the subjects of law—and, indeed, the interpreters and enforcers of law—do on a routine basis. That is not to say the task will always be easy. Legal texts are often vague and sometimes ambiguous. And occasionally they indicate morally or politically difficult outcomes even when they are clear. But the more that constitutional interpretation departs from "ordinary" legal interpretation, the more it seems like the almost exclusive province of a Supreme Court that decides an ever-smaller number of cases and decides even the ones it does decide on ever-narrower grounds. Conversely, the more that constitutional interpretation converges with the kind of legal interpretation that most judges and most officials and, indeed, most legal subjects engage in on a daily basis, the likelihood increases that those whose constraint is the principal object of constitutional governance will actually wind up not only feeling constrained but also being constrained.

Conclusion: Constitutionalism's Multiple Goals

The tenor of the closing sentences of the previous section notwithstanding, constitutional governance serves multiple goals, not all which are compatible with each other. And however tempting it may be to see the Constitution as serving only one master goal, or as serving multiple goals all of which operate together, the temptation should be resisted. Tradeoffs are inevitable, and Panglossian efforts to deny that serving some goals may impede others will result in avoiding the difficult problems that inhere in all aspects of governance, constitutional or otherwise.

The goal of this Article has therefore not been to argue that constraining officials is the only or even the principal goal of constitutionalism in general or of the Constitution of the United States in particular. But nor are the various other goals often touted for constitutionalism—liberty, equality, democratic legitimacy, and scores of others—usefully understood as singularly dominant. This Article is best understood therefore as arguing that guidance and constraint are important constitutional goals, and that *these* goals are best served by adopting contemporary public meaning textualism as the appropriate interpretive approach. Whether the virtues so achieved require the subjugation of all of the other values and goals of constitutionalism is a question that this Article does not even dare to answer.