

HARVARD LAW REVIEW

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THE SUPREME COURT  
2014 TERM

FOREWORD:  
DOES THE CONSTITUTION MEAN WHAT IT SAYS?

*David A. Strauss*

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I. THE CONSTITUTION VERSUS THE TEXT?

*A. Anomalies*

“**W**hat do you do when there is a practice that flatly contradicts a clear text of the Constitution? Which of the two prevails?”<sup>1</sup> Justice Scalia asked the Solicitor General that question during the oral argument in *NLRB v. Noel Canning*,<sup>2</sup> the case about the President’s power to make recess appointments that was decided during the Supreme Court’s 2013 Term. The U.S. Court of Appeals for the District of Columbia Circuit had held that the text of the Recess Appointments Clause did not permit the President to make recess appointments in circumstances in which, the government argued, the President had been making those appointments for decades.<sup>3</sup> If the D.C. Circuit was right about the clear meaning of the text, shouldn’t it — Justice Scalia’s question suggested — prevail over even a well-established practice?

The Solicitor General questioned the premise that the language was clear, but his answer was that “the practice has to prevail,” even over clear language.<sup>4</sup> He explained, though, that “we don’t have that here” because “[t]his provision has been subject to contention as to its mean-

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<sup>1</sup> Transcript of Oral Argument at 6, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-1281\\_pmo2.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_pmo2.pdf) [<http://perma.cc/5ZPP-354K>].

<sup>2</sup> 134 S. Ct. 2550.

<sup>3</sup> See *Noel Canning v. NLRB*, 705 F.3d 490, 506 (D.C. Cir. 2013), *aff’d on other grounds*, 134 S. Ct. 2550.

<sup>4</sup> Transcript of Oral Argument, *supra* note 1, at 6.

ing since the first days of the Republic.”<sup>5</sup> In fact, the Solicitor General said, “[i]t’s extremely unlikely that [the question] would arise if the text were so free of doubt.”<sup>6</sup>

Actually, it might not be unlikely at all. If we read the text of the Constitution in a straightforward way, American constitutional law “contradicts” the text of the Constitution more often than one might think. Adhering to the text would require us to relinquish many of the most important and well-established principles of constitutional law. Here are some examples of the anomalies — outcomes that are inconsistent with established principles of constitutional law — that following the text of the Constitution would produce:

- Both the President and the federal courts could abridge the freedom of speech and prohibit the free exercise of religion, because the First Amendment, by its terms, applies only to “Congress.”<sup>7</sup>
- A state could have an established church.
- The requirement that “searches” not be “unreasonable” would not apply to the interception of many electronic communications.<sup>8</sup>
- States could disenfranchise, for example, poor people or gay people, because the Equal Protection Clause of the Fourteenth Amendment does not protect the right to vote.
- States could discriminate against racial minorities, or any other group, in providing, for example, schools, parks, or transportation, because the Equal Protection Clause, by its terms, refers only to “protection.”<sup>9</sup>
- The federal government would be free to engage in discrimination on the basis of race or sex, because the Equal Protection Clause applies only to the states.
- The federal government, under a standard application of the principle of *expressio unius*, could not enact criminal laws, except in certain narrow areas.
- The Bill of Rights would not apply, in whole or with the current exceptions, to the states.
- States would not be immune from suit when federal statutes made them liable, at least in state courts and when sued by their own citizens in federal court.

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<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.*

<sup>7</sup> See U.S. CONST. amend. I.

<sup>8</sup> See *id.* amend. IV.

<sup>9</sup> See *id.* amend. XIV, § 1.

Some of these examples are well known, like the principle of *Bolling v. Sharpe*,<sup>10</sup> according to which the law developed under the Equal Protection Clause applies to the federal government.<sup>11</sup> Other instances in which we have departed from the text of the Constitution are obvious but more or less systematically ignored, like the fact that the First Amendment begins with “Congress.” Others require more explanation, which I will provide. But the important point is that these examples cannot be dismissed as curiosities that don’t really have much to do with the nature of American constitutional law. They involve important and well-established principles of constitutional law that are inconsistent with the text. They are anomalies not in the sense that they are odd excrescences but in the sense that they call into question our familiar way of thinking about the relationship between the text of the Constitution and constitutional law.<sup>12</sup>

That familiar way of thinking, I believe, goes something like this: Constitutional law is derived from the text of the Constitution. Sometimes the text is clear; if so, it controls. But many provisions are not clear. They must be “interpreted” according to relatively familiar, if sometimes controversial, principles. Always, though, constitutional law begins with the text and proceeds from there.

That familiar view misdescribes American constitutional law. Clear text does not always govern, as the anomalies show; there are times when established principles are simply inconsistent with the text. Beyond that, constitutional “interpretation” usually has little to do, in practice, with the words of the text. There are times when the text is decisive, and it is never acceptable to announce that you are ignoring the text. But routinely the text, although not flatly inconsistent with the outcome of a case, has very little to do with the way the case is argued or decided. In most litigated cases, constitutional law resembles the common law much more closely than it resembles a text-based system.<sup>13</sup>

So there is a puzzle: How can we make sense of a system that treats the text in this way? If the familiar understanding — start with the text, and proceed from there — is incorrect, just what role does the text play, and how can that role be harmonized with the other sources of constitutional law?

The answer, I think, is that provisions of the text of the Constitution are, to a first approximation, treated in more or less the same way

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<sup>10</sup> 347 U.S. 497 (1954).

<sup>11</sup> See *id.* at 499–500.

<sup>12</sup> This use of the term “anomaly” is associated with THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* ch. VI (1962).

<sup>13</sup> For an extended defense of this claim, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

as precedents in a common law system. The effect of constitutional provisions is not fixed at their adoption — or, for that matter, at any other time. Instead, like precedents, provisions are expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward — on subsequent decisions and on judgments about the direction in which the law should develop.

As a result, a provision of the Constitution will be most important when there are not a lot of subsequent precedents “interpreting” it. Once a large body of precedent-based law has developed, the text will recede from view. Like a venerated old case, a textual provision might be invoked for rhetorical effect and maybe even for more than that — in the way that, for example, *Marbury v. Madison*<sup>14</sup> might be invoked when a court is considering the constitutionality of an act of Congress. But just as the reasoning and precise holding of *Marbury* do not determine the scope of judicial review today, so the text of the Constitution often does not determine the shape of constitutional law today — as the anomalies dramatically show. It is true that the Supreme Court would never “overrule” a provision of the text, in the way it might overrule a precedent. But the anomalies — instances in which the text has been effectively overridden by later developments — suggest that there is less to this difference than meets the eye.

These claims will have to be qualified in some important ways. But I believe the idea that provisions of the Constitution function roughly in the same way as precedents in a common law system is a better description of U.S. constitutional law than the familiar view that constitutional law is a matter of “following” or “interpreting” those provisions. And because the common law is a well-established approach to the law that has plausible (at least) justifications,<sup>15</sup> understanding constitutional law as an evolutionary, common law system avoids the notorious problem of explaining why constitutional provisions adopted decades or centuries ago should continue to bind us today.

### B. October Term, 2014

*Noel Canning* was unusual because the parties and the Court explicitly considered the role of the text and its arguable conflict with es-

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<sup>14</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>15</sup> For a summary of those justifications, see, for example, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 893 & n.41 (1996) (citing Calvin’s Case, (1608) 77 Eng. Rep. 377, 381; 7 Co. Rep. 1a, 3b; EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 58–59, 84 (J.M. Dent & Sons 1940) (1790); MATTHEW HALE, REFLECTIONS BY THE LRD. CHEIFE JUSTICE HALE ON MR. HOBBS HIS DIALOGUE OF THE LAWE, *reprinted in* 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW app. at 500, 504 (2d ed., rev. 1937)).

established practices. More often, these self-conscious questions about the text are not addressed, even though the treatment of the text is just as puzzling. Most of the time, in litigated cases, the text makes only a token appearance; sometimes, although rarely, it is central; occasionally it is something in between. Last Term's decisions provide plenty of examples.

In *Obergefell v. Hodges*,<sup>16</sup> which invalidated state laws limiting marriage to opposite-sex couples, the text of the Constitution made only a cameo appearance. The opinion of the Court relied on "the principles and precedents that govern these cases."<sup>17</sup> Those principles were derived mostly from the Court's previous decisions;<sup>18</sup> from "the Nation's traditions";<sup>19</sup> and, although the opinion did not put it in quite these terms, from the Court's own essentially moral judgment that same-sex marriage should be permitted.<sup>20</sup> The Court invoked the Due Process Clause of the Fourteenth Amendment<sup>21</sup> and, secondarily, the Equal Protection Clause,<sup>22</sup> but it seems fair to say that those provisions functioned as sources of inspiration, roughly in the way that a revered nonlegal document like the Declaration of Independence might.

*Obergefell* is, of course, an unusual case in many ways. The holding was momentous and controversial, and the opinion had an oracular tone, often relying on abstract formulations. The Court in *Obergefell* explicitly conflated the Due Process and Equal Protection Clauses,<sup>23</sup> and that is unusual. But in substance it is a common law-like opinion; or at least a common law approach is broadly consistent

<sup>16</sup> 135 S. Ct. 2584 (2015).

<sup>17</sup> *Id.* at 2593.

<sup>18</sup> See *id.* at 2597 ("Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. . . . That case law helps to explain and formulate the underlying principles this Court now must consider."); *id.* at 2599 ("A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."); *id.* ("A second principle in this Court's jurisprudence is that the right to marry is fundamental. . . ."); *id.* at 2600 ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))); *id.* at 2601 ("Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").

<sup>19</sup> *Id.* at 2601.

<sup>20</sup> See, e.g., *id.* at 2598 ("The nature of injustice is that we may not always see it in our own times. . . . When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."); *id.* at 2602 ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.").

<sup>21</sup> *Id.* at 2597.

<sup>22</sup> *Id.* at 2602–03.

<sup>23</sup> See *id.* ("The Due Process Clause and the Equal Protection Clause are connected in a profound way. . . ."); *id.* at 2604 (referring to "the interlocking nature of these constitutional safeguards").

with the Court's own analysis and provides the most secure justification for the Court's holding. One line of precedents had established the right to marry as a fundamental right.<sup>24</sup> Another line had, step by step, eroded any possible argument that disapproval of gay and lesbian relationships could justify a law.<sup>25</sup> Those precedents did not compel the conclusion that states had to allow same-sex marriage, but they certainly permitted that conclusion; indeed, they pointed toward it. Moreover, decisions in the lower courts generally favored a right to same-sex marriage.<sup>26</sup> Faced with precedent that left it room to maneuver, the Court chose the course that seemed to it to be morally preferable. This kind of approach — extending precedent in the direction that seems to make more sense as a matter of morality or good policy — is characteristic of the common law.<sup>27</sup>

The principal dissent in *Obergefell*, by Chief Justice Roberts (joined by Justices Scalia and Thomas), also operated within an essentially common law-like frame. Chief Justice Roberts acknowledged that “[t]here is no serious dispute that, under our precedents, the Constitution protects a right to marry”<sup>28</sup> — even though, as he later remarked,

<sup>24</sup> See *Turner v. Safley*, 482 U.S. 78, 99 (1987) (holding that prisoners have a constitutionally protected right to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating bans on interracial unions).

<sup>25</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding Texas's sodomy law unconstitutional); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (invalidating an amendment to the Colorado Constitution that prohibited government protection of gays and lesbians).

<sup>26</sup> See, e.g., *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

<sup>27</sup> See, for example, Justice Cardozo's classic discussion of the common law approach: One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third . . . . One path [is] followed, another closed, because of the conviction in the judicial mind that the one selected led to justice. Analogies and precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight. . . . We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue . . . .

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 40–43 (1921).

In constitutional law as well, this idea is, I believe, accepted as common sense among reflective lawyers. See, e.g., Archibald Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 98 (1966) (“A chief responsibility of counsel in constitutional litigation is to aid the Court in that mysterious process by which decisions meet new needs yet are shown to have the legal roots needed to maintain the rule of law.”).

<sup>28</sup> *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

“[t]he Constitution itself says nothing about marriage.”<sup>29</sup> The dissent’s main argument was that the “core definition of marriage” is “the union of a man and a woman,” and that none of the Court’s previous decisions had challenged that definition.<sup>30</sup> The dissent said that any such revision of this traditional understanding of marriage should be made by the political process, not by the courts,<sup>31</sup> and argued that the majority had ignored the lessons of the era identified with *Lochner v. New York*<sup>32</sup> by imposing its own views on the nation.<sup>33</sup> The reference to *Lochner* invoked a kind of anti-precedent: a decision that has been so thoroughly repudiated that you can discredit your opponent’s position by associating it with that decision.<sup>34</sup> When it came to the Equal Protection Clause, the dissent’s central criticism of the majority was that the majority had not taken “casebook doctrine” — that is, principles derived from the Court’s precedents — seriously.<sup>35</sup> So even in the dissent, the recognized sources of law were precedent, tradition, and general principles derived from those sources.

As unusual as *Obergefell* was in other ways, its common law-like character is entirely typical. In the modal Supreme Court constitutional decision, the text of the Constitution plays no real role at all. The usual pattern is for the text to be cited early in the Court’s analysis — “the First Amendment provides . . .” — after which the text, having served its ceremonial role, bows out, and the serious analysis focuses on the precedents. This was the pattern last Term, as it is every Term. In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*<sup>36</sup> — which held that the First Amendment does not prevent Texas from refusing to issue a vanity license plate with a Confederate flag on it<sup>37</sup> — the Court did not even recite the First Amendment. It proceeded directly to its precedents.<sup>38</sup> No one, it’s fair to say, raised an eyebrow about that aspect of the opinion. The text of the First Amend-

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<sup>29</sup> *Id.* at 2613.

<sup>30</sup> *Id.* at 2619.

<sup>31</sup> *See id.* at 2624–25.

<sup>32</sup> 198 U.S. 45 (1905).

<sup>33</sup> *See Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (referring to “the debacle of the *Lochner* era”).

<sup>34</sup> *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007) (characterizing *Lochner* as “the great anti-precedent stigmatizing an entire era of constitutional law”). *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (discussing “the presence of the anticanon within our constitutional discourse,” *id.* at 382).

<sup>35</sup> *See Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (“Absent from [the Equal Protection] portion of the [majority] opinion, however, is anything resembling our usual framework for deciding equal protection cases.”).

<sup>36</sup> 135 S. Ct. 2239 (2015).

<sup>37</sup> *Id.* at 2253.

<sup>38</sup> *See id.* at 2245.



ment got only a ceremonial mention in *Reed v. Gilbert*,<sup>39</sup> the same was true of the Fourth Amendment in *City of Los Angeles v. Patel*,<sup>40</sup> the Takings Clause in *Horne v. Department of Agriculture*,<sup>41</sup> and the Sixth Amendment in *Ohio v. Clark*.<sup>42</sup> *Clark* is especially notable because *Crawford v. Washington*,<sup>43</sup> an earlier decision interpreting the Confrontation Clause of the Sixth Amendment (the provision at issue in *Clark*), had purported to rely more closely on the text of that clause.<sup>44</sup> But the Court in *Clark* followed the usual pattern — a quotation of the text of the clause, followed immediately by an extensive discussion of the precedents.<sup>45</sup> Justice Scalia, the author of *Crawford*, protested vehemently.<sup>46</sup>

*Arizona State Legislature v. Arizona Independent Redistricting Commission*<sup>47</sup> looked like a case in which the text might be central. The constitutional issue was whether Article I, Section 4, Clause 1 of the Constitution forbade Arizona from using a commission, established by popular ballot initiative, to draw congressional district lines.<sup>48</sup> That clause says, in part, that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”<sup>49</sup> The Court ruled that the people of Arizona, acting through the initiative, constituted the “Legislature” for purposes of that clause.<sup>50</sup> A case that addressed the meaning of a word in the Constitution in such a specific way — and that presented an issue that had not generated a substantial body of precedent — seemed like one in which a close reading of the text would be center stage.

The principal dissent, again by Chief Justice Roberts, did emphasize the text. Chief Justice Roberts identified all the places in the text of the Constitution in which the term “Legislature” appeared.<sup>51</sup> “When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.”<sup>52</sup> The dissent argued that in every other instance, the clear reference was to a representative body; often it could not possibly be to the peo-

<sup>39</sup> 135 S. Ct. 2218 (2015); *see id.* at 2226.

<sup>40</sup> 135 S. Ct. 2443 (2015); *see id.* at 2451–52.

<sup>41</sup> 135 S. Ct. 2419 (2015); *see id.* at 2426.

<sup>42</sup> 135 S. Ct. 2173 (2015); *see id.* at 2179.

<sup>43</sup> 541 U.S. 36 (2004).

<sup>44</sup> *See, e.g., id.* at 51.

<sup>45</sup> 135 S. Ct. at 2179–81.

<sup>46</sup> *See id.* at 2184–85 (Scalia, J., concurring in the judgment).

<sup>47</sup> 135 S. Ct. 2652 (2015).

<sup>48</sup> *See id.* at 2658–59.

<sup>49</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>50</sup> *See Ariz. State Legislature*, 135 S. Ct. at 2659.

<sup>51</sup> *See id.* at 2680–81 (Roberts, C.J., dissenting).

<sup>52</sup> *Id.* at 2680.

ple as a whole.<sup>53</sup> Chief Justice Roberts's pièce de résistance was the Seventeenth Amendment, which provides that Senators are elected by "the people" of each state,<sup>54</sup> instead of by "the Legislature," as the original Constitution had prescribed.<sup>55</sup> The Seventeenth Amendment was unnecessary if the term "the Legislature" in the original Constitution could have been understood simply to mean the electorate as a whole.<sup>56</sup>

But that was the dissent. The opinion of the Court relied not on the text but on precedents,<sup>57</sup> and it invoked a variety of policy arguments to justify its result: concern with "the problem of partisan gerrymandering," which the independent commission was designed to solve,<sup>58</sup> as well as the values of popular sovereignty<sup>59</sup> and federalism.<sup>60</sup> The Chief Justice's dissent tartly criticized the majority for this: "The majority begins by discussing policy. I begin with the Constitution."<sup>61</sup> But in fact the majority's approach — relying on precedents and policy arguments to reach a conclusion that may or may not be the most straightforward reading of the text — is characteristic of U.S. constitutional law.

In particular, the Court in *Arizona State Legislature* used three precedents to try to show that there was a way to read the Constitution that allowed the use of the initiative in redistricting.<sup>62</sup> In one of those earlier cases, the Court allowed a referendum to overturn a districting plan enacted by the state legislature (although not to replace it with a new one);<sup>63</sup> in another, the Court allowed a governor to veto the legislature's districting plan.<sup>64</sup> The majority relied on those cases to conclude that "the Legislature" in Article I, Section 4, Clause 1 could include more than just the legislative branch of the state government and could, in the case of the referendum, include the population as a whole.<sup>65</sup> The third precedent, *Hawke v. Smith (No. 1)*,<sup>66</sup> held that

<sup>53</sup> *Id.* at 2680–81.

<sup>54</sup> U.S. CONST. amend. XVII, § 1.

<sup>55</sup> *Id.* art. I, § 3, cl. 1.

<sup>56</sup> *Ariz. State Legislature*, 135 S. Ct. at 2677–78 (Roberts, C.J., dissenting).

<sup>57</sup> See *id.* at 2666 (majority opinion) ("Before focusing directly on the statute and constitutional prescriptions in point, we summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes.").

<sup>58</sup> *Id.* at 2658.

<sup>59</sup> *Id.* at 2671 ("[T]he animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government.").

<sup>60</sup> *Id.* at 2673 ("[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes.").

<sup>61</sup> *Id.* at 2678 (Roberts, C.J., dissenting).

<sup>62</sup> See *id.* at 2666–67 (majority opinion).

<sup>63</sup> See *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916).

<sup>64</sup> See *Smiley v. Holm*, 285 U.S. 355 (1932).

<sup>65</sup> See *Ariz. State Legislature*, 135 S. Ct. at 2668.

<sup>66</sup> 253 U.S. 221 (1920).

Article V, which prescribes the process by which the Constitution is amended, allowed only states' legislative bodies to participate in the ratification of a proposed amendment.<sup>67</sup> But, the *Arizona State Legislature* majority said, the Court in *Hawke v. Smith* had distinguished between the “ratifying function,”<sup>68</sup> which Article V vested exclusively in the legislature, and “the ordinary business of legislation.”<sup>69</sup> That distinction enabled the *Arizona State Legislature* majority to say that districting, being part of the ordinary business of legislation, was not a power limited to the legislative body alone.<sup>70</sup>

The *Arizona State Legislature* majority also mentioned many other provisions of various states' laws, adopted by popular vote without the legislature's involvement, that affected the “‘Times, Places and Manner’ of holding federal elections” — such as provisions in popularly adopted state constitutions dealing with voter registration, vote counting, primary elections, absentee voting, and secret ballots.<sup>71</sup> The dissent's approach, the Court said, would call those provisions into question.<sup>72</sup>

*Arizona State Legislature* suggests several things about the role of the text. Despite the dominance of precedent in many areas of constitutional law, it remains true that appeals to straightforward textual arguments, like those made by the Chief Justice, can be powerful. But, as I said, *Arizona State Legislature* was a case in which textual arguments were likely to play an important role, because of the relative lack of precedent. The Court did not have anything like the extensive body of precedent it has in a First or Fourth Amendment case. And despite that, the textual argument did not prevail.

The majority opinion relied instead on the typical elements of the common law — the Court's precedents and various policy judgments. The majority also relied, in a way, on what might be considered nonjudicial precedent — the general acceptance of the many provisions of state law that might have been endangered by a narrow definition of “Legislature.” Finally, the way the majority dealt with the text is revealing. Rather than argue, as the dissent did, that it was reading the text in the single best way,<sup>73</sup> the majority just tried to show that it was possible to read the text in a way that accommodated the majority's result.<sup>74</sup> One could read “Legislature” to mean different

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<sup>67</sup> See *id.* at 225, 231.

<sup>68</sup> *Ariz. State Legislature*, 135 S. Ct. at 2667.

<sup>69</sup> *Id.* (quoting *Hawke*, 253 U.S. at 229).

<sup>70</sup> See *id.* at 2668.

<sup>71</sup> See *id.* at 2676 (quoting U.S. CONST. art. I, § 4, cl. 1).

<sup>72</sup> *Id.* at 2676–77.

<sup>73</sup> See *id.* at 2677–82 (Roberts, C.J., dissenting).

<sup>74</sup> See *id.* at 2667–68 (majority opinion).

things in different provisions, depending on what function the various provisions assigned to the legislature.<sup>75</sup>

This approach to the text — finding a way to make the text consistent with an outcome that is reached for other reasons — is often the response to the anomalies I have identified: there is a way to read the text to eliminate the anomaly, even if that is not the most obvious or straightforward way to read the text. This, of course, just adds to the puzzle about the role of the text. It seems to be an oddly intermediate position. We find some way to reconcile with the text a result that is actually dictated by precedent and policy, instead of either following the most straightforward reading of the text or openly treating the Constitution as a source of inspiration but not a legally binding document. Why is this way of dealing with the text characteristic of our constitutional law?

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As these various examples suggest, the text of the Constitution routinely plays only a token role in litigated cases, although text-based arguments are occasionally influential. At the same time, as I will discuss, some issues are so conclusively settled by the text that they are never litigated. Also, it seems that explicitly ignoring the text is never acceptable. Courts make it a point to try to reconcile their results with the text, even if that means reading the text in a way that is not straightforward or obvious.<sup>76</sup> And some established principles are simply inconsistent with the text.

As if that were not enough, there is another layer to the puzzle. In ordinary statutory cases, these days at least, the Court emphasizes the exact wording of the text, often to the exclusion of everything else.<sup>77</sup> In constitutional cases, if I am right, the text is often all but ignored and sometimes even contradicted. What are we to make of that dramatic difference?

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<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 709 (2011) (“[O]ur commitment to the text creates a discursive requirement that all constitutional norms and arguments be couched as ‘interpretations’ of the big-C Constitution.”).

<sup>77</sup> See, e.g., *Boyle v. United States*, 556 U.S. 938, 950 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”); see also *Carr v. United States*, 130 S. Ct. 2229, 2242 (2010) (“When the statutory language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms.” (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006))); John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 22–29 (2014).

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In a word, U.S. constitutional law is not a text-based system but a mixed system, composed of both text and precedent.<sup>78</sup> The building blocks of constitutional law are those two familiar things; there is no need for recourse, as is sometimes made, to more mystical claims about the enduring values of the American people or anything like that. Constitutional law should resemble other familiar forms of law, like common law and law derived from an authoritative text — forms of law that have been around for centuries and are present in other nations as well. And, in fact, statutory interpretation, despite the emphasis on the language of the text in recent cases, is also a mixed system, consisting of both text and common law, although the mixture is different. The problem is to figure out what one can say about such mixed systems in a way that helps explain and, potentially, justify their features.

In Part II, I will explain why it is important to recognize that American constitutional law is a mixed system, not a text-based system. As I have suggested, seeing constitutional law as a mixed system draws into question the familiar notion that constitutional law is derived, in a direct way, from the text. As a corollary, constitutional fundamentalism — the idea that the text is the ultimate source of law and that precedents have a second-tier status and can always be challenged as being inconsistent with the text — is mistaken. Moreover, similar mixed systems are common, even when it comes to areas governed by statute; constitutional law is not exceptional in this respect.

In Part III, I will discuss the anomalies and defend the claim that these are, in fact, instances in which well-established principles of constitutional law are inconsistent with the text of the Constitution. Finally, in Part IV, I will suggest some implications that may extend beyond constitutional law. In particular, I will suggest that our practices, in constitutional law and perhaps more generally, can be justified as accommodating three institutional interests — interests in what might be called sovereignty, adaptation, and settlement. Understanding constitutional law as that kind of accommodation can help define the role the text plays in constitutional law and solve some of the puzzles of our current system. That view of constitutional law is better than seeing constitutional law as a matter of “interpreting” the Constitution in any ordinary sense.

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<sup>78</sup> This point has, of course, been made in various forms by others. For two important examples, see Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); and Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

## II. THE MIXED SYSTEM

A. *The Origins of the Mixed System*

The Constitution is an old document, and it is very hard to amend. For these reasons alone, it should not be surprising that the text is not central and that some established principles are even inconsistent with it. But there is a more general point. We do not always follow the original understandings of constitutional provisions — that is, the understandings, held at the time that a provision was adopted, about how it would be applied. There are well-known examples in which following the original understandings of various vague provisions would require us to abandon settled constitutional principles.<sup>79</sup>

We should expect that some unacceptable original understandings were also stated explicitly in the text. So just as we have to discard original understandings sometimes, we should expect to have trouble following the text sometimes. In a way, the surprising thing is that there are not more anomalies like the ones I listed. The drafters of the Constitution and its amendments deserve credit for many things, but one of their accomplishments that may not be sufficiently recognized is that they drafted many provisions that have enough flexibility to allow us to read them in ways that accommodate our current understandings.

An easier amendment process would undoubtedly reduce — although, just as undoubtedly, not eliminate — the extent to which common law processes are used to adapt the Constitution to new circumstances. But at first glance it does seem surprising that the existing amendment process, specified in Article V, has not at least removed the anomalies — instances in which the text seems inconsistent with principles that almost everyone accepts. The very fact that the principles are well established should mean that there would be no problem in rallying support for an amendment. But instead our system has found other ways to adapt.

That itself is revealing. Part of the reason that anomalies persist may be that the now-established principles emerged slowly, so there was no single decisive moment at which the conflict between the text

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<sup>79</sup> See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 15–16 (2001); STRAUSS, *supra* note 13, at 12–17; CASS R. SUNSTEIN, RADICALS IN ROBES 63–65 (2005); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221 (1980). Even people sympathetic to originalism are prepared to accept some decisions that, they acknowledge, might be questioned on originalist grounds. See, e.g., Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2417 (2006) (book review) (mentioning “protection against sex discrimination under the Equal Protection Clause, application of the Equal Protection Clause to the federal government, expansion of the Commerce Clause to permit federal regulation of intrastate commercial activity, [and] prohibition of gross malapportionment of state legislative districts”).

and the principles became too stark to ignore. For example, people gradually got accustomed to the idea that there should be no established churches in the states and to the steady expansion of the franchise, and reading those principles back into the Constitution seemed natural because the principles seemed natural. If this is so, it suggests that an evolutionary process, rather than decisive interventions, is the normal way in which we should expect constitutional law to change. Formal amendments are just not that important.

In general, one would expect a well-functioning system to develop ways to work around features that are anachronistic or otherwise inadequate but costly to fix. Institutions do not exist on paper; they exist in people's practices and understandings. Those practices and understandings will develop over time, and if what's written on paper is too hard to change, people will ignore what's on the paper or just read it in a way that makes it conform to the understandings. Once that happens, undertaking a difficult amendment process is not worth it. There is little to be gained from trying to amend the Constitution if the understandings are already secure. And there might be something to be lost, if the amendment fails because the process is so demanding — thereby potentially undermining the settled understanding — or if the effort to amend the Constitution in one uncontroversial respect spirals away into something ill-advised.<sup>80</sup> The fact that we have not resorted to amendments, but have instead just made our peace with the anomalies (or, rather, barely noticed them), is evidence that, in general, the amendment process is not as important a means of changing the Constitution as one might think.<sup>81</sup>

In all of these ways, constitutional law seems to work well enough despite the general lack of clarity about the precise role of the text and despite the anomalies in particular. No one seriously says that the President can disregard the First Amendment and selectively prosecute his political opponents, or that the federal government can operate racially segregated facilities, or that states can disenfranchise gays. But these issues about the role of the text are significant for more subtle reasons. They affect how we think about constitutional law in ways

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<sup>80</sup> President Franklin Roosevelt, for example, decided against seeking a constitutional amendment either to authorize New Deal legislation explicitly or to limit the Court's power to review congressional legislation. He was deterred by both the difficulty of amendment and the risk that seeking an amendment would end up backfiring — either because the rejection of a proposed amendment would prove politically harmful, or because of the difficulty of drafting language that would achieve what he wanted without being subject to hostile interpretation. For discussion, see, for example, DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995* ch. 13 (1996); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 91–96 (1995).

<sup>81</sup> For an argument to this effect, see generally David A. Strauss, Commentary, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457 (2001).

that might have a practical impact. Beyond that, these issues in constitutional law may suggest something more far-reaching and fundamental about other areas of the law.

*B. Does Constitutional Law Begin with the Text?*

Instinctively, we think of constitutional law as starting with the text of the Constitution and proceeding from there. We say that constitutional law is a matter of interpreting the Constitution's language,<sup>82</sup> or discerning the meaning of its provisions,<sup>83</sup> or implementing the Constitution.<sup>84</sup>

One problem with this assumption is that, as I've said, constitutional litigation — unlike litigation about ordinary statutes — generally does not actually pay much attention to the text. *Arizona State Legislature* and *Noel Canning* were unusual cases just because a close reading of the text featured so prominently. And in those cases, there were few (in *Noel Canning*, no) directly relevant Supreme Court precedents.<sup>85</sup> As it happens, in both cases, a good argument can be made that the Court's decision allowed the most natural reading of the text to be defeated, in part because of nonjudicial precedent.<sup>86</sup> But the main point is that those decisions were exceptional among litigated cases because the text actually did play some role. Precedent-based, common law-like constitutional law — which is most of constitutional law — does not seem to be generated by the text or derived from the text in any obvious way. *Obergefell* makes this clear, but even in more typical cases, one simply cannot derive the elaborate doctrine that is constitutional law from the spare words of the text in any direct way. Those words could have generated very different bodies of doctrine.

To be clear, it is easy to identify instances in which the text is very important. As I will discuss, important parts of the basic structure of

<sup>82</sup> See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 37–41 (1997).

<sup>83</sup> One recurrent theme distinguishes between constitutional “interpretation,” which discerns the “meaning” (or, it is often said, the “semantic meaning”) of a constitutional provision, and “construction,” which identifies principles of constitutional law when interpretation does not settle them. For examples, see JACK M. BALKIN, LIVING ORIGINALISM 3–16 (2011); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89–131 (rev. ed. 2014); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 1–16 (1999); Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 NW. U. L. REV. 923, 940–55 (2009); Lawrence B. Solum, *Semantic Originalism* 1–10 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), <http://ssrn.com/abstract=1120244> [<http://perma.cc/NG4T-N7TC>].

<sup>84</sup> FALLON, *supra* note 79, at 37–44; Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

<sup>85</sup> See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2666 (2015) (“Three decisions compose the relevant case law . . . .”); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (“We have not previously interpreted the [Recess Appointments] Clause . . . .”).

<sup>86</sup> See generally Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 46–49.



the federal government seem entirely settled by the text, for example.<sup>87</sup> That is part of the puzzle. But in controversial areas the text all but disappears. In fact, the anomalies suggest that there are important domains of constitutional law in which the common law — the precedents and the policies — comes first, and the text follows.

In other words, the precedents shape the text, rather than the other way around.<sup>88</sup> This is apparent in the case of the anomalies, but the anomalies identify a more general feature of U.S. constitutional law. The reason it is unthinkable to say that the Constitution permits the President to abridge the freedom of speech is that our law has developed in a way that makes it unthinkable. For that matter, the words alone do not make it unthinkable that people could be put in jail for criticizing the government — Blackstone famously said that “*liberty of the press*, properly understood . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.”<sup>89</sup> The text of the First Amendment did not dictate how what we think of as “the First Amendment” — that is, the constitutional law of freedom of expression — has developed; the developments in the law have dictated our “interpretation” of the text. That is why it matters that our settled understandings of the Equal Protection Clause, while not obviously inconsistent with the language of the text, do not follow from the way we would read that language if it were, say, in a statute: it suggests that those understandings have developed for reasons independent of the language in the text.<sup>90</sup>

We routinely read principles we have developed for other reasons back into the text. When we think about what the First Amendment, or the Commerce Clause, or the Due Process Clause “means,” we think of the cases and nonjudicial practices that have developed the law in the areas identified with those provisions. And then, as in *Obergefell*, the majestic language of those clauses is invoked in support of those principles. That is why the usual image of constitutional law — begin with the text, and go from there — is often inaccurate.

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<sup>87</sup> For a criticism of these “hard-wired” provisions of the Constitution, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 25–77 (2006).

<sup>88</sup> For an important statement of the position that the text of the Constitution takes its meaning from other sources (not limited to precedent), see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 *DUKE L.J.* 1213, 1216–17 (2015) (arguing that “perceived [textual] clarity” can hinge on “a variety of other considerations,” *id.* at 1216, including conclusions about purpose, structure, national ethos, consequences, practice, and precedent).

<sup>89</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*151; *see also id.* at \*151–52.

<sup>90</sup> *See, e.g.*, Bradley & Siegel, *supra* note 88, at 1273 (“[E]xtratextual considerations can also be important in determining which portions of text are clear and which are unclear.”).

### C. *The Rejection of Fundamentalism*

A more specific implication of the claim that constitutional law is not text-centered is that the principle suggested by Justice Scalia's question in *Noel Canning* — that the text always has priority over even well-established practices — should be rejected. Justice Scalia's concurrence in *Noel Canning*, and (to an even greater degree) the D.C. Circuit's opinion, flirted with what might be called constitutional fundamentalism.<sup>91</sup> The dissent in *Arizona State Legislature*, although it did address the precedents, emphasized the text more heavily and had a fundamentalist tone.<sup>92</sup> Fundamentalism, here as in other settings, treats the foundational text as the only ultimate authority. Only a narrow range of interpretations and implementations is permitted; deviations from the text are forbidden.

Over time, in the fundamentalist vision, the law might have drifted away from its foundations. But to the extent it has done so, it is erroneous and possibly corrupt. Therefore, on the fundamentalist view, it is always acceptable, in fact presumptively mandatory, to return to the text, even if that means rejecting precedents and practices that have come to be taken for granted, and even if those practices have existed for a long time. There might be some room for a pragmatic compromise with longstanding practices and precedents, but in principle the text is the law and precedents that deviate from it should be rejected.

Fundamentalism in this sense — in which the text is always the ultimate authority — is different from originalism, the view that the original understanding of a constitutional provision, somehow defined, controls.<sup>93</sup> These two views share the premise that certain decisions, made at the time a constitutional provision was adopted, must be followed until that provision is formally amended. But, as I said, originalism has well-known vulnerabilities. As a result, departures from the original understandings are acceptable in a way that departures from the text seem not to be. Again, *Obergefell* is an example,

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<sup>91</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring in the judgment) (discussing the Court's "duty to interpret the Constitution in light of its text, structure, and original understanding"); *Noel Canning v. NLRB*, 705 F.3d 490, 500 (D.C. Cir. 2013) ("When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution."), *aff'd on other grounds*, 134 S. Ct. 2550.

<sup>92</sup> See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677–80 (2015) (Roberts, C.J., dissenting) (criticizing the majority opinion for having "no basis in the text, structure, or history of the Constitution," although also asserting that the opinion "contradicts precedents from both Congress and this Court," *id.* at 2678).

<sup>93</sup> See, e.g., BARNETT, *supra* note 83, at 4; SCALIA, *supra* note 82, at 23–25. For a criticism of the related form of fundamentalism — the form that rejects established principles of constitutional law in order to revert to the original understandings of constitutional provisions — see SUNSTEIN, *supra* note 79, at 25–27, 30–38.

although very far from the only one, of how the text and the original understandings are treated differently. The opinion of the Court in *Obergefell* did not make any attempt to argue that the Fourteenth Amendment, when adopted, was understood to create a right to same-sex marriage, and of course such an argument would not have been plausible. But the text is not explicitly ignored or brushed aside in that way. That is why the anomalies are notable, and that is why text-based fundamentalism retains some appeal.<sup>94</sup>

The Supreme Court's decision in *District of Columbia v. Heller*,<sup>95</sup> which held that the District's gun control ordinance violated the Second Amendment, is probably the most fundamentalist decision in recent times. The Court announced, "[w]e turn first to the meaning of the Second Amendment."<sup>96</sup> The Court then examined the text in great detail.<sup>97</sup> The opinion examined historical materials, but it insisted that in doing so it was just shedding light on the "meaning" of the text.<sup>98</sup> Only after its inquiry into meaning did the Court "ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment."<sup>99</sup>

Fundamentalism seems most appealing to the courts in cases in which there are not a lot of judicial precedents — cases like *Heller*, *Noel Canning*, and *Arizona State Legislature* — which is revealing: it is further evidence that the primary source of constitutional law is precedent, because the text becomes decisive only, it seems, when there are no precedents to draw on. As I suggested earlier, it is as if the text has the status of an old precedent — it is decisive if, but only if, there is nothing more recent. But that is not the way fundamentalist opinions are written, and it is not the conventional way of thinking about the Constitution.

As an aside, even if you treat the text as a backstop to be used only when the Supreme Court has not addressed an issue, there would still be a problem with *Heller*, and with the dissent in *Arizona State Legislature* and the concurrence and lower court opinion in *Noel Canning*. The problem is that these opinions arguably slight the role

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<sup>94</sup> Fundamentalism is also well represented in the literature. See, e.g., BARNETT, *supra* note 83; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010) [hereinafter Rosenkranz, *Subjects*].

<sup>95</sup> 554 U.S. 570 (2008).

<sup>96</sup> *Id.* at 576.

<sup>97</sup> See *id.* at 576–605.

<sup>98</sup> See, e.g., *id.* at 584.

<sup>99</sup> *Id.* at 619.

of nonjudicial precedent.<sup>100</sup> Nonjudicial precedents — the practices of the executive and legislative branches, for example, or (in *Arizona State Legislature*) the state election laws adopted by popular vote — can be harder to work with than judicial precedent is, but many of the arguments for adhering to judicial precedent apply at least as strongly to the nonjudicial kind.<sup>101</sup> In addition, one form of nonjudicial precedent is the absence of litigation: for decades, so far as we can tell, few of the many people convicted of violating laws restricting firearms, few of the many firms subject to regulation by recess appointees, and few of those affected by popularly adopted regulations of congressional elections raised constitutional claims. You have to be careful in drawing conclusions from that, but the absence of litigation might suggest a consensus that should be given more weight than even a solid line of judicial precedent in an actively litigated, and therefore more controversial, area of the law.<sup>102</sup>

The deeper problem, though, is with the fundamentalist premise that the true Constitution is the text and the precedents are secondary at best. That premise, if followed consistently, would overturn many settled and important principles of constitutional law — that is the significance of the anomalies. For this reason, fundamentalism is very much the exception, not the rule. Even the *Heller* Court, in the most fundamentalist majority opinion in recent years, could not maintain its fundamentalism consistently. Among other things, it went out of its way to say that “nothing in our opinion should be taken to cast doubt on” many “longstanding prohibitions” — such as laws forbidding felons or mentally ill individuals from possessing firearms, or laws barring firearms from “sensitive places such as schools and government buildings.”<sup>103</sup> The Court gave no explanation for how these exceptions fit with the “meaning of the Second Amendment” that it had so painstakingly analyzed.<sup>104</sup> But these exceptions are sensible, and they are “longstanding” — the hallmarks of the common law, not of fundamentalism.

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<sup>100</sup> See generally MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* ch. 4 (2008).

<sup>101</sup> See, e.g., David A. Strauss, *Constitutional Fundamentalism and the Separation of Powers: The Recess Appointments Case*, 83 U. CIN. L. REV. 347, 360–64 (2014).

<sup>102</sup> Cf. *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402, 404; 10 M. & W. 109, 114 (“If there had been any ground for such an action, there certainly would have been some precedent of it; but with [certain] exception[s] . . . no case of a similar nature has occurred in practice.”).

<sup>103</sup> *Heller*, 554 U.S. at 626.

<sup>104</sup> For criticism of this aspect of the *Heller* opinion, by a self-described originalist, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356–67 (2009).

*D. Making Sense of a Mixed System*

It would be straightforward to dismiss fundamentalism, and to be untroubled by the ways in which constitutional law seems at odds with the text, if constitutional law consisted exclusively of precedents. In the ordinary constitutional case, as I said,<sup>105</sup> the arguments and the analysis focus on precedents and on concerns of fairness and good policy, and the text plays hardly any role. If all of constitutional law were like that, we could just treat the text of the Constitution as a source of guidance and inspiration, like the Declaration of Independence, and view constitutional law as an entirely precedent-based system, as if we had no written constitution at all.<sup>106</sup>

But it is very clear that we do not treat the Constitution that way. In our legal system, it is not acceptable *explicitly* to ignore the text of the Constitution — that is why the anomalies I mentioned earlier fly under the radar and are generally unacknowledged. Any claim about constitutional law has to be connected to the text in some way, however contrived. The ceremonial mentions of the Due Process and Equal Protection Clauses in *Obergefell* are examples.<sup>107</sup> You can also never say, for example, that a provision is obsolete and should be “overruled” in the way a court might overrule an obsolete precedent. In addition, some features of our system that do derive from the text — such as those that determine the composition of Congress<sup>108</sup> and the respective roles of Congress and the President in legislating<sup>109</sup> — are not only very important, but also very difficult to change through common law-like means, apparently precisely because they are in the text.

For example, the Supreme Court used the principle of “one person, one vote” to mandate fundamental changes in the government of every state, even though that principle is not explicit in the Constitution.<sup>110</sup> But it would never occur to the Court to order that the United States Senate be reconstituted according to that principle. The natural explanation is that the composition of the Senate is written into the Constitution.<sup>111</sup> But mandating “one person, one vote” for state legislatures is, as far as anyone can tell, every bit as inconsistent with the original understandings as mandating it for the Senate would be. It

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<sup>105</sup> See *supra* pp. 8–9.

<sup>106</sup> For an argument that no other view of the text of the Constitution is defensible, see LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 15–21 (2012).

<sup>107</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (discussing the Due Process Clause); *id.* at 2602–03 (discussing the Equal Protection Clause).

<sup>108</sup> See U.S. CONST. art. I, §§ 1–3.

<sup>109</sup> See *id.* § 7, cl. 2.

<sup>110</sup> See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

<sup>111</sup> See U.S. CONST. art. I, § 3, cl. 1.

just happens that the original understandings about the Senate were written into the document, and the original understandings that permitted malapportioned state legislatures were not stated explicitly. But why should that make any difference, if we know what the original understandings were? Somehow, the fact that one norm is explicit in the text seems to matter even if we know that the other norm was taken for granted when the text was written.

This is not to say that even the explicit norm is immutable. One could imagine an evolutionary, common law–like change in the features of our system that are explicit in the text — for example, one could imagine the Senate evolving to be more like the British House of Lords, which plays a very limited role in legislating.<sup>112</sup> The norms governing the election of the President have evolved in roughly the same way: the settled practice can be squared with the text, but the practice is different from what the text seems to contemplate.<sup>113</sup> So in that sense the text does not fix the constitutional order permanently. But there is no question that the bare fact that the provisions about the Senate are in the text makes a difference.

The overall picture, then, is that the text retains an ultimate authority, both nominal (in the sense that all constitutional principles must be formally linked to the text in some way) and real (in the sense that some key elements of our system are attributable primarily or exclusively to the text). But at the same time, constitutional law routinely proceeds without regard to the text, in a common law–like fashion. And if I am right about the anomalies, the force of the common law–like elements is so strong that in important categories of cases it even sweeps aside the text.

*E. Are Mixed Systems Ubiquitous?  
Against Constitutional Law Exceptionalism*

This kind of mixed system may actually be the norm. That is, constitutional law may not be distinctive in this respect. Many areas of the law that we think of as being governed by authoritative texts

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<sup>112</sup> See, e.g., ANTHONY KING, *THE BRITISH CONSTITUTION* 299 (2007) (discussing the Salisbury Convention, according to which the House of Lords will not impede the passage of legislation adopted by the House of Commons if the legislation was prefigured in the election manifesto of the majority party in the Commons).

<sup>113</sup> See, e.g., *Ray v. Blair*, 343 U.S. 214, 231 (1952) (upholding a state law authorizing political parties to require presidential electors to take an oath that they will support the candidate chosen by the party convention); *id.* at 232 (Jackson, J., dissenting) (“No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation’s highest offices.”); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 371 (1990) (describing Justice Jackson’s argument as “unimpeachabl[e]”).

might, in fact, present the same challenge of reconciling textual and precedent-based elements. Ordinarily, for example, we think there is a clear priority rule governing the relationship between statutes and the common law: the common law operates only when there is no statute in the picture. If there is a statute, the statute governs to the exclusion of nonstatutory precedent. But there is an older tradition — one that seems foreign to us today — that puts statutes and the common law more on a par, so that the text of the statute must be harmonized with principles generated by the common law.<sup>114</sup>

For example, in 1936, Harlan Fiske Stone, then an Associate Justice, described “the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.”<sup>115</sup> Statutes should be treated “as starting points for judicial lawmaking comparable to judicial decisions.”<sup>116</sup> Justice Stone saw this as a matter not of exalting precedent but, on the contrary, of giving statutes greater influence — more influence than their text alone would require. “[T]he common-law courts,”<sup>117</sup> he wrote, “have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence.”<sup>118</sup> Instead, statutes should be “regarded . . . as a point of departure for the process of judicial reasoning by which the common law has been expanded.”<sup>119</sup> Courts “have done practically that with our ancient statutes, such as the statutes of limitations, frauds and wills, readily molding them to fit new conditions within their spirit, though not their letter, possibly because their antiquity tends to make us forget or minimize their legislative origin.”<sup>120</sup>

Something like that approach — melding the common law with an authoritative text — seems to be how we do constitutional law. What Justice Stone suggests about the “ancient statutes” — that judges seem to have forgotten to treat them as statutes — sounds like the way in which we have more or less forgotten what various provisions of the Constitution say and have integrated those provisions into a precedent-

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<sup>114</sup> See, e.g., Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936). For a modern statement along similar lines, see Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436–37. Justice Harlan’s opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), is an example of this tradition. See also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* ch. XII (1982). I am indebted to Thomas Grey for this point.

<sup>115</sup> Stone, *supra* note 114, at 12.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 12–13.

<sup>119</sup> *Id.* at 13.

<sup>120</sup> *Id.*

based system. And, as Justice Stone also suggests,<sup>121</sup> that is a good thing.

However well it describes constitutional law, at first glance this approach seems antithetical to the way statutes are treated today. One of the important developments in recent decades has been an emphasis on text in statutory interpretation. In the typical statutory case — very unlike the typical constitutional case — courts focus very closely on the words.<sup>122</sup> The idea of melding the text with common law, à la Justice Stone, seems like, at best, a throwback. Consider, for example, *Milner v. Department of the Navy*,<sup>123</sup> a case from 2011 that illustrates how discordant Stone’s approach seems today. In *Milner*, the government rejected a Freedom of Information Act (FOIA) request for information about how the Navy stored explosives.<sup>124</sup> The court of appeals — relying on longstanding precedent from the D.C. Circuit<sup>125</sup> — ruled in favor of the government on the basis of Exemption 2 of FOIA,<sup>126</sup> which allows the government to withhold records “related solely to the internal personnel rules and practices of an agency.”<sup>127</sup>

The Supreme Court reversed the court of appeals. The Court did not deny that it made sense to allow the Navy to keep those records secret,<sup>128</sup> and the government’s position had substantial support in judicial and nonjudicial precedent<sup>129</sup> — the kinds of things that would matter under a common law approach. But the Court’s opinion emphasized that the language of the exemption — in particular, its use of the word “personnel” — simply did not extend to records having to do with the safe storage of explosives.<sup>130</sup> Perhaps most strikingly, this intense focus on text was barely controversial within the Court.<sup>131</sup> The opinion was joined by eight Justices, with only Justice Breyer dissent-

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<sup>121</sup> See *id.* at 25–26.

<sup>122</sup> See, e.g., Manning, *supra* note 77, at 22–29.

<sup>123</sup> 131 S. Ct. 1259 (2011).

<sup>124</sup> *Id.* at 1263–64.

<sup>125</sup> See *Milner v. U.S. Dep’t of the Navy*, 575 F.3d 959, 964–65 (9th Cir. 2009) (citing *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc)), *rev’d*, 131 S. Ct. 1259.

<sup>126</sup> *Id.* at 965.

<sup>127</sup> 5 U.S.C. § 552(b)(2) (2012).

<sup>128</sup> *Milner*, 131 S. Ct. at 1270–71.

<sup>129</sup> See *id.* at 1271 (“[W]e acknowledge that our decision today upsets three decades of agency practice . . .”). Compare *id.* at 1274 (Breyer, J., dissenting) (asserting that the position rejected by the majority “has been consistently followed, or favorably cited, by every Court of Appeals to have considered the matter during the past 30 years”), with *id.* at 1268–69 (majority opinion) (rejecting the dissent’s argument and asserting that only a “bare majority,” *id.* at 1269, of the courts of appeals adopted that position).

<sup>130</sup> *Id.* at 1266.

<sup>131</sup> See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114, 132–33 (“[T]he Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text . . .” *Id.* at 114).



ing. In many ways, *Milner* is typical of the way the Supreme Court approaches statutes today.<sup>132</sup> So it looks as if there is a sharp distinction between constitutional law and statutory interpretation.

In fact, though, matters are more complicated than that. As text-focused as the Court has become in statutory cases, common law elements are important in many areas of public law that are ostensibly governed by statutes.<sup>133</sup> For example, two of the central principles of administrative law — the *Chenery* doctrine<sup>134</sup> and the form of “hard look” review associated with *State Farm*<sup>135</sup> — do not have a clear statutory basis and are the product of common law reasoning.<sup>136</sup> One can reconcile these principles with the Administrative Procedure Act (APA), but they do not follow very obviously from the text of the APA. Other principles of administrative law, too, seem to be generated by a common law process of learning from experience with the administrative state, responding to changing circumstances, and adapting the principles in a way that makes practical sense.<sup>137</sup> The principles, arrived at in this way, are then read back into the statutes. This process parallels the way in which, for example, we develop principles of equality and nondiscrimination and then read them back into the Equal Protection Clause.

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<sup>132</sup> See *supra* note 77 and accompanying text.

<sup>133</sup> In international law, as well, unwritten law derived from custom coexists with written treaties. The two have “equal authority as international law.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. j (AM. LAW. INST. 1987). Customary law is comparable to nonjudicial precedent; it “results from a general and consistent practice of states followed by them from a sense of legal obligation.” *Id.* § 102(2). Ordinarily an agreement between two nations will supersede customary international law, but not always. *Id.* § 102 cmt. j (“[A]n agreement will not supersede a prior rule of customary law that is a peremptory norm of international law . . .”).

<sup>134</sup> The *Chenery* doctrine requires a reviewing court to uphold an agency action only on the grounds upon which the agency relied when it acted. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943).

<sup>135</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). For an argument against “hard look” review, both on normative grounds and as a description of the Supreme Court’s actual practice, see Jacob E. Gersen & Adrian Vermeule, *Thin Rationality Review* (Aug. 4, 2015) (unpublished manuscript), <http://papers.ssrn.com/abstract=2639644> [<http://perma.cc/VD8E-AZKV>].

<sup>136</sup> See, e.g., Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 24–25 (2011) (describing how *State Farm* arose from a common law process rather than the APA); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 117–18, 118 n.23 (1998) (describing how the Court endorsed a common law doctrine in its *State Farm* decision); Gillian E. Metzger, *Annual Review of Administrative Law — Foreword, Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012). For general statements of the point that much of administrative law does not have a clear statutory basis, see, for example, LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 328–29 (1965); and Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986) (“Much of administrative law is common law.”).

<sup>137</sup> See, e.g., Metzger, *supra* note 136, at 1300–10, 1312–13.

The administrative law counterpart to fundamentalism is the approach associated with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>138</sup> In that case, the Court repudiated procedural requirements that had been developed by the lower courts in a common law–like way but that went beyond the text of the APA.<sup>139</sup> The question of when the *Vermont Yankee* approach will govern — as opposed to the approach taken in, for example, the hard look review cases<sup>140</sup> — is analogous to the puzzle about the respective roles of text and precedent in constitutional law.<sup>141</sup> There does not seem to be a clear answer.<sup>142</sup>

There are other statutes that, like the APA, coexist with a body of common law that cannot easily be inferred from the text. The Sherman Act is a familiar example.<sup>143</sup> Section 1983 of Title 42, which allows civil actions against state officials for violations of federal constitutional rights, has given rise to an extensive body of judge-made doctrine that goes well beyond the terms of the text.<sup>144</sup> The attorney’s fees provision that accompanies section 1983, 42 U.S.C. § 1988 — a statute that is, as a practical matter, very important in public law litigation — has been interpreted in a remarkably countertextual way.<sup>145</sup>

<sup>138</sup> 435 U.S. 519 (1978).

<sup>139</sup> *Id.* at 539–49.

<sup>140</sup> *See, e.g., State Farm*, 463 U.S. 29.

<sup>141</sup> The Court took a similarly fundamentalist approach last Term in *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206–10 (2015) (rejecting, as going beyond the terms of the APA, the D.C. Circuit’s requirement that agencies use notice and comment procedures before adopting interpretive rules that significantly change previous interpretations). For an argument that anticipated, and advocated, the result that the Supreme Court reached, see Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 427–34 (2015).

<sup>142</sup> *See* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375, 395 (suggesting that *Vermont Yankee* “attributes to the APA a fundamentality which . . . the statute can no longer bear,” *id.* at 375, and that “*Vermont Yankee*’s demand for fealty to the APA must be taken with a grain of salt,” *id.* at 395).

<sup>143</sup> *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute. Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach.” (alteration in original) (citations omitted)).

<sup>144</sup> *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation — and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 691–92, 718–22 (2014).

<sup>145</sup> Section 1988(b) provides that “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs,” 42 U.S.C. § 1988(b) (2012), but the Supreme Court has removed nearly all the “discretion” of lower courts to decide whether to grant fees and has drawn a distinction, not at all suggested by the text of the statute, between prevailing plaintiffs (who nearly always get fees, *see, e.g., Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (per curiam) (discussing the fee-shifting provision of Title II of the Civil Rights Act and noting that an individual “who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney’s fee unless special circumstances would ren-

Section 1331 of Title 28, which gives federal district courts jurisdiction over cases arising under federal law, is the basis for a complex body of judge-made law that is designed to advance the apparent purposes of the statute while accounting for the practicalities of litigation.<sup>146</sup> Section 1331 is an especially notable example because, even though its language is nearly the same as the grant of federal question jurisdiction in Article III, the two provisions are interpreted quite differently, for practical and historical reasons.<sup>147</sup> In all of these instances, it seems fair to say that courts have treated statutes according to Justice Stone’s model.

Even the domain that seems most clearly governed by authoritative texts — complex, detailed regulatory statutes that courts interpret by following the text closely — may actually be characterized by the same puzzling mix of text-based and common law elements. But the common law elements are provided mostly by administrative agencies, not the courts. *Chevron* and its predecessors<sup>148</sup> — cases dealing with the deference courts must give to administrative agencies’ interpretations of the law — are supposed to dictate how the text of statutes and the (somewhat) common law-like processes of agencies coexist. Nominally, the rules of their coexistence are simple: if the statute is clear, the agency must comply; if the statute is vague, a reasonable agency interpretation will be accepted by the courts.<sup>149</sup>

In practice, though, it is not always obvious when a provision is clear enough to preclude deference to the agency.<sup>150</sup> Even when the agency’s action seems to be consistent with the words, the Supreme Court might reject what the agency has done because of a settled pattern of understandings to the contrary — a kind of nonjudicial precedent.<sup>151</sup> Or the Court might decide — as it did last Term in *King v.*

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der such an award unjust,” *id.* at 402)), and prevailing defendants (who hardly ever do, *see* *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 424 (1978) (holding that defendants recover only if the suit was frivolous)).

<sup>146</sup> *See* RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 780–95 (6th ed. 2009).

<sup>147</sup> *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983) (“Although the language of § 1331 parallels that of the ‘Arising Under’ Clause of Art. III, this Court never has held that statutory ‘arising under’ jurisdiction is identical to Art. III ‘arising under’ jurisdiction. Quite the contrary is true.”).

<sup>148</sup> *See, e.g.*, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944).

<sup>149</sup> *See Chevron*, 467 U.S. at 866.

<sup>150</sup> *Compare* *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015) (holding that the EPA must consider cost under 42 U.S.C. § 7412, which requires the agency to determine that a regulation is “appropriate and necessary” before promulgation), *with id.* at 2717–18 (Kagan, J., dissenting) (arguing that the Court should defer to the EPA’s interpretation of “appropriate and necessary” as long as it is reasonable).

<sup>151</sup> *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (determining that Congress intended to create “a distinct regulatory scheme [apart from the FDCA] addressing

*Burwell*,<sup>152</sup> the high-profile litigation that threatened the viability of the Affordable Care Act — that, while the statute is ambiguous, the issue is too important to be left to an agency and should be resolved by a court.<sup>153</sup> If an agency has consistently adhered to a view that seems to be at odds with the text of the statute, that might persuade a court to find a degree of vagueness or ambiguity in the text that the court would otherwise not perceive and to defer to the agency’s longstanding view.<sup>154</sup> And then there are the questions about what kind of agency actions are entitled to deference, and to what degree.<sup>155</sup>

The puzzle of when, exactly, *Chevron* requires deference is again analogous to the puzzle of how text and precedent coexist in constitutional law. Obviously the analogy is, for many reasons, not exact: statutes are easier to amend than the Constitution; agencies do not have the same obligation to follow precedent that courts have; and agencies are correspondingly freer to base their decisions on judgments about good policy. But the same forces that create anomalies in constitutional law — the difficulty of enacting an authoritative text that is specific enough to accomplish its objectives but flexible enough to adapt to unanticipated circumstances — may be responsible for the *Chevron* doctrine (and its antecedents) and for the issues that doctrine trails in its wake. If that is so, then the apparent anomalies in constitutional law might not be so anomalous after all. Mixed systems, taking authoritative texts and common law-like evolutionary processes and combining them in a way that lacks clear priority rules, may be the norm.

### III. THE ANOMALIES

The anomalies — instances in which the text of the Constitution seems inconsistent with well-established principles of constitutional law — are the most vivid evidence that U.S. constitutional law is not a text-based system. Of course, if you assert that a text is inconsistent with something, you are implicitly assigning a meaning to the text. But in the case of the anomalies, the meanings are pretty clear.<sup>156</sup>

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the subject of tobacco and health,” partly evidenced by Congress’s passing separate legislation regulating tobacco against the backdrop of “the consistency of the FDA’s prior position” that it lacked authority to regulate tobacco products).

<sup>152</sup> 135 S. Ct. 2480 (2015).

<sup>153</sup> *Id.* at 2488–89; *cf. Brown & Williamson*, 529 U.S. at 133 (“[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”).

<sup>154</sup> *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 218–20 (2002).

<sup>155</sup> *See United States v. Mead Corp.*, 553 U.S. 218 (2001); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

<sup>156</sup> *See generally* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

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There is no need to resort to controversial theories of interpretation to show that the anomalies exist.

The claim about the anomalies is not that it is impossible to read the language in a way that is consistent with the established principles. We *do* read it that way; in a sense, that is precisely the point. The claim is rather that the established principles are inconsistent with the most straightforward or natural reading. At the very least there is a tension between the text and the established principles, although I believe that understates the extent of the inconsistency in these cases. Something is causing us to “interpret” the language in the way we have. That something, as I have said, is the common law–like process that is characteristic of U.S. constitutional law.

Implicit in all of this is Chief Justice Marshall’s famous statement that “it is *a constitution* we are expounding.”<sup>157</sup> We should not expect to treat the Constitution as if it were any ordinary text. But Chief Justice Marshall’s dictum is just the starting point. The idea is to see, as best we can, what we are doing when we “expound” the Constitution. Expounding the U.S. Constitution means operating in a mixed system that comprises precedent as well as the text, and in which provisions of the Constitution often, as I have suggested, seem to function roughly in the same way as precedents. One way to put the point might be that the proper interpretation of the text, or the true meaning of the text, is one that harmonizes the text with the precedents and other sources of law.<sup>158</sup> Using terms like “interpretation” and “meaning” is problematic if it suggests that the text is foundational. But if we leave that implication aside, some version of that view seems to me correct. And it follows that fundamentalism is a mistake, and we should reconsider the notion that constitutional law is derived from the text in some meaningful way.

It might be tempting to dissolve some of the anomalies by recourse to originalism — to say, for example, that the original understanding (somehow defined) of the Free Speech Clause was that it applied to the entire federal government, even though the language is limited to Congress; or that the Fourteenth Amendment was understood to incorporate the Bill of Rights. For most of these anomalies, original understandings don’t help; there is not much doubt that the language of the constitutional provision, given its ordinary meaning, is consistent with the original understanding. But even when that is not true, resorting to the original understanding does not solve the problem posed by the

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<sup>157</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>158</sup> See, for example, the well-known discussion of interpretation in RONALD DWORKIN, *LAW’S EMPIRE* 45–86, 313–99 (1986) and the exploration of “meaning” in Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015).

anomalies. That is because, as I noted earlier, there are many well-settled instances in which constitutional law departs from original understandings. So even if the original understandings could resolve some of these anomalies, the question would be why we invoke the original understandings in these cases and not, for example, to discredit the cases that say the Equal Protection Clause forbids discrimination against women — a pretty uncontroversial example of a settled principle that is inconsistent with original understandings. If the answer to that question is that we resort to original understandings in order to save principles that are already well established — like the incorporation of the Bill of Rights — but not when the original understandings would undermine established principles, then, necessarily, something other than either the text or the original understandings is determining the content of constitutional law.

*A. The First Word of the First Amendment*

The First Amendment is uncontroversially understood to protect freedom of speech, and the other rights it lists, against all three branches of the federal government. But the amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>159</sup> On its face, the amendment applies to “Congress” alone. Elsewhere, the Constitution defines “Congress”: it “shall consist of a Senate and House of Representatives.”<sup>160</sup> (As Chief Justice Roberts remarked in his dissent in *Arizona State Legislature*, “[w]hen seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.”<sup>161</sup>) The division of the federal government into the three branches is foundational; it structures the entire original Constitution. And the First Amendment specifically says that “Congress shall make no law”; the other branches of the federal government do not make laws. So it seems odd to suggest that “Congress” should be read to include the other branches of the federal government.

What’s more, no other provision of the Bill of Rights is phrased in the same way as the First Amendment. The other provisions refer to the “right” of the people<sup>162</sup> or of an individual,<sup>163</sup> or they simply say that certain actions are not allowed.<sup>164</sup> It would have been easy enough to phrase the First Amendment in the same way: to say, for

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<sup>159</sup> U.S. CONST. amend. I.

<sup>160</sup> *Id.* art. I, § 1.

<sup>161</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting).

<sup>162</sup> *See* U.S. CONST. amends. II, IV.

<sup>163</sup> *See id.* amends. VI, VII.

<sup>164</sup> *See id.* amends. III, V, VIII, IX.

example, that the rights of free speech and free exercise of religion shall not be abridged. This suggests that the First Amendment's reference to Congress was advertent.

It is possible, of course, that the drafters of the First Amendment, when they wrote "Congress," meant to refer to the entire federal government, and that the First Amendment was understood in this way.<sup>165</sup> But, as I said, we do not uniformly follow original understandings even to clarify vague provisions of the Constitution; why would we allow original understandings to defeat the straightforward meaning of "Congress"? Unless, of course, the content of constitutional law is determined by principles about free expression we have arrived at over time, through an evolutionary process.

This is not a case of an obvious glitch in the text, something that no rational person could have meant (like the comma that seems to make everyone born in the last 227 years ineligible to be President<sup>166</sup>). The premise of the separation of powers is that different branches have different virtues and vices; it is certainly possible that Congress presents a greater threat to the freedom of speech and religion than the President does. The assertion that "Congress" in the First Amendment must just be a stand-in for the entire government, because otherwise freedom of speech would be endangered,<sup>167</sup> reflects the view of free speech we have developed over time. It might be the right view, but it is hard to make the case that that is what the text says.

Some fundamentalists, biting the proverbial bullet, say that the First Amendment applies only to Congress, not to the President or the courts.<sup>168</sup> One version of the fundamentalist position is that the Presi-

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<sup>165</sup> See *Shrum v. City of Coweta*, 449 F.3d 1132, 1142 (10th Cir. 2006) (McConnell, J.) ("As this history shows, there was no intention to confine the reach of the First Amendment to the legislative branch."); BALKIN, *supra* note 83, at 205, 409 n.106 (citing and discussing *Magill v. Brown*, 16 F. Cas. 408, 427 (C.C.E.D. Pa. 1833), as assuming that the First Amendment applied to the entire federal government); Bradley & Siegel, *supra* note 88, at 1244 & n.126 (quoting and discussing *Magill*, 16 F. Cas. at 427, for the same proposition).

<sup>166</sup> Article II, Section 1, Clause 5 provides that "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . ." U.S. CONST. art. II, § 1, cl. 5. The comma after "States" seems to turn "or a citizen of the United States" into a parenthetical phrase, which would apparently make every President since Zachary Taylor illegitimate. See Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

<sup>167</sup> See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 316 (2005); BALKIN, *supra* note 83, at 204–05 ("We can certainly imagine principles that would distinguish congressional power to censor from judicial and executive power, but none of those principles makes particular sense either at the time of the founding or today, and a very long history of practice rejects the idea." *Id.* at 205.)

<sup>168</sup> See, e.g., GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE* 42 (2004) ("To read the First Amendment to apply to entities other than Congress is simply to abandon the enterprise of textual interpretation."); Rosenkranz, *Subjects*, *supra* note 94, at 1252–53; see also

dent is in effect forbidden to abridge the freedom of speech not by the First Amendment but by the Take Care Clause or the Due Process Clause.<sup>169</sup> The argument is that those clauses provide that the President must act according to law, and, leaving aside inherent presidential powers granted by Article II, that means that the President may act only in ways authorized by Congress.<sup>170</sup> If Congress has authorized the President to abridge the freedom of speech, then Congress has violated the First Amendment.<sup>171</sup> If the President abridges the freedom of speech without congressional authorization, then he has acted *ultra vires*, in violation of the Due Process Clause or the Take Care Clause.<sup>172</sup> Either way, the argument concludes, the President is in practice forbidden to abridge the freedom of speech.<sup>173</sup>

A quick way to see the problem with this argument is that it would make the Pentagon Papers case, *New York Times Co. v. United States*<sup>174</sup> — which is ordinarily considered one of the great First Amendment cases — not a First Amendment case at all.<sup>175</sup> In the Pentagon Papers case, the government sought an injunction against the publication of documents containing national security secrets.<sup>176</sup> No statute authorized the injunction;<sup>177</sup> the government asserted that the President had inherent power, under Article II, to seek the injunction.<sup>178</sup>

On the fundamentalist view of the First Amendment, the only question would have been whether the President had that power under Article II. If he did, his action was lawful, irrespective of anything having to do with freedom of speech. If he did not have that power, then his action was unlawful, again for reasons unrelated to freedom of speech. It might be tempting to say that the President's powers should be construed narrowly when they might be used to abridge free speech. But the text of the First Amendment gives us no basis for thinking that potential presidential abridgment of the freedom of speech is a concern. In fact one could even infer from the way the Bill of Rights is written — with the First Amendment, alone among the provisions of the Bill of Rights, limited by its terms to Congress —

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Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1157 (1986) (arguing that while the First Amendment may apply to the President, it does not apply to courts).

<sup>169</sup> See, e.g., Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601, 606–11 (2013).

<sup>170</sup> See *id.* at 609–10.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 610–11.

<sup>174</sup> 403 U.S. 713 (1971) (per curiam).

<sup>175</sup> See Bradley & Siegel, *supra* note 88, at 1244–47.

<sup>176</sup> *New York Times*, 403 U.S. at 714.

<sup>177</sup> *Id.* at 720 (Douglas, J., concurring).

<sup>178</sup> *Id.* at 741 (Marshall, J., concurring).



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that the First Amendment conveys an affirmative willingness to allow the President to take actions that abridge the freedom of speech.

Needless to say, none of the litigants, none of the judges, and none of the observers saw the Pentagon Papers case this way. Some of the Justices did mention the absence of congressional authorization,<sup>179</sup> but, of course, none of them suggested that the First Amendment was irrelevant. On the contrary, the case was seen then, and is seen today, as one of the great First Amendment landmarks.

The Pentagon Papers case suggests a general problem with the fundamentalist argument that the First Amendment does not apply to the President: in the exercise of his inherent powers, the President might abridge the freedom of speech or religious freedom in ways that we would find intolerable. The President may not abuse his inherent powers; when he acts as Commander in Chief, for example, he must exercise reasonable, good faith judgment in that role. (The courts might not enforce this limit on his power, but the Constitution imposes it nonetheless, and the President would violate his oath of office if he breached it.) But he might, for example, conclude that certain religious or political groups present a greater danger to national security, or are more suited to especially dangerous military operations. On the fundamentalist view, concerns about religious freedom and freedom of speech would be irrelevant.

The problem with the fundamentalist view of the First Amendment goes beyond the President's inherent powers under Article II. The fundamentalist view would also exempt more familiar executive branch actions from free speech principles. It is surely correct to say, as fundamentalists do, that Congress abridges the freedom of speech if it commands the executive branch to do something that constitutes an abridgment. But the typical pattern is that Congress enacts a statute prohibiting some form of private conduct and implicitly or explicitly gives the President discretion in deciding how to enforce the statute. If the President (or his delegate) then enforces the statute in a way that abridges the freedom of speech or the free exercise of religion, it is the executive branch — not Congress — that has abridged the freedom. In such a case, the crucial decision was made by the President, not by Congress. It is implausible, or at least strained, to read the First Amendment to apply to instances in which the crucial decision was made by the President, when the President has been excluded from the scope of the amendment's prohibition. Or to paraphrase what the

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<sup>179</sup> See *id.* at 731 (White, J., concurring); *id.* at 740–48 (Marshall, J., concurring).

Court has said in a different context, granting the President the power to abridge a freedom does not itself abridge the freedom.<sup>180</sup>

There is something artificial about suggesting that executive branch actions that interfere with freedom of speech or freedom of religion don't violate the Constitution — or so it seems to us. But that is just testimony to the power of nontextual constitutional principles that have been developed over time by judicial and nonjudicial precedents. Of course, we think, the President cannot “violate someone's First Amendment rights.”<sup>181</sup> But we think that because the principles of free expression have taken hold in a way that has become detached from — and may never have been all that securely connected to — the words of the First Amendment.

### B. *The Establishment Clause*

The First Amendment provides that “Congress shall make no law respecting an establishment of religion.”<sup>182</sup> When the First Amendment was adopted, a number of states had established churches.<sup>183</sup> A straightforward reading of the Establishment Clause is that Congress could not interfere with those state establishments.<sup>184</sup> It is difficult to see what other meaning the Establishment Clause might have had. There was no federal establishment, and if the Establishment Clause had been designed simply to keep Congress from establishing a church, it could have just forbidden Congress from doing that. Instead, it used the obviously broader language — “respecting an establishment” — that would prohibit not just an establishment but a disestablishment, necessarily of the states' established churches.

Today, the Establishment Clause — as “incorporated” by the Fourteenth Amendment's Due Process Clause and applied to the states — is interpreted to forbid states from establishing churches or aiding religion in certain ways.<sup>185</sup> Incorporation itself raises questions about how seriously we take the text, especially when a provision specifically limiting Congress's power over the states is somehow applied to the

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<sup>180</sup> Cf. *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 921–22 (2015) (holding that a statute authorizing an agency to prohibit a disclosure does not itself prohibit the disclosure).

<sup>181</sup> This fixed idea is embodied not just in common understandings, but in the fabric of the law. The view that Congress violates the First Amendment when, and to the extent that, it authorizes the executive branch to abridge the freedom of speech would require a radical revision of several well-established doctrines. See generally Richard H. Fallon, Jr., *Appraising the Significance of the Subjects and Objects of the Constitution: A Case Study in Textual and Historical Revisionism*, 16 U. PA. J. CONST. L. 453 (2013).

<sup>182</sup> U.S. CONST. amend. I.

<sup>183</sup> See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 32–33 (1998).

<sup>184</sup> See *id.* at 32 & 324 n.62 (citing sources).

<sup>185</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

states.<sup>186</sup> But if we accept incorporation, then the Establishment Clause, as incorporated, authorizes the federal courts — and Congress, using its power under section 5 of the Fourteenth Amendment — to forbid states from establishing religion. To say that Congress may forbid states from establishing religion seems to be the opposite of what the Establishment Clause says.<sup>187</sup> And if we read “Congress” in the First Amendment to mean “the federal government” — as we must, to avoid the problems with the freedom of speech and the freedom of religious exercise — then the federal courts also contravene the text when they forbid state establishments.

Except for a few aberrational opinions,<sup>188</sup> the courts do not confront this problem, just as they do not confront the problem with “Congress.” There is a plausible justification for the current understanding of the Establishment Clause, but it is basically an evolutionary, common law–like account. In the first decades of the nineteenth century, the argument goes, states abolished their religious establishments, and the idea took hold that religious establishments are inconsistent with the principles of religious liberty found in the First Amendment. The Fourteenth Amendment, adopted in 1868, then incorporated that “version” of the First Amendment.<sup>189</sup>

This certainly may be the right way to think about religious establishments. It has the virtues of a common law approach, because it takes into account changes, over time, in people’s understandings. And it does lead us to where we are today. But this approach cannot be derived from the text alone. The Establishment Clause itself, read in a straightforward way, leads, if anything, to the opposite conclusion. The Fourteenth Amendment, even assuming it is properly interpreted to incorporate the Bill of Rights, does not specify that it incorporates a version of the Establishment Clause that had evolved in a way that is at variance with that clause’s text. It will not do simply to invoke original understandings,<sup>190</sup> because we do not accept the original understandings of the Fourteenth Amendment in many other respects. In any event, if the Fourteenth Amendment *is* understood to incorporate, not the text of the Establishment Clause, but an evolved understand-

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<sup>186</sup> See *infra* pp. 47–49.

<sup>187</sup> See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 170 (2012) (“Critics charged that these cases [applying the Establishment Clause to the states] turned the establishment clause — ‘Congress shall make no law respecting an establishment of religion’ — on its head.” (quoting U.S. CONST. amend. I)).

<sup>188</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–54 (2004) (Thomas, J., concurring in the judgment).

<sup>189</sup> See, e.g., AMAR, *supra* note 183, at 251–52; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1088 (1995).

<sup>190</sup> See Lash, *supra* note 189, at 1141–45.

ing of its underlying principles, then the question is why the amendment should be understood to freeze the understanding that obtained when it was adopted, rather than allowing a continuing evolution; certainly the text does not dictate that result.

In other words, we could deal with the application of the Establishment Clause to the states by viewing the Fourteenth Amendment as a font of evolving, common law–like constitutional law on issues relating to state aid to religion. But there is no apparent reason — certainly none in the text — to stop at religion, instead of saying that the Constitution embraces an evolving understanding of all issues relating to the Bill of Rights. And that would amount to a nearly unequivocal embrace of a common law view of the Constitution that often leaves the text behind — which is, I believe, our system.

### C. *Electronic Surveillance*

The Fourth Amendment provides in part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”<sup>191</sup> If the government captures an electronic communication by intercepting radio waves, or by tapping into cables that are not on private property, then the government’s access to the communication is not the product of a search or seizure of a “house” or a “person” in any ordinary sense. Nor is the government’s action a search or a seizure of one’s “papers” or “effects.” Much of what’s distinctive about electronic communications is precisely that they are an alternative to “papers.” And it is hard to imagine anyone referring to a phone call as part of his or her personal “effects.”

So, judging from the text alone, the Fourth Amendment does not seem to limit the government’s power to intercept electronic communications, if the government does so without, for example, invading a house.<sup>192</sup> The Court so held in *Olmstead v. United States*,<sup>193</sup> over a celebrated dissent by Justice Brandeis. The Court overruled *Olmstead* in *Katz v. United States*.<sup>194</sup> Justice Black dissented in *Katz* precisely on the ground that the Court had departed from the language of the Fourth Amendment.<sup>195</sup> Justice Black emphasized that the terms of the

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<sup>191</sup> U.S. CONST. amend. IV.

<sup>192</sup> See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 78 (1988) (“If one focuses on the specific intent of the framers, the fourth amendment surely does not encompass wiretaps. The framers had in mind the sort of search or seizure that involved a physical disruption of privacy or repose by governmental officials.”).

<sup>193</sup> 277 U.S. 438, 466 (1928).

<sup>194</sup> 389 U.S. 347, 353 (1967).

<sup>195</sup> See *id.* at 364 (Black, J., dissenting).

Fourth Amendment refer to tangible objects, and electronic communications are not tangible.<sup>196</sup>

It is tempting to try to answer Justice Black’s position by saying that we should be allowed to update the Constitution in order to account for technological innovations that obviously could not have been anticipated when the Constitution was adopted. The Constitution makes the President “Commander in Chief of the Army and Navy of the United States”;<sup>197</sup> the omission of the Air Force does not seem to be something that should trouble us. It is not obvious that this kind of updating is permissible; arguably that is what amendments are for. But if we do allow that kind of updating, certain kinds of electronic surveillance might come within the terms of the Fourth Amendment. Emails, or information stored in digital form, for example, might qualify as “papers.”

Part of Justice Black’s argument, though, was that the electronic interception of telephone calls is a version of eavesdropping, and unaided eavesdropping by itself has never been regarded as a search within the meaning of the Fourth Amendment.<sup>198</sup> The point is not just about history: a search or seizure of one’s person or one’s tangible effects is not the same kind of intrusion as listening to communications.<sup>199</sup> There is a more general point. *Katz* inaugurated a development that reoriented the Fourth Amendment away from the kinds of interests that have traditionally been protected by the law of torts and toward a more general notion of privacy. In the process, the courts did not follow, in any remotely rigorous way, the words of the Fourth Amendment. The key terms in what we call the law of the Fourth Amendment are “privacy” and, more specifically, “reasonable expectations of privacy” — terms that, of course, are not in the text. This reorientation has become a deeply entrenched part of our law, and it certainly seems justified. But it is hard to reconcile with the text.

#### *D. The Equal Protection Clause and Voting*

Ever since Justice Holmes’s opinion in *Nixon v. Herndon*,<sup>200</sup> the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment forbids racial discrimination in voting. In the 1960s, the Court relied on the Equal Protection Clause to invalidate a

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<sup>196</sup> *Id.* at 365.

<sup>197</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>198</sup> *Katz*, 389 U.S. at 366 (Black, J., dissenting).

<sup>199</sup> Cf. David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1092–95 (2014) (discussing the distinction between privacy rights regarding information and privacy rights regarding more immediate intrusions of one’s person or physical place of refuge).

<sup>200</sup> 273 U.S. 536 (1927).

number of other restrictions on voting and to require state and local legislative bodies to be apportioned according to the principle of “one person, one vote.”<sup>201</sup> But in fact a straightforward reading of the text makes it clear that the Equal Protection Clause does not require equality in voting. Justice Harlan made that argument (also invoking the history of the Fourteenth Amendment) in his dissents in the reapportionment cases,<sup>202</sup> and it was anticipated by *Minor v. Happersett*,<sup>203</sup> which held, in 1874, that the Fourteenth Amendment did not give women the right to vote.<sup>204</sup>

The argument, in a word, is that the Fourteenth Amendment protects the right to vote (to the extent it protects it) with a liability rule, not an entitlement: states are free to restrict the franchise if they are willing to pay the price. Section 2 of the Fourteenth Amendment provides:

[W]hen the right to vote at any election for [federal or state offices] is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation [in the House of Representatives] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.<sup>205</sup>

That is, if a state disenfranchises certain male citizens over the age of twenty-one, its representation in the House will be reduced accordingly. A state that wanted to disenfranchise African Americans could do so (before the Fifteenth Amendment was adopted), as long as it accepted reduced representation. If the Equal Protection Clause in section 1 of the amendment prohibited states from denying the right to vote, then states would not have the option that section 2 clearly seems to give them.

It is possible to read the Fourteenth Amendment in a different way. It's not unusual for regulatory regimes to have overlapping or duplicative remedies — civil and criminal remedies, for example, or remedies initiated by both private parties and the government. You could see the Equal Protection Clause as providing a judicial remedy (an injunction against disenfranchisement) as a backup if Congress fails to invoke the section 2 remedy of reducing the state's representation. An injunction might even be an independent remedy that would be available irrespective of what Congress did — which is, essentially, how the Fourteenth Amendment has been interpreted.

<sup>201</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

<sup>202</sup> See, e.g., *id.* at 593–94 (Harlan, J., dissenting).

<sup>203</sup> 88 U.S. (21 Wall.) 162 (1874).

<sup>204</sup> See *id.* at 174–75, 178.

<sup>205</sup> U.S. CONST. amend. XIV, § 2.

But that is, quite clearly, not the most straightforward reading of the words. Section 2 refers explicitly to voting, and it provides both a detailed right (available only to certain men over the age of twenty-one) and a specific remedy.<sup>206</sup> Section 1 does not refer to voting at all.<sup>207</sup> It does not explicitly establish a right to vote, and it does not specify a remedy. The amendment as a whole says nothing about how the section 2 remedy should be harmonized with a supposed remedy available under section 1.<sup>208</sup> Read naturally, the amendment does not seem to provide dual remedies.

There is an even more important point, though. Other provisions of the Constitution forbid certain kinds of discrimination in voting, and reading those provisions together tells us a lot about how we interpret the Constitution. Specifically, it demonstrates that we read the Constitution according to the approach reflected in the passages I quoted earlier from Justice Stone's article<sup>209</sup> — an approach that treats textual provisions as themselves a kind of precedent, to be harmonized with other precedents, and with judgments of fairness and good policy, in a common law-like way.<sup>210</sup>

The original Constitution left the composition of the electorate, even for federal elections, almost entirely to state law. The House of Representatives was to be chosen by the "People of the several States," and the "Electors" of the House were to have the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature."<sup>211</sup> And of course Article IV provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."<sup>212</sup> But beyond that, states had a free hand.

Then, bit by bit, the text was amended to impose limits on the states. Section 2 of the Fourteenth Amendment was the first such limit. The Fifteenth Amendment prohibited discrimination in voting on the basis of "race, color, or previous condition of servitude."<sup>213</sup> The Nineteenth Amendment provided that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex."<sup>214</sup> The Twenty-Third Amendment gave voting rights in presi-

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<sup>206</sup> *Id.*

<sup>207</sup> *See id.* § 1.

<sup>208</sup> *See id.* amend. XIV.

<sup>209</sup> *See* Stone, *supra* note 114, and text accompanying notes 115–20.

<sup>210</sup> I believe this is the approach to the Equal Protection Clause taken in, for example, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002), although it is justified simply as a way to read the text rather than as an application of common law methods to the text, *see id.* at 973–87.

<sup>211</sup> U.S. CONST. art. I, § 2, cl. 1.

<sup>212</sup> *Id.* art. IV, § 4.

<sup>213</sup> *Id.* amend. XV, § 1.

<sup>214</sup> *Id.* amend. XIX.

dential elections to the District of Columbia.<sup>215</sup> The Twenty-Fourth Amendment effectively forbade poll taxes in federal elections,<sup>216</sup> and the Twenty-Sixth Amendment effectively enfranchised eighteen-year-olds.<sup>217</sup>

If one were just to read the text — certainly if one were to read it as one would an ordinary statute — the implication would be clear: the People (in amending the Constitution) had, over time, decided to carve out certain specific exceptions to the original principle of state control over the franchise. Those exceptions were very significant, but they were clearly defined. To say that in fact, all along, while the People were expanding the franchise step by considered step, judges had (by virtue of the Equal Protection Clause) an across-the-board power to expand the franchise as they wished on the basis of an undefined notion of equality — that seems like a very odd way to read a text characterized by calibrated extensions of voting rights.

But the oddity disappears if you recognize that, in dealing with the Constitution, we use something closer to the approach described by Justice Stone. If you take that view, then the successive expansions of the franchise should not be treated as isolated commands of the sovereign people, to be followed according to their specific terms. Instead, they should be treated more like precedents. And there are extratextual precedents, as well. Property qualifications, which were fairly common when the Constitution was adopted, were abandoned by the states during the first decades of the nineteenth century, without a constitutional amendment.<sup>218</sup> Presidential electors in every state came to be chosen by popular vote. The franchise was expanded in other ways as well.<sup>219</sup>

Given all of those “precedents,” it was appropriate for courts to proceed — in a common law-like way — to add into the mix their own judgments about the importance of equality in voting. Those common law-like judgments, not the text, are the basis of the now completely established principle that the Equal Protection Clause protects the right to vote;<sup>220</sup> the same kind of judgments established the principle of “one person, one vote.”<sup>221</sup> You cannot get there from the text alone. But you can get there by recognizing the essentially common law-like character of U.S. constitutional law, when the common

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<sup>215</sup> *Id.* amend. XXIII.

<sup>216</sup> *Id.* amend. XXIV.

<sup>217</sup> *Id.* amend. XXVI.

<sup>218</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 24–25 (rev. ed. 2009).

<sup>219</sup> See generally KEYSSAR, *supra* note 218.

<sup>220</sup> See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

<sup>221</sup> *Id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).



law is understood to include textual provisions as well as judicial and nonjudicial precedent.<sup>222</sup>

### *E. Equal Protection Means Equal Protection*

This may be the most counterintuitive of the anomalies. The Equal Protection Clause — infamously derided by Justice Holmes as “the usual last resort of constitutional arguments” as late as 1927, in *Buck v. Bell*<sup>223</sup> — has become so central to modern constitutional law that the words seem to have taken on a new meaning. The Equal Protection Clause is, as has been said countless times, the Constitution’s great guarantee of equality. And so it is, but not because of what it says. The evolutionary development of the law — not the text — determines what the law is, and the Equal Protection Clause is now a guarantee of equality because that is how the law has evolved. What “equality” means will be worked out by the usual common law methods. But if we are adhering to the text, the clause does not say “equality” or “equal treatment” or “equal status” or anything like that. It uses a narrower term. The modern Equal Protection Clause has taken shape notwithstanding its language.

Of course there is a sense in which one might say that all laws “protect” people — from other people’s hostile actions, from misfortune, from market forces, or from the arbitrary behavior of executive officials, for example. That seems to be the basis of the Court’s statement in *Vick Wo v. Hopkins*<sup>224</sup> that “the equal protection of the laws is a pledge of the protection of equal laws.”<sup>225</sup> But this sweeping under-

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<sup>222</sup> There is an additional complication in dealing with voting rights. Some defenders of the “one person, one vote” decisions have argued that the Court relied on the wrong constitutional provision: it should have invoked the Guarantee Clause of Article IV. See, e.g., AMAR, *supra* note 187, at 190. Certainly that clause requires the United States to do something about voting rights in the states. A state could not establish a monarchy, for example. But the text just does not give much guidance of the kind we would need to resolve specific controversies.

One difficulty with saying that the Guarantee Clause establishes the principle of “one person, one vote” is that the United States itself would, then, not have a republican form of government — because the Senate violates that principle. See Saikrishna Bangalore Prakash, *Guru Dakshina*, 2013 U. ILL. L. REV. 1787, 1793–94 (reviewing AMAR, *supra* note 187).

More generally, when a phrase of comparable vagueness to the Guarantee Clause occurs in a statute, we seem to do one of two things: either we interpret it to do what the people who adopted it thought it would do, or we allow some entity — often an administrative agency — to determine what the vague provision will allow and forbid. See generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 205–29 (2006). The first option, when applied to the Constitution, encounters familiar problems: there are too many instances in which we reject the original understandings of what a provision would do as a basis for current law. The second — allowing some interpreter discretion to fill out the contents — is consistent with the common law-like character of constitutional law.

<sup>223</sup> 274 U.S. 200, 208 (1927).

<sup>224</sup> 118 U.S. 356 (1886).

<sup>225</sup> *Id.* at 369.

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standing of the term “protection” would be inconsistent with the conclusion — strongly supported by the text, as I’ve said — that the Equal Protection Clause does not guarantee an equal right to vote. That right certainly seems to provide an especially important form of “protection,” if that word is used in an extended sense. More generally, if “equal protection of the laws” means equal protection from all the kinds of adversity that people might encounter, then the clause seems indistinguishable from a more broadly worded one that simply requires equality, or equal treatment. And it would be very questionable simply to treat a relatively specific word like “protection” as if it were a more general term like “treatment.”

An argument about the original understanding is useful here, although it has many of the problems that accompany most such arguments. So it cannot be taken as authority for how the text should be interpreted — only as an account that gives a sense of why the text says what it does. The argument is that section 1 of the Fourteenth Amendment was intended to secure the constitutionality of the Civil Rights Act of 1866<sup>226</sup> (there is general agreement that this was at least one of the purposes of the amendment), and the phrase in the Civil Rights Act that seems to be the antecedent of the Equal Protection Clause specified that all citizens “shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”<sup>227</sup> On this account, the Equal Protection Clause provides, essentially, for the equal protection of the criminal laws and the law of torts. Whatever the problems with this specific account, it does give a sense of what the natural meaning of the term “protection” might be — essentially, protection from private violence.<sup>228</sup>

In any event it is hard to see how the words of the clause could be stretched to mean what they mean today — a prohibition against unjustified inequality in every realm, including education, recreation, and even matters that are entirely symbolic, like the award of a purely ceremonial office — while still taking seriously the fact that the clause uses the word “protection.” A person who is excluded from a public swimming pool because he or she is a member of a racial minority is certainly treated unequally. But it is not clear that anyone would call that treatment a denial of equal “protection” — unless they had the clause in mind.

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<sup>226</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

<sup>227</sup> *Id.* § 1.

<sup>228</sup> See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 342–51 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1433–40 (1992).

### F. *Bolling v. Sharpe*

This is a well-known anomaly. *Brown v. Board of Education*<sup>229</sup> relied on the Equal Protection Clause to hold that state-mandated racial segregation in schools was unconstitutional.<sup>230</sup> The Equal Protection Clause, by its terms, applies to the states. In *Bolling v. Sharpe*, a companion case to *Brown v. Board of Education*, the Supreme Court held that school segregation in the District of Columbia was also unconstitutional.<sup>231</sup> But the District is of course not a state but a component of the federal government. So in *Bolling* the Court invoked the Due Process Clause of the Fifth Amendment.<sup>232</sup>

Ordinarily it would be questionable to interpret a provision referring only to states to apply to both state and federal governments. On the contrary, the fact that the Equal Protection Clause is limited to states would support an inference that the federal government is deliberately excluded. That inference is especially strong because the Citizenship Clause, which precedes the Equal Protection Clause in section 1 of the Fourteenth Amendment, specifically mentions both the United States and the states.<sup>233</sup> So if *Bolling* is to be justified on the basis of the text, the argument would have to be that the Constitution forbade the federal government to violate equal protection principles even before the Fourteenth Amendment was adopted. The Equal Protection Clause, on this account, just extended to the states the protections that were already in force against the federal government.

But if the textual source for the limits on the federal government is the Due Process Clause of the Fifth Amendment, then the Equal Protection Clause in the Fourteenth Amendment is redundant — because the Fourteenth Amendment also contains a Due Process Clause.<sup>234</sup> So again, the inference one draws from the text of the Fourteenth Amendment — which contains both an Equal Protection Clause and a Due Process Clause — is that those provisions cover different matters, and the Due Process Clause of the Fifth Amendment cannot be used to apply equal protection principles to the federal government.

The remarkable thing about *Bolling* — the aspect of the case that is most illuminating about the nature of our system — is not *Bolling* itself. As the Court said in the *Bolling* opinion, it was “unthinkable” that segregation might be upheld in the nation’s capital after having

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<sup>229</sup> 347 U.S. 483 (1954).

<sup>230</sup> See *id.* at 495.

<sup>231</sup> *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

<sup>232</sup> *Id.*

<sup>233</sup> See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

<sup>234</sup> Compare *id.* amend. V, with *id.* amend. XIV, § 1.

been struck down in the states.<sup>235</sup> But *Bolling* might have been seen as a case about the District of Columbia, which resembles a state in many ways.<sup>236</sup> Or perhaps *Bolling* could have been understood as a kind of justified civil disobedience by the Court, part of an effort to uproot Jim Crow segregation that warranted extraordinary, and perhaps extralegal, action. Alternatively, the *Bolling* decision might be based on the premise that the Due Process Clause forbids irrational legislation; that is what the language of the opinion suggests.<sup>237</sup> That “substantive” use of the Due Process Clause is hardly compelled by the text,<sup>238</sup> but more important, what is the basis for the conclusion that segregation, in particular, is irrational in a way that violates the Due Process Clause? There is no source for that conclusion in the text, and it is obviously not what the Framers of the Due Process Clause of the Fifth Amendment thought. So that conclusion would have to rely on evolutionary understandings and judgments of fairness and policy, rather than on the text alone.<sup>239</sup>

What is striking about *Bolling* is that the principle that the Equal Protection Clause effectively applies to the federal government did not stop with that case but became deeply entrenched in constitutional law, without any real consideration of the textual difficulties. The Court now routinely speaks of the “equal protection component” of the Fifth Amendment’s Due Process Clause, as if there were something like an equal protection subsection of the Fifth Amendment.<sup>240</sup> And no Justice seems to object to the nontextual character of that compo-

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<sup>235</sup> *Bolling*, 347 U.S. at 500.

<sup>236</sup> See, e.g., *id.* at 499–500 (discussing segregation in schooling, which is a state-like function that the District of Columbia carries out).

<sup>237</sup> See *id.* at 500 (referring to the unreasonableness of legislation that “constitutes an arbitrary deprivation” of liberties).

<sup>238</sup> See generally John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (examining but ultimately finding unpersuasive various theories reconciling the text of the Constitution with substantive due process).

<sup>239</sup> See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* 87–88 (2011) (“*Bolling* . . . was a ‘substantive due process’ opinion with roots in several liberty of contract era cases.” *Id.* at 88.).

<sup>240</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). In fact, the Court seemed to begin applying equal protection principles to the federal government even before *Bolling*. See Peter J. Rubin, Essay, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1889–92 (2006) (discussing the Court’s assumption in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), that racial discrimination by the federal government was constitutionally suspect); see also Kenneth L. Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 543 (1977) (“The decision in *Bolling v. Sharpe* . . . did not so much create the doctrine of fifth amendment equal protection as ratify it.”).

ment — not even those Justices who show the strongest fundamentalist inclinations, and not even in cases in which they disagree with the majority’s conclusion that equal protection principles were violated.<sup>241</sup>

The Due Process Clause is, as I said, vague enough that one could imagine reading it to embrace equal protection principles. Commentators have also identified a half-dozen other possible bases for *Bolling* — the Citizenship Clause of section 1 of the Fourteenth Amendment, the Privileges or Immunities Clause of the same section, the Ninth Amendment, the Guarantee Clause, the Titles of Nobility Clause, and others.<sup>242</sup> If you take a step back, it is actually quite clear what is going on here, and it does not really have much to do with the text. We are starting with a principle that seems as if it must be correct — the federal government, like the states, may not engage in race discrimination or other forms of discrimination that resemble race discrimination in relevant respects — and we are finding a way to apply that principle to the federal government. The principle that racial segregation is unconstitutional comes first, whatever exactly its origins, and the text is then “interpreted” in a way that will conform to that principle.

#### G. *Expressio Unius and Federal Criminal Law*

Article I, Section 8 of the Constitution enumerates Congress’s powers, including the power to “make all Laws which shall be necessary and proper for carrying into Execution the [other enumerated] Powers.”<sup>243</sup> The Necessary and Proper Clause has, of course, been interpreted expansively, beginning with the Court’s decision in *McCulloch v. Maryland*.<sup>244</sup> But, as the Court has said many times, “[t]he enumeration presupposes something not enumerated.”<sup>245</sup> What powers might be off limits to the federal government?

<sup>241</sup> See, e.g., *Windsor*, 133 S. Ct. at 2706 n.5 (Scalia, J., dissenting); *Califano v. Goldfarb*, 430 U.S. 199, 225 (1977) (Rehnquist, J., dissenting). See also Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1823 (2005) (“Justices of all substantive persuasions have felt entitled not only to uphold *Bolling* but also to expand upon its commitments.”).

<sup>242</sup> See, e.g., AMAR, *supra* note 187, at 143–45 (the Preamble, the Guarantee Clause, the Titles of Nobility Clause, and the Bill of Attainder Clause); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 33 (1980) (Ninth Amendment); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* 146 (1994) (Ninth Amendment); Bruce Ackerman, *Ackerman, J., Concurring, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 100, 114–16 (Jack M. Balkin ed., 2001) (Citizenship Clause of the Fourteenth Amendment, section 1).

<sup>243</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>244</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>245</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). But see Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 580 (2014) (arguing that the “internal-limits canon” is incorrect, and that Congress may enact “any legislation that would be justified by a grant of general regulatory power”).

In his opinion in *National Federation of Independent Business v. Sebelius*<sup>246</sup> (*NFIB*), the case dealing with the constitutionality of the Affordable Care Act, the Chief Justice, whose views controlled the outcome, quoted from a passage in *McCulloch* in which Chief Justice Marshall, speaking for the Court, noted that the power of creating a corporation — the power at issue in *McCulloch* — “is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.”<sup>247</sup> This approach can be seen as an application of the principle of *expressio unius*: the enumeration of certain powers implies the exclusion of powers of comparable significance — other “great substantive and independent power[s].”<sup>248</sup> Chief Justice Roberts did not develop the idea that the Necessary and Proper Clause would be limited in this way, but the notion that “great substantive and independent power[s]” are off limits has become a theme in some of the literature arguing for limits on Congress’s Article I powers.<sup>249</sup>

The power to enact and enforce criminal laws seems to be a singularly good candidate for such an off-limits power. Partly this is intuitive: if drafters of a constitution enumerated powers to avoid granting the government plenary power, there seem to be few governmental powers they would be more concerned with limiting than the power to enact criminal laws. The powers to declare war, to raise armies, and to tax are candidates; but those powers are explicitly provided in Article I. Article I does not give Congress a general power to define and punish crimes.

One need not rely on intuition, though, because the text supports the same inference. Section 8 explicitly authorizes Congress “[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States”<sup>250</sup> and “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>251</sup> Article III presupposes that treason will be a crime.<sup>252</sup> Under a standard application of, again, *expressio unius*, a reasonable inference — not ineluctable, but on balance the most plausible reading of the text — is that Congress has no general power to create crimes. Some powers must be off limits, or else there would be no point to

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<sup>246</sup> 132 S. Ct. 2566 (2012).

<sup>247</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 411, quoted in part in *NFIB*, 132 S. Ct. at 2591.

<sup>248</sup> *Id.*

<sup>249</sup> See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749–55 (2013); see also Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 319–20 (2004).

<sup>250</sup> U.S. CONST. art. I, § 8, cl. 6.

<sup>251</sup> *Id.* cl. 10.

<sup>252</sup> See *id.* art. III, § 3, cl. 1.

enumeration; the power to punish people for crimes certainly seems as significant a power as those that are enumerated; and that power is granted, but only in a limited way.

There is more evidence, too, in the text. Congress is given the power to “coin Money” and “regulate the Value thereof.”<sup>253</sup> The power to punish counterfeiting certainly seems to be a natural incident of that power, the kind of incidental power that would, ordinarily, be clearly authorized by the Necessary and Proper Clause and so not require an explicit authorization. But there *is* an explicit authorization. Unless that explicit authorization to punish counterfeiting is redundant, the most straightforward inference is that the Necessary and Proper Clause does not authorize Congress to enact criminal laws.

That is where we are led by the logic of a text-based reading of Article I. (It is also where we are led by the logic, if not the stated conclusions, of the commentary that uses the “great substantive and independent power[s]” phrase from *McCulloch* as a basis for limiting federal power — commentary that seems to be having some influence.<sup>254</sup>) That is, if we followed the text, nearly all of the federal criminal code, as well as much of the ancillary power to investigate crimes and operate a system of criminal punishments, would be unconstitutional. That conclusion seems utterly implausible today. It seems to be a *reductio* of the “great substantive and independent power[s]” line of argument. The federal criminal justice system is a well-established and important institution, and its constitutionality has been implicitly upheld countless times: every time someone is punished for a federal crime (other than those explicitly authorized by the Constitution), and, in a way, every time a person accused of a federal crime does not raise a constitutional challenge. The conclusion that the federal government lacks the power to punish crimes was not even plausible at the time of *McCulloch*. Chief Justice Marshall went out of his way to say — in fact, it seems, to treat it as obvious — that Congress could punish someone who stole mail from the post office or who falsified a federal record or committed perjury.<sup>255</sup>

#### H. *The Incorporation of the Bill of Rights*

One of the important developments of twentieth-century constitutional law was the application of the provisions of the Bill of Rights to the states. The Bill of Rights originally applied only to the federal

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<sup>253</sup> *Id.* art. I, § 8, cl. 5.

<sup>254</sup> See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring in the judgment); *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (opinion of Roberts, C.J.).

<sup>255</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416–18 (1819) (observing that a narrower interpretation would have a “baneful influence,” *id.* at 417, that would “render[] the government incompetent to its great objects,” *id.* at 418).

government, as the Supreme Court held in *Barron v. Mayor of Baltimore*.<sup>256</sup> In a series of decisions the Court has since held that provisions of the Bill of Rights are “incorporated” through the Due Process Clause of the Fourteenth Amendment and now apply to states as well as to the federal government.<sup>257</sup> But not all the provisions were incorporated: the Fifth Amendment requirement that felony prosecutions be initiated by a grand jury indictment does not apply to the states, nor does the Seventh Amendment requirement of a trial by jury in civil cases.<sup>258</sup> The Court has also not ruled on whether the Excessive Fines Clause of the Eighth Amendment applies to the states. But, as the Court made clear in holding that the Second Amendment applies to the states, incorporation is the default approach to the Bill of Rights.<sup>259</sup>

Incorporation is difficult to square with the text in several well-known ways. The textual difficulty with using the Due Process Clause to incorporate substantive rights is familiar: the clause seems to require only fair procedures. It would be a natural way to apply some of the procedural protections of the Bill of Rights to the states, but it is not clear how a failure to protect freedom of speech, for example, can be said to violate a clause that requires only fair procedures. For that reason, many people — including Justice Black, the leading champion of incorporation in the years when it prevailed — have urged that the Privileges or Immunities Clause of the Fourteenth Amendment should be the basis for incorporating the Bill of Rights.<sup>260</sup>

The Privileges or Immunities Clause certainly seems plausible as a textual matter; it is natural to suppose that the “privileges or immunities of citizens of the United States”<sup>261</sup> include the rights guaranteed by the Bill of Rights. But there are several difficulties. One is that the Supreme Court has, recently and quite emphatically, rejected this use of the Privileges or Immunities Clause, invoking the substantial body of precedent that relied on the Due Process Clause<sup>262</sup> — a further indication that when a common law-like development collides with the text, the text loses. Beyond that, as Justice Harlan, an opponent of in-

<sup>256</sup> 32 U.S. (7 Pet.) 243, 250–51 (1833).

<sup>257</sup> See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 n.12 (2010).

<sup>258</sup> *Id.* at 3035 n.13.

<sup>259</sup> See *id.* at 3026, 3034–36.

<sup>260</sup> See, e.g., *Adamson v. California*, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting).

<sup>261</sup> U.S. CONST. amend. XIV, § 1.

<sup>262</sup> See *McDonald*, 130 S. Ct. at 3030–31 (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause . . . not under the Privileges or Immunities Clause.”); see also Transcript of Oral Argument at 7, *McDonald* (No. 08-1521), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1521.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1521.pdf) [<http://perma.cc/RAV3-2B8T>] (“Justice Scalia: [Interpreting the Privileges or Immunities Clause as applying the Second Amendment to the states is] contrary to 140 years of our jurisprudence.”).



corporation, once noted, “privileges or immunities” is not the most straightforward way to say that the protections of the Bill of Rights apply against the actions of the states — you could say *that*, for example, instead.<sup>263</sup> And the Privileges or Immunities Clause refers to the privileges and immunities of citizens; it is well established that the Bill of Rights protects aliens inside the United States as well.<sup>264</sup>

There are other textual problems with incorporation. The Fifth Amendment contains a Due Process Clause; if the Fourteenth Amendment incorporates the Bill of Rights, the Due Process Clause of the Fourteenth Amendment would be redundant. The principle that a text should not be interpreted in a way that makes some provisions redundant is not ironclad, but this is at least another textual problem with incorporation. In addition, some provisions of the Bill of Rights — the Establishment Clause and probably the Second Amendment — seem to be federalism provisions, protecting the states against federal power. As I discussed before, in connection with the Establishment Clause, it seems odd to take a provision that, on its face, protects states against federal intervention and use it to authorize federal intervention against the states.<sup>265</sup> And beyond that, there does not seem to be a textual basis for excluding the Grand Jury Clause or the Seventh Amendment from the default approach to the Bill of Rights.

There is one final complication. Even *Barron*, which held that the original Bill of Rights applied only to the federal government, does not actually have that strong a textual basis — apart from the First Amendment’s explicit limitation to Congress, a limitation that, of course, has been ignored. The other provisions of the Bill of Rights are written in general terms that could certainly, as a textual matter, apply to the states. The *Barron* Court’s central premise — that the original Constitution established the federal government, so the Bill of Rights appended to it should be viewed as a limitation on that government<sup>266</sup> — is plausible but not ineluctable.

So this entire area — so closely associated with the specific text of the Bill of Rights — is much less text-based than it may appear. Incorporation in the way we have it today is not entirely consistent with the text and is in large part a product of a common law–like evolution: the Court incorporated provisions on a case-by-case basis, excluded certain provisions from incorporation for practical or historical reasons, overlooked textual difficulties with its course, and adhered to precedent in the face of those textual problems. Having said that, it

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<sup>263</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 174 n.9 (1968) (Harlan, J., dissenting).

<sup>264</sup> See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the Fifth and Sixth Amendments apply to “all persons . . . even aliens”).

<sup>265</sup> See *supra* section III.B and accompanying notes.

<sup>266</sup> See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

would, obviously, be a mistake to say that the text was unimportant. The text provided a relatively clear basis for what the Court was doing, notwithstanding the textual difficulties.<sup>267</sup> But incorporation was not read off from the text of the Constitution. A common law–like evolution determined the role that the text would play. In that sense, the text, as important as it was, was subordinate to that evolutionary process. That is an inversion of the usual way of thinking about constitutional law, but it is consistent with the way constitutional law actually works.

### I. State Sovereign Immunity

The nontextual basis of state sovereign immunity is also a familiar story. The only explicit basis for state sovereign immunity in the Constitution is the Eleventh Amendment. The Eleventh Amendment was adopted in response to the Supreme Court’s decision in *Chisholm v. Georgia*,<sup>268</sup> which authorized a federal court contract action against Georgia by a creditor. The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>269</sup>

On its face, the Eleventh Amendment seems to say that no suit may be brought against a state, in federal court, by a citizen of another state or a foreign state. Read in context, though, the Eleventh Amendment might be even narrower: Article III, Section 2 of the Constitution provides that “[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects.”<sup>270</sup> The parallel language of the Eleventh Amendment might be interpreted as just making an exception to this grant of so-called diversity jurisdiction. That would leave intact the power of federal courts to hear claims brought against a state even by a citizen of another state, if that case had another basis in Article III — for example, if the case arose under federal law.<sup>271</sup>

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<sup>267</sup> For a discussion, see David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1744–47 (2003).

<sup>268</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>269</sup> U.S. CONST. amend. XI.

<sup>270</sup> *Id.* art. III, § 2.

<sup>271</sup> There has been extensive debate about these competing interpretations of the Eleventh Amendment. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh*

But since 1890, the Court has held that states are immune from suits in federal court even when those suits are brought by their own citizens, raising federal claims.<sup>272</sup> The Court has since extended state sovereign immunity to admiralty actions<sup>273</sup> (even though the Eleventh Amendment is limited to cases in law and equity), to suits brought by foreign sovereigns<sup>274</sup> and Indian tribes<sup>275</sup> (not mentioned in the Eleventh Amendment), and to claims based on federal law that are brought in federal administrative agencies<sup>276</sup> or state courts<sup>277</sup> (even though the Eleventh Amendment addresses only the judicial power of the United States). The Court has also developed an elaborate body of doctrine on the question of when Congress can override state sovereign immunity.<sup>278</sup> The Court has dealt with the text of the Eleventh Amendment by saying that state sovereign immunity was presupposed by the Constitution itself — a presupposition that *Chisholm* erroneously ignored. The Eleventh Amendment closed the gap that *Chisholm* wrongly opened; the amendment, the argument goes, did not purport to be a comprehensive definition of the scope of state sovereign immunity.<sup>279</sup>

Not surprisingly, there has been a great deal of controversy about both the historical claims about sovereign immunity and the present-day significance of those claims, even assuming they are correct.<sup>280</sup> Whatever one makes of that controversy, though, the development of the law of state sovereign immunity greatly complicates not only any rigorous fundamentalist claim about the authority of the text but also the more widely shared notion that constitutional law begins with the text and works from there. On an ordinary reading, using principles

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*Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Lawrence C. Marshall, Commentary, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); David L. Shapiro, *The Supreme Court, 1983 Term — Comment: Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

<sup>272</sup> See *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>273</sup> See *Ex parte New York*, 256 U.S. 490 (1921).

<sup>274</sup> See *Monaco v. Mississippi*, 292 U.S. 313 (1934).

<sup>275</sup> See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991).

<sup>276</sup> See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

<sup>277</sup> See *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>278</sup> The Court has held that Congress can override state sovereign immunity when Congress is exercising its powers under section 5 of the Fourteenth Amendment. See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). It has also held that Congress has some power to override state sovereign immunity pursuant to its Article I authority to regulate bankruptcy, see *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), although it has held that Article I generally does not authorize Congress to override such immunity, see *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>279</sup> See *Hans v. Louisiana*, 134 U.S. 1, 10–12 (1890).

<sup>280</sup> See, e.g., *Seminole Tribe*, 517 U.S. at 76–100 (Stevens, J., dissenting); *id.* at 100–85 (Souter, J., dissenting).

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of *expressio unius* and viewing the Constitution as we generally do, the Eleventh Amendment — the only provision explicitly addressing state sovereign immunity — should be a comprehensive account.<sup>281</sup> If there are constitutional presuppositions that override that usual inference, then the question is: what other presuppositions might there be, in the background, that can defeat the inferences we would usually draw from the text? It is certainly not obvious why the only constitutional presupposition that matters should be one having to do with state sovereign immunity. Are there presuppositions about, for example, equality, or freedom of expression, or democratic self-government? How do we identify those other presuppositions, if they exist? And how do we apply them to specific constitutional issues?

Or perhaps state sovereign immunity is *sui generis*, in which case it is just another anomaly, like “Congress” in the First Amendment — another counterexample to the claim that the text is primary in constitutional law. And perhaps the real basis of state sovereign immunity is not a quasi-textual, historically validated “presupposition” but simply — as in so many other areas of constitutional law — the common law-like evolution of precedent.

#### IV. SOVEREIGNTY, ADAPTATION, AND SETTLEMENT

##### A. *Three Institutional Interests*

The anomalies suggest that constitutional law is a more complicated enterprise than might first appear. The idea that we are interpreting the text of the Constitution in some straightforward way is problematic even apart from the anomalies. Too many principles, as I said, seem to have their source in precedent, with only a loose connection to the text. One might have thought that the text at least controls when it is clear. The anomalies suggest otherwise. Alternatively one might, of course, contend that in these cases, the text is not clear; it is vague or ambiguous, so the principles that have developed are at least not inconsistent with the text. But that just makes the point. Our understanding of the provisions of the text cannot be separated from the common law-like elements of constitutional law. The principles that have evolved over time, and are attributable to precedent and policy, are so deeply a part of constitutional law that we unreflectively think of the text as saying things that actually were established by the precedents, not by the text.<sup>282</sup> What’s more, there is some reason to think that constitutional law is not exceptional in this respect. In other areas

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<sup>281</sup> See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

<sup>282</sup> This is a central claim of Bradley & Siegel, *supra* note 88, at 1216–17.

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as well, we have to harmonize precedent-based, common law–like developments with a supposedly authoritative text. How can we make sense of this process?

My proposal, tentative of course, is that the legal systems within which we operate today should be seen as an effort to accommodate three institutional interests — what I’ll call the interests in sovereignty, adaptation, and settlement. Different aspects of the legal system develop ways of balancing these interests, and the ways in which they do so evolve over time. So, to simplify, today we emphasize the text in interpreting ordinary statutes, because that seems to be the best way to accommodate these interests. But that might not always have been the best way, and a different approach may evolve if our current approach proves to be unsatisfactory. At the same time, as the anomalies show, we emphasize the text less in dealing with the Constitution, because there a different balance among those three interests seems best.

The idea of an accommodation among these interests does two things. It provides a justification for the system that we have, and it gives actors in that system a sense of how to proceed. The underlying notion is that a legal system exists because there is agreement on certain norms.<sup>283</sup> Exactly who are the parties to the agreement, and what counts as agreement — those are very difficult things to specify.<sup>284</sup> But norms, agreed upon in some sense, define what counts as an acceptable legal argument, and they provide a basis for making a judgment about when an argument is correct. Something like this has to be true if law is capable of being learned and practiced.

Within the boundaries set by those norms, there is room for good faith differences in judgment about what the law is. And, because the norms are ultimately based on agreement, they can change over time. My suggestion is that in making arguments within the existing boundaries, or in attempting to shift the boundaries, the three interests I mentioned are ultimately what we should take into account. That is how the notion of an accommodation among those interests can provide some guidance. They are also interests that any reasonable person should accept as interests that a legal system should try to promote. That is why they can serve as a justification. To be a little more concrete, if conforming to the text of even an old and nearly unamendable Constitution is a good way to accommodate, say, the interest in settlement, then we have a reason that we can give to people for conforming to the text. We do not have to rely on the kind of vague and arguably sectarian notions (like claims about an intergener-

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<sup>283</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* chs. V & VI (1961).

<sup>284</sup> See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *NW. U. L. REV.* 719, 728 (2006).

ational community of Americans) that are sometimes offered as a basis for adhering to the text.<sup>285</sup> And, by the same token, if we cannot justify adherence to the text by reference to those interests, then we should — in fact, we do — depart from it.

Not surprisingly these three interests are recurrent themes in political theory. At the risk of great oversimplification, we might associate sovereignty with Hobbes, Bodin, and Bentham;<sup>286</sup> adaptation with aspects of Burke's thought and the common law tradition more generally;<sup>287</sup> and settlement with Hume and his more modern counterparts, for example in game theory, who discuss coordination, focal points, and the like.<sup>288</sup>

Sovereignty refers to the interest in having some institution that can intervene and change things. Today we naturally associate that capacity with the legislature and with the process for amending the Constitution. There is an interest in having sovereignty vested somewhere for both practical and, we would say today, democratic reasons. The practical reason is that new problems can arise and we should have a way to address them quickly and comprehensively. The democratic reason is that if large numbers of people believe that something should be done, they should, as a general matter, have their way. In fact, a sovereign without some kind of democratic pedigree would be unacceptable in societies like ours today. One can imagine a legal system that does not have an entity that is sovereign in any simple sense — a system governed entirely by custom, for example. But the modern legal systems with which we are usually concerned do have some institution or combination of institutions that serve this interest.

The interest in adaptation is obvious. Whatever the initial state of a legal system, there will have to be a mechanism to adjust to changes in the world — either in circumstances or in people's assessments of whether the laws adequately deal with those circumstances. In principle a single entity could serve both the interest in sovereignty and the interest in adaptation, intervening on a larger or smaller scale depending on what was needed. In practice, though, there will often be a natural division of labor, roughly corresponding to the respective roles

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<sup>285</sup> Cf. SEIDMAN, *supra* note 106; Strauss, *supra* note 267, at 1722–24.

<sup>286</sup> See generally JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (1776); JEAN BODIN, ON SOVEREIGNTY (Julian H. Franklin ed. & trans., 1992); THOMAS HOBBS, LEVIATHAN (C.B. MacPherson ed., Penguin Books 1985) (1651).

<sup>287</sup> See generally BURKE, *supra* note 15; J.G.A. Pocock, *Burke and the Ancient Constitution — A Problem in the History of Ideas*, 3 HIST. J. 125 (1960).

<sup>288</sup> See generally DAVID HUME, A TREATISE OF HUMAN NATURE 489–90 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739–40); DAVID K. LEWIS, CONVENTION 3–4, 36–42 (1969); David Gauthier, *David Hume, Contractarian*, 88 PHIL. REV. 3, 22–24 (1979); Andrei Marmor, *Legal Conventionalism*, 4 LEGAL THEORY 509, 515–27 (1998); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 182–97 (1982).

of a legislature on the one hand and courts and executive agencies on the other. Some institutions are more suited to intermittent but far-reaching interventions; others are better for gradual adjustments. Over time, it seems fair to say, the central role in making adaptations has shifted from courts using a common law-like approach to regulatory agencies (which often also use such an approach).<sup>289</sup>

The interest in settlement is based on the familiar idea that sometimes it is more important that matters be resolved than that they be resolved correctly. While the interest in adaptation is naturally served by an evolutionary process, of which the common law is an example,<sup>290</sup> the interest in settlement is served by various norms that favor leaving existing arrangements intact if they seem satisfactory, even if they are not optimal, especially if unsettling those arrangements could be costly. One would expect to find these norms throughout the system. The rarity of sunset provisions in legislation may be an example.<sup>291</sup> The text of the Constitution also serves the settlement function; that seems to be the best explanation for why we adhere to the text to the extent we do.<sup>292</sup> And while the common law-like character of much of constitutional law can be seen as a means of adaptation, it is also a means of settlement. It is tempting, and to some degree correct, to justify common law practices on broadly Burkean grounds that appeal to the accumulated, trial-and-error wisdom of past generations.<sup>293</sup> But that seems an implausibly grandiose explanation of why courts generally follow precedent in ordinary cases. It is hard to say that the wisdom of the ages lies behind a year-old rule about, say, what constitutes an unreasonable search. But following precedent in those everyday contexts does serve the interest in leaving imperfect rules settled when the costs of unsettlement would be greater.

### B. Three Puzzles

These institutional interests give us a way to understand some features of our system that are otherwise very puzzling. To be clear, there is no algorithmic solution to the questions raised by our mixed system.

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<sup>289</sup> See, e.g., Sunstein, *supra* note 136, at 271 (“Flexibility — in some respects a hallmark of the common law — is especially valuable in administrative law.”). See generally Duffy, *supra* note 136.

<sup>290</sup> See Strauss, *supra* note 267, at 1731.

<sup>291</sup> See, e.g., CALABRESI, *supra* note 114, at 59 (“Some statutes recently passed have had expiration dates written into them. But that is still an occasional phenomenon.” (endnote omitted)). But see Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 249–50 (2007) (suggesting that such measures are, in fact, more common).

<sup>292</sup> For an extended defense of this claim, see Strauss, *supra* note 267.

<sup>293</sup> See, for example, the justification offered in STRAUSS, *supra* note 13, at 40–42; and Strauss, *supra* note 15, at 891–94.

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But the interests in sovereignty, adaptation, and settlement at least give us a way to think about the issues raised.

1. *The Senate Versus “One Person, One Vote.”* — Evolutionary processes are important in our constitutional system, but it remains true that the text settles many vitally important questions. One common example is the age of the President; the President must be thirty-five years old.<sup>294</sup> There is no serious dispute about that, and that provision is not treated as the source of a body of evolving precedent. The text simply settles that question.

But there are much more important examples of how the text performs a settlement function, and no account of U.S. constitutional law can ignore them. For example, the text determines when the President must leave office<sup>295</sup> and what to do if the President is disabled.<sup>296</sup> These are questions that could easily become controversial — highly controversial, in fact — in circumstances that are not too hard to imagine. So it is very important to settle questions like these. Evolving understandings might provide enough settlement, but those understandings will probably be less secure than a settlement that is explicitly stated in the text and is generally accepted.

While uncertainty about issues like presidential succession could create enormous problems, it is less important that those issues be settled in an optimal way. Knowing when, for sure, the presidential transition will take place is more important than having a presidential term of ideal length, whatever that might be. The text is especially well suited to performing the settlement function in these circumstances. The text can state a rule clearly; evolutionary norms are less able to do that. The rule stated in the text will probably be harder to change, but since the important thing is settlement, not optimality, that is an advantage.

This feature of the text — its ability to settle matters that should be settled — has more general effects. In particular, it explains the taboo against explicitly ignoring the text. If it were sometimes acceptable explicitly to ignore the text, then it might be more difficult to rely on the text to settle issues like the date on which the President leaves office. The anomalies suggest that this taboo is, to some extent, illusory. But, on the other hand, the anomalies mostly go unnoticed, and that is a way of preserving the settlement function of the text.

This is probably the best way to understand why it is unthinkable that the “one person, one vote” rule would be applied to the Senate.<sup>297</sup> The provision specifying that each state has two Senators is entirely

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<sup>294</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>295</sup> See *id.* amend. XX, § 1.

<sup>296</sup> See *id.* amend. XXV.

<sup>297</sup> For discussion of these points, see Strauss, *supra* note 267, at 1741–44.



clear.<sup>298</sup> Uncertainty about the composition of the Senate could be very troubling, because, among other things, it might raise questions about whether certain laws had been validly enacted.

Of course no one would say that the composition of the Senate is an unimportant issue as long as it is settled one way or another. For that reason, as I mentioned earlier, it is not unthinkable that we could see a common law–like evolution in which the Senate’s power were diminished, in the same way that the power of presidential electors has been diminished — and, arguably, in the same way that the power of state governments has been diminished. But that is the form in which the principle of “one person, one vote” would assert itself against the Senate, if it were ever to do so: the text would remain formally intact, so that the ability of the text to settle issues would not be impaired too badly.

2. *The Domain of Originalism.* — The problems with originalism are well known; as I have mentioned, originalism is inconsistent with many central principles of constitutional law. But while it would be implausible to adopt a thoroughly originalist approach to constitutional law, it would also be a mistake to reject originalism entirely. That is because democratic sovereignty requires a limited form of originalism.

The key point is one that Jefferson recognized: original understandings are binding for a time but then lose their force.<sup>299</sup> To give a concrete example, there are, periodically, proposed constitutional amendments that provide, in substance, that local governments should be allowed to conduct “voluntary” prayers in public school classrooms.<sup>300</sup> If such an amendment were adopted, a reasonable observer — let’s assume — would know that the amendment reflected a decision to overturn the Supreme Court’s decisions in *Engel v. Vitale*<sup>301</sup> and *School District of Abington Township v. Schempp*<sup>302</sup> and to allow states to require teacher-led prayer in public schools, as long as students were permitted to leave the classroom.

Even after the hypothetical amendment were adopted, its language alone — “voluntary prayer” — would not compel the courts to allow prayer of the kind *Engel* and *Schempp* invalidated. One can plausibly argue that prayer that is officially endorsed, and led by a teacher, is not truly voluntary, even if a student may leave the classroom, because

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<sup>298</sup> See U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . .”).

<sup>299</sup> See Strauss, *supra* note 267, at 1731 (citing Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON, WRITINGS 1395, 1401 (Merrill D. Peterson ed., 1984)).

<sup>300</sup> See, e.g., H.R.J. Res. 42, 113th Cong. (2013) (clarifying that the Constitution does not prohibit “voluntary prayer” in schools).

<sup>301</sup> 370 U.S. 421 (1962).

<sup>302</sup> 374 U.S. 203 (1963).

of the pressures on students to conform; that argument was one of the principal defenses of the Supreme Court's school prayer decisions.<sup>303</sup> But if an amendment were adopted, with the generally accepted understanding that it overturned those decisions, it would, I believe, be lawless for a court, acting right after such an amendment were adopted, to say that teacher-led prayer was still unconstitutional because it was not "voluntary." A court that did that would thwart an exercise of democratic sovereignty: if there is a sufficient popular majority that wishes to amend the Constitution to accomplish some objective, it should be allowed to do so, except, perhaps, in the most extraordinary circumstances. To that extent, originalism can legitimately claim to be an element of constitutional law.

But a decision that would be lawless in the immediate wake of a constitutional amendment might be acceptable — in fact is, in our system, routinely accepted — after time has passed. We have, without serious question, departed from the original understandings of many constitutional provisions.<sup>304</sup> The best way to understand this aspect of our practices, I think, is that it reflects a balance of the interests of sovereignty and adaptation. If "the people" make a decision through the amendment process, it would be wrong for a court to seize on the vagueness in the language of the amendment to thwart them. But over time, the interest in sovereignty fades — this is the familiar Jeffersonian point that "[t]he earth belongs . . . to the living"<sup>305</sup> — and the interest in adaptation becomes correspondingly stronger. So original understandings become less important, and a gradual process of

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<sup>303</sup> See *Engel*, 370 U.S. at 430–31.

<sup>304</sup> "Original understandings" refers here to specific understandings, at the time of adoption, of the effects that a provision will have. There are important and well-settled bodies of law that disregard original understandings at that specific level, for example in treating the Fourteenth Amendment as outlawing school segregation and discrimination against women. Despite that, if an amendment has just been adopted, I believe that the specific understandings (assuming they can be ascertained) should control for a time.

One might say — and originalists often do say — that original understandings (or original meaning, or some similar notion) should be characterized at a higher level of generality. For example, one might say that the Fourteenth Amendment should be understood to enact a general principle of racial equality which, properly applied, bans school segregation; or, more abstractly still, that it enacted a principle of equality that extends beyond race to sex or sexual orientation. One criticism of originalism is that the choice among these various levels of generality is arbitrary and manipulable. The discussion in the text does not implicate these issues. On the choice of a level of generality, see, for example, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091–92 (1981); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 726–27 (2011); and Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1926–27 (1995).

<sup>305</sup> Strauss, *supra* note 267, at 1721 (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd ed., 1958) (emphasis omitted)).

responding to changes (in the world or in people's views) can lead to outcomes that contradict the original understandings.

We have worked out, over time, this way of dealing with original understandings. We have learned it from our experience with segregation, among other things. One can describe it as somehow inherent in the notion of interpretation, but I think that is unhelpful. It is the product of an evolution in the way our understandings and our institutions balance the competing interests that underlie a legal system.

3. “*Majestic Generalities*” Versus *Technical Clauses*. — In his dissenting opinion in *Arizona State Legislature*, Chief Justice Roberts implicitly acknowledged the limited role of the text in resolving constitutional issues. He drew a distinction between the “majestic generalities” of the Constitution<sup>306</sup> — the First and Fourth Amendments were his examples<sup>307</sup> — and the occasions on which the Constitution “speaks . . . with elegant specificity.”<sup>308</sup> His examples of the latter were the provision establishing the minimum age for members of the House of Representatives and the clause that gives each state two Senators.<sup>309</sup> The provision at issue in *Arizona State Legislature*, he argued, was also an example of the latter, and “there is no real doubt about what ‘the Legislature’ means.”<sup>310</sup>

This distinction — between constitutional provisions that are specific, on the one hand, and the “majestic generalities,” on the other — has a long and illustrious history.<sup>311</sup> The idea is that when a provision is specific it must be applied strictly according to its terms, but provisions like the Commerce Clause, the First Amendment, the Due Process Clause, and the Equal Protection Clause enact principles, not specific directives, and their content can be filled in over time by courts and other interpreters.

One problem with this claim is that, for the most part, the text itself does not tell us which provisions are specific and which are more general — as the disagreement in *Arizona State Legislature* illustrates. The Commerce Clause, the Establishment Clause, and the Self-Incrimination Clause, for example — and for that matter the First

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<sup>306</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2689 (2015) (Roberts, C.J., dissenting) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

<sup>307</sup> *See id.*

<sup>308</sup> *Id.* at 2690.

<sup>309</sup> *See id.*

<sup>310</sup> *Id.*

<sup>311</sup> *See, e.g.*, *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646–47 (1949) (Frankfurter, J., dissenting); *United States v. Lovett*, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring); LEARNED HAND, *THE BILL OF RIGHTS* 22–24 (1958); HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 3, 24 (1961); RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–8 (1996); BALKIN, *supra* note 83.

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Amendment's protection of "*the* freedom of speech" — all might have been seen as specific and relatively technical provisions, rather than the majestic generalities that they have become.<sup>312</sup> The Commerce Clause might have been narrowly limited to interstate commercial transactions. The Establishment Clause, rather than applying to government aid to religion generally, might have been read to forbid only an officially sanctioned state church. The Self-Incrimination Clause, instead of being seen as foundational to our adversarial system of criminal justice,<sup>313</sup> might have just provided for a narrow testimonial privilege. And the Free Speech Clause might have extended only as far as Blackstone said, to prior restraints on speech.

These narrow understandings were rejected not because of the language of the provisions but because of a series of decisions, over time, to treat the provisions as sources of more general principles. This process is an example of what I suggested earlier: provisions of the Constitution, in our system, operate less as authoritative commands and more like precedents. They are expanded or contracted, over time, in the same way that the principle of an earlier decision might be. What the Court has done in these other areas — to say nothing of what it has done with the anomalies — is, *pace* Chief Justice Roberts, no more adventuresome than what the majority did with the term "Legislature" in *Arizona State Legislature*.

Similarly, the decision to treat some provisions as not "majestic" — as technical provisions that are not the basis for common law-like development — is not dictated by language alone. It is a decision to use a provision to serve the settlement function, rather than to permit adaptation. If, for example, it would have destabilized settled electoral arrangements to allow a body other than the legislature to determine congressional districts — one might imagine a recurring problem of competing factions in some states, each claiming to have drawn the district lines that should prevail — then there would be an argument for Chief Justice Roberts's approach. But in fact the opposite was more nearly true. As the *Arizona State Legislature* majority showed, the term "Legislature" had already been given a more flexible construction, and the dissent's approach would have jeopardized settled arrangements. Precedent, too, can settle things, and in that instance, it had.

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<sup>312</sup> For an argument to this effect, see David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1167–68 (2012).

<sup>313</sup> See generally David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

## CONCLUSION

Constitutional law has its share of complexity and mystery, but in the end it is law — subject to being manipulated and abused, of course, as all law is, but also capable of being applied in good faith. It is easier to apply it in good faith, though, if we have a sense of what it involves. And the presence of the great document can mislead us.

It hardly needs to be said that the Constitution — the document, that is — has played a critical role in American history. The risk, though, is that we will ask it to do too much, and in that way obscure the true nature — the true genius, in fact — of our constitutional system. We do not simply read commands from the text. We do not simply implement decisions made when provisions were adopted. We have learned a lot over the years, and much of what we have learned is, necessarily, not directly stated in the text. All of that is part of constitutional law — in many ways the most important part.

Everyone, really, knows those things. The risk is that our rhetoric about the Constitution sometimes says otherwise, and that rhetoric might lead us astray — both in our understanding of the system and in the specific decisions we make. In the end, the Constitution requires not following the dictates of the document but working out, over time, a complex balance among institutional interests. That is how we do constitutional law, and that may be how we do law in general.