
ORIGINALISM'S SUBJECT MATTER: WHY THE DECLARATION OF INDEPENDENCE IS NOT PART OF THE CONSTITUTION

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INTRODUCTION

Scholars across the ideological spectrum have argued for a unique role for the Declaration of Independence in constitutional interpretation.¹ These

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1. See, e.g., AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 247 (2012) (describing the Declaration as part of "America's symbolic Constitution" that "set[s] forth background principles that powerfully inform American constitutional interpretation"); *id.* at 253 (describing the Constitution as "implement[ing]" the Declaration); SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 3 (1995) ("I endeavor to show in this volume that . . . the natural-rights principles embodied in the Declaration are not 'above' or 'beyond' the Constitution; they are at the heart of the Constitution." (footnote omitted)); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 510 (2004) ("interpreting the Constitution in light of the Declaration"); Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1627 (2013) ("Both the Declaration and the Preamble contain guiding principles about governmental powers, duties, and limitations."); Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 694–95 (2012) ("I argue in this Article that although the Declaration of Independence has no enforcement provisions, it nevertheless sets constitutional obligations to protect life, liberty, and the pursuit of happiness. On my account, the Declaration of Independence requires all three branches of the federal government to protect inalienable rights on an equal basis. The document's principled statements about liberal equality and political participation are foundational to the Constitution's structure."). See also ALEXANDER TSESIS, *FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* 316 (2012) [hereinafter TSESIS, *FOR LIBERTY*] (surveying the Declaration's impact on American culture and law over two centuries and then suggesting that "constitutional theory should be understood through the

scholars' arguments fall into two general categories: (1) the Declaration is the "interpretive key" to the Constitution's text's meaning²; and (2) the Declaration is itself part of the Constitution.³ In this Article, I argue that, from an originalist perspective, the Declaration is not part of the Constitution. I first articulate the analysis that originalists should utilize to identify what the Constitution is and second argue that the Declaration is not part of the Constitution.

I argue that originalism's subject matter—that which originalism interprets—is and is only the document in the National Archives that begins "We the People of the United States,"⁴ along with canonical amendments.⁵ Therefore, even though the Declaration is a rich data source for the Constitution's original meaning,⁶ it is not itself a subject of constitutional interpretation.

This Article is important for two reasons. First, there is little discussion in the literature on what analysis originalists should utilize to ascertain the subject matter of interpretation—it is nearly always assumed. Originalists typically presume that only the written Constitution is the subject matter of interpretation, and this Article makes express that assumption. More importantly, doing this provides an opportunity to respond to a criticism of originalism: that originalism is incorrect because it is inconsistent with our normative constitutional practice, which identifies more than the written Constitution as the Constitution.⁷

lens of the Declaration of Independence").

2. See, e.g., Scott Douglas Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1, 4 (2014) ("Liberal originalism," by contrast, maintains that the Constitution should be interpreted in light of the political philosophy of the Declaration of Independence."); Sandefur, *supra* note 1, at 490 (discussing the argument that the "Declaration is part of the organic law of the United States, and ought to guide our understanding of the Constitution").

3. See, e.g., DOUGLAS W. KMEC ET AL., *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY* 101 (2d ed. 2004) ("[T]he United States Code includes the Declaration of Independence as one of Organic Laws upon which all statutory law rests."); Sandefur, *supra* note 1, at 508 ("[T]he Declaration is a timeless principle, framed in the Constitution . . .").

4. U.S. CONST. pmbl.

5. *Rotunda for the Charters of Freedom*, NAT'L ARCHIVES MUSEUM, <http://www.archives.gov/museum/visit/rotunda.html> (last visited March 21, 2016).

6. Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413, 439 (2006).

7. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* 342–44 (1998) (describing the Supreme Court's New Deal precedent as constitutional higher lawmaking); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (identifying constitutional modalities that include more than the written Constitution); JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 222 (2001) (arguing that the Constitution's text authorizes unenumerated rights); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 34 (2010) ("[I]f you think the

Second, the application of this analysis will provide an additional reason why the Declaration—though an important piece of evidence of the Constitution's original meaning⁸—does not play a unique role in constitutional interpretation. This more theoretical claim complements historical claims I have made elsewhere.⁹

This Article proceeds in three parts. In Part I, I briefly describe the debate over the Declaration's role in constitutional interpretation. Part II argues that, based on originalism's own commitments, only the written Constitution is the subject matter of constitutional interpretation. Part III shows that this limitation of the Constitution to the written Constitution fits both important and widely accepted facets of our legal practice. I conclude, in Part IV, by suggesting that this limitation of the subject matter of constitutional interpretation to the written Constitution also comports with the natural law tradition's conception of law as an authoritative, prudential, social-ordering decision, aimed at procuring the common good and human flourishing.

Constitution is just the document that is under glass in the National Archives, you will not begin to understand American constitutional law.”); *id.* at 44 (“[T]he governing principles of constitutional law are the product of precedents, not of the text.”); *id.* at 101 (describing the written Constitution and the living constitution as equally important and as coexisting); Ian Bartrum, *Two Dogmas of Originalism*, 7 WASH. U. JURIS. REV. 157, 181 (2015) (“In practice, as Bobbitt has so insightfully observed, relevant officials actually engage in a complex sort of rule-following that involves several ‘modalities’ of analysis and argumentation. In a given case, these officials might recognize norms generated by any or all of these modalities as legally authoritative.” (footnote omitted)); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 33–36 (2009) (describing possible reconciliations of originalism and nonoriginalist precedent, though expressing doubt about its persuasiveness); Steven D. Smith, *Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium*, 5 AVE MARIA L. REV. 153, 168 (2007) (describing how one might argue that precedent possesses “a limited legal authority . . . on the same basis as the Constitution itself” (footnote omitted)); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1751 (2013) (“The Constitution or the constitutional law consists of multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers’ and ratifiers’ shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.”); Stefan Sciaraffa, *The Ineliminability of Hartian Social Rules*, 31 OXFORD J. LEGAL STUD. 603, 620 (2011) (stating that legal practice may “ignore” parts of a written constitution). *But see* AMAR, *supra* note 1, at xi, 74, 247 (stating that “special texts” like the Declaration of Independence “are not on the same legal level as the written Constitution itself”); RUBENFELD, *supra*, at 222 (“To recognize privacy’s unwrittenness is to acknowledge, as *Roe*’s critics have always said, that the right of privacy neither appears in the Constitution nor is plausibly derived from an interpretation of any of the rights that are enumerated.”); STRAUSS, *supra*, at 103 (explaining that any constitutional claim must be “consistent with the text of the Constitution”).

8. Strang, *supra* note 6, at 414.

9. *Id.*

I. DEBATE OVER STATUS AND ROLE OF THE DECLARATION IN CONSTITUTIONAL INTERPRETATION

The Declaration of Independence enjoys a special place in American history and in the hearts of most Americans.¹⁰ It is much more than the point in time at which Americans threw off their allegiance to a king.¹¹ It is a justification for independence¹² and, even more importantly, a statement of political principle,¹³ one that has been used throughout the Republic to both justify and criticize American institutions.¹⁴

In a 2006 article, I argued that, despite the Declaration's importance to American history and contemporary life, the Declaration does not have a unique role in constitutional interpretation.¹⁵ I reviewed the framing and ratification period to ascertain the extent to which the Framers and Ratifiers utilized the Declaration in a unique manner—in a way different from other contextual historical materials—to understand the Constitution's text's meaning. My findings—which surprised me—were that the Declaration was rarely referenced and that the Declaration was utilized as one source of the Constitution's meaning, among many. I also offered a number of reasons why this conclusion—that the Declaration did not possess a unique role in constitutional interpretation—was reasonable.¹⁶ For example, I argued that the Declaration was unable to play a unique role in constitutional interpretation because it was inconsistent with (parts of) the Constitution.¹⁷

Below, I provide an additional reason why the Declaration does not have a unique role in constitutional interpretation: it is not (part of) the

10. See TESIS, FOR LIBERTY, *supra* note 1, at 312 (“The Declaration of Independence looms large in American history [T]he manifesto’s statement of national purpose has inspired generations of Americans. Social movements have incorporated the Declaration’s second paragraph and consent clauses into their demands for recognition of inalienable rights. The takeaway point from this book is . . . to provide clearer understanding of how the manifesto’s core values have informed the U.S. public, its leaders, and even foreign nations as to the nature of justice, civility, and governance.”). See also Scott Rasmussen, *Americans Still Embrace the Spirit of ’76*, RASMUSSEN REP. (July 5, 2013), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_scott_rasmussen/americans_still_embrace_the_spirit_of_76 (describing the continuing belief by the vast majority of Americans in the Declaration’s propositions).

11. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

12. *Id.* paras. 3–30.

13. *Id.* para. 2.

14. Strang, *supra* note 6, at 457–58. See generally, TESIS, FOR LIBERTY, *supra* note 1, at 6–311 (explaining how the Declaration of Independence has been used to legitimize and vilify the actions of politicians, associations, groups, and individuals).

15. Strang, *supra* note 6, at 414.

16. *Id.* at 457–77.

17. *Id.* at 458–61.

Constitution. I identify originalism's subject matter as solely the written Constitution. I make this argument in three parts. First, I argue that originalism's own commitments identify the written Constitution as the sole subject of constitutional interpretation. Second, I argue that both important and commonly accepted facets of American constitutional practice support originalism's limitation of constitutional interpretation to the written Constitution.¹⁸ Third, utilizing a thicker—and more controversial—account, taken from the natural law tradition, I show that the written Constitution is the only subject matter of constitutional interpretation.

II. ORIGINALISM'S SUBJECT MATTER IS—ONLY—THE WRITTEN CONSTITUTION

A. INTRODUCTION

In this Part, I show that four of originalism's own key commitments designate the written Constitution as the sole subject matter of constitutional interpretation. These four commitments are: (1) the authoritative role of the Constitution's original meaning; (2) originalism's place for constitutional construction; (3) originalism's treatment of nonoriginalist precedent; and (4) common normative justifications for originalism. My description of originalism's internal commitments is ecumenical within originalism. Therefore, originalism's identification of the written Constitution as the sole subject of constitutional interpretation is one of the characteristics that distinguishes originalism from other theories of interpretation.

B. ORIGINALISM'S INTERNAL COMMITMENTS IDENTIFY THE WRITTEN CONSTITUTION AS THE SOLE SUBJECT OF CONSTITUTIONAL INTERPRETATION

1. Originalism's Privileging of the Original Meaning Identifies the Constitution as the Sole Subject of Interpretation

Originalism's privileging of the Constitution's original meaning precludes resort to texts outside of the written Constitution. This

18. As I describe in Part II.C, American legal practice is conflicted on this point, so it does not univocally support originalism. I make two moves in response. First, I show that originalism is able to accommodate some facets of the practice that do not fit originalism. Second, I argue that the key facets of the practice—and the bulk of the practice—support originalism's limitation of the subject matter of constitutional interpretation to the written Constitution.

privileging of the original meaning cashes out in two primary ways. The first is identified by the fixation thesis.¹⁹ As articulated by Professor Lawrence Solum, the fixation thesis is the proposition that the Constitution's original meaning was fixed at the Framing and/or Ratification.²⁰ "The object of constitutional interpretation is the communicative content of the constitutional text, and that content was fixed when each provision was framed and/or ratified."²¹ The Constitution's original meaning was fixed at this time because the contributing components of its communicative meaning—including, for instance, its communicative context and the rules of syntax—were time dependent.²² For example, some of the words utilized in the original Constitution have since taken on a different conventional meaning,²³ so to recover the original meaning of such words, one must resort to the semantic meaning at the time the text was drafted and/or ratified.

Second, the constraint principle is the proposition that the Constitution's original meaning constrains constitutional doctrine.²⁴ The Supreme Court's opinions create and work with constitutional doctrines that govern distinct areas of law, such as the doctrine governing Congress' Commerce Clause authority.²⁵ This legal doctrine bridges the analytical space between the Constitution's original meaning and the factual scenarios presented in cases,²⁶ and therefore serves the crucial role of implementing the Constitution.²⁷ For instance, the original packages doctrine, articulated by the Court in the nineteenth century, performed this bridging function by

19. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 16 (2015) [hereinafter Solum, *Fixation Thesis*]. See also Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 33 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter Solum, *What Is Originalism?*] (briefly describing the fixation thesis).

20. Solum, *Fixation Thesis*, *supra* note 19, at 13.

21. *Id.* at 15.

22. *Id.* at 24–25.

23. What Professor Solum labels "linguistic drift." *Id.* at 20–21.

24. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 482 (2013) ("[T]he original meaning[] should constrain the content of constitutional doctrine, unless a defeasibility condition obtains.").

25. See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) ("Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power.").

26. This is what Professor Solum labels "legal meaning," which is produced by the process of constitutional construction. Solum, *supra* note 24, at 480–85.

27. See Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1766–78 (describing originalist precedent's key role implementing the Constitution's original meaning).

delineating federal and state power over products in interstate commerce.²⁸

Though it is theoretically possible for originalists to fall along a continuum regarding the constraint that the original meaning should exercise over resultant constitutional doctrine,²⁹ nearly all originalists interpret the constraint principle robustly,³⁰ which means that any resulting doctrine must (at least) be consonant with the Constitution's original meaning.³¹ In other words, even though an originalist could argue that the original meaning is one factor to weigh in the ultimate development of constitutional doctrine, that is not the approach typically taken by originalists. For originalists, the constraint principle imposes a powerful limit on constitutional doctrine by precluding inconsistent doctrine.³²

The fixation thesis combined with the constraint principle explains originalism's identification of the written Constitution as the sole authoritative source of constitutional norms. They preclude resorting to texts outside of the written Constitution. Without the fixation thesis and constraint principle, the original meaning would be a nonexclusive factor

28. This doctrine originated in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442 (1827).

29. Solum, *What Is Originalism?*, *supra* note 19, at 34.

30. *Id.* at 35. Perhaps Professor Jack Balkin is the best example of an originalist whose substantive interpretations of the Constitution are likely the most attenuated from the original meaning. For example, Professor Balkin has defended a "social intercourse" interpretation of the Commerce Clause. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 16 (2010). Yet, Professor Balkin retains the claim that all of his substantive interpretations are consonant with the original meaning. *See id.* at 4 ("Constitutional interpretation requires fidelity to the original meaning of the text and to the principles stated by the text or that underlie the text."). This suggests that Professor Balkin's conception of the constraint principle is robust and that all legal doctrine must be consonant with the original meaning.

31. My own view is that the form this constraint takes depends on whether the Constitution's original meaning is determinate or underdeterminate. If the original meaning is determinate, then the constitutional doctrine should parrot the original meaning or specify the original meaning. Strang, *supra* note 27, at 1767–78. For instance, the original packages doctrine specified, though did not parrot, Congress' power over goods transported over state lines into the destination state. If the original meaning is underdetermined, then the resulting doctrine must be consonant with the original meaning, but it will not parrot or specify that meaning. For example, what tasks Congress may delegate to or require of the federal judiciary likely includes underdeterminacy. *See, e.g., Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43, 45–46 (1825) (discussing the constitutionality of a federal statute that authorized federal courts to create their own rules of execution and stating: "But, in the mode of obeying the mandate of a writ issuing from a Court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts. The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.").

32. *See* Solum, *Fixation Thesis*, *supra* note 19, at 34.

that contributes to constitutional doctrine, in which case the original meaning would be overridden—in practice, frequently—by other considerations.³³ This would occur for both fixation and constraint.³⁴

First, judges might utilize interpretative data from sources other than the written Constitution, such as nonoriginalist precedent³⁵—or the Declaration—to craft constitutional doctrine and, in doing so, displace the written text’s meaning. Only the written Constitution (and subsequent amendments) was fixed: only it went through the authoritative³⁶ framing and ratification process at a particular time.

Second, making the original meaning nonexclusive would undermine constraint by prompting two questions: (1) what additional sources of constraint exist?; and (2) how do the various sources of constraint interact? For example, if the Declaration also operated as a constraint on constitutional doctrine, it could, depending on the circumstances, trump the text’s original meaning and interact with other sources of constraint in unpredictable ways to overpower the original meaning.

In sum, the fixation thesis and constraint principle show that originalism is committed to the written Constitution as the sole subject of interpretation.

2. Originalism’s Acceptance of Constitutional Construction Identifies the Constitution as the Sole Subject of Interpretation

Originalism’s acceptance of constitutional construction shows that originalism identifies the written Constitution as the sole subject matter of interpretation. Constitutional construction depends on a distinction between constitutional interpretation and constitutional construction. Interpretation is when the Constitution’s original meaning provides one right answer to a legal question.³⁷ For example, the Commerce Clause determinatively

33. See BOBBITT, *supra* note 7, at 31 (“It can easily be shown, I think, that the various ‘explanations’ of the American constitutional process that result from taking one of the modalities and elevating it to a privileged status are unsuccessful in that they do not in fact either explain why courts decide cases in a certain way or why such holdings would be legitimate if they did.”).

34. This would be caused both by the indeterminacy of what counts as (part of) the Constitution and by the indeterminacy of when factors other than the original meaning would trump the original meaning.

35. This is precedent that, on the originalist account, is not consonant with the Constitution’s text. Strang, *supra* note 27, at 1729–52.

36. “Authoritative” here means recognized by Americans and American legal officials at the time—and today—as having the ability to designate something as the ultimate legal norm in our society.

37. Strang, *supra* note 27, at 1756–57.

authorizes Congress to regulate interstate commercial shipments of goods on railroads.³⁸ Construction, by contrast, is when the Constitution's original meaning is underdetermined; it does not provide one right answer to a legal question.³⁹ In the "construction zone,"⁴⁰ interpreters possess discretion to create constitutional doctrine consistent with the original meaning, underdetermined though it is. Returning to the Commerce Clause example, Congress likely has discretion over how to construct its authority over interstate commercial transactions performed via the Internet.⁴¹ Most originalists, to a greater⁴² or lesser⁴³ degree, accept constitutional

38. See *United States v. Lopez*, 514 U.S. 549, 558 (stating that Congress has the power to "regulate the use of the channels of interstate commerce").

39. Strang, *supra* note 27, 1757–62. Professor Solum has described a different conception of construction. See Solum, *supra* note 24, at 483 ("The second activity is the determination of the legal content and legal effect produced by a legal text: I will use the term *construction* to name this second and distinct activity."). For Professor Solum, construction is the activity of articulating the legal content and effect of the Constitution's original meaning, even when that meaning is determinate and the legal content parrots the original meaning. See *id.* at 511 ("[T]he legal content associated with a particular legal text is not necessarily identical with the communicative content of that text. In practice, many legal texts are associated with legal content that is richer than the communicative content of the text." (emphasis added)). My reading of the literature is that Professors Barnett and Whittington do not share Professor Solum's conception. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–31 (rev. ed. 2014); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 5–9 (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 67 (2011) ("Where the semantic meaning of the text provides enough information to resolve a particular issue about constitutionality, applying it will require little, if any, supplementation, and construction will look indistinguishable in practice from interpretation."); *id.* at 69 ("The original meaning of the text does not definitively answer these and many other similar and important questions. Instead, courts handle these questions by the judicially devised doctrines These doctrines are constitutional constructions that are nowhere in the text, but are nevertheless a good way to put into effect what the text *does* say."); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 403 (2013) (identifying constitutional construction as a response to indeterminacy).

I tentatively think that construction can include only those instances when the original meaning is indeterminate because it is only in those situations in which the original meaning is metaphysically indeterminate, or metaphysically determinate and epistemically indeterminate; construction can occur only when there is no original meaning or our legal practice cannot access it. Relatedly, I tentatively think that the original meaning is frequently determinate, even when the resulting legal doctrine does not parrot the original meaning as when the doctrine specifies how the original meaning governs particular situations. Strang, *supra* note 27, at 1767–78.

40. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–72 (2013) (using this metaphor).

41. See Lee J. Strang, *Originalism and the "Challenge of Change": Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 980–81 (2009) (describing this example).

42. Jack Balkin has, in practice, likely the most capacious conception of the construction zone. See JACK M. BALKIN, *LIVING ORIGINALISM* 21–23 (2011) (explaining "framework originalism" with its robust role for construction).

43. My own, tentative, view is that there are a sufficient number of closure rules—for instance, the rule of construction in the Necessary and Proper Clause that requires federal legislation to comport

construction.⁴⁴

Originalism's acceptance of constitutional construction is dependent on its commitment to constitutional interpretation, which in turn depends on the primacy of the text's, and only the text's, determinate original meaning. Constitutional construction occurs only when the written Constitution's original meaning is exhausted. Otherwise, when the original meaning is determinate, following the fixation thesis and constraint principle, the original meaning of the Constitution's text governs.

In the construction zone, as I understand it, constitutional interpreters must utilize factors other than and in addition to the Constitution's text to construct constitutional meaning. Originalism's conception of construction is that construction is something other than constitutional interpretation,⁴⁵ and that its subject matter is not solely the written Constitution.⁴⁶ Therefore, originalism cordons off interpretation from construction. This separation exemplifies and preserves originalism's commitment to the written Constitution as the sole subject of constitutional interpretation.

3. Originalism's Treatment of Nonoriginalist Precedent Identifies the Constitution as the Sole Subject of Interpretation

The acceptance by some originalists,⁴⁷ or rejection by others,⁴⁸ of nonoriginalist precedent shows that only the written Constitution is the

with constitutional principles—to eliminate most, though not all, underdeterminacy, in particular, when the law is epistemically indeterminate.

44. The major exceptions are Professors John McGinnis and Michael Rappaport, who argue that the original methods of interpretation, in place at the Framing and Ratification, have sufficient thickness that they close all or nearly all underdeterminacy that would exist without the original methods of interpretation. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 139–40 (2013).

45. Slightly more precisely, the written Constitution constrains the construction zone, but within the zone, it is not the written Constitution that determines resultant legal doctrine.

46. In fact, Professor Rappaport recently questioned and criticized construction because judicial decisions within the construction zone result, at least in part, from something other than the written Constitution. Mike Rappaport, *Does a Judge Who Decides a Matter Within the Construction Zone Enforce the Constitution? A Question About Construction*, LIBR. L. & LIBERTY (Aug. 4, 2015), <http://www.libertylawsite.org/2015/08/04/does-a-judge-who-decides-a-matter-within-the-construction-zone-enforce-the-constitution-a-question-about-construction>; Mike Rappaport, *More on Construction: A Response to Larry Solum*, LIBR. L. & LIBERTY (Aug. 7, 2015), <http://www.libertylawsite.org/2015/08/07/more-on-construction-a-response-to-larry-solum>.

47. See MCGINNIS & RAPPAPORT, *supra* note 44, at 154–74 (arguing for a “minimal notion of precedent”); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1477 (2007) (“[A]n originalist committed to the principles of popular sovereignty may justifiably follow Madison’s example and apply at least discount stare decisis in upholding erroneous cases that still allow for majoritarian action.”); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J.

subject matter of interpretation. Nonoriginalist precedent is precedent that incorrectly articulated or applied the Constitution's original meaning.⁴⁹ For example, *Wickard v. Filburn* incorrectly ruled that intrastate agricultural production constituted "Commerce."⁵⁰ Originalists have grappled with how to treat nonoriginalist precedent because of the tension between widespread and important nonoriginalist precedents, such as *Wickard*, and the Constitution's original meaning.⁵¹

Those originalists who reject (all or almost all) nonoriginalist precedent do so because of the primacy of the written Constitution. Rejection of all nonoriginalist precedent is premised on the written Constitution's status as the "supreme Law of the Land."⁵² Professor Gary Lawson pithily summarized this view: "[i]f the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution."⁵³ On this view, only the written Constitution *is* the Constitution; therefore, only it is the subject of constitutional interpretation.

Originalists who accept the continued viability of some nonoriginalist precedent do so because of originalism's prior commitment to the primacy of the written Constitution's original meaning; in particular, Article III's original meaning.⁵⁴ Nonoriginalist precedent retains viability only because the written Constitution, in Article III, says so.⁵⁵ This position depends on the unique place of the written Constitution.

For originalists of all stripes, therefore, originalism's rejection of all (or acceptance of some) nonoriginalist precedent occurs because only the

CONST. L. 155, 186 (2006) ("The Supreme Court should consider itself bound by its own prior decisions—that's my claim."); Strang, *supra* note 27, at 420 (finding that the original meaning of "judicial Power" required federal judges to give precedent significant respect).

48. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–62 (2005); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3–4 (2007); Michael Stokes Paulsen, *The Intrinsic Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

49. See Strang, *supra* note 27, at 1739–52 (articulating the Originalism in Good Faith standard to distinguish originalist precedent from nonoriginalist precedent).

50. See *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

51. *Solum*, *supra* note 47, at 155.

52. U.S. CONST. art. VI, cl. 2.

53. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994). See also Barnett, *supra* note 48, at 258–59 (providing a syllogism to show how nonoriginalist precedent violates originalism's major premise "that the meaning of the Constitution should remain the same until it is properly changed").

54. MCGINNIS & RAPPAPORT, *supra* note 44, at 164–69; Strang, *supra* note 27, at 447–71.

55. To my knowledge, this constitutional command to displace the written Constitution is unique. Therefore, only the written Constitution is a proper subject of interpretation.

written Constitution is a proper subject for constitutional interpretation.

4. Originalists' External Normative Justifications for Originalism Identify the Constitution as the Sole Subject of Interpretation

Originalists' external normative arguments for originalism push originalism to identify the written Constitution as the sole subject matter of interpretation.⁵⁶ An external normative justification for a theory of constitutional interpretation is an appeal to subjects beyond the Constitution and our legal practice.⁵⁷ It looks outside the commonly accepted facets of our practice to justify a theory. An external normative argument in favor of originalism is a claim that originalism, consistently followed, leads to a good state of affairs.⁵⁸ Stated differently, originalists have argued that, even though originalism does not create an ideal state of affairs—overall and on balance—it leads to more normatively attractive results than nonoriginalist alternatives.⁵⁹

Originalists have offered a wide array of external normative justifications that cover the figurative waterfront. These include assisting popular sovereignty,⁶⁰ protecting natural rights,⁶¹ securing good consequences,⁶² and the facilitation of human flourishing.⁶³ For each of these normative justifications for originalism, the written Constitution is the lynchpin of the argument. Without our written Constitution, the respective justifications would fail. This axiomatic role excludes other texts playing the written Constitution's role.

Most clearly, Professor Randy Barnett's normative justification for originalism hinges on the written Constitution. He argued that originalism best protects natural rights, and it does so through two steps. First, the

56. See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1122 (2008) (describing originalist theories as "assum[ing] that the very idea of a written constitution, entrenched against change except by supermajoritarian processes, would make no sense unless based on the premise that constitutional language has a fixed meaning that binds judges").

57. See Lee J. Strang, *Originalism's Promise, and Its Limits*, 63 CLEV. ST. L. REV. 81, 85–87 (2014) (distinguishing between internal and external justifications for a constitutional theory).

58. Or at least a better state of affairs than that to which other interpretative methodologies lead.

59. See, e.g., BARNETT, *supra* note 39, at 4, 45 (identifying "adequate" as the relevant standard for legitimacy); MCGINNIS & RAPPAPORT, *supra* note 44, at 2 ("We argue that originalism advances the welfare of the present-day citizens of the United States because it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories.").

60. WHITTINGTON, *supra* note 39, at 110–59.

61. BARNETT, *supra* note 39, at 3–5, 53–54, 116–17.

62. MCGINNIS & RAPPAPORT, *supra* note 44, at 11–18.

63. See Strang, *supra* note 57, at 87–91 (summarizing this argument).

Constitution's original meaning is protective of natural rights, both because of the original meaning itself⁶⁴ and because of rights-protective rules of construction found in the Ninth Amendment and the Privileges or Immunities Clause.⁶⁵ Second, constitutional interpreters must utilize originalism to "lock-in" the original meaning's protectiveness of natural rights.⁶⁶

It is the written Constitution upon which Barnett's theory hinges. Without this one document's "writtleness," the locking-in of the rights-protectiveness of the Constitution's original meaning would be undermined or eliminated.⁶⁷ For instance, if judges could utilize other documents to craft constitutional doctrine, then they could deviate from the Constitution's rights-protective original meaning and thereby undermine natural rights.

Professors John McGinnis and Michael Rappaport argue that originalism leads to the best consequences of any plausible theory of constitutional interpretation.⁶⁸ In particular, they argue that the Constitution's original meaning leads to better consequences than nonoriginalist judicial precedent because the American People adopted the original meaning via supermajoritarian requirements.⁶⁹ Their key insight is that the American People are a diverse group⁷⁰—and have been for a long time, including along important axes, such as religious and political views—so the American People's agreement on a proposition is strong evidence of the proposition's soundness.⁷¹ Nonoriginalist precedent, by contrast, did not go through a similar supermajoritarian process—it was adopted by a relatively small, relatively insular, and relatively homogeneous group—and therefore we have less confidence that its propositions are as good as the original meaning.⁷²

McGinnis and Rappaport's argument hinges on the written Constitution having gone through the rigorous supermajoritarian ratification processes. This document—and only this document—has the assurances that that process provides. Therefore, their normative argument

64. BARNETT, *supra* note 39, at 153–90, 274–318.

65. *Id.* at 191–252.

66. *Id.* at 89–117.

67. *Id.* at 105–11.

68. MCGINNIS & RAPPAPORT, *supra* note 44, at 139–40.

69. *Id.* at 2–3.

70. *See id.* at 14, 27, 81.

71. *See id.* at 33–99.

72. *See id.* at 175–78.

pushes originalism to privilege only the written Constitution. As they summarized, “the beneficence of the Constitution is connected to the supermajoritarian process from which it arose. Originalism is the appropriate method of constitutional interpretation because it captures the meaning that passed through the supermajority process. Consequently, the results generated by originalism are likely to be beneficial.”⁷³

Similarly, Professor Keith Whittington’s normative argument for originalism hinges on the unique role of the written Constitution. Whittington argues that originalism is the best theory of interpretation because it best advances popular sovereignty,⁷⁴ and it does so in two primary ways. First, it protects the American People’s constitutional judgments, embodied in the Constitution’s text, by privileging those judgments over, for example, nonoriginalist precedents, which embody different judgments.⁷⁵ Second, originalism preserves the American People’s capacity to embody constitutional judgments because it protects those judgments from derogation via nonoriginalist precedent and, therefore, preserves the possibility of future constitutional decision-making.⁷⁶

The axis point of Whittington’s argument is the written Constitution. No other document incentivizes and protects the constitutional judgments of the American People like the Constitution.⁷⁷ The written Constitution is the depository of prior constitutional judgments by the American People, and originalism’s continued privileging of the written Constitution incentivizes future constitutional judgments by the American People.

My own normative argument for originalism also focuses on the written Constitution. I have argued that originalism best leads to the creation of the background conditions necessary for human flourishing.⁷⁸ This argument privileges the written Constitution. In brief, I argue that the written Constitution embodies the authoritative, prudential, social-ordering

73. *Id.* at 3.

74. *See* WHITTINGTON, *supra* note 39, at 110–11.

75. *See id.* at 111.

76. *See id.*

77. Professor Bruce Ackerman’s theory of higher lawmaking, coupled with his theory of nontextual “amendments” to the Constitution such as occurred during the New Deal, is in tension with Whittington’s claim that the written Constitution is the sole location for the American People’s constitutional judgments. ACKERMAN, *supra* note 7, at 10–26. My point here is not that Whittington’s claim is correct, though I believe it is, Strang, *supra* note 27, at 430–33 (describing nonoriginalist precedent, including much New Deal precedent); rather, it is that Whittington’s normative justification for originalism places the written Constitution at its focal point.

78. Strang, *supra* note 41, at 982–92.

judgments of the American People on how best to overcome coordination problems.⁷⁹

For instance, the Articles of Confederation government did not possess the authority to regulate interstate commerce.⁸⁰ This failure, along with many others, almost caused the Union to fail,⁸¹ and it was one of the main impetuses for the Philadelphia Convention.⁸² The Constitution embodied the American People's judgment that national regulation of interstate trade—via the Commerce Clause—was necessary to create the background conditions for a robust Union.⁸³ This judgment was and remains authoritative because it went through the Framing and Ratification process. (The written Constitution, as I describe below,⁸⁴ remains authoritative in our constitutional practice.) The Commerce Clause's particular articulation and scope was the result of the Framers' and Ratifiers' prudential judgment, in light of the nation's experiences, on how best to coordinate interstate commercial relations within the United States.⁸⁵ Lastly, the American People's judgment about how interstate commercial relations should be regulated has ordered and continues to order Americans' lives today.⁸⁶

Originalism, my argument continues, is necessary to access the American People's judgments and hence to obtain the reasoned solution to the coordination problem embodied in the Constitution's text. Nonoriginalist interpretative methodologies, by contrast, fail to fit the authoritative framing and ratification process, undervalue the exercises of prudential wisdom embodied in the American People's constitutional judgments, and cannot account for the written Constitution's unique

79. *Id.*; Strang, *supra* note 57, at 87–91. See also Lee J. Strang, *Originalism and the Aristotelian Tradition: A New Normative Justification for Originalism in Human Flourishing* (unpublished working paper) (on file with author) [hereinafter Strang, *Originalism and the Aristotelian Tradition*] (elucidating this normative justification).

80. See ARTICLES OF CONFEDERATION of 1777, art. IX.

81. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–34 (1996).

82. See WILLIAM PETERS, A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONSTITUTION 1–14 (1987).

83. See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 106–08 (2005).

84. See *infra* Part III.

85. AMAR, *supra* note 83, at 107–08.

86. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (“It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (“The individual mandate cannot be upheld as an exercise of Congress' power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it.”).

provenance.⁸⁷

Like the other three normative arguments discussed above, my argument's architectonic point is the written Constitution. It is only the written Constitution that embodies the American People's authoritative constitutional judgments, which is the culmination of a unique reasoned process that resulted in reasonable judgments.

C. CONCLUSION

In this Part, I demonstrated that four of originalism's own commitments show that the written Constitution is the sole subject matter of constitutional interpretation. Next, I argue that originalism's identification of the written Constitution as the sole subject of constitutional interpretation fits both key and widely accepted facets of American constitutional practice.

III. IMPORTANT AND COMMONLY ACCEPTED FACETS OF AMERICAN CONSTITUTIONAL PRACTICE FIT ORIGINALISM'S IDENTIFICATION OF THE WRITTEN CONSTITUTION AS THE SOLE SUBJECT MATTER OF CONSTITUTIONAL INTERPRETATION

A. INTRODUCTION

In this Part, I argue that originalism's identification of the written Constitution as the sole subject matter of interpretation is the most reasonable position because it fits both important and widely accepted facets of our constitutional practice. My argument below is that our constitutional practice, as exemplified by the actions of key governmental officials, largely—though not without exception—fits originalism's identification of the subject matter of interpretation. I then argue that, even if some practices do not support originalism's position, the importance, ubiquity, and normative attractiveness of the practices that do support originalism's position suggest that the divergent practices be labeled mistakes. This claim is important, I argue below, because it shows that originalism's internal commitments match our legal practice's rule of recognition.⁸⁸ The five facets of our practice to which I point show that the

87. Strang, *supra* note 57, at 89. *See also* STRAUSS, *supra* note 7, at 101 ("Many people revere the U.S. Constitution. Many Americans consider themselves connected, in some important way, to the earlier generations who wrote and ratified the Constitution we have today—not just the living Constitution, but the document.").

88. *See* H.L.A. HART, *THE CONCEPT OF LAW* 100–23 (2d ed. 1994). *See generally* Kent

written Constitution, and only it, is authoritative until lawfully changed.⁸⁹

B. THE CONSTITUTION'S TEXT

The written Constitution—which nearly all members of our constitutional practice acknowledge is at least part of the constitution⁹⁰—identifies the written Constitution as the sole subject matter of interpretation.⁹¹ The written Constitution is the foundational element of our constitutional practice. Therefore, its own identification of the subject matter of constitutional interpretation is significant.

Even nonoriginalist scholars identify the written Constitution as (at least) part of the authoritative American constitution. For example, according to Philip Bobbitt, two of the six “modalities” of American constitutional law are facets of the written Constitution: text and structure.⁹² Similarly, Ronald Dworkin identified the written Constitution as a “basic [] piece of interpretative data”⁹³ that forms the larger body of practices that constitute the constitution.⁹⁴

This written Constitution identifies itself as the sole subject matter of constitutional interpretation. In particular, the Constitution's indexicals

Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987) (providing an early attempt to describe the rule of recognition in the United States).

89. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 818–19 (2015) (arguing that a “common assumption of legal systems” is that “the law stays the same until it's lawfully changed,” and showing how originalism is a manifestation of that assumption).

90. I use the small-c constitution to designate the set of practices and documents identified by nonoriginalist scholars as the authoritative American constitution, and to distinguish it from the big-C Constitution located in the National Archives.

91. See Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 95, 111 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (stating that Supreme Court interpretations must “rationally be grounded in the text”); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358 (2007) (“[Living constitutionalists] don't necessarily sideline text, history, and structure; these are just parts of the motley constellation that is constitutional interpretation.”).

92. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11, 12–13 (1991).

93. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 83 FORDHAM L. REV. 1249, 1260 (2015). See also RONALD DWORKIN, JUSTICE IN ROBES 120 (2006) (“We must begin, in my view, by asking what . . . the authors of the text intended to say.”).

94. See STRAUSS, *supra* note 7, at 99 (“It is impossible to understand American constitutional law without recognizing [precedent and traditions] But it is also impossible to understand American constitutional law without acknowledging the role that the document itself plays in our system.”); Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 91, at 47, 55 (“Judges and Justices always purport to reconcile their rulings with the written Constitution and have never claimed authority to displace it.”).

show that only the written Constitution is the subject matter of constitutional interpretation.⁹⁵ Constitutional indexicals are the Constitution's text's identification of what the U.S. Constitution is. The U.S. Constitution contains many indexicals, beginning with the Preamble's identification of the document of which it is a part as "this Constitution,"⁹⁶ and ending with the Ratification Clause, at the bookend of the original Constitution, which confirms that "this Constitution" is the written Constitution that went through the ratification process.⁹⁷ Both enactment and ratification refer only to the written Constitution and, in between, are numerous identifications of the Constitution as the written Constitution; for instance, Article V describes how changes to the text of "this Constitution" may occur.⁹⁸

The Article VI Supremacy Clause confers on "This Constitution"—that is, the document identified by the constitutional indexicals as the U.S. Constitution "ordain[ed] and establish[ed] by "We the People"⁹⁹—the status of "supreme Law of the Land."¹⁰⁰ The Constitution's indexicals, coupled with the Supremacy Clause, identify the written Constitution—and only it—as the Constitution, and therefore as the sole subject of constitutional interpretation. Article VI's oath requirement for federal and state officers identifies the document of which Article VI is part as "this Constitution."¹⁰¹ This oath, in turn, binds federal and state officers to privilege (only) the written Constitution over other laws and sources of law.

This written Constitution-centric focus of our practice is so pervasive that nonoriginalists regularly lament the fact that prominent actors in our practice publicly—though, in the nonoriginalists' eyes, falsely—justify their (*sub rosa* nonoriginalist) claims with reference to the written Constitution.¹⁰² For example, nonoriginalists lamented that even the

95. Christopher R. Green, "This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 NOTRE DAME L. REV. 1607, 1641–67 (2009). See also Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 864–72 (2009); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1391–92 (2014).

96. U.S. CONST. pmb.

97. *Id.* art. VII.

98. *Id.* art. V.

99. *Id.* pmb.

100. *Id.* art. VI, cl. 2.

101. *Id.* art. VI, cl. 1, 3.

102. See Sachs, *supra* note 89, at 837 ("Originalist claims are standard features of our legal practice—something nonoriginalists have occasionally recognized (to their dismay).").

progressive Supreme Court nominees¹⁰³ (not to mention the conservative nominees!¹⁰⁴) during their confirmation hearings purported to limit the judicial role to enforcing the written Constitution.¹⁰⁵ Another example is the Supreme Court's "rhetoric" that its decisions are compelled by the Constitution, which nonoriginalists attempt to show is a facade, or screen, for the truth (of nonoriginalism).¹⁰⁶ The existence of this standard nonoriginalist move of "pulling back the curtain" shows how strongly our practice focuses on only the written Constitution.¹⁰⁷

C. CONSTITUTIONAL AMENDMENTS

The existence of constitutional amendments also shows that only the written Constitution is the subject of constitutional interpretation. It does so by identifying constitutional amendments as having the authority to displace all other facets of our legal practice—including, importantly for our purposes, Supreme Court precedent—contrary to the amendment.

The Constitution's text authorizes changes to itself.¹⁰⁸ The Constitution also recognizes that these changes—amendments—are equivalent to and part of the written Constitution.¹⁰⁹ These amendments are sufficiently authoritative that they may replace the Constitution's previously existing text, which had been, up to that point, authoritative.¹¹⁰

Our legal practices likewise recognize that changes via amendment are (part of) the Constitution and that other documents are not. The Supreme Court, for instance, recognizes that amendments displace its contrary holdings, and this has occurred repeatedly,¹¹¹ including in situations where

103. *E.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 2 (2010), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm>.

104. *E.g.*, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.).

105. Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1, 40–41 (2014); Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 135–36 (2011).

106. *See, e.g.*, ACKERMAN, *supra* note 7, at 32–33 (“[T]he official canon is composed of the 1787 Constitution and its subsequent formal amendments.”); STRAUSS, *supra* note 7, at 29 (“Constitutional law is supposed to consist in the interpretation of a written text.”).

107. *See also* BARNETT, *supra* note 39, at 2 (employing this metaphor in a similar context).

108. U.S. CONST. art. V.

109. *Id.*

110. *E.g., id.* amend. XII.

111. The Eleventh Amendment abrogated *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Thirteenth and Fourteenth Amendments abrogated *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Sixteenth Amendment abrogated *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), the Nineteenth Amendment abrogated *Minor v. Happersett*, 88 U.S. 162 (1875), and the

the amendment makes clear that the Supreme Court had previously *mis*interpreted the Constitution, such as occurred in the context of state sovereign immunity. As the Court explained in *Alden v. Maine*, “Congress acted not to change but to restore the original constitutional design.”¹¹² The Supreme Court has not “overruled” these textual amendments, and scholarly calls to do so are exotic.¹¹³

The Constitution’s authorization of amendments and our legal practice surrounding them shows that documents and practices inconsistent with the written Constitution are not the Constitution, and that the sole subject of constitutional interpretation is the written Constitution.

D. CONSTITUTIONAL PROVENANCE

Our constitutional practice identifies the Constitution by its provenance. This provenance identifies only the written Constitution as the Constitution.

Constitutional provenance is the origin of a constitution. Constitutional provenance is crucial because it is the characteristic that explains why a particular document,¹¹⁴ and not another, is a polity’s constitution. A constitution’s provenance identifies the constituent authority that possessed the authority to designate a document as the constituent authority’s polity’s constitution.¹¹⁵

The U.S. Constitution is identified by its provenance.¹¹⁶ Only it originated from the Philadelphia Convention on September 17, 1787, and was ratified by nine state ratification conventions by 1788.¹¹⁷ Americans then, and today, recognize(d) that the Framing and Ratification process identified the Constitution and that the Ratifiers possessed the authority to designate the document now located in the National Archives as the U.S.

Twenty-Sixth Amendment abrogated *Oregon v. Mitchell*, 400 U.S. 112 (1970).

112. *Alden v. Maine*, 527 U.S. 706, 722 (1999).

113. See Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 95, at 894–95.

114. This could also be a practice or tradition or institution.

115. See generally Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715 (2011) (explaining this concept). See also Larry Alexander, *Originalism, or Who Is Fred?*, 19 HARV. J.L. & PUB. POL’Y 321 (1996) (arguing that a society must identify an authority that then determines constitutional rules that provide coordination).

116. See Richard S. Kay, *American Constitutionalism*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16, 29–33 (Larry Alexander ed., 1998) (explaining a claim similar to this in detail).

117. See also Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1–6 (2001) (arguing that the date the Constitution went into effect varied depending on the provision in question).

Constitution.¹¹⁸ No matter how much more normatively attractive another document is, it is not the U.S. Constitution if it did not go through that Framing and Ratification process.¹¹⁹ For this reason, for instance, Supreme Court precedent is not (part of) the Constitution. The Constitution's provenance identifies and includes only one subject matter: the written Constitution in the National Archives' Rotunda.

E. OATH TAKING

All federal officers take action that identifies only the written Constitution as the subject matter of constitutional interpretation. All officers take an oath to support "the Constitution of the United States."¹²⁰ The oath required of federal judicial officers is a specification of the constitutionally required oath.¹²¹ It requires federal judges to swear to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution . . . of the United States. So help me God."¹²² The "Constitution of the United States" identified in both oaths is the same "Constitution of the United States" identified in Title I of the United States Code as the "Constitution of the United States."¹²³ In practice, federal office holders understand "the Constitution" as the written Constitution.¹²⁴

As a result, the key gatekeeping mechanism for governmental officials who authoritatively interpret the Constitution binds those officials to identify the written Constitution as the sole subject of interpretation.¹²⁵

F. SUPREME COURT PRACTICE

Numerous facets of the Supreme Court's practice identify the written Constitution as the sole subject matter of interpretation. The thread that runs through these Supreme Court practices is its prioritization of the

118. See STRAUSS, *supra* note 7, at 101 ("Many people revere the U.S. Constitution. Many Americans consider themselves connected, in some important way, to the earlier generations who wrote and ratified the Constitution we have today—not just the living Constitution, but the document."); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U.L. REV. 703, 717 (2009).

119. See Kay, *supra* note 118, at 717.

120. 5 U.S.C. § 3331 (2012). The President takes a constitutionally prescribed oath. U.S. CONST. art. II, § 1, cl. 8.

121. 28 U.S.C. § 453 (2012).

122. *Id.*

123. 1 U.S.C. §§ 1–213 (2012) (reprinting the U.S. Constitution).

124. Green, *supra* note 95, at 1643–48, 1645 n.120.

125. See AMAR, *supra* note 1, at xii.

written Constitution over other potential sources of constitutional law.¹²⁶ As summarized by Professor Richard Fallon, “Judges and Justices always purport to reconcile their rulings with the written Constitution and have never claimed authority to displace it.”¹²⁷

First, the Supreme Court typically explains its rulings as required by the written Constitution. For example, in *District of Columbia v. Heller*, the Supreme Court justified its—admittedly controversial—holding in terms of fealty to the written Constitution:

The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.¹²⁸

Second, the Supreme Court regularly justifies changes in its constitutional doctrine by reference to the written Constitution. In *Crawford v. Washington*, for instance, the Court rejected its governing rule and key precedent, *Ohio v. Roberts*,¹²⁹ and defended this change with reference to the written Constitution’s requirements:

Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . In this case, the State admitted Sylvia’s testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.¹³⁰

Third, the Supreme Court defends even its most controversial decisions as mandated by the written Constitution. *Planned Parenthood v. Casey*¹³¹ is one of the principal cases identified by nonoriginalists as

126. See Himma, *supra* note 91, at 111.

127. Fallon, *supra* note 94, at 55.

128. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (citation omitted).

129. *Ohio v. Roberts*, 448 U.S. 56 (1980).

130. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2003).

131. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

evidence of originalism's failure to accurately describe American constitutional practice.¹³² However, even though—or because—the Court knew that its ruling would be greeted with tremendous skepticism,¹³³ it rooted its holding in the written Constitution:

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.¹³⁴

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws.¹³⁵

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.¹³⁶

Fourth, the Supreme Court, even when it is implausible, identifies the written Constitution as the reason for its actions. Perhaps the best example of this is the Court's fantastic claim in *Dickerson v. United States*.¹³⁷ There, the Supreme Court affirmed *Miranda v. Arizona*,¹³⁸ even though the Supreme Court—including *Dickerson*'s author, Chief Justice Rehnquist¹³⁹—had repeatedly stated that *Miranda* was not required by the

132. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 42–129 (1996); James E. Fleming, *Lawrence's Republic*, 39 *TULSA L. REV.* 563, 570 (2004). See also Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 *CONST. COMMENT.* 311, 315–16 (2005) (arguing that precedent trumps the original meaning only when all three branches of the federal government have accepted the precedent as “well-settled”).

133. *Casey*, 505 U.S. at 866–67 (“[T]he Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”).

134. *Id.* at 846.

135. *Id.* at 865.

136. *Id.* at 901.

137. *Dickerson v. United States*, 530 U.S. 428 (2000).

138. *Miranda v. Arizona*, 384 U.S. 436 (1966).

139. See, e.g., *New York v. Quarles*, 467 U.S. 649, 654 (1984) (“The prophylactic *Miranda* warnings therefore are ‘not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.’” (alterations in original) (citation omitted)).

Constitution.¹⁴⁰ Indeed, this description of *Miranda* as a prophylactic mechanism to protect the Constitution was necessary to the series of Court decisions limiting *Miranda*'s reach,¹⁴¹ as the *Dickerson* Court itself acknowledged.¹⁴² Despite the Court's statements, reasoning, and holdings over thirty years, in *Dickerson*, Chief Justice Rehnquist cagily claimed that *Miranda* "announced a constitutional rule,"¹⁴³ was a "constitutional decision,"¹⁴⁴ was "constitutionally based,"¹⁴⁵ and was "constitutionally required."¹⁴⁶ Chief Justice Rehnquist made this strained argument because, in our legal practice, the written Constitution is the sole subject of constitutional interpretation, so he could only justify the continued viability of *Miranda* by reference to the written Constitution.¹⁴⁷

Fifth, the Supreme Court subordinates other forms of argument to the written Constitution even when it would be plausible to use these other forms autonomously.¹⁴⁸ For example, in *NLRB v. Canning*, the Court refused to rely on a longstanding constitutional tradition to *supplant* the constitutional text,¹⁴⁹ even though it was invited to do so by the administration.¹⁵⁰ Instead, the Court found that the phrase "Recess of the Senate"¹⁵¹ was ambiguous¹⁵² and relied on the originalist interpretative method of "liquidation"¹⁵³ to argue that constitutional tradition had fixed

140. *E.g.*, *Davis v. United States*, 512 U.S. 452, 457 (1994).

141. *E.g.*, *id.* at 457; *Oregon v. Elstad*, 470 U.S. 298, 304 (1985); *Quarles*, 467 U.S. at 654; *Oregon v. Hass*, 420 U.S. 714, 723 (1975); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

142. *Dickerson*, 530 U.S. at 437–38, 441.

143. *Id.* at 438, 444.

144. *Id.* at 432, 438.

145. *Id.* at 440.

146. *Id.* at 438.

147. *See id.* at 443 (engaging in *stare decisis* analysis to see whether *Miranda*, if it was not correct, should be overruled).

148. *See Sachs*, *supra* note 89, at 856 (identifying the substance of this claim).

149. *NLRB v. Canning*, 134 S. Ct. 2550, 2559–60 (2014).

150. Transcript of Oral Argument at 6–8, *NLRB v. Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281).

151. U.S. CONST. art. II, § 2, cl. 3.

152. *Canning*, 134 S. Ct. at 2560–61.

153. *See MCGINNIS & RAPPAPORT*, *supra* note 44, at 128–38 (describing the original methods approach). *See, e.g.*, THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., 2001) (describing precedent as a "liquidator" of the Constitution's meaning); THE FEDERALIST NO. 82, at 426 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (using the concept of "liquidate"); Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON, 1808–1819, at 320, 321 (Gaillard Hunt ed., 1908) ("It . . . was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them."). *See also* Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1979 (stating that when

the meaning of the phrase to permit intra-recess appointments.¹⁵⁴

Sixth, dissenting justices regularly appeal to the written Constitution against existing doctrine. For example, Justice Ginsburg appealed to the Commerce and Spending Clauses to show why her dissent was correct in *NFIB v. Sebelius*:

I agree with THE CHIEF JUSTICE that . . . the minimum coverage provision is a proper exercise of Congress' taxing power. . . . Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.¹⁵⁵

This same move was made by Justice Scalia on the other end of the Court's ideological spectrum to justify his dissent:

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.¹⁵⁶

Seventh, neither the Supreme Court nor its justices *ever* claim that their conclusions are at variance with the written Constitution. Despite the widespread belief in different versions of nonoriginalism—which, on many accounts, permit trumping the written Constitution with other modalities of constitutional argumentation¹⁵⁷—both on and off the Supreme Court, no Supreme Court opinion or justice's opinion states that it is contrary to the written Constitution. This includes cases where the consensus is that the Supreme Court's holding was contrary to the paradigm example of what the text was meant to do, such as *Home Building and Loan Ass'n v. Blaisdell*,¹⁵⁸ where the Supreme Court still purported to follow the Contracts Clause.¹⁵⁹

These facets of Supreme Court practice shows that the written

the text is “vague or irreducibly ambiguous . . . originalists can accept the use of historical practice to liquidate constitutional meaning”).

154. *Canning*, 134 S. Ct. at 2561–64.

155. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., dissenting in part).

156. *Id.* at 2642 (Joint Dissent).

157. See sources cited *supra* note 7 (listing scholars taking this position).

158. *Home Bldg. & Loan v. Blaisdell*, 290 U.S. 398 (1934).

159. JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 67–68 (2005).

Constitution is the subject matter of constitutional interpretation. Professor Akhil Amar summarized this practice: “No Supreme Court opinion has ever openly proclaimed that its members may properly disregard or overturn the written Constitution.”¹⁶⁰

G. THE EXCLUSIONARY POWER OF THESE REASONS

One last note before moving further: these five characteristics of our legal practice, which identify the written Constitution as the big-C Constitution of the United States, exclude other subjects from the scope of constitutional interpretation.¹⁶¹ These characteristics are best explained as identifying only one document that is the authoritative Constitution of the United States. Other documents—even substantively better ones—are not the Constitution.

H. A COUNTER-ARGUMENT CONSIDERED

1. The Counter-argument: Official Practices Show that America’s Constitution Includes More Than the Written Constitution

A counter-argument to my claim that the subject matter of constitutional interpretation is only the written Constitution is to point to facets of our constitutional practice that, critics argue, belie my claim. For example, Professor Paul Brest, while criticizing originalism, claimed that one facet of our practice was that it treated the Constitution’s text as “important but not determinative. . . . [It] create[s] a strong presumption, but one which is defeasible in light of changing public values.”¹⁶² Call this the Practice Critique, for short. In a similar move, Professor Richard Fallon pointed to a number of facets of our constitutional practice that he claimed show that the subject matter of constitutional interpretation is more than just the written Constitution.¹⁶³

If the Constitution’s status as ultimate law depends on practices of acceptance, then the claim that the written Constitution is the only valid source of constitutional norms loses all pretense of self-evident validity. As originalists candidly admit, originalist principles cannot explain or justify much of contemporary constitutional law. Important lines of

160. AMAR, *supra* note 1, at xi.

161. Sachs, *supra* note 89, at 864.

162. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229 (1980).

163. See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 545–48 (1999). See also *id.* at 549 (“A good constitutional theory must fit *either* the written Constitution *or* surrounding practice.” (emphases added)).

precedent diverge from original understandings. Judges frequently take other considerations into account. Moreover, the public generally accepts the courts' non-originalist pronouncements as legitimate—not merely as final, but as properly rendered.

In urging that existing judicial practices should be altered, originalists are not pure positivists, who insist that the “rule of recognition” prevailing in the United States reflects originalist principles. Rather, originalists, like all other participants in constitutional theoretical debates, carry a burden of normative justification. They must attempt to establish that the constitutional regime would be a better one—as measured by relevant criteria—if constitutional practice were exclusively text-based and if originalist precepts were consistently followed.¹⁶⁴

Most prominent and formidable in Professor Fallon's list of practices divergent from the written Constitution is the pervasive existence of nonoriginalist precedent, such as *Wickard v. Filburn*.¹⁶⁵ The Court's nonoriginalist precedents, he claimed, formed constitutional doctrine that was not plausibly derived from the written Constitution's original meaning.¹⁶⁶ Professor Fallon then leveraged this claim to support a second, related argument that, therefore, the rule of recognition in the United States recognized more than just the written Constitution.¹⁶⁷ Instead, according to Fallon, our practice's rule recognized nonoriginalist precedent and doctrine as comprising part of our constitution.¹⁶⁸

2. A Clarification Before Proceeding

Let me be clear that the position against which I am arguing is that many facets of our legal practice show that the subject of constitutional interpretation includes more than the written Constitution.¹⁶⁹ This position

164. *Id.* at 548.

165. *Id.* See also Fallon, *supra* note 56, at 1122–32.

166. Fallon, *supra* note 163, at 548.

167. *Id.* at 547–48.

168. Professor Fallon's view on the subject matter of constitutional interpretation appears to have evolved toward the originalist position I have been articulating. In 1999, Professor Fallon claimed that nonoriginalist precedent had constitutional status because it was accepted as legitimate by officials (judges) and the public. *Id.* Then, in 2008, Professor Fallon left the question open by stating that there are “at least two conceptual accounts” of the status of nonoriginalist precedent, one of which was his former position and the second was that nonoriginalist precedent was not the Constitution but privileged vehicles to interpret the Constitution. Fallon, *supra* note 56, at 1132. Most recently, in 2009, Professor Fallon adopted the originalist position and rejected the view that nonoriginalist precedent is itself part of the Constitution. Fallon, *supra* note 94, at 55. See also Larry Alexander & Frederick Schauer, *Rules of Recognition: Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 91, at 175, 185 (arguing that the rule of recognition in the United States identifies the written Constitution and Supreme Court precedent).

169. *Cf.* Fallon, *supra* note 163, at 547–48 (articulating this contrary position).

is that the big-C Constitution is also composed of, for instance, precedent and entrenched practices.¹⁷⁰ I am *not* engaging the distinct argument that nonoriginalist practices, which themselves are used to interpret the written Constitution, and which are accepted by officials and the American People, undermine originalism.¹⁷¹

3. Originalism Is Able to Account for Some Subset of the Purportedly Inconsistent Practices

My response to the counter-argument is twofold. First, originalism, as currently articulated, blunts or eliminates the Practice Critique's descriptive claim, and it does so in two key ways. First, originalism's incorporation of the doctrine of *stare decisis* blunts Fallon's descriptive claim.¹⁷² Some nonoriginalist precedent is preserved, from an originalist perspective, because of Article III's command that federal judges exercising "judicial Power" give significant respect to precedent, including nonoriginalist precedent.¹⁷³ Therefore, some subset of the nonoriginalist precedent and doctrine identified by the Practice Critique as powerful evidence of a rule of recognition inconsistent with originalism is actually consistent with originalism and with the written Constitution.¹⁷⁴

Second, originalism's acknowledgement of the existence of constitutional construction further blunts the Practice Critique's descriptive claim. Constitutional construction, which I described in more detail in Part II.B.2, permits the creative articulation of constitutional doctrine beyond the Constitution's original meaning.¹⁷⁵ This constitutional doctrine must be consistent with the known and determinate original meaning, but it will not be coterminous with it.¹⁷⁶ Therefore, some subset of constitutional doctrine that is identified by the Practice Critique as evidence of a rule of recognition inconsistent with originalism is actually consistent with originalism and with the written Constitution.¹⁷⁷

Both of my points share the common thread that the written Constitution itself requires the practices that the Practice Critique points to

170. *See id.*

171. Though I tentatively think that this other nonoriginalist criticism of originalism is more plausible, on balance and systemically, I think that our practice rejects it as well.

172. *See* Strang, *supra* note 27, at 445–47.

173. *Id.* at 420.

174. *Cf.* Fallon, *supra* note 56, at 1129–32 (describing Fallon's contrary position).

175. *See* Solum, *supra* note 40, at 467–72.

176. *See id.* at 469–72.

177. *Cf.* Fallon, *supra* note 56, at 1129–32 (describing Fallon's contrary position).

as extending beyond the written Constitution.¹⁷⁸ The written Constitution requires the preservation of some nonoriginalist precedent and,¹⁷⁹ by its limited nature, the written Constitution also requires the construction of constitutional doctrine.¹⁸⁰

4. Architectonic and Widespread Practices Better Support Originalism's Conception of the Constitution

My second response to the Practice Critique is to acknowledge that, to some extent, our practice *is* internally conflicted.¹⁸¹ Some facets of our practice, like the ones I identified earlier,¹⁸² presuppose the centrality of the written Constitution. For example, the Constitution's indexicals exclude nonoriginalist precedent as part of the Constitution.¹⁸³ While other practices, such as some of those identified by the Practice Critique, expand the subject matter of constitutional interpretation.¹⁸⁴ For instance, it is unlikely that originalism can accommodate *Wickard's* substantial effects test.¹⁸⁵

Some level of internal tension is a common phenomenon in human practices. For example, in family life, the norm is to treat family members with respect, but unfortunately—both intentionally and unintentionally—family members treat others without due respect. Or, even more aptly, family members disagree over whether a particular action—one spouse using a particular tone with another, for example—constituted respect (or the lack thereof). The existence of failure to live up to the norm of respect, and the existence of disagreement within a family about what counts as respect, does not, by itself, show that one view of what respect is, is right.

Similarly, the existence of a tension in our constitutional practice does not—by itself—mean that the tension is or should be resolved in the Practice Critique's favor. In other words, the existence of tension itself does not lead to the Practice Critique's conclusion that the practice recognizes—as part of the Constitution—practices beyond the written Constitution. Another, I think better, conclusion is that some facets of the practice are mistaken.¹⁸⁶

178. See Fallon, *supra* note 163, at 547–48.

179. See *id.*

180. See Solum, *supra* note 40, at 467–72.

181. See Sachs, *supra* note 89, at 835–37.

182. See *supra* Part III.B–F.

183. See *supra* Part III.B.

184. See Fallon, *supra* note 163, at 545–48.

185. See BARNETT, *supra* note 39, at 315–18.

186. See Strang, *supra* note 27, at 428–30 (explaining why our constitutional practice will produce

Law is a complex and human practice, so we should expect to find a fair number of mistakes by officials in the practice. This is especially likely in a legal practice as complex as ours, operating over so long a period, with so many different levels of conventions, which make it more likely that higher-order conventions will deviate from on-the-ground practices.¹⁸⁷

Instead—for reasons both important and common to the practice, which I identified earlier¹⁸⁸—the tension should be resolved by affirming the written Constitution’s centrality. I argued above that the architectonic facets of our constitutional practice, such as constitutional indexicals, identify the written Constitution as the sole subject matter of constitutional interpretation.¹⁸⁹ The written Constitution, everyone agrees, is the central part of our constitutional practice and, since it identifies the written Constitution as the sole part of the Constitution, inconsistent practices are mistakes and not part of the Constitution.¹⁹⁰

I also argued that widespread practices, such as the federal oaths of office taken by federal officers, likewise limited constitutional interpretation to the written Constitution. If widespread facets of our constitutional practice identify the written Constitution as the Constitution, then contrary practices are likely mistaken.

To these practical facets are added the normative justifications for originalism¹⁹¹—human flourishing, natural rights, good consequences, and popular sovereignty—which also push to limit constitutional interpretation to the written Constitution.¹⁹² Even if the most important and wide-spread facets of our constitutional practice did not decide the issue—in other

mistakes). Cf. Mike Rappaport, *Is Originalism the Law? Part I: The Rule of Recognition and the Legality of Originalism*, LIBR. L. & LIBERTY (Dec. 18, 2013), <http://www.libertylawsite.org/2013/12/18/is-originalism-the-law-part-i-the-rule-of-recognition-and-the-legality-of-originalism> (suggesting that the American rule of recognition does not require and does not exclude originalism).

187. See Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2262–64 (2014) (describing the complexity of our legal system’s various levels of ordering). In fact, originalism’s ability to identify some facets of the practice as mistaken is one of its virtues because we should expect our human practices to (at least occasionally) fail to live up to their commitments. See Strang, *supra* note 57, at 99–100 (making this argument).

188. See *supra* Part III.B–F.

189. See Sachs, *supra* note 89, at 837 (“When we look to these higher-order principles, the case for originalism is far stronger.”); *supra* Part III.B.

190. See Sachs, *supra* note 187, at 2256 (suggesting that originalism may be able to show that the gap between higher-level legal commitments and on-the-ground conclusions should be resolved in originalism’s favor).

191. By “practical” here, I mean facets of our constitutional practice.

192. See *supra* Part II.B.2.

words, it was too close to call—then our practice should limit the Constitution to the written Constitution because doing so would, for instance, create better protection for natural rights, than the inconsistent practices.

IV. ORIGINALISM'S IDENTIFICATION OF THE WRITTEN CONSTITUTION AS THE SOLE SUBJECT MATTER OF INTERPRETATION FITS THE NATURAL LAW TRADITION'S CONCEPTION OF LAW

This last Part briefly shows how originalism's limitation of the subject matter of interpretation to the written Constitution is also bolstered by the natural law tradition's conception of law. I suggest below that this conception of law, in fact, rather elegantly fits our constitutional practice and use, as an example, the process by which the Constitution became the "supreme Law of the Land."¹⁹³ I raise this argument because it is part of my long-term scholarly project to argue that the natural law tradition's conception of law identifies originalism as the way Americans should interpret the United States Constitution.¹⁹⁴ My explanation here is a promissory note of a more expanded account later.¹⁹⁵

Within the natural law tradition, humans have a final end, labeled human flourishing or happiness.¹⁹⁶ Human flourishing is when a human is fully and deeply happy.¹⁹⁷ Human flourishing occurs when a human virtuously—excellently—participates in the basic human goods.¹⁹⁸ The basic human goods are those analytically distinct facets of human life that constitute the good life, such as life, friendship, and knowledge.¹⁹⁹

However, achievement of human flourishing requires cooperation with other humans throughout one's life.²⁰⁰ In addition to private

193. U.S. CONST. art. VI, cl. 2.

194. In this brief Article, I do not argue that the natural law tradition's conception of law is attractive. That is the work of others, including, most importantly, its foundational figures—Aristotle, St. Thomas Aquinas—and its most prominent modern Anglo-American exponent, John Finnis.

195. See generally Strang, *Originalism and the Aristotelian Tradition*, *supra* note 79 (arguing "originalism is the most normatively attractive interpretative methodology because it best enables Americans to flourish as full human beings").

196. 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 1, art. 7 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (1265–1274).

197. See *id.* pt. I-II, q. 3, art. 1.

198. See *id.* pt. I-II, q. 3, art. 2.

199. See *id.* pt. I-II, q. 4 ("Of Those Things That Are Required for Happiness."); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59–99 (1980).

200. See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 63–79 (1999).

cooperation, human flourishing requires societal ordering, including through law.²⁰¹ However, this social ordering is hindered by what are called coordination problems: the inability of humans to spontaneously self-organize and cooperate, not through any fault of their own, but because of the plethora of reasonable means of cooperation.²⁰² Law is necessary because it is the key means by which members of a society overcome the coordination problems that impede the social cooperation necessary for individuals to achieve their own flourishing.²⁰³

Law's purpose is to facilitate a society's members' pursuit of their own human flourishing²⁰⁴; this is its focal case.²⁰⁵ Law does so by embodying (1) authoritative, (2) prudential, (3) social-ordering decisions that (attempt to) overcome coordination problems.²⁰⁶ Law's role and purpose, in the natural law tradition's conception, is to create the background conditions necessary to enable members of a society to work together, so that each member can effectively pursue his own human flourishing.

Taking a statutory example, the Sherman Antitrust Act²⁰⁷ was passed by Congress, which had utilized its members' prudential judgment on how to respond to a coordination problem by re-ordering society to eliminate large capital trusts. The trusts impeded the common good by improperly ordering the American economy and individual Americans' human flourishing.²⁰⁸ Congress was recognized, within our legal system, as having the authority to pass a statute like the Sherman Antitrust Act under its Commerce Clause authority.²⁰⁹ Congress utilized its members' political wisdom to ascertain the challenges posed by trusts and to craft a legal mechanism to respond to the trusts.²¹⁰ Trusts and monopolies had created

201. See AQUINAS, *supra* note 196, pt. I-II, q. 90.

202. See *id.* pt. I-II, q. 91, art. 3.

203. See *id.* pt. I-II, q. 90, art. 2.

204. See *id.* pt. I-II, q. 92, art. 1.

205. See FINNIS, *supra* note 199, at 9–11.

206. AQUINAS, *supra* note 196, at pt. I-II, q. 90, art. 4.

207. Sherman Antitrust Act, ch. 647, 26 Stat. 209, 209–10 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

208. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836–1937*, at 226–67 (1991) (describing in detail monopoly and responses); PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE 560–69* (1997) (describing trusts and responses).

209. See Sherman Antitrust Act § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”); *N. Sec. Co. v. United States*, 193 U.S. 197, 271–73 (1904).

210. See JOHNSON, *supra* note 208, at 600–01.

an obstacle to effective social coordination.²¹¹ The Act reordered how Americans acted by eliminating the trust and monopoly as ways to act.²¹²

The written Constitution resolves basic coordination problems via the numerous authoritative, prudential, social-ordering decisions it embodies.²¹³ The Constitution's resolutions are authoritative because they were adopted through a mechanism recognized as authoritative, the state ratification conventions.²¹⁴ The reason why the document in the National Archives *is* our Constitution is because it, and only it,²¹⁵ went through that process.²¹⁶

The Constitution's resolutions primarily regard matters of prudence.²¹⁷ The Constitution embodies a series of prudential judgments addressing fundamental issues.²¹⁸ For example, the length of the President's term²¹⁹: there is no one right answer to the length of a president's term of office, but there are better and worse answers, and a choice must be made.

The Constitution's resolutions are social ordering because they coordinated Americans' activities then and today.²²⁰ For instance, since Ratification—and unlike before—the federal Congress could maintain the United States as a free trade zone by limiting state regulation of interstate commerce.²²¹

The natural law conception of lawmaking identifies the written Constitution as the sole subject matter of interpretation because only it embodies authoritative, prudential, social-ordering decisions for the entire American society.²²² The Declaration of Independence, by contrast, was a legal norm in only one, limited sense: it severed the legal ties between the

211. See HOVENKAMP, *supra* note 208, at 226–67; JOHNSON, *supra* note 208, at 560–69.

212. See JOHNSON, *supra* note 208, at 600–01.

213. See Strang, *supra* note 57, at 87–91.

214. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 6 (1980) (noting that both proponents and opponents of the Constitution accepted the Constitution as authoritative once it was ratified); AMAR, *supra* note 1, at 248.

215. I am putting to one side subsequent amendments.

216. Professor Amar argued that the document that went through the ratification process was different from the document framed in Philadelphia, which is in the National Archives after a long, circuitous historical route. AMAR, *supra* note 1, at 65–69. As Amar acknowledged, there are no major differences between the two documents. *Id.* at 68.

217. See Strang, *Originalism and the Aristotelian Tradition*, *supra* note 79, at 15–23.

218. See *id.*

219. U.S. CONST. art. II, § 1, cl. 1.

220. See Strang, *supra* note 57, at 88–89.

221. With the Supreme Court's assistance via its Dormant Commerce Clause jurisprudence.

222. See Strang, *Originalism and the Aristotelian Tradition*, *supra* note 79, at 15–23.

United Kingdom and the thirteen colonies.²²³ Americans, since 1787 and today, did not and do not recognize the Declaration as having gone through the authoritative process of constitution-making that the written Constitution went through.²²⁴ Furthermore, the Declaration—certainly after the written Constitution’s ratification and likely before—did not order Americans’ lives.²²⁵ Therefore, the natural law tradition’s conception of law supports my earlier claim that the written Constitution is the sole subject of constitutional interpretation, and the Declaration is not part of the Constitution.

The natural law tradition’s analysis of the Constitution is also more attractive than other conceptions. Because of space constraints, let me offer four brief examples that support this claim. First, the natural law tradition offers a more satisfactory explanation of the Constitution’s origins. The legal norms that our legal practice identifies as the Constitution have a unique provenance via the Framing and Ratification of one particular written text.²²⁶ The natural law tradition’s explanation for this is that law is the result of processes like this, a process that includes an authoritative lawmaker or lawgiver.²²⁷ In our society, other processes—even procedurally more attractive ones that may produce substantively better results, such as nonoriginalist precedent²²⁸—are not the Constitution because they did not proceed from the constitutional provenance.

Second, the natural law tradition better accounts for important facets of our Constitution. One important facet of our Constitution is its Preamble.²²⁹ The Constitution set out its purpose in the Preamble.²³⁰ The Preamble identified the Constitution’s purposes in terms of the American People’s common good,²³¹ a concept at home in the natural law tradition,²³² but harder to square with other conceptions of law.

Third, the natural law tradition also better explains why the process of Framing and Ratification was valuable. The process of Framing and Ratification utilized the Framers’ and Ratifiers’ political wisdom to

223. See Strang, *supra* note 6, at 415–16.

224. See ELY, *supra* note 214, at 5–6.

225. See Strang, *supra* note 6, at 468–70.

226. See *supra* Part III.D.

227. See FINNIS, *supra* note 199, at 266–70.

228. Cf. MCGINNIS & RAPPAPORT, *supra* note 44, at 81–99 (explaining why the Constitution’s procedural origin and substantive content is better than Supreme Court nonoriginalist precedent).

229. See U.S. CONST. pmb.

230. See *id.*

231. See *id.*

232. See AQUINAS, *supra* note 196, pt. I-II, q. 90, art. 2.

construct a governmental structure that would facilitate human flourishing.²³³ Their wisdom was coupled with the supermajoritarian processes by which the Constitution was ratified that utilized the American People's wisdom.²³⁴

Fourth, the natural law tradition also makes sense of the limited role ascribed to judges in our legal system.²³⁵ The natural law tradition identified the American People as the primary creators of constitutional law in our legal system. It is the Framers and Ratifiers who possessed the authority, on the People's behalf, to craft and adopt the Constitution. The judicial role is subsidiary. Judges are not tasked with independently creating constitutional norms.

CONCLUSION

In this Article, I argued that, from an originalist perspective, the Declaration of Independence is not part of the Constitution. I first briefly described the debate over the Declaration's role in constitutional interpretation. I then argued that, based on originalism's theoretical commitments, only the written Constitution is the subject matter of constitutional interpretation. I then showed that this limitation of the Constitution to solely the written Constitution fit both important and widely accepted facets of our legal practice. I concluded by suggesting that this limitation of the subject matter of constitutional interpretation to the written Constitution also comported with the natural law tradition's conception of law as an authoritative, prudential, social-ordering decision, aimed at procuring the common good and human flourishing.

233. See Strang, *supra* note 57, at 90.

234. See *id.*; MCGINNIS & RAPPAPORT, *supra* note 44, at 1–3.

235. See Strang, *supra* note 57, at 99–100.

