January, 2005

Dampening the Illegitimacy of the United States' Government: Reframing the Constitution from Contract to Promise

Malla Pollack, American Justice School of Law

Available at: https://works.bepress.com/malla_pollack/2/
For the Constitution, readership is to authorship as consent is to sovereignty.¹

ABSTRACT

Realistic political philosophers working in the United States face a serious problem. The public accepts as axiomatic the fundamental status of the 1789 Constitution. That Constitution, however, even as amended, is blatantly illegitimate, thus undermining any theoretical claim that citizens should respect (as opposed to obey) the existing national government. This paper tenders a method for shoring up the legitimacy of the federal government through the Constitution-as-promise. Realism is central to this project: I am discussing the words of the ratified document with its twenty-seven Article V-created amendments. I am not taking the common path of deflecting problems by building a more just theoretical construct out of philosophy, the subset of practice I approve, or hope in the future moral behavior of my fellow Americans.

I claim that we can dampen the illegitimacy of the federal government by creating a theoretically sound practice to ground the government on the existing popular faith in the Constitution. Specifically, the government should approach the written Constitution as a promise which is made to each reader at each reading, and then strongly regulate itself within the constitutional limits and priorities set by the document so read. The promise binds the government, because the government claims to be the embodiment of the Constitution. Citizens are not bound by the Constitution itself or by the Constitution’s history: the United States works because citizens voluntarily choose to support the Constitution. This voluntary support is the realistic underpinning of the promise approach.

This approach substitutes the metaphor of promise for the standard contract metaphor. Promise has three major advantages over contract. Promise provides an ac-

* Professor, American Justice School of Law; visiting Univ. of Idaho, College of Law through Spring 2006. My thanks for research support to the colleges of law of the Univ. of Idaho and Univ. of Oregon. My thanks for helpful comments on earlier drafts to Randy E. Barnett, Michael Dorf, Richard Fallon, Barry Friedman, Eric M. Friedman, Susan Kuo, Gary Lawson, Kevin H. Smith, Ilya Somin, Edward Waltersheid, and the faculty colloquium of the Univ. of Idaho, College of Law.

¹ Michael Warner, Textuality and Legitimacy in the Printed Constitution 77 (1987).
count that is realistic, one which meshes with both historical and current events. Promise provides an account that is more inclusive, one which honors more of the past and present population. Promise clarifies that the sovereign people retain sovereignty: individuals are not bound by the Constitution; they choose to give support to the Constitution and the constitutional government. Both promise and contract mesh with the importance of the Constitution’s writtenness. Contract, however, has problems dealing with the temporal extension of the Constitution, former political exclusion of currently enfranchised groups, and the post-1789 experience of being born into a constitutional state. Additionally, the contract metaphor chains construction of the document to its meaning at the time the contract was originally formed. Proponents of an evolving constitution have long sought a responsive metaphor, one which authorizes a temporal shift in the authentic readership of the Constitution. Promise fulfills this need while providing a more legitimate grounding for constitutional government.

Even for those wedded to historicism, promise is a better frame than contract. Promissory originalism asks what promises would have been heard in the constitutional language by all members of the ratification-era population. Promissory originalism renders the constitutional government slightly more legitimate than contract originalism by providing a method of somewhat empowering groups disenfranchised in 1789, even though it does not provide the robust legitimacy of the promise frame in evolving-Constitution mode.

The final section of the article is primarily a suggested research agenda. In the hope that others will assist in constructing workable doctrines, it provides a tentative explication of how to apply the evolving promise frame to different types of constitutional language. One point is not tentative, discussing constitutional language en masse is unlikely to be fruitful. People may be created equal, but words are not: they should be divided into categories for consideration.

This essay is only one step in an ongoing, major project. The next segment, The Constitution as Promise: Textualism, Originalism, and Evidentiary Bias, will explain and illustrate how to include the non-elite while empirically investigating 1789 word meaning.

TABLE OF CONTENTS

I. LEGITIMACY: ISSUE AND PROPOSAL ........................................... 125
   A. Thesis ..................................................................................... 125
   B. Legitimacy ............................................................................. 129
   C. The Constitution as an Express Contract ......................... 135
   D. The Constitution as Promise ............................................. 139

II. FOUNDATIONAL POINTS .......................................................... 145
   A. The Writtenness of the Constitution ................................. 145
   B. The Importance of Transparency ..................................... 150
   C. Inclusion ................................................................................. 151
   D. Empirical Word Meaning .................................................. 152

III. CITIZEN-CENTERED REALISM: POLLACK'S
PROMISE IS NOT RUBENFELD’S COMMITMENT .......... 155

IV. THE CONSTITUTION AS PROMISE IN THE
RATIFYING GENERATION ..................................................... 159
A. Promise Accurately Reflects History While Allowing
   Current Inclusion .......................................................... 159
B. Responses to Expected Criticisms ........................................ 167

V. CURRENT EXPERIENCE OF THE CONSTITUTION .......... 173

VI. PRELIMINARY EXERCISES IN READING THE
CONSTITUTION THROUGH PROMISSORY
   EYEGLASSES............................................................................. 182
A. Relational Value Words .................................................... 185
B. Talismanic Words ............................................................... 190
C. Possibly Technical Words .................................................. 191
D. Mundane, Refocused Words ............................................... 194
   1. Jarring Nonsense: Humpty Dumpty
      Squashed ........................................................................... 195
   2. New Entities within Existing Categories:
      An Air Force? .................................................................... 195
   3. Sliders: Promise’s Slippery Slope?
      i. How Much is Twenty Dollars? .................................... 199
      ii. A Well-Regulated Militia ........................................... 203
      iii. Progress and Its Companions ................................. 206

VIII. CONCLUSION .......................................................................... 207

I. LEGITIMACY: ISSUE AND PROPOSAL

A. Thesis

Political theory’s central conundrum is why the ruling government should be obeyed: is the structure worthy of support, that is, legitimate, or is authority based merely on power? My thesis’ legitimizing the United States government would be better served by approaching its constitutive document, the written Constitution, through the metaphor of promise, not contract. This suggested reframing is based on a citizen-centered approach. I focus on citizens because citizens, not judges, are the theoretical core of republican government. Nevertheless, the promise frame provides a methodol-

2 In Matthew Adler’s terminology, this statement asserts deep popular constitutionalism. Matthew D. Adler, Popular Constitutionalism and the Rule of Recognition:
ogy for interpreting the text and, therefore, impacts proper judicial decision-making. The promise frame has an additional advantage. The contract metaphor chains construction of the document to its meaning at the time the contract was originally formed. Proponents of an evolving Constitution have long sought a responsive metaphor, one which authorizes a temporal shift in the authentic readership of the Constitution. Promise fulfills this need. Furthermore, the promise frame requires judges to take at least some public perceptions into account when construing the Constitution. However, the promise frame is not a panacea for solving the alleged problem of constraining judicial interpretation.

Realistic political theory starts with reality. The present population of the United States accepts the legitimacy of the Constitution as an axiom, but may not know the details of the sacred document.


3. The promise frame, therefore, is a form of "mediated popular constitutionalism." Barry Friedman, Mediated Popular Constitutionalism, 101 MICH. L. REV. 2596, 2602 (2003) ("Under a regime of mediated popular constitutionalism, the judiciary plays an important role in identifying those constitutional values that achieve widespread popular support over time.").

4. See, e.g., MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 26 (1988) (noting that some grand constitutional theories focus on "preventing judicial tyranny"); Robert H. Bork, Original Intent: The Only Legitimate Basis for Constitutional Decision Making, JUDGE'S J. 13, 14 (Summer 1987) ("The Constitution is law . . . . This means that . . . it has the capacity to control judges."); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 723 (1988) (stating that originalism "provides assurances against judicial usurpation of power properly belonging to other branches of government, or retained by the people themselves"); Michael S. Moore, Do We Have an Unwritten Constitution?, 63 S. CAL. L. REV. 107, 108 (1989) ("[N]ormative questions about how we ought to conceive of law—here, constitutional law—inevitably get translated into questions of desirable judicial behavior."); But see, e.g., DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 8 (2002) ("Theories are so malleable that a judge adopting any one of them could reach virtually any result."); WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 22–25 (1993) (pointing out that making judicial review central to constitutional theory is an optional choice with hard consequences); Barry Friedman, The Importance of Being Positive: The Nature and Function of Judicial Review, 72 U. CIN. L. REV. 1257, 1295 (2004) (arguing that the Court does not have power to resist long-term popular disagreement: "From a descriptive posture . . . the Supreme Court is not the Supreme Ruler that poses a hope or a threat: rather, [it] acts as a catalyst for debate").

Promise theory builds a bridge between this untheorized faith in historical documents and a considered decision that the current government is worthy of respect. Promise suggests how the government may earn justification through the people's acceptance of the Constitution as legitimate. This is an origin (as opposed to content) theory of legitimacy, but the origin is on-going. Realism is central to this project; I am discussing the words of the ratified document with its twenty-seven Article V-validated amendments. I am not taking the common path of deflecting problems by building a more just theoretical construct out of philosophy, the subset of practice I approve, or hope in


6. The summary of the National Constitution Center's 1997 poll asserts a "startling lack of constitutional knowledge," because "only 5 percent of Americans can correctly answer 10 rudimentary questions about the Constitution." National Constitutional Center, Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll, http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCC NationalPoll/index.shtml (last visited Dec. 1, 2005). However, I would not have chosen the questions asked: for example, the number of members of the House of Representatives, or Amendments to the Constitution. Instead of asking for the four rights listed in the First Amendment (sixty-four percent knew of speech, but only six percent could list all of free speech, press, religion, and assembly), I would have asked if the Constitution included the rights to free speech, press, religion, assembly, and petitioning the government for redress of grievances. (Why did the survey deconstitutionalize petition?) The public deserves credit for knowing that the Constitution is the supreme law of the land (86%), can be modified (76%), does not make Christianity the national religion (75%), makes the President the Commander in Chief of the military (74%), and does not expressly mention a woman’s right to have an abortion (74%). Id. According to a 2002 five question survey, 83% recognized the Constitution’s definition of a citizen, 60% knew that the President could not suspend the Bill of Rights in time of war, 64% knew that Supreme Court Justices did not serve twelve-year terms, slightly over half incorrectly thought that overruling Roe v. Wade would make abortion illegal nationwide, and general confusion reigned regarding Marx's slogan, "from each according to his ability, to each according to his needs." Asked if that slogan was part of the Constitution, 35% said yes: 31% no, and 34% said they did not know. Columbia Law Survey: Americans' Knowledge of the U.S. Constitution (May 2002), available at http://www2.law.columbia.edu/news/surveys/surveyconstitution/fact_sheet.shtml [hereinafter Columbia Law Survey]. In light of the survey evidence, I consider some academics' dismissals of popular understanding a little too dismissive. See, e.g., Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1078 (2001) ("[M]any Americans have little idea of the exact contours of constitutional doctrine and tend to associate the Constitution with whatever they regard as most right and just. The ordinary citizen does not distinguish between constitutional politics and something called 'ordinary politics' . . . ."); Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 Iowa L. Rev. 1287 (2004) (arguing that voter ignorance supports validity of judicial review).
the future moral behavior of my fellow Americans. I start with the Constitution as a historically ratified and amended document because this historical document is the only usable icon honored by a super-majority of the United States' population.

The promise theory provides a way to legitimize the United States government provided that citizens decide to honor the Constitution. Since empirical evidence demonstrates that the supermajority of American citizens do honor the Constitution, promise is a powerful approach for critiquing governmental attempts to manipulate the meaning of constitutional language.\(^7\) Promise, however, does not claim to provide a normative reason for citizens to commit to the Constitution.

To explain the thesis, the rest of this section will discuss the concepts of legitimacy, the standard view of the Constitution as an express contract, and (my thesis) the Constitution as promise. Part II specifies my foundational views: (i) the importance of the constitutional text, (ii) the importance of transparency, (iii) the importance of including all affected persons in the interpretive community, and (iv) the importance of an empirical approach to word meaning. Part III explains the realism underlying my approach by contrasting promise with Professor Rubenfeld's theory of commitmentarianism.

Returning to my promise thesis, Part IV of this article deals with the constitutional enterprise at the time of ratification; it explains why, when attempting to discern “original meaning,” promise is a better metaphor than the intent of contracting parties. Consistent textual originalists should accept this section of my argument, even if they anathemize the rest. Part V moves into the more disputed area of how the Constitution works over time, the so-called evolving Constitution.\(^8\) This section argues that “promise” makes sense of how current citizens experience the Constitution, while “contract” does not. Part VI illustrates how the evolving promise frame affects textual analysis. This last section is the most preliminary and least central. It is the most preliminary because much more work is needed on its complex issues. It is the least central because this article prioritizes constitutional legitimacy, not constitutional explication. The section is primarily a suggested research agenda. However, one point is not

\(^7\) See Fallon, supra note 5, at 1789 (“[T]he legal legitimacy of the Constitution depends more on its present sociological acceptance than on the (questionable) legality of its formal ratification.”).

\(^8\) See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) (asserting that the theory of a living constitution constitutes improper amendment); Roper v. Simmons, 125 S. Ct. 1183, 1229 (2005) (Scalia, J., dissenting) (“In a system based upon constitutional and statutory text democratically adopted, the concept of ‘law’ ordinarily signifies that . . . words have a fixed meaning.”).
tentaive, discussing constitutional language *en mass* is unlikely to be fruitful. People may be created equal, but words are not: they should be divided into categories for more practical consideration. Hopefully, this article will spark insightful responses, helping to shape the promise frame by applying it to specific constitutional segments.

This essay is one step in an ongoing project. The next segment, *The Constitution as Promise: Textualism, Originalism, and Evidentiary Bias*, will explain and illustrate how to include the non-elite during empirical investigation of 1789 word meaning.

### B. Legitimacy

Legitimacy has two faces: pragmatic and moral. Pragmatic legitimacy is the willingness of the population to cooperate with directives. The United States government has pragmatic legitimacy as the perceived creature of the semi-divine written Constitution. My goal is to shore up its moral legitimacy—the quality which renders obedience an ethical imperative, even from citizens who disagree with the specific command at issue.\(^9\)

As to pragmatic legitimacy, governments retain effective power either through the ubiquitous threat of force stifling disagreement or the cooperative acceptance of the government by the population. The United States attempts to run on the second model. “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.”\(^10\) But mere absence of armed rebellion is insufficient for an effective government: the populace needs to actively cooperate. For example, 172,618,970 federal income tax returns were filed with the IRS for the 2003 fiscal year; the IRS examined roughly one-half of one percent.\(^11\) Tax rates would be unbearably higher if the

\(^9\) See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 206–22 (1977) (discussing the morality of civil disobedience of draft statutes during the Vietnam War).

\(^10\) THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

IRS needed to scrutinize fifty or one hundred percent of returns. In this practical sense, "legitimacy" is the populace's acceptance of the government as worthy of its support. In the United States, popular perception of governmental legitimacy is popular perception of the government's constitutional legitimacy. A better theory of moral legitimacy, therefore, increases pragmatic legitimacy.

Moral legitimacy may be based on content or origin. I take as demonstrated that the population of the United States accepts that the federal government has origin legitimacy as the instantiation of the Constitution. This empirical axiom moves our query to the legitimation of the Constitution.

Any claim that the United States Constitution has strong content legitimacy is bunting, suitable only for patriotic speeches to beer-guzzling hotdog eaters. The content of the document is unacceptable, both regarding the substantive rights it creates and regarding the political process it founds. Even putting aside the substantive problems of slavery and the failure to provide minimum positive rights to food, shelter, or education, the procedural error of giving disproportionate power to smaller states in the Senate condemns the document as the instantiation of a long-dead power play. The Supreme

12. See, e.g., LEVINSON, supra note 5, at 11–17, 37 (discussing American quasi-worship of the Constitution and the Supreme Court's willingness to declare itself, like the Pope, the final arbiter of the meaning of Holy Writ).


15. See U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State."). Accord Fallon, supra note 5, at 1808 (using equal state representation in the Senate as one proof that the Constitution is a historical compromise, not a statement of just political principles to which all reasonable persons would agree).
Court’s consistent under-enforcement of constitutional norms further erodes the document’s content legitimacy. Additionally, a claim of content legitimacy requires an objective test for valuing content. As an empirical matter, the population of the United States does not agree on any such test. As a philosophical matter, the principle of equal respect for others’ reasonable beliefs forbids any test except one based on origin. I shall elaborate this analysis of the content illegitimacy of the Constitution later.

Rather than by substance, the Constitution claims moral legitimacy by virtue of its origin, its communal ordination. “We the people of the United States” officially authored the United States Constitution; that is, in 1789, “[w]e . . . ordain[ed] and establish[ed] this Constitution for the United States of America.” However, this political authorship is not merely a singular historical occurrence. The Constitution’s printed text correctly speaks in the present tense. Perpetually “[w]e the people of the United States . . . do ordain and establish this Constitution for the United States of America.” This text “summons the readership of the print audience to recertify it continuously and universally.” Since the underlying sovereignty is in the people, the Constitution both logically and literally is the people’s document. It remains legitimate only if it remains bound by the sovereign people.

In self-proclaimed political theory, the Constitution is the dependent creation of the sovereign people. This creation is ongoing. As Saint Thomas Aquinas said of the Divinity’s relationship to the cosmos, the Sovereign People are not just the historical (efficient) cause

---

19. “We the people . . . do ordain . . . .” U.S. Const. pmbl.: accord The Declaration of Independence para. 2 (U.S. 1776). (“[T]o secure these [inalienable] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”).
21. Id. As Warner states, “we the people” by constituting the government also constitutes itself as a people. See Warner, supra note 1, at 66 (“By constituting the government, the people’s text literally constitutes the people. In the concrete form of these texts, the people decides the conditions of its own embodiment. The text itself therefore becomes not only the supreme law but the only original embodiment of the people.”).
22. Warner, supra note 1, at 77.
of the constitutional government’s coming into being, they are the necessary underlying cause of its continuing in being as a legitimate government.\textsuperscript{23} If the constituted government strays from the constituting text, it becomes theoretically incoherent. The moral legitimacy of the Constitution requires a working tie between the document and the public.

Promise provides the needed on-going tie between the document as enforced and the current population while remaining tethered to the historical inscription accepted by the population. Promise, therefore, provides a robust theoretical model of the moral legitimacy of constitutional government. Promise provides a theory that deals with reality.

My legitimacy project is doubly realistic, hence, both limited and important. First, my project is realistic because it deals with the world in which actual people actually live (not some simplified, theoretical model).\textsuperscript{24} Second, it is realistic because it values transparency, as discussed in the next section. Due to the first type of realism, my theory does not attempt to legitimize governmental use of coercive power to enforce laws that both the enforced and the enforcing persons recognize to be “very bad and immoral ones.”\textsuperscript{25}

Professor Michelman dissects that view of “legitimacy” into two beliefs. First, “that our country’s total, extant system of government by law is morally worth preserving . . . considering the realistically available alter-

\textsuperscript{23} The third way [of proving the existence of the Deity] is taken from possibility and necessity, and runs thus. We find in nature things that are possible to be and not to be, since they are found to be generated, and to corrupt, and consequently, they are possible to be and not to be. But it is impossible for these always to exist, for that which is possible not to be at some time is not. Therefore, if everything is possible not to be, then at one time there could have been nothing in existence. Now if this were true, even now there would be nothing in existence, because that which does not exist only begins to exist by something already existing. Therefore, if at one time nothing was in existence, it would have been impossible for anything to have begun to exist and thus even now nothing would be in existence—which is absurd. Therefore, not all beings are merely possible, but there must exist something the existence of which is necessary. But every necessary thing either has its necessity caused by another, or not. Now it is impossible to go on to infinity in necessary things which have their necessity caused by another, as has been already proved in regard to efficient causes. Therefore, we cannot but postulate the existence of some being having of itself its own necessity, and not receiving it from another, but rather causing in others their necessity. This all men speak of as God. ST. THOMAS AQUINAS, SUMMA THEOLOGICA 14–16 (Fathers of the English Dominican Province trans., Benzinger Bros. ed. 1947), available at http://www.ccel.org/ccel/aquinas/summa.pdf; see also Robert M. Cover, Nomos and Narrative, 97 HARV. L. REV. 4, 16 (1983) (“Maintaining the world is no small matter and requires no less energy than creating it.”).

\textsuperscript{24} See, e.g., Larry D. Krames, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 204 (2004) (“More so than most areas of philosophic inquiry, democratic politics is probably not a good place for ideal theory . . . .”).

natives . . . . ” This I include in my definition of “legitimacy.” Second, a proposition Michelman traces to Hobbes, “that preserving [the government system] requires recognition all-round that the state is . . . within its rights enforcing every law that issues from the system, including some very bad and immoral ones.” This I deny, although I do not consider this article the proper venue for full discussion of the disagreement. Michelman’s Hobbesian ploy is akin to basing a moral system on the response to a Nazi’s question as to which of your twin daughters he should shoot in front of you. Cases this hard make bad law, bad morals, and bad political theory. When we build a road that runs from the shopping center where we buy groceries each week to the public school auditorium where we vote each November, our best template may not be the engineering specifications for a bridge over the Grand Canyon.

Nor am I seeking the deep legitimacy of Platonic (or other) metaphysics. While I believe in God, my God may not be your God. Furthermore, history teaches (if it teaches anything) that theocracies (including those worshiping unorthodox divinities such as the state itself) cannot be trusted to treat individual human beings with respect; somehow earthly power corrupts even (especially?) those who claim to speak in God’s name.

In the absence of any deep, shared metaphysical value system among current Americans, the popular acceptance of an ongoing project type of legitimacy will do. This “will do” is not a skimpy second

---

26. Id.
27. Id. But see Fallon, supra note 5, at 1813 (recognizing that the Constitution is only “minimally legitimate,” and that such minimal moral legitimacy leaves open the question of whether officials are always justified in enforcing positive law).
28. See JOHN RAWLS, POLITICAL LIBERALISM xxvii (1996) (“Before the successful and peaceful practice of toleration in societies with liberal institutions there was no way of knowing of [the possibility of a stable pluralist society]. It is more natural to believe, as the centuries-long practice of intolerance appeared to confirm, that social unity and concord requires agreement on a general and comprehensive religious, philosophical, or moral doctrine. Intolerance was accepted as a condition of social order and stability.”)
29. My refusal to insist on finding an Archimedean point, of course, owes much to Richard Rorty.

To see relativism lurking in every attempt to formulate conditions for truth or reality or goodness which does not attempt to provide uniquely individuating conditions we must adopt the “Platonic” notion of transcendental terms . . . .
best. As discussed below, I accept inclusiveness as foundational. Since the free, informed acceptance of the same deep value system by one hundred percent of the population is impossible, legitimacy based on a deep value system would be exclusionary. Deep legitimacy is, therefore, illegitimate.30

In sum, because the people of the United States assume the Constitution’s legitimacy, the core problem of practical constitutional theory is constructing a theoretically founded practice, which honors the people’s faith, one in which the government may properly proclaim itself the embodiment of the Constitution. The promise frame supports such a practice. It does not provide a normative reason for citizens to choose to honor the Constitution, but that goal is ill considered for two reasons. First, citizens do honor the Constitution; therefore the goal is unnecessary. Second, the goal is impossible, because the Constitution is not worthy. The document’s fairly good moral practices of 1789 (as slightly amended over time) are not as good as the best moral practices of 2005.

My legitimacy project focuses on citizens, not judges. Judges are important in practice because (whether theoretically preferable or not)31 many political issues in the United States spawn law suits.32 I

---

30. “There are many of us and we disagree about justice.” WALDRON, supra note 17, at 1. “[T]he point of law is to enable us to act in the face of disagreement.” Id. at 7.

31. “[T]he delegates at the Philadelphia convention never envisioned the judicial role championed today, . . . . the people never have consented to a redefining of the judicial power . . . .” WILLIAM GANGI, SAVING THE CONSTITUTION FROM THE COURTS 122 (1995). See also KRAMER, supra note 24, at 106–07, 221 (arguing for “departmentalism,” that is allowing the people to be the final arbiter of which branch of government has correctly interpreted the Constitution); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing for constitutional decision making by legislative and executive
prioritize legitimizing the constitutional government. We should then organize the court system to support the constitutional government’s legitimacy.33

C. The Constitution as an Express Contract

Under this long-standing metaphor, the Constitution is a written contract34 whose effective date was March 3, 1789.35 During the Enlightenment, government was recognized to be a social contract formed for the benefit of the public. The population of the United States lived this theory by drafting and ratifying an express, written

branch as well as courts, that is refusing Court authority to review constitutional decisions of other branches. But see Friedman, supra note 3, at 2606–11 (arguing that the problem is overstated because empirical studies support the propositions that (i) “judicial decisions rest within a range of acceptability to a majority of the people,” and (ii) “that even when the public disagrees with some decisions, it nonetheless supports the practice of judicial review”).

32. See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (George Lawrence trans., Harper & Row 1965), in 44 GREAT BOOKS OF THE WESTERN WORLD 50 (Mortimer J. Adler et al. eds., 1990) (“In practice few laws can long escape the searching analysis of the judges, for there are very few that do not injure some private interest and which advocates cannot or should not question before the courts.”).

33. In the early republic, “[t]he Court was but one player, and litigation was but one method, among many in shaping constitutional meaning.” Gary D. Rowe, The Founders, Federalism, and Force: A Litigious Sailor and the Conflict over Constitutionalism in the Early Republic 7 (Interdisc. L. and Human. Junior Scholar Workshop Paper, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582004. The judiciary survived with “fragile dependence not only on Executive support, but on even more fragile public opinion as well.” Id.


According to the strict form of originalism, the Constitution derives its authority from its ratification during particular periods in American history. Under this view, any departure from the understandings of those discrete periods robs constitutional interpretation of its claim to legitimacy. The political theory underlying strict originalism is a form of social contract theory . . . .

Id. While there are relatively few strict originalists, “virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.” Id.

35. See, e.g., Owings v. Speed, 18 U.S. (5 Wheat.) 420, 423 (1820) (noting that the new government of the United States “commence[d] . . . the first Wednesday in March, 1789”); 1 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES 269 (Henry St. George Tucker ed., 1899) (clarifying that on March 4, 1789 the Constitution became effective only as to states which had ratified document). But see Gary Lawson & Guy Seidman, When Did the Constitution Become Law?, 77 NOTRE DAME L. REV. 1 (2001) (concluding that answer varies by provision, March 4, 1789 was the opening of the first session of Congress, but June 21, 1788 was the date the ninth state ratified.).
contract—the United States Constitution. The Amendments are properly enacted contract modifications, provided for in the original contract by Article V. All past, present, and future citizens of the United States are part of this great contract—just as all proper monotheists are part of the Covenant the Divinity formed with Moses and the Israelites at Mount Sinai.\(^{36}\) Wonderful rhetoric, how powerful, how American—how misleading! The Deity’s covenant with Believers rests on the nature of the Deity.\(^{37}\) Deities, unlike governments, are not created by the people for the people’s purposes.\(^{38}\)

As discussed below, neither what happened in the United States between 1787 and 1789, nor how modern Americans experience the Constitution, meshes with the formation of an express contract—at least not with an express contract to which the majority of the population of the United States are parties, leaving aside the issue of why anyone should be bound by a contract merely because many other

---

36. Exodus 19:19–20 (King James), available at http://www.biblegateway.com (“And when the voice of the trumpet sounded long, and waxed louder and louder, Moses spake, and God answered him by a voice. And the LORD came down upon mount Sinai, on the top of the mount: and the LORD called Moses up to the top of the mount: and Moses went up.”).

37. Malla Pollack, The Under Funded Death Penalty: Mercy as Discrimination in a Rights-Based System of Justice, 66 UMKC L. REV. 513 (1998) (discussing the difference between justice in a rights-based system, i.e., a system based on relationships between equal persons, and in a duty-based system, i.e., one centered on a commanding deity).

38. This is the statement of a believer. See, e.g., Genesis 1:1 (King James) (“In the beginning God created the heaven and the earth.”), available at http://www.biblegateway.org; John 1:1 (King James) (“In the beginning was the Word, and the Word was with God, and the Word was God.”), available at http://www.biblegateway.org. But see V.I. Lenin, NOVAYA ZHIZN, Dec. 3, 1905, reprinted in 10 LENIN COLLECTED WORKS 83–87 (1965), available at http://www.marxists.org/archive/lenin/works/1905/dec/03.htm (last visited Dec. 1, 2005) (viewing the covenant as a weapon of political oppression: “Religion is opium for the people. Religion is a sort of spiritual booze, in which the slaves of capital drown their human image, their demand for a life more worthy or less worthy of man.”); FRIEDRICH W. NIETZSCHE, THE ANTICHRIST 84 (H.L. Mencken trans. 1920) (1895), available at http://www.fns.org.uk/ac.htm (last visited Dec. 1, 2005) (viewing the covenant as a noxious fiction created for the benefit of priests).

The priest depreciates and desecrates nature; it is only at this price that he can exist at all.—Disobedience to God, which actually means to the priest, to “the law,” now gets the name of “sin”; the means prescribed for “reconciliation with God” are, of course, precisely the means which bring one most effectively under the thumb of the priest; he alone can “save”. . . . Psychologically considered, “sins” are indispensable to every society organized on an ecclesiastical basis: they are the only reliable weapons of power: the priest lives upon sins: it is necessary to him that there be “sinning”. . . . Prime axiom: “God forgiveth him that repenteth”—in plain English, him that submitteeth to the priest.

Id.
persons are parties. Yes, the politically powerful among the founding generation chose the more modern and humane concept of a social contract over the older, more elitist concept of the divine right of kings; but history has moved on, providing us with living condemnation of the limits of their inclusiveness. Nor should we sidestep the problem by invoking some sort of "collective acceptance" theory. Collectives need to be legitimized before they can claim each of us has some individual duty to abide by their will. The collective entitled "the people of the United States" is merely a post hoc characterization of the population living inside the geographic area now dominated by the government formed during ratification. This people's oneness is merely analogy and the shadow of power, not a breathing natural being. We should not be caught in the anthropomorphic, linguistic trap of reifying the term "social contract." No legitimate contract existed, or exists.

39. See Randy E. Barnett, An Originalism for Nonoriginalists, 45 LOY. L. REV. 611, 629 (1999) ("C]ontacts require the unanimous consent of all its parties, and the Constitution, indeed any constitution, must lack the requisite consent."). Accord Moore, supra note 4, at 121 ("[T]here is no social contract theory that makes the Constitution authoritative in the way democratic theory makes statutory texts authoritative.").

40. Stephen M. Griffin, for example, accepts the legitimacy of the Constitution as a historical matter, based on the eighteenth-century doctrine that the collective "people" could act through "special assemblies" such as those called "constitutional conventions." Stephen M. Griffin, Barnett and the Constitution We Have Lost, 42 SAN DIEGO L. REV. 283, 289 (2005). Griffin, a "historicist," accepts that the Constitution (or the constitutional tradition) has changed over time. See id. at 297 ("[O]ur constitutional 'tradition' has discontinuities that are just as important to understanding American constitutionalism as are the continuities."). Griffin's attack on Barnett correctly recognizes that the Constitution is not a contract. See id. at 287 ("A key assumption behind Barnett's analysis is that the kind of consent required in the constitutional context is the same as the consent required to make a contract."). Griffin correctly recognizes that theory should be based on accurate history. See id. at 295 ("[A] major element of the power of the living Constitution perspective is that it accords with a widespread understanding of how the American constitutional system has developed over time . . . . [I]t is understood to be an accurate description of how American constitutionalism has actually worked."). However, Griffin is too ready to stop at what happened. That Barnett's theory "ha[s] nothing to do with the actual reasons the Constitution was accepted as legitimate when it was ratified," is not a sufficient reason to dismiss Barnett's important point—the absence of individual consent to the Constitution. Id. at 285. Griffin does not confront the emotional and practical reasons why former exclusion cannot be simply ignored. Even though the power mechanisms of eighteenth-century "collective" action ignored most of the people then living, Griffin seemingly thinks we should simply overlook that unpalatable fact and accept the "collective" action as our own; we should merely choose to be the heirs of the eighteenth-century "collective."
Who cares? Contract is, after all, only a metaphor. We may properly invoke our national unity by considering our constitutional government to be a constantly renewed contract among all living Americans. However, in constitutional practice, contract is much more than a metaphor.

Based on the contract metaphor, originalists insist that the text of the original Constitution must continue to take the meaning the words had to readers in 1789; the words of later amendments forever keep the meanings they had to readers on their respective dates of ratification. This methodology is asserted as axiomatic. Anything else is branded amendment without the required Article V process because a contract’s text is interpreted by the intent of the parties at the time the contract became effective. According to originalists, the Constitution should be interpreted similarly because “original meaning follows naturally, though not inevitably, from the commitment to a written text.” I strongly disagree.

Original meaning follows naturally from the commitment to a contract, not from the commitment to a written text. A contract solidifies a deal between two or more simultaneously existing parties. They form a contract for the specific purpose of freezing into binding form a decision as to how they will allocate future risks. Written and oral contracts have the same functions. Written contracts are preferred because they are easier to prove, hence easier to enforce, hence more reliable in practice. Contracts are construed according to objective intent at the time of execution in the sense that the parties’ ex ante decision on risk allocation is not changed in light of ex post experience with how those risks played out. Parties must be expected to rethink the meaning of contract terms after these terms saddle them with a million dollar loss, instead of the expected half-million dollar profit. The time lapse is merely from the execution of the contract to

---

41. See, e.g., Barnett, supra note 39, at 636–43 (arguing that exclusion of Blacks, women, and other groups from ratification of the Constitution is unimportant because “contract” is merely a metaphor, not the basis of the document’s legitimacy).
42. See, e.g., SCALIA, supra note 8, at 38.
43. See, e.g., Barnett, supra note 39, at 634 (“With a constitution, as with a contract, we look to the meaning established at time of formation and for the same reason: if either a constitution or contract is reduced to writing and executed, where it speaks it establishes a rule of law from that moment forward. Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text in violation of the parol evidence rule and thereby to undermine the value of writtenness. Put another way, writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment.”)
44. Barnett, supra note 39, at 630.
45. See, e.g., E. ALLAN FARNSWORTH, CONTRACTS § 7.9 (3d ed. 1999) (stating that “the meanings attached by each party at the time the contract was made,” not at the time of the contract dispute).
its full or failed performance. When the court adjudicates the meaning of the now-failed contract, the parties to the lawsuit are the original parties to the contract or their voluntary successors in interest.

The contract metaphor ignores the violence of the Constitution, the coercive power of the institutions it posits.46 Relatedly, time affects constitutions more complexly than it does contracts. Most importantly, unlike contracts, the affected community changes—from persons who are superficially similar to contracting parties (because they had some power to affect the content or enactment of the constitution) to persons who were merely born into a situation including the coercion-justifying Constitution. Originalists’ mental jump from written document to contract to original meaning is not warranted.47 The originalists, however, seem tightly bonded to that leap.

The Constitution is illegitimate if it is a contract, as discussed at length below. Nevertheless, as long as the metaphor of contract rules constitutionalists, anyone invoking a living constitution will need to justify “amendment” without due process. This locks in an eighteenth-century mindset without theoretical justification. Even worse, it locks in the values of a subset of the eighteenth-century population, the ratifiers and drafters. I seek to change the metaphor, thus simultaneously legitimizing the Constitution and undermining the “axiom” that the Constitution’s main text must be read through eighteenth-century eyeglasses.

D. The Constitution as Promise

Promise is a better frame than contract. I propose that the United States Constitution be viewed metaphorically as a promise made to each citizen at each reading. The promise is made repeat-

46. See, e.g., Robert M. Cover, The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role, 20 GA. L. Rev. 815, 819 (1986) (“[T]he subject matter of constitutional interpretation is violence . . . . the government thereby ordained and established has the power to practice violence over its people.”). “No program or set of principles can found a politics, because politics is always a process in which we are already engaged . . . .” Iris Marion Young, Polity and Group Difference: A Critique of the Ideal of Universal Citizenship, in FEMINISM AND POLITICAL THEORY 117, 133 (Cass R. Sunstein ed., 1990).

edly, in the way a sign alongside the highway separately suggests to each traveler a stop at the Hilton Express® or a purchase of Texaco® gasoline. The promisor is the Constitution itself, not any person or set of persons. However, the federal government purports to be the embodiment of the constitutional promise for the purpose of obtaining supportive action (and non-action) by the citizen/reader. The Constitution is a promise flaunted by current government in the hope that the readers will rely on it when contemplating action, that they will live supportively of the allegedly constitutional structure.48 The Constitution is legitimate to the extent the current population decides to rely on its promises. Most seemingly do so.49 Because of this citizen reliance and the federal government’s self-description as the embodiment of the Constitution, the federal government may claim legitimacy if it acts in conformity with the Constitution-promise. Therefore, the government is limited by the Constitution. No citizen, however, is morally bound by the Constitution. Citizen support of the Constitution is a choice.

A citizen’s choice to support the Constitution is not a fully “free” choice. Generally, United States citizens are socialized to revere the Constitution. However, since the nature of human life is to be born into a person-shaping environment, I see neither reason to try to escape, nor any credible method for escaping, cultural limits.

In sum, promise provides a process-centered method of theoretically grounding the empirically-demonstrated pragmatic legitimacy of the federal government in its character as embodiment of a historical document, the United States Constitution. This is an origin, as opposed to a substantive, theory of legitimacy. Origin, however, is a con-

48. See Jed Rubenfeld, Reading the Constitution as Spoken, 104 YALE L.J. 1119, 1155–56 (1995) (asserting that the act of living under a written constitution constitutes a commitment to continue to try and live under that document as written). But see infra Part III (discussing the gulf between promise theory and Rubenfeld’s commitmentarianism).

49. The promise metaphor would help resolve some of the issues raised by Balkin about Michelman’s legitimacy project. See Jack M. Balkin, Respect-Worthy: Frank Michelman and the Legitimate Constitution, 39 TULSA L. REV. 485 (2004). Balkin, despite approval of much of Michelman’s construct, faults it for not recognizing the full temporal range of a citizen’s Constitution-accepting-act, the past and future view. See id. at 493 (“[I]Legitimacy is . . . a judgment about the constitutional/legal system that looks backward to the past and forward to the future.”). “Promise” incorporates the temporal scope of the Constitution. Balkin recognizes that “judgments of legitimacy require that members of the political community be able to see themselves as part of a political project that extends over time.” Id. “Promise” makes citizens part of the Constitution-project as promisees with power to interpret, accept, and reject. Balkin also wants a “method of feedback” between the Court and the populace. See id. at 494. “Promise” provides feedback loops through reflexive interpretation. See infra Parts V, VI.
This frame celebrates the core value on which the theory of human rights rests, the value of rights-bearing individuals as entities capable of choice. It also provides a method of integrating this value with the historically determined context in which Americans live their less-than-fully autonomous lives.

One could slip into speaking of the federal government as the promisor. In most instances this slip is harmless. However, more properly, the government is a powerful nonhuman entity which claims our allegiance as the alleged incarnation of the Constitution-promise. Allegiance to the Constitution may not equate to allegiance to the current government. In standard rhetoric, in 1789, the Constitution constituted, that is, created, the government; on several occasions, amendments to the Constitution partially reconfigured that government. But this description is misleading; human beings acted to form the legislative, executive, and judicial branches allegedly described in the document. The document itself has no motor. Unlike the Deity, the Constitution’s words do not, of themselves, create matter or energy. Powerful humans created a government which other powerful humans insist is a reflection of the Constitution; that government, however, may be no more accurate than a fun-house mirror.

Was the Constitution ever a contract? At the moments of ratification and amendment, the Constitution came closest to being an express contract—living humans drafted language, discussed whether the language would improve government structure, and voted to empower that language. Non-ratification was a palpable risk. However, people were forced into the so-called contract without personally agreeing to be bound. Furthermore, even at ratification, the document’s content did not deal with citizens as contracting parties. The constitutional text contains descriptions of, and orders to, governmental entities, not citizens. The Constitution does not specify any consideration which each citizen must furnish. Failure by a citizen to

50. See also Stephen Breyer, Our Democratic Constitution, 77 N.Y.U. L. REV. 245, 246 (2002) (“When judges interpret the Constitution, they should place greater emphasis upon the ‘ancient liberty,’ i.e., the people’s right to ‘an active and constant participation in collective power.’”).

51. See WALDRON, supra note 17, at 250–52.

52. In many historical scenes, such as jury nullifications and public protests over the Jay Treaty, “Americans of the Founding era reveal how they understood their role in popular government in ways that we, who take so much for granted, do not . . . . [T]he people who gave that consent [to the formation of the government] were intensely, profoundly conscious of the fact.” KRAMER, supra note 24, at 5.
perform some bargained for exchange does not vitiate citizenship. The Constitution is not and never was a contract to which citizens are parties. 53

The Constitution’s function is to promise that the government will remain within its constitutional description. This is clearest at times other than ratification or amendment. Citizens are promisees. If, in the population’s perception, the government abides by constitutional promises, the government’s request for citizen support is likely to be perceived by the public as legitimate. 54 However, the citizen/promisee is not a party to any contract; she may at any time decide either to toss the Constitution, or to declare the current government illegitimate as a promise-breaker. 55

This view of the Constitution as a binding promise is not a legal grotesquerie. Noncontractual promises have long been enforceable legally against promisors. As per promissory estoppel, section 90 of the Restatement Second of Contracts: “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action

---


54. The limited remedy available against the government is a function of power, not the morally binding nature of the constitutional promises. Whatever your tolerance of puffery, lies, deception, or good faith failure of party platforms and other promises by politicians, such relative ephemera are not on par with the Constitution itself.

55. Many other theories speak (perhaps without so intending) as if the Constitution binds the populace, not the government.

The question of why the Constitution, largely written by generations long dead, should bind us today, is a hotly contested question of political theory. Originalists propose one answer: The Constitution binds us because it was adopted by the People. In the introduction, I proposed a different answer: The Constitution binds us because the overwhelming proportion of the population accepts that it does. One can readily imagine other answers. Following Edmund Burke, for example, we might locate the Constitution’s authority in a view about the organic nature of society over time. Or we might suppose that the Constitution binds us because it embodies substantively just principles.

Dorf, supra note 34, at 1796 (footnotes omitted). In my view, as restated by Dorf, the originalist, Burkean, and moral responses are attempts to bind the people into obedience. Dorf’s response, while framed in parallel fashion, provides a reason why the government is bound by the Constitution: Dorf’s “population” consists of agents who make choices. According to my observation, however, the “choice” is more apparent than real, even though it is about as much choice as a realistic pragmatist can expect.
or forbearance is binding if injustice can be avoided only by enforce-
ment of the promise. 56

Under promissory estoppel theory, one first asks whether the al-
leged promisor should have reasonably expected to induce action or
forbearance by others, primarily those who heard the promise. The
cases then turn to whether the listeners’ reliance was reasonably in-
duced by the promise.57 As with contracts, promissory estoppel cases
do not involve promises made two hundred years ago by persons long
dead to other persons long dead. However, the time lag can be neu-
tralized if we recognize that the current promise is made by the
document, not the document’s long dead drafters or ratifiers. The
promise is reiterated repeatedly; the promise is made anew to each
reader of the Constitution at each reading.

Promissory estoppel, like modern express contract doctrine, con-
strues terms according to the objectively manifested meaning to the
humans involved. The only humans involved in the Constitution are
the citizens, the promisees, the listeners. The non-representative
drafters and ratifiers are merely two subsets of promisees. However,
since they were involved in writing down and launching the continu-
ing promise, we may find their views on its meaning helpful—helpful,
not constraining. The binding promise is only the text of the Constitu-
tion. The promisor is the document itself. Even slipping into the error
of considering the federal government to be the promisor, the promise
should be limited to the text. While the Constitution is one document,
too many disparate voices were speaking during ratification. They
contradicted each other. Before ratification, none of them was an “of-
icial” spokesperson of the government-to-be. As anyone who reads
current newspapers knows, the existence of official spokespersons,
of itself, does not generate consistency. If we bound the current govern-
ment by all promises made in its name, the government would be un-
able to function.58 However, refusing to accord respect or allegiance to

for breach may be limited as justice requires.” Id. The Second Restatement’s rule is only a
slight variation from the First Restatement. See id. § 90, Reporter’s Note (“The principle
change from former § 90 is the recognition of the possibility of partial enforcement.”). The
Restatement of Contracts points to similar rules of estoppel in agency, torts, and restsitu-
tion. See id. § 90, cmt. a (listing sections in the second restatements of agency, torts, and
restitution).

57. See, e.g., Farnsworth, supra note 45, § 2.19, at 96–97.

58. See, e.g., Heckler v. Cnty. Health Servs. of Crawford County, 467 U.S. 51, 60
(1984) (reversing the Third Circuit’s holding of estoppel) (“When the Government is unable
to enforce the law because the conduct of its agents has given rise to an estoppel, the in-
the government to the extent it violates the Constitution/promise lacks these drawbacks.

The promise metaphor’s key supports are reality and inclusiveness. Promise deals with what actually happened in 1789 and what actually happens today. Promise gives more recognition to more of the past and present populations of the United States. The promise metaphor, like the contract metaphor, makes sense of the Constitution’s writteness. The writing is evidence of the exact terms of the promise. As discussed below, however, promise outperforms contract in handling (without fudge, myth, or lies) the temporal extension of the Constitution, the historical political exclusion of large segments of the population, and the modern experience of living under a pre-existing Constitution.

In evolving-Constitution mode, the promise frame provides an account which enables constitutional evolution to co-exist with the Constitution’s writteness. Each reader experiences the Constitution as a promise remade each time he or she reads the document: the text does not change, but the interpretive community does. Those wedded to historicism could increase the legitimacy of their constitutional interpretations (at least slightly) by using the promise frame in originalist mode: In this mode, the promise frame asks what the entire public of the United States heard when the document was ratified. This makes the Constitution more legitimate by providing a method of somewhat empowering 1789’s political outcasts.

This section has introduced my thesis, the constitutional government is more legitimate if viewed through the metaphor of the Constitution as promise than the metaphor of the Constitution as...

59. I accept as obvious that “[c]onstitutions obsolesce rapidly, and must be updated over time to reflect changes in the polity’s circumstances and citizens’ values.” Adrian Vermeule, Constitutional Amendments and the Constitutional Common Law 1 (U. of Chicago Pub. L. & Legal Theory, Working Paper No. 73, 2004), available at http://www.ssrn.com/abstract_id=590341. Professor Vermeule argues that constitutions may be updated in two ways, by judicial common-law reinterpretation and by amendment. He argues against over privileging the former. See id. My contribution is to propose a more citizen-centered model of reinterpretation. I agree with one of Vermeule’s critiques of current reinterpretation models, their empowering of “an ongoing constitutional convention whose delegates are all judges (and hence all lawyers),” despite the value of inclusiveness. See id. at 2.

60. Of course, under Article V, the interpretive community has the power to change the text. U.S. CONST. art. V. But see David A. Strauss, The Irrelevance of Constitutional Amendments, 114 HARV. L. REV. 1457, 1458–59 (2001) (arguing that constitutional amendments are neither necessary nor sufficient to create legal change: “the forces that bring about constitutional change work their will almost irrespective of whether and how the text of the Constitution is changed.”).
contract. The next section acknowledges my fundamental assumptions. The following sections will expand on the realism and usefulness of the promise frame in both originalist and evolving-constitution mode, thus demonstrating its superiority to the contract frame.

II. FOUNDATIONAL POINTS

This article assumes four foundational points. This section briefly describes the points and their importance, but does not purport to provide deep justification. My foundations are (i) the importance of the constitutional text, (ii) the importance of transparency, (iii) the importance of including all affected persons in the interpretive community, and (iv) the importance of an empirical approach to word meaning during constitutional analysis. Readers who already cherish these values may skip to Part III’s explanation of the hard realism which distinguishes Pollack’s Promise from Rubenfeld’s Commitmentarianism or Part IV’s explanation of how the promise frame meshes with ratification history.

A. The Writtenness of the Constitution

Overwhelmingly, citizens, judges, and scholars proclaim the importance of the written Constitution to Americanism. Americans boast that writing down the text constructing and constraining government power is their singular contribution to political theory.61 The Constitution is often invoked as a quasi-sacred document served by its high priests, the Justices of the United States Supreme Court.62

61. A written constitution is the “greatest improvement on political institutions.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803). See also, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 3 (1991). (“The United States was the first state to attempt a written constitution.”); LEVINSON, supra note 5, at 30 (“The special nature of the American Constitution as a writing is a prominent theme in American . . . thought.”). But see LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 179 (1988) (asserting that “the clauses of the First Amendment cannot be taken literally. They do not mean what they say nor say what the Framers meant.”). But see KRAMER, supra note 24, at 50–51 (“Contrary to a common misperception among present-day constitutional lawyers, putting a constitution into writing was not thought [in 1789] to alter its fundamental character . . . . [C]ustomary constitutional law regularly drew on written sources . . . .”).

62. See, e.g., LEVINSON, supra note 5, at 11–17, 37 (discussing American quasi-worship of the Constitution and the Supreme Court’s willingness to declare itself, like the Pope, the final arbiter of the meaning of Holy Writ); see also Griffin, supra note 40, at 311 (arguing that by the New Deal era, the Constitution was so “revered as the cornerstone of the American political system,” that Roosevelt could not suggest fundamental amend-
Yet scholars of international constitutional law find the Court relatively uninterested in the exact wording of the sacred document.63

The relative lack of interest in the document is especially problematic in light of how little else is available to support decision making. The text is the only non-fabulous starting point, the only one that survives the transparency principle. The founders did not have a singular theory of government during the drafting convention, during ratification, or that survived in the ratified document. All was contested: all is compromise. Rather than some short trip to Olympus by a group of Philosopher Kings or the temporary transportation of the public to a higher sphere of being, both ratification and the first decades of the new government are best described as very raucous politics.64 Repeated appeals to some overarching theory of government standing behind the Constitution is non-historical, a failure of transparency.65 Similarly, anti-historical is the common claim that action by the first few congresses (which included giants of the ratification controversy) is heavy support for constitutionality.66 Besides the obvious disagreements among these politicians,67 the claim is undercut by individuals’ repeated changes of position.68 The coup de grace to
such hero worship should be President John Adams’ attempt to silence critics of his presidency with the Sedition Act of 1798, a gross violation of modern First Amendment basics.\footnote{See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 872 n.2 (1995) (Souter, J., concurring) (citing patent unconstitutionality of Alien and Sedition Acts against using acts of early congresses as a litmus test of constitutionality: “like other politicians, members of the early Congresses could raise constitutional ideals one day and turn their backs on them the next” (internal editing and citation omitted)).}

The messy details of the working government emerged over time from an unclear and incomplete document.\footnote{The first presidential election demonstrated a major flaw, since the electors did not vote separately for president and vice-president, “a vice presidential candidate might accidentally walk off with the presidency.” ChernoW, supra note 68, at 272. This fear prompted Alexander Hamilton to ask several electors not to vote for John Adams, which later “incensed” Adams. \textit{id}. at 271–72. In 1816, Thomas Jefferson described the founding period as “very like the present, but without the experience of the present: and forty years of experience in government is worth a century of bookreading: and this [the Drafters] would say themselves, were they to rise from the dead.” Schneiderman v. United States, 320 U.S. 118, 139 n.15 (1943) (quoting 10 JEFFERSON’S WRITINGS 42 (Paul Leics- ter Ford ed., 1904)). See also Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.) (asserting that the words of the Constitution of the United States “called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters”); Kramer, supra note 24, at 94 (stating that during the first years of the union, “the Federalists … learned that almost everything they had thought about how the new government would function was wrong,” listing specifics); 1 Joseph Story, Commentaries on the Constitution of the United States § 220 at 156 (3d ed. 1858) (“[N]othing is indeed more difficult to foresee, than the practical operation of given powers, unless it be the practical operation of restrictions, intended to control those powers.”); 1 Tucker, supra note 35, at 1 (“Political Science … is a practical science and not a theory. The relations involved are infinite, and the social machinery needed for their regulation is too intricate to be constructed upon any other foundation than experience.”). Cf. Rowe, supra note 33, at 7–8 (explaining the 1809 case of Peters v. United States, 9 U.S. (5 Cranch) 115).} The claim that we have convention, when fighting ratification of the Jay Treaty, then-Congressman James Madison went so far as to argue that the treaty, because it dealt with commerce, needed to be confirmed by the House, not just the Senate).
inherited a system of government created by consensus during the founding era is a myth used to justify some decision maker’s own view of what the current system should be. Our heritage from the founding era is the ratified document and a (possibly biased) subset of positions expressed before, during, and after ratification. Furthermore, even if the Drafters had created (or conceived) a political system, the current United States government does not match that system. What enumerated power gave President Jefferson the right to buy the Louisiana Territory? What section of the Constitution authorizes the New Deal Era’s administrative agencies? Consider the Federalist’s paean to a unitary executive whose singleness prevents hiding responsibility for unpopular decisions; how does this mesh with an executive department employing almost one and a half million persons? Furthermore, where does the Constitution authorize ex-

Id. Dorf, supra note 34, at 1811 (explaining Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), by positing that “experience . . . painted for the Court a vivid picture of segregation as it actually existed, so that the Court could assert with confidence that separate could not be equal”).

71. “The constitutional disputes that took place in the nation’s early years did not merely put flesh on the bare bones of an original understanding; in significant ways, they altered that understanding.” Rowe, supra note 33, at 52. See also LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 45–46 (2004) (“It is very seldom the case that the answers to important constitutional questions are reflected in a stable, widespread understanding by the framing generation of the entailments of the text they are enacting.”).

72. “The only noncontroversial thing that constitutes the Constitution is the written document itself.” Moore, supra note 4, at 121. But see Calvin H. Johnson, Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution, in 20 CONSTITUTIONAL COMMENTARY 463, 468 (2003) (“The unmentioned parts of the national government and cultural history of the United States continued from the Articles of Confederation into the Constitution. The words of the Constitution are a thin veneer on top of a thick layer of unstated experiences and collective assumptions.”). Whatever the strength of Professor Johnson’s point for explaining why George Washington was eligible to be president, id., it does not provide a normative basis for limiting twenty-first-century citizens by the assumptions of a subset of the eighteenth-century population.

73. See James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 2 (1986) (discussing possible inaccuracy of basic documents). “[S]ome [documents] have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans. To recover original intent from these records may be an impossible hermeneutic assignment.” Id.

74. See THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961), available at http://thomas.loc.gov/home/histdocs/fed_70-2.html (arguing in favor of a unitary executive). “But one of the weightiest objections to a plurality in the executive, and which lies as much against the last as the first plan is that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds—to censure and to punishment.”

75. In 1996, the Executive Department employed 1,482,644 persons in the General Schedule and Related Grades wage systems. U.S. OFFICE OF PERSONNEL MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS, THE FACT BOOK 28 (2003). In 2002, the number was down 5.1 percent to only 1,406,576. Id. For a detailed study of historical changes
executive agreements, as contrasted to treaties made by the President with the advice and consent of the Senate?  

Therefore, I take as basic that constitutional decision making must start with the actual text of the Constitution: the document ratified in 1789 as modified by the twenty-seven Article V-enacted amendments. All that was ratified was the text.  

The icon held sacred by the American public is that historical text, not some law-professor constructed theory. While I am not advocating limiting analysis to the four-corners of this one document, I am advocating the primacy of its text. The very limitations of the text support clearly admitting departures from it in the name of transparency—the foundational principle I discuss next.

in the unitary executive, see Christopher S. Yoo et al., The Unitary Executive in the Modern Era, 1945–2004, 90 IOWA L. REV. 601 (2005) [hereinafter Modern Unitary Executive] (covering presidencies of Harry S. Truman through William Jefferson Clinton); Christopher S. Yoo et al., The Unitary Executive During the Third Half-Century, 1889–1945, 80 NOTRE DAME L. REV. 1 (2004) (covering presidencies of Benjamin Harrison through Franklin Delano Roosevelt); Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive During the Second Half-Century, 26 HARV. J.L. & PUB. POL’Y 667 (2003) (covering the presidencies of Martin Van Buren through the first administration of Grover Cleveland); Steven G. Calabresi et al., The Unitary Executive During the First Half-Century, 47 CASE W. RES. L. REV. 1451 (1997) (covering the first seven presidencies). This interesting series of articles “reject[s] claims that arguments regarding the proper balance of power between the legislative and the executive branches have been effectively foreclosed by history.” Modern Unitary Executive, supra, at 607. Nevertheless, the level of personal control by the president which the series supports is quite modest compared to Federalist No. 70. THE FEDERALIST NO. 70, supra note 74. See also supra text accompanying note 53. See Modern Unitary Executive, supra, at 607.

We do not claim that there is consensus among all three branches of government as to the president’s control of the removal power and of the powers to direct and nullify. Rather, we claim only that there is no consistent, three-branch custom, tradition, or practice to which presidents have acquiesced permitting congressionally-imposed limits on the president’s sole power to execute the law.

Id. Perhaps more correctly, Yoo et al. see a strong presidency because of the president’s “imperial” position in setting agendas and becoming the embodiment and the focal point of the national will. Federalist 70, however, talks about accepting blame, not just about declaring policy initiatives.

76. See WHITE, supra note 70, at 37–43 (discussing Supreme Court’s gradual acceptance of such agreements starting in 1892). The Federalist lauds the Senate’s role in treaty ratification as a means to prevent the president from being corrupted by foreign powers. See THE FEDERALIST NO. 75 (Alexander Hamilton).

77. 1 STORY, supra note 70, § 406 at 288.
B. The Importance of Transparency

Transparency is important for both practical and ideological reasons. One cannot control one’s agents without knowledge of the agents’ acts—and the facts underlying the agents’ choices. Furthermore, an agent whose reports distort reality is both manipulating and exhibiting disdain for her principal.\textsuperscript{78} Constitutional adjudication without transparent, reasoned opinions is an insult to the ultimate sovereignty of “We the People, of the United States.”\textsuperscript{79} Lies are disrespectful, as well as counterproductive if the lies are unmasked. For those who look at the structure, not just the outcome, of cases, Supreme Court opinions with slipshod framework insult core values of both republicanism and professionalism. Too basic to discuss?

Then why does the Supreme Court repeatedly justify decisions with distorting simplifications? “History is just a means to an end for the [Supreme] Court.” In fact, “[t]wo centuries of Court history should bring us to understand what really is a notorious fact: the Court has flunked history.”\textsuperscript{80} Factually inaccurate opinions preempt the foundational nature of constitutional text without supplying the necessary explication. If a decision is based on fantasy, truth undermines the legitimacy of both the decision and the decision maker. Presumably, the fabrication clothes a policy choice whose paternity the decision maker chooses to veil from the public. Such obscurantism insults the public, even if the public accepts the case’s outcome.

In sum, transparency mandates basing constitutional theory on accurate history,\textsuperscript{81} not myth.\textsuperscript{82}


\textsuperscript{79} U.S. CONST. pmbl. A deceitful promise is one of Kant’s prime examples of behavior which violates both fundamental moral principles: never acting “in such a way that [one] could not also will that [one’s] maxim should be a universal law,” and “[a]ct[ing] so that [one] treat[s] humanity . . . always as an end and never as a means only.” IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT 18, 47 (Lewis White Beck trans., Library of Liberal Arts 1959 (1785).

\textsuperscript{80} LEVY, supra note 61, at 300. Happily, the Court does not have the power “to bind us by their history . . . . Each of us is entirely free to find his history in other places than the pages of the United States Reports.” Cover, note 23, at 19.

\textsuperscript{81} Considering the appalling historical errors and simplicities of Supreme Court case law, this point does not require deciding how much historical sophistication would be
I am not arguing that the Court may appropriately reach any outcome it wishes provided it is open about its manipulations. I am arguing that the Court should meet an additional requirement of openness on top of the, at least theoretically recognized, professional constraints on judicial decision making. Such openness would, hopefully, place certain outcomes out-of-bounds. If not, openness might arouse public opinion against outlier Court decisions, hopefully giving the Court pause.83

C. Inclusion

Inclusion of all inside “[w]e the people”84 is my core rationale for suggesting the promise metaphor. Inclusion, in modern political discourse, is the core plank of political liberalism.85 But inclusion is not a modern fad, the American Revolution started with repudiation of the British claim that colonists were virtually represented in Parliament.86 Over time, Americans have chosen to take seriously the

82. The work of a constitutional analyst consists of:

[Repeated acts of faith that more is at stake than [mere use of power]: that constitutional interpretation is a practice alive with choice but laden with content: and that this practice has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed.

LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 4 (1985); see also WHITE, supra note 70, at 31–32 (asserting that disputes over the New Deal changes in constitutional theory are fueled by disagreement about judging: one side sees constitutional judging as merely another form of political reaction to outside events, the other believes that “constitutional decisions are significantly affected by the existing universe of legal doctrines and categories”).

83. But see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 47–48 (1980) (asserting that, as Justices know, neither political checks nor public opinion effectively restrain the Supreme Court).

84. U.S. CONST. pmbl.

85. “Liberals,” . . . are those of us who insist on the recognition by persons of each other as ‘free and equal’ . . . [Which entitles] a sense of moral obligation to take political disagreement seriously, respect it, and try to work around it.” Michelman, supra note 25, at 352 (using John Rawls’ terminology).

86. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 at 173–81 (1998) discussing that colonists began by claiming that British did not have sufficient common interests with colonists to allow British to virtually represent
equality rhetoric used with more limited extension by the Founding Fathers. The theory of a government constructed by a textual constitution obtains authority, if at all, from the myth of ratification by the entire people. Whatever Thomas Jefferson may have intended, the Declaration does say that “all men are created equal; that they are endowed, by their Creator, with certain unalienable rights.” If historical fact is used to undercut the authority of the entire people to constitute the interpretive community, the polity becomes one based on power, not one based on law. Pragmatic legitimacy, ethics, psychology, and history demonstrate that persons are emphatically more willing to support an institution if they feel themselves included. Moral legitimacy, the importance of each human regardless of wealth, race, class, education, gender, or religion, is central to any moral system I am willing to take seriously.

However, making believe that the history of the United States did not include rampant exclusions, especially on the basis of race, violates the transparency principle and convinces no one. By switching to the promise metaphor, we can include the historically excluded without resorting to fables. One may reasonably believe (as do I) that this inclusion is not enough morally, but it may be as much inclusion as practically possible without trashing one or more of my other foundations, such as the deified written Constitution and the transparency requirement. This article addresses the existing United States, not a philosophical construct.

D. Empirical Word Meaning

The Supreme Court has repeatedly asserted that the “words [of the Constitution] are to be understood in that sense in which they are

the colonists, but not repudiating the theory of virtual representation, under which women and those without property were excluded from colonial legislatures).

87. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 368 (Vintage Books 1993) (1991) (“The founding fathers were unsettled . . . because the American Revolution . . . had succeeded . . . . White males had taken only too seriously the belief that they were free and equal . . . [and were followed by] black slaves and women . . . .”).

88. See HARRIS, supra note 4, at 111.

89. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

90. See also HARRIS, supra note 4, at 73–74.

91. See, e.g., ERNEST J. MCCORMICK & JOSEPH TIFFIN, INDUSTRIAL PSYCHOLOGY 361 (6th ed. 1974) (reporting that experiments prove that “employee participation in decision-making . . . serves to raise the levels of the employee production and morale”); Mariano-Florentino Cuéllar, Rethinking Regulatory Democracy 57 ADMIN. L. REV. 411, 489 n.238 (2005) (“Both theories of rational choice and of social cognition imply that it makes a difference to convince participants that their opinion matters.”); see generally ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993) (discussing the importance of voice, as opposed to the mere ability to exit a situation).
generally used by those for whom the instrument was intended.”92 Approaching the Constitution through the legitimacy problem clarifies the foundational need for inclusiveness, leading to the recognition that the instrument was intended for the general public, not just recondite scholars and judges. Justice Story supported this view93 as did President Franklin Roosevelt.94 Of course, the Court has also asserted different methods of analysis, and its practice is even more complex. However, I agree with those who prioritize the words of the Constitution as the only unquestionable backbone for analysis. Professed textualists, including Justice Scalia, have gradually accepted the illegitimacy of the related concept of subjective originalism—claiming to decide constitutional issues based on the subjective intent of some privileged group, usually denominated as the Founders or Framers or Ratifiers. Instead, textualists look to the objectively ascertainable meaning of the text.95

As a starting point for constitutional analysis, words are the only available bedrock—but words are bedrock only if the “meaning” of a word is an empirical issue. I propose, therefore, that textualists carefully perform empirical research on the meaning of the words in the Constitution. After empirical explication, other methods should and must be used, but one should start with the meaning of the text.

This point is not trivial. Few constitutional researchers perform scholarly, empirical word explication. Historical accounts of the ratifi-

---

92. E.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., joined by Duvall & Story, JJ., dissenting on other grounds) (listing this as one of the unquestioned axioms of constitutional analysis).

93. 1 STORY, supra note 70, at 322 (“In the first place then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them: the people adopt them, the people must be supposed to read them, with the help of common sense: and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.”)

94. Franklin D. Roosevelt, An Address on Constitutional Day: The Constitution of the United States was a Layman’s Document (Sept. 17, 1927), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 359 (Samuel I. Rosenman ed., 1941) (proclaiming the Constitution to be a “layman’s document”); see also KRAMER, supra note 24, at 248 (“[T]his complexity [of constitutional law] was created by the Court for the Court and is itself a product of judicializing constitutional law.”).

95. See SCALIA, supra note 8, at 38. But see TRIBE, supra note 82, at 65, 81–83 (asserting that Scalia does use subjective intent despite his contrary claim).
cation background and discussions tend to locate the results which some subgroup of the public foresaw from a provision. Such forecasts are far different from the meaning of the individual words in the provision.\(^96\) The Court commonly relies on dictionaries.\(^97\) However, dictionaries are biased or useless for the ratification period. They are not (and were not intended to be) reports on common word usage. First, they were didactic, instructing writers in the more literary use of words. Second, dictionaries were not based on surveys of word usage: they were composed by cribbing older dictionaries and by idiosyncratically consulting the “best” authors.\(^98\) In contrast, newspapers are important evidence of actual everyday word use.\(^99\) For the late eighteenth-century, the non-elite population’s reading material was generally limited to newspapers and religious materials.\(^100\) The illiterate and barely literate had access to some of the same material by listening to others read aloud\(^101\) and by attending public orations, especially sermons.\(^102\) Unless textual originalists explore this material, they are using an aristocratically biased evidence set. The next article

\(^{96}\) Such forecasts, furthermore, were unlikely to be realistic. See, e.g., 1 STORY, supra note 70, at 156 (“[N]othing is indeed more difficult to foresee, than the practical operation of given powers, unless it be the practical operation of restrictions, intended to control those powers.”).

\(^{97}\) See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 199 (2003) (consulting the 1785 edition of Johnson’s dictionary and the 1796 edition of Sheridan’s dictionary to define the word “limited” in U.S. CONST. art. 1, sec. 8, cl. 8).

\(^{98}\) See Malla Pollack, What is Congress Supposed to Promote? Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause, 80 NEB. L. REV. 754, 794–97 (2001) (discussing dictionaries). Modern dictionaries are also questionable sources. They disagree with each other, may not include all existing word meanings, and have extreme space constrains. See Clark D. Cunningham et al., Plain Meaning and Hard Cases, 103 YALE L.J. 1561, 1614–16 (1994) (discussing these shortcomings).


\(^{100}\) See, e.g., Forrest McDonald & Ellen Shapiro McDonald, Requiem: Variations on Eighteenth-Century Themes 9 (1988) (asserting that many ordinary Americans limited their reading to the newspapers and the Bible); David D. Hall, The Uses of Literacy in New England, 1600–1830, in PRINTING AND SOCIETY IN EARLY AMERICA 1, 1 (William L. Joyce et al. eds., 1983) (stressing that most families had only a few religious books and perhaps an almanac).

\(^{101}\) See, e.g., Hall, supra note 100, at 12, 21 (reporting on common practice of reading aloud); see also Lawrence A. Cremin, American Education: The Colonial Experience 1607–1783, at 130–31 (1970) (explaining oral use of devotional literature in colonies).

\(^{102}\) See, e.g., Mark A. Noll, Protestants in America 41–42 (2000) (explaining that New England ministers preached regular sermons at least twice a week: these sermons were the center of community life); id. at 50–54, 59–60, 63–64, 73–74 (discussing various Protestant groups which preached to slaves, poor whites, and frontier settlers).
in this series will explain and illustrate a non-elitist empirical analysis of 1789 American word meaning.\textsuperscript{103}

III. CITIZEN-CENTERED REALISM: POLLACK’S PROMISE IS NOT RUBENFELD’S COMMITMENT

This section clarifies the wide gulf between Professor Jed Rubenfeld’s brilliant,\textsuperscript{104} though failed, attempt to place the Constitution into a temporally-extended setting\textsuperscript{105} and my promise theory.\textsuperscript{106} This section is included for two reasons. First, the contrast between the two approaches clarifies my call for realistic theory centered on citizens. Second, the quality of the work and the renown of its author require response by any scholar wishing to be taken seriously on the same topic.\textsuperscript{107}

To summarize briefly something which should be read in full, Rubenfeld posits that time extension is central to being human. As per Locke: “a person is a being that can ‘consider itself as itself, the same thinking being, in different times and places.’”\textsuperscript{108} Rubenfeld then leverages the temporal nature of the human self-consciousness into a response to Bickel’s counter majoritarian difficulty: because “a people” exists over time, judges do not violate the will of the sovereign people by enforcing the sovereign people’s long-term commitments even if that commitment is opposed by the current, living citizens.\textsuperscript{109}

Writing the Constitution is an action taken in the past as part of the

\textsuperscript{103}See Malla Pollack, The Constitution as Promise: Textualism, Originalism, and Evidentiary Bias (forthcoming).

\textsuperscript{104}See Pierre Schlag, The Brilliant, the Curious, and the Wrong, 39 STAN. L. REV. 917, 921 n.9 (1987) (“The virtue of brilliance is that it achieves at once a great distance from the conventional understanding and yet returns to shed a stronger light on the subject matter.”). \textit{But see} Daniel A. Farber, Brilliance Revisited, 72 MINN. L. REV. 367, 367 (1987) (arguing that “brilliant” legal arguments, i.e. “clever but highly counterintuitive theories,” are “unlikely to be valid.”); Daniel A. Farber, The Case Against Brilliance, 70 MINN. L. REV. 917 (1986).


\textsuperscript{106}While perhaps unimportant to anyone but me, this article was not written as a response to Jed Rubenfeld’s Freedom and Time.


\textsuperscript{108}Rubenfeld, supra note 105, at 137 (quoting John Locke, An Essay Concerning Human Understanding 335 (Peter H. Nidditch ed., 1979) (1689)).

\textsuperscript{109}Rubenfeld, supra note 105, at 11, 168–75.
American people's on-going creation of its own long-term commitments. In the end, Rubenfeld argues “that written constitutionalism is properly understood as a nation's struggle to lay down and live its own fundamental political commitments over time.” Freedom, like humanity, only exists in temporal extension and consists of the people's on-going commitment to live by its self-chosen, but continually re-examined, ideals. “Two moments at least are required for law: one at which a rule is established, and one at which it holds.”

Every commitment is a kind of text that the self gives itself to govern itself over time. And we cannot live without such texts. They may be self-authored or not, but we will live, one way or another, within lines laid down for us in the past to govern our future. This means: freedom is always a struggle over the authorship of our commitments. Man must commit himself to be free.

In other words, freedom is being the author of the texts controlling one's life.

First problem is that the written Constitution vanishes. “Written” is a trope for “over time” and “spoken” is a trope for “in the present instance.” The historical document composed in 1787 with its twenty-seven Article V-enacted official amendments is, therefore, not necessarily the only “written” Constitution, that is, a long-term commitment binding the “people” of the United States. This expansive definition ignores the unique iconic status of the historical document to the American citizenry. The death of the specific document kills even that vague objective standard for measuring the fidelity of the Supreme Court to the people's commitment. “Hold” is never defined beyond its generalized relationship to a commitment the people have decided to keep. But since the people never exist in the present (or at any past instance) and its voice is only authentic if the statement “holds,” I find this rather unhelpful. As Richard Rorty says of Platonic ideals, “The trouble with [Rubenfeld's commitmentarian constitutional limits] is not that they are ‘wrong’ but that there is not a great deal to be said about them—specifically, there is no way to ‘naturalize' them or otherwise connect them to the rest of inquiry, or culture, or life.”

110. See id. at 77 (recognizing constitution writing as necessary at founding moment to provide rules of recognition for when “voice of the people” has officially spoken); id. at 165 (“[C]onstitution writing became a constitutive element of democracy itself.”).
111. Id. at 93.
112. See id. at 156.
113. Id. at 85.
114. Id. at 97.
115. RORTY, supra note 29, at 311.
The second problem is that the living humans inhabiting the United States vanish. This is most visible in the extremely brief section “How a Constitution Binds,” which never explains the relationship between any individual citizen and either the Constitution or the “people.” Rubenfeld addresses, but does not overcome, my two major objections to his core concept of “a people,” one being ontological and the other moral. The ontological problem is that “people” is a noun, not a moral agent. Rubenfeld’s response is to use extreme cases of “individuals” to argue that individuals are no more real than “peoples.” If this attack worked, individuals would become problematic, without making “peoples” more viable. However, the attack does not work. Rubenfeld’s examples are the type of teasers which give metaphysics a bad name. For example, if an individual has many organ transplants or a complete religious conversion, is she the “same person?” The answer in the real world (not the metaphysical one) is it depends on why you ask the question. Do you want to know whether the state should execute a murderer who has found religion during his fifteen years on death row? Do you want to know if the subject of a brain transplant should inherit from the father of the brain donor? However, the existence of imaginable cases where natural language speakers do not have a clear answer to whether the “same” individual has continued does not change the overwhelming ease of recognizing the continuation of most biological individuals. “Peoples” on the other hand are always problematical, because they “exist” only as collective nouns: they are not independent moral agents. The individuals inside a “people” are not related to the “people’s” commitments in the same way that my spleen, liver, cells, and limbs are related to “my” commitments. This raises the moral issue, the third problem.

The third problem is that individual humans’ control of government vanishes. Rubenfeld correctly posits that democracy requires

---

116. See RUBENFELD, supra note 105, at 176–77.
117. See id. at 93. Rubenfeld also addresses an objection from “rationality” based on Arrow’s Impossibility Theorem. See id. I accept the refutation of public choice theory’s attack on democracy explained in Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 COLUM. L. REV. 2121 (1990) (providing a brilliant refutation of public choice theory’s attacks on democracy by explicating deliberative democracy).
118. See RUBENFELD, supra note 105, at 138–39.
that the commitments binding on moral agents be chosen by the bound moral agents. He therefore rejects communitarianism. However, he also recognizes that individuals are born into “peoples” with no ability to choose otherwise, and that “peoples” generally start with violence. This tension is welded into the core of Rubenfeld’s theory by his insistence that the binding commitments authored by peoples exist over time and correctly resist the contrary aggregated will of any collection of currently living individual citizens. Rubenfeld deflects this tension by referring to “commitments” by “peoples” as opposed to acts of “will” by aggregated individuals. Nevertheless, in Rubenfeld’s freedom over time, individuals never choose for themselves, only “peoples” choose, and “peoples” do not exist.

In sum, in order to address the theoretical problem of judicial review, Rubenfeld has created a theory that has no way of determining the substance of proper commitments, no free individual citizens, no ability to cabin the discretion of government actors (judicial or otherwise), and no anchor in public beliefs.

Promise is not grand, not utopian, not justified down to the bottom turtle, but it is realistic and citizen-centered.

120. See Rubenfeld, supra note 105, at 97–100.
121. See id. at 145, 156–59.
122. See id. at 172–74. But see Ely, supra note 83, at 70 (“Controlling today’s generation by the values of its grandchildren is no more acceptable than controlling it by the values of its grandparents . . . .”).
123. Isaiah Berlin warned, that once I accept the view that there is a division between the present self and the true self.

I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their ‘real’ selves, in the secure knowledge that whatever is the true goal of man . . . must be identical with his freedom—the free choice of his ‘true’, albeit often submerged and inarticulate, self [which is known to me].

124. See Wikipedia, Turtles All the Way Down, http://en.wikipedia.org/wiki/Turtles_all_the_way_down (last visited Dec. 14, 2005). In one version of this recurring legend, a colonial poohbah hears a local story claiming that the world stands on the back of a turtle and inquires what supports the turtle. A native responds (with patience, wisdom, but no brilliance) that turtles extend all the way down. Id. But see Rubenfeld, supra note 105, at 158–59 (recognizing the brutality of founding moments of the United States).
IV. THE CONSTITUTION AS PROMISE IN THE RATIFYING GENERATION

A. Promise Accurately Reflects History While Allowing Current Inclusion

Constitutional theory can stand firmly only if it stands on reality. No legitimate contract was formed in 1789, but a promise was launched. No legitimate contract survives today, but the promise is still motivating citizens.

Many stakeholders were not allowed to vote for or against the 1787 Constitution. The Revolutionary War was not fought solely by European-Americans. Native Americans and African-Americans also fought on both sides. These groups were quite aware that their futures were being shaped. Some eighty to one hundred thousand slaves fled their masters during the war, of which fifty-five to sixty-five thousand were males between fifteen and forty years of age, that is, “half of the prime agricultural and artisanal black male workers in the South.” Warfare decimated Indian areas, preventing normal hunting and agricultural pursuits even for those not killed in combat. Native Americans had no difficulty recognizing that changes in Europeans’ political structure affected their ability to survive by play-

125. See COLIN G. CALLOWAY, THE AMERICAN REVOLUTION IN INDIAN COUNTRY: CRISIS AND DIVERSITY IN NATIVE AMERICAN COMMUNITIES 26–64 (1995) (describing how, despite majority desire to stay neutral, Native Americans individually and as groups were pressured into fighting on both sides); see also BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION (1972) (describing how groups of Iroquois Confederation fought on both sides); ARMSTRONG STARKIE, EUROPEAN AND NATIVE AMERICAN WARFARE, 1675–1815, at 111–35 (1998) (providing an overview of Native American fighting in the Revolution).


128. Nash, supra note 126, at xxiii.

129. See CALLOWAY, supra note 125, at 48–65 (describing interference of war with daily life and food supply).
ing one foreign power against the other. At the end of the Revolutionary War, Native Americans were outraged by Great Britain’s treaty cession of Native American lands to the United States. If the States had not formed a unitary Indian policy, the tribes could have attempted to play one State against another. Poor whites and women were also affected by politics but excluded from political deliberation. While the franchise was widely available in the Colonies for adult white males, many colonies had property qualifications. After the Revolutionary War, the poor, slaves, Native Americans, and women still inhabited the now-independent United States, but

130. See CALLOWAY, supra note 125, at 8–11 (explaining that by the eighteenth-century tribal policy had become a balance of power among tribes and different sets of Europeans); id. at xiv–xv (reporting Indian chiefs’ contemporary evaluation of the American Revolution as the greatest disaster that could have happened to them).

131. “As news of the peace terms filtered into Indian country, Indian speakers in council after council expressed their anger and disbelief that their British allies had betrayed them and handed their lands over to the their American and Spanish enemies.” CALLOWAY, supra note 125, at 273.

132. CALLOWAY, supra note 125, at 273.

133. Generally, for those who had fought in the Revolutionary War, property qualifications were waived in the elections for delegates to the ratifying conventions. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131 (1991). The proportion of the population eligible to vote in the colonies varied by subdivision inside colonies as much as between colonies. The best estimate is that in most areas some fifty percent to seventy-five percent of adult, free, white males were eligible to vote. The percentage increased slightly after the Revolution. See CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760–1860, at 38, 111–12 (1960): see also ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 24 (2000) (“By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote.”). Accord AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 7, 503–05 (2005). The elections for delegates to the state ratifying conventions were more democratic than previous state elections because New York waived its property requirement, several states with disparate property qualifications for different elections chose their lowest requirement, Connecticut allowed all town inhabitants (not just “town freeman”) to vote, and several states liberalized the property qualifications for candidates.

134. Native Americans lived among white settlements, not solely beyond the moving frontier. DANIEL R. MANDELL, BEHIND THE FRONTIER: INDIANS IN EIGHTEENTH-
overwhelmingly they were not allowed to vote for or against ratification. In sum, the entire population of the United States was involved in the war and its aftermath, but the entire population was not represented in the empowerment of the current Constitution.

Nor can we claim that the voters virtually represented the disenfranchised: colonial Americans never spoke with one voice. Even the necessity of revolution was contested.

According to some sharp-eyed, contemporary observers, the separation from Great Britain was the work of a few demagogues, or a fraud perpetuated on the majority by a merchants’ cabal. As for the period immediately predating

---

135. Female suffrage was limited to the few propertyed widows allowed to vote in early New Jersey. See WILLIAMSON, supra note 133, at 104. “Free African Americans were tacitly enfranchised in North Carolina, Massachusetts, New York, Pennsylvania, Maryland, and Vermont.” KEYSSAR, supra note 133, at 20. These same statutes tacitly enfranchised Native Americans and create the possibility that some Native Americans living among European-American settlers and away from tribal enclaves cast ballots. Keyssar does not, however, present any evidence that the statutes’ failure expressly to disenfranchise non-whites resulted in votes being cast by non-whites. Similarly, Justice Curtis assumes that technically enfranchised free African Americans voted in several states, but does not mention any evidence that they actually cast ballots. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 576 (1856) (Curtis, J., dissenting) (“[I]n at least five of the States [free African Americans] had the power to act [by voting], and doubtless did act, by their suffrages, upon the question of its adoption.”). Curtis made a stronger statement about Massachusetts:

   It is true, beyond all controversy, that persons of color, descended from African slaves, were by the 1780 Constitution of the Commonwealth of Massachusetts made citizens of the State and such of them as have had the necessary qualifications, have held and exercised the elective franchise, as citizens, from that time to the present.

   Id. at 574. See Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836). However, the Massachusetts case on which Justice Curtis relies makes no mention of the franchise being held or used by anyone.

   136. On May 5, 1775, the date Benjamin Franklin returned to Philadelphia from London, “there was still no consensus [in the Second Continental Congress], except among the radical patriots in the Massachusetts delegation, about whether the war that had just erupted should be waged for independence or merely for the assertion of American rights within a British Empire that could still be preserved.” WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 291 (2003).

   137. See, e.g., PETER OLIVER’S ORIGIN & PROGRESS OF THE AMERICAN REBELLION: A TORY VIEW 145 (Douglass Adair & John A. Schutz eds., 1961) (asserting that during the American Revolution the generality of people were “weak, & unversed in the Arts of Deception,” hence misled by a few demagogues into unjustified rebellion); id. at 65 (claiming that merchants defrauded the lower classes into thinking that “liberty” was in the lower classes’ interest, when merchants were only trying to enlarge their own selfish interests).
ratification, many sources assert that crisis only existed in Federalist propaganda.\footnote{138}

The United States Constitution is a document whose original text was composed in 1787 by a group of fifty-five adult white males,\footnote{139} all of whom (as a group) had more education, money, and political leverage than the average resident of the thirteen States at the time.\footnote{140} Certainly, none of them were indentured poor,\footnote{141} slaves, Native Americans, or women. The Constitution became binding super-law on March 3, 1789, after being ratified by special purpose conventions in nine states—\footnote{142}a procedure created by the new Constitution as opposed to one legitimized by the then-current rules of government, the Articles of Confederation.\footnote{143}

Peter Oliver was a wealthy Massachusetts judge who moved to England during the Revolutionary War. His manuscript is dated 1781. See id. at ix–xii.  
\footnote{138}{E.g., Forrest McDonald, \textit{E Pluribus Unum: The Formation of the American Republic} 1776–1790, at 256–57 (Liberty Fund 1979) (1965) (stating that the months before the meeting of the Constitutional Convention were “critical” only if you wanted a national government: most Americans had a better life than ever before); Jackson Turner Main, \textit{The Antifederalists: Critics of the Constitution} 1781–1788, at 178–79 (Quadrangle Books 1964) (1961) (asserting that Federalists grossly exaggerated the United States’ economic problems during the ratification discussions).}

\footnote{139}{Fifty-five includes all delegates who attended the drafting convention at any time. The Founding Fathers’ Delegates to the Constitutional Convention, \url{http://www.archives.gov/national/archives-experience/charters/constitution_founding_fathers_overview.html} (last visited Oct. 18, 2005) (an online exhibit). The delegates “scarcely constituted a cross section of America. They were white, educated males and mostly affluent property owners. A majority were lawyers . . . . The majority owned public securities, the values of which would be affected dramatically by decisions taken [at the convention].” Chernow, supra note 68, at 229.}

\footnote{140}{U.S. National Archives & Records Admin., The Founding Fathers’ A Brief Overview, \url{http://www.archives.gov/national/archives-experience/charters/constitution_founding_fathers_overview.html} (last visited Dec. 14, 2005) (an online exhibit) (“The 55 delegates who attended the Constitutional Convention were a distinguished body of men who represented a cross section of the 18th-century American leadership. Almost all of them were well-educated men of means who were dominant in their communities and states, and many were also prominent in national affairs.”)}

\footnote{141}{When indentured servants are included it is a fair estimate that the class of poor people in the North comprised nearly one-third of the whole white population.” Jackson Turner Main, \textit{The Social Structure of Revolutionary America} 41 (1965).}

\footnote{142}{See sources cited supra note 35.}

\footnote{143}{Compare U.S. Const. art. VII. (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same”) \textit{with} \textit{The Articles of Confederation}, art. XIII (requiring consent of the legislatures of every state for alteration to the Articles of Confederation). For a list of additional procedural problems with the drafting and ratifying of the current Constitution, see 2 Bruce Ackerman, \textit{We the People: Transformations} 34–39 (1998) (listing irregularities).}
The 1787–1789 ratification of the Constitution is a stereotypical example of political wrangling,144 employing “every political trick in the book,” including “vilification, slander, invective, and downright deception.”145 The included philosophical discussions146 were not between unsituated selves separated from factional biases by a veil of ignorance.147 As for the ratifiers148 of the original Constitution,149

144. “[R]atification was part of the politics of the period . . . . In each of the states, peculiar histories shaped the process.” RATING THE CONSTITUTION 5 (Michael Allen Gillespie & Michael Lienesch eds., 1989). “The rancor ushered in a golden age of literary assassination in American politics. No etiquette had yet evolved to define the legitimate boundaries of dissent. Poison-pen artists on both sides wrote vitriolic essays that were overtly partisan, often paid scant heed to accuracy, and sought a visceral impact.” CHERNOW, supra note 68, at 244. Some of the main discussions of the ratification details include the thirteen state specific essays collected by Gillespie and Lienesch. See RATING THE CONSTITUTION, supra, as well as the classic work by Robert Allen Rutland. ROBERT ALLEN RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787–1788 (Northeastern Press 1983) (1966); see also RATING THE CONSTITUTION, supra, at 2 (highlighting the importance of Rutland’s work).


146. Philosophical discussions did occur: they were important. See, e.g., Douglass Adair, “That Politics May be Reduced to a Science”: David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBRARY Q. 343, 347 (1957), reprinted in THE FORMATION AND RATIFICATION OF THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 21, 25 (Kermit L. Hall ed., 1987) [hereinafter FORMATION AND RATIFICATION] (“[T]he use of history in the debates both in the Philadelphia Convention and in the state ratifying conventions is not mere rhetorical-historical window-dressing . . . . The speakers were making a genuinely ‘scientific’ attempt to discover the ‘constant and universal principles’ of any republican government . . . .”). RATING THE CONSTITUTION, supra note 144, at 19 (“Throughout the [ratification] process, ideology was a factor as well [as economics and self-interest]. In some of the states, such as North Carolina, ideological factors seemed particularly prominent.”). See CHERNOW, supra note 68, at 275 (“Like other founding fathers, Hamilton inhabited two diametrically opposed worlds. There was the Olympian sphere of constitutional debate and dignified discourse . . . and the gutter world of personal sniping, furtive machinations, and tabloid-style press attacks . . . as they jockeyed for personal power and advantage in the new government.”).

147. But see JOHN RAWLS, A THEORY OF JUSTICE (1971) (judging righteousness of a system by whether it would be chosen by persons who did not know their social, economic, or power position in the polity under consideration, i.e. behind a veil of ignorance).

148. Bobbitt places modern U.S. citizens in the shoes of the ratifiers of all segments of the Constitution and likens the “Framers” to mere “draftsmen.” See BOBBITT, supra note 61, at 127. I agree to the extent of referring to these over-hallowed (though remarkable men) as “Drafters.” However, Bobbitt produces two contradictory tropes: the constitutional document is like a trust instrument with the current public the beneficiaries, but the Constitution is a contract between state and sovereign with the public as successors in interest to all earlier ratifier/sovereigns. See id. Bobbitt, on his own terms, is not contradictory because he separates justification from legitimacy. See id. at 120. But the tropes do collide—beneficiaries cannot change the terms of a trust, entire ownership vests
each state decided on its own method of choosing delegates to its own ratifying convention. Each of these decisions was made independently by each state. Approximately 1750 men were locally chosen as delegates to these state conventions. The legislature of Pennsylvania voted to hold rapid elections for delegates to a ratifying convention only after a Federalist mob physically dragged dissenting members into the chamber to obtain a quorum; the delegate election did not allow the six month period for public consideration then required by Pennsylvania’s state constitution. This sounds very much like politics as usual; notice the striking similarity to the Texas legislature’s recent problem with Democratic members leaving the jurisdiction to prevent a quorum and the subsequent Republican gerrymander. Also politics as usual was the Federalists’ offer of a high government office to John Hancock in return for his endorsement. As for the Federalist-spread rumor that delegates to the Massachusetts ratifying convention would not be reimbursed for their expenses unless ratification passed, that tactic may be low even for normal politics.

Ratification was probably not supported by a majority, even a majority of those eligible to vote. In most states, the voting districts were malapportioned with a consistent bias in favor of longer settled, more commercial, more Federalist areas. One man, one vote reap...
portionment would have meant refusal to ratify by New York, South Carolina, and Rhode Island. According to the leading historian of the Massachusetts ratification, if the state legislature had not voted down a proposal for a popular vote, instead of a convention of delegates, “the proposed system would unquestionably have been rejected by an overwhelming vote.” About 480,000 of the approximately 640,000 adult white males who lived in the original thirteen States in 1789 did not vote: some were legally ineligible, but most simply did not bother. In 1790, the United States held approximately 1,615,000 white males and 1,557,000 white females for a total of 3,172,000 whites. Non-whites totaled approximately 757,000. Using very rough calculations and assuming a stable population between 1789 and 1790, about forty percent of the male white population were old enough to vote. If forty percent of white females and forty percent of non-whites were also old enough to vote, the unfranchised number some 925,000. This ignores the modern lowering of the voting age from twenty-one to eighteen. Lowering the age limit would have enfranchised a very large number of additional persons because the population was relatively young. The median age of white males in 1790 America was 15.9 years. In contrast, the median age of the American population in 2000 was 35.3.

158. Even with slanted representation, New York ratified by a “wafer-thin majority” and only after the state’s convention learned that New Hampshire and Virginia had become the ninth and tenth states to ratify, thus ensuring the formation of the new federal government and threatening commercial New York with the problems of outsider status. See Cherno, supra note 68, at 268.

159. See Roll, supra note 157, at 31–34: But see Grant M. Hayden, The False Promise of One Person, One Vote, 102 Mich. L. Rev. 213, 215 (2003) (arguing that a decision to apply the one person, one vote standard is no more neutral or objective than decisions made with respect to the other two voting rights, which are who receives the right to vote and which groups deserve the right to a qualitatively undiluted vote).


163. See id.

164. See id. at 11 tbl. A 86–94.

In sum, the United States’ mythic founding is bogus. The ratification process was not a morally superior operation. If ratification is viewed as formation of a contract, a super-supermajority of adult Americans living in 1789 did not affirmatively choose to be parties.\textsuperscript{166} We cannot change these facts. However, if we want to live our current allegedly inclusive ideology, we need to include those who were historically not included by our political predecessors. Hence, my suggestion is that those who insist on originalism (as I do not) view the 1789 document as a promise to all, not a contract formed by a minority. How?

What I propose is that originalists consider language usage by all social groups in the ratification era of the United States. This expanded language base mirrors the move from the metaphor of express contract to the metaphor of promise. Promise binds a speaker based on the reasonable reliance of listeners. All groups present in the 1789 United States were listeners. All of them had some ability to derail the Constitution and the resulting central government. While the metaphor of promise does not provide equality, it does give some recognition to persons not allowed to vote or unable to comment during ratification. Importantly, promise allows inclusion without misrepresenting history.

Promise, furthermore, focuses on the limitations the powerful actor asserted to gain support (or at least acquiescence) from less powerful listeners. Promise refuses arguments based on abstruse history which purport to prove that some wide-sounding constitutional provision does not have such a generous meaning.\textsuperscript{167} While I greatly enjoy discussions of the seventeenth-century Parliamentary abuses which led to the \textit{ex post facto} clauses,\textsuperscript{168} or the details of seventeenth-}

---

\textsuperscript{166} These figures do not support the rosy tone in Amar’s assertion of the Constitution’s origin-legitimacy based on a “performative act of ordainment [which was] at the time the most democratic and inclusive act in world history” and “so understood by those doing it”: an act during which “[t]he American People [birthed the] text . . . with their minds wonderfully concentrated by the epic events they experienced and the palpable evils they endured.” Akhil Reed Amar, \textit{The Supreme Court 1999 Term, Forward: The Document and the Doctrine}, 114 HARV. L. REV. 26, 35, 44 (2000).

\textsuperscript{167} For example, the ban on double jeopardy is a bad joke on those who do not realize that having survived jeopardy in one state court system does not prevent their re-trial both by other states and by the federal government. \textit{Compare} U.S. Const. amend. V (“[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .”) \textit{with} Heath v. Alabama, 474 U.S. 82, 87–90 (1985) (holding that prosecution for the same murder by two different states does not violate double jeopardy clause for the same reasons successive prosecutions by a state and federal government do not violate the clause).

century English search procedure, such nuances were unknown to most ratification listeners. The heard promise should not be interpreted narrowly based on scholarly research. Language used in the Constitution for the purpose of quieting disaffection should be enforced as a promise spoken to induce reliance and which has induced the listener to take action in reliance. In sum, promise binds the Constitution to its correct function—limiting the constituted government.

B. Responses to Expected Criticisms

What are the drawbacks to my proffered move in its originalist form? My criticism is that promissory originalism is an inadequate reformation; I strongly prefer promise in the evolving-constitution mode.

Why am I bothering with such a long discussion of modifying originalism if I consider originalism an improper approach? My prime reason is that a large number of judges and thoughtful scholars are originalists of some type. While many of my substantive problems with the originalist reading of the Constitution can only be fixed through amendment or abandoning originalism, some important errors can be fixed by using promise originalism. Additionally, I take seriously the emotional and symbolic burdens of former exclusion.

169. See Atwater v. City of Lago Vista, 532 U.S. 318, 330 (2001) (relying on English practice as early as 1671 in holding that the Fourth Amendment does not prevent police from placing a woman in handcuffs and taking her to jail for driving without a seat belt).

170. Justice Story agreed: Constitutions “are instruments of a practical nature, ... fitted for common understandings. The people make them; the people adopt them, the people must be supposed to read them ... and cannot be presumed to admit in them any rec- ondite meaning.” 1 Story, supra note 70, at 322.


172. See, e.g., double jeopardy, ex post facto clause, and search doctrine discussed supra notes 166–69.

173. See Ely, supra note 83, at 5 (footnotes omitted) (“The Constitution [unlike the Articles of Confederation] was submitted for ratification to “the people themselves” ... A few spoil-sports pointed out that this was not significantly more “democratic” than submitting the document to the legislatures (since the conventions themselves would necessarily be representative bodies and much the same cast would likely be chosen as the people’s representatives). But the symbolism was important nonetheless.”)
borne by large segments of the current population. These burdens would be lightened, even if only slightly, if originalists were convinced to use promise originalism. Second, broadening the sources used in originalism should make slippage from textual into intent originalism more difficult. Relatedly, if forced to look at the entire ratifying-era population, the Court should have more difficulty concocting the existence of some commonly accepted popular meaning or intent behind specific provisions. Promise originalism might, therefore, lead to increased transparency.

The bulk of this section, however, responds to the originalist criticism that even in its originalist mode, promise goes too far from traditional originalist theory.

Many intelligent persons have responded to my promise suggestion by asking, “Why should Madison have cared what a field slave or nominally free day laborer thought the Constitution meant?” Of course, this objection sees textualism as a tactic of excluding the powerless—a description not accepted by textualists. The objector is refusing to accept inclusiveness, one of my foundations. Presumably, the objector accepts subjective originalism, a theory of constitutional interpretation which has already been roundly refuted, as admitted even by textual originalists. Even assuming away (very counter

174. Focusing on Madison is also somewhat anachronistic; Madison was not dubbed “the father of the Constitution” until 1836. See Douglass Adair, The Tenth Federalist Revisited, 8 WM & MARY Q. 48, 51 & n.6 (1951), reprinted in FORMATION AND RATIFICATION, supra note 146, at 1, 4 & n.6 (locating first such statement in John Quincy Adam’s “Eulogy on James Madison”).

175. See, e.g., Barnett, supra note 39, at 611–14 (admitting that Paul Brest and H. Jefferson Powell’s critiques of subjective originalism are both “familiar and widely accepted”). See also Paul Brest, The Misconceived Quest for Original Understanding, 60 B.U. L. REV. 204 (1980) (presenting the classic statement of the unworkableness of subjective original understanding); H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985) (demonstrating that the Framers did not believe in interpreting the Constitution according to their subjective intent). See also INTERPRETING THE CONSTITUTION, supra note 171 (collecting articles on both sides of the original intent controversy of the 1970s and 1980s). But see, e.g., Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 NW. U. L. REV. 226, 228 (1988) (arguing for original intent constitutionalism while admitting that “[t]he legal, social and economic impacts of judicial review [not based on original intent] cannot be wished away, nor may we want them to be”). During the first few sessions of Congress, some delegates to the 1787 drafting convention did argue from their convention recollections. See, e.g., LYNCH, supra note 64, at 74 (quoting disagreeing recollections by Madison, Sherman, and Gerry). However, at least in the case of James Madison, correct constitutional construction depended on the interests of the state he represented. Powers could be implied only when such powers were to Virginia’s interests. See id. at 75. Madison, however, was not alone in having a convenient recollection on the issue of federal assumption of state war debts: “the various recollections of the convention’s proceedings supported the rememberers’ present positions” on the issue. Id.
factually) the relevance of the objector’s theory of governance, the objection is easily answered.

First, assume Madison did not care. The groups the Drafters excluded are now a constitutionally guaranteed voice in government. If you continue to interpret the Constitution to support the Drafters’ aristocratic mind frame, you are making an independent choice to exclude, despite your constitutional duty to the contrary. While lying about historical exclusion would be futile, we can use promise to slightly extend current inclusion back in time—thus demonstrating commitment to our stated ideals.

Second, Madison and his fellow Drafters had reason to care. They had reason to fear that if the rabble were too unhappy with the ruling government order they would rebel. After all, the Drafters had just been part of such a rebellion. The country had recently gone through Shay’s Rebellion and seen arms used by slaves and

176. See, e.g., Thurgood Marshall, The Constitution’s Bicentennial: Commemorating the Wrong Document?, 40 VAND. L. REV. 1337, 1338 (1987), reprinted in 1 RACE, LAW, AND AMERICAN HISTORY 1700–1990: THE AFRICAN-AMERICAN EXPERIENCE 313, 314 (Paul Finkelman ed., 1992) [hereinafter 1 RACE, LAW AND AMERICAN HISTORY] (asserting that African Americans cannot accept the Constitution as written in 1787 because “[w]hen the Founding Fathers used [the phrase “We the People”] in 1787, they did not have in mind the majority of America’s citizens”); see also Raymond T. Diamond, No Call to Glory: Thurgood Marshall’s Thesis on the Intent of a Pro-Slavery Constitution, 42 VAND. L. REV. 93, 101 (1989), reprinted in 1 RACE, LAW, AND AMERICAN HISTORY, supra, at 329, 337 (“Even if the Constitution had within it the seeds of change [on racism], no change compromising the institution of slavery and the economic interests that it represented could take place without the consent of the slave states.”).

177. Major historians agree that the South Carolina ratifying convention had two purposes: (i) to ratify, and (ii) to obtain more public support in the back country for the despised new federal constitution. See Robert M. Weir, South Carolina: Slavery and the Structure of the Union, in RATIFYING THE CONSTITUTION, supra note 144, at 201, 225–26.

178. As Bruce Ackerman describes the Drafters’ predicament: “Revolution is a game any number can play. Just as you challenged established authority, so can the next fellow.” 1 ACKERMAN, supra note 149, at 170.

179. See generally George Richards Minot, History of the Insurrections in Massachusetts in 1786 and of the Rebellion Consequent Thereon (Da Capo Press, 1971) (1788) (providing detailed history of rebellion). While Shay’s forces were crushed, contemporaries were quite aware of the depth of the insurgents’ support. For example, Massachusetts forces were prevented from following retreating insurgents into Vermont because the people assembled in such numbers, and evidenced such a hostile disposition, the legislature of Rhode Island voted overwhelmingly not to help apprehend fugitive insurgents, and the next Massachusetts general election unseated some three-quarters of the legislators and seated some former insurgents. Id. at 148, 152, 176–77. The “alarming insurrection” in Massachusetts is commonly considered a strong motive for adopting a more vigorous federal government than the Articles of Confederation provided. Alexander Hamilton asked, “Who can determine what might have been the issue of [Massachusetts’]
Native Americans. Furthermore, we know that Madison and his fel-
low Drafters did care about the reactions of Native Americans and
slaves to the masters’ political choices—though presumably not about
these Native Americans’ and slaves’ opinions on political theory. For
example, fear of armed slaves and Native Americans strongly influ-
enced Edmund Randolph to reverse position and argue for the Consti-
tution at the Virginia Ratifying Convention.180

Regardless of the extent to which various Drafters and Ratifiers
distrusted the rabble, the rabble have the franchise now, according to
the Constitution as officially amended. Fidelity to the document does
not require preventing the eighteenth-century precursors of currently
enfranchised groups from having full voice in interpreting the entire
document. Such methodology is not equivalent to making believe that
the rabble had input into drafting and ratification. The text of the
Constitution has aristocratic elements. These remain until they are
amended out of the text. The dead weight of eighteenth-century
prejudice still retains enormous power, more than enough to honor
tradition.

Of course, if the Constitution were an actual contract, then
slaves, Native Americans, most women, and many of the poor were
not even asked to be parties. However, nothing forces modern Ameri-
cans to define the Constitution as such a limited contract. Contract
was not even the Drafters’ first metaphor. During the ratification de-
bates, both Federalists and Anti-Federalists commonly used a statu-
tory construction model to analyze the proposed Constitution.181 The

180. See  Lance Banning, Virginia’ Sectionalism and the General Good, in
Ratifying the Constitution, supra note 144, at 261, 285–86 (discussing sources demon-
strating that Madison, and many other Virginians, supported the Constitution because,
among other reasons, they considered Virginia at greater military risk as a separate
state).

181. Powell, supra note 175, at 923 (“[M]ost Americans in public life . . . accepted
the propriety of a statutory analogy for constitutional construction . . . .”).
contract metaphor seems to date from Jefferson’s and Madison’s opposition to the Federalist presidencies. 182

Nothing in the document requires us to continue the contract metaphor, a metaphor that undermines the legitimacy of current government. If the constitutional contract was among the 1789 population of the United States, no one now living was a party; leaving the document with zero current legitimacy. 183 If the constitutional contract was among the States, the South was correct in the Civil War; 184 additionally, the legitimate power of the central government over its citizens is both diluted and made dependant on their tie to the States, raising questions of the original States’ legitimacy and the place of States created after 1789.

We could view the Constitution as a statute, but that ignores the relative ease with which the current citizenry can change statutes, as opposed to the obduracy of the United States Constitution. Furthermore, we would need to consider the legitimacy of the institution generating the statute. The above discussion of the ratification process demonstrates procedural problems with considering the document a properly enacted statute. In sum, transparency fractures both the contract and the statutory frames.

Next objection: the proposed method is too labor intensive. I agree that looking for the type of evidence I suggest can involve massive additional labor. However, the stakes are sufficiently high to warrant the effort. Furthermore, a researcher can use many usually ignored sources relatively easily by employing the texts available in computer readable and searchable databases. If this method of interpretation is accepted, hopefully, more people will convert such infor-

182. See id. at 923–34 (tracing the origin of “intent of parties to a contract” version of constitutional interpretation to the Virginia and Kentucky resolutions against the Alien and Sedition Acts: pointing out that the “parties” involved were the states, not the members of the general public).

183. Probably the best contract reading is that the Articles of Confederation were “a confederacy by State governments: the [Constitution] is a confederacy by State peoples.” 1 TUCKER, supra note 35, at 287. Accord FORREST McDONALD, STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876, at 8–9 (2000) (arguing that the Constitution is a compact between the peoples of different social societies, the States).

184. See 1 STORY, supra note 70, at 206–53 (explicating and rejecting the theory of the Constitution as a compact because, among other reasons, the theory legitimizes state secession). But see 1 TUCKER, supra note 35, at 347–48 (concluding that the Civil War only settled intellectual dispute in 1861 as to whether any single state could dissolve its tie to the federal government by answering that the tie was only dissolvable if either all states agree or by power of revolution).
mation to electronic format, thus making the project somewhat easier.

Third objection: the additional sources will be relatively useless as they will not focus on the provisions under scrutiny. I agree that scholars are relatively unlikely to find a field hand's diary discussing the extent of “commerce” in the interstate commerce clause. However, this objection confuses textualism (public meaning explication) with the quite different concepts of subjective intent and expected outcomes. Furthermore, if we discover that the Drafters chose uncommon words, our search still has probative value: it supports Lynch's thesis that much of the Constitution was written with purposeful ambiguity to defer the need to work out additional compromises. Such proof emphasizes that constitutional interpretation is primarily policy choice, which has interesting implications on the proper scope of judicial review, arguments appropriate in court opinions, and criteria for choosing federal judges.

Fourth objection: the method does not supply sufficiently determinative answers to prevent unacceptable judicial tampering with our basic legal charter. This objection has force, but it proves too much. Nothing but judicial temperament has ever prevented judicial “tampering.”

As to the promise metaphor's absence from ratification era discussions, this objection rejects the possibility of learning by doing, a position not endorsed by the heroic ratification generation. In the eighteenth-century, social contract theory was a relatively recent improvement in political theory; it definitely trumped the divine right of kings in inclusiveness. Furthermore, the Constitution came closest to being a contract at the instant of ratification. The political exclusion of women, African-Americans, Native Americans, and the very poor presumably seemed legitimate to most politically empowered Amer-

185. See generally LYNCH, supra note 64. See also Steven J. Heyman, Ideological Conflict and the First Amendment, 78 CHI.-KENT L. REV. 531 (2003) (arguing that the First Amendment and the Bill of Rights were written in generalities to allow compromise consensus, supporters were deeply divided over specific coverage of these generalities).

186. “I do not think it possible or desirable to construct a jurisprudence that would operate as the social version of a chemical formula, automatically resolving all problems of judicial choice.” Walter F. Murphy, An Ordering of Constitutional Values, 53 S. CAL. L. REV. 703, 759 (1980). As Madison warned, mere “parchment barriers” are unlikely to guard the guards. THE FEDERALIST No. 48 (James Madison) (basing need for checks and balances on inefficacy of “parchment barriers”). See also FARBER & SHERRY, supra note 4, at 8 (reporting of eight major foundational constitutional theories, including Robert Bork’s and Antonin Scalia’s versions of originalism, that “the theories are so malleable that a judge adopting any one of them could reach virtually any result”); Balkin & Levinson, supra note 6, at 1108 (describing Bush v. Gore as a “judicial coup” in light of mass disenfranchiseMENT of black voters in Florida though false designations as convicted felons and use of antiquated voting machines, and the Supreme Court stay of the recount).
cans at the time of ratification. The ratifying generation lived through the vote to accept the Constitution; it did not experience being born into a pre-existing Constitution. For these reasons, the empowered subset of the ratifying generation had less reason to question the quasi-statutory or quasi-contractual nature of the Constitution than do modern Americans.

Interpretation of the Constitution is difficult. However, to the extent that public meaning, group intent, and choosing the proper level of abstraction are problems, the complexities result from textualism—not my desire to remove the disclaimed aristocratic bias from such approaches to constitutional interpretation by shifting the originalist frame from contract to promise. As for textualism, as discussed above, ignoring text undermines the entire project of a written Constitution; it also wastes the strongest icon holding together the United States’ population.

Hopefully, the above has convinced you that promise in its originalist form is a better constitutional frame than contract. But the originalist promise frame is a half-measure, let us now discuss the more realistic, more inclusive evolving promise frame.

V. CURRENT EXPERIENCE OF THE CONSTITUTION

How many people freely and voluntarily contract to be bound by the United States Constitution as understood by its Drafters or Rati-fiers? I certainly did not. 187 Most of the persons living within the jurisdiction of the United States Constitution are born into that situation. 188 They never de-

---

187. When I clerked for a federal judge, I did swear to support the United States Constitution, but by then I was already a thoroughly indoctrinated adult. Furthermore, the oath was tied to my status as a functionary of the judicial branch of government, not my status as a citizen. Childhood recitations of the Pledge of Allegiance are made by children, i.e., persons lacking the capacity to contract. Furthermore, the Pledge is to “the flag” and “the Republic for which it stands,” not the Constitution. In these situations, furthermore, citizenship is not a bargained for exchange, and methods of constitutional interpre-tation are not specified.

188. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, 44 tbl. 42 (showing that in 1990 the native born constituted 92.1% of the population of the United States), http://www.census.gov/prod/2002pubs/01stab/pop.pdf; see also id. at 5 (defining “native population” to mean “all persons born in the United States, Puerto Rico, or an outlying area of the United States. It also includes persons born in a foreign country who had at least one parent who was a U.S. citizen. All other persons are classified as ‘foreign born’”). See also 1 ACKERMAN, supra note 149, at 23.
cided freely and voluntarily to be bound by the Constitution at all, let alone with an interpretation caveat. The current population of the United States follows the Constitution (or to be more precise, the statutes and regulations of the constitutional government) because it has no livable choice. Government is; government is powerful; socialization teaches one to accept the government as largely legitimate; everyday life takes all one’s efforts without considering overthrow of a government—especially if you do not perceive it to be aiming at your personal destruction. Human beings are experts at reducing cognitive dissonance with facially acceptable reasons to support whatever they do not have the will to change.

As we come to our political maturity, today’s Americans do not encounter one another as if they were explorers setting up a new colony on some previously uninhabited new world. They enter upon a political stage already set with a complex symbolic practice charged with meaning by the thought and action of prior generations.

Id. 1 TUCKER, supra note 35, at 39 (“The man is bound to the environment of birth by a necessity from which he may revolt by expatriation, but in which, while he remains, he must acquiesce, because he can neither successfully resist nor change it by his own will.”).

189. See RAWLS, supra note 28, at 222 (“The government’s authority cannot, then, be freely accepted in the sense that the bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong that the right of emigration (suitably qualified) does not suffice to make accepting its authority free, politically speaking . . . .”)

190. “A constitution is in fact a fundamental law or basis of government . . . . It may be founded upon our consent, or that of our representatives; but it derives its ultimate obligatory force, as a law, and not as a compact.” 1 STORY, supra note 70, at 227. See Fallon, supra note 5, at 1805 (“The Constitution is law not because it was lawfully ratified, as it may not have been, but because it is accepted as authoritative”; purposefully “elid[ing] the questions of exactly what needs to be accepted and by whom for the Constitution to enjoy its [positivist] lawful status.”).

191. “[A] child in the American public schools is not more encouraged to make fundamental critiques of the American political structure and its presuppositions than is one who attends a specifically religious school encouraged to consider the merits of atheism.” LEVINSON, supra note 5, at 156–57. See DE TOCQUEVILLE, supra note 32, at 132 (“I know no country in which, speaking generally, there is less independence of mind and true freedom of discussion than in America.”). Human reasoning, furthermore, is “bi-directional—decisions follow from evidence, and evaluations of the evidence shift toward coherence with the emerging decision.” Dan Simon et al., The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction 86 J. OF PERSONALITY & PSYCHO. 814, 814.

192. Believing that you have some input into government decisions presumably helps as well, but low voter turnout implies that many Americans are not convinced of their own individual power. Only 51.3% of the voting age population (which includes non-citizens and felons not entitled to vote) entered presidential choices in the 2000 election in the United States. Only 67.5% of registered voters cast ballots for the president in 2000.


193. Bruce Ackerman asserts that “hypertextualists” ignore the irregularity of state ratification of the Thirteenth and Fourteenth Amendments to prevent having to pro-
Lack of open revolution, paucity of constitutional amendment, and, arguendo, modern procedural regularity do nothing to defuse the lack of actual consent to the current Constitution by the individual people currently living within the United States. The group-consent theory is unacceptable because the individuals did not freely decide to give such power to any group. The Constitution cannot, therefore, be legitimized by a claim that the current population has agreed to it (in the contract sense of agreement).

At this point, let us look more closely at the claim I brusquely rejected earlier in this paper, the claim that the Constitution is legitimate because of its just content, substantive or procedural. This Rawlsian-style argument asserts that in ideal circumstances we would have chosen to form the contract; therefore, seeing that the “contract” is in place, we have no legitimate basis to repudiate it. I will discuss this point only to the extent needed to demonstrate that content does not provide an easy way to legitimize the Constitution, thus making necessary some origin backing for legitimacy, such as contract or promise. A full discussion of what content would be necessary to legitimize the Constitution is beyond the scope of this paper.

claim the “awful truth,” that under textualist rules “the Emancipation and Equality Amendments” are NOT part of the Constitution. 2 ACKERMAN, supra note 143, at 117. “[Chief Justice John] Marshall, no less than Jefferson, was able to live with this dissonance [between the liberty principle and slavery], and various political systems have shown a remarkable ability to exist in the face of similar glaring internal contradictions in ideological logic.” Murphy, supra note 186, at 721 (footnote omitted). As for Jefferson, he was notorious for his “propensity . . . for speaking in multiple internal voices but hearing only one at a time,” a trait illustrated in his handling of African Americans, Native Americans, and the constitutional limits on executive power. See ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 16 (1999). See also Phillip Hamilton, Revolutionary Principles and Family Loyalties: Slavery’s Transformation in the St. George Tucker Household of Early-National Virginia, 55 WM. & MARY Q. 531–56 (1998) (providing detailed explanation of how Tucker changed his views to enable him to accept his continued ownership of slaves). But see William W. Freehling, The Founding Fathers and Slavery, 77 AM. HIST. REV. 81–82 (1972), in FORMATION AND RATIFICATION, supra note 146, at 203–04 (providing a more sympathetic explanation of the practical forces which limited late eighteenth-century anti-slavery actions and arguing that the humanistic ideals expressed by leading founders belong in “the creeping American antislavery process”).

194. The assumption that “modern” government actions are constrained by “procedural regularity” is posited only for the sake of argument. See generally American Civil Liberties Union, http://www.aclu.org (providing critiques by the American Civil Liberties Union); see also, e.g., Balkin & Levinson, supra note 6, at 1108 (2001) (describing Bush v. Gore, 531 U.S. 98 (2000), as a “judicial coup”).

195. See supra text accompanying note 40 (discussing problems with group consent theory).

196. See generally RAWLS, supra note 147.
sary to create a content-legitimate Constitution is beyond the scope of this article. Currently, I am merely undermining the claim that the United States Constitution can be legitimized by its allegedly legitimate content.

Randy E. Barnett offers a content-legitimacy argument after recognizing that contract doctrine cannot render the United States Constitution legitimate by origin. Barnett argues that the Constitution would constrain if “laws are made by procedures which assure that they are not unjust.” Let us hypothesize a Professor B who claims Barnett’s proviso is met by the United States Constitution. Professor B’s argument does not persuade. First, the definition of “not unjust” is so formal that its content is unclear. To the extent that I understand Barnett’s definition of “not unjust,” I doubt that effective government is possible within such a stringent limit. More important, the limit is not respected in fact. I look around me at the United States in 2005 and I see unjust laws, unjust enforcement of laws, and unjust procedures for enacting laws. I read about the United States in 1789, 1850, 1875, 1910, 1940, etc. and I see unjust laws, unjust enforcement of laws, and unjust procedures for enacting laws. No amount of word parsing will convince me otherwise as long as, among other problems, children are born into poverty and raised under its...
warping influence. Clearly, Professor B has a different concept of “not unjust,” but it seems to me as ethereal as Rawls’ persons without interests, even more so. Rawls never claims that the United States Constitution would be chosen behind a veil of ignorance, any more than John Locke claims that the actual property institutions of his Great Britain conform to his theory of property. Of course, I lack an unshakeable normative basis for requiring you (or B) to accept my definition of “not unjust.” This concession points to the core problem.

199. But see Ely, supra note 83, at 136 (“The constitutionality of most distributions thus cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question . . . .”). Over eleven percent of the United States population lives in poverty, but the young are over represented. Almost nineteen percent of Americans under five live in poverty. See U.S. CENSUS BUREAU, SMALL AREA INCOME & POVERTY ESTIMATES, (2000), available at http://www.census.gov/cgi-bin/saipe/national.cgi?year=2000. This poverty violates John Rawls’ second principle of justice as fairness, that opportunity to use resources be equal, or if inequality is necessary, that access tilts towards those least well off. Rawls, supra note 28, at 291. Rawls, nevertheless, has accepted a less stringent criteria for the constitutional essentials allowing the legitimacy of a liberal government: Rawls would grant legitimacy to those governments which obey only the first principle of justice (basic liberties and process), provided they strive to meet the second. Id. at 227–30. I see no such consistent striving in the modern United States. Similarly, Sager’s recent, modestly approving discussion of American Constitutional practice as “justice seeking” requires and claims to find a modest commitment to economic rights. See Sager, supra note 71, at 95–102, 129–60. I must respectfully disagree. I cannot find any constitutional commitment to economic rights when, as Sager agrees, neither the Court nor the Constitution articulate such a commitment. See id. at 101–02 (admitting that Supreme Court cases on which he relies do not rely on constitutional economic rights). The Columbia Law School survey in which “from each according to his ability, to each according to his need” was placed in the Constitution by about one third of respondents, with another one third not being sure that it was not constitutional, demonstrates the strong popular belief in welfare rights. See Columbia Law Survey, supra note 6.

200. John Rawls, The Law of Peoples 75 (1999) (“In the case of democratic peoples, the most we can say is that some are closer than others to a reasonably just constitutional regime.”): Rawls, supra note 28, at 407 (castigating the United States Constitution for creating political power imbalance by not providing for public funding of elections, allowing wide disparities in wealth which create wide disparities in opportunity, and failing to provide minimums of basic goods such as health care).

201. Relatedly, moral realist Michael Moore argues consequentially for “the authority of the Constitution” because its natural rights provisions enhance protection of individual rights, especially with judicial review using his natural rights interpretation method. Moore, however, never claims that the United States Constitution as written, or as written and enforced, is sufficiently supportive of natural rights. See Michael S. Moore, Justifying the Natural Law Theory of Constitutional Interpretation, 69 FORDHAM L. REV. 2087, 2100–01 (2001).
The core problem with B’s argument is the core problem of any substantive-content argument for legitimacy, our entrenched reasonable disagreements about the substance of justice.\textsuperscript{202}

This raises the possibility of legitimacy through process content. Perhaps a written constitution should only set up just procedures and allow the political process to address all issues of substantive justice.\textsuperscript{203} Perhaps we can prove that the United States Constitution has content legitimacy because of the political process it creates. This claim fails for several reasons. First, in the most common but superficial meaning of “just procedure” majority rule, the Constitution is defective because of both the disproportionate power of small states in the Senate and the supermajority requirements of Article V. Second, history has demonstrated that even with a Bill of Rights, majority tyranny will occur. Lack of substantive limits would exacerbate this problem. Of course, this second point will persuade only those who believe, as I do, that even if we lack a clear way to publicly justify any specific and complete set of substantive limits on government, at least as to some forms of injustice, we know them when we see them. Even the classic proceduralist, John Hart Ely, recognizes that individual voting rights are meaningless absent some substantive protection of minorities against majority decisions, “the duty of representation that lies at the core of our system requires more than a voice and a vote.”\textsuperscript{204} Once this concession is made, minimal economic rights are easily justifiable. To acquire the adult ability to independently evaluate political claims (that is, the ability to be rational voters), people need minimally competent caregiving as infants and young children.\textsuperscript{205} Poverty puts the caregiving relationship at great risk.\textsuperscript{206}

Ely’s concession highlights the core problem with process-content legitimacy: deciding what procedures are just involves substantive claims about justice which themselves are open to reasonable disagreement. In addition to the choice of what substantive choices to remove from majority power, even if everyone accepted the view that

\begin{footnotes}
\item[202] See WALDRON, supra note 17, at 243–44 (“Rights, in other words, are no exception to the general need for authority in politics. Since people hold different views about rights and since we have to settle upon and enforce a common view about this, we must ask: ‘Who is to have the power to make social decisions, or by what processes are social decisions to be made, on the practical issues that competing theories of rights purport to address?’”).
\item[203] See, e.g., ELY, supra note 83, at 87 (asserting that the United States Constitution is overwhelmingly about process and that judicial review should focus on preserving unblocked process).
\item[204] See id. at 135.
\item[206] See id. at 68–71.
\end{footnotes}
the best process is rule by a simple majority, one would need to decide perplexing issues about who should be allowed to vote, how often, under what procedural rules, how the voting agenda should be set, and many other outcome-affecting details. The claim that simple majority voting might be irrational because aggregation of individual preferences may yield intransitive results was raised in the eighteenth-century by Condorcet and expanded in the mid-twentieth-century into the “public choice” attack on democracy. Even the canonical ban on vote-trading has been vilified as preventing beneficial consideration of the intensity of voters’ preferences. If one accepts public choice theory, democracy is irrational. If one does not, the necessary responsive discussion of the political process highlights the need for substantive limits, not just simple procedures, to ensure that democracy is deliberative.

In sum, I reject the claim that the current written Constitution is legitimate either because of its historical origin or its content (substantive or procedural or both). I propose instead a theory of ongoing origin legitimacy—promise. The promise theory allows the government to be legitimized by the population’s continuing decision to honor the written Constitution. As discussed above, this theory does

---

207. But see 2 JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY, 163–64 (Liberty Fund 2004) (“[Majority voting will . . . tend to result in an overinvestment in the public sector when the investment projects provide differential benefits or are financed from differential taxation.”): Id. at 243–44 (“[U]nless equal intensity of preferences is postulated, there are no particular characteristics attributable to the 51 per cent rule for choice.”).

208. See, e.g., Akhil Reed Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem, 65 U. COLO. L. REV. 749, 749–52 (1994) (asserting that American history is full of heated disagreement about the “denominator problem,” determining the group whose majority rules); Hayden, supra note 159, passim (arguing that the “one person, one vote” standard is appealing because of its apparent objectivity, but that the standard is not objective).

209. See, e.g., RUBENFELD, supra note 105, at 103–10 (discussing Marquis de Condorcet’s recognition of the preference-cycling problem which underlies Arrow’s Impossibility Theorem).

210. See generally RUBENFELD, supra note 105, at 103–10 (reviewing attacks).

211. See Saul Levmore, Voting with Intensity, 53 STAN. L. REV. 111, 112 (2000) (arguing for reconsideration of “conventional view” that “vote buying (and selling) is considered antithetical to democratic principles” because vote inalienability prevents social recognition of differences in the intensity of voters’ preferences).

212. See generally Pildes & Anderson, supra note 117 (providing brilliant refutation of public choice theory’s attacks on democracy by explicating deliberative democracy).
not bind the populace; it binds the government. The government obtains legitimacy by acting in accordance with a promise continually approved of by the populace. The populace remains free to discard the government (for failing to follow the constitutional promise as understood by the public) or the Constitution itself. I consider the second extremely unlikely due to socialization pressures, but this is an empirical statement, not a normative claim. Promise theory allows the public a theoretically legitimate ground for insisting that all branches of government follow the current meaning of iconic historical documents. I would prefer these documents to have different content, but I am limited by reality.

Promise theory is realistic; it starts with the empirically demonstrated fact that the population of the United States (by a strong supermajority) views the historical document, the Constitution, as the core of governmental legitimacy. The promise theory does not require me to argue that this document is particularly wise, efficient, or just. Nor does it require resort to any complex theoretical construct beyond the ken (or caring) of the sovereign general populace. The promise argument does not require a citizen (as opposed to a government official) to support the institutional status quo. As a citizen, I could consistently accept the promise theory and lead an armed rebellion because either (1) I had decided that the current government is not keeping the Constitution’s promise, or (2) I had decided that the content of the Constitution-promise is so unjust that the high cost of warfare is acceptable. As a citizen, I could also consistently deny the Constitution’s content legitimacy, but decide against open rebellion for moral or pragmatic reasons. However, as empirical evidence demonstrates, a supermajority of the individuals who inhabit the United States do choose to honor the Constitution. As long as this choice continues, the promise theory has sufficient bite to provide normative (as well as pragmatic) reasons for the government to abide by the terms of the Constitution.

Let us turn now to reading the promissory Constitution. In contrast to the contract frame, where the words of each section of the Constitution are construed according to the date of their enactment, the evolving promise frame matches the way living Americans experience the Constitution.

Per the evolving promise frame, during every post-ratification reading, the Constitution is experienced as speaking in the present.

---

213. These type of decisions deal with recognizing when a situation involves Fallon’s “minimal” moral legitimacy. See Fallon, supra note 5, at 1798 (“In contrast with ideal theories, minimal theories of moral legitimacy define a threshold above which legal regimes are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives.”).
When we each individually read the Constitution, it transmits a promise that the government will operate in accordance with the Constitution. The action of the government, the culture of surrounding society, the education we receive, the books and newspapers we read, and the TV we watch all help influence what we think the words of the Constitution mean.\footnote{214}{See Friedman & Smith, supra note 107, at 5–6 (“This Article makes a simple claim: history is essential to interpretation of the Constitution, but the relevant history is not just that of the Founding, it is that of all American constitutional history.”).}

In general, the shared (or public) meaning of the promissory Constitution in 2005 is the meaning that a reasonable citizen obtains by reading the Constitution in 2005.\footnote{215}{See id. at 6 (calling for “a very different notion of fidelity, one of fidelity to the Constitution itself, rather than to its Framers”).} In general, this current meaning is what the United States Supreme Court should enforce absent strong countervailing considerations. Of course, if one could prove empirically that reasonable Americans in 2005 read the Constitution the same way reasonable Americans read it in 1789, evolving and original promise theory would merge. However, I have seen no such evidence. Deciding what a reasonable citizen would think the words mean is hardly an easy task.\footnote{216}{Unlike the “reasonable observer” discussed by Justice O’Connor, my reasonable citizen reader is not required to do historical research. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 34 (2004) (O’Connor, J., concurring) (“[T]he reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape.”). My “reasonable observer” is closer to the “ordinary citizen” hypothesized by Justice Breyer in Schriro v. Summerlin, 542 U.S. 348 (2004). Certainly the ordinary citizen will not understand the difference. That citizen will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing. How can the Court square this spectacle with what it has called the “vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason”? Beck v. Alabama, 447 U.S. 625, 637–638 (1980). Schriro v. Summerlin, 542 U.S. 348, 366 (2004) (Breyer, J., dissenting) (dissenting from Court holding that Teague v. Lane, 489 U.S. 288 (1989), prevented federal court from granting habeas relief to petitioner whose death sentence had been imposed pursuant to procedure held unconstitutional in Ring v. Arizona, 536 U.S. 584 (2002)).} When dealing with current populations, even practiced comedians have difficulty mouthing the myth of homogeneity.\footnote{217}{I was tempted to argue that the Constitution must be interpreted so that the words take on the meanings necessary to allow the current population to ratify the document if given the opportunity. However, I am unsure that any version of any constitution would be ratifiable in the modern United States—even with political maneuvering similar to those of the historical ratification.} This is good news because it pressures the Supreme Court toward more transparent opinions.
Promise is not plebiscite. The Constitution—promise retains the same words. Modern Americans change the Constitution in two ways: by amending it, or by gradually changing the meaning of its words—within limits. The limits are necessary because the Constitution has many types of words. Arguments over evolving constitutional meaning generally focus on only a few, the set I label, “relational value words.” As discussed in the next section, under the promise frame, relational value words are the easiest case for evolving constitutional word meaning.

VI. PRELIMINARY EXERCISES IN READING THE CONSTITUTION THROUGH PROMISSORY EYEGLASSES

The perceived major problem with recognizing that the Constitution changes meaning over time because words change meaning, is the fear that the resulting operational structure will no longer be viable, let alone desirable. Let me call this the Humpty Dumpty Problem, after Lewis Carroll's famous proponent of individual, subjective, verbal flexibility. The Humpty Dumpty Problem is theoretical.

218. James Madison may have feared Humpty Dumpty without thinking through the issue:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense. And that the language of our Constitution is already undergoing interpretations unknown to its founders, will I believe appear to all unbiased Enquirers into the history of its origin and adoption.

Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON, 190, 191 (Gaillard Hunt ed., 1910). Madison’s letter demonstrates yearning over his generation’s loss of political control, an understanding of the ratification as a singular event exhausting the public’s sovereignty, and a belief in the permanent superiority of the 1787 document's content. I understand the first, but respectfully disagree with the last two. As for the trigger of Madison’s ill humor, the immediately preceding paragraph complains of the growth of “parties,” and the end of the paragraph objects to using the word “consolidate” (from the Address of the Convention prefixed to the Constitution, not the Constitution itself) as an excuse for “destruction of the States, by transfusing their powers into the government of the Union.” See id. at 190–192. Along with Barnett, “I do not think we are bound by James Madison’s opinions concerning constitutional interpretation.” Barnett, supra note 39, at 628 (discussing same letter; my thanks to Barnett for bringing the letter to my attention).

cally possible because the promise frame does not require “we the people” to carefully consider whether the words’ meaning should change to allow a more desirable political order. If words’ meanings changed in the arbitrary manner evoked by Humpty Dumpty, the promissory constitution would shatter irretrievably. However, as discussed below, the Humpty Dumpty Problem is far from serious. At most, the Humpty Dumpty Problem supports limiting the textual construction aspect of the evolving promise frame to certain types of words.

In this preliminary essay, as a call for additional scholarship, I would like to tentatively propose treatment of several types of words (or phrases): relational value words, talismanic words, possibly technical words, and several subsets of mundane, refocused words. I invite comment and criticism: this section contains very preliminary work and is not backed by organized empirical research. It also attempts to sidestep philosophical and psychological issues regarding words’ meaning, use, and relationship to human personality. My aim is a reframing which is widely both understandable and acceptable, hence one agnostic on other disputable issues, including those of linguistic theory.

“[T]hat shows that there are three hundred and sixty-four days when you might get unbirthday presents—”
“Certainly,” said Alice.
“And only one for birthday presents, you know. There’s glory for you!”
“I don’t know what you mean by ‘glory,’” Alice said.
Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I mean ‘there’s a nice knock-down argument for you!’”
“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.
“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

220. My proposal for constitutional change without amendment is quite different than Bruce Ackerman’s theory of two types of law making. Ackerman posits that the Constitution may be changed when “we the people” think through and decide in favor of government restructuring, even if approval is manifested without following Article V’s procedure. Word meaning changes, however, are more gradual and less deliberate than the type of rapid, core structural changes Ackerman’s theory seeks to legitimize. “American constitutional law is best seen as the result of a complex, evolutionary process, rather than of discrete, self-consciously political acts by a sovereign People.” Strauss, supra note 60, at 1457.

221. Word meaning is generally located within the “semantics” subset of natural language study. See, e.g., Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277, 289 (1985). The three major semantic theories are the paradigm case theory (where words are tied to typical examples), the criterial theory (where words are explained by phrases giving necessary and sufficient conditions for word use), and the real-
One point is not tentative: discussing constitutional language *en masse* is not very fruitful. People may be created equal, but words are not: they need to be pre-sorted into relevant categories. For example, some years ago, Gary Lawson lambasted evolving-Constitution scholars by telling the story of a recently discovered eighteenth-century recipe:

The document lists quantities of items such as “one 2 1/2 pound chicken,” “1/4 cup of flour,” “one teaspoon of salt,” “plenty of lard for frying,” and “pepper to taste.” It also contains instructions for combining and manipulating those items, such as “combine the one teaspoon of salt with the 1/4 cup of flour,” “add pepper to taste to the salt and flour mixture,” “coat the chicken with the flour,” and “fry the coated chicken in hot lard until golden brown.” The document, in other words, appears to be a late-eighteenth-century recipe for preparing fried chicken.

Lawson humorously proceeded to hypothesize non-cooks attempting to muddle the obvious clarity of the recipe, including metamorphosing pepper into rosemary. Rosemary might be tastier to modern palates, admits Lawson, but the substitution should not be hidden by disingenuously insisting that one is merely reading the recipe. Michael Dorf’s response focuses on the two hundred years of practice Americans have built into the Constitution: pointing out that unlike Lawson’s recipe, the recipe for a government was not hidden in an attic for two hundred years. Dorf’s response is excellent, but it supports the use of policy and practice to allow the substitution of rosemary, not the claim that the correct meaning of the word “pepper” is “rosemary.” My response is that all words are not equal. Lawson’s recipe example uses “sliders,” the one type of words for which a modern reading is the least supportable, discussed at length below.

---

223. See id. at 1830.
225. See infra Part VII. D.3. Professor Claus relies on a similar slippage between word categories, arguing that “cruel and unusual” should be interpreted in the same way as “arms.” See Laurence Claus, *The AntiDiscrimination Eighth Amendment* 28 HARV. J.L. & PUB. POL’Y 119, 162 (2004) (“To hold a punishment constitutionally unusual on the ground that other jurisdictions do not impose it is to rely on linguistic happenstance. It is like holding that the Second Amendment protects the right of the people to keep and bear their upper limbs.”). Similarly, Sager agrees too quickly with Bork that when constitutional words have changed meaning, judges should use the late eighteenth-century defini-
The provisional analyses that follow deal primarily with the first steps in constitutional reasoning. The promise metaphor is a frame providing a new entry point into such deliberation. I am not suggesting that constitutional issues can be decided solely by clarifying the relevant word meanings. Emphatically, we should start with the text, but, equally emphatically, we cannot stop with the text.

A. Relational Value Words

One of the central disputes between so-called originalists and various opposing groups is whether relational value words in the Constitution should be interpreted to cover only the set of instances that 1789 interpreters would have believed covered by the phrases, that is, the extension of the words in 1789. Many leading scholars have pointed out the open nature of key constitutional words and phrases,226 locutions such as “due process,” “cruel,” and “unreasonable.” These words invoke human value judgments on the appropriate relations between fact-sets and social acceptability. Proponents of a living Constitution point to the Drafters’ choices not to use tighter locutions. The Constitution does not call for “the legal process available in England in 1789” or for the “legal process as approved by Blackstone.” Nor does it ban punishments “more cruel than those practiced in the United States on the date this Constitution is ratified.” Even if the Constitution should be interpreted forever as it was understood by the 1789 white, male population of the United States, these long-
dead men must have recognized the open nature of the text’s relational value language.\(^{227}\)

Once we frame the written Constitution as a promise made to the current reader, we delegitimize the claim that “cruel” means “what 1789 propertied white men thought was cruel.” \(^{228}\) “Unreasonable searches” are those the reader reasonably considers unreasonable, which, of course, depends on \textit{inter alia} the details of current living conditions.\(^{228}\) The problems in applying relational value words are legion, but unrelated to the change of time frame. That \(x\) happened, even repeatedly, in 1789 does not prove that \(x\) was “reasonable” in 1789, any more than current industry custom is determinative on the issue of “reasonable care” in a modern tort case.\(^{229}\)

What about the Humpty Dumpty Problem? No problem. These words have changed meaning for very good reasons. Relational value words are relational words about value. Such words change \textit{extension} because society’s basic situations and values change. The changes in extension are not necessarily changes in \textit{intention}. Furthermore, unlike the ratifying generation at the time of ratification, modern Americans use these words in the shadow of the Constitution. As we use them, we invoke the aura of that sacred text. Our use of the words is embedded and reflexive: it is conditioned by our schooling, our knowledge of then-current social practice,\(^{230}\) and—to some unknown extent—Supreme Court decisions.\(^{231}\) Neither the intention nor

\(^{227}\) \textit{See also} Ronald Dworkin, \textit{Comment}, in \textsc{Scalia}, \emph{ supra} note 8, 115, at 122 (equating recognition of changes in extension of relational value words with “semantic-originalism”).

\(^{228}\) \textit{See}, \textit{e.g.}, Lawrence Lessig, \textit{Fidelity in Translation}, 71 \textsc{Tex. L. Rev.} 1165, 1214 (1993) (arguing that the Constitution should be “translated” when presuppositions about what is true have changed).

\(^{229}\) \textit{See}, \textit{e.g.}, The \textsc{T.J. Hooper}, 60 \textsc{F.2d} 737, 740 (2d Cir. 1932) (“Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.”) (Learned Hand, Circuit Judge).

\(^{230}\) “[The laws of nature and human psychology would lead citizens who grow up as members of that well-ordered society to acquire a sense of justice sufficiently strong to uphold their political and social institutions over generations.” \textsc{Rawls, supra} note 28, at xlii.

\(^{231}\) My thesis, therefore, is not “ahistorical.” “The question then would be, ‘what do these words mean to us now?’ Although such an approach is possible, it is oddly ahistorical. We know that the Constitution was not adopted yesterday. We also know that text alone has no meaning—meaning also requires context.” Dorf, \emph{ supra} note 34, at 1797. Dorf’s criticism misses the historical embeddedness of the human ‘now.’ Accord David McGown, \textit{(So) What if it’s All Just Rhetoric?} 20 (U. Minn. L. Sch. Legal Studies Research Working Paper Series, No. 04-15, 2004), available at http://ssrn.com/abstract=578542 (reviewing \textsc{Eugene Garver, For the Sake Argument: Practical Reasoning, Character, and the Ethics of Belief} (2004)) (“The practice of judicial review grows stronger with exercise. As the country accepts creative decisions, they become more accustomed to such decisions, making creativity less costly in the future, and therefore more likely.”). As for the effect of Court decisions on popular opinion, the evidence is unclear. \textit{See}, \textit{e.g.}, Fried-
the extension of relational value words are free of the past. In short, while not decided by ballot or conference, changes in the meanings of relational value words are the outcomes of diffuse public consideration of value issues and, therefore, worthy of respect. Changes of meaning are not mere “linguistic happenstance.”

Some will be horrified because the Court may have to guess whether a word has changed or (even worse!) is changing meaning. One could respond that the Court is usually reflecting changes that have already taken place, or are in mid-stream, but this “mid-stream” exists only in hindsight. I prefer to be transparent. In some cases, the Court makes a moral choice to look to a better, hoped-for future. When it does so, the Court’s pronouncement may lead to greater public acceptance of a probably incipient change in word meaning. The Court, of course, will not know in advance whether the public will endorse a specific change. As a human being, I would counsel a Justice to choose the meaning which best comports with human dignity.

The Court has the capacity to challenge Americans to become more moral and I hope that Americans respond to such challenges. Of course, this attitude risks the Court’s deciding that the “moral future” is one I abhor. I will have to live with this possibility: I simply do not understand how any Justice could decide the cases Americans bring to the Supreme Court without making moral choices.

---

232. See Claus, supra note 225, at 75–76.

233. See, e.g., ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 3 (1994) (“[T]he Court usually follows, rather than leads, public opinion and the political branches.”); id. at 4 (“Although the Court’s major pronouncements may seem to come from on high, they often reflect and accentuate tendencies already underway in ordinary political life.”).

234. This point is close to the view of Robert A. Burt that decisions became constitutional as the public gradually accepts them, a position he finds unclearly stated in Alexander Bickel’s “The Least Dangerous Branch.” The historical record demonstrates the relative rarity in which the Court has led public opinion. See BURT, supra note 67, at 9–33 (discussing jurisprudential problems with Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)).

235. See Brennan, supra note 171, at 30 (asserting that “the great design of the Constitution” is securing “the freedom, the dignity, and the rights of all persons within our borders.”); Breyer, supra note 50, at 246 (defining “better constitutional law” as “law that will promote governmental solutions consistent with individual dignity and community need.”).
How does promise theory mesh with the pantheon of factually unassailable, but theoretically suspect decisions? Quite well in at least two instances.

The clearest example is Brown v. Board of Education of Topeka. Brown is a problem for the contract frame because the Fourteenth Amendment was written and ratified to provide newly-freed African-Americans with a limited set of rights without disturbing social segregation. Yet, Brown is one decision no current politician would dare attack as erroneous judicial activism. Promise theory explains Brown as enforcing the 1954 American consciousness that the words of the Reconstruction Amendments clashed with social segregation. Note that I said “the words.” I am not claiming that most Americans (especially most white or southern-white Americans) desired school desegregation. My suggestion is somewhat supported by Michael McConnell’s historical research demonstrating that “the belief that school segregation does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders who had supported the Amendment.”

237. See, e.g., Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 58 (1955) (asserting that legislative history made “obvious” that Amendment was originally understood not to reach education, jury service, or voting); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 950–53 (1995) (stating that almost all scholarly investigators agree that the original understanding of the Fourteenth Amendment did not include school desegregation).
238. See McConnell, supra note 237, at 952 (“Such is the moral authority of Brown that if any particular theory does not produce the conclusion that Brown was correctly decided, the theory is seriously discredited.”); see also, e.g., Akhil Reed Amar, Becoming Lawyers in the Shadow of Brown, 40 WASHBURN L.J. 1, 1 (2000) (providing various positive readings of Brown, “the most famous case of the twentieth century”); Cass R. Sunstein, One Case At A Time/ Judicial Minimalism on the Supreme Court 36 (1999) (“Brown v. Board of Education may well be the most celebrated” decision in the Court’s history.).
239. To some degree, this parallels Gunnar Myrdal’s conclusion that Americans believed in equality when they thought in abstractions, but had difficulties putting these beliefs into practice across the color bar. See 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO IN A WHITE NATION lxxi–lxxii (McGraw-Hill 1964) (1944) (discussed in Burt, supra note 67, at 272–74). Burt rests both Myrdal and the Brown Court’s decision on the belief that “the American race problem could be solved if Americans generally, and southern whites in particular, would engage in reasoned inquiry regarding their own beliefs.” Burt, supra note 67, at 275. See also Friedman & Smith, supra note 107, at 68–69 (“Jim Crow stood as one huge, gaping embarrassment, a weapon often turned against the United States in foreign relations as well as a source of discomfort at home”; “The entire country—save the Supreme Court—seemed to view Brown for what it was, a case resting on a fundamental national commitment to ending formal barriers to racial equality.”).
240. See McConnell, supra note 237, at 953.
Another judicial modernism beyond recall is the incorporation of most of the Bill of Rights against the States. While I do not have supporting empirical research, I would expect an everyday American reading the Constitution to believe that the document protected citizens from government, not merely the federal government. Historically, incorporation may be a reflexive reading of the Constitution, one begun by citizen belief, reinforced by Court action which, in turn, supported a deepening citizen consensus, which, in its turn, induced further Court action. If asked for a textual hook in the First Amendment, everywoman would probably read “Congress” as “the government,” not “the federal government.” Amendments Two, Three, Four, Five, Six, and Eight do not specify any level, branch, or type of government entity. Everywoman could easily read them as limiting all government in the United States, especially in light of the Supremacy Clause. Alternatively, everywoman might follow the courts’ lead and cite the first and fifth sections of the Fourteenth Amendment.

At this point in my argument, I would expect various voices to bring up institutional competence. Congress, not the federal courts, has investigative arms which could survey public sentiment and word use. True, but the Court has more expertise in dealing with the

---

241. *But see* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (“I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.”).

242. Some modern historians, in concert with Justice Black, see the Privileges and Immunities Clause of Article Four as demonstrating an original understanding that the states were bound to treat their citizens in accordance with those citizens’ natural rights, including the natural rights enumerated in the Bill of Rights. Similarly, the Congressmen drafting and supporting the Fourteenth Amendment included a reiteration of “privileges and immunities” to make clear that the Federal government could force the states to do so. See William E. Forbath, *Lincoln, the Declaration, and the ‘Grisly, Undying Corpse of States’ Rights*: History, Memory, and Imagination in the Constitution of a Southern Liberal, GEO. L.J., (forthcoming) (manuscript at 34–35 available at http://papers.ssrn.com/sol3/papers.cfm ?abstract_id=544283).

243. While the First Amendment facially limits only “congress,” this wording has not been read to allow executive and judicial encroachments on free speech. See Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1192 (1987) (discussing the origin of this construction of “congress”: “[t]he specific use of the word ‘Congress’ in the [F]irst [A]mendment may plausibly be viewed as a device to prevent the imposition of a licensing system for speech and press”).

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

245. I doubt, however, that any reader would think the text supports the exact details of current incorporation and non-incorporation.

246. See generally TUSHNET, supra note 31 (attacking the primacy of federal courts in constitutional interpretation).
construction of legal texts and in applying these texts to specific fact situations. Individual litigants have the right to force the courts to make decisions: getting the legislature to act is more difficult. Furthermore, while lack of political accountability has drawbacks, so does an overabundance of political accountability, especially as distorted by the need for campaign contributions. The Supreme Court may be the worst caretaker for the Constitution, except for all the other possibilities. Perhaps the promise frame does support modification of the United State’s practice of judicial review, but I leave that issue to other articles.

In sum, Humpty Dumpty does not fracture relational value words both because relational value words change extension for a reason and because word usage occurs in the shadow of constitutional text and practice.

B. Talismanic Words

The recognized tie of some words to constitutional power raises another theoretical problem: total loss of meaning. Overuse of specific words to argue for legal change might dilute these words into mere rhetorical flourishes. A word or phrase might serve as a magic rallying cry, a battle flag, a talisman.

Examples? Try “magna carta.” The Magna Carta was, of course, the concessionary document King John signed in 1215; it was intended by its drafters and ratifiers to protect barons, not the common people. During the Stuart era disputes between the Crown and Parliament, the document was resurrected from obscurity as a parliamentary rallying cry. If talisman syndrome is a practical problem, I would expect “magna carta” to be moribund. My WESTLAW searches located 388 federal cases employing the phrase at least once and 2628

247. Cf. Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996) (holding that the meaning of patent claims is an issue of law for the judge, not an issue of fact for the jury, because, among other reasons, “[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis”).

248. “[I]t is hardly a stretch to conclude that, in fact, the judiciary does a comparatively better job than Congress in addressing constitutional claims. One need just compare opinions of the Supreme Court with the sound-bite-filled, abbreviated discussions regarding similar issues in Congress.” Williams, supra note 53, at 285.

249. See A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 1, 5–8 (1964); see also J.A. W. GUNN, BEYOND LIBERTY AND PROPERTY: THE PROCESS OF SELF-RECOGNITION IN EIGHTEENTH-CENTURY POLITICAL THOUGHT 230 (1983) (discussing anachronistic uses of Magna Carta as an ancient charter of liberties only then being claimed).
law review articles doing so. Some uses were merely evocative of respect, for example, “[t]he Sherman Act is indeed the Magna Carta of free enterprise.” Some respond to talismanic use by litigants, for example, “[a]lthough the Magna Carta and Geneva Convention are venerated documents, citation of such sources without more does not suffice to demonstrate judicial error.” Others, however, deal with the details of the 1215 document. In conclusion, the centuries since 1215 have not turned “Magna Carta” into a mere talisman. I do not believe that any of the words or phrases of the relatively recent United States Constitution have been diluted into mere talismans. However, like “Magna Carta” they are sometimes used in talismanic fashion, as verbal flypaper to catch the audience’s fluttering attention. My working hypothesis is that proper constitutional interpretation rests on empirical investigation of only the meaningful instances of word use. When deciding a word’s import, interpreters need to filter out and discount merely talismanic utterances— as good radios and telephones filter out background noise.

C. Possibly Technical Words

More interesting are words like “habeas corpus” and “ex post facto” (or perhaps “due process”) which seem to have had technical, limited meanings at least to lawyers in 1789, but which a modern,
non-professional reader might interpret more broadly. As discussed above, my instinct (so far unbacked by empirical research) is that Everyman in 1789 read these clauses as relatively broad protections against government overreaching. Justice Story’s approach is rather complex and not particularly clear. He recognizes that in a legal document, as he views the Constitution, technical words are presumably used technically, but notes two exceptions. First: if the text shows otherwise. Second: if the word has both a common and a technical meaning. In both these situations, Story generally prefers the common meaning. On this last point, promise theory agrees with Story. If the word would be read by a non-elite reader in a non-technical sense, the word should be given the common meaning during constitutional analysis.

Some formerly technical words retain the same dual status they had in 1789, for example, “habeas corpus” and “ex post facto.” As with relational value words, their non-constitutional use seems tied


257. See supra text accompanying notes 166–70.

258. 1 STORY, supra note 70, at 322. In the next place, where technical words are used, the technical meaning is to be applied to them, unless it is repelled by the context. See id. at 323 n.1, (citing Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la conduite et aux Affaires des Nations et des Souverains [The Law of Nations, or the Principles of Natural Law, applied to the conduct and to the affairs of Nations and of Sovereigns], reprinted in 1 CLASSICS OF INTERNATIONAL LAW 470–71 (James Brown Scott ed., Carnegie Institution of Washington photo reprint 1916) (1758)). But the same word often possesses a technical and a common sense. In such a case the latter is to be preferred, unless some antecedent circumstance points clearly to the former.

No one would doubt, when the constitution has declared, that “the privilege of the writ of habeas corpus shall not be suspended, unless” under peculiar circumstances, that it referred, not to every sort of writ, which has acquired that name; but to that, which has been emphatically so called, on account of its remedial power to free a party from arbitrary imprisonment. So, again, when it declares, that in suits at common law, & the right of trial by jury shall be preserved, though the phrase “common law” admits of different meanings, no one can doubt that it is used in a technical sense. When, again, it declares, that congress shall have power to provide a navy, we readily comprehend, that authority is given to construct, prepare, or in any other manner to obtain a navy. But when congress is further authorized to provide for calling forth the militia, we perceive at once, that the word “provide” is used in a somewhat different sense.

1 STORY, supra note 70, at 323 (footnote omitted).

259. See, e.g., Rumsfeld v. Padilla, 542 U.S. 426, (2004) (Stevens, J., dissenting) (“We have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.”) (internal editing and quotation marks omitted) (quoting Hensly v. Mun. Ct., San Jose Milpitas Judicial Dist., Santa Clara County, 411 U.S. 345, 350 (1973)).
to beliefs about the proper relationship between persons and government. I see no Humpty Dumpty Problem in enforcing their modern common meaning. What if a word had a technical meaning in 1789 but is now read differently? This may be the position of “due process.”\(^{260}\) To the extent such words have become relational value words, their changes in meaning are tied to changed beliefs about government, as discussed above. The modern wide meaning should be enforced as a current promise to the current public.

Some words are simply archaic. What is the current common meaning of “letters of marque and reprisal”?\(^{261}\) My response, after a quick search of the World Wide Web, is that the phrases “letters of marque” and “letters of reprisal” are currently used to refer to legal documents allowing so-called privateers to use force to take enemy vessels, that is, a method of employing private innovation and the profit motive to supplement a national navy.\(^{262}\) The words have not changed meaning, their usage has dropped because the things to which they refer are not aspects of everyday life in the twenty-first-century. After September 11th, several bills were introduced in the House to reharness this methodology and expand it to cover airplanes.\(^{263}\) These words do not seem to have acquired a common public meaning divorced from their 1789 definitions. No Humpty Dumpty Problem exists.

Of course, one could hypothesize that since “reprisal” has a non-technical meaning, the public might develop a non-technical meaning for “letter of reprisal,” a meaning that is completely at odds with limited government as currently allegedly practiced in the United States. This possibility suggests several responses, the more generalizable are discussed in the next section, “Mundane, Refocused Words.”

However, the question provides a good opening for a brief discussion of judicial maxims of statutory construction, because these two phrases occur in the Constitution as part of a list.\(^{264}\) Legal aphorism

---

\(^{260}\) See BERGER, supra note 255, at 193–200 (asserting that “due process” meant judicial “procedural process”).

\(^{261}\) See U.S. CONST. art. I, § 8, cl. 11 (Congress has power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”).


\(^{264}\) Actually the phrases occur in two different lists, the list of congressional powers, quoted supra note 261, and the list of behaviors forbidden to the states, U.S.
counsels that a word “gathers meaning from the words around it,” items in a list being a common application of that generality. While I am arguing for reading the Constitution without professional eyeglasses, I think that this particular slogan reflects common practice. For a non-legal example, consider the song of the Walrus and the Carpenter (who are trying to divert the young oysters’ attention from the danger of being eaten).

“The time has come,” the Walrus said,

“To talk of many things:

Of shoes—and ships—and sealing-wax—

Of cabbages—and kings—

Of why the sea is boiling hot—

And whether pigs have wings.”

Surely, three of the indications that the Walrus is engaging in misdirection are the lack of apparent connection between the items, the blatant nonsense of discussing the cause for something known to be non-existent, and the equally blatant nonsense of discussing the truth of something known to be false. The young oysters should have heard the listed items as a whole and refused the invitation for a stroll, as did their older oyster bedmates. In sum, reading items in context is not limited to professional elites, even seasoned oysters do so. However, other judicial canons of document construction might not survive the test of common practice and, therefore, might not be legitimate methods of construing a promissory Constitution.

D. Mundane, Refocused Words

Some words are used in everyday life in ways untethered to value judgments about interpersonal relationships or government. Such words might easily change meaning for reasons totally unrelated to interpersonal relationships or government power theories. They are, therefore, possible candidates for the Humpty Dumpty Problem. Let us look at a few, always remembering that constitu-

---


266. *Carroll*, *supra* note 219, at 240.

267. *Id.* at 239.
utional discernment starts with the meaning of the words, but does not stop there.

1. Jarring Nonsense: Humpty Dumpty Squashed

On my first visit to Mexico, a waiter handed me an English language menu; it included “Chicken and Smash.” Presumably this odd dish derived from some confusion among the distinct English words which coincide in the letters S-Q-U-A-S-H. They are “homonyms,” “word[s] the same as [each other] in sound and spelling but different in meaning.”268 One type of squash is a vegetable. One is an athletic sport. One is an action flattening out or breaking something—like Humpty Dumpty.269

Native speakers generally have no difficulty dealing with homonyms. Does anyone argue that “arms” in the Second Amendment means “body limbs ending in fingers”?270 I see no reason why the existence of a word homonymous with a different constitutional word should create a problem, even if the constitutional word has become obsolete. I have full faith and credit that Americans, even judges, would perceive this phenomenon as a case of temporally displaced homonymy.271 Nonsense is generally easily recognizable.

A much more complex problem may arise when a set of letters has different, but related, meanings. This is a problem with “well-regulated” in the Second Amendment; “twenty dollars” in the Seventh Amendment, and a number of words in the Progress Clause, a.k.a. the Copyright and Patent Clause.272 I discuss these types of issues in subsection three below.

2. New Entities within Existing Categories: An Air Force?

Congress has power to “raise and support [a]rmies,” “to provide and maintain a [n]avy,” and “to make Rules for the Government and

268. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 916 (1996), [hereinafter WEBSTER’S].
269. See id at 1850.
270. See Barnett, supra note 99, at 853 (providing this example of word ambiguity).
271. Similarly, I assume that most readers of this article recognized my allusion to the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1.
272. U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have the power . . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”).
Regulation of the land and naval [forces].

So, does Congress have the constitutional power to organize an air force? If the answer is yes, does the conclusion follow from a decision that “air force” is a newly invented entity within the pre-existing categories of “army,” “navy,” or (a larger stretch) “land and naval forces”?

The United States Air Force officially began in 1907 as a small command within the Army Signal Corps, though both the Union and Confederate forces had used tethered balloons for reconnaissance. If creating an air force were held beyond the powers of Congress, the practical outcome of the suit might be limited to reorganization of the same men and materiel inside a constitutionally sanctioned government department. Unsurprisingly, I have been unable to locate a case discussing the constitutionality of an air force.

The linguistic question in evolving promise mode is whether a modern American would consider “air force” a subcategory of “army” or “navy.” If we limit our empirical research to a standard dictionary, the linguistic answer matches the historical one. The first listed definition of “army” is “the military forces of a nation, exclusive of the navy and in some countries the air force.”

The linguistic question in contract mode would be whether a 1789 speaker of English—who was legally allowed to vote for or against the Constitution—would consider “air force” to be a subpart of either “army” or “navy.” If we look at late eighteenth-century word use by speakers of English, we could hardly expect to find many uses of “army” which include air power, since no country had as yet made

273. U.S. CONST. art. I, § 8, cls. 12–14. Additionally, Congress has power “[t]o lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1. The Spending Clause is one of three congressional power clauses that have notoriously expanded so far that they threaten to swallow constitutional limits on government. The other two are the Commerce Clause and the Necessary and Proper Clause. Each of these clauses includes some words which are not overtly laden with moral judgment and, therefore, not covered by my earlier discussion of relational value words. In the case of the Air Force, spending for “the common defense” seems unstrained, but all uses of these clauses are not as supportable. A generalized evolving promise analysis of these three expanding clauses would need both to discuss the meaning of the individual words in each clause and to recognize that long-term experience of the expansive version of the clauses tends to condition the public to accept the expansive reading as normal. While I hope to work on these clauses in the future, I am not ready to take a position on their proper interpretation.

274. Presumably, if this were a live, modern controversy, the answer would be yes for two reasons: the Spending Power and judicial deference to expert advice on military matters.


277. WEBSTER’S, supra note 268, at 115.
military use of balloons. Using the dictionary short cut (which would not be sufficient in a full analysis), the relevant definition of “army” in Johnson’s Dictionary reads, “A collection of armed men, obliged to obey one man.”278 If you believe that the meaning of a word in year x includes usages which were never made in year x, but which seem to be allowed by the verbal definitions provided for the words in year x, an air force is constitutionally allowable.279

If you take the more realistic position that word meaning is somewhat limited by actual uses—since verbal definitions do not take unimagined possibilities into consideration—the question is more complicated.280 By the date the Constitution was drafted, newspaper-reading Americans would have known of balloons capable of carrying humans aloft.281 One Mr. Carnes of Maryland had flown a hot air bal-


279. The United States Supreme Court followed this procedure in its decision that basic crop plants are “manufactures” or “compositions of matter” for purposes of the definition of subject matter on which utility patents may be granted. See J.E.M. Agric. Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc., 534 U.S. 124 (2001); see also Malla Pollack, Originalism, J.E.M., and the Food Supply, or Will the Real Decision Maker Please Stand Up?, 19 J. ENVTL. L. & LITIG. 495, 506–08 (2004) (discussing Court’s analysis of word meanings).

280. This position is not a substitution of extension for intention. Definition by verbal description commonly misses caveats that have not been considered. See, e.g., Michael Steven Green, Dworkin’s Fallacy, or What the Philosophy of Language Can’t Teach Us About the Law, 89 VA. L. REV. 1897, 1901 (2003) (discussing the difficulty of exhaustively articulating the necessary and sufficient conditions for proper use of a word, using example of “bachelor” whose standard conditions would imply that both the Pope and a two-year-old boy are “bachelors”).

loon; gentlemen in Philadelphia were taking up a subscription to fund a more grandiose balloon launch. Learned speculation raised the possibility of ancient, secret uses of air balloons, including Roman use of balloons for rapid transmission of military information. A subjective intent originalist might cogitate over the possibility that the Drafters chose “army” and “navy” to block the horrific possibility of aerial warfare, but he should decide to the contrary. At the Drafting Convention, a suggestion that the standing army be expressly limited was rebuked by a suggestion for an express limit on the size of invading forces.

In sum, whomever the promise metaphor invites to the discussion of “air force,” it is not Humpty Dumpty.

3. Sliders: Promise’s Slippery Slope?

Sliders are words whose meanings have changed unobtrusively. For these, I tentatively counsel consulting policy before using modern word meaning. Sliders have three characteristics. First, they are not relational value words. Second, their meanings have shifted. Third, the meaning shift is cabined within a general concept. Such contained shifts are unlikely to jar the modern listener but may involve major policy changes which deserve (but have not received) deep analysis. Unlike relational value words, the words’ changes in meaning do not necessarily relate to a public change in attitude towards values or

See generally PA. GAZETTE, Dec. 8, 1784, reprinted in Accessible Archives, supra, at Item No. 70974 (discussing “balloon petticoats” able to lift their wearers); See generally PA. GAZETTE, July 28, 1784, reprinted in Accessible Archives, supra, at Item No. 70427 (scoffing at fashion for hot air ballooning in reference to advertisement for “balloon string beans”). Benjamin Franklin was in France during the historic balloon experiments of 1783 and wrote reports on them to the British Royal Society. ISAACSON, supra note 136, at 420–22 (presenting section on “balloon mania”).

282. See generally PA. GAZETTE, July 21, 1784, reprinted in Accessible Archives, supra, at Item No. 70401 (discussing Carnes); PA. GAZETTE, June 30, 1784, reprinted in Accessible Archives, supra, at Item No. 70326 (discussing both Carnes and the subscription); PA. GAZETTE, July 28, 1784, reprinted in Accessible Archives, supra, at Item No. 70416 (discussing both Carnes and the subscription).

283. See generally PA. GAZETTE, July 13, 1785, reprinted in Accessible Archives, supra, at Item No. 71768. In 1784, Benjamin Franklin had suggested that balloons might be useful in war. ISAACSON, supra note 136, at 422 (discussing letter from Benjamin Franklin to a Dutch scientist Jan Ingenhousz).

284. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) (recording that Mason wanted standing army in time of peace limited to a “few garrisons” or two or three thousand men); Id. at 329 (recording that the motion was voted down, but not mentioning the suggestion about invading armies); see also William S. Fields & David T. Hardy, The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History, 35 AM. J. LEGAL HIST. 393, 421–22 (1991) (discussing standing armies, citing these pages of THE RECORDS OF THE FEDERAL CONVENTION OF 1787 in support of invading army response).
government. Slider cases share concerns, but need to be approached individually with careful consideration of nuances. Analysis will most definitely require more than empirical explication of the current (and 1789) meaning of the text.

My preliminary approach counsels considering at least the following in each analysis:

(i) the 1789 meaning of the words;
(ii) the 1789 policy supporting the 1789 meaning of the words;
(iii) the current meaning of the words;
(iv) the obviousness to a current reader that the facial meaning of the clause has shifted since it was written;
(v) the current policy view of the 1789 meaning of the words; and
(vi) the current policy view of the current meaning of the words.

Item four, “the obviousness to a current reader that the facial meaning of the clause has shifted since it was written,” looks to the actual existence of a heard promise. Obviously archaic wording may alert reasonable persons to the impropriety of judging the clause’s meaning without research.

Let us check this schema against a few examples. Please recognize that the discussions below are designed only to evaluate the evolving promise frame and to suggest fruitful areas for further research, not to provide definitive explications of the constitutional clauses. To facilitate readers’ focus on the promise frame itself, the first example is carefully trivial.

i. How Much is Twenty Dollars?

How much is twenty dollars? The Seventh Amendment was ratified December 15, 1791: it preserves the right to trial by jury in suits at common law “where the value in controversy shall exceed twenty dollars.” The meaning of “twenty dollars” is currently unimportant both because of the higher minimum needed for diversity

285. Seemingly no cases turn on this issue.
286. U.S. CONST. amend. VII.
jurisdiction\textsuperscript{287} and the relatively high cost of a lawsuit. It may never have had practical importance: Congress passed the Process Act, which required federal courts to follow local state practice regarding juries for suits at common law, only a few days after sending the Seventh Amendment to the states for ratification.\textsuperscript{288}

To explicate “twenty dollars,” a contract intent originalist might consult the ratification debates, the first Congress’ discussions while drafting the Seventh Amendment, and the discussions in state legislatures during the ratification of the amendment. While such research would uncover massive material on the importance of juries in civil trials, it would give no illumination on the twenty dollar limit,\textsuperscript{289} which the Senate inserted very late in the process without recorded justification.\textsuperscript{290}

A contract textual originalist might rely on ordinary commercial practice in 1789, but in the welter of available currencies this might be quite varied.\textsuperscript{291} For this discussion, let us assume the definition in the first federal currency bill, even though it postdates ratification of the Seventh Amendment. According to the Coinage Act of April 2, 1792, “dollars or units” were to be “the value of a Spanish milled dollar as the same is now current, and to contain three hundred and sev-

\begin{itemize}
\item \textsuperscript{287} See 28 U.S.C. § 1332(a) (1996) (setting minimum at $75,000): see also id. (1988) (raising amount to $50,000); see also id. (1958) (raising amount from $3,000 to $10,000).
\item \textsuperscript{288} See Process Act, ch. 21 §§ 1–3, 1 Stat. 93 (Sept. 29, 1789); see also Wolfram, supra note 256, at 713 nn.202–03. (discussing early federal statutes on judicial process).
\item \textsuperscript{290} See 1 ANNALS OF CONG. 76 (Joseph Gales ed., 1834). “[T]he Senate, during these early years, chose to operate in such secrecy that there is no authority available to explain the Senate’s position” on details of the Bill of Rights. Denbeaux, supra note 243, at 1164.
\item \textsuperscript{291} While Continental currency was out of circulation by the end of 1782, the Continental Congress did issue other financial instruments. See E. JAMES FERGUSON, THE POWER OF THE PURSE 66 (1961). States were issuing various types of tender. According to some economic historians, American local currencies were valued in relation to the Spanish milled silver dollar. See GORDON C. BJORK, STAGNATION AND GROWTH IN THE AMERICAN ECONOMY, 1784–1792, at 15 (1985). See also, e.g., CHERNOW, supra note 68, at 201 (reporting that in the mid-1780s, New York City “was awash with strange foreign coins” with “exchange rates differing from state to state”). The first treaty ending the Revolutionary War barred any “lawful impediment to the recovery of the full value in sterling money, of all bona fide debts” owed by Americans to citizens of Great Britain. Notice the specificity. definitive Treaty of Peace with Great Britain art. IV, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 (emphasis added). The United States Mint was not established by Congress until the spring of 1792. CHERNOW, supra note 68, at 356.
\end{itemize}
enty-one grains and four sixteenth parts of a grain of pure, or four hundred and sixteen grains of standard silver.”

Applying “twenty dollars” to a case arising in 2005, with no obvious textual strain, the judge could choose any of the following:

(i) the current value of the silver needed to coin twenty silver dollars pursuant to the 1792 Coinage Act ($90);[293]

(ii) the current value matching the buying power of twenty U.S. dollars on the date the Amendment was ratified (about $400);[294]

(iii) the current value of twenty dollars of current American paper money.

A principled originalist should choose between the first two.

Let us switch to evolving promise mode, but not spend time on empirical research (since this problem is merely intended to illustrate the promise approach). My guess is that a modern, non-lawyer reading the Seventh Amendment is most likely to choose answer three, the current value of twenty dollars of current American paper money. Why? She would be used to statements such as “a dollar doesn’t buy what it used to,” using “dollar” to mean the currency, not the buying value of the currency. Suppose a restaurant has a standing order with one supplier for twenty dollars of fresh roses to be delivered every


293. Rounding off very roughly, the dollar defined in this statute contains three quarters of a troy ounce of pure silver. Coinage Act of April 2, 1792, 1 Stat. 246 (codified as amended at 31 U.S.C. § 5112 (1994). One ounce of pure silver is currently worth slightly under six dollars. Rounding up to six dollars an ounce, one 1792 dollar is worth four and a half 2004 dollars; therefore, twenty 1792 dollars are worth ninety 2004 Dollars.

294. One 1790 dollar had the purchasing power of $19.26 in 2002. ISAACSON, supra note 136, at 507. The problem is more complex than admitted in the text. Many different methods can be used to update the “value” of currency. Current Value of Old Money, http://www.ex.ac.uk/~RDavies/arian/current/howmuch.html#tools (see hyperlinks listed under Tools and Online Sources) (last visited Dec. 15, 2005). $20 in 1791 was worth the following differing amounts in 2005: $389.49 using the Consumer Price Index, $415.09 using the GDP deflator, $6,966.49 using the unskilled wage, $12,303.20 using the GDP per capita, and $882,489.05 using the relative share of the GDP. My thanks to Mark A. Graber for this insight. E-mail from Mark A. Graber, Professor, Associate Department Chair and Director of Graduate Studies, University of Maryland, to Malla Pollack, Visiting Associate Professor, University of Idaho College of Law (Dec. 30, 2004, 8:26 A.M. PST) (on file with author).
Friday at six p.m. Week one, the supplier delivers a dozen roses billed at $20. The wholesale price of roses goes up. Week two, the supplier delivers another dozen roses, but bills them at $25. I would expect the restaurant to complain on the ground that its order was for the number of roses buyable for $20 at the time of each purchase, not the number of roses buyable for $20 at the time of the first purchase.

Should a 2005 litigant be denied a jury if her claim is worth twenty dollars under definition three, but not under an originalist definition? My first question would be whether the language of the Amendment warns the modern reader of possible anachronism, that is, was her reliance on a modern meaning reasonable? This is disputable: “common law” may or may not present such a warning. Next, I would inquire as to the current policy arguments for a twenty dollar requirement. Does this current policy undercut some 1789 policy reason for setting the limit higher? If so, does this 1789 policy still have validity? Obviously, even the answer to this facially easy question requires policy choices outside the text, a conclusion which is highlighted by the varying answers courts have reached on similar valuation questions.295

295. For example, the United States Supreme Court changed its position about the import of contracts written to prevent payment in depreciated currency. In 1868, a contract requiring payment of a specified sum “in gold and silver coin, lawful money of the United States,” was held unsatisfied by tender of the same nominal amount in United States paper currency, even though the paper was statutorily legal tender. See Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 229 (1868). “It is not pretended that any real payment and satisfaction of an obligation to pay fifteen hundred and seven coined dollars can be made by the tender of paper money worth in the market only six hundred and seventy coined dollars.” Id. at 245. However, in 1935, a five-to-four Court required creditors who had specified payment in gold coins of specified quality to accept tender of the same nominal amount in depreciated paper currency.

We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money.

... Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

... But, if the clauses are treated as ‘gold value’ clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress, and hence subject to prohibition.

ii. A Well-Regulated Militia

What quality is properly organized by rule in the Second Amendment’s “well-regulated militia”\(^{296}\)?\(^{296}\) Even if we limit our empirical investigation of 1789 word use to Federalist 29, the answer is unclear.

If a *well-regulated* militia be the most natural defense of a free country, it ought certainly to be under the *regulation* and at the disposal of that body which is constituted the guardian of the national security.

To oblige the great body of the yeomanry and of the other classes of the citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a *well-regulated* militia, would be a real grievance to the people and a serious public inconvenience and loss.\(^{297}\)

The second quote implies that “well-regulated militia” has the precise meaning of “well-drilled militia,” that is, one that has been trained into unthinking, rapid obedience of routine orders and, therefore, is more likely to withstand the stress of battle. Under this reading, “regulation” has a general meaning, but the adjective “well-regulated” when applied to armed men, and only when applied to armed men, has a technical meaning, fairly close to “highly disciplined.” If this is correct, then in the first quote, Hamilton is using the phonetically similar “regulation” and “well-regulated” to elide the difference between who decides how long the troops exercise on the practice field.

---

each Saturday afternoon and who decides where and when to send them into combat.

Focusing on the one phrase “well-regulated militia,” the 1789 linguistic question is how to weigh the technical and non-technical readings of “well-regulated.” Limiting ourselves (for demonstration purposes) to dictionaries, in Johnson, the verb “regulate” has a primary meaning of “to adjust by rule or method,” and a secondary meaning of “to direct.”

“Well-regulated” does not have an entry, but one of the meanings of “well” is “skillfully.” Johnson, while lacking a technical military definition of “regulate” or “well-regulated,” allows “well-regulated” to mean “skillfully adjusted by rule,” or “skillfully ordered,” somewhat close to “well drilled.” The Oxford English Dictionary defines “regulated” as “governed by rule, properly controlled or directed, adjusted to some standard, etc.”

To decide how to read the Second Amendment, an intentional originalist would read the Drafters’ and Ratifiers’ copious discussions of standing armies, militia, federalism, the right of revolution, etc. Probable outcome: no consensus.

A contract, textual originalist would perform a detailed exposition of the odd construction of the entire provision, comparing it to other similar constructions by the Drafters and Ratifiers. Additionally, the textualist would look for other instances where the Drafters and Ratifiers used the phrase “well-regulated militia.” Probable outcome: ambiguous, perhaps purposefully ambiguous. (After all, the first Congress did have some highly skilled practical politicians.)

A promise originalist would start with an empirical investigation of late eighteenth-century American uses of the phrase “well-

---

298. See 2 JOHNSON, supra note 278, at 1819.
299. See id. at 2226.
300. Id.
302. Id.
303. See THE COMPLETE BILL OF RIGHTS, supra note 289, at 169–205 (bringing together some of this material).
304. “No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions.” Sanford Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637, 643–44 (1989). But see Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. REV. 793, 794 (1998) (“[T]he Second Amendment is actually not unusual at all: Many contemporaneous state constitutional provisions are structured similarly.”). Even though Volokh finds the structure of the Second Amendment “commonplace,” he recognizes that the justification and operative clauses are not coextensive, preventing “mechanical” interpretation of the text. See id. at 794, 812.
regulated militia,” being sure to use sources reflecting non-elite word use. The sentence construction would be compared to the same material. Not having done the research, I forbear to guess the outcome.

Now, let us try an evolutionary promise approach. What does “a well-regulated militia” convey to a reasonable, modern American? The first outcome of my quick and dirty research was a renewed appreciation of the importance of doing empirical research on word meaning. My modern dictionary defines the verb “to regulate” as primarily meaning “to control or direct by a rule, principle, method, etc.” None of the secondary meanings relate to drilling troops. Based on the dictionary and my personal reaction to “well-regulated,” I expected the phrase to be out of use, hence something that might alert a reasonable modern speaker of English not to rely on familiar word definitions. This would be important in the culture wars because of the relatively high correlation between approving of gun control laws (hence wanting an originalist collective rights interpretation of the Second Amendment) and general approval of an evolving Constitution. However, a Google search turned up 24,600 sites using “well-regulated” without any of “militia, army, gun, troops, or 2nd.” Another Google search located 24,800 sites using the exact phrase “well-regulated militia.” Where does this leave the believer in the Constitution as an evolving promise?

First, Humpty Dumpty seems uninvolved; the phrase “well regulated” in public use is still shadowed by the Second Amendment. Second, someone needs to do a lot of reading to discover what, if anything, is the modern general consensus on the phrase’s meaning. If the public has converged on the non-technical meaning, explication of the Second Amendment should start from that meaning, not from the possible narrow technical meaning of 1789 America. Since strong policy arguments support both readings, the facial meaning of the text

305. WEBSTER’S, supra note 268, at 1624. The secondary definitions read: “2. to adjust to some standard or requirement, as amount, degree, etc.: to regulate the temperature. 3. to adjust so as to ensure accuracy of operation: to regulate a watch. 4. to put in good order: to regulate the digestion.” Id.

306. See id. at 2157–59.

307. See generally Levinson, supra note 304 (explaining general down grading of Second Amendment by so-called liberals, such as the ACLU).

might be determinative. Outcome? Unknown as yet, but definitely intriguing.

iii. Progress and Its Companions

Congress has the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” under the Progress Clause, a.k.a. the Patent and Copyright Clause. Until I conducted empirical research on 1789 word use, the academic community assumed that “progress” in this Clause meant “qualitative improvement,” and that the entire Clause was premised on an outmoded Enlightenment belief in reason’s power to lead man to heaven on earth. My research demonstrates that “progress” meant “spread,” as in “the progress of the fire.” The entire Clause, therefore, originally gave Congress only the power to grant such individual time limited control over so-called intellectual property as would encourage the dissemination of knowledge and new technology among the general populace. However, the modern American meaning of “progress” is probably “quality improvement.”

So, does my general constitutional theory destroy my long-standing claim that the Constitution is pro-public domain? I do not think so, although I admit the problem.

First, a modern American, even if ignorant of the odd details of copyright statutes, would presumably be aware that copyright protects music and video art. Otherwise, why is the RIAA suing teenagers over downloading? But “science and useful arts” in modern English does not include hip hop songs or fantasy movies, so either modern American copyright law is unconstitutional or the words in the Constitution do not mean what they seem to say. The obvious modern expansion of copyright law also clashes with the contemporary, relatively limited meanings of “author” and “writing.” Copyright protects sculpture, but today’s Americans do not refer to The Thinker as a “writing,” or to Rodin as its “author.”

310. See Pollack, supra note 98.
In sum, I have a good argument that modern Americans do not reasonably rely on the current facial meaning of the Clause’s individual words; Humpty Dumpty saves all the queen’s horses and all the queen’s men.

Second, modernism and post-modernism reject the Idea of Progress which imbues the changed meaning of “progress.” This not only suggests that current readers do not rely on the contemporary facial meaning of the Clause, it suggests that a contemporary facial reading is nonsense to a twenty-first-century reader. I doubt, however, if anyone wants Congress to lose the power to enact copyright and patent statutes. Again, Humpty Dumpty to the rescue.

Third, turning to policy, the 1789 reading of the Clause better meshes with current First Amendment theory. This supports the argument that a modern reader (having been alerted by points one and two to problems with the facial contemporary reading of the Clause) would choose the 1789 reading as a better fit with the Constitution as a whole. After all, the primacy of the First Amendment is a contemporary axiom.

Of course, a modern reader could insist on the contemporary meaning of the Clause’s words and, therefore, on the unconstitutionality of much of current copyright law. I, however, think that this version of evolving constitutionalism is just as wrongheaded as the more common insistence on reading the text with the eyes of its drafters.

In summary, I think I can have the evolving promise frame and a pro-public domain Progress Clause. Alternatively, the example supports omitting sliders from the evolving promise frame—including Lawson’s fried chicken.

VIII. CONCLUSION

313. See Margaret Chon, Postmodern “Progress”: Reconsidering the Copyright and Patent Power, 43 DePaul L. Rev. 97, 99–100 (1993) (pointing out that modernist and, even more emphatically, postmodernist theory seriously undercut the legitimacy of “progress” as a social goal).


315. See Edmond Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464, 481 (1956) (“[C]lassic republican virtues . . . will ultimately maintain the firstness of the First Amendment.”); see also Levinson, supra note 304, at 638 (pointing out the primacy of the Free Speech Clause to the ACLU, but not to the New Rightist).

316. See supra text accompanying notes 222–25 (discussing Lawson’s hypothetical).
In response to the question of how the origin and content (procedurally and substantively) of an illegitimate United States Constitution can found a legitimate government, this essay has proposed approaching that document as a promise which is made to each reader at each reading. This approach substitutes the metaphor of promise for the standard contract metaphor, destroying originalists’ analogical basis for freezing word meaning to the date of enactment. While not a panacea for doctrinal disputes, promise is both more realistic and more morally acceptable than contract. Promise deals more transparently with the temporal extension of the Constitution, historical exclusion of groups from political power, and the experience of being born into a constitutional state. The promise frame can be used in two very different approaches—an originalist mode and an evolving-Constitution mode. Used in originalist mode, the promise frame renders the Constitution slightly more legitimate by providing a method of somewhat empowering groups without power in 1789. In evolving-Constitution mode, the promise frame robustly enhances legitimacy by providing an account that enables constitutional evolution to co-exist with the Constitution’s writtenness. The promise metaphor also clarifies that the Constitution binds the government but not its citizens.

More scholarship is needed on applications of both the originalist and evolving promise frames to specific constitutional provisions. My forthcoming article, The Constitution as Promise: Textualism, Originalism, and Evidentiary Bias, will explain and illustrate how to include the non-elite while empirically investigating 1789 word meaning. The last section of the current article sketches possible evolving promise explications of relational value words, talismanic words, technical words, and several types of mundane, refocused words. It tentatively concludes that the evolving promise frame works well for relational value words, talismanic words, and technical words. Mundane, refocused words are more problematic, especially the “slider” subset.