



January 2013

The American Constitution as “Our Law”

Jack M. Balkin
Yale Law School

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yjlh>



Part of the [History Commons](#), and the [Law Commons](#)

Recommended Citation

Jack M. Balkin, *The American Constitution as “Our Law”*, 25 YALE J.L. & HUMAN. (2013).
Available at: <https://digitalcommons.law.yale.edu/yjlh/vol25/iss1/8>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law & the Humanities by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

The American Constitution as “Our Law”

Jack M. Balkin*

A central theme of *Living Originalism* is that the legitimacy of the American Constitution depends on its success not only as *basic* law and *higher* law but also as *our law*. To succeed, the Constitution must provide a viable framework for governance that allocates powers and responsibilities (basic law), and it must serve as a source of aspiration, a reflection of values that stand above our ordinary legal practices and hold them to account (higher law). But it must also succeed as *our law*—a constitution that Americans view “as our achievement and the product of our efforts as a people, which involves a collective identification with those who came before us and with those who will come after us.”¹ Viewing the Constitution as our law means that we are attached to it, even if we never officially consented to it. We regard it as belonging to us, and therefore we have the right to interpret it for ourselves and make claims in its name.²

The notion that the Constitution’s legitimacy might depend on its success as “our law” is a useful frame for discussing the excellent papers in this symposium. I will not be able to address everything the contributors have to say; instead I shall pick a few ideas in each essay, and show how they are connected to the idea of the American Constitution as “our law.”

I. “OUR LAW” AND COMPARATIVE CONSTITUTIONALISM

One of the most exciting things about the symposium was the chance to hear how two distinguished comparative constitutionalists—Kim Scheppele and Sujit Choudhry—would engage with the arguments of the book.³ *Living Originalism*, like its companion volume, *Constitutional Redemption*, is primarily a book about the American Constitution and

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Sanford Levinson for his comments on a previous draft.

1. JACK M. BALKIN, *LIVING ORIGINALISM* 60 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]; see also JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 239 (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*].

2. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 60.

3. Sujit Choudhry, “*Our Law*” and *Comparative Constitutional Law*, 25 *YALE J.L. & HUMAN.* 1 (2013); Kim Lane Scheppele, *Jack Balkin Is an American*, 25 *YALE J.L. & HUMAN.* 23 (2013).

American constitutional culture. That is not to say that I did not think about comparisons with other countries when I wrote it. Comparative considerations influenced, for example, the central idea of *Constitutional Redemption* that behind constitutional interpretations are stories, that different constitutional cultures may have very different stories, and that people understand their constitution in terms of an explicit or implicit narrative about the constitution's role in the development of their society.⁴ Comparative ideas also influenced *Living Originalism's* argument that constitutions around the world feature a distribution of rules, standards, principles, and silences, and that this distribution is not accidental but tells us something important about the point of a constitution, namely, that constitutions are not simply devices for preventing change. Constitutions are frameworks for a sustainable politics that channel change rather than merely forestall it.⁵

Even so, I wrote the book as an account of American constitutional law and the American constitutional tradition. I was concerned that what I said about the United States—its national narratives, its revolutionary tradition, its ancient and very difficult to amend constitution, its veneration of the Constitution and of the generation that framed it—would not apply equally well to other countries' experiences.⁶ Jeffrey Goldsworthy reminded me that the triptych of “basic law, higher law, our law” that I developed in *Living Originalism* might sound strange in New Zealand or Australia, countries in which the constitution is surely basic law but not necessarily higher (that is, aspirational) law.⁷ He also noted that a significant part of Canada's basic law, the British North America Act, was not the creation of We the Canadian People but of Canada's colonial overseer, the British Parliament. Therefore, it cannot be “our law” for Canadians in the same way that the U.S. Constitution is “our law” for Americans.⁸

Making broad generalizations about constitutions and constitutional theory drawn primarily from the American experience is likely to get you dismissed as yet another parochial American. On the other hand, being overly modest about what your theory says about other constitutions and other countries is likely to draw the same criticism!

4. See BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 1, at 3-4, 25-32, 50-60.

5. BALKIN, LIVING ORIGINALISM, *supra* note 1, at 24-25, 29-30 (proposing that the purpose of constitutions with combinations of rules, standards, principles and silences is to channel and discipline future constitutional judgment rather than forestall it); *id.* at 28-29 (noting prevalence of open-ended and abstract rights guarantees in post-World War II constitutions); Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 838-41 (arguing that the fact that constitutional cultures around the world do not employ original methods originalism offers good reasons to believe that original methods originalism is not required by fidelity to a written constitution).

6. See BALKIN, LIVING ORIGINALISM, *supra* note 1, at 81-82, 90-91, 359 n.2.

7. See Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, and Unwritten Principles*, 2012 U. ILL. L. REV. 683, 684-90, 694, 709 (arguing that many constitutions do not serve as “higher law” or as “our law”).

8. *Id.* at 694.

Choudhry correctly points out that constitutional comparativism is simply unavoidable if one wants to apply the arguments of *Living Originalism* and *Constitutional Redemption* to other countries. The two books argue that, in order to be successful, a constitution like America’s must simultaneously succeed as basic law, as higher law, and as our law.⁹ But countries around the world have a wide variety of different political histories, and constitutions may not play the same central and constitutive role in their national narratives as the American Constitution does in the United States. How, then can we translate the ideas of the two books to the political experience of other countries?

There is a further complication. In the United States, the question of comparative constitutionalism is unfortunately tied to an acrimonious debate over whether it is legitimate for judges to cite, make use of, or even expose themselves to comparative constitutional materials. Choudhry has called this debate “deadlocked, futile, and sterile.”¹⁰ I couldn’t agree more, and that is one reason why I didn’t have much to say about it in my two books. In this symposium, however the question of comparativism—and the use of comparative materials—is squarely presented.

I argue that the Constitution is “our law” when we are attached to it, identify with it, and see it as belonging to us and as the product of our collective efforts. Does the fact that the Constitution is “our law” mean that we cannot use materials from other countries? Would doing so make the Constitution less our law? Choudhry points out that India’s constitution has much in common with America’s. In “the world’s other great common law, federal, post-colonial liberal democracy,” he explains, citizens are attached to the Indian Constitution, view it as belonging to them, identify the constitution with the nation, and repeatedly call upon the memory of the constitution’s founding.¹¹ And yet Indian constitutional law, Choudhry explains, has no qualms about using comparative materials. In India, “something akin to living originalism is married to deep comparative constitutional reasoning.”¹²

Surely Choudhry is correct. There is no a priori reason why a constitution that is “our law” could not engage deeply with comparative materials.¹³ What matters is the nature of the constitutional culture at

9. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 59, 66.

10. Choudhry, *supra* note 3, at 6.

11. *Id.* at 3.

12. *Id.*

13. Vicki Jackson, for example, has argued for a philosophy of “judicial engagement.” VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010). Engagement emphasizes a “commitment[] to judicial deliberation and is open to the possibilities of either harmony or dissonance between national self-understanding and transnational norms.” *Id.* at 71. The point of engagement, Jackson explains, is to encourage judges to think more carefully “about the content of their own constitutional norms” by comparing and contrasting them with international and transnational norms. *Id.* Engagement is as interested in how other countries are different as in how

issue. The central questions are and must be: who are “we,” and how do we come to understand who “we” are? A constitutional culture might decide who “we” are solely through an examination of its history, attempting to disregard the influence of every other nation. But this is a hopeless task, and, in any case, it is not true of the American experience. Americans explain their constitutional traditions in terms of other countries in the past: ancient Judea, Greece, and Rome as well as eighteenth-century Britain. We understand that these legal cultures are not foreign to our law because we see them as part of us. Put another way, we constitute our tradition as Americans so that it includes them as honored predecessors. The constitution of this tradition is simultaneously a constitution of ancestors and strangers, those with whom we identify and disidentify, heroes and villains, good examples and bad, “us” and “them.” In *Constitutional Redemption*, I point out that constitutional interpretation is often based on narratives, and these narratives often involve selective identification with the past and people who lived in the past.¹⁴ The same is true, more generally, with the construction of constitutional traditions. Members of a constitutional culture identify some parts of world history as “of us” and others as “not us.” Our nationalism is actually a selective comparativism. So too is India’s; it simply chooses different tools for comparison.

One way to understand who we are is through comparison and contrast with others. We see ourselves reflected in the traditions of other countries, or we understand ourselves in contrast to what is done elsewhere. For example, originalists often explain the American Constitution both in terms of its similarities to and its differences from the constitutional monarchy of Great Britain.¹⁵ During World War II and the Cold War, Americans sometimes argued about the proper interpretation of American civil rights and civil liberties by contrasting the American political tradition with that of fascist Germany and the Communist Soviet Union and its satellites.¹⁶

Even the choice of which countries and examples to learn from says something about who we are. The choice of the British Empire rather than the French Republic, of ancient Israel rather than ancient China, is an implicit construction of identity. As America’s demographics and

they are similar. Accordingly, engagement does not necessarily require dialogue between the constitutional court and other courts; its focus is not reciprocity but self-understanding. *Id.*

14. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, at 3, 50-60 (arguing that constitutional legitimacy is premised on an understanding of the present through “an interpretation of and selective identification with the past”).

15. *See, e.g.*, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 177-88 (2005) (contrasting the powers of the American President with the English monarch); THE FEDERALIST NO. 69 (Alexander Hamilton) (offering a similar comparison).

16. RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* i, 67-71 (1999) (discussing the impact of Soviet and Nazi totalitarianism on American conceptions of rights).

experiences change, so too will Americans’ views of their history and origins. This, in turn, may lead them to imagine their constitutional traditions differently. For example, by the middle of the twentieth century, due in part to decades of Jewish immigration and a war against Nazi Germany, it became commonplace to speak of America not as a Christian nation but as founded on a “Judeo-Christian tradition.”¹⁷ Seemingly fixed traditions are continually re-imagined and reconstituted so that people can make sense of the world in which they live. Given current demographic trends, it would not be at all surprising if sometime in the twenty-first century a judge or politician spoke unselfconsciously of America’s “Judeo-Christian-Islamic-Confucian” tradition. The fact that India defines itself in conversation with and in contrast to other countries is not inconsistent with the preservation of India’s distinctive national or constitutional identity. Rather, it is a feature of that identity.

Thus, Choudhry argues, it is perfectly plausible to have a “comparatively inflected living originalism that . . . affirms a distinct constitutional identity”¹⁸ through the logic of similarity and difference; constitutional interpretation achieves this both by calling attention to constitutional and experiential differences *and* by noting “shared constitutional premises,” experiences, and assumptions.¹⁹ Emphasizing difference obviously can assist in the self-understanding of a national constitutional project, but so can discovering commonalities. Just as individuals sometimes understand themselves better when they discover that they are not alone, and that others have gone through similar experiences, so too constitutional cultures can understand themselves better by noting how other countries have tackled similar problems and how similar structural and political arrangements have produced similar advantages and difficulties.

“[A] claim to constitutional distinctiveness,” Choudhry explains, “is inherently relative; a constitutional text and its interpretation are only unique by comparison with other constitutions and interpretations.”²⁰ “Since difference is defined in comparative terms, a keener awareness and a better understanding of difference can be achieved through a process of comparison.”²¹ Moreover, “[i]f we engage comparatively and ask *why* a foreign constitution has been drafted, and interpreted in a certain way, this better enables us to ask ourselves why *we* reason the way *we* do.

17. See DEBORAH DASH MOORE, *G.I. JEWS: HOW WORLD WAR II CHANGED A GENERATION* 10 (2004) (arguing that America’s entry into World War II legitimated Judaism as one of the three “fighting faiths of democracy” along with Protestantism and Catholicism, leading to widespread acceptance of a “Judeo-Christian” tradition).

18. Choudhry, *supra* note 3, at 3.

19. *Id.*

20. *Id.* at 7.

21. *Id.*

Comparative materials are interpretive foils, tools for constitutional self-reflection that help to identify what is special or distinctive about a constitutional order.”²²

Choudhry’s arguments make particular sense to me as a constitutional historicist, for historicism is also a kind of comparativism. Historicists understand the comparative logic of similarity and difference with respect to time instead of (or in addition to) space. Thus, there is an obvious analogy between Choudhry’s arguments about horizontal comparativism—between situations separated by space—and vertical comparativism—between situations separated by time. Sometimes we best understand our present situation through understanding how different the past was, and sometimes we are enlightened through noting historical patterns and similarities. Moreover, the logic of similarity and difference is often hybrid. To recognize the most valuable similarities we must first take differences into account, and to understand the most interesting differences we must often look past surface similarities.

What is at stake in debates over constitutional comparativism is more than the potential value of recognizing similarities and differences. It is a debate *within* American constitutional culture over how that culture will be constituted and understood.

The rejection of some foreign constitutional law (as opposed to foreign law treated as part of our traditions) is based on a construction of most of the rest of the world as other or as “not us.” But this is only a rhetorical construction or a cultural convention, premised on a currently existing form of self-understanding and self-definition, and it could change over time. Indeed, that is the point of opposing the use of foreign sources in American constitutional argument. The fear is that the introduction of these sources would do more than influence American law through a cosmopolitan dialogue with other nations; the fear is that it would change our traditions and our self-conception.

It is no secret that conservative political discourse in the United States has been deeply fearful of becoming more like “Europe,” which serves as a symbol for social democratic tendencies in American policy that conservatives do not like. When conservatives argue against using foreign legal materials, I suspect that they are particularly objecting to the use of constitutional materials from social democratic nations—especially those in Europe. They fear that lawyers and judges will selectively invoke decisions from these nations in order to promote the progress of social democracy in the United States. Their concern is that repeated use of foreign constitutional law would infect American constitutional culture with these alien elements, thus changing Americans’ self-conception and their national narrative. Thus, the fight over foreign materials is literally

22. *Id.*

an aspect of the “culture wars” in that it is a struggle over the elements of American legal culture, reflecting a deeper struggle over American political culture. Arguments about the use of foreign materials in constitutional law are examples of what Philip Bobbitt has called arguments about American constitutional ethos.²³

Opponents argue that lawyers and judges using foreign sources will cherry-pick, using constitutional ideas they like while disregarding those that they find inhospitable or embarrassing.²⁴ But that claim is less a criticism than a restatement of the central issue. *Of course* lawyers and judges will be selective in drawing comparisons with the experience of other countries; that selectiveness will be driven by the constitutional values they want to emphasize within the United States. The selection of constitutional sources is a way of struggling over what is or what should be American.

The debate over the uses of foreign materials in constitutional argument, therefore, is more than a debate about baleful foreign influences, on the one hand, or potentially useful new ideas, on the other. It is a debate about Americanness itself. These arguments about the American constitutional tradition are both a description and a prescription. They do not simply seek to capture existing truths—they are trying to make things true (or more true) in practice. Nor is one side defending “true” Americanness while the other is attempting to undermine it. *Both* advocates of the use of foreign materials *and* their opponents are trying to shape American constitutional culture. They are simply trying to move it in different directions. Both seek to change inchoate or unsettled understandings about what rhetorical performances are permissible and effective.

The Supreme Court becomes a site of struggle because of the Court’s central role in American constitutional culture, and because lawyers look to Supreme Court opinions as examples of legitimate argument. In this respect, the fight over foreign materials has much in common with Justice Scalia’s crusade to banish all discussion of legislative history from

23. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 94 (1978) (describing arguments from constitutional ethos as arguments “whose force relies on a characterization of American institutions and the role within them of the American people”).

Political conservatives are not the only skeptics of comparative constitutionalism. Jed Rubenfeld’s critique—from a liberal perspective—of using foreign sources in American constitutional law is also an argument from national ethos. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004). Rubenfeld argues that American constitutionalism, which views a constitution as a reflection of a sovereign people’s commitments over time expressed through democratic lawmaking, is importantly different from “European constitutional developments since the Second World War,” which view constitutions as “express[ing] universal rights and principles, which in theory transcend national boundaries, applying to all societies alike.” *Id.* at 1975.

24. See, e.g., *Judicial Reliance on Foreign Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 11 (2011) (statement of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation) (“What Justice Scalia has said about the citations of legislative history applies equally here. The trick is to look over the heads of the crowd and pick out your friends.”).

Supreme Court opinions. Despite Scalia's determined efforts, legislative history survives because people continue to find it useful in persuading others; but they find it useful in part because they notice that federal and state courts keep using arguments from legislative history.

Similarly, the test of whether foreign materials will become part of American constitutional discourse is whether judges and lawyers find these materials rhetorically useful. And whether they are rhetorically useful is not limited to the question of whether they will have persuasive impact in any particular case. Even if they have only limited persuasive impact, even if they are just window dressing for conclusions arrived at through other means, their presence affects constitutional culture because it affects the background rules of reasonable debate. That is why there is a fight over the inclusion of these materials. Opponents do not want American culture to become a culture in which lawyers or judges might find these materials rhetorically effective, even if they do not actually determine the outcome of any particular decision.

Choudhry is far more sanguine about these possibilities. He argues that lawyers can and should use comparative materials not to impose unwanted foreign ideas but to highlight distinctive national values. His first example is a negative precedent or a negative comparison. The adopters of India's constitution wrote and interpreted Article 21—the equivalent of America's due process clause—in order to forestall *Lochner*-style interpretations.²⁵ India's framers looked to American constitutional history to forge a path different from America's. As noted above, there are many examples of this sort of negative comparison in American constitutional culture—for example, contrasting the American President to the British monarch, or American civil liberties to fascism or communism. Americans have little problem in using the comparative logic of difference to establish Americanness. The more interesting question is how Americans might employ the comparative logic of similarity.

This is the point of Choudhry's second example. It involves the Indian Supreme Court's decision to protect homosexuals from discrimination through interpretation of Article 21 and Article 14 (the equality clause) of the Indian Constitution. The Indian Supreme Court invoked the views of other countries about sexual orientation discrimination, but Choudhry argues that the court's most important technique was not direct citation of these views. Instead of directly adopting the decisions of other countries as persuasive authority, the Court turned to a discussion of the ideals underlying the Indian Constitution—in particular, the ideal of "inclusiveness."²⁶ Choudhry believes that this move allowed the Court to make an implicit analogy between the views of other constitutional courts

25. Choudhry, *supra* note 3, at 9-12.

26. *Id.* at 14-15.

and India’s own constitutional guarantees with respect to the treatment of untouchables. That is, Choudhry argues that courts can use comparative materials to reflect on and highlight their own deep national commitments.

Choudhry believes that American courts could use comparative constitutional jurisprudence in the same way—to make analogical arguments that would shed light on American constitutional values and the American constitutional tradition: “Analogies from foreign constitutional systems can . . . help identify principles that *Americans* have already committed themselves to. . . . [F]oreign analogies can also be more disruptive, because they can highlight how precedents are unfaithful to national constitutional premises, and can provide the interpretive resources to overturn them.”²⁷

Using the example of *Lawrence v. Texas*, he argues that Justice O’Connor’s concurring opinion, “in applying the anti-caste doctrine . . . could have engaged with the reasoning of the South African Court, and made a parallel line of argument” focusing on how criminalization of sodomy makes homosexuals outlaws and creates a status offence.²⁸ O’Connor could also have “draw[n] an analogy between discrimination on the basis of sexual orientation and race—a possibility that was highlighted by comparative jurisprudence from South Africa.”²⁹

In fact, the argument that anti-sodomy laws make homosexuals outlaws and impose a status offense was made to the Court in *Lawrence*.³⁰ And a

27. *Id.* at 19.

28. *Id.* at 22.

29. *Id.*

30. See Brief of Human Rights Campaign et al. as Amicus Curiae Supporting Petitioners at 10, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152347 (“[T]he primary function of sodomy laws today is to brand gay people as ‘criminals,’ a brand that itself works to inflict a variety of psychological and legal harms.”); Brief of the American Bar Association as Amicus Curiae Supporting Petitioners at 13, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 164108 (“Criminal sodomy laws are also viewed by some members of society, including some participants in the legal system, as a justification for setting gay men and lesbians apart as second-class citizens not entitled to the same government protections as other members of society.”); Brief of Professors of History as Amicus Curiae Supporting Petitioners at 3, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152350 (“Sodomy laws that exclusively targeted same-sex couples . . . reflect [a] historically unprecedented concern to classify and penalize homosexuals as a subordinate class of citizens” while “state practices and ideological messages worked together to create or reinforce the belief that gay persons were an inferior class to be shunned by other Americans.”); Brief of the CATO Institute as Amicus Curiae Supporting Petitioners at 20, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152342 (“The presumptive criminal activities of gay people have civil consequences . . . Texas and nearby states have invoked the outlaw status of gay people to exclude them from hate crime and employment anti-discrimination laws; to discriminate against them in hiring and promotion decisions for state or local employment; to deny them custody of or even visitation with their own biological children; and to introduce antigay messages in sex or AIDS education programs.”) (citations omitted); Brief of Constitutional Law Professors Bruce A. Ackerman et al. as Amicus Curiae Supporting Petitioners at 4, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 136139 (arguing that sodomy laws have multiple collateral consequences that burden intimate relationships, parental relationships, employment opportunities, and privacy in the home by gays and lesbians and that Texas’s “law can and is used as an excuse to persecute gay people, even if it is seldom directly enforced”); Brief of the National Lesbian and Gay Law Association et al. as Amicus Curiae Supporting Petitioners at 19-20, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152348 (arguing that gays are subject to “widespread prejudice,

version of the idea does appear in Justice Kennedy's majority opinion. As Justice Kennedy explained, "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law 'legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,' including in the areas of 'employment, family issues, and housing.'"³¹

Choudhry's point, however, is that Kennedy's arguments could have been made stronger and more convincing by using comparative constitutional jurisprudence, which would have helped draw attention to deep features of the American constitutional tradition. It would have emphasized that such laws reflect more than mere animus against homosexuals, and would have "address[ed] the broader system of social meanings and subordination of which the challenged law was a part."³²

Phrased this way, Choudhry's argument could be either an argument that comparative analogies offer greater *insight* or an argument that comparative analogies offer greater *rhetorical effectiveness*.

As to whether comparative argument leads to greater insight about national commitments, I agree with Choudhry's basic point but am not sure that *Lawrence* provides the best example to demonstrate it. The gay rights movement in the United States was quite familiar with the outlaws argument, and the argument that sodomy laws have pervasive and systematic subordinating effects on the lives of homosexuals.³³ These arguments were offered to the Supreme Court in *Lawrence* itself.³⁴ Choudhry does not fully explain what extra insight analogies to South African jurisprudence would have provided in this particular case.³⁵ Even

ranging from everyday social interactions, to the ability to get and keep a job, obtain housing, maintain custody of one's children, walk on the street in safety, or—as demonstrated here—be free from arrest").

31. *Lawrence*, 539 U.S. at 581-82; see also *id.* at 581 ("[P]etitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. . . . Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement.").

32. Choudhry, *supra* note 3, at 20.

33. This was the point of the various amicus briefs offered in *Lawrence*. See, e.g., Brief of Human Rights Campaign, *supra* note 30, at 9-10 (noting that the "primary function" of sodomy laws is to make gay people "criminals" and arguing that "[n]o credible authority disputes that gay people have been subjected to the most dehumanizing forms of discrimination employed by American government at any level in the 20th century"). And, of course, the American law student organization for gay, lesbian, transgender, and queer law students is called OutLaws.

34. See *supra* note 30.

35. Nevertheless, I should note that the amicus brief that I joined in *Lawrence* (written primarily by William Rubenstein and Pam Karlan) did cite to Justice Albie Sachs's opinion for the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 S.A.L.R. (Const. Ct. Oct. 9, 1998) (No. 11/98), <http://www.saflii.org/za/cases/ZACC/1998/15.pdf>. See Brief of Constitutional Law Professors Bruce A. Ackerman et al., *supra* note 30, at 18. Moreover, an amicus brief representing various international and human rights organizations

so, Choudhry's more general point is untouched. Using comparative materials to make analogies that shed light on American constitutional commitments might provide valuable insights in many areas, including gay rights cases.

Moreover, the similarity between the outlaws arguments made in India, South Africa, and the United States suggests another vehicle for constitutional comparativism: social movements. As Choudhry notes, the movement for gay rights, like many other social movements, crosses national boundaries.³⁶ Social movements are an important vehicle for the development and circulation of ideas. Because social movements are always interested in producing arguments that will be the most persuasive, they learn to tailor and reshape their arguments for each national audience. As a result, social movements may become effective translators and creators of the kinds of analogical arguments that Choudhry celebrates. Members of transnational social movements may transmit and translate particular arguments and ideas from country to country whether or not they explicitly cite comparative materials.

As for rhetorical effectiveness, again I am not sure that *Lawrence* makes the best case for Choudhry's larger point. I am somewhat dubious that if O'Connor appealed to South Africa or India's constitutional jurisprudence in her concurring opinion, her arguments would have been more compelling before the particular audiences she was addressing. In fact, I suspect that her arguments would have been less convincing to her intended audience and the use of comparative materials would have distracted attention from the merits of her argument. She would have been met with the same frenzy that accompanied Justice Kennedy's very modest use of comparative materials, and because she would have been using the analogies far more substantively than Kennedy did, the reaction might have been even fiercer.

Viewed as advice about effective rhetoric, therefore, Choudhry's suggestions for Justice O'Connor would probably have not been very effective in 2003 and might even have been counter-productive. Whether comparative analogies might be effective more today than in the future, of course, is another question. It has to do with how constitutional culture changes. And constitutional culture probably won't change in a way that makes these arguments effective, one suspects, until a critical mass of judges, lawyers, and scholars are willing routinely to use comparative

(and substantially drafted by Yale Law School faculty, alumni, and students) emphasized that other countries and international courts had banned discrimination against homosexuality, offering numerous examples from around the world. See Brief of Mary Robinson et al. as Amicus Curiae Supporting Petitioners at 18-29, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 164151 (arguing that international and foreign court decisions had banned sexual orientation discrimination or held that sodomy laws were expressions of animus and irrational prejudice).

36. Choudhry, *supra* note 3, at 12 (describing "a global legal-political strategy to advance the cause of same-sex rights through public interest litigation").

materials in constitutional arguments. That is the sense in which the use of comparative materials is really a question about the evolution of culture and cultural practices. The best way to ensure that comparative materials are used in ordinary legal discourse is for lawyers to begin using them. That, of course, is precisely what opponents of these materials wish to forestall.

II. PURPOSIVISM AND CONSTITUTIONAL REDEMPTION

Comparativism has two moments, one that emphasizes similarity and one that emphasizes difference. Choudhry's essay emphasizes the possibility of similarity, or at least potential connection, between different constitutional cultures. Scheppele's essay, by contrast, emphasizes differences between American constitutional culture and that of other countries.³⁷ Her central claim is that American constitutional culture is distinctive because it features originalism rather than purposivism.³⁸ Thus, her argument becomes a sort of backhanded version of American exceptionalism. Americans are exceptional because they are parochial, out of step with the rest of the world.

I agree with Scheppele that American-style originalism is almost unheard of outside of the United States. Ironically, it is not even the dominant form of argument among American judges, who are much more likely to make arguments from precedent. Only in rare cases of first impression of a constitutional text do judges primarily use originalist methods. That is what made the Second Amendment decisions in *District of Columbia v. Heller*³⁹ and *McDonald v. City of Chicago*⁴⁰ so unusual; there was very little Supreme Court case law on the Second Amendment, and nothing important since the 1930s.⁴¹ In most other contexts, precedent dominates, even if originalist arguments are occasionally thrown in as spice or decoration.⁴² As Sara Solow and Barry Friedman explain in their contribution to this Symposium, originalism is much more the province of popular culture and the legal academy than of everyday litigators.⁴³

In fact, if we look beyond surface appearances, we will discover that Scheppele's purposivism is actually characteristic of American constitutional culture. So I shall emphasize underlying similarities where

37. Scheppele, *supra* note 3, at 23-24.

38. *Id.*

39. 554 U.S. 570 (2008).

40. 130 S.Ct. 3020 (2010).

41. See Michael Greve, *The Originalism That Was, and the One That Will Be*, 25 YALE J.L. & HUMAN. 101, 104 (2013) (observing that cases like *Heller* and *McDonald* are rare); Sara Aronchick Solow & Barry Friedman, *How To Talk About the Constitution*, 25 YALE J.L. & HUMAN. 69 (2013).

42. See, e.g., *Printz v. United States* 521 U.S. 898 (1997). Although Justice Scalia's majority opinion offers plenty of originalist discussion, see *Printz*, 521 U.S. 905-15, 918-22, it ultimately turns on a recent precedent, *New York v. United States*, 505 U.S. 144 (1992). See *Printz*, 521 U.S. at 925-33.

43. Solow & Friedman, *supra* note 41, at 69.

she emphasizes differences. Indeed, her essay is valuable because it reveals deep aspects of constitutional culture—including American constitutional culture—that many observers may overlook. Moreover, although she attempts to use my work as a foil, her account of purposivism is actually consistent with the constitutional theory offered in *Living Originalism* and *Constitutional Redemption*. Much of Scheppele’s argument seems consonant with the two books’ focus on narrative construction in American constitutional culture and the idea of constitutional redemption. In fact, Scheppele’s analysis helps show another way that the arguments of *Living Originalism* and *Constitutional Redemption* might apply to other constitutional cultures.

In most “advanced constitutional systems,” Scheppele explains, “purposive interpretation” dominates, which, she hastens to point out, “is not originalism by another name.”⁴⁴ Scheppele identifies several features of purposive interpretation. First, it focuses on “the *point* of a particular constitutional order.”⁴⁵ Second, its goal is to “work out what the constitution demands of us now.”⁴⁶ Third, it “look[s] forward to the imagined future of a polity rather than backward to its historical starting point.”⁴⁷ Instead of requiring us to live up to “what others imagined for us,” it attempts to “explain[] the present by understanding it in light of a desirable future state of affairs.”⁴⁸

Judges engaged in purposive interpretation do not ask about the psychological states of drafters or adopters. Instead they ask about the larger purposes behind a constitution. This approach is not really foreign to the American tradition of constitutional interpretation. To begin with, it sounds remarkably similar to the interpretive practices of lawyers at the time of the founding. As H. Jefferson Powell pointed out in a famous essay, founding-era lawyers were not interested in the subjective intentions of the authors. Instead, they looked to the “intent” of the text or the statute—the point and purpose of the statute given the text.⁴⁹

In fact, Scheppele’s account of purposivism reminds me of nothing so much as the interpretive practices of the great Chief Justice John Marshall. Like other lawyers of his time, Marshall was not particularly interested in the psychological states of the framing generation. Instead, he *ascribed* purposes to the text based on his understanding of how the constitutional system was supposed to operate and, equally important, how it should

44. Scheppele, *supra* note 3, at 24.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 25.

49. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895 (1985) (“The ‘intent’ of the maker of a legal document and the ‘intent’ of the document itself were one and the same.”); see also *id.* at 888 (“The original intentionalism was in fact a form of structural interpretation.”).

operate in the future given its larger purposes.

*McCulloch v. Maryland*⁵⁰ demonstrates Marshall's view that the terms of the Constitution should be viewed together as a whole, rather than as a set of isolated clauses. Marshall also treated constitutional argument as forward-looking; this is the basis of his famous argument that the scope of federal power should be interpreted generously because of America's potential for growth across the continent.⁵¹ Perhaps some of the framing generation would have agreed with Marshall's vision of a continental republic. But many others, fearful of the sort of imperial ambitions and corruption they identified with Great Britain, would have rejected Marshall's remarkable anticipation of what would later be called Manifest Destiny.⁵²

Finally, two of Marshall's most famous statements about the Constitution are entirely in the spirit of Scheppele's account of purposivism. The first is that the Constitution must be construed in a way that adapts the plan of government to changing times, and it must always be interpreted in light of future needs.⁵³ The second is that a constitution offers only the great outlines of a charter of government, and therefore must be construed generously given its central point and basic purposes.⁵⁴ Or, as Marshall famously put it, we must never forget that it is a constitution that we are expounding.⁵⁵ Any approach that counts John Marshall as one of its chief exemplars can hardly be an outlier in American legal culture.

Many modern constitutional scholars treat Marshall's synoptic, synthetic, and structural approach to constitutional interpretation as their model. Michael Greve points out that a narrow clause-bound interpretation is "a product of modern-day originalism, not of an 'exceptional' American constitutional tradition."⁵⁶ Akhil Amar's work is deeply structural, always attempting to find connections between different parts of the text and different parts of the Constitution.⁵⁷ And Neil Siegel has insightfully pointed out that the "new textualism" that Jeffrey Rosen discusses is really

50. 17 U.S. (4 Wheat.) 316 (1819).

51. *Id.* at 408 ("Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed.").

52. See Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 987-88 (1998) (contrasting Marshall's nationalist vision with a Jeffersonian vision of America as "a tranquil land of agrarian farmers who hoped to avoid the corruptions of ambition and avarice characteristic of European monarchies").

53. *Id.* at 415-16.

54. *Id.* at 407-08.

55. *Id.* at 407.

56. Greve, *supra* note 41, at 104.

57. See AMAR, *supra* note 15; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

“the old Marshallianism.”⁵⁸

Scheppele also explains that purposive constitutional interpretation may have a negative as well as a positive aspect. It may focus on what the constitution attempted to avoid in the light of history. In addition to aspiration for a better future, constitutional interpreters are often guided by their understanding of the reasons for drafting a constitution, and the evils, crises, and disappointments that led to the formation of a new political order. This is a central idea in *Constitutional Redemption*, which emphasizes the role of narrative construction in framing constitutional arguments—stories about what we promised ourselves we would do and stories about what we promised ourselves we would never do again.⁵⁹

Thus, in Chapter Two of *Constitutional Redemption*, the formation of the American Republic is told both as a story about aspirations toward freedom and republicanism and as a story about Americans distancing themselves from the hierarchy and corruptions of monarchy.⁶⁰ The point can be generalized to many other examples of American constitutional development. Reconstruction can be understood both as a story about what Lincoln called a “new birth of freedom,” and a story about ending the caste-like structures and corruption of the slaveocracy. The New Deal was a constitutional response to a misguided form of laissez-faire capitalism; the civil rights revolution dismantled the legacy of Jim Crow, and so on.

Perhaps equally important, Scheppele explains that a narrative understanding of what the Constitution is designed to avoid need not be identical to the understandings of the founding generation, even if people routinely ascribe these purposes to the Founders. Although purposive argument may be historically informed argument, it is not an inquiry into the psychology of the adopting generation. Instead, interpreters in the future will understand the point of the constitution in light of its subsequent development, and in light of what later history reveals to us about the events that led up to the creation of the constitution (or amendments thereto).⁶¹ As a result, a later generation may ascribe purposes to the Constitution—both what the Constitution aspires to and what it seeks to avoid—that the adopting generation may not have actually held.

Scheppele’s central example is the German Basic Law. She points out that that it is widely accepted nowadays that the German Basic Law was designed to protect human dignity as its central value, and that the

58. Neil S. Siegel, *The New Textualism, Progressive Constitutionalism, and Abortion Rights: A Reply to Jeffrey Rosen*, 25 *YALE J.L. & HUMAN.* 55, 56 (2013).

59. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, at 3 (arguing that underlying constitutional interpretations are narratives about “things ‘we’ (the People) did before, things we still have to do, things that we learned from past experience, things that we will never let happen again”).

60. *Id.* at 17-33.

61. Scheppele, *supra* note 3, at 23-25.

centrality of human dignity was a reaction to “the signature evils of National Socialism, in particular the Holocaust.”⁶² Yet, Scheppele argues, “this ‘never again’ purpose became the dominant point of the constitution only after the initial drafting of the Basic Law,” and “was then projected backwards into the history of the text as its core purpose.”⁶³ The Holocaust, Scheppele points out, was not on the minds of the Basic Law’s framers, who were more concerned with the division and demoralization of the German state following World War II, and with constitutional questions of federalism, the separation of powers, and religious freedom.⁶⁴ Only years later did the Holocaust “emerg[e] as the defining evil of World War II,” transforming the public understanding of the “moral core” of the German Basic Law in the process.⁶⁵ “With recognition that the targeted destruction of peoples . . . was the central evil committed by the German state, the point of German Basic Law shifted its center of gravity, and constitutional interpretation followed.”⁶⁶

Scheppele offers Germany as a contrast to the United States, but the phenomenon she describes is actually fairly common in American constitutional culture. That is because we can understand her example in two ways. It is an example of an invented tradition⁶⁷ in constitutional culture and it is an example of a structural account of the purposes of a constitution that is not tied to framers’ intentions. Both types of argument appear prominently in American constitutional culture.

An invented tradition is a set of norms and purposes that have developed comparatively recently but that are projected back onto the past as either having always been the case or as having existed at some primordial moment.⁶⁸ American constitutional argument is full of such invented traditions, and American originalists are often some of the worst offenders.⁶⁹

A particularly powerful example of how Americans have reinterpreted the central point of their constitution is the familiar idea that the basic purpose of the American Constitution is to promote democracy. In fact, many of the Framers of the Constitution were suspicious if not opposed to the idea of democracy, which they thought extremely dangerous and likely

62. *Id.* at 29.

63. *Id.* at 30.

64. *Id.* at 31-33.

65. *Id.* at 34.

66. *Id.* at 34-35.

67. Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 1-2 (Eric Hobsbawm & Terence Ranger eds., 1983).

68. *Id.* at 2.

69. See, e.g., Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1312 (2012) (arguing that “the notion that the concept of sex discrimination was traditionally understood to refer—always and only—to practices that divide men and women into two groups perfectly differentiated along biological sex lines” is an invented tradition from the mid-1970s that has been used to justify current doctrine).

to degenerate into demagoguery, dictatorship, and tyranny.⁷⁰ Many of the Framers believed in a republic led by the “best men,” whom the common people would look up to and follow.⁷¹ Only in the nineteenth century, and especially with the Jacksonian revolution, the elimination of property qualifications for voting, the movement for universal male suffrage, and the creation of mass political parties, does American politics begin to move toward what we would now call democracy. Our modern conception of the Constitution as a charter of democracy also owes a great deal to the Progressive Era—with its focus on good government and popular control—and the New Deal. The New Deal revolution emphasized judicial restraint; it treated the judicial exertions of the *Lochner* era that preceded the New Deal as a negative precedent that must never be repeated. This “never-again” idea helped shape the familiar notion that judicial review presents what Alexander Bickel called the “counter-majoritarian difficulty,” a term coined not at the founding, but in 1962.⁷²

We can also understand Scheppele’s account of the German Basic Law as a non-originalist structural argument. Structural arguments are arguments about the point of a constitution, not arguments about original intentions.⁷³ To be sure, many people confuse structural argument with arguments from history or original intention, probably because structural arguments often quote historical source material like *The Federalist*, Madison’s notes of the Philadelphia Convention, or the ratification debates. But even when it uses history, structural argument is not the same thing as historical or originalist argument.

Structural arguments are arguments about how the Constitution works or should work. They are also arguments about how different parts of the Constitution should work together, and thus play their appropriate role in a larger scheme. Structural arguments are arguments about the Constitution as a system of government, and therefore could also be called *systemic*

70. See, e.g., RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 4 (1948) (describing complaints about democracy by delegates to the Philadelphia Convention, including Edmund Randolph, Elbridge Gerry, Roger Sherman, and William Livingston); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 165-67 (1972) (noting that concerns about the excesses of democracy in state governments led to calls for a new constitutional convention); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1791-92 (2010) (“[T]he Framers of the American Constitution believed that democracies were dangerous precisely because they might lead to what they called ‘tyranny’ . . . Even as they celebrated republicanism—rule by the people—they distrusted the passions of majorities.”).

71. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 253-55 (1991) (explaining that Framers thought that officers of new federal government would be “disinterested gentlemen” or “wise and virtuous elite”). On the phenomenon of “deference politics,” both in England and America, see EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 169-79, 248-49, 285-87, 305-06 (1988).

72. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

73. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 142, 262-63.

arguments.⁷⁴

Moreover, as I argue in *Living Originalism*, because the Constitution is always changing, the best structural account of the Constitution can change over time in ways that the adopters might not have expected or might even have opposed.⁷⁵ As noted above, a central purpose of the American Constitution has become democracy; and many of its features have become increasingly nationalist. Many of the 1787 framers would have objected to both of these developments.

Structural arguments generally invoke what Scheppele would call the point or purpose of a constitution; they need not be connected to original intentions.⁷⁶ Earlier I noted that Scheppele's account of purposivism sounds a lot like John Marshall's approach. The reason is that Marshall, and many of those who followed his methods, were actually not originalists in the sense that Scheppele objects to. Rather, they were textualists and structuralists.

In Scheppele's account of originalism (not mine), "we are bound to become what our imagined constitutional ancestors wanted,"⁷⁷ and we must engage in "a tour through the minds of those who wrote the constitution or who lived in those times."⁷⁸ I do not recognize my book in her description of originalism; her account of purposivism seems closer to my argument.⁷⁹

74. Structural arguments are the opposite of what John Hart Ely once called a "clause-bound interpretivism." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Ely's key insight was that constitutional theory should go beyond a rigid dichotomy between "clause-bound" textualism and a non-interpretivism that looks for values outside of the text. *Id.* at 11, 12-13, 88 & n.*. Structural arguments—like Ely's argument for democratic representation-reinforcement—refer to norms that may not be overtly stated in the text. Nevertheless, these norms make sense of the text and express its point or purpose. *See id.* at 88-89, 100-01 (arguing that the point of the Constitution is to promote fair processes, including fair processes of representative government). Moreover, structural reasoning shows how different parts of the text fit together in a satisfying and coherent whole, and therefore should be interpreted in light of general structural principles. *Living Originalism* agrees with this basic insight of Ely's about the relationship between text and structure; it emphasizes that there are many other structural values in the Constitution besides Ely's central example of representation-reinforcement.

75. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 261 ("Indeed, because of the cumulative effects of later developments, some principles that the founding generation would have rejected or conceived narrowly can be underlying principles today."). Scheppele therefore misunderstands me when she insists that my "originalism presumes that the basic point of a constitutional order cannot shift over time" and that I would be "shocked—*shocked!*"—to discover that this had occurred in the United States. Scheppele, *supra* note 3, at 41.

76. *See* BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 142 ("Structural principles do not have to have been intended by anyone in particular; indeed, they may only become apparent over time as we watch how the various elements of the constitutional system interact with each other."); *id.* at 262 ("[S]tructural principles might emerge from the constitutional system that no single person or generation intended. . . . We must look to other generations as well as the founding generation to understand how constitutional structures should work (and how they might fail to work).").

77. Scheppele, *supra* note 3, at 25.

78. *Id.* at 29.

79. *Living Originalism* argues that we should follow clear rules in the text because these rules were designed by the framers and adopters of a Constitution to limit discretion and to structure political action. Conversely, where the text provides for standards or principles instead of hard-wired

Scheppele believes that purposivism offers a distinctive approach to how history matters in constitutional argument. Purposive interpretation, she explains, does not require that we accept the founding generation’s understanding of history or its account of a constitution’s purposes. “[T]he point of the history giving rise to the need for a new constitution can change over time as that history is seen in a new light,”⁸⁰ because “it is precisely what happens later that allows us to understand what was happening at the start.”⁸¹ Hence, Scheppele concludes, “a vibrant constitutional order remakes itself over time as it comes to understand its own past in new ways.”⁸² She could find similar sentiments in *Living Originalism*:

Fidelity to the past is a present-day decision about what we are committed to seen through the lens of a present-day perspective. . . . [Because] the present is always changing into the future, . . . so too does our situation and our perspective. These are the inextricable circumstances of fidelity to an ongoing creedal tradition and a continuing political practice.

Even if the facts of history do not change, and even if we uncover no new historical sources, what history means to us and the way it appears to us continually do change, because we ourselves are moving through history and continually see what happened in the past through new perspectives. . . . We inevitably recognize and conceptualize what happened in the past from the standpoint of our own cultural memories and experiences. These are always changing—new things happen to us or become salient to us, while older events and memories are reinterpreted or forgotten. Hence, elements of the past always look salient to us in ever-new ways, even if specific source materials do not change.

History seems freshly (and differently) relevant as time passes, not because the facts of history have altered, but because what facts are important to us and what they mean to us change as we and our

rules, there is room for constitutional construction reflecting contemporary understandings and values. See BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 24. Scheppele argues that this means that I am committed to “focusing on the meaningful actions of a particular set of people”—that is, the framers who drafted the rules—and that, therefore, my approach to constitutional interpretation is not purposivist. Scheppele, *supra* note 3, at 28 n.14. The conclusion does not follow; it confuses a specific argument for following hard-wired rules with a general commitment to a philosophy of original intention.

Many constitutions around the world have hard-wired rules that establish basic structures: election rules, the organization of the parliament, the length of terms or qualifications for officeholding, and so on. Like the rules in the American Constitution, these rules were also put in place to limit discretion and to structure politics, and it would hardly be surprising if constitutional courts enforced these norms as rules. But this fact, in and of itself, does not mean that interpreters who follow and enforce these rules cannot be purposivists. Rather, a purposivist might point out that the fact that a norm is written as a hard-wired rule that is difficult to evade suggests a constitutional purpose to limit discretion.

80. Scheppele, *supra* note 3, at 29.

81. *Id.* at 42.

82. *Id.*

country go through various crises, conflicts, controversies, and transformations. We see the problems and the difficulties, the fears and the commitments, the goals and the aspirations of people in the past in terms of our present controversies and experiences. So the past always seems relevant to us, in ways that may differ markedly from how previous generations apprehended our common history. History always looks new to us because we ourselves are constantly changing; our perspectives are constantly shifting under our feet. We are always moving through history and viewing the past from ever-new perspectives, in light of contemporaneous events that are themselves ever receding before us. You cannot step into the same Constitution twice, but this is not because the Constitution is always changing; it is because you and the position from which you interpret the Constitution are always changing.⁸³

The more Scheppele describes purposivism, the more I am convinced that it has deep resonances with the claims made in *Living Originalism* and *Constitutional Redemption*. One of the reasons why I find her account of purposivism so interesting is that it seems like an argument for what I call redemptive constitutionalism. If that is so, then this kind of approach occurs around the world, and not merely in the United States.

A redemptive constitutionalism argues that a constitution is a transgenerational project in which each generation aspires to do better than the generations that preceded it. Each generation seeks to fulfill promises—not specific commands from the past—that Americans have made to themselves as a people, understood from the point of the present, not the past. Moreover, in a redemptive constitutionalism the nature of the future is not—and cannot be—fully contained in the past.⁸⁴ What redemption looks like cannot be understood at the beginning of the process—it can only become clear over time through political contestation and political development.⁸⁵ In addition, we understand redemption through narrative construction: we tell a story about ourselves that begins in the past and projects outward into the future. Thus, what Scheppele says of purposive interpretation is also true of a redemptive constitutionalism: “we remember the past, but we are accountable to a future and to each other.”⁸⁶

In *Living Originalism* and *Constitutional Redemption*, I focus on American examples of redemptive constitutionalism, largely because I know these examples best. In both books, I try not to suggest that

83. BALKIN, *LIVING ORIGINALISM*, *supra* note 1, at 268-69.

84. BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, at 6.

85. *Id.*; see also Jack M. Balkin & David Strauss, *Response and Colloquy*, 92 B.U. L. REV. 1271, 1286 (2012) (“Redemption is not making things conform to a preexisting template . . . the first redemption is incomplete, it’s compromised, it’s impure, it’s not innocent. But it makes possible another redemption, and that redemption, in turn, makes possible yet another redemption.”).

86. Scheppele, *supra* note 3, at 26.

2013]

Balkin

133

redemptive constitutionalism would look the same in every country. That is because constitutions play different roles in the political culture of different countries. As in the United States, people in different cultures make aspirational appeals that connect the past to the future; they offer narratives about their country's history; and they speak about the need to affirm and realize their nation's most basic values. But people may not invoke their country's constitution when they do this, or invoke it in the same way that Americans might.

Moreover, what it means to "redeem" the constitution might look very different in different constitutional cultures. Many Americans regard the Second Amendment's guarantee of a right to keep and bear arms as a crucial element of human liberty; they believe that it is perpetually threatened by government power and needs increased constitutional protection. Europeans might well recoil at such a vision of constitutional redemption.

Some constitutional traditions—for example, in South Africa and Europe—might see constitutional redemption as the eventual acceptance of universal human rights and other liberal values connected to the Enlightenment tradition. A strongly nationalist constitutional tradition, however, might view redemption as the fulfillment of the nation's distinctive values. These values might include protecting the interests or the hegemony of a particular ethnic, linguistic, or religious group. Redeeming these distinctive constitutional values might be orthogonal to or even in conflict with the protection of universal human rights. Finally, the constitutional tradition of a theocratic country might view constitutional redemption as the extirpation of Western influences and the restoration of religious orthodoxy.

I make these suggestions not to emphasize American distinctiveness, but rather out of intellectual caution. My point is simply that redemptive constitutionalism need not work the same way in other constitutional cultures as it does in the United States, because the degree of veneration that Americans have toward their Constitution and their Founders is unusual, and because different nations may have very different political ideals.

Although Scheppele emphasizes American difference, I believe that she actually shows us deep similarities between American constitutionalism and other forms. Scheppele's account of purposivism is valuable precisely because she demonstrates how other countries might engage in what I call redemptive constitutional argument. And she shows that redemptive argument does not require American-style constitutional veneration or founder worship.

III. THE NEW TEXTUALISM: CONSTITUTIONAL STRATEGY OR CONSTITUTIONAL FAITH?

The exchange between Jeffrey Rosen⁸⁷ and Neil Siegel⁸⁸ concerns the potential strategic and political uses of what Rosen calls the “new textualism.”⁸⁹ The term “new textualism” was coined by Jim Ryan and Doug Kendall, who offer my work and Akhil Amar’s as prominent examples.⁹⁰ As Neil Siegel points out, the term “new textualism” is a bit of a misnomer, because it is about structure and history as much as text, and it is hardly new.⁹¹ Both Amar and I see ourselves as continuing a tradition of synoptic (or what Scheppelle would call “purposive”) constitutional interpretation employed by judges like Chief Justice Marshall, the first Justice Harlan, and Justice Black. Rosen also helpfully suggests Justice Brandeis as a predecessor of the method of text and principle.⁹²

Rosen believes that the new textualism “seeks to beat conservatives at their own game” by embracing text, history, and structure. It also “expand[s] the range of arguments that [liberals] can use to persuade conservative Justices to embrace liberal results.”⁹³ Thus, Rosen describes the new textualism largely in strategic terms. Even so, Rosen believes, these strategic advantages are not enough: “Ultimately . . . the success of the New Textualism will depend on the ability of liberals to stop squabbling about constitutional methodology and to agree on the substantive values that they belie[ve] the Constitution protects.”⁹⁴ The new textualism as a methodology, Rosen explains, is no substitute for a political vision of the Constitution or a substantive conception of justice. Even so, as a methodology, the new textualism might help a political mobilization succeed, perhaps as originalism helped conservatives succeed in the past forty years.⁹⁵

This is not how I understand my purposes. As I explained in *Constitutional Redemption*, I did not become an originalist “in order to hoist conservatives by their own petards, or to engage in a shallow ‘me-tooism.’”⁹⁶ Quite the contrary, I became an originalist because I saw something deeply *true* in the appeal to text, history and structure,

87. Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMAN. 43 (2013).

88. Siegel, *supra* note 58.

89. Rosen, *supra* note 87, at 44.

90. James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011); Doug Kendall & Jim Ryan, *The Case for New Textualism* 21 DEMOCRACY: J. IDEAS 66 (2011), available at <http://www.democracyjournal.org/21/the-case-for-new-textualism.php?page=all>.

91. Siegel, *supra* note 58, at 56.

92. Rosen, *supra* note 87, at 45, 50-51 (describing Brandeis’ textualism).

93. *Id.* at 44.

94. *Id.*

95. Greve, *supra* note 41, at 107-08.

96. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 1, at 232.

something that liberals of a previous generation had forgotten.⁹⁷ My originalism is based on a protestant constitutionalism, in which the text belongs to everyone and everyone may call upon it, “in which the text provides a common framework for constitutional construction that offers the possibility of constitutional redemption.”⁹⁸ My version of originalism is “much more than a theory of stasis. It is also a theory of change, often quite radical in nature. It is not a device for preserving the status quo. It is a weapon of dissent. It does not pledge faith in the dead hand of the past. It pledges faith in the future redemption of the Constitution.”⁹⁹ In short, what Rosen views as a question of political strategy, I see as a question of constitutional faith. The point of the new textualism is not to devise better political messaging or to play verbal games with one’s political opponents. It is to place oneself on the side of the Constitution and to work for its redemption in history.

Rosen comes closest to this idea, I think, when he mentions that in the past, progressives were successful at “claiming the Constitution as their own.” and “making political arguments in constitutional terms.”¹⁰⁰ He also notes that Akhil Amar’s textualism is based on the view that the Constitution, rightly understood, is a progressive document that has evolved toward increasing inclusiveness and equality.¹⁰¹

Consider these three ideas together: (1) claiming the Constitution as your own, (2) being unafraid to state your arguments in terms of the Constitution itself rather than merely in terms of good public policy, and (3) affirming that however unjust, imperfect, and fallen the Constitution-in-practice might be, the arc of the Constitution bends toward justice. These are not simply stratagems or feints. They are matters of political belief.

The new textualism—or at least my version of it—reflects an attachment to the Constitution and a faith in the Constitution. Our attachment to the Constitution means that we view it not only as basic law and higher law but also as “our law”—a law that is the product of our collective strivings and ambitions, a law that belongs to all Americans and that we have every right to call upon.

The new textualism also presumes a faith in the constitutional framework. Rosen understands that the next generation of liberals need more than methodology; they must also have a substantive constitutional vision that is worth fighting for. I would say that they need even more than this. They need a liberal constitutional faith. They need to believe that the

97. *Id.*

98. *Id.*

99. *Id.*

100. Rosen, *supra* note 87, at 53.

101. *Id.* at 47.

Constitution is theirs, and that they have the authority to declare what it means every bit as much as their political opponents, who are, after all, their fellow Americans. To have faith in the Constitution, they must believe that the Constitution contains the resources for its own redemption, and commit themselves to working for that redemption—not just in some future time, but today.

IV. A PLEA FOR ORDINARY PRACTICE

Sara Solow and Barry Friedman's article¹⁰² disagrees with Rosen about the potential value of interpretive theory. Theirs is a plea to abandon sterile debates about methodology and to return to the everyday practice of constitutional interpretation, using the familiar modalities of constitutional argument—text, history, structure, precedent, consequences, and ethos. Solow and Friedman “urge a turn away from the longstanding debates over interpretive methodology and toward more actual interpretation,” using methods common to most lawyers and judges.¹⁰³

Solow and Friedman believe that academic debates about constitutional interpretation are full of jargon that cannot speak to ordinary citizens. In particular, they assert that my book “fails to offer a digestible organizing principle or message to those members of the public who might seek to use it as a platform for constitutional dialogue.”¹⁰⁴ What Solow and Friedman want instead is “a slogan for recapturing the constitutional high ground.”¹⁰⁵

Solow and Friedman remind me of the Talmudic story in which the great Rabbis Shammai and Hillel are confronted by a pagan who says that he will convert to Judaism if either rabbi can explain the entire Torah to him while standing on one foot.¹⁰⁶ Shammai, who apparently believes either that the man is taunting him or that the Torah is too complicated to summarize, chases him off. Hillel, by contrast, calmly takes up the challenge. “What is hateful to you,” he explains, “do not do to your neighbor. The rest is commentary. Now go and study.”¹⁰⁷

Solow and Friedman believe that we academics are destined to be like Shammai. But I think we can also model ourselves after Hillel. And so I say to them: if you want a slogan, I can give you a slogan. If you want me to explain how to interpret the Constitution standing on one foot, I will stand on one foot. Everything I say in *Living Originalism* can be boiled

102. Solow & Friedman, *supra* note 41.

103. *Id.* at 69.

104. *Id.* at 74.

105. *Id.*

106. See BABYLONIAN TALMUD, Shabbat 31a. The questioner is one of three gentiles seeking conversion and making unreasonable demands; each gentile is rebuffed by Shammai and patiently accepted by Hillel.

107. *Id.*

down to a few sentences: “The Constitution is yours. Be faithful to its text and to its great principles. The rest is commentary. Now go and study.”

Indeed, not to put too fine a point on it, that is why my method of interpretation is called “text and principle.”

Although I am happy to engage in slogans or even jingles if need be, I think that Solow and Friedman—discouraged by the aridity of much academic debate—have given up too easily on constitutional theory. After all, there is far more to constitutional theory than debates about how to interpret the Constitution. And I have always believed that interpretive debates must ultimately be grounded in much larger questions about the sources of constitutional legitimacy and the mechanisms of legitimate constitutional change.

In fact, the most important parts of *Living Originalism* and *Constitutional Redemption* are not arguments about the proper methods of constitutional interpretation. Rather, in my view, the point of these books is to show: (1) the sources of constitutional development; (2) how change is the only constant in the life of a stable constitution; (3) how legitimacy is produced not at a magic moment but continuously and over time; (4) the purposes of a constitution and constitutional language; (5) the role of citizens, social movements, political parties, and the political branches in constitutional change; (6) why the institutions and processes of constitutional change help further democratic legitimacy in the long run; (7) how people of different substantive views participate in the production of constitutional change; (8) the importance of viewing the Constitution as a document of redemption; (9) the centrality of narrative in constructing constitutional vision; and (10) the role of constitutional faith in producing constitutional legitimacy over time. These are questions of constitutional theory that go well beyond arguments about which version of original-meaning originalism is the only true and correct one.

Some of the concerns of my book may primarily interest academics, but others—those of narrative, faith, and redemption—go to the very heart of political life. Ordinary citizens care about the latter concerns as much as academics do. For me, at least, questions of interpretive theory cannot be addressed in isolation; they must flow from these larger questions of legitimacy and faith, and not the other way around. Indeed, I would go further: anyone who reads *Living Originalism* as centrally about the correct methods of interpretation rather than these questions has not understood the book.

A focus on ordinary practice is opposed, on the one hand, to academic debates about theory and, on the other hand, to debates about constitutional vision of the sort that Jeffrey Rosen describes. Arguments about constitutional vision are also implicit in Michael Greve’s call for a new kind of originalism that focuses on the Constitution’s larger purpose of creating structures of competitive federalism. I assume that both Rosen

and Greve would agree with me that just as methodology is insufficient without a constitutional vision, so too is a call for ordinary practice.

Solow and Friedman believe that standard methods can yield surprising results. “[W]e advocate adopting [the] common and familiar method [of] ‘ordinary constitutional interpretation,’” to “show how . . . one can come to important and perhaps surprising conclusions about what is part of our Constitution (and what is not).”¹⁰⁸ Surely one can use the familiar forms of constitutional rhetoric to argue for many different positions, but that does not make these positions plausible or likely to be accepted. The use of the modalities, by itself, cannot win over a hostile audience or move arguments from “off the wall” to “on the wall.” That task must be accomplished through other features of the constitutional system.

Solow and Friedman’s call for a return to ordinary practice tells us nothing about constitutional vision, and nothing about the connections between practices of interpretation and legitimacy. Let me say a bit about each.

Solow and Friedman’s argument for a right to education is a *tour de force* of constitutional modalities. But it is unlikely to persuade anyone unless it resonates with that person’s constitutional vision. One doubts that many contemporary conservatives will change their minds in the face of Solow and Friedman’s virtuoso performance. Rather, as Friedman the constitutional historian would point out, these arguments will become compelling when they are broadly supported by public opinion. Or, as I would point out, they are likely to prevail only as a result of successful mobilizations in politics, litigation campaigns, and new judicial appointments. The work that “ordinary constitutional interpretation” is doing remains unclear when it is divorced from these larger structural forces.

Solow and Friedman base their argument for ordinary practice on the work of Philip Bobbitt and Richard Fallon.¹⁰⁹ But, unlike Solow and Friedman, neither Bobbitt nor Fallon believed that questions of legitimacy or constitutional theory were irrelevant to their project. To the contrary, each sought to show that their theories of interpretation either explained or justified the legitimacy of judicial review and the constitutional system.

Bobbitt, influenced by Ludwig Wittgenstein, argues that our existing constitutional practice of argument is self-legitimizing because it is an ongoing form of political life.¹¹⁰ We use the six modalities—and only

108. Solow & Friedman, *supra* note 41, at 69.

109. *Id.* at 76-77.

110. BOBBITT, *supra* note 23, at 233-40, 244-45; PHILIP C. BOBBITT, CONSTITUTIONAL INTERPRETATION, 122-40, 155-56 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION]; Philip C. Bobbitt, *Reflections Inspired by My Critics*, 72 Tex. L. Rev. 1869, 1886 (1994) (“The second conclusion of *Constitutional Fate* was its rejection of an external legitimating criterion for law.”).

those six—because they were handed down to us from the common law.¹¹¹ Using the standard modalities according to their traditional forms ensures the legitimacy both of constitutional interpretation in general and judicial review in particular.¹¹² Conversely, theoretical or political attacks on the use of particular modalities, and “ideologies” like originalism or prudentialism that seek to elevate some modalities over others, misunderstand the nature of our inherited form of life. Such attacks undermine the legitimacy of the system.¹¹³

Fallon, drawing on coherentist theories of truth, argues that “[t]he implicit norms of our practice of constitutional interpretation prescribe an effort to achieve plausible understandings of arguments from text, the framers’ intent, constitutional theory, precedent, and relevant values, all of which point to the same result.”¹¹⁴ If a result is justifiable through all or most all of the ways that lawyers have traditionally tried to discover constitutional meaning, such uses of legal argument are more likely to be legitimate. Fallon’s claim is simultaneously descriptive and normative. Interpreters in the American system both do attempt and should attempt to seek consensus between the forms of argument because this coherence legitimates the practice of constitutional argument.

Note that Bobbitt and Fallon do not have the same theory of legitimacy. When the modalities conflict, Fallon argues, “the implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the framers’ intent, constitutional theory, precedent, and moral and policy values.”¹¹⁵ For Bobbitt, on the other hand, no modality of argument dominates the others, and when the modalities conflict, the individual interpreter must

111. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 110, at 121 (arguing that once sovereignty is separated from the state, “the power of the state, no longer sovereign, was put under law—the Constitution—and by doing so, put under the common law forms of argument”); Philip C. Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1303 (1989) (reviewing MARK V. TUSHNET, RED WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)) (“These six forms are available to any judge; indeed it was their availability as common law forms that recommended them once the power of the state was subordinated to law by our Constitution.”).

112. See Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 272 (1993) (reviewing PHILIP C. BOBBITT, CONSTITUTIONAL INTERPRETATION (1991)):

Bobbitt’s position is that all attempts to find a normative foundation outside the conventions of legal argument confuse legitimacy with justification. Neither the Constitution, the conventions of legal argument, nor judicial review requires legitimation. Legitimacy is obtained when the conventions of legal argument (the modalities) are adhered to. Justification is the use of the modalities to demonstrate that a proposition of constitutional law is true. A constitutional argument in support of the truth of a proposition of constitutional law is legitimate to the extent it employs the modalities. To the degree it does not, it is illegitimate.

113. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 110, at xii (1991) (noting that, during the twentieth century, people on both the left and the right undermined constitutional legitimacy by attacking various modalities or elevating particular modalities over others).

114. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240 (1987).

115. *Id.* at 1193-94.

turn to conscience. Decision according to conscience preserves the legitimacy of the decision.¹¹⁶ Thus, for Fallon adherence to ordinary practice legitimates because it strives for coherence; for Bobbitt ordinary practice is self-legitimizing as a conventional cultural form that creates a space for individual conscience.

Solow and Friedman do not tell us why their approach explains or promotes the legitimacy of the constitutional system as a whole. It is not clear that they would accept Bobbitt's Wittgensteinian philosophy or Fallon's coherentist account. Instead, they want to stop talking about the legitimacy question altogether. That makes sense if (1) existing practices are widely accepted and largely uncontroversial, and (2) conventional practice is either consistent with or furthers the political legitimacy of the entire system.

As to the first point, Solow and Friedman assume—correctly, I think—that the use of multiple modalities is widely accepted among lawyers and judges. Nevertheless, if they did a systematic empirical study of lawyers' briefs and judicial opinions, I suspect they would find that recourse to judicial precedent dwarfs all of the other modalities put together.¹¹⁷ If that is so, then Solow and Friedman may actually be asking for a *departure* from existing practice, which, of course, they would have to justify.

As to the second point, Solow and Friedman make no argument—in this article, at least—for why their account of conventional practice is consistent with or furthers the political legitimacy of the constitutional system as a whole. However, Friedman, wearing his hat as constitutional historian and theorist, does have an answer to this question. In his 2009 book *The Will of People*, he explains that constitutional development is consistent with democratic and sociological legitimacy (although perhaps not moral legitimacy) because the Supreme Court tends to stick fairly closely to popular opinion, especially after the New Deal.¹¹⁸

Of course, this explanation raises a couple of puzzles. First, given Friedman's account of why judicial review is democratically legitimate, what is it about the use of multiple modalities of constitutional argument that helps ensure this legitimacy? Does the use of these modalities in precisely the way that Solow and Friedman prescribe somehow drive constitutional doctrine to match public opinion over time, or would using a smaller, larger, or different set of modalities lead to pretty much the same results? If a different approach would work just as well, then ordinary practice doesn't seem to be doing very much work in promoting

116. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 110, at 168.

117. See Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495 (1996) (emphasizing the dominance of doctrinal argument in constitutional adjudication, especially for lower court judges).

118. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

democratic legitimacy. Lots of different approaches might equally achieve a connection between judicial product and popular opinion.

The second puzzle follows from the first. As I argue in *Living Originalism*, and consistent with Friedman’s account in *The Will of the People*, among the most important drivers of constitutional change are social and political mobilizations, the party system, and the practice of partisan entrenchment in the federal judiciary. Over the long run these mechanisms keep judicial decisions roughly in line with popular opinion (in Friedman’s view) or with the dominant political regime (in my account).

The problem is that many of these social and political mobilizations tend to think that arguments about how courts should interpret (or not interpret) the Constitution are quite important. Social and political movements often attack existing practices of constitutional interpretation and propose new ones in their stead. For example, the idea of a living constitution does not arise first in the 1960s, as Solow and Friedman suggest;¹¹⁹ it begins in the 1920s and 1930s as a challenge to *Lochner*-era decisions, and it is accompanied by a call for judicial restraint and for making judicial practice consistent with democracy.¹²⁰ The idea of a living constitution is transformed during the Warren Court era to justify not judicial restraint but the use of judicial power to promote the values of Kennedy/Johnson liberalism and to check outliers in state and local governments, especially in the South.¹²¹ Defenders of the older vision of living constitutionalism (exemplified by Justice Frankfurter and his acolytes) continued to preach the old-time religion of judicial restraint and denounced the practice of the federal courts and the Supreme Court as lawless and illegitimate.¹²²

119. Solow & Friedman, *supra* note 41, at 70.

120. See Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 *STUD. AM. POL. DEV.* 191 (1997). Moreover, as I show in *Constitutional Redemption*, Franklin Roosevelt anticipates the method of text and principle in the constitutional struggle over the New Deal. See BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 1, at 240-42.

121. See *Harper v. Virginia State Bd. of Elections* 383 U.S. 663, 669 (1966) (“[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954) (“In approaching this problem [of segregated public schools], we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”).

122. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 228-34 (2002) (describing academic arguments for judicial restraint by Justice Frankfurter’s followers and the Legal Process scholars); Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 *HARV. L. REV.* 143, 144 (1964) (complaining about the Warren Court’s work).

Similarly, movement conservatives developed originalism to critique the work of the Warren and early Burger Courts, arguing that the current practices of lawyers and judges were illegitimate. Even though most judges have not become originalists in their everyday decisionmaking, the conservative critique nevertheless reshaped constitutional culture over time—in public discourse, in legal practice, and in the legal academy. Like living constitutionalism, originalism started out as a justification for judicial restraint and sought to promote democratic decisionmaking.¹²³ Once conservatives had stocked the courts, however, a new generation of conservatives began to argue for what is now called “judicial engagement”—the term “judicial activism” having been rendered radioactive by a previous generation of conservatives.¹²⁴ Now movement conservatives argued that courts should be unafraid to flex their judicial muscles to protect important structural values in the Constitution, the free speech rights of corporations and conservative Christians, equal protection for white people, the rights of property owners, Second Amendment rights, and so on. Sometime in the 1990s, liberals began to sit up and take notice; they stopped pining for the second coming of Earl Warren. Instead, they began to denounce conservative exercises of judicial review, offering new theories of minimalism, departmentalism, “taking the Constitution away from the courts,” popular constitutionalism, and democratic constitutionalism. And the beat goes on.

This abbreviated history suggests two things. First, “ordinary constitutional interpretation” is a moving target, constantly subject to revision, and constantly theorized and argued over, not only within the legal academy but in social and political movements as well. Second, and equally important, this history suggests that the actual practices of lawyers and judges have often *included* challenges to what was then regarded as “ordinary” constitutional interpretation. The recurrent debates about interpretive theory that drive Solow and Friedman to distraction may not be just an academic sideshow. These debates may be part of the larger constitutional culture, and integral to the processes of constitutional development. What Solow and Friedman would like to cast out from the purity of ordinary constitutional practice is actually part of the practice.

Fighting over how to interpret the Constitution and who has authority to interpret the Constitution has been an essential ingredient in the way that

123. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 602 (2004) (“The primary commitment within this critical posture [of the old originalism] was to judicial restraint. Originalist methods of constitutional interpretation were understood as a means to that end.”); Greve, *supra* note 41.

124. Mark Tushnet, *From Judicial Restraint to Judicial Engagement: A Short Intellectual History*, 19 GEO. MASON L. REV. 1043 (2012); Whittington, *supra* note 123, at 604-05 (“As conservatives found themselves in the majority, conservative constitutional theory—and perhaps originalism—needed to develop a governing philosophy appropriate to guide majority opinions, not just to fill dissents.”).

lawyers and judges—not to mention social and political movements—have argued about the Constitution during the twentieth century. To be sure, sometimes academics have been fussier—and, well, more academic—in their arguments than most lawyers and judges have been, but their debates about constitutional interpretation have not been sealed off from those occurring in constitutional politics. Quite the contrary: to vary Clausewitz’s famous dictum, interpretation wars are a continuation of constitutional politics by other means. They are part and parcel of the processes of constitutional change.

V. BABYSITTERS AND CITIZENS

Michael Greve’s essay begins from very different premises than Solow and Friedman’s. Greve believes that the task of constitutional theory is to reveal the deep structures of the Constitution and to offer a comprehensive constitutional vision.¹²⁵ Greve’s vision, as outlined in his remarkable book, *The Upside-Down Constitution*, is that the Constitution produces political stability and economic prosperity through competitive federalism.¹²⁶ Greve recognizes that debates about constitutional interpretation are often lodged in larger political and social movements that affect interpretive practice. Finally, his general approach to constitutional interpretation, like Scheppele’s and mine, is purposive, even though, like me and unlike Scheppele, he is happy to be called an originalist.

Readers of Greve’s work on the “upside-down Constitution” will not encounter a laundry list of opinions about particular clauses or a set of lawyerly arguments employing Solow’s and Friedman’s “ordinary constitutional interpretation.” Rather, readers of Greve’s book will discover a coherent synoptic vision that unifies many different parts of the Constitution under an overarching conception, whether or not one agrees with that vision. A strong constitutional vision, Jeffrey Rosen argues, must underwrite arguments about interpretive methodology. Greve would surely agree.¹²⁷ In Greve’s view, the correct path for constitutional interpretation today is not the “democratic originalism” of the 1980s but an originalism motivated by Greve’s federalist vision, in which strong judicial review may be a necessary tool.¹²⁸

The disagreements between Greve and myself are pitched at this basic

125. Greve, *supra* note 41, at 104 (“[E]xpounding’ a constitution . . . cannot be done without (among other things) some account of what the instrument is supposed to do. That account, in turn, requires a theory of politics . . .”).

126. MICHAEL GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2011).

127. Greve, *supra* note 41, at 107-11.

128. See *id.* at 109-10 (arguing that “constituencies that are worried about government overreach and abuse and, more broadly, the fate of the country’s economic order” want “judicial ‘engagement,’ not ‘restraint’”).

level of constitutional purpose and vision, and that is why, for different reasons, each of us believes that the older forms of originalism developed by movement conservatives have run out of steam.

Greve explains his vision by way of a famous passage in Ludwig Wittgenstein's *Philosophical Investigations*. Wittgenstein's text reads: "Someone says to me: 'Shew the children a game.' I teach them gaming with dice, and the other says, 'I didn't mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order?"¹²⁹ Greve imagines that the speaker is a parent giving directions to a babysitter, although Wittgenstein does not say this.

Because living originalism does not treat original expected applications as binding, Greve argues, it does not sufficiently constrain a wayward future. Living originalism, he explains, is like a babysitter who, instructed to show the children a game, teaches the children "to duel with kitchen knives and to shoot dice for money."¹³⁰ In so doing, it "slights a central purpose of constitutionalism—the purpose of keeping stuff off the wall even if you cannot exactly envision what future generations might think of."¹³¹ In fact, Greve argues, "What living originalism says instead is, 'Babysitters of the world unite! Let's start a social movement and invent some more games.'"¹³² Greve's point is that the "intended purpose" of originalism—and of constitutions generally—is to "discipline[] a wayward politics."¹³³ In particular, Greve believes that the American Constitution was enacted in order to discipline states so that they would compete with each other. The deep structural purpose of our constitution is to establish competitive federalism, and for that reason, Greve believes, much of our post-New Deal jurisprudence is mistaken.

This is a dispute, in Scheppele's terms, about the point of a constitution. I have a different view than Greve does, and I shall use the same example from Wittgenstein to express it. Wittgenstein, of course, is a notoriously gnomic philosopher, and it is often difficult to pin down why he uses a story or example as he does. Although I do not pretend to be a Wittgenstein scholar, I think Greve has missed what Wittgenstein was actually interested in.

Wittgenstein offers his imaginary dialogue in the middle of a larger discussion about the nature of categories and the uses of language. He is challenging the traditional view that in order for people to use language effectively, linguistic concepts must have necessary and sufficient conditions that can be known in advance. This is the same part of the

129. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 33 (1954).

130. Greve, *supra* note 41, at 105.

131. *Id.* at 106.

132. *Id.*

133. *Id.* at 111.

Philosophical Investigations in which Wittgenstein introduces his famous idea of “family resemblances.”¹³⁴ He uses the meaning of the word “game” as an example of a concept that does not adhere to the classical conception of categories, that is not bounded by necessary and sufficient conditions, but whose examples bear family resemblances, and whose meaning is developed over time in culture and through practice.

Wittgenstein offers his example about teaching children a game in order to make at least two different points. The first is that speakers of a language figure out the meanings of the terms they use as they go along; as they are confronted by new circumstances, they make analogies to examples already encountered. Thus, the meaning of the word “game” is not fully determined at the time the speaker gives the order; rather, its meaning in context is developed through experience and through practice. If this is Wittgenstein’s point, then it seems far more consistent with living originalism than with fidelity to original expected applications. The point of using abstract language like “freedom of speech” or “equal protection of the laws” is not to settle everything at the moment of adoption; rather it is to set in motion a learning process about our commitments, in which we may revise our views as we encounter new experiences. That is why, Wittgenstein suggests, the full meaning of “game” did not have to be in the speaker’s mind when he gave the order to teach the children a game.¹³⁵

Wittgenstein’s second point is that speakers of a language do not consciously have to intend all of the things they mean when they use language. Rather, the audience properly *infers* this meaning from the social context of the situation and from existing social conventions.¹³⁶ Language is embedded in culture, in thick features of social life and in conventions of interpersonal interaction. These aspects of culture bestow meaning on our words quite apart from any conscious intentions we might have. Therefore, given the context—as Greve imagines it—the babysitter should understand what the parent says consistent with the babysitter’s role: guarding and guiding children who are too young to think for themselves.

But if meaning is embedded in culture in this way, then we must not assume that the social context that applies to parents and babysitters is the same as the social context that applies to different generations living under an enduring constitution. We must focus on how and why language is used

134. WITTGENSTEIN, *supra* note 129, §§ 66-69; see SEVERIN SCHROEDE, WITTGENSTEIN: THE WAY OUT OF THE FLY BOTTLE 140-45 (2006) (discussing how Wittgenstein uses the concept of “game” to introduce the idea of “family resemblances”).

135. This idea—that we should elaborate constitutional meaning in new contexts in light of prior practice—is consistent with John Marshall’s admonition that a constitution must “be adapted to the various *crises* of human affairs.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

136. See SCHROEDE, *supra* note 134, at 195-96 (arguing that meaning “is not made by some miraculous mental mechanism, but by the circumstances in which the particular utterance is made” including background conventions and social institutions).

in a constitution. And not just any constitution, but “a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”¹³⁷ A constitution is a trans-generational project that requires the work, the commitment, and the judgment of many generations to succeed. It begins as a mere framework that must be built out over time in order to produce a decent politics.

Greve and I agree that the goal of a constitution is to channel politics and to constrain it where needed. We agree that constitutions not only can but must discipline politics in particular ways. For example, I argue in *Living Originalism* that the choice of hard-wired rules, standards, and principles in a constitution reflects a series of choices about what kinds of constraints to impose on later generations. In making sense of a constitution, we can and we should ascribe these architectural choices to the adopters whether or not they were specifically or consciously intended.

Where Greve and I disagree, I think, is about the *nature* of constitutional discipline: what basic substantive commitments the Constitution contains, and how political discipline is achieved. Perhaps equally important, we disagree about the role that later generations will play in ensuring that important constitutional commitments are preserved.

Greve reads Wittgenstein as talking about parents and babysitters because he believes that the central purpose of a Constitution is to prevent later generations from engaging in self-destructive, child-like behavior. Like children, later generations will lack impulse control; they will spend too much, and politicians will lack the incentives to rein them in.¹³⁸

We Americans may refer to the founding generation as “the Founding Fathers,” but the familial metaphor is quite misleading. The Founders are not our parents; we are not children lacking in mental capacity; and judges—who are, after all, our contemporaries—are not our babysitters.

The parent/babysitter metaphor, I fear, leads one to view later generations as childlike, impulsive people who cannot be trusted with their own political destiny. Their opinions about how to implement a constitution do not and should not matter except to the extent that they follow the wisdom of the Framers. In that case, they are not expressing their own reasoning but the political logic of a former, wiser time that has not fallen prey to the political and fiscal temptations of the present.

That is now how I see things. The temptations of politics are ever-present; they occur in our generation and in the generation of the framers. For this reason, we need a Constitution for our own time as much as the framers did in their time. But the work of the adopting generation is

137. *McCulloch*, 17 U.S. at 415.

138. See Greve, *supra* note 41, at 110 (“[T]he *demos* appears to insist both on a really big transfer state and on not paying for it, and that disposition has brought the country to the edge of a financial abyss.”).

necessarily limited. It can only begin a constitutional project, it cannot complete it. It can only create a basic framework for a decent politics on which later generations must build. And this is necessary precisely because human vision is limited and human predictive judgment is fallible. Adopters can hope to channel political judgment through a combination of rules, standards, and principles, but they cannot forestall the exercise of that judgment. A constitution necessarily must leave much to later generations.

All of this leads me to understand Greve's project differently than he does. Greve—who wants a tighter, more business-friendly fiscal constitution, and who wants to ensure that states compete rather than collude—sees himself as calling for a return to commands from the distant past that can constrain an unruly present. I see Greve instead as a present-day *participant* in the process of building out the Constitution in a post-New Deal world. He is a reformer using the rhetorical tropes of restoration for what is actually a modernist project—achieving a workable, business-friendly fiscal constitution in the age of the administrative and welfare state.

An ongoing constitutional project needs people like Greve—as well as those who disagree with him. It needs them not as the servants of wise founders but as intelligent people exercising their own present-day constitutional judgments that draw on the past as a resource. The Constitution-in-practice is a work in progress that might move in many different directions. Greve wants to move it in one way; I want to move it in another. But neither of us is simply returning to a course already fully prepared for us; we are urging people to move forward to what we believe is the right path. Each of us, although drawing on the past, is exercising political judgment in our own time.

The familial/babysitter metaphor also disguises the source of democratic authority for a long-lived Constitution. The Constitution has democratic authority in part because it serves as "our law." But for it to serve as our law, Americans cannot view the Constitution as swaddling clothes designed to contain an unruly infant. Rather, each generation must have a stake in its continuation; each generation must see the Constitution—in part—as the work of its own hands. One can still honor the founding generation without believing that it contains all wisdom, or that the Founders' relationship to us is that between wise parents and immature children. For the same reason, judges do not obtain authority as babysitters whose job is to discipline unruly children according to the desires of their parents. Although constrained by legal culture and professional role, the judges in each generation are ultimately no better and no worse than the public they are part of.

The authority of the Constitution is not parental authority. It comes from the participation of successive generations in the constitutional project,

each of which can therefore claim the Constitution as its own. The constitution-making power of the people is not exhausted by initial adoption or by intermittent amendment. Rather, it is continually exercised over time through constitutional construction. The Constitution is not merely inherited; it is also built out and adapted. It is always in a state of becoming and that is why it endures. Through this process of constitutional construction, the Constitution becomes more than a venerated object from the past. It becomes and continues to be “our law.”