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## Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?

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# POPULAR CONSTITUTIONALISM AND RELAXING THE DEAD HAND: CAN THE PEOPLE BE TRUSTED?

TODD E. PETTYS\*

## ABSTRACT

*A growing number of constitutional scholars are urging the nation to rethink its commitment to judicial supremacy. Popular constitutionalists argue that the American people, not the courts, hold the ultimate authority to interpret the Constitution's many open-ended provisions whose meanings are reasonably contestable. This Article defends popular constitutionalism on two important fronts. First, using originalism as a paradigmatic example of the ways in which courts frequently draw constitutional meaning from sources deeply rooted in the past, the Article contends that defenders of judicial supremacy still have not persuasively responded to the familiar dead-hand query: Why should constitutional meanings that prevailed in the past be privileged over the meanings that a majority of Americans would assign to the Constitution's text today? The Article considers five of the leading efforts to respond to that query and argues that each of them falls short of its objective. Second, the Article responds to the most fundamental criticism that has been leveled against popular constitutionalism—namely, that the American people cannot be trusted to preserve constitutionalism's essential distinction between ordinary and fundamental law, and that citizens thus need to rely upon politically insulated judges to preserve that distinction for them. The Article identifies five reasons to believe that, if the ultimate power to interpret the Constitution's open-ended provisions were shifted from the courts to the political domain, the American people would prove themselves able and willing to distinguish between their long-term fundamental commitments and their short-term political desires in the manner that constitutionalism demands.*

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## INTRODUCTION

For my part, I believe that the people and their Representatives, two or three centuries hence, will be as honest, as wise, as faithful to themselves, and will understand their rights as well, and be as able to defend them, as the people are at this period. The contrary supposition is absurd.

—Noah Webster<sup>1</sup>

Although Congress and the President occasionally have indicated that they do not feel obliged to accept the federal courts' interpretations of the Constitution,<sup>2</sup> it has been a long time since the United States' commitment to judicial supremacy seemed genuinely in doubt. Citizens and politicians today usually appear content to accept the Supreme Court's claim that "the federal judiciary is supreme in the exposition of the law of the Constitution."<sup>3</sup> Americans have focused their disagreements instead on how courts should arrive at the constitutional interpretations that will bind the country. While originalists stress the primacy of the text's original meaning,<sup>4</sup> for example, nonoriginalists try to identify ways in which judges can discover constitutional meanings beyond those in play at the time of the text's ratification.<sup>5</sup>

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1. Giles Hickory [Noah Webster], *Government*, 3 AM. MAG. 137, 140 (1788).

2. *See, e.g.*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a), (b) (2000) (expressly disapproving of the Supreme Court's construction of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990), and seeking to restore the construction advanced by the Court in an earlier era), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (examining the Religious Freedom Restoration Act and holding that Section 5 of the Fourteenth Amendment does not authorize Congress to reject the Court's determination of "what constitutes a constitutional violation"); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 23–25 (16th ed. 2007) (reviewing various presidents' assertions of interpretive authority).

3. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see* NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 5 (2004) (stating that "newspapers and constitutional law texts typically treat Court interpretations of the Constitution as supreme"); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 2 (2007) ("At least in the United States, judicial supremacy is often regarded as essential to constitutionalism."); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1637–39 (2005) (arguing that, although citizens sometimes disagree with the Supreme Court's rulings, they widely accept judicial supremacy).

4. *See infra* note 18 (citing authorities that provide an overview of originalists' methods).

5. *See, e.g.*, RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 15 (1996) (declaring his goal of reconciling judicial supremacy with democracy); *id.* at 7–10 (outlining his theory of constitutional interpretation, under which judges work with other officials—past, present, and future—to construct "a coherent constitutional morality"); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 111 (2001) (stating that the courts can find

In recent years, however, a number of scholars—falling loosely under the banner of “popular constitutionalism”—have skeptically set their sights squarely on the Court’s claim that its constitutional interpretations bind the nation.<sup>6</sup> Larry Kramer,<sup>7</sup> Sanford Levinson,<sup>8</sup> Mark Tushnet,<sup>9</sup> Adrian Vermeule,<sup>10</sup> Jeremy Waldron,<sup>11</sup> and others<sup>12</sup> have argued that it is “the People,” and not federal judges, who hold the ultimate interpretive authority on disputed constitutional questions.<sup>13</sup> Because sovereignty rests with the nation’s citizens, these scholars argue, it is ultimately the task of the citizenry—and not a politically unaccountable judicial elite—to interpret the nation’s fundamental law.

In this Article, I defend popular constitutionalism on two important fronts. Both of my arguments build upon concerns regarding the democratic legitimacy of granting the judiciary the ultimate power to

constitutional meaning in sources beyond the written Constitution, such as “judicial precedent and entrenched historical practice”); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1759–60 (2007) (describing his “movement-party-presidency” theory of how the Constitution may be amended outside the confines of Article V); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 947 (2006) (“Courts respond to social disruption by social movements . . . ; they reconstitute and reformulate law in the light of political contestation, rationally reconstructing and synthesizing changes in political norms with what has come before.”); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007) (describing a theory under which the courts retain ultimate interpretive authority, but take into consideration “popular values and ideals” when identifying constitutional meanings).

6. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 723 (2006) (“All of the concrete legal proposals advanced by ‘popular constitutionalists’ seek to qualify judicial supremacy.”).

7. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* *passim* (2004).

8. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 46–50 (1988) (endorsing a “Protestant” conception of constitutional interpretation, in which supreme interpretive authority does not rest with the Court). Professor Levinson also has identified ways in which the ratified texts themselves establish undemocratic institutional arrangements. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* *passim* (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*] (criticizing such things as life tenure for federal judges, the Electoral College, and the equal representation of the differently populated states in the Senate).

9. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* *passim* (1999).

10. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* *passim* (2006).

11. See JEREMY WALDRON, *LAW AND DISAGREEMENT* *passim* (1999).

12. See, e.g., NAOMI WOLF, *THE END OF AMERICA* 4–5 (2007) (arguing that ordinary citizens, rather than lawyers and government officials, are ultimately responsible for protecting citizens’ constitutional freedoms); Andrei Marmor, *Are Constitutions Legitimate?*, 20 CAN. J. L. & JURISPRUDENCE 69, 86–92 (2007) (arguing that legislatures are better suited than courts to resolve disputed questions of values).

13. See generally Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 898 (2005) (“[T]he People’ have become constitutional theory’s hottest fashion.”).

resolve disputes concerning the meaning of the many open-ended provisions of the Constitution that are reasonably susceptible to conflicting interpretations. First, I argue that defenders of judicial supremacy still have not offered a satisfying response to the familiar dead-hand objection that plagues many of the interpretive methods that courts ordinarily employ. Second, and most fundamentally, I argue that the American people can be trusted to preserve the distinction between ordinary and fundamental law that constitutionalism requires, and that the American people thus do not need to rely upon politically insulated judges to preserve that distinction for them.

For those encountering popular constitutionalism for the first time, the claim that the American people are the supreme interpretive authority on disputed matters of constitutional law might seem like a difficult pill to swallow. As Mark Tushnet notes, some observers are terrified about what might happen if the courts were stripped of their interpretive supremacy.<sup>14</sup> Larry Alexander and Lawrence Solum, for example, respond to Larry Kramer's version of popular constitutionalism with a shudder, stating that it has "the capacity to inspire dread and make the blood run cold."<sup>15</sup> Indeed, it often seems as if we are hardwired to defer to the courts on questions of constitutional meaning. Surely, we tell ourselves, the ultimate responsibility for interpreting the Constitution should rest with highly intelligent, law-savvy judges, and not with untrained, grubby-handed, ordinary Americans.<sup>16</sup> Although our constitutional system draws its legitimacy from "the consent of the governed,"<sup>17</sup> we are disinclined to allow the governed themselves to play the leading role in determining what the Constitution means. So long as courts apply the appropriate methods of constitutional interpretation, this view suggests, we should accept judicial supremacy as a necessary feature of our constitutional system.

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14. See TUSHNET, *supra* note 9, at 124, 177.

15. Alexander & Solum, *supra* note 3, at 1594.

16. Max Lerner captured the sentiment nearly three-quarters of a century ago:

We have somehow managed in our minds to place the judges above the battle. Despite every proof to the contrary, we have persisted in attributing to them the objectivity and infallibility that are ultimately attributes only of godhead. The tradition persists that they . . . sit in their robes like the haughty gods of Lucretius, high above the plains on which human beings swarm, unaffected by the preferences and prejudices that move common men.

Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1311 (1937).

17. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that . . . Governments . . . derive[] their just powers from the consent of the governed . . ."); see also U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America.").

Consider, for example, originalism's continued prominence as a method of constitutional interpretation, notwithstanding the attacks consistently leveled against it.<sup>18</sup> Originalist methods owe their widespread use, at least in part,<sup>19</sup> to the apparent appeal of two fundamental claims, both of which are aimed at alleviating concerns about the democratic legitimacy of allowing unelected judges to bind the nation with their interpretations of the Constitution. First, originalists contend that their interpretive methods offer the greatest promise of preventing judges from imposing their personal preferences on the rest of society.<sup>20</sup> Second, they argue that the courts' primary task when interpreting the Constitution is to ensure that government officials obey the supreme will of the sovereign people as expressed in the Constitution's text—a task that originalists contend can be accomplished only if courts enforce the Constitution's original, ratified meaning.<sup>21</sup> The resulting formulation draws a tight

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18. See FALLON, *supra* note 5, at 3 (identifying originalism as a leading theory of constitutional interpretation); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999) (arguing that originalism is the reigning theory of constitutional interpretation); Jonathan R. Macey, *Originalism as an "ism"*, 19 HARV. J.L. & PUB. POL'Y 301, 301 (1996) (positing that originalism is far more widely accepted than commonly believed). The precise contours of originalism continue to evolve. See George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 330–33 (1995) (describing many originalists' shift in focus from original intentions to original meaning); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–613 (2004) (describing the evolution of originalist theory over the past forty years).

19. Scholars offer a variety of additional explanations for originalism's continued prominence. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 367 (1996) (arguing that appeals to original meaning remain common because "the Revolutionary era provides Americans with the one set of consensual political symbols that come closest to universal acceptance"); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) (attributing originalism's prominence to its usefulness in driving a conservative political agenda); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that originalism and textualism "owe their preeminence not to their plausibility but to the lack of a coherently formulated competitor").

20. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155 (1990) (arguing that originalism is the only "method of constitutional adjudication [that] can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American Republic"); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 27 (1998) (stating that nonoriginalist theories have been criticized for "appear[ing] to give unelected judges free rein with the country's fundamental charter"); John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83 (2003) (stating that originalists in the 1970s "found it impossible to explain what judges had been doing for the preceding twenty or thirty years unless the judges had been making choices that reflected their own views of desirable results and not general, impersonal legal principles"); Whittington, *supra* note 18, at 602 (stating that many of originalism's proponents have argued that originalism "prevent[s] judges from acting as legislators and substituting their own substantive political preferences and values for those of the people and their elected representatives").

21. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 153–56 (1999) (linking originalism, judicial supremacy, and

connection between originalism and judicial supremacy: The American people have expressed their fundamental commitments in the Constitution, and it is ultimately the job of politically insulated judges to make sure those commitments are honored.<sup>22</sup>

For many years, however, critics of that formulation have questioned originalism's ability to deliver the democratic legitimacy that its proponents promise. Many scholars have argued, for example, that originalism rarely constrains judges who are tempted to decide cases based on their personal preferences.<sup>23</sup> Even if originalism did meaningfully constrain judges, it creates a legitimacy problem of a different sort, reflected in the familiar dead-hand query: Why should people alive today be bound by the values and understandings of generations long dead?<sup>24</sup>

the textually expressed will of the sovereign people); Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 506 (1989) ("Th[e] act of popular sovereignty provides the political legitimacy for the interpretive methodology of the originalist."); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (stating that the most common normative justification for originalism is "popular sovereignty and the judicially enforced will of the people"); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) ("The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.").

22. Robert Bork, who helped spur originalism to its current prominence, offers precisely that formulation when he argues that, if originalism were fatally flawed, "there would remain only one democratically legitimate solution: judicial supremacy, the power of courts to invalidate statutes and executive actions in the name of the Constitution, would have to be abandoned." BORK, *supra* note 20, at 160. *But see* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987) (asserting, as an originalist, that the Supreme Court's interpretations of the Constitution do "not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore").

23. *See, e.g.*, Macey, *supra* note 18, at 304 (arguing that "originalism is not nearly so determinate as its most vocal proponents would suggest" and that "willful judges will be able to use this indeterminacy to justify whatever results they want on originalist grounds"); Post & Siegel, *supra* note 19, at 557–65 (arguing that originalists only apply their declared methods of interpretation when it leads to outcomes they desire); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 433 (1998) (stating that originalist methods often yield principles framed at such a high level of generality that they are "useless in hard cases for anything other than symbolic purposes"); *cf.* Scalia, *supra* note 21, at 856 (conceding that "it is often exceedingly difficult to plumb the original understanding of an ancient text").

24. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980) (arguing that originalists' claim to be democratically abiding by the will of the people "is largely a fake," since the people who wrote and ratified the constitutional language "have been dead for a century or two"); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 382 (1997) [hereinafter Klarman, *Antifidelity*] (asserting that it is "antidemocratic for a contemporary majority to be governed by values enshrined in the Constitution over two hundred years ago"); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1915 (1995) [hereinafter, Klarman, Brown, *Originalism and Constitutional Theory*] ("No originalist thinker of whom I am aware has convincingly explained why the present generation should be ruled from the grave."); Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263, 263–73 (1996) (rejecting attempts to justify giving conclusive authority

What gave men in the late eighteenth century, who lived in a world vastly different from our own,<sup>25</sup> the right to impose their preferences on all future generations of Americans, unless those later generations could meet the supermajority requirements that the founding generation prescribed for constitutional amendments in Article V?<sup>26</sup> For those generations that do manage to amend the Constitution, what gives them the right to bind future majorities until a supermajority can again be assembled?

Nonoriginalist proponents of judicial supremacy must confront legitimacy challenges of their own. As Andrei Marmor points out, “the more flexible the culture of constitutional interpretation is taken to be, the more power it grants to the courts in determining its content,” and thus “the more reason you have to worry about the anti-democratic role of the courts in determining matters of moral [and] political importance in the constitutional domain.”<sup>27</sup> Moreover, many of the sources of constitutional meaning that nonoriginalists identify—such as tradition and prior generations’ social movements<sup>28</sup>—are themselves largely imposed on the present generation by the dead hand of the past.<sup>29</sup> Faced with that reality, one might conclude that the only way to ensure that Americans today are truly self-governed is to abandon judicial supremacy altogether—which is precisely what popular constitutionalists urge us to do.

Popular constitutionalists do not try to escape the reach of the dead hand entirely. None of these scholars contend, for example, that the nation can simply disregard the Constitution’s unambiguous requirements, such as those concerning the age one must be to serve as a Senator, the length of a Representative’s term, the congressional supermajority needed to override a presidential veto, and so forth.<sup>30</sup> Popular constitutionalists

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to original meanings and the traditions that have emerged out of them). *See generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

25. *See* Klarman, *Antifidelity*, *supra* note 24, at 384–87 (emphasizing the differences between the founders’ world and the modern era).

26. *See* U.S. CONST. art. V (describing several means by which the Constitution may be amended, all of which require multiple supermajorities).

27. Marmor, *supra* note 12, at 76–77.

28. *See supra* note 5 (citing authorities that endorse the use of such sources).

29. *Cf.* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 392 (2007) (“[I]f the dead hand objection is really right, why should we ever pay attention to the constitutional text, formulated long ago, regardless of whether it is to be given its original meaning? That text is as much a product of the past as the meaning a past generation understood it to convey.”).

30. *See, e.g.*, TUSHNET, *supra* note 9, at 9–11, 24 (distinguishing between the “thick” Constitution (those parts that establish the federal government’s basic structures) and the “thin” Constitution (those parts that concern individual rights) and focusing his arguments against judicial supremacy on the latter); VERMEULE, *supra* note 10, at 230 (“Judges should . . . defer to legislatures on the interpretation of constitutional texts that are ambiguous, can be read at multiple levels of

appear content to presume that if a constitutional provision is not reasonably susceptible to competing interpretations, then the nation should deem itself bound by that provision's plain meaning.<sup>31</sup> But with respect to the open-ended provisions whose meanings are reasonably contestable (such as the frequently litigated provisions of the Bill of Rights and the Fourteenth Amendment), popular constitutionalists insist that "the People," and not the courts, have the ultimate authority to determine what those provisions demand.<sup>32</sup>

The prospect of popular constitutionalism raises provocative issues. One of those issues is largely practical in nature: By what means are the American people expected to exercise their interpretive power? Should the power be exercised by citizens' elected representatives and manifested in the legislation that those representatives enact? Should it be exercised by citizens themselves through direct-democracy mechanisms, such as referendums and initiatives? Is there some other, less formalized way in which citizens should make their interpretations clear? As one scholar has noted, popular constitutionalists have said very little "about what their theories demand from individual citizens in order to operate effectively."<sup>33</sup> These are vitally important matters on which popular constitutionalists owe their critics a persuasive response.<sup>34</sup>

In this Article, I focus on two even more fundamental concerns, both of which must be addressed if a proposal for popular interpretive mechanisms is to be anything other than a hollow academic exercise. First, does judicial supremacy actually suffer from the kinds of democratic deficits that popular constitutionalists perceive? If judicial supremacy is more easily reconciled with democratic values than its critics allege, then

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generality, or embody aspirational norms whose content changes over time with shifting public values." Cf. BORK, *supra* note 20, at 170 (noting that scholars who raise the dead-hand objection against originalism are usually focusing only on "those amendments to the Constitution that guarantee individual rights," and not the provisions establishing the federal government's basic policymaking processes); DWORKIN, *supra* note 5, at 11 (stating that, in many constitutional cases, "[t]he ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction").

31. See *infra* text accompanying notes 78–80 in which I posit an explanation for this limited acceptance of the dead hand's grasp.

32. This theme of popular constitutionalism strongly resembles James Thayer's contention that the courts must defer to the political branches' constitutional interpretations unless those interpretations are so clearly mistaken that the matter "is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

33. Gewirtzman, *supra* note 13, at 910.

34. See *infra* notes 128–30 (noting a few scholarly discussions of these practical concerns); cf. KRAMER, *supra* note 7, at 207 (stating that advocates of judicial supremacy have historically benefited from ordinary citizens' "uncertainty over the means through which [their constitutional interpretations are to be] expressed").

perhaps we should leave well enough alone. Second, and most fundamentally, can political majorities be trusted to self-enforce the limits that the Constitution purports to place upon them? Parts I and II focus on those concerns, respectively.

In Part I, using originalism as a paradigmatic example of a judicial method of interpretation that draws upon constitutional meanings forged long ago, I argue that defenders of judicial supremacy still have not satisfactorily responded to the dead-hand objection. I hasten to emphasize at the outset that the problem is not unique to originalism. The judicial supremacist must confront the dead-hand problem even if he or she prefers to pull constitutional meaning from tradition, prior generations' social movements, or some other nonoriginalist source that draws its purported authority from the past.<sup>35</sup> I focus on originalism simply because it presents the dead-hand problem in a classic, readily appreciable form, because originalist modes of interpretation remain so frequently used by the courts, and because originalists have argued so strenuously that their interpretive methods offer the best hope of reconciling judicial supremacy with democratic values. I consider five leading efforts to explain why it is democratically legitimate for courts to apply the original meaning of an open-ended constitutional provision in cases in which the original meaning conflicts with the meaning that a majority of Americans would assign today. I argue that all of those explanatory efforts fall short of their objective.

In Part II, I respond to what is perhaps the most serious attack on popular constitutionalism. Regardless of how the American people are to exercise their interpretive power, in what sense is popular constitutionalism genuinely a form of *constitutionalism* if the Constitution's open-ended provisions mean whatever a majority of the people or their representatives say they mean?<sup>36</sup> The very notion of constitutionalism entails a distinction between ordinary and fundamental law, with the latter constraining the former.<sup>37</sup> Following Chief Justice John

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35. See *supra* note 5 and accompanying text (noting the existence of nonoriginalist yet past-focused modes of interpretation).

36. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998) (stating that "the dead hand argument, if accepted, is fatal to any form of constitutionalism"); McGinnis & Rappaport, *supra* note 29, at 392 (cautioning that one should not take the dead-hand argument too far, because doing so would lead to allowing present-day majorities to do anything they like, in violation of a fundamental premise of constitutionalism).

37. See KRAMER, *supra* note 7, at 29–31, 45–46 (stating that the founding generation honored a distinction between fundamental law, which is created by the people in order to constrain government, and ordinary law, which is created by government in order to regulate the people in compliance with the people's fundamental law).

Marshall's lead in *Marbury v. Madison* more than two centuries ago,<sup>38</sup> this nation has long presumed that the chief purpose of the Constitution—beyond establishing the federal government's basic institutions and procedural ground rules—is to place constraints on what political majorities can do when creating and enforcing statutes, regulations, and other forms of ordinary law.<sup>39</sup> If the power to interpret the Constitution ultimately rests with political majorities, rather than with a politically insulated judiciary, are not the American people then unconstrained in precisely the areas where we want the Constitution to constrain them?<sup>40</sup> Believing that a popularly interpreted constitution is not really a constitution at all, critics have charged that what popular constitutionalists

38. Chief Justice Marshall wrote:

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

5 U.S. 137, 176–77 (1803).

39. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”); RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* 135 (2006) (“The American Constitution limits the power of political majorities by recognizing individual constitutional rights that majorities may not infringe.”); Friedman & Smith, *supra* note 20, at 58 (“This is the single most important function of a constitution—to limit present preferences in light of deeper commitments.”); Marmor, *supra* note 12, at 70 (stating that the primary purpose of a written constitution “is to remove certain important moral/political decisions from the ordinary business of lawmaking”); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *TEX. L. REV.* 703, 786 (2002) (stating that, when considering the means by which the Constitution may be amended, it “is necessary to ensure that the Constitution actually limits majorities”).

40. See James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377, 1390 (2005) (stating that “it is not clear that the Constitution, or constitutionalism, is doing much work in popular constitutionalism”). Michael McConnell makes a comparable point in his criticism of nonoriginalist modes of interpreting the Constitution:

If the Constitution is authoritative only to the extent that it accords with our independent judgments about political morality and structure, then the Constitution itself is only a makeweight: what gives force to our conclusions is simply our beliefs about what is good, just, and efficient. Taken to its logical conclusion, this line of argument does not provide a reason for treating the Constitution as authoritative; it instructs us to disregard the Constitution whenever we disagree with it.

McConnell, *supra* note 36, at 1129.

are endorsing is nothing short of mob rule.<sup>41</sup> I argue that the people's capacity for self-restraint is greater than critics of popular constitutionalism have imagined, and is sufficient to maintain the distinction between ordinary and fundamental law that constitutionalism demands.

## I. ORIGINALISM AND THE DEAD-HAND PROBLEM

### A. *Odysseus and the Sirens*

When considering the ways in which a written constitution might legitimately bind a citizenry, Jon Elster proposes an analogy to the measures that Odysseus took in his effort to avoid the Sirens in Homer's *The Odyssey*.<sup>42</sup> Circe warns Odysseus that he and his men will soon be sailing by the Sirens' island, that the Sirens will try to lure Odysseus ashore with their beautiful singing, and that Odysseus must resist the temptation because all who succumb to it die.<sup>43</sup> Following Circe's instructions, Odysseus orders his men to bind him to the ship's mast, to fill their own ears with beeswax, and to resist any pleading gestures he might make while enthralled by the Sirens' voices.<sup>44</sup> When Odysseus hears the Sirens, he motions at his men to free him, but they only bind him more tightly and continue sailing until they and their leader are out of danger.<sup>45</sup> Similarly, Elster suggests, if a democratic society believed it might sometimes fall "under the sway of irrational fears or demagoguery," it could codify its fundamental "precommitments" in a constitution and then take the job of interpreting that constitution "out of the hands of those whom it is supposed to keep in line."<sup>46</sup>

If that analogy were persuasive, it would offer a way of conceptualizing judicially enforced constitutionalism without the dead-

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41. Alexander & Solum, *supra* note 3, at 1640 (arguing that "constitutional interpretation by mob . . . is the logical stopping point of" popular constitutionalism).

42. HOMER, *THE ODYSSEY* (Robert Fagles trans., Viking Penguin 1996) (n.d.); see JON ELSTER, *SOLOMONIC JUDGEMENTS* 195 (1989) [hereinafter ELSTER, *SOLOMONIC JUDGEMENTS*] (analogizing constitutional "precommitments" to Odysseus' efforts to avoid the Sirens); JON ELSTER, *ULYSSES AND THE SIRENS passim* (1979, rev. ed. 1984) (same); JON ELSTER, *ULYSSES UNBOUND* 89–96 (2000) [hereinafter ELSTER, *ULYSSES UNBOUND*] (same). Elster draws his inspiration for the analogy from Benedict de Spinoza, who used it to defend his claim that there are some laws that a monarch cannot abolish. See BENEDICT DE SPINOZA, *Tractatus Politicus*, in *A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE* 279, 327 (R.H.M. Elwes trans., Dover Publ'ns 1951) (1677).

43. HOMER, *supra* note 42, at 272–73.

44. *Id.* at 276–77.

45. *Id.* at 277.

46. ELSTER, *SOLOMONIC JUDGEMENTS*, *supra* note 42, at 195, 198.

hand problem. Just as Odysseus's men were not illegitimately enforcing the will of some long-dead decision maker when they refused Odysseus's pleas to be untied, but rather were enforcing the previously revealed supreme will of Odysseus himself, the American people might express their supreme will in the Constitution, and then rely upon life-tenured judges—judges whose ears are filled with beeswax, rendering them beyond the reach of short-sighted temptations—to ensure that the people's supreme will is honored.

Although one wishes he had put it more delicately, Jeremy Waldron points us in the right direction when he concludes that “anyone who thinks [American constitutionalism] is appropriately modelled by the story of [Odysseus] and the Sirens is an idiot.”<sup>47</sup> The analogy suffers from two central problems. First, as Professor Elster readily acknowledges, there is a critical difference between Odysseus's act of binding himself and constitution-makers' act of binding others.<sup>48</sup> Those who ratified the Constitution elected to try to bind not only themselves, but future generations who were not even parties to the deliberations, as well.<sup>49</sup> What gave the founding generation the right to impose constraints on the kinds of laws that future political majorities might wish to create? It seems patently clear that *X*'s self-binding is not politically or morally equivalent to *X*'s attempt to bind its successor, *Y*, regardless of whether *X* and *Y* are individuals or political majorities.<sup>50</sup> That is not to say that *X* can never bind *Y*—it is only to say that the legitimacy of *X*'s attempt to bind *Y* is not nearly as self-evident as the legitimacy of *X*'s attempt to bind itself. Even some members of the founding generation questioned the legitimacy of

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47. WALDRON, *supra* note 11, at 268. Elster acknowledges ways in which the analogy breaks down. See ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 42, at 196 (acknowledging that “the analogy between individual and political self-binding is severely limited”); ELSTER, ULYSSES UNBOUND, *supra* note 42, at 92–95 (describing some of the analogy's limitations).

48. See ELSTER, ULYSSES UNBOUND, *supra* note 42, at 92 (acknowledging that “constitutions may bind others rather than being acts of self-binding”).

49. See Barnett, *supra* note 18, at 636–37 (suggesting that the Constitution cannot acquire its binding force on us today merely by virtue of the ratifiers' consent, because the ratifiers had no right to bind current and future dissenters).

50. Paul Brest makes the point well:

According to the political theory most deeply rooted in the American tradition, the authority of the Constitution derives from the consent of its adopters. Even if the adopters freely consented to the Constitution, however, this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone.

Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) (footnotes omitted); see also *supra* note 24 (citing authorities making the same point).

attempting to bind future Americans.<sup>51</sup> Thomas Paine argued, for example, that “[t]he vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies,” and that “[e]very age and generation must be free to act for itself *in all cases* as the ages and generations which preceded it.”<sup>52</sup> In Noah Webster’s view, the attempt to establish a perpetual constitution was an “arrogant and impudent” attempt<sup>53</sup> to “legislate for those over whom we have as little authority as we have over a nation in Asia.”<sup>54</sup>

Second, even if the founding generation could legitimately bind its successors with a set of constitutionally enshrined precommitments, the nature of the Founders’ actual precommitments is often far from clear. Although the content of Odysseus’s supreme will was obvious—his men were to ensure that they and Odysseus continued sailing past the Sirens’ island—the content of the Constitution’s precommitments is frequently the subject of great controversy. Professor Waldron persuasively argues that constitutional disputes are more akin to a scenario in which a person torn between religious faith and religious doubt decides to go the way of faith, and so asks her friend to take custody of the books in her library that tend to inflame her skepticism.<sup>55</sup> When the would-be believer later asks the friend to return the books, the friend cannot confidently identify the would-be believer’s preeminent wishes. The friend has no choice but to take sides in the dispute between the would-be believer’s conflicting inclinations.<sup>56</sup> Courts asked to resolve constitutional disputes are often similarly asked to take sides in a battle between conflicting—but nevertheless reasonable—interpretations of the ratified texts. In such cases, one cannot convincingly contend that politically insulated courts are simply enforcing the clear and supreme will of the people.

These two criticisms of the Odysseus analogy track the two central components of originalists’ vision of the relationship between their

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51. See, e.g., Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in WRITINGS 959, 963 (Merrill D. Peterson ed., 1984) (“[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”).

52. THOMAS PAINE, *Rights of Man*, in COMMON SENSE, RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 129, 138 (Signet Classics 2003) (1791).

53. Webster, *supra* note 1, at 139.

54. Giles Hickory [Noah Webster], *On Bills of Rights*, 1 AM. MAG. 13, 14 (1787). Webster focused his criticism on constitutions that purported to be unamendable. See *id.* (“If . . . our posterity are bound by our constitutions, and can neither amend nor annul them, they are to all intents and purposes our slaves.”).

55. WALDRON, *supra* note 11, at 268–69.

56. See *id.* at 269.

interpretive methods and judicial supremacy.<sup>57</sup> The first problem concerns the democratic legitimacy of privileging the original meaning of an open-ended constitutional text over the meaning that a majority of Americans would ascribe to the same text today. The second problem concerns the democratic legitimacy of giving politically unaccountable judges the ultimate authority to resolve reasonable disputes over the meaning of the Constitution's open-ended provisions, regardless of whether the competing interpretations are grounded in originalism or some other interpretive methodology. I take up the second problem in Part II. For the remainder of Part I, however, I wish to focus on the first problem—the problem of privileging original meaning over contemporary meaning.

Let us assume that, in a given case, the original meaning of an open-ended constitutional provision—such as the right to the freedom of speech, equal protection, or due process of law—can be discerned with sufficient clarity to adjudicate the facts of a dispute arising under that provision. (That is often a dubious assumption, as critics of originalism have pointed out,<sup>58</sup> but I wish to make it here so that I can proceed with a further critique of the problems that arise when one gives dispositive force to constitutional meanings shaped by the dead hand of the past.) Let us further assume that the original meaning of the constitutional provision at issue conflicts with the interpretation favored by a contemporary majority of Americans. Why is it that the meaning assigned in an era long past should prevail? Scholars have proposed a number of possible responses, none of which is fully satisfying. I briefly consider five of the leading responses here.

## *B. Failed Rationales for Privileging Original Meaning over Contemporary Meaning*

### *1. The Framers Were Wiser and Less Self-Interested than We Are*

In *Federalist No. 49*, James Madison considered the suggestion that a constitutional convention be called to consider amendments whenever Congress determined by a two-thirds vote that such a convention would be useful.<sup>59</sup> After conceding that some might initially find the proposal

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57. See *supra* notes 18–22 and accompanying text (describing originalists' traditional formulation).

58. See *supra* note 23 (citing sources arguing that originalism is far more indeterminate than its proponents acknowledge).

59. See THE FEDERALIST NO. 49, at 310 (James Madison) (Clinton Rossiter ed., 2003).

appealing—the American people are the nation’s ultimate sovereign, after all, and so discovering the people’s wishes by holding conventions might seem perfectly natural<sup>60</sup>—Madison rejected it as unwise. He argued that drafting constitutional provisions is a “ticklish” business and he urged his contemporaries not to assume that future Americans would rise to the challenge.<sup>61</sup> Members of the founding generation, Madison argued, faced great dangers that caused them to suppress “the passions most unfriendly to order and concord” and to “stifle[] the ordinary diversity of opinions on great national questions.”<sup>62</sup> In his view, there was little reason to believe that future generations would be similarly inspired to rise above the muck of ordinary politics and to place themselves in a trustworthy, constitution-writing frame of mind.<sup>63</sup>

Madison’s argument lends weight to the possibility that “constitution-makers regard themselves as superior both to the corrupt or inefficient regime they are replacing and to the interest- and passion-ridden regimes that will replace them.”<sup>64</sup> As Professor Elster concludes, however, “[t]he idea that framers are demigods legislating for beasts is a fiction.”<sup>65</sup> The view errs both by overemphasizing the Framers’ wisdom and moral reliability and by underestimating subsequent generations’ ability to act responsibly. Michael Klarman nicely makes the first point, reminding us that, “[n]o matter how smart the Framers were, they still held slaves and subordinated women[,] . . . and they wrongly assumed basic demographic, political, and other facts about the world.”<sup>66</sup> Historians, moreover, have “describ[ed] in rich detail the self-interested political horsetrading that characterized the constitutional convention,” leading to such provisions as the temporary ban on congressional interference with slavery and the equal representation of the differently populated states in the Senate.<sup>67</sup> It is far from clear, therefore, that the Framers operated on a rarified moral plain beyond the reach of ordinary Americans.

The second point—that the solution to the dead-hand problem cannot lie with discounting the deliberative capacities of modern Americans—is

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60. See *id.* at 311 (stating that the Constitution’s authority flows from the people and that one might thus conclude that the people “can alone declare [the Constitution’s] true meaning, and enforce its observance”).

61. *Id.* at 312.

62. *Id.*

63. *Id.*

64. ELSTER, ULYSSES UNBOUND, *supra* note 42, at 115.

65. *Id.* at 172.

66. Klarman, *Antifidelity*, *supra* note 24, at 388–89.

67. *Id.* at 389–90; see U.S. CONST. art. I, § 9, cl. 1 (forbidding congressional interference with the slave trade until 1808); *id.* § 3, cl. 1 (apportioning two Senators to each state).

the point that Noah Webster was making in the passage that appears at the beginning of this Article.<sup>68</sup> Webster rejected the proposition that future generations of political leaders would “be less honest—less wise—and less attentive to the interest of the State” than his contemporaries.<sup>69</sup> There is indeed something fundamentally amiss if we assume that Americans today possess the kinds of rights that are reflected in such texts as the Bill of Rights and the Fourteenth Amendment, but that the very same autonomy and capacity for deliberation that justify the recognition of those rights cannot be trusted to lead Americans to construe those rights responsibly today.<sup>70</sup> If we are no less deserving than the founding generation of the kinds of rights that the Constitution aims to protect, then there is good reason to believe that we are no less able to flesh out the content of those rights in whatever circumstances we find ourselves facing.

## 2. *The Constitution’s Original Meaning Gives Us the Stability We Need to Govern Ourselves*

Resisting the claim that constitutionalism is undemocratic because it entails government by the dead hand of the past, Stephen Holmes argues that the Constitution actually enhances democracy.<sup>71</sup> Professor Holmes contends that, by providing a stable governmental framework, the Constitution spares modern Americans from being “victimized by the urgent need to put an end to the chaos of a sovereignless nation,” and thus enables them to focus their energies on achieving their particular political goals.<sup>72</sup> Several of the First Amendment’s guarantees, for example—those protecting the basic rights of speech, press, assembly, and petition<sup>73</sup>—provide contemporary Americans with democracy-enhancing ground rules.<sup>74</sup> Far from undemocratically constraining present-day citizens,

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68. See *supra* note 1 and accompanying text.

69. Webster, *supra* note 1, at 139.

70. See WALDRON, *supra* note 11, at 222 (arguing that entrenching rights in a written constitution reflects mistrust in one’s fellow citizens, and that this mistrust “does not sit particularly well with the aura of respect for their autonomy and responsibility that is conveyed by the substance of the rights which are being entrenched in this way”).

71. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988).

72. *Id.* at 225.

73. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

74. See Holmes, *supra* note 71, at 233 (“Popular sovereignty is meaningless without rules organizing and protecting public debate.”).

Professor Holmes suggests, the Constitution enables them “to achieve more of their aims than they could if they were left entirely unconstrained.”<sup>75</sup> Keith Whittington<sup>76</sup> and Frank Easterbrook<sup>77</sup> reach comparable conclusions.

With respect to those constitutional provisions that straightforwardly establish the federal government’s basic structures and that unambiguously describe the way in which those structures are to be constituted and to function, the stability argument is quite strong.<sup>78</sup> Indeed, the strength of that argument likely goes a long way toward explaining why popular constitutionalists who are otherwise determined to resist the dead hand’s grasp have been largely content to regard many of the Constitution’s provisions as binding on Americans today.<sup>79</sup> As David Strauss has observed, “it is more important that some matters be settled than that they be settled right,”<sup>80</sup> and there certainly are many portions of the Constitution that usefully settle matters that we might otherwise find ourselves constantly and unprofitably debating.

The constitutional provisions for which the stability argument is quite strong, however, are generally not the provisions that place the dead hand’s democratic legitimacy in the sharpest relief. The tension between original and contemporary meaning arises most pointedly with respect to

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75. *Id.* at 236; *see also id.* at 240 (“The dead should not govern the living; but they can make it easier for the living to govern themselves.”); accord ELSTER, *ULYSSES UNBOUND*, *supra* note 42, at 155 (“The stabilizing effect of requiring supermajorities for amending the constitution is arguably the most important aspect of constitutional precommitment.”); DAVID HUME, *Of the Original Contract*, in *ESSAYS, MORAL, POLITICAL, AND LITERARY* 465, 476 (Eugene F. Miller ed., Liberty Classics 1985, rev. ed. 1987) (“[A]s human society is in perpetual flux, one man every hour going out of the world, another coming into it, it is necessary, in order to preserve stability in government, that the new brood should conform themselves to the established constitution . . .”).

76. *See* WHITTINGTON, *supra* note 21, at 132–34. Whittington argues:

The existing Constitution is a placeholder for our own future expression of popular sovereignty. . . . We can replicate the fundamental political act of the founders only if we are willing to recognize the reality of their act. Stripping them of their right to constitute a government would likewise strip us of our own.

*Id.* at 133; *see also id.* at 137 (arguing that the stability the Constitution provides enables citizens to focus their energies productively on nongovernmental matters).

77. *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1120 (1998) (“[A]ffirming the force of old laws is essential if sitting legislatures are to enjoy the power to make new ones.”); *id.* at 1122 (“Today’s majority accepts limits on its own power in exchange for greater surety that its own rights will be respected when, sometime in the future, power has shifted.”).

78. *See* Marmor, *supra* note 12, at 79 (stating that “the argument from stability would seem to make some sense with respect to the structural prong of constitutional entrenchment”).

79. *See supra* notes 30–32 and accompanying text (noting popular constitutionalists’ apparent acceptance of some constitutional provisions’ original meaning).

80. Strauss, *supra* note 19, at 907.

the Constitution's open-ended provisions whose meanings are reasonably contestable, such as those that appear throughout the Bill of Rights and the Fourteenth Amendment.<sup>81</sup> As Andrei Marmor notes, these provisions occupy the "domain of rights and moral principles," where "it is mostly truth that we value, not stability."<sup>82</sup> Far from providing stabilizing decision-making structures for substantive democratic deliberations, these provisions often are variously interpreted in support of substantive, conflicting, values-laden outcomes. The stability argument in this domain is considerably less helpful.<sup>83</sup>

### *3. Article V Permits Us to Amend the Constitution if We Are Dissatisfied*

Responding to Thomas Jefferson's well-known suggestion that the nation avoid the dead-hand problem by letting the Constitution and all other laws expire every twenty years,<sup>84</sup> James Madison argued that a present-day generation legitimizes old laws with its tacit consent when it opts not to change them.<sup>85</sup> On this view, enforcing the Constitution's original meaning does not create a legitimacy problem because Article V provides mechanisms by which dissatisfied citizens can infuse the Constitution with new meaning.<sup>86</sup> If citizens are unhappy with the Constitution's content, they can change it; if they decline to change it, we can safely assume that they accept the Constitution as it stands. This argument apparently satisfied many of the Framers, and at least one commentator believes it is "the view of the vast majority of the American people today."<sup>87</sup>

The difficulty with this response is that Article V imposes supermajority requirements that can leave a political majority bound to constitutional meanings that they find objectionable. Article V declares that the initial endorsement of either two-thirds of Congress or two-thirds

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81. See *supra* notes 30–32 and accompanying text.

82. Marmor, *supra* note 12, at 79.

83. See McConnell, *supra* note 36, at 1130 ("Most of what we now think of as constitutional law lies outside [the stability argument's] justification.")

84. See Letter from Thomas Jefferson to James Madison, *supra* note 51, at 963 ("Every constitution . . . and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.")

85. See Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 503, 505–06 (Philadelphia, J.B. Lippincott & Co. 1865) (making this argument).

86. See U.S. CONST. art. V (describing ways in which the Constitution may be amended).

87. McConnell, *supra* note 36, at 1131–32.

of the states is required to initiate the amendment process, and that the ultimate ratification of three-fourths of the states is required to complete it.<sup>88</sup> It is entirely possible, therefore, that a majority of Americans might disapprove of a given aspect of the Constitution, but be unable to summon the supermajority demanded by the founding generation for altering it. Pointing to the possibility of amendment thus does not fully address concerns regarding the democratic legitimacy of enforcing the Constitution's original meaning.<sup>89</sup> As Akhil Reed Amar argues, if democratic legitimacy arises from the express or implied consent of the governed, then the founding generation cannot be given more than the power to declare the status quo until a present-day majority elects to change it.<sup>90</sup> Professor Amar reasons:

[S]uppose that the People of 1787 had attempted to make, say, the taxing power unamendable, save perhaps by unanimous consent of all individuals. Suppose 99.9 percent of all Americans today wanted to amend that provision, but could not do so constitutionally. Could we really view our Constitution as being of, by, and for the People? And if you accept the argument for 99.9 percent, then there is no principled way to stop short of 50 percent plus one.<sup>91</sup>

#### 4. *We Can Amend the Constitution by Means Other than Those Described in Article V if We Are Dissatisfied*

If a political majority could amend the Constitution by means other than those described in Article V, one might find greater appeal in the argument that the Constitution's original meaning may legitimately be

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88. See U.S. CONST. art. V (describing ways in which the Constitution may be amended).

89. See Klarman, *Antifidelity*, *supra* note 24, at 387 (“The dead-hand problem of constitutionalism is not solved by an amendment mechanism biased in favor of the status quo through supermajority requirements.”); McConnell, *supra* note 36, at 1132 (stating that, if a majority—but not a supermajority—of Americans consistently resisted the Constitution, “we would have a genuine crisis of legitimacy”). Jon Elster suggests that requiring a supermajority to amend the Constitution “is justified whenever the minority would rather live under a regime that is preferred by the majority and protected by a supermajority requirement than live under its own preferred regime that was not similarly protected.” ELSTER, *ULYSSES UNBOUND*, *supra* note 42, at 155. Professor Elster’s argument does provide a measure of comfort at the level of second-best alternatives, but it still does not provide an affirmative rationale for giving the founding generation the power to bind succeeding political majorities on particular values-laden issues.

90. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1074 (1988).

91. *Id.* at 1073.

enforced until the nation opts to change the Constitution's content.<sup>92</sup> In recent years, numerous scholars have in fact argued—both descriptively and normatively—that Article V's amendment mechanisms are not exclusive.<sup>93</sup> Bruce Ackerman contends, for example, that on several occasions during its history,<sup>94</sup> the nation has usefully deployed a “movement-party-presidency” method of amending the Constitution, involving a social movement by determined citizens, a political party that takes up the movement's cause, and a president who builds a coalition of legislators and judges who help to achieve the movement's objectives.<sup>95</sup> William Eskridge and John Ferejohn argue that the Constitution has frequently been amended by “dynamic judicial interpretations of its provisions,” in large part because it is “easier . . . than the bulky process of formal constitutional amendment entailed by Article V.”<sup>96</sup> Reva Siegel contends that citizens have altered the Constitution's meaning by

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92. See *supra* notes 84–87 and accompanying text (acknowledging a comparable argument based on Article V).

93. See, e.g., WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 193–96 (1993) (suggesting that Article V only constrains how government officials may amend the Constitution, not how the American people themselves may do so); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 *passim* (1994) (arguing that Article V is not exclusive); Amar, *supra* note 90 *passim* (same); Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 160–61 (Sanford Levinson ed., 1995) (concluding that we add or subtract from our Constitution when, simply as a “social and political fact,” we begin or cease regarding something as our fundamental law).

94. Professor Ackerman focuses on the eras of Reconstruction, the New Deal, and the civil rights movement of the 1960s. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 47–63 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*] (discussing the New Deal); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99–252 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*] (discussing Reconstruction); *id.* at 255–377 (discussing the New Deal); Ackerman, *supra* note 5, at 1761–90 (discussing the civil rights movement of the 1960s).

95. See Ackerman, *supra* note 5, at 1759–60 (briefly summarizing his theory); *id.* at 1762 (identifying five key phases of the process: “signaling, proposing, triggering, ratifying, and finally consolidating the new principles supported by the American people”). Numerous scholars have offered critiques of Professor Ackerman's theory. See, e.g., LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 46 (2001) (arguing that Professor Ackerman has not persuasively explained why Americans today should be bound by the desires of those citizens who successfully amended the Constitution); TUSHNET, *supra* note 9, at 67–68 (arguing that theories like Professor Ackerman's help to explain “why judgments made during times of high political mobilization and deliberation about fundamentals might be *different* from judgments made in ordinary politics, but not why they are better”); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's WE THE PEOPLE*, 9 CONST. COMMENT. 309 *passim* (1992) (offering numerous points of praise and criticism).

96. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1267–68 (2001); accord Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) (“Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”).

participating in social movements.<sup>97</sup> David Strauss presses the nonexclusivity of Article V to its limits, arguing that we have informally amended the Constitution so often that Article V has become virtually superfluous.<sup>98</sup>

Difficulties arise, however, when one relies upon the possibility of non–Article V amendments to legitimize the continued enforcement of the Constitution’s original meaning. Theories of amendment outside Article V are invariably backward-looking—they seek to establish retrospectively that a particular series of historical events (such as elections, social movements, or judicial rulings) culminated in an alteration of the Constitution’s content. For those present-day citizens who prospectively wish to amend the Constitution in a manner that politicians and the courts will be obliged to uphold,<sup>99</sup> however, the existing theories of alternative amendment mechanisms are not particularly helpful. Once they step outside the confines of Article V, agitated citizens do not know precisely what they must do in order to persuade the nation’s judges that the supreme law of the land has been altered.<sup>100</sup> Similarly, the nation’s judges cannot cite any clear rules of recognition—other than those described in Article V—to demonstrate that their revised interpretations of the Constitution are based upon a valid amendment rather than their own wishful thinking.<sup>101</sup> Consequently, unless we can give dissatisfied citizens clearer prospective guidance about how they may amend the Constitution

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97. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1328 (2006) (positing that “movements can change the Constitution’s meaning outside Article V”).

98. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) (positing that, with only a few exceptions, “our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment”).

99. See U.S. CONST. art. VI, cl. 3 (stating that all state and federal legislators and executive and judicial officials “shall be bound by Oath or Affirmation, to support this Constitution”).

100. See Amar, *supra* note 90, at 1092–93 (arguing that Professor Ackerman’s theory is too imprecise on such matters as determining when an amendment has been decisively approved through electoral victories); Balkin & Levinson, *supra* note 96, at 1080 (arguing that Professor Ackerman’s theory “does not offer much help to someone in the midst of a potential constitutional revolution who wants to know what to do”); Sandalow, *supra* note 95, at 321 (arguing that the constitutional significance of electoral victories is often clear only in hindsight); Peter M. Shane, *Voting Rights and the “Statutory Constitution,”* 56 LAW & CONTEMP. PROBS. 243, 249 (1993) (stating that any theory of amendment outside Article V must confront rule of recognition problems); *id.* at 251 (“When non-Article V regime changes occur, where will they find at least some authoritative expression to guide courts engaged in constitutional adjudication?”).

101. See generally H.L.A. HART, *THE CONCEPT OF LAW* 92–114 (1961) (providing a seminal discussion of rules of recognition); *id.* at 113 (stating that, for a legal system to operate satisfactorily, “its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials”).

by means other than those described in Article V, the possibility of non–Article V amendments cannot assure us that the continued enforcement of the Constitution’s original meaning is democratically legitimate.

5. *All Americans—from the Founding Generation to the Present—  
Form One Transtemporal National Self*

In an effort to defend the legitimacy of the British monarchy and to rebut the claim that Britain’s citizens were entitled to choose their own leaders,<sup>102</sup> Edmund Burke argued in 1790 that the British people had forever surrendered any such right a century earlier.<sup>103</sup> Burke contended that, in the Glorious Revolution of 1688, the British people had made new arrangements for the succession of the Crown, and those arrangements remained “equally binding on king and people too, as long as the terms are observed, and they continue the same body politic.”<sup>104</sup> Burke argued that Britain’s governmental arrangements were an inheritance that each new generation received from its predecessors, that each generation was obliged to behave “as if in the presence of canonized forefathers,” and that the British people’s freedom thus carried “an imposing and majestic aspect” with “illustrating ancestors” and its own “gallery of portraits.”<sup>105</sup>

In making that argument, Burke drew upon imagery that had inspired some of his predecessors and that continues to inspire some American defenders of originalism today. Burke’s argument built upon Richard Hooker’s contention in the late sixteenth century that a long-dead generation’s consent to a set of laws is sufficient to legitimize the continued application of those laws for many centuries to come.<sup>106</sup> Members of a generation-spanning society are joined together as one body politic, Hooker argued; just as an individual may make a decision early in her life that legitimately binds her later in life, so too can one generation of

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102. Burke was responding to a speech delivered by a minister named Richard Price, in which Price praised the French Revolution and suggested that Britain’s King was legitimate only because he had the support of Britain’s people. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 9–13 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

103. See *id.* at 17 (“So far is it from being true, that we acquired a right by the Revolution [of 1688] to elect our kings, that if we had possessed it before, the English nation did at that time most solemnly renounce and abdicate it, for themselves, and for all their posterity for ever.”).

104. *Id.* at 18.

105. See *id.* at 30; see also *id.* at 27–30 (presenting Burke’s overarching argument).

106. See RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* 194–95 (Ernest Rhys ed., Everyman’s Library 1907) (1593).

the body politic make decisions that bind its successors.<sup>107</sup> Hooker concluded:

Wherefore as any man's deed past is good as long as himself continueth; so the act of a public society of men done five hundred years [ago] standeth as theirs who presently are of the same societ[y], because corporations are immortal; we were then alive in our predecessors, and they in their successors do live still.<sup>108</sup>

American scholars sometimes defend originalism's legitimacy on comparable grounds.<sup>109</sup> Michael McConnell argues, for example, that "[w]e are not alone in the present, but part of a historically continuous community," and that the appropriate mode of constitutional interpretation is thus one that lends decisive weight both to the Constitution's original meaning and to the American people's traditional interpretations of the Constitution's text over time.<sup>110</sup> Paul Kahn observes that originalists often rely upon transtemporal metaphors, suggesting not merely that we are the Founders' descendants, but that we and the Founders, as well as all intervening generations of Americans, are joined together in one "American political self."<sup>111</sup> When conceptualizing our relationship with the founding generation, this view posits, we must recognize that "we are them."<sup>112</sup> Because "we" were present at the founding and committed ourselves to a particular set of constitutional meanings, we remain bound by those meanings until we decide to change them using one of the methods of amendment that "we" specified in Article V at the time of ratification.<sup>113</sup> When we contemplate the Founders' act of constitution-making, therefore, we need to see it not as a problematic act of others-binding, but rather as an act of self-binding in which all generations of

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107. *See id.*

108. *Id.*; *see also* Holmes, *supra* note 71, at 208 (describing Hooker's argument). Hooker's argument mirrors many Christians' belief in the "communion of saints," under which Christians both past and present are joined together in one community and are able to pray for one another's well being. *See* WILLIAM BARCLAY, *THE APOSTLES' CREED FOR EVERYMAN* 9–10 (1967) (noting the doctrine's roots in the Apostles' Creed); CLEMENT H. CROCK, *DISCOURSES ON THE APOSTLES' CREED* 227–28 (1938) (describing a Roman Catholic conception of the doctrine); HENRY BARCLAY SWETE, *THE HOLY CATHOLIC CHURCH: THE COMMUNION OF SAINTS* 147–69, 229–44 (1915) (describing an Anglican conception of the doctrine).

109. For one presentation of this view, see Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909 (2005).

110. McConnell, *supra* note 36, at 1134–36.

111. Kahn, *supra* note 21, at 512–15.

112. *Id.* at 515.

113. *See* Strang, *supra* note 109, at 913–14.

Americans participated, just like Odysseus's binding of himself to the mast.<sup>114</sup>

For those Americans who are already inclined to deploy originalism's interpretive methods, this line of argument provides an appealing explanation for their willingness to subordinate contemporary meanings to those meanings that prevailed far in the past. The argument builds upon Americans' strong sense of national identity and invites them to see themselves as organically part of something much greater than their individual selves. As Professor Kahn explains, the argument seeks to persuade Americans to deny their own absolute freedom and to accept their subordination to the Constitution's original meaning as part of the "natural" order.<sup>115</sup> Professor Kahn writes:

[O]riginalism denies that the present decisionmaker has any role except as conveyor of the historical facts. The decisionmaker has no personal identity: he is only ritualistically mouthing the voice of the past. Originalism thereby discourages the separation of the subject from the object of political construction. . . .

Originalism does all of this by suggesting a "natural" identity between the present citizenry and those present at the origin. This is the function of the idea of "popular sovereignty," which is the dramatic actor in the myth of originalism. This actor—the popular sovereign—suggests identity across time and space. It links not only the entire nation at the moment of birth, but the entire nation back to the moment of birth.

Originalism denies individual freedom by asserting participation in the popular sovereign. "Popular sovereignty" asserts that we are them.<sup>116</sup>

Although it provides originalists with a means of explaining why they deem themselves bound by the Constitution's original meaning, the argument does little to persuade those who do not already possess originalists' inclinations. The argument is merely an analogy aimed at encouraging modern Americans to see themselves in a particular way. For those who decline to regard themselves as organically joined with the Founders, the argument can do little to persuade them that original meaning must prevail over contemporary meaning. After all, Americans

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114. See *supra* notes 42–56 and accompanying text (discussing the Odysseus analogy).

115. Kahn, *supra* note 21, at 512–13.

116. *Id.* at 514.

past and present are not one united self in any literal sense of the term—there plainly is a difference between saying that an individual remains bound by her earlier choices and that Americans today remain bound by the choices that other Americans made many generations ago. As Keith Whittington writes, America’s many generations “need not be viewed, and in fact do not exist, as a single unitary social organism.”<sup>117</sup> Rather, as Professor Kahn argues, the notion of a transtemporal national self is a “myth” that we propagate in order to justify the prevailing political order.<sup>118</sup> If we prefer, we may reject that myth and recognize that “the political order is only an artifact” and that we actually possess “a freedom not simply within that order, but a freedom to choose among competing political orders.”<sup>119</sup> If we choose to reject the transtemporal myth and we then encounter constitutional texts that are reasonably susceptible to conflicting interpretations, we will find ourselves still questioning the democratic legitimacy of being bound to those constitutional meanings that were in play more than two hundred years ago.<sup>120</sup>

My aim here has not been to conclusively rebut every conceivable response that an originalist might make to the dead-hand objection. Rather, my goal has been to illustrate just how daunting the dead-hand objection is, and how problematic the standard responses to that problem are. If we grant our politically unaccountable judges the ultimate authority to interpret the Constitution, we undoubtedly want those judges to adjudicate cases based on “law,” rather than on their personal predilections. As we cast about for the modes of interpretation that we want our judges to employ, however, we often find ourselves drawn to sources of constitutional meaning that have their roots in the preferences, values, or actions of Americans who have long since died. As I noted earlier, for example, originalist methods remain frequently deployed by originalists and nonoriginalists alike.<sup>121</sup> If we cannot persuasively justify privileging dead-hand sources of meaning over the meaning that a majority of Americans would assign today, then concerns about

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117. WHITTINGTON, *supra* note 21, at 149.

118. See Kahn, *supra* note 21, at 512–15 (describing this myth and the way it is deployed by originalists).

119. *Id.* at 513.

120. Cf. WALDRON, *supra* note 11, at 270–75 (acknowledging that people may want to conceive of themselves as being joined with their predecessors in a transtemporal political community and thus bound by prior generations’ values and political preferences, but concluding that this argument loses strength when it is difficult to amend those prior generations’ decisions).

121. See *supra* notes 18–19 and accompanying text (noting the continued prominence of originalist methods of constitutional interpretation).

democratic legitimacy give us good reason to question whether it really is necessary to give the nation's supreme interpretive power to judges, whose decision-making methods draw heavily from those dead-hand sources. It is to the supposed necessity of judicial supremacy that I now turn.

## II. TRUSTING THE PEOPLE

### A. America's "Dirty Little Secret" and the "Deepest Question of All"

Because many of the Constitution's provisions are open-ended in their language, the Constitution's meaning is often highly contested. Regardless of whether they rely upon originalist or nonoriginalist modes of interpretation, reasonable judges and litigants frequently disagree about what, if anything, the Constitution demands in particular cases. When the Constitution's indeterminate language is reasonably susceptible to conflicting interpretations and politically unaccountable judges bind the nation with the interpretations they favor, we face another problem of democratic legitimacy.

Consider, once again, the analogy to Odysseus and the Sirens.<sup>122</sup> Odysseus's instructions to his crew members were clear: they were to tie him to the mast, plug their ears, and ignore his pleading gestures until they had sailed beyond the Sirens' voices. The Constitution's demands, however, are frequently far less obvious. As a result, one often cannot say that courts are simply enforcing the supreme will of the people when they adjudicate constitutional disputes.<sup>123</sup> Rather, courts are taking sides in reasonable arguments about the meaning of the Constitution's language. It is as if Odysseus gave his crew a broad declaration about the ends he hoped to achieve—something along the lines of "Take all reasonable steps to avoid the seductive dangers that lurk ahead." As Odysseus's shipmates engaged in their inevitable disputes about the nature of the dangers that Odysseus had feared, and about whether this or that course of action would be a reasonable means of avoiding them, it would be extraordinarily difficult for one member of the crew to demonstrate, over the dissent of his colleagues, that he alone accurately perceived Odysseus's supreme will, and that everyone else should defer to his interpretation. Indeed, when a majority of the crew finally settled upon an interpretation of Odysseus's indeterminate declaration, their conclusion probably would tell

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122. See *supra* notes 42–56 and accompanying text (discussing the analogy).

123. See *supra* notes 55–56 and accompanying text (making this argument).

us as much about the crew's preferences as it would about those of Odysseus.

Popular constitutionalists would argue that, if Odysseus's precommitments are not clear, and we do not paternalistically want to make Odysseus's decisions for him but rather want to act in accordance with his own wishes, then "there is nothing to do but *ask [Odysseus]*" to clarify his specific intentions.<sup>124</sup> If the American people are truly the nation's ultimate sovereign, popular constitutionalists contend, and if the specific content of the American people's fundamental law is ambiguous, then the best, most democratically legitimate way to clarify the ambiguity is to turn for direction to the people themselves. There is no reason to believe, after all, that judges are better able to ascertain the people's will, or better able to engage in the moral and political deliberation that shapes the people's will, than the people themselves.<sup>125</sup> Indeed, judges are frequently no less divided than the citizenry about how particular constitutional disputes should be resolved.<sup>126</sup>

As I indicated earlier,<sup>127</sup> popular constitutionalists have not yet specified the precise means by which the American people are to provide their answers to the nation's reasonably contested constitutional questions. Some might favor a regime marked by departmentalism, for example, in which the courts share interpretive power with the federal government's political branches.<sup>128</sup> Others might see merit in a system of legislative supremacy, in which the nation's supreme interpretive authority rests with the people's elected representatives in Congress.<sup>129</sup> Still others might be attracted to the populist suggestion that the American people be permitted to declare the Constitution's content through referenda and citizen initiatives.<sup>130</sup> No matter what the contours of their particular visions,

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124. WALDRON, *supra* note 11, at 265.

125. *Cf.* Marmor, *supra* note 12, at 85 ("[J]udges are no experts in moral deliberation. . . . Nothing in the legal education and legal expertise that judges acquire prepares them better to conduct sound moral deliberation than legislators or other (reasonably educated) members of the community.").

126. *Id.* at 85–86 ("[J]udges in constitutional cases are often just as divided about the conclusion as the general public.").

127. *See supra* notes 33–34 and accompanying text (discussing popular constitutionalists' lack of clarity about how the American people are to exercise their supreme interpretive power).

128. *See* Fleming, *supra* note 40, at 1379 (defining "departmentalism" as "the idea that legislatures and executives share with courts authority to interpret the Constitution and indeed are the ultimate interpreters on certain questions").

129. *See* VERMEULE, *supra* note 10, at 268–82 (arguing in favor of legislative supremacy).

130. While not rejecting judicial supremacy, both Bruce Ackerman and Akhil Reed Amar have written favorably about allowing the American people to amend the Constitution outside Article V, through popular referenda or initiatives. *See* ACKERMAN, FOUNDATIONS, *supra* note 94, at 54–55 (arguing that we should consider allowing the President and a supermajority of Congress to propose

however, popular constitutionalists share a deep faith in citizens' ability to constrain themselves and their elected officials in the kinds of desirable ways that lead us to value the Constitution in the first place.

Yet when one expresses such faith in the American people, one runs squarely into what Roberto Unger has described as one of the "dirty little secrets of contemporary jurisprudence."<sup>131</sup> Despite their rhetoric, the United States and many other western nations are profoundly uncomfortable with democracy.<sup>132</sup> Professor Unger contends that this discomfort reveals itself in numerous ways—in the "ceaseless identification of restraints upon majority rule," in the frequent reliance upon judges to secure changes in public policy, in "the single-minded focus upon the higher judges and their selection as the most important part of democratic politics," and in the desire to reduce democratic deliberations to something akin "to a polite conversation among gentlemen in an eighteenth-century drawing room."<sup>133</sup> Larry Kramer makes the same point, observing that "skepticism about people and about democracy is a pervasive feature of contemporary intellectual culture"<sup>134</sup> and that this skepticism usually prompts us to reserve the realm of lawmaking and law interpreting "for a trained elite of judges and lawyers."<sup>135</sup>

In the United States, this discomfort with the citizenry's governmental capacities is hardly a recent development. One finds manifestations of it, for example, in John Adams's rejection of Thomas Paine's populism<sup>136</sup> and in the Federalists' desire in the late eighteenth century to disassociate themselves from developments in France.<sup>137</sup> James Madison famously

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amendments to the citizenry, with citizens then approving or disapproving those amendments in a national referendum); ACKERMAN, *TRANSFORMATIONS*, *supra* note 94, at 415 (arguing that we should consider "popular sovereignty initiatives," pursuant to which the President would submit a proposed constitutional amendment to Congress, and then, upon securing Congress's approval by a two-thirds vote, the proposed amendment would require approval in a ballot measure presented to the citizenry in two successive presidential election seasons); Amar, *supra* note 90, at 1044–46, 1060–61 (suggesting that a constitutional convention could propose amendments that would then be ratified or rejected by a popular majority vote in a national referendum).

131. ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 72 (1996).

132. *See id.* at 72–73.

133. *Id.*

134. KRAMER, *supra* note 7, at 243.

135. *Id.* at 7.

136. *See* HARVEY J. KAYE, *THOMAS PAINE AND THE PROMISE OF AMERICA* 52 (2005) (noting that Thomas Paine and John Adams deeply disagreed about ordinary people's capacity for self-government); *id.* at 53 ("In the Adams-Paine exchange we see the beginnings of the perennial contest in American political culture between those who would try to set limits to the expansion of democracy and those who would seek to extend and deepen it.").

137. *See* KRAMER, *supra* note 7, at 134 (stating that, in an effort to capitalize on the public's anti-France sentiment in the wake of the XYZ Affair, the Federalists unleashed "a relentless stream of

articulated some of the reasons for this mistrust of rule by ordinary citizens in *Federalist No. 10*.<sup>138</sup> When a popular majority is allowed to place its hands directly on the levers of governmental power, Madison argued, there is a great risk that the majority will “sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”<sup>139</sup> “If the impulse and the opportunity be suffered to coincide,” he wrote, “we well know that neither moral nor religious motives can be relied on as an adequate control.”<sup>140</sup> In Madison’s view, therefore, pure democracies inevitably devolve into “spectacles of turbulence and contention” and are “incompatible with personal security or the rights of property.”<sup>141</sup> The cure, he argued, was the Constitution’s system of representative government, in which each elected official represents a geographical area encompassing citizens of diverse interests, thereby making it less likely that any “improper or wicked project” will spread beyond localized areas and “pervade the whole body of the Union.”<sup>142</sup>

True to those convictions, the Constitution that Madison and his colleagues produced at the Philadelphia Convention does not expressly acknowledge any way in which ordinary Americans can engage in direct, unmediated lawmaking at the federal level.<sup>143</sup> The business of policy making is committed entirely to elected officials. The amendment mechanisms described in Article V similarly require that the amendment process be initiated by elected state or federal officials, rather than directly

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propaganda calling upon Americans to reject the French-influenced, popular politics of Jefferson and return to a virtuously passive and deferential concept of democratic citizenship”); Letter from Thomas Jefferson to James Madison, *supra* note 51, at 963 (“This principle that the earth belongs to the living and not to the dead is of very extensive application and consequences in every country, and most especially in France.”). See generally DAVID J. SIEMERS, *THE ANTIFEDERALISTS: MEN OF GREAT FAITH AND FORBEARANCE* 29 (2003) (“Most Antifederalists had faith in a more popular brand of government than the Federalists did.”).

138. See *THE FEDERALIST NO. 10* (James Madison) (Clinton Rossiter ed., 2003).

139. *Id.* at 75.

140. *Id.*

141. *Id.* at 76.

142. *Id.* at 79.

143. See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *COLUM. L. REV.* 121, 165 (1996) (arguing that “the Constitution was designed to prevent all unmediated lawmaking by the people”). See generally KRAMER, *supra* note 7, at 47 (“The men who led the campaign for a new Constitution were not fans of the people out-of-doors; they preferred a more sedate style of politics, safely controlled by gentlemen like themselves.”); *id.* at 121 (“In its most extreme manifestations, Federalism exhibited open contempt for ordinary citizens and a sure conviction that republicanism would fail unless those citizens left problems of governing to their social and intellectual betters.”); *id.* at 132 (arguing that, by the end of the eighteenth century, many Federalists were shifting “from seeing judicial review mainly as a device to protect the people from their governors, to viewing it first and foremost as a means of guarding the Constitution from the people”).

by citizens themselves.<sup>144</sup> Making constitutional amendments any easier, Madison argued, would needlessly stir up people's passions and "agitate the public mind more frequently and more violently than might be expedient."<sup>145</sup>

That same mistrust of the American people reveals itself when we insist that the federal courts retain the supreme interpretive power on disputed questions of constitutional law. We worry that, if the interpretive power were somehow placed in the popular domain, citizens would not distinguish between their interpretation of the Constitution's fundamental demands, on the one hand, and their raw political desires, on the other.<sup>146</sup> In the view of at least some defenders of judicial supremacy, Larry Kramer argues that

ordinary people are emotional, ignorant, fuzzy-headed, and simple-minded, in contrast to a thoughtful, informed, and clear-headed elite. Ordinary people tend to be foolish and irresponsible when it comes to politics: self-interested rather than public-spirited, arbitrary rather than principled, impulsive and close-minded rather than deliberate or logical. Ordinary people are like children, really.<sup>147</sup>

Fearing what political majorities might do if they remained unchecked by external forces, we thus have placed the ultimate power to interpret the Constitution in the hands of life-tenured judges who, once seated on the bench, are largely beyond the quick, retributive reach of political majorities.

Having long ago ceded the nation's ultimate interpretive authority to a judicial elite, citizens and politicians have sometimes behaved in ways that admittedly make it difficult to imagine them wielding greater interpretive powers on fundamental questions of constitutional law.<sup>148</sup> Akhil Reed

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144. See U.S. CONST. art. V (describing means by which the Constitution may be amended).

145. Madison, *supra* note 85, at 504; accord THE FEDERALIST NO. 49 (James Madison), *supra* note 59, at 312 ("The danger of disturbing the public tranquility by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society.").

146. See Fleming, *supra* note 40, at 1390 ("[I]t is not clear that the people themselves, when they triumph over judicial supremacy, are ultimately interpreting the Constitution, as distinguished from it simply being the case that public opinion about wants, interests, or justice has prevailed as a fact of political power over judicial interpretations of the Constitution."); cf. Balkin & Levinson, *supra* note 96, at 1078 ("[I]n some sense the movement from ordinary politics to constitutional politics is seamless, for many Americans have little idea of the exact contours of constitutional doctrine and tend to associate the Constitution with whatever they regard as most right and just.").

147. KRAMER, *supra* note 7, at 242.

148. See *infra* note 172 and accompanying text (citing an example).

Amar argues that “the People today are at times irresponsible because they have not been given responsibility” and that this has “caused the People’s constitutional muscles to atrophy through disuse.”<sup>149</sup> As for Congress, Mark Tushnet contends that its members suffer from what he calls the “judicial overhang” problem—they do not feel obliged to take their constitutional obligations as seriously as one might like because they believe that the responsibility for identifying legislation’s constitutional defects ultimately rests with the courts.<sup>150</sup> James Thayer identified the same problem more than a century ago, long before the Supreme Court had become the overshadowing presence that it is today. When determining what the Constitution permits, Professor Thayer wrote, members of Congress “have felt little responsibility; if we are wrong, they say, the courts will correct it.”<sup>151</sup>

Popular constitutionalists thus are swimming against a powerful tide. Are there nevertheless good reasons to believe that the American people possess the powers of deliberation and restraint necessary to honor the distinction that constitutionalism requires between their long-term fundamental commitments and their short-term political desires? As Professor Amar notes with respect to the comparable question of popular majorities’ capacity to craft praiseworthy amendments outside the strict requirements of Article V, “[t]his is perhaps the deepest question of all.”<sup>152</sup>

One might respond to that question by arguing that defenders of judicial supremacy actually underestimate the degree to which legislative bodies have behaved laudably in the past, and correspondingly overestimate the degree to which the nation’s courts have played a countermajoritarian, rights-preserving role. Some scholars have pointed out, for example, that the Warren Court—often cited as a prime example of a countermajoritarian Court in action—“did not climb out on limbs as often as some of its admirers believe,” and “ably represented the American majority in most of its rulings.”<sup>153</sup> Moreover, the Court’s own record on issues of rights is hardly pristine—for every *Brown v. Board of*

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149. Amar, *supra* note 90, at 1101.

150. See TUSHNET, *supra* note 9, at 57–58, 66.

151. Thayer, *supra* note 32, at 155–56.

152. Amar, *supra* note 90, at 1101.

153. LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 8, at 125; accord LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 215–16 (2000) (positing that the conventional wisdom about the Warren Court’s countermajoritarianism is false and that the Warren Court actually “conformed to the values that enjoyed significant national support in the mid-1960s”).

*Education*<sup>154</sup> that judicial supremacists can cite, popular constitutionalists can cite a *Scott v. Sandford*.<sup>155</sup>

Although that is a promising line of argument, I wish to take a complementary but different tack. I wish to argue directly that the American people today are worthy of the faith that popular constitutionalists urge us to place in them.

### *B. Reasons to Trust the People's Commitment to Constitutionalism*

In this section, I identify five separate reasons to believe that, if the ultimate power to interpret the Constitution's indeterminate provisions were shifted from the courts to the political domain, the American people would prove themselves able and willing to distinguish between their long-term fundamental commitments and their short-term political desires in the kinds of ways that constitutionalism demands.

#### *1. The Centrality of the Founders and the Constitution to Americans' Self-Understanding*

Earlier, when considering the ways in which originalists attempt to justify privileging original meaning over contemporary meaning, I considered Edmund Burke's argument that a nation's many generations form a transtemporal national self.<sup>156</sup> While acknowledging the Burkean myth's appeal, I rejected it as a theory of why Americans today, whether they like it or not, are bound by the Constitution's original meaning. Because the notion of a transtemporal national self is not grounded in literal truth, it can only serve as a mere invitation to modern Americans to see themselves in a particular way in relation to their predecessors—an invitation that one may reasonably reject.<sup>157</sup>

Although it fails as a rationale for inflexibly privileging the Constitution's original meaning, the myth of a transtemporal national self points us toward the first reason to predict that Americans today could responsibly interpret the Constitution for themselves, without the binding supervision of politically insulated courts. Burke advised his British contemporaries to behave as if they were "in the presence of canonized

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154. 347 U.S. 483 (1954) (holding that racially segregated public education is unconstitutional).

155. 60 U.S. 393 (1857) (holding that persons of African descent were not citizens of the United States and thus could not invoke the federal courts' diversity jurisdiction, and that Congress behaved unconstitutionally when it declared slaves in a region of the country free).

156. See *supra* notes 102–05 and accompanying text (introducing the Burkean myth).

157. See *supra* notes 117–20 and accompanying text (rejecting the Burkean myth).

forefathers” and to recognize that their freedom carried “an imposing and majestic aspect” with “illustrating ancestors” and a “gallery of portraits.”<sup>158</sup> Such advice resonates powerfully in American culture today. We are, in short, exceedingly reluctant to do anything that would open us to the charge that we are breaking faith with either the Founders or the Constitution.

Tracing our political ancestry to its late eighteenth-century roots provides us with a widely shared dimension of our self-understanding as Americans. As Stephen Carter observes, much of the Constitution’s popularity as an object of reverence “flows from a mythos that venerates the Founders” and that sees them as “larger-than-life figures who met at Philadelphia at the dawn of the nation’s history and joined in the most successful act of constitutional creation the world has ever known.”<sup>159</sup> Even among those who do not count themselves as originalists, associating one’s constitutional views with those of the Founders carries tremendous rhetorical power.<sup>160</sup> Although we are not strictly bound by the founding generation’s values and expectations, we do not disregard those values or expectations lightly.<sup>161</sup> Our desire to see ourselves as tightly joined with the nation’s first leaders gives us a strong incentive not to deviate recklessly far afield from the central values that we believe they embraced.

Playing an even greater role than the Founders in shaping our political identities today are the Constitution and its core values of liberty and equality. As Max Lerner wrote nearly three-quarters of a century ago, “[e]very tribe needs its totem and its fetish, and the Constitution is ours.”<sup>162</sup> Indeed, reverence for the Constitution is one of the American tribe’s chief defining features. In their interviews with numerous Americans, Robert Bellah and his coauthors discovered “a widespread and strong identification with the United States as a national community.”<sup>163</sup> Membership in that community is defined by, more than anything else, a

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158. BURKE, *supra* note 102, at 30.

159. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 368–69 (1990).

160. See *supra* note 18 (citing authorities for the proposition that originalist methods are widely used by self-declared originalists and nonoriginalists alike).

161. Cf. WALDRON, *supra* note 11, at 273–74 (finding value in claims of political ancestry, so long as the present generation has significant opportunities to change prior generations’ constitutionalized precommitments when those precommitments have become undesirable).

162. Lerner, *supra* note 16, at 1294; see also *id.* (stating that “the very habits of mind begotten by an authoritarian Bible and a religion of submission to a higher power have been carried over to an authoritarian Constitution and a philosophy of submission to a ‘higher law’”).

163. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 250 (1996).

commitment to the Constitution's principles of liberty and equality,<sup>164</sup> which rest at the heart of what Gunnar Myrdal called "the American Creed."<sup>165</sup>

Although they may disagree sharply about what the Constitution demands, Americans today are convinced that a commitment to constitutionalism in general, and to the core values of the United States Constitution in particular, are central to what it means to be a full-fledged member of the American community. To violate one's perception of what the nation's fundamental law demands would be to undercut a vital dimension of one's own identity and self-understanding. We thus have good reason to anticipate that, if they were given the ultimate authority to interpret the Constitution, ordinary Americans would take seriously the tasks of distinguishing between their long-term constitutional commitments and their short-term political desires, and of ensuring that the former were not sacrificed to the latter.<sup>166</sup>

## 2. *The Increased Value of Americans' Constitutional Inheritance*

At the time of the Constitution's ratification, it was far from clear whether the Founders' hopes of building an enduring constitutional regime would be met. The Articles of Confederation had been a disaster<sup>167</sup> and Americans were closely divided on whether the new Constitution would take the country in a more promising direction.<sup>168</sup> Over the past two

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164. See WALTER BERNS, *MAKING PATRIOTS* 50 (2001) (stating that our adherence to these principles is what makes us "one people"); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 11 (1999) ("The Constitution helps create a national identity . . .").

165. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 8 (20th anniversary ed. 1962) ("For practical purposes the main norms of the American Creed as usually pronounced are centered in the belief in equality and in the rights to liberty."); see also SAMUEL P. HUNTINGTON, *WHO ARE WE?* 46 (2004) ("Americans, it is often said, are a people defined by and united by their commitment to the political principles of liberty, equality, democracy, individualism, human rights, the rule of law, and private property embodied in the American Creed.")

166. Cf. TUSHNET, *supra* note 9, at 65–66 (arguing that elected officials have an incentive to interpret the Constitution responsibly because the Constitution is popular with their constituents).

167. See, e.g., Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1068 (2001) ("The Articles of Confederation had been a fiscal disaster, with the purportedly 'national' government's having absolutely no taxing power over individual citizens."); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 867–68 (1989) ("[L]ife under the Articles of Confederation had demonstrated that insufficient national power led states to engage in disastrous economic warfare . . .").

168. See JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788*, at 249 & n.1 (1961) (estimating that, at the time of ratification, Americans were nearly evenly split between the Federalists who endorsed the Constitution and the Anti-Federalists who opposed it—

centuries, however, the value of the Constitution's stock has soared. Although it has been formally amended only a handful of times,<sup>169</sup> the Constitution has helped to provide freedom and security for Americans of numerous generations, even as the society in which those Americans live has changed dramatically from one era to the next. Of course, the nation's constitutional record is marred by a number of egregious stains—some inflicted by the authors of the Constitution itself,<sup>170</sup> some inflicted by the Supreme Court,<sup>171</sup> some inflicted by citizens and elected officials,<sup>172</sup> and some inflicted by the Court, citizens, and elected officials working tragically together.<sup>173</sup> As Americans have continued to work out what the Constitution's principles demand in specific situations, however, the Constitution's widely perceived value to the nation has only increased.

The Constitution's popularly perceived value underlies the second reason to believe that ordinary citizens can be trusted to honor constitutionalism's distinction between ordinary and fundamental law. Having inherited a constitutional tradition that has enjoyed such remarkable success, Americans have strong incentives to manage that inheritance with care. No generation of Americans wants to be the generation that causes the Founders' centuries-spanning experiment with constitutionalism to fail. Every generation wants to demonstrate that it can manage the Founders' experiment reliably and that it can bequeath to its successors a constitutional regime that is at least as robust as the one it inherited.

Citizens' and politicians' rhetoric makes it clear that the public believes the nation's success has its roots in the kinds of fundamental values that the Constitution can reasonably be interpreted to enshrine. When debating

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although the Anti-Federalists may have formed a slight majority—and that the Federalists were clearly “a minority in at least six and probably seven states”).

169. Of course, it may have been informally amended far more often. *See supra* notes 93–98 and accompanying text (discussing the possibility of amendment outside the requirements of Article V).

170. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 1 (banning congressional interference with the slave trade prior to 1808); *id.* art. IV, § 2, cl. 3 (requiring any state in which a slave seeks refuge to return the slave to the person from whom the slave fled); *id.* art. V (banning any constitutional amendment that would authorize congressional interference with the slave trade prior to 1808).

171. *See, e.g.*, *Scott v. Sandford*, 60 U.S. 393, 426–27 (1857) (holding that, as a slave, Dred Scott was not a citizen of the United States and so could not obtain diversity jurisdiction in federal court).

172. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 8–12 (1958) (describing efforts by citizens and elected officials in Arkansas to resist the Court's ruling that de jure racial segregation of a state's public schools is unconstitutional).

173. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 217–20 (1944) (upholding the exclusion of persons of Japanese descent from specified areas during World War II); *Plessy v. Ferguson*, 163 U.S. 537, 542–52 (1896) (upholding a Louisiana law requiring railroads to provide separate cars for their black and white passengers).

political issues or critiquing courts' rulings, for example, citizens and elected officials routinely make claims about the principles on which the nation was built.<sup>174</sup> The underlying presumption is that if a principle is indeed one on which the nation was founded, then the principle ought to be honored and preserved. Of course, citizens and politicians (just like judges) often disagree about the precise content of the principles on which the nation was established, and about the level of generality at which those principles ought to be articulated.<sup>175</sup> But there is no question that the American people appreciate the importance of identifying their fundamental commitments and of honoring those commitments when choosing particular courses of action. Distinguishing in this way between long-term commitments and short-term objectives is precisely what constitutionalism demands.

### 3. *The Seamlessness of Generational Transitions*

In his 1748 essay *Of the Original Contract*, David Hume attacked the notion that a government acquires its legitimacy from its people's actual consent.<sup>176</sup> Hume said that his position might be different if every member of each generation entered the historical stage at precisely the same moment:

Did one generation of men go off the stage at once, and another succeed, as is the case with silk-worms and butterflies, the new race, if they had sense enough to choose their government, which

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174. Illustrative examples are unnecessary, as anyone who has lived in the United States is familiar with such rhetoric. Indeed, a search in LexisNexis's news database for the word "principle" appearing within the same sentence as the phrase "this nation was built" or "this nation was founded" gets rejected because it would produce more than 3,000 hits.

175. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality) (stating that a court should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"); Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 318 (1990) ("In interpreting the power-granting side of the Constitution, today's Court exhibits no hesitation about the liberating power of abstraction. . . . Instead, the Court saves all its doubts about abstract thought for the rights-granting side of the Constitution."); Klarman, Brown, *Originalism, and Constitutional Theory*, *supra* note 24, at 1915 (arguing that originalists must confront "the difficulty of defending a focus on one out of many possible levels of abstraction at which to interpret the original intent"); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (stating the authors' intent to "challenge[] Justice Scalia's formulation of the levels of generality problem").

176. See HUME, *supra* note 75, at 465. Hume rejected the argument, for example, that those people who choose to remain in the country in which they were born tacitly consent to that country's laws. "We may as well assert," Hume wrote, "that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her." *Id.* at 475.

surely is never the case with men, might voluntarily, and by general consent, establish their own form of civil polity, without any regard to the laws or precedents, which prevailed among their ancestors. But as human society is in perpetual flux, one man every hour going out of the world, another coming into it, it is necessary, in order to preserve stability in government, that the new brood should conform themselves to the established constitution, and nearly follow the path which their fathers, treading in the footsteps of theirs, had marked out to them.<sup>177</sup>

For the sake of achieving stability, Hume argued, a government's citizenry might acquiesce to the regime in which they find themselves living, even if they disapprove of many of its important particulars. But the perpetual flow of births and deaths makes it impossible to say that, at every given moment in time, a government can claim legitimacy as a result of its citizens' affirmative approval.<sup>178</sup>

The same seamlessness of generational transitions that made popular consent a problematic source of governmental legitimacy for Hume provides the third reason to believe that the American people have the self-discipline required to subordinate their short-term political desires to their long-term constitutional commitments. At any given moment, the United States is populated by individuals representing the past, the present, and the future—those who grew up in an earlier era, those who are just now entering their prime, and those who will inherit the governmental regime that the current generation of leaders leaves behind. When the nation is faced with a constitutional choice, therefore, the citizenry's grandparents, parents, and children provide visible and vocal reminders of those who feel attached to the interpretations and traditions of the past, those who are taking their turn at society's helm today, and those who will bear the long-term consequences of any actions that the current generation of leaders chooses to pursue.

That combination of temporal perspectives among the citizenry makes it unlikely that a political majority will regularly and recklessly deviate from the nation's long-term constitutional commitments. If each generation of Americans entered and left history's stage together, like Hume's silk worms and butterflies, each generation not only would be able expressly to consent to any governmental arrangements they found attractive, as Hume observed, but also would feel comparatively few

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177. *Id.* at 476–77.

178. *See id.*

restraints when deciding which particular governmental arrangements to adopt. As Hume implied, the generation that moved en masse onto the historical stage today might feel little obligation to show respect for the judgments of those generations that preceded it. After all, knowing that they would be leaving the stage together, those prior generations might have felt little impulse to serve as models for their successors, and might not have given much thought to the kinds of circumstances in which their successors would find themselves living. The generation on the stage today might similarly feel free to take significant constitutional risks, believing that they are principally gambling only with their own fortunes. It is easier to behave shortsightedly when one knows that the consequences of one's actions either will never be inflicted on others or will be inflicted only on others whom one will never meet.

In the real world, however, where generations move seamlessly from one to the next, the past, present, and future are all represented to varying degrees at every given moment in time. That diversity of temporal perspectives increases the likelihood that, when debating the merits of short-term objectives and strategies, citizens will find themselves pulled toward the common ground provided by the long-term fundamental commitments that all of those temporal perspectives purport to share. Again, citizens and politicians will disagree amongst themselves about the precise content of some of those commitments, but they all will appreciate the importance of debating those commitments' contours and of honoring them in the nation's political undertakings.

#### *4. The Desire for Politicians Driven by Principles, Rather than Merely by Polls*

Political scientists have long distinguished between two different models of representation: the delegate model and the trustee model.<sup>179</sup> Under the delegate model, lawmakers' primary task when crafting legislation is to carry out the specific wishes of their constituents.<sup>180</sup> Under the trustee model, lawmakers are expected to exercise their own independent judgment, even when that judgment leads in directions that a

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179. See, e.g., JOHN C. WAHLKE ET AL., *THE LEGISLATIVE SYSTEM: EXPLORATIONS IN LEGISLATIVE BEHAVIOR* 272–80 (1962) (distinguishing between these two models and a third model—the “politico” model—which combines features of the delegate and trustee models); Dennis F. Thompson, *Representatives in the Welfare State*, in *DEMOCRACY AND THE WELFARE STATE* 131 (Amy Gutmann ed., 1988) (discussing the delegate and trustee models).

180. See WAHLKE ET AL., *supra* note 179, at 276–77.

majority of their constituents might find undesirable.<sup>181</sup> The trustee model posits, for example, that legislators should follow their own judgments when their constituents are not comparably well informed.<sup>182</sup>

In American political culture, aspects of both of those models are commonly regarded as crucial to effective representation.<sup>183</sup> Indeed, studies suggest that people do not strongly prefer one model to the exclusion of the other.<sup>184</sup> Lee Sigelman and his coauthors describe the resulting “paradox of leadership”:

Public officials who pursue policies that are opposed by most members of the public leave themselves open to the charge that they are arrogantly ignoring “the will of the people”—strong words in a democracy. But officials who refuse to step outside the bounds of policies that most people favor are no less susceptible to harsh criticism, for their caution invites the charge that they are mere panderers to the polls who lack conviction and refuse to exercise leadership . . . .<sup>185</sup>

One can easily see that paradox, for example, in the debate during the 2008 presidential election season regarding the United States’ military presence in Iraq: some candidates wanted to withdraw American troops fairly quickly, as those leaders believed the American people desired, while other candidates contended that the United States should maintain a significant troop presence in Iraq even if it was domestically unpopular.<sup>186</sup> Both of those positions understandably had large constituencies among the American public.

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181. The trustee model traces its roots to Edmund Burke. See EDMUND BURKE, *Speech to the Electors of Bristol*, in EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY 156, 157 (B.W. Hill ed., 1976) (1774) (“Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”).

182. See WAHLKE ET AL., *supra* note 179, at 272–75.

183. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 149 (1967) (stating that both models have large numbers of adherents in the United States).

184. See Lee Sigelman et al., *The Public and the Paradox of Leadership: An Experimental Analysis*, 36 AM. J. POL. SCI. 366, 380–82 (1992) (summarizing the authors’ empirical findings); *cf. id.* at 381 (suggesting that people might have a small preference for the delegate model when dealing with legislators and a small preference for the trustee model when dealing with executives).

185. *Id.* at 366.

186. Consider, for example, the debate in 2008 between presidential candidates Senator John McCain and Senator Barack Obama about Senator McCain’s comment that he would be willing to support maintaining a troop presence in Iraq for the next one hundred years. See Elisabeth Bumiller, *McCain Leads the Field, but Shuns Talk of Victory*, N.Y. TIMES, Feb. 5, 2008, at A17 (noting the debate); Sasha Issenberg, *Once Derided as an Idealist, McCain Hands Label to Obama*, BOSTON GLOBE, Feb. 15, 2008, at A10 (same).

Significant for my purposes here is the second half of Professor Sigelman's paradox—citizens' belief that politicians should be guided at least partially by principles, and not entirely by polls.<sup>187</sup> The American people recognize that public majorities sometimes favor ill-advised courses of action. They acknowledge that either their own preferences or the preferences of a majority of their fellow citizens are sometimes regrettable, and that the will of political majorities is thus sometimes best ignored. What flows from that candid self-assessment? One might initially believe it lends weight to the argument that political majorities cannot be trusted to self-enforce the distinction between ordinary and fundamental law, and that judicial supremacy is thus a necessary component of American constitutionalism. If informational or cognitive deficits sometimes lead hotheaded or benighted political majorities in unfortunate directions on matters of ordinary, day-to-day politics, should one not expect those same deficits to lead political majorities to ignore their long-term constitutional commitments in favor of their short-term political desires?

The American people's awareness of their own fallibility actually provides good reason to believe that the ultimate authority to interpret the Constitution could safely be placed in their hands. If the American people were reluctant to admit that political majorities' short-term judgments are sometimes mistaken, one would hesitate to place *any* important matter in their hands, much less something as important as interpreting the Constitution. After all, one is unlikely to take steps aimed at avoiding errors in judgment if one is reluctant to admit that such errors are a genuine threat. Ever since the nation's founding, however, the American people have employed modes of self-government that take their own deliberative fallibility into account. Recognizing the dangers of invariably

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187. Evidence of that belief is easily found. During President George W. Bush's first term, for example, White House spokesman Ari Fleischer described President Bush's perception of the kind of leadership the American people frequently desire:

The President does not think it's the task of a leader to govern by the polls. He thinks it's just the opposite. The President believes that a president should work with the Congress in a bipartisan way on behalf of what that president, out of principle, thinks is the right thing to do. [P]residents who govern by the polls are often seen by the public as weather vanes and not leaders . . . .

Ari Fleischer, White House Press Briefing (June 7, 2001) (on file with author). Senator John Ensign of Nevada has similarly argued that "if you govern by polls, that is not leadership. And anybody who just governs, basically, wetting their finger, sticking it up, see[ing] which way the wind's blowing, is not . . . a person of courage, not a statesman." *Hardball with Chris Matthews* (MSNBC television broadcast Jan. 30, 2007) (on file with author); accord Dan Burton, *Politics and Consequences*, WASH. TIMES, Jan. 29, 2007, at A15 (arguing that political leaders sometimes must make decisions "no matter how unpopular they are," rather than allowing the nation to "be governed by pollsters").

relying on the judgment of popular majorities in ordinary political matters, for example, the nation not only has conferred its lawmaking power upon elected officials who can focus their energies on exercising that power in a responsible fashion,<sup>188</sup> but also has maintained structures and norms that give those elected officials varying measures of freedom to ignore popular wisdom when they believe the public's short-term wishes are unwise. We allow our elected federal officials to remain in office for periods ranging from two to six years before they have to stand for reelection, for example, thus ensuring that many of their decisions can be evaluated from a temporal distance.<sup>189</sup> Just as importantly, we foster a political culture in which political leaders know they may suffer at the ballot box if they develop a reputation for merely pandering to the short-term whims of the electorate.<sup>190</sup>

If the ultimate authority to interpret the Constitution were shifted from the courts to the political domain, one thus could reasonably expect that, when devising the precise means by which they would manifest their interpretive judgments,<sup>191</sup> the American people would take steps aimed at minimizing the risk that their long-term fundamental commitments would be sacrificed to short-sighted political temptations. If the interpretive power were exercised principally by elected officials, for example, politicians' perceived fidelity to the Constitution undoubtedly would be a recurring election issue. If the people sometimes used popular initiatives or referendums to settle constitutional disputes, they likely would see the wisdom in implementing a system of procedural rules designed to be sure the electorate proceeded with appropriate caution. The American people might find merit, for example, in Bruce Ackerman's analogous discussion of the ways in which the nation might amend the Constitution by means other than those specified in Article V.<sup>192</sup> Professor Ackerman suggests that the United States should permit the President to propose specific constitutional amendments, with ratification requiring a favorable vote in Congress, followed by the citizenry's direct approval on ballot measures

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188. See *supra* notes 143–45 and accompanying text (noting ways in which the Constitution deprives ordinary citizens of the ability to engage in unmediated lawmaking).

189. See U.S. CONST. art. I, § 2 (establishing two-year terms for Representatives); *id.* § 3 (establishing six-year terms for Senators); *id.* art. II, § 1 (establishing four-year terms for the President).

190. See *supra* note 187 (citing various politicians' assessment of the leadership qualities that the American people desire).

191. As I noted earlier, popular constitutionalists have not yet rallied behind specific proposals concerning the ways in which the American people might reveal their constitutional interpretations. See *supra* notes 33–34 and accompanying text.

192. See *supra* note 94–95 and accompanying text (noting Professor Ackerman's argument).

presented during two successive presidential election cycles.<sup>193</sup> The American people's awareness of political majorities' fallibility likely would prompt them to consider comparably cautious means of interpreting the Constitution, so that constitutionalism's necessary distinction between ordinary and fundamental law would be preserved.

5. *The Political Domain's Long-Standing Supervision of "the Constitution Outside the Constitution"*

I acknowledged earlier that the American people and their elected representatives sometimes behave irresponsibly on matters involving the nation's fundamental commitments, perhaps believing that the courts will correct any egregious errors in constitutional judgment.<sup>194</sup> One should not conclude, however, that there is a sharp disjunction between the political domain and desirable constitutional developments. To a much larger extent than many scholars have acknowledged, the people and their elected representatives have constructively established what Ernest Young calls "the constitution outside the Constitution."<sup>195</sup> As Professor Young explains, a nation's constitution typically does at least two things: "it establishes the various institutions of the government and sets out their powers and obligations," and "[i]t identifies certain rights of individuals against that government."<sup>196</sup> When one searches for the sources of law that perform those constitutional functions in the United States, one finds that "much of the law that constitutes our government and establishes our rights derives from legal materials outside the Constitution itself."<sup>197</sup>

With respect to establishing the federal government's structures and institutions, for example, an enormous proportion of the government's work is performed by institutions that owe their creation and powers to statutes and presidential orders, rather than the text of the Constitution.<sup>198</sup> Professor Young points out that even Congress's day-to-day operations are "framed largely by extracanonical materials," reflected in such long-standing practices as Congress's organization along party lines, Congress's heavy use of an intricate committee system, and "[e]ven the

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193. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 94, at 415 (briefly outlining his proposal).

194. See *supra* notes 148–51 and accompanying text (making this observation).

195. Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 473 (2007).

196. *Id.* at 411–12; see also *id.* at 412 (noting that constitutions sometimes perform a third function—namely, "entrench[ing] these structures against change, absent compliance with a difficult amendment procedure").

197. *Id.* at 413.

198. See *id.* at 417.

basic principle that a bare majority in each house is sufficient to approve legislation.”<sup>199</sup> With respect to establishing individual rights, Professor Young emphasizes that “many rights that are fundamental for individuals in modern America”—rights involving such matters as race, gender, age, disability, food, housing, health care, and retirement security—“are entirely creatures of statute.”<sup>200</sup>

A few other scholars have similarly recognized the significant degree to which the United States’ constitutional functions are performed by sources of law other than the text of the 1789 document and its formal amendments. As I noted earlier, for example, David Strauss argues that we have informally changed the nation’s constitutional order so frequently that Article V has become largely irrelevant.<sup>201</sup> Keith Whittington contends that the political branches have developed elaborate “constitutional constructions” aimed at filling in the gaps created by the Constitution’s indeterminacy on matters involving both institutional structures and individual rights.<sup>202</sup> Benjamin Berger points out that the United States’ constitution today “is, in important ways, an informal, unwritten entity, even in its structural dimensions.”<sup>203</sup>

Because the political domain is already responsible for carrying out so much of the nation’s constitutional work, there is reason to believe that it could responsibly interpret the open-ended commitments enshrined in the 1789 document and its formal amendments, as well. After all, there are no essential differences between the subject matter of those constitutional commitments that appear in the ratified, uppercase-*c* Constitution and those that the political domain has placed in the unratified, lowercase-*c* constitution. Both sets of commitments concern governmental structures and individual rights, and both require the application of fundamental principles to which the nation has deep attachments.<sup>204</sup> Absent some vital difference between the two sets of commitments—a difference so

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199. *Id.* at 419–20.

200. *Id.* at 424.

201. See Strauss, *supra* note 98, at 1459; *id.* at 1469–75 (pointing to the growth in Congress’s legislative powers, the President’s executive powers, and administrative bodies’ rulemaking and adjudicative powers as examples); see also *supra* note 98 and accompanying text (noting Professor Strauss’s argument).

202. See WHITTINGTON, *supra* note 164, at 9; see also *id.* at 208 (stating that “the political branches . . . [have] sought, by their own methods and forms of argument, to elucidate the meaning of the Constitution and to realize its terms in political practice”).

203. Benjamin L. Berger, *White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text*, 3 J. COMP. L. (forthcoming 2008) (manuscript at 28, on file with *Washington University Law Review*).

204. Cf. WHITTINGTON, *supra* note 164, at 9 (stating that the political branches’ constitutional constructions “address constitutional subject matter”).

significant that they should be assigned different interpretive authorities—one can reasonably conclude that the political forces we trust to shape and interpret the constitution outside the Constitution may be trusted to interpret the open-ended provisions of the formally ratified Constitution as well.

There is only one apparent and overarching difference between the commitments made in the ratified and unratified constitutions: the ratified Constitution's commitments purport to be deeply entrenched, alterable only by the extraordinary means described in Article V,<sup>205</sup> whereas the unratified constitution's commitments remain subject to change by ordinary legislation. One might thus argue that, if the point of entrenching a set of commitments is to remove those commitments from the reach of ordinary politics, then placing the written Constitution's commitments under the care of the political domain would undercut the very reason for declaring those commitments entrenched.

Although not without superficial appeal, that line of reasoning is ultimately unpersuasive. First, as I have noted,<sup>206</sup> the Constitution has been amended on multiple occasions using non–Article V methods. The degree of entrenchment that purportedly distinguishes the commitments made in the ratified and unratified constitutions thus may not be of sufficient magnitude to warrant placing those two sets of commitments under the ultimate supervision of two different interpretive authorities.

Second, it is a mistake to assume that the American people's practice of formally ratifying constitutional texts necessarily presumes a regime in which politically unaccountable judges hold the supreme interpretive authority. The texts themselves do not articulate that presumption, and the ratification of numerous texts between 1787 and 1789 certainly did not relieve the Marshall Court and its successors from having to lay the groundwork for their eventual claim of interpretive supremacy.<sup>207</sup> The practice of ratifying texts certainly is aimed at guiding and constraining those who interpret the nation's constitution, but it does not make any necessary presumptions about who those interpreters will be.

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205. See U.S. CONST. art. V.

206. See *supra* notes 93–98 and accompanying text (describing scholars' accounts of constitutional amendments by means other than those described in Article V).

207. The Marshall Court claimed the power of judicial review in 1803. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). The Court did not definitively claim interpretive supremacy, however, until 1958. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (claiming that “the federal judiciary is supreme in the exposition of the law of the Constitution”).

Finally—and here we come full circle, back to one of the primary reasons that popular constitutionalists urge us to reject judicial supremacy—many of the commitments that appear in the ratified Constitution are enshrined in open-ended provisions whose specific meanings are reasonably contestable.<sup>208</sup> Citizens, politicians, and judges often reasonably disagree amongst themselves when trying to ascertain the specific content of many of the commitments made in such texts as the Bill of Rights and the Fourteenth Amendment. When dealing with those constitutional provisions that are reasonably susceptible to conflicting interpretations, what metric are we to use when determining whether the interpretation favored by a political majority honors constitutionalism’s distinction between ordinary and fundamental law? One cannot simply use one’s own preferred interpretation as the measure by which all other interpretations are judged—to do so would beg the question of whose interpretations should prevail when reasonable interpreters disagree about the text’s meaning. When we ask whether the American people can be trusted to preserve the distinction between ordinary and fundamental law in their interpretations of the Constitution’s open-ended provisions, therefore, there is a sense in which we are asking a question that must be answered in the affirmative in all but the most egregious cases. After all, to determine whether a political majority’s preferred interpretation amounts to a breach of the American people’s long-term commitments, we need to know what those long-term commitments actually are. When reasonable people disagree about the content of those commitments, we lack a clear and neutral measure by which to evaluate the political majority’s judgment. Unless a political majority settles upon an interpretation that plainly falls beyond the range of interpretations that a reasonable interpreter could assign to the text, we really have no clear basis on which to refute the American people’s claim that their preferred interpretation does indeed honor constitutionalism’s distinction between ordinary and fundamental law.<sup>209</sup>

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208. See *supra* notes 3, 55–56, 122–23 and accompanying text (making this point).

209. Cf. Thayer, *supra* note 32, at 144 (arguing that the political branches’ constitutional interpretations should prevail unless the matter “is not open to rational question”).

## CONCLUSION

On January 28, 2008, President George W. Bush closed his final State of the Union Address with the following words:

By trusting the people, our Founders wagered that a great and noble nation could be built on the liberty that resides in the hearts of all men and women. By trusting the people, succeeding generations transformed our fragile young democracy into the most powerful nation on Earth and a beacon of hope for millions. And so long as we continue to trust the people, our nation will prosper, our liberty will be secure, and the state of our Union will remain strong.<sup>210</sup>

Yet for a nation that routinely trumpets its faith in the judgment of ordinary Americans and that grounds its claims of constitutional legitimacy in the will of the American people, we have been extraordinarily reluctant to allow the American people themselves to play the leading role in determining what the Constitution demands. The nation's politically insulated judges have claimed the supreme interpretive authority for themselves and, thus far, the nation has acquiesced.

Of course, when interpreting the Constitution's requirements, judges do purport to be enforcing the textually expressed will of the American people. In many cases, however, the Constitution's open-ended provisions are reasonably susceptible to conflicting interpretations, giving rise to the very real possibility that the interpretation chosen in a given case by a majority of the Supreme Court will conflict with the interpretation favored by a majority of the American people. When that occurs, the familiar dead-hand objection demands a response. Originalist and nonoriginalist judges alike frequently draw constitutional meaning from sources that have their roots deep in the past, whether those sources be the Framers' original intentions, the ratifiers' original understandings, the text's original meaning, the nation's traditions, or prior generations' social movements. Defenders of judicial supremacy must explain why it is that, when there is a conflict between the constitutional meaning that the courts have uncovered from the past and the constitutional meaning that a majority of Americans would assign to the text today, the former must prevail.

All of the leading responses to the dead-hand objection are problematic. The Framers were not gods possessed of wisdom and

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210. George W. Bush, State of the Union Address (Jan. 28, 2008), *available at* <http://www.whitehouse.gov/news/releases/2008/01/20080128-13.html>.

selflessness unlike anything modern Americans can match;<sup>211</sup> a desire for governmental stability cannot justify frustrating the will of a majority in those values-laden areas where it is less important that a matter be settled than that it be settled correctly;<sup>212</sup> Article V's supermajority requirements can prevent an unhappy majority from indisputably changing the Constitution's content;<sup>213</sup> although the nation has sometimes informally amended the Constitution by means other than those specified in Article V, we cannot articulate any clear rules of recognition that would enable citizens and judges to know precisely when such amendments have occurred and what those amendments demand;<sup>214</sup> and the notion of a transtemporal national self that permits one generation of Americans to bind another is a myth that one may reasonably reject.<sup>215</sup>

Because judges' interpretive methods frequently create such dead-hand concerns, one should ask whether it really is necessary to give judges the ultimate authority to interpret the Constitution's open-ended provisions. At the heart of the case for judicial supremacy—and of the case against popular constitutionalism—is the belief that, if matters of constitutional interpretation were placed in the political domain, political majorities would run roughshod over the limits that the Constitution purports to place upon them. Assigning the supreme interpretive authority to politically insulated courts is necessary, judicial supremacists argue, if we want to preserve constitutionalism's essential distinction between ordinary and fundamental law.

I have identified five reasons to believe that judicial supremacists are mistaken. Maintaining faith with the Founders and the Constitution is central to Americans' self-understanding;<sup>216</sup> the American people are keenly aware of the value of the constitutional regime they have inherited;<sup>217</sup> the seamlessness of Americans' generational transitions ensures that, at any given moment in time, a variety of temporal perspectives are represented, and people holding those differing perspectives are likely to seek the common ground provided by the American people's long-term fundamental commitments;<sup>218</sup> Americans' desire for politicians who are driven at least partially by principles, rather

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211. *See supra* notes 59–70 and accompanying text.

212. *See supra* notes 71–83 and accompanying text.

213. *See supra* notes 84–91 and accompanying text.

214. *See supra* notes 92–101 and accompanying text.

215. *See supra* notes 102–20 and accompanying text.

216. *See supra* notes 156–66 and accompanying text.

217. *See supra* notes 167–75 and accompanying text.

218. *See supra* notes 176–78 and accompanying text.

than entirely by polls, demonstrates that Americans know that political majorities are sometimes mistaken and that appropriate measures should be taken to prevent short-sighted mistakes;<sup>219</sup> and the political domain's long-standing experience with "the constitution outside the Constitution," on matters of both institutional structure and individual rights, provides good reason to believe that the political domain could responsibly interpret the open-ended provisions of the Constitution itself.<sup>220</sup>

Finally, it is worth underscoring the difficulties a judicial supremacist faces when trying to prove that a political majority's interpretation of an open-ended constitutional provision would obliterate constitutionalism's distinction between ordinary and fundamental law. To gauge an interpreter's fidelity to the Constitution, one must know what the Constitution demands. When the Constitution's text may reasonably be interpreted in conflicting ways, however, rigid fidelity determinations become nearly impossible to make. The fact that a majority of the American people and a majority of the Supreme Court would interpret an open-ended text differently is hardly proof that the American people are flouting the Constitution's requirements. So long as the popular majority's interpretation falls within the range of interpretations that an interpreter could reasonably assign to the text, one cannot confidently say that the popular majority has collapsed constitutionalism's distinction between ordinary politics and fundamental commitments. Absent a genuine risk that the American people's interpretations would be plainly unreasonable, an endorsement of the courts' interpretive supremacy does not seem grounded principally in a laudable defense of constitutionalism. Rather, it seems grounded in the judicial supremacist's belief that the courts are more likely than the American people to produce outcomes that the judicial supremacist personally desires. That is hardly a satisfying foundation on which to build a constitutional system.

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219. *See supra* notes 179–93 and accompanying text.

220. *See supra* notes 194–209 and accompanying text.