

BEYOND FORMALIST SOVEREIGNTY: WHO CAN
REPRESENT “WE THE PEOPLE OF THE UNITED
STATES” TODAY?

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Table of Contents

I.	INTRODUCTION	551
II.	SOVEREIGN SELF-GOVERNANCE: THE LIVING ELECTORATE’S LEGISLATIVE EXPRESSION SHOULD NOT BE VIEWED AS LESS AUTHORITATIVE THAN A PAST ELECTORATE’S CONSTITUTIONAL EXPRESSION	558
III.	FRAMING A MISSION STATEMENT FOR JUDICIAL REVIEW: TO IDENTIFY THE CHOICES THE SOVEREIGN LIVING PEOPLE WOULD MAKE IF THEY ENGAGED IN CONSTITUTIONAL POLITICS	573
IV.	BEFORE INTERPRETATION AND BEYOND ANTIFIDELITY: IS THE AGING CONSTITUTION RELEVANT FOR IDENTIFYING THE CHOICES THE SOVEREIGN LIVING PEOPLE WOULD MAKE IF THEY ENGAGED IN CONSTITUTIONAL POLITICS?	578
V.	TOWARD SERVING “WE THE PEOPLE” TODAY BY INTERPRETING THE AGING CONSTITUTION.....	586
	A. <i>Complete Constitutional Meaning</i>	586
	1. The Under-Considered Strategic Component Implicit in Dualism	586

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550	UNIVERSITY OF RICHMOND LAW REVIEW	[Vol. 45:549
	2. An Enriched Understanding of the Substantive Component: Accommodating <i>Starkly</i> <i>Competing Values</i>	590
	3. Intended “Applications” and “Levels of Generality”	592
	4. A Rationale and Structure for Interpretive “Translation”	597
	B. <i>Case and Context Studies: Continuity of Complete Constitutional Meaning for Post-Ratification Gen- erations</i>	601
	1. Equal Protection: “Created Equal” Versus Racism, Sexism, and Homophobia	601
	2. Substantive Due Process: Liberty Versus Social Order	612
	3. Federalism: The Commerce Clause	615
	4. Speech: Political Advocacy by Corporations	630
VI.	THE RULE OF LAW: OBJECTIONS AND RESPONSES	638
VII.	CONCLUSION: THE LIMITS, AND THE PROMISE, OF INTERPRETATION	643

I. INTRODUCTION

*“We the People of the United States”*¹

*“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”*²

*“We, the members of The Tea Party Patriots, are inspired by our founding documents and regard the Constitution of the United States to be the supreme law of the land. We believe that it is possible to know the original intent of the government our founders set forth, and stand in support of that intent.”*³

*“People for the American Way is dedicated to making the promise of America real for every American: Equality. Freedom of speech. Freedom of religion. The right to seek justice in a court of law. The right to cast a vote that counts. The American Way. . . . We believe a society that reflects these constitutional principles and progressive values is worth fighting for”*⁴

To so many among us, it appears that our political system is broken. From the rigid partisanship in Congress, to the Senate’s rule of sixty, to the influence of lobbyists, to the vapid commercials and “robo-calls” used to influence voters, to the disproportionate power of small states in presidential primaries and in the Senate, to the disproportionate political influence of profit-seeking corporations, it seems that a system predicated on the people’s rule is badly in need of repair. The Supreme Court’s decision last term in *Citizens United v. FEC*, striking down a recent congressional effort to curb the influence of corporations in politi-

1. U.S. CONST. pmb1.

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

3. *Tea Party Patriots Mission Statement and Core Values*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/Mission.aspx> (last visited Dec. 3, 2010).

4. *Our Mission and Vision*, PEOPLE FOR THE AM. WAY, <http://www.pfaw.org/about-us/our-mission-and-vision> (last visited Dec. 3, 2010).

cal campaigns,⁵ is just the latest occasion when pressing public needs have crashed against the barriers posed by an aging Constitution and a broad range of aging practices that have evolved within its framework.

While there have been calls for a new Constitution—some from the political fringe,⁶ others from academia⁷—there has not been, at least not yet, much call for such fundamental constitutional change at the level of politics as practiced. For the foreseeable future, we will continue to live governed under the Constitution, two centuries old (and counting), adding our own sedimentary layer of practice on those already settled. Apart from creating a new Constitution, what should this generation's layer of practice entail?

One can respond to this question at many levels—seeking reforms of political matters from campaign finance laws, to voting procedures, to Senate rules; or structural reforms of judicial matters, such as through a legislative assault on judicial supremacy.⁸ Of course, any such reform could be vulnerable to constitutional challenge and judicial review. Thus, my present focus involves the theory and practice of constitutional interpretation—by courts, and by political actors as well.

Some, such as Robert Bork and Antonin Scalia, argue that the Constitution's text is authoritative because it was adopted by the recognized sovereign under the rule of law.⁹ That text originally had meaning, or at least a range of plausible meanings, to the People who ratified it. For these Formalists, the aging Constitution's original meaning should be enforced because any other ap-

5. 558 U.S. ___, ___, 130 S. Ct. 876, 913 (2010) (invalidating Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b(b)(2) (2006))).

6. See, e.g., CALLACONVENTION.ORG, <http://callaconvention.org/> (last visited Dec. 3, 2010) (asserting that an Article V convention is the only way the “Framers preserved for escaping from captured government”).

7. See, e.g., LARRY J. SABATO, A MORE PERFECT CONSTITUTION 4–5 (2008); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 9 (2006).

8. See LARRY D. KRAMER, THE PEOPLE THEMSELVES 249–53 (2004) (arguing for judicial review without judicial supremacy); David Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 283, 397 (1991) [hereinafter Chang, *Critique*] (arguing for judicial review supplemented by congressional supremacy).

9. See ROBERT H. BORK, THE TEMPTING OF AMERICA 173–74 (1990); Antonin Scalia, *Steven D. Smith's Law's Quandary*, 55 CATH. U. L. REV. 687, 689 (2006) (book review).

proach undermines the Constitution *as law*.¹⁰ The rule of law demands that the ratifiers’ originally understood meaning is properly and practicably enforced not only on themselves, but also on subsequent generations, until some subsequent People formally amend that text.¹¹ Underlying the Formalists’ focus on the rule of law are concerns for preserving the living electorate’s right of sovereign self-governance through *legislative* expression against the evils of “legislating policy from the bench.”¹²

Others have rejected continued governance under the inherited Constitution—a position with roots in Jefferson’s counsel that each generation ought to make the Constitution its own by evaluating it formally and comprehensively, and reforming it according to contemporary needs.¹³ Sanford Levinson has called for a recommitment to dualism by creating a new Constitution;¹⁴ Michael Klarman, at times, has seemed to reject constitutional dualism altogether.¹⁵ These “Antifederalists” argue not only that the meaning originally intended by the Constitution’s framers and ratifiers

10. See BORK, *supra* note 9, at 145–46; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

11. Rejecting the contention that “liberty” in the Fourteenth Amendment’s Due Process Clause should be construed as providing special protection for the privacy interests of married couples to use contraceptives, Justice Black said:

The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. . . . I must . . . reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good enough for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.

Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

12. See BORK, *supra* note 9, at 16–17.

13. Jefferson said:

[L]et us provide in our Constitution for its revision at stated periods. . . . Each generation is as independent of the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the Constitution; so that it may be handed on, with periodical repairs, from generation to generation

Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE BEST LETTERS OF THOMAS JEFFERSON, at 221 (J.G. de Roulhac Hamilton ed., 1926).

14. See Sanford Levinson, *Introduction: Imperfection and Amendability*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 3, 7, 9 (Sanford Levinson ed., 1995).

15. Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 382–83 (1997).

is too often unknowable, but more fundamentally, that known original choices—for example, the equal representation of the states in the Senate—do not fit current needs.¹⁶ The living electorate is the rightfully governing sovereign, and its right of self-governance is not properly constrained by the dead hand of the past.¹⁷ Between the Formalists and the Antifidelistes are Faithful Dualists—those (like Bruce Ackerman and Keith Whittington) who embrace the aging Constitution, and the enforcement of its original meaning over the living electorate's self-governance, on grounds that recognize the existence of true popular sovereignty only when people actually create constitutional policies of their own.¹⁸

This article explores the space between the unrealized ideal of a new Constitution created by the sovereign People today against the inescapable realities of an aging Constitution enforced by judges who lack not only a reliable interpretive method, but more fundamentally, a clear sense of interpretive mission. It pursues a tenuous common ground among these perspectives—Formalism, Antifidelity, and Faithful Dualism—and, ultimately, a reconceptualization of Article III judicial review. Can one develop a concept of interpretive mission and interpretive method under the aging Constitution that serves *both* the rule of law, *and* the rule of the sovereign living electorate?

The article ultimately develops the following propositions: First, as between the ratifiers of the past and the living citizenry, the people who matter—those possessing the sovereign right of self-governance—are the living. Second, a dead electorate's expression of will through constitutional agents should be viewed as superior to the living electorate's sovereign right of self-governance through legislative agents only if such is deemed to be the living People's will. Third, the living electorate's sovereign

16. See *id.* at 393–95.

17. See, e.g., ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 145 (2d ed. 2005) (“[W]hy should the political leaders of one generation have the power to bind future generations to their conceptions of the good and the right?”).

18. See *infra* Part II. I refer here to the creation of constitutional *policies*, rather than constitutional *text*, to account for Ackerman's view that the People may amend the Constitution without amending its text, as he says they putatively did through a “structural amendment” during the New Deal. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1052–56 (1984). On Ackerman's unconventional appeal to originalism, see *infra* text accompanying notes 56–60. On Whittington's embrace of originalism, see *infra* text accompanying notes 64–69.

right of self-governance as *potentially* expressed through *constitutional* agents should be viewed as superior to that right as *actually* expressed through *legislative* agents. Fourth, the People today, despite having not exercised their sovereignty in its constitutional form, remain committed to constitutional dualism. Fifth, *someone* among their governmental agents must strive to speak for the sovereign living People in their constitutional capacity. Sixth, such is the mission the Court should pursue when exercising its Article III powers of judicial review. Indeed, the Court should pursue an interpretive mission for Article III that tracks the political goal for Article V—to identify the choices the sovereign living People *would* make *if* they engaged in constitutional politics toward creating their own constitutional policies. Seventh, having framed such an interpretive mission, one might justify, and explore interpretive methods for, the “translation” of original meaning in a way that speaks for the People today.

Part II develops the first three of the foregoing seven propositions. Along the way, Part II examines the shortcomings of Formalism, Faithful Dualism, and Antifidelity in relation to the proposition that those possessing the sovereign right of self-governance are the living People today.

Part III explores whether positing the living electorate’s sovereignty can be reconciled with continued governance under the inherited Constitution. It considers how one should conceptualize the *interpretive mission* for judicial review to serve the sovereign living electorate based on the aging Constitution. Part III begins with the underlying purpose for a process of constitutional creation such as Article V: to provide a vehicle of special politics so that the sovereign People, if they chose to do so, might deliberate about the choices they should make in creating constitutional policy through representative agents. It suggests that like the political goal for Article V itself, Article III judicial review ideally would fulfill an analogous interpretive goal of identifying the choices the sovereign living electorate would make if they engaged in constitutional politics toward creating their own constitutional policies.¹⁹

19. Some already might be concerned that speculating about the choices the living electorate would make *if* engaged in constitutional politics is hopelessly indeterminate. But questions of practicability ultimately are questions about *method*. If the goal is desirable, but difficult to fulfill, one can define a second-best version or explore the best availa-

Part IV engages the Antifederalist's contention of irreconcilable differences between the political cultures of 1787, 1868, and 2011. It suggests that if one can plausibly posit continuity in fundamental values—including, most fundamentally, a commitment to constitutional dualism—one might harmonize ongoing judicial interpretation of an aging Constitution with the sovereignty of the living electorate. Part IV concludes that there are such meaningful continuities—not only in fundamental substantive values, but also in an ongoing dualist struggle among multiple competing normative traditions.²⁰

Part V.A. suggests that by reorienting one's view of constitutional meaning beyond an exclusive focus on intended substantive prohibitions to the strategic reasons for framing such prohibitions as supreme constitutional law, one can develop a justification and a methodological framework for the "translation" of *original* constitutional meaning into interpretations of choices the sovereign *living* electorate would make if it engaged in constitutional politics.²¹ Part V.A. thereby endeavors to address the concerns of both the Antifederalists (by crafting judicial interpretation of an aging Constitution as a plausible means for serving the sovereign living electorate) and the Formalists (by addressing the cornerstone "rule of law" concern for constraining the judge's discretion through interpretive subservience to an external authority's will).²²

Part V.B. examines several constitutional contexts—from equal protection, to due process, to federalism and, finally, to the question of whether business corporations should be deemed to qualify

ble methods for pursuing the goal. Can this interpretive ideal be fulfilled by interpreting the aging Constitution? If so, through what interpretive method(s) can this interpretive goal be achieved? See *infra* Part V, for further discussion of questions about method.

20. See *infra* text accompanying notes 140–43.

21. Part V.A suggests that there are two essential components comprising the meaning of constitutional provisions that, when accounted for, can provide a sense of structure that is missing from conventional accounts of original meaning. One component is *substantive*; the second, systemic and more fundamental, is *strategic*. Substantively, constitutional mandates involve a choice to balance, or accommodate, starkly competing values. The strategic component is implied by the dualist agenda, and entails an objective of securing a greater commitment to constitutionally preferred values than Congress is trusted to respect. Thus, creating constitutional mandates involves a strategic decision to favor one side in the normative competition that comprises the substantive component of original meaning—e.g., equality secured against racism (equal protection); political dissent secured against political correctness (the freedom of speech).

22. I compare this reconceptualized interpretive mission and method to the "translations" of Lawrence Lessig and Randy Barnett. See *infra* Part V.

as protected “persons” for the freedom of speech. It endeavors to characterize *complete* original meaning by accounting both for the strategic and substantive components of constitutional meaning. Toward positing what the sovereign living electorate would choose if engaged in constitutional politics, it translates that original meaning by exploring the implications of fundamental continuities in our constitutional culture and by accounting for evolution in relevant prevailing values.

Part VI examines objections that those concerned about the “rule of law” might make against this reconceptualized interpretive mission and method. Noting that determinate answers to improperly framed questions are of little value, it concludes that so long as the old Constitution must be interpreted, there can be no solution that perfectly serves the sovereign living electorate. To posit, as do the Faithful Dualists, that the true sovereign People exist only when creating constitutional provisions demeans popular self-governance. To constrain popular self-governance by the decisions (*and in the name*) of the dead, as do the Formalists, unnecessarily elevates rule of law formalisms over popular self-governance. Some governmental institution must at least strive to speak for the *living* People in their *constitutional* capacity. That should be the mission for Article III judicial review.

Thus, this article frames an interpretive mission for Article III that tracks the political goal for Article V—to identify the choices the sovereign living People *would* make *if* they engaged in constitutional politics toward creating their own constitutional policies. It suggests structures and limits for an interpretive method—imperfect to be sure—toward pursuing this interpretive mission, based on the choices actually made by ratification generations, and on the implications of fundamental continuities in the American political culture. It suggests, as well, that other interpretive methods, whether established or not yet developed, should be evaluated by the extent to which they promise to represent the sovereign *living* electorate in its potential *constitutional* capacity.²³ Finally, the article suggests that because Article III interpretations would be made in their name, judicial review could better challenge the People today to create new constitutional provisions of their own—and thereby to establish points of convergence at

23. See *infra* text accompanying notes 368–82.

which the Formalists, Antifederalists, and Faithful Dualists could find solid common ground.

II. SOVEREIGN SELF-GOVERNANCE: THE LIVING
ELECTORATE'S LEGISLATIVE EXPRESSION SHOULD NOT BE VIEWED
AS LESS AUTHORITATIVE THAN A PAST ELECTORATE'S
CONSTITUTIONAL EXPRESSION

This Part will develop three normative propositions: First, as between the ratifiers of the past and the living citizenry, those possessing the sovereign right of self-governance are the People today.²⁴ Second, a dead electorate's expression of will through constitutional agents should be viewed as superior to the living electorate's sovereign right of self-governance through legislative agents only if such is deemed to be the living People's will. Third, the living electorate's sovereign right of self-governance as potentially expressed through constitutional agents should be viewed as superior to that right as actually expressed through legislative agents.

The people possessing the sovereign right of self-governance are those comprising the living electorate. Sovereignty is a concept locating the ultimate right to make law.²⁵ Sovereignty—such as that proclaimed by “We the People” in 1787—is meaningfully practicable when the asserted right to govern coincides with the power to govern. It is a plaintive wish, or a call to ongoing struggle, when the assertion of right confronts superior power.²⁶ Issues of sovereignty, or disputes about where the ultimate right to make law is located, might be intergenerational (or temporally vertical); such issues also might be intragenerational (or temporally horizontal).

24. Of course, in addition to this intergenerational (or vertical) question of sovereignty are intragenerational (or horizontal) questions—for example, for any generation, who qualifies as part of the sovereign People.

25. See, e.g., F.H. HINSLEY, SOVEREIGNTY 26 (Cambridge Univ. Press 2d ed. 1986) (1966) (“Sovereignty was the idea that there is a final and absolute political authority in the political community.”); see also Dan Philpot, *Sovereignty*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2009), <http://plato.Stanford.edu/entries/sovereignty/> (last updated June 8, 2010) (defining sovereignty as “supreme authority within a territory”).

26. See, e.g., HINSLEY, *supra* note 25, at 1 (differentiating power and sovereignty); *id.* at 224–25 (noting the fiction in international relations that recognizes sovereign authority in some states “even though they do not in fact rule effectively”); ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 4 (1970).

Temporally vertical issues of sovereignty seem to dominate questions about the status of the inherited Constitution, and about whether Article III judges should interpret and enforce its original meaning until formally amended.²⁷ Intragenerational issues of sovereignty are wide-ranging, and have included disputes about whether “the class of persons . . . imported as slaves, [and] their descendants” were part of “the [P]eople” in 1787,²⁸ whether the People of the nation or the People of the states ratified the Constitution,²⁹ and the criteria for bestowing citizenship—an issue in play again today.³⁰

In a significant sense, because the dead can exert no responsive power, temporally vertical issues of sovereignty (that is, as between the dead and the living, determining who possesses the ultimate right to make law) depend on temporally horizontal issues of sovereignty (that is, determining who among the living have the ultimate right to make law).³¹ To be sure, the past has exercised power over the present in having created the point of departure that the present inevitably must confront. But as undeniably

27. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting) (rejecting the notion that the Court has a “duty . . . to keep the Constitution in tune with the times” because “[t]he Constitution makers knew the need for change and provided for it”).

28. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. In 1857, Justice Taney addressed this horizontal question of sovereignty as decided in 1787 by the self-proclaimed People. *Id.* (“[N]either the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people[.]”). By viewing the policy chosen in 1787 as binding in 1857, Taney also addressed the vertical question of sovereignty. *Id.* at 405 (“The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.”).

29. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 847–49 (1995) (Thomas, J., dissenting) (arguing that the Constitution was ratified by the People of each state, not the undifferentiated People of the nation); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 377 (1819) (rejecting Maryland’s argument that the States ratified the Constitution, asserting instead that “the People” ratified the Constitution).

30. Senator Mitch McConnell has supported congressional hearings to review the Fourteenth Amendment’s provisions on birthright citizenship. See, e.g., Julia Preston, *Citizenship From Birth Is Challenged on the Right*, N.Y. TIMES, Aug. 7, 2010, at A8; see also H.R. 1868, 111th Cong. (1st Sess. 2009) (proposed amendment to “the Immigration and Nationality Act to clarify those classes of individuals born in the United States who are nationals and citizens of United States at birth”). For an example of a more academic examination, see William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 223–24 (2008) (discussing the narrow reading the Fourteenth Amendment’s citizenship provisions have received historically).

31. See *supra* notes 25–30 and accompanying text.

as the past has set the table for the present, the present has the exclusive power to choose what to do with its inheritance. Whatever the present might choose, neither James Madison, George Mason, nor Thaddeus Stevens—nor anyone else from the past—could respond.

Thus, with respect to issues across generations, the reality of power allocates any practicable version of sovereignty with the People today.³² When one (such as Bork or Whittington) argues that Article III judges should enforce the original meaning of constitutional provisions, he is speaking to agents of the living electorate.³³ In raising this temporally vertical issue of sovereignty, he simultaneously addresses temporally horizontal issues, and implicitly (but necessarily) acknowledges the practicable sovereignty of the living.³⁴

A dead electorate's expression of will through constitutional agents should be viewed as superior to the living electorate's sovereign right of self-governance through legislative agents only if such is deemed to be the living People's will. This proposition follows naturally from the foregoing observations about practicable

32. See *supra* notes 25–38 and accompanying text.

33. To the extent that the dead hand holds the governmental tiller today, it is through the acceptance of the living—an exercise of *our own* sovereign rights. See David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 784–88 (1987) [hereinafter Chang, *Conflict*]. Indeed, it is entirely revealing that if the Constitution's original meaning is to be enforced today, it takes a Keith Whittington today to assert the rightfulness of doing so; it takes a Clarence Thomas today to purport to apply the ratifiers' original meaning.

34. Consider an analogy that helps reveal both the vertical or intergenerational issues, and the horizontal or intragenerational issues. The developer of the Empire State Building exercised power in a way that any purchaser of the parcel of property at 350 Fifth Avenue must confront. The new purchaser might renovate the building; might tear down the building; might maintain the building; or might restore the building to its exact specifications when originally created. But, in the vertical or intergenerational sense, it is the right of the present owner of the building to make those decisions, rather than the right of the building's creator, if only because it is within the present owner's power.

Yet, there are horizontal, or intragenerational issues of right that the present owner must confront as well. The present might have passed a law placing conditions or restrictions on the changes that any owner of the Empire State Building might make. The present might have enacted a law permitting, or prohibiting, a building's original owner from placing perpetual conditions on what future owners might do with the building. In any event, it is for the present to decide the rules—the propriety of options—with respect to which the power of the present over circumstances inherited from the past is to be exercised. Indeed, the variations on the rule against perpetuities reflect each present generation's power to decide the effectiveness of efforts by the past to control its posterity and, generally, the normative judgment that it is for the present to decide the disposition of its resources.

sovereignty. Indeed, if the inherited Constitution is supreme law today, it is not simply because a past generation purported to exercise its sovereignty through constitutional agents; rather, the inherited Constitution is supreme law today because the living People view it as such.³⁵ But because the People today have not clearly declared *why* they continue to live under inherited forms, critical questions—questions for the People today and their representatives—continue to vex: What considerations should inform the exercise of the Article III power by judges, hired by agents of the living People, purporting to interpret and enforce the inherited Constitution’s mandates? Perhaps more fundamental, what considerations should inform the Article II and Article I agents of the living People when hiring those Article III judges?

To these questions, the Antifederalists, Formalists, and Faithful Dualists have very different responses. Some Antifederalists push the implications of the living electorate’s right of sovereign self-governance to the point of denying the aging Constitution’s relevance and authority.³⁶ Michael Klarman suggests a solution to the anti-majoritarianism of dead-handed originalism: abandon constitutionalism.³⁷ “[W]e can decide controverted policy questions for ourselves through political struggle (as much of the rest of the world does), rather than through the edicts of long-dead Framers or relatively unaccountable judges.”³⁸ Sanford Levinson bemoans “our undemocratic Constitution.”³⁹ His rationale for a movement to create a new Constitution focuses primarily on ways the inherited Constitution thwarts national majorities from establishing their will as law.⁴⁰ From both perspectives, the aging Constitution presents undesirable barriers to a meaningful route through which the living People’s sovereign right of self-governance can be vindicated—making ordinary law through everyday political procedures.⁴¹ Klarman’s commitment to the living electorate’s sove-

35. See *infra* text accompanying notes 382–84; see also Chang, *Conflict supra* note 33, at 787–88.

36. See Klarman, *supra* note 15, at 383.

37. See *id.* at 382. He contends that the anti-majoritarianism of dead-handed originalism is exacerbated because the ratifiers “inhabited a radically different world, and possessed radically different ideas.” *Id.* at 381. Given these differences, he asks, do “they have much of relevance to say about how we should govern ourselves today?” *Id.* at 387.

38. *Id.* at 412.

39. See LEVINSON, *supra* note 7.

40. See *id.* at 167–68.

41. See *id.* at 11–16; Klarman, *supra* note 15, at 381–83, 387.

reignty begs questions about how that sovereignty is to be actualized, when the “political struggle” for which he calls—to the extent it exists—has not sought to abandon either the aging Constitution or constitutionalism. Levinson’s call for a new Constitution begs questions about what one is to do until the aging Constitution is (if ever) superseded.

By focusing on rule of law concerns as they endeavor to justify Article III enforcement of the aging Constitution’s original meaning, the Formalists neglect the implications of the living electorate’s right of sovereign self-governance. Robert Bork embraces the aging Constitution, and urges its interpretation according to its original meaning.⁴² Bork’s rationale for originalism reduces to two essential points. First, originalism can best constrain legislating from the bench and “judicial tyranny.”⁴³ This goal of constraining judicial tyranny presupposes that making ordinary laws through everyday political procedures is a valuable component of the People’s sovereign right of self-governance. Second, the Constitution is “law,” Bork says, and all law should be interpreted according to “the meaning the lawmakers intended.”⁴⁴ Justice Scalia has similarly relied on these two propositions.⁴⁵

These two Formalist propositions are insufficient to justify enforcing the aging Constitution according to its original meaning. Consider the goal of preventing judicial tyranny. One might question how well conventional originalism does constrain discretion to legislate from the bench. Proponents of conventional originalism can reach widely disparate interpretations of the Equal Protection Clause, such as Raoul Berger’s insistence that *Brown v. Board of Education*⁴⁶ was wrongly decided,⁴⁷ and Robert Bork’s remarkable “confirmation conversion” contention that *Brown* was

42. See BORK, *supra* note 9, at 144–45.

43. See *id.* at 16, 146; see also RAOUL BERGER, GOVERNMENT BY JUDICIARY 314 (Liberty Fund, Inc. 2d ed. 1997) (1977) (“When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power.”).

44. BORK, *supra* note 9, at 145.

45. See Scalia, *supra* note 10, at 854 (“[T]he Constitution . . . is in its nature the sort of ‘law’ that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”). Scalia also has decried alternatives to originalism—interpretation “on the basis of what the judges currently [think] it desirable for [the Constitution] to mean.” *Id.* at 852. Yet, Scalia acknowledges that originalism’s “greatest defect . . . is the difficulty of applying it correctly.” *Id.* at 856.

46. 347 U.S. 483 (1954).

47. See BERGER, *supra* note 43, at 264–66.

an originalist decision.⁴⁸ Originalism can be manipulated, and self-proclaimed originalists can choose how they use that tool from one occasion to another.

More fundamentally, one might ask whether preventing legislating from the bench should be the ultimate benchmark against which the merits of an interpretive methodology is measured. Indeed, one should view such “rule of law” concerns to be significant in a system predicated on the sovereignty of the People only if—and only to the extent that—one can posit their embrace by the sovereign. It is *that sovereign* which provides the perspective properly guiding the exercise of judicial discretion. It is *that sovereign*—in both its legislative and constitutional representations—for whose benefit judicial discretion is limited.⁴⁹ Furthermore, if the measure of an interpretive methodology is its success in preventing legislating policy from the bench, there is, as Michael Klarman implies, a better solution: abandon judicial review altogether.⁵⁰ Of course, this would require forgoing whatever benefits that judicial review might provide.⁵¹

Bork’s second rationale for originalism also is inadequate. He notes that the Constitution is “law,” and that “[i]f the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legis-

48. After his “confirmation conversion,” Robert Bork viewed *Brown* as a proper enforcement of original intent. See BORK, *supra* note 9, at 76 (*Brown*’s result was “compelled by[] the original understanding of the equal protection clause.”). Bork also criticizes Justice Taney’s performance in *Dred Scott* as creating “a constitutional right to own slaves . . . by changing the plain meaning of the due process clause of the fifth amendment.” *Id.* at 31. Yet Taney was explicitly and self-consciously originalist, at least in his interpretation of “citizen” in Article III. See *Dred Scott*, 60 U.S. (19 How.) 393, 405, 407 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV. *Dred Scott* declared that determining whether “the class of persons who had been imported as slaves, [and] their descendants,” were included as “citizens” is a decision that “belonged to . . . those who formed the sovereignty and framed the Constitution. *Id.* The duty of the court is, to interpret the instrument they have framed, . . . and to administer it as we find it, according to its true intent and meaning when it was adopted.” *Id.* For widely disparate propositions about the original meaning of the Commerce Clause, see *infra* text accompanying notes 267–328.

49. See *infra* text accompanying notes 372–73.

50. Klarman, *supra* note 15, at 382.

51. Bork acknowledges that judicial review also must be measured by the “energetic” enforcement of constitutional “rights.” See BORK, *supra* note 9, at 140. The rationale centered on the constraint of judicial lawmaking (to preserve majoritarian discretion) does not explain why originalism is the best method for enforcing the side of “the Madisonian dilemma” concerned with constraining majoritarian discretion. Whittington argues that originalism must be justified positively, not simply by asserting its virtues in restraining judicial policymaking. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 168 (1999).

latures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: ‘Law.’”⁵²

But the Constitution is *not like* all other law. It is different by design—designed to be supreme, and so designed, one would suppose, for certain systemic reasons.⁵³ More fundamental, however, are normative propositions about popular sovereignty that not only underlie the Antifederalists’ critiques of originalism, but also, because they are part of the Formalists’ own justifications for originalism, support an internal critique.⁵⁴ The living People’s sovereign right of self-governance is meaningful when exercised through their legislative agents. This aspect of the living People’s sovereignty is precisely what the Formalists seek to protect by preventing “legislating from the bench.”⁵⁵ Though it is clear that one generation’s constitutional decision to constrain its *own* legislative representatives is entirely consistent with any plausible version of popular sovereignty, it is far from clear why—indeed, *whether*—constraining a present generation’s self-governance through legislative agents by enforcing a past generation’s aging constitutional choices is consistent with the living electorate’s sovereign right of self-governance.

On this, the Faithful Dualists construct an answer. Bruce Ackerman posits that the *true* sovereign People exist only during constitutional lawmaking.⁵⁶ Ackerman also views constitutional policies chosen by the true sovereign People as properly binding future generations.⁵⁷ “During periods of normal politics, [government officials] must be constrained by the constitutional forms imposed during rare periods of constitutional creativity, when the

52. BORK, *supra* note 9, at 145; *see also id.* at 144 (“What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law’s enactment.”).

53. In presenting his version of the “Constitution is law” rationale for originalism, Scalia at least acknowledges that “it has an effect superior to other laws.” Scalia, *supra* note 10, at 854. Do the designed, functional distinctions between the Constitution and other forms of law imply ancillary distinctions in the proper manner of interpretation? Neither Bork nor Scalia considers this question.

54. *See supra* text accompanying notes 14–17.

55. *See supra* text accompanying notes 9–12.

56. *See* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 139 (1991). Significantly mitigating this limited notion of true sovereignty, Ackerman argues that the People can amend the Constitution through intricate processes outside Article V—and indeed, that they have done so. *See id.* at 267–68.

57. *See id.* at 290–91.

People mobilize and speak with a very different voice.”⁵⁸ In support, Ackerman sometimes emphasizes that when creating constitutional policy, the People act with special political mobilization—more people are overcoming political apathy and more seriously debating and deciding matters of public concern than during normal times.⁵⁹ At other points, Ackerman emphasizes that when creating constitutional policy, the People speak with a “different voice”—people are more focused on “the rights of citizens and the permanent interests of the community” than during normal times.⁶⁰

Do these observations truly establish that “popular sovereignty” is normatively meaningful only for a People who are engaged in creating their supreme law on the “higher” dualist track? Do they truly explain why a past generation’s constitutional expression of self-governance is superior to the present generation’s legislative expression of self-governance?⁶¹ The proposition that more (but not all) people may participate in constitutional politics than ordinary politics, and participate with more (but not full) intensity suggests differences of degree. The proposition that they make decisions more (but not entirely) focused on the permanent and aggregate interests of the community also suggests differences of degree. But what clearly is a difference not of mere degree but of kind is that members of the living electorate—unlike the ratifiers—are quite *alive*.⁶² This has stark implications for locating so-

58. *Id.* at 171. Ackerman seems to endorse a concept of originalism for judicial enforcement of the sovereign People’s constitutional decisions. *See id.* at 139 (“The prophetic vision of the Court is flatly inconsistent with the principles of dualist democracy. . . . What the judges are especially equipped to do is *preserve* the achievements of popular sovereignty during the long periods of our public existence when the citizenry is not mobilized for great constitutional achievements.” (emphasis added)).

59. Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 14, at 64 (“[M]ovements for constitutional transformation earn broad and deep support for their initiatives.”).

60. Ackerman, *supra* note 18, at 1034; *see id.* at 1031 (noting that the Constitution is designed “to make the most of what virtue we have”).

61. Furthermore, unless one posits that post-ratification generations may amend the inherited Constitution by procedures other than Article V, present constitutional discretion is constrained by the past in this fundamental way. *Cf. id.* at 1059–60; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1055–56 (1988).

62. Indeed, Ackerman’s second example of amendment by the sovereign people outside Article V posits that President Roosevelt and Congress, with a mandate from the 1936 elections, abandoned some constitutional prohibitions and imposed new constitutional prohibitions. *See* BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 362–69 (1998)

verignty in both its practicable and ethical dimensions. Unlike the ratifiers, the living People possess human awareness *now*; they experience the effects of the law *now*.⁶³

Whittington agrees with Ackerman that the sovereign exists only when the People actually create constitutional provisions.⁶⁴ “The underlying assumption behind the notion of potential sovereignty is that ‘the people,’ in their sovereign capacity, do not always exist.”⁶⁵ Continuing to enforce original meaning against post-ratification generations is necessary to serve popular sovereignty, he says, despite (or, more precisely from his perspective, *because of*) the current electorate’s status as *mere* “potential sovereign.”⁶⁶ Enforcing original meaning today presents no dead-handed intrusion on *sovereign* prerogatives because an electorate not engaged in constitutional creation is not actually sovereign. “The authority to constitute government is prior to and more basic than the authority to replace its members. . . . [O]riginalism both requires the renewed expression of the sovereign to change constitutional meaning and renders the possibility of such expressions meaningful by making them legally significant.”⁶⁷ Thus, for Whittington, failing to do the dead hand’s higher-track bidding would contravene popular self-governance.⁶⁸ He contends that “[s]elf-governance becomes an empty phrase if the intentions of authoritative popular bodies can be disregarded.”⁶⁹

[hereinafter ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS] (discussing the “structural amendment” of laissez faire economic principles established in the original commerce power and properly enforced by the Court through 1936); *see also* ACKERMAN, *supra* note 56, at 142–50 (discussing the augmentation of the Reconstruction amendments’ limited commitment to racial equality). To posit these as authoritative constitutional changes, without clear procedures for making constitutional changes, and without a formal proposal to amend constitutional text, undermines the supposedly *stark* distinction between the exercised constitutional sovereignty of the true sovereign people during one generation, and the decisions of mere “stand-ins” for the sovereign people in subsequent generations. *Cf. id.* at 280–90 (summarizing the “proposal,” “mobilized deliberation,” and “codification” functions of non-Article V amendment).

63. *See infra* text accompanying notes 83–86, 372–73.

64. WHITTINGTON, *supra* note 51, at 135.

65. *Id.* “Like tacit consent, potential sovereignty is concerned with ensuring the consensual foundation of government. Unlike tacit consent, however, potential sovereignty does not assume that such consent exists at all moments to authorize current government actions.” *Id.* at 132.

66. *See id.* at 156 (emphasis added).

67. *Id.* at 154–55.

68. *See id.* at 156.

69. *Id.*

But when a generation makes constitutional choices to constrain its own legislative representatives, and when those constraints are enforced for that generation, how would “self-governance” be rendered an empty phrase (i.e., meaningless) if such constraints were not enforced in subsequent generations? If a generation’s constraint of its own legislative agents during that generation’s lifetime is viewed as trivial, then is the only meaningful reason to create a constitution to constrain the political discretion of *future* generations? Is Whittington suggesting that the essence of sovereign *self*-governance is governance by the dead hand?⁷⁰

On the contrary, one might well conclude that this rationale for enforcing original meaning in post-ratification generations itself makes “self-governance” an “empty phrase.”⁷¹ In the end, Whittington simply bestows the mantle of sovereignty on “authoritative popular bodies” only when representatives of the People create constitutional policies, and denies such a mantle when representatives of the People enact congressional legislation.⁷² He addresses the dead-hand problem by defining it away.⁷³

70. “The essential aspect of sovereignty is not delegated to the government but is retained by the people, and as such it is actually absent from the political sphere.” *Id.* at 136. Whittington insists that sovereign must be active and decisive. “The concern is with the rightful *exercise* of power, not the mere capacity to influence events.” *Id.* at 115 (emphasis added). Despite the fact that existing governmental forms and officials might well represent current electoral desires, the People’s sovereignty is not expressed or implicated by decisions making and implementing ordinary policy. Whittington says, “There is every reason to think that the government is highly responsive to the electorate. . . . The critical point is . . . whether [the government] adequately represents the people for constitutional purposes.” *Id.* at 131. Whittington’s dualism seems more formalistic than Ackerman’s—resting not on “any posited elevation of public virtue,” but on “the authority to decide.” *Id.* at 138.

71. There are surely senses in which past decisions unavoidably constrain future discretion. The choice to build a skyscraper requires the future to live with it, or to tear it down. *See supra* note 31. The choice to consume fossil fuels requires the future to live with the pollution, and the unavailability of depleted resources. The choice to run budget deficits requires the future to pay the debt. Whether this suggests that the future is rightfully constrained by past choices, however, is quite a different matter. Indeed, one might suggest that the present has a responsibility to preserve as much freedom of choice for the future as is possible, precisely because of notions about the future’s right of self-governance in its own time.

72. *Id.* at 135–36.

73. Elsewhere, Whittington subverts his stark distinction between actual and potential sovereignty. He suggests that institutions other than the Court fill gaps in constitutional meaning with constitutional “constructions.” *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3, 5 (1999). The “partial sovereign” exists in the form of elected officials, such as the President and Congress, who resolve questions of constitutional meaning too indeterminate for judicial

Whittington also examined “another angle” toward justifying the perpetual enforcement of the Constitution’s original meaning.

Present and future generations can only expect their own constitutional will to be effectuated if they are willing to give effect to prior such expressions. . . . Unless we accept the authority of the past, we cannot assert our own authority over the future, whether understood as a matter of decades or as a matter of weeks. By enforcing the originalist meaning of the Constitution, the judiciary preserves the mechanism for our own efforts at constitutional creation.⁷⁴

The present accepts (or embraces) being governed by the past in exchange for the potential right to control its posterity.⁷⁵ Far from reinforcing his contentions that the sovereign exists only when creating constitutional provisions, however, this line of Whittington’s analysis supports the *living* electorate’s status as the “authoritative” sovereign that Article III review should endeavor to serve—for three reasons.

First, this rationale for originalism is developed from the perspective of *post*-ratification generations. It relies on the counterfactual proposition that the People today, *if* they thought about it, *would choose* to be governed by inherited original meaning, for the purpose of preserving their own potential governance of future generations. If the propriety of enforcing original meaning today depends on speculating about the counterfactual preferences of the present generation, Whittington’s position slides toward the proposition that the living electorate are the rightfully

interpretation. *See id.* But why is the “partial” constitutional decisionmaking by representatives of the current electorate so inferior to decisions made by representatives of the electorate when involved in constitutional ratification? Why do representatives engaged in “construction” merely represent the potential sovereign, but representatives involved in ratification represent the actual sovereign? The People are represented by political agents in either case, and more or less imperfectly in each case.

74. WHITTINGTON, *supra* note 51, at 156; *cf.* MARMOR, *supra* note 17, at 144–45 (discussing how “the inter-generational issue is central to the question about the very legitimacy of constitutions”).

75. Whittington further suggests that *self*-governance involves the *right* of the *present* to govern the *future*. “The abandonment of the principle that past decisions control the future until replaced by a new decision marks the abandonment of popular government itself.” WHITTINGTON, *supra* note 51, at 156. Elster posits very different intergenerational preferences. “[E]ach generation wants to be free to bind its successors, while not being bound by its predecessors.” JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 94 (1979).

governing sovereign, even when their authority to create constitutional provisions has not actually been exercised.⁷⁶

Second, the counterfactual proposition itself seems implausible. Has any generation actually chosen to submit to original constitutional meaning to preserve the *option* of controlling *future* generations? This perspective has not been part of ongoing political debate. During this generation, Robert Bork’s nomination was rejected because of his professed rigid originalism.⁷⁷ When Republican presidential candidates criticize “legislating from the bench” and promise to nominate professed originalists, they (and the voters who support them) seem driven by their own commitments to policies today—whether about abortion, homosexuality, gun control, or the regulatory state—rather than by a desire to preserve some unexercised option of controlling the future. When Democratic presidential candidates promise to nominate Justices committed to serve perceived contemporary norms, they provide even less support for Whittington’s posited counterfactual trade-off.

Furthermore, it seems implausible that the People of any given generation *would* view this trade as desirable (*if* they actually were to consider it). The only generations that might be viewed as having wished to control the distant future—those of 1787 and 1868—*rejected* their inherited pasts in exercising *self*-governing sovereignty in its constitutional form. That other generations have not been sufficiently interested in creating their own constitutional provisions hardly implies that they endorsed being constrained by the past as the price for an unexercised authority to control the future.⁷⁸

Third, and critically significant, Whittington links the sovereign right of self-governance to the fact that the people themselves are also *the governed*.⁷⁹ “Democratic dualism rests on the

76. Indeed, this part of Whittington’s argument essentially asserts a counterfactual proposition about each living generation—that the living people, if engaged in constitutional politics, would choose to be governed by the constitutional choices of the past—as the Tea Party declares for its members in its platform. *See supra* text accompanying note 3. Not only does this facet of Whittington’s analysis fail to provide a moral or ethical endorsement of the past People’s current sovereignty independent of the will of the living, it implicitly pursues the interpretive mission developed in Part III.

77. *Nominations*, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited Dec. 3, 2010) [hereinafter *Nominations*].

78. *See supra* text accompanying notes 76–78; *infra* text accompanying notes 85–89.

79. WHITTINGTON, *supra* note 51, at 133.

claim that this power of decision should reside with the people who must live under those constitutional forms.”⁸⁰ Obviously, a ratification generation lives under its constitutional handiwork, but only for so long. Thereafter, every post-ratification generation in its time, including the present generation, are “the people who must live under those . . . forms.”⁸¹ Members of the living electorate are actual lawmakers through Article I agents. Furthermore, they are not merely potentially governed; they are *actually* governed—by the laws enacted by Congress and by judicial decisions defining Congress’s discretion. It is *their* lives, *their* politics, and *their* lawmaking that is constrained by constitutionalism and judicial review.⁸²

Thus, once going beyond the definitional, Whittington’s arguments support recognizing the living electorate as the sovereign that governmental agents, including Article III judges, should feel bound to serve. If the inherited Constitution is properly enforced today, it must be in the name and in the service of the living electorate. Rather than defining popular sovereignty as existing only when the People acted through Article VII agents, or when their agents fulfill Article V or other procedures, it seems a better expression of practical political ethics to view the full sovereign right of self-governance as residing in each generation, during its time.⁸³

In the hierarchy of things having moral worth, does anything matter more than human awareness? Human awareness is the precondition for making moral judgments, for doing good works, for experiencing human emotion—indeed, for making the norm of sovereign self-governance meaningful. Because it is not the dead

80. *Id.* at 138.

81. *Id.*

82. *Cf.* EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 10 (2007) (explaining that the legitimacy of the Constitution derives from “continuing popular judgment that the Constitution embodies both political and moral wisdom” and the fact that “the current people of the United States” have inherited that Constitution from prior generations and will pass it on to “our own posterity”).

83. Practical power also points to the living electorate as sovereign. The living electorate, through its representatives, might choose Supreme Court Justices who profess allegiance to original meaning—but if so, original meaning would continue to govern (at least in name) because of the choices of the living electorate’s agents. The People’s representatives today might reject Supreme Court nominees who profess allegiance to originalism, as they rejected Robert Bork. *See Nominations, supra* note 77. Thus, the past cannot bind the present unless the present chooses to be bound.

but the living who experience the consequences of decisions defining the nation’s supreme law—who are, in Whittington’s phrase, those “who must live under those constitutional forms”⁸⁴—Article III judges should view themselves as agents for the living. Because it is the Article II and Article I agents of the living who choose their Article III judges, such judges should view themselves as agents of the living. Thus, to posit that a past electorate’s expression of constitutional sovereignty is superior to the present electorate’s expression of sovereignty in lesser forms is a practical and ethical fallacy.

The living electorate’s sovereign right of self-governance as potentially expressed through constitutional agents should be viewed as superior to that right as actually expressed by legislative agents. That the People today have not created their own Constitution hardly implies that they reject constitutional dualism. In many ways, the People today recognize and seem to embrace it—for example, when they contemplate a new constitutional amendment, and when their Article II and Article I agents focus on a nominee’s interpretive philosophy when filling a vacancy on the Supreme Court. The dualist distinction between ordinary law and supreme law—between the inferior expression of their right of sovereign self-governance through legislative agents, and the potential for superior expressions of their sovereignty through constitutional agents—remains foundational in our ongoing political culture.⁸⁵

Thus, proposing that the living People are sovereign is not to deny that there may be superior (e.g., through Article V) and inferior (e.g., through Article I) *expressions* of sovereignty.⁸⁶ Fur-

84. WHITTINGTON, *supra* note 51, at 138.

85. See *Tea Party Patriots Mission Statement and Core Values*, *supra* note 3 (declaring commitment to the Constitution); *Our Mission and Vision*, *supra* note 4 (declaring commitment to constitutional principles); *infra* text accompanying notes 126–28. Like the young bachelor who contemplates the potential of marriage—and with marriage, his own choice to constrain his otherwise freewheeling lifestyle—each generation of the People in our dualist constitutional culture might well understand and embrace the concept of higher lawmaking to constrain their otherwise freewheeling lawmaking. While the bachelor might never marry, and the People might never create their own Constitution, both principals accept the binding superiority of the higher decision they *might* make (entering a marriage or creating a Constitution) over the lower decisions they otherwise would make. In both contexts, the principals embrace the notion of fidelity to their own decisions of self-constraint.

86. I do not suggest that the living electorate may exercise its superior form of sovereignty only through inherited Article V processes—a proposition which would be inconsis-

thermore, as suggested by Ackerman's notion of implicit "structural amendment,"⁸⁷ and Amar's notion of amendment by explicitly chosen routes other than Article V,⁸⁸ the living People's constitutional sovereignty might be expressed in different ways. Indeed, except when electing representatives, the People *themselves* do not act to effectuate their sovereignty. Whether under Article VII, Article V, Article I, Article III, or other suggested improvisations, the People's *representative agents* act—in different contexts and in different ways.⁸⁹ The proposition that the People today remain committed to constitutional dualism, and its implications for their Article III agents exercising the power of judicial review, will be further examined in the next section.

To summarize: (1) As between the past and the present, the living electorate are the sovereign who Article III agents should feel bound to serve; (2) a dead electorate's expression of will through constitutional agents should be viewed as superior to the living electorate's sovereign right of self-governance through legislative agents only if such is deemed to be the living People's will; and (3) the living electorate's sovereign right of self-governance as potentially expressed through constitutional agents should be viewed as superior to that right as actually expressed through legislative agents. From these propositions emerges a critical question: Can the living People's potential constitutional sovereignty be actualized by means other than creating their own Constitution? If so, *how?*

tent with their sovereignty. See Amar, *supra* note 61 *passim* (arguing that the nonexclusivity of Article V and rigorous notions of popular sovereignty allow a mere majority of the People to amend the Constitution); cf. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS*, *supra* note 62, at 268–74 (positing constitutional amendment by non-Article V procedures). Indeed, I will suggest a mission statement for Article III judicial review that tracks the political purpose for Article V—to identify the choices the living electorate would make if it engaged in constitutional politics. See *infra* Part III.

87. See Ackerman, *The Storrs Lecture*, *supra* note 18, at 1051–57 (discussing "structural amendment").

88. See Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 14, at 89 [hereinafter Amar, *Popular Sovereignty and Constitutional Amendment*]; Amar, *supra* note 61, at 1044–48, 1054–57, 1068–69.

89. See Amar, *Popular Sovereignty and Constitutional Amendment*, *supra* note 88, at 90 (distinguishing the People, themselves, and their representatives, even when constitutional amendments are ratified in the name of the People through Article V); Akhil Reed Amar, *The Consent of the Governed*, 94 COLUM. L. REV. 457, 459–60 (1994) [hereinafter Amar, *The Consent of the Governed*].

III. FRAMING A MISSION STATEMENT FOR JUDICIAL REVIEW:
TO IDENTIFY THE CHOICES THE SOVEREIGN LIVING PEOPLE
WOULD MAKE IF THEY ENGAGED IN CONSTITUTIONAL POLITICS

The purpose of a process for constitutional creation or amendment is to provide the means for identifying the choices that the sovereign living electorate would make if they chose to engage in constitutional politics.⁹⁰ Might two components of the constitutional scheme—the sovereign’s potential act of creation (through Article V—or otherwise) and the servant’s act of interpretation and enforcement (through Article III)—be viewed as different (and differently reliable) means toward achieving the same ends? Might it make sense to posit as an ideal goal for judicial review in post-ratification generations the same systemic goal as that implicit in Article V—to identify the choices the sovereign living People would make if they engaged in constitutional politics?⁹¹

90. The details of Article V procedures are rooted in subsidiary goals as to how the People’s constitutional decisions ought to be made. See, e.g., THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 2003) (addressing purposes for characteristics of proposed amendment process).

91. It has seemed self-evident that if the People make constitutional choices of their own, the interpretive mission during the ratification generation would be to identify the choices the living electorate actually made. If, indeed, the people who created the Constitution in 1787 were sovereign—if, as he proclaimed in *Marbury*, they had the right to their preferred constitutional principles—then Marshall was their servant in his capacity as Supreme Court Justice. As their servant, Marshall’s *interpretive goal* was to identify the constitutional choices they made. In *Marbury v. Madison*, this interpretive goal was implicit when Marshall determined that Article III provides the Court with the power of judicial review because “the people” who created the Constitution intended such power. See 5 U.S. (1 Cranch) 137, 176–77 (1803). Marshall pursued a similar approach in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). He said that the framers and ratifiers “must be understood to have employed words in their natural sense We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.” *Id.* at 188–89.

But is it necessarily true that the interpretive mission during the ratification generation should be to identify the choices the living electorate actually made? For Marshall in both *Marbury* (1803) and *Gibbons* (1824), complexities posed by generational passage were emerging. For both cases, the governed electorate was not the same group of people who ratified the Constitution in 1787. Some members of the People of 1787 had died; some members of the People of 1803 joined the polity after 1787. Discussing another matter, Amar recognized a tension between concerns for rule of law stability and a pure vindication of popular sovereignty: “[E]very new day [brings] a slight redefinition of the polity, with some voters dying and others coming of age[.]” Amar, *Popular Sovereignty and Constitutional Amendment*, *supra* note 88, at 105. Truly taking seriously the notion that the living electorate is the sovereign with the right to its preferred government perhaps implies that even during the ratification generation—even the day after ratification—the

Toward addressing these questions, one should isolate issues of practicability. Exploring ideal objectives is conceptually distinct from confronting real world impediments, and from crafting methods for achieving the ideal. To conflate framing goals and accommodating practical challenges preempts a careful examination of each task on its own terms.⁹²

If the rightfully governing sovereign is the living electorate, the ideal implementation of popular sovereignty would have the People today adopt constitutional policies of their own. Short of that, any other mechanism that might approximate the results of the living People's constitutionalism would warrant consideration. If a mechanism were fashioned that facilitated the creation of constitutional policy according to the living electorate's values—indeed, if Article III interpretation could serve the function otherwise fulfilled through Article V politics—the People could be provided the *decisions* they would make if they engaged in constitutional politics, without actually having so engaged.

My posited mission for judicial review—to identify the choices the sovereign living People would make if they engaged in constitutional politics—takes seriously Ackerman's notion of economizing on public virtue.⁹³ It views decisionmaking mechanisms, such

properly conceived interpretive mission should be to identify the choices the sovereign living electorate would make if it engaged in constitutional politics.

92. If difficulties in proof were front and center in framing policies and legal rules, legislatures might be dissuaded from defining crimes in terms other than negligence or strict liability.

93. According to Ackerman, "The *Federalist* proposes a democratic constitution that tries to economize on virtue. . . . The task is to economize on virtue, not to do without it altogether; to create a constitutional structure that will permit Americans, in both ordinary and extraordinary times, to make the most of the public spirit we have." ACKERMAN, *supra* note 56, at 198–99 (emphasis added). Ackerman posits the "private citizen," who has both personal and public concerns, and who is ordinarily far more focused on the former than the latter. When more people overcome ordinary "apathy, ignorance, and selfishness," and create supreme constitutional policy, they can return to ordinary concerns having established a *mechanism* that tends toward the public good, without demanding too much of them on an ongoing basis. *Id.* at 235; *see id.* at 137 ("[T]he dualist insists that political elites *earn* such authority [to speak for the People] by a long effort at political mobilization."); *id.* at 236 ("[O]ur normally elected representatives are only 'stand-ins' for the People and should not be generally allowed to suppose that they speak for the People themselves" (emphasis omitted)). Whittington similarly recognizes that constitutional dualism "puts fewer demands on the citizenry," and "allows individuals to stop 'acting like citizens' and turn to nonpolitical affairs." WHITTINGTON, *supra* note 51, at 137. But he eschews Ackerman's linkage of elevated public virtue as an essential characteristic of popular constitutional decisionmaking. *See id.* at 138. For both Ackerman and Whittington, actual constitutional decisionmaking by the sovereign People is significant not primarily

as Article V, Article III, and Article I, as varied means toward a common end *for the living electorate*—common means toward the “great object” of the dualist constitutional design asserted by Madison in *The Federalist No. 10*—i.e., to provide security against the danger of a majority faction’s pursuit of passion or interest “adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁹⁴

Bruce Ackerman briefly contemplated a similar interpretive objective, and dismissed it.

[I]t is simply impossible to say how the people of today *would* decide an issue *if they mobilized their political energies and successfully hammered out a new constitutional solution*. . . . Only a fool would predict the outcome of this hypothetical higher lawmaking process on the basis of the “soft” opinions expressed during a period of normal political life. . . . [D]uring normal politics, the People simply do not exist; they can only be represented by “stand-ins.”⁹⁵

Yet, confronting challenges in executing a goal versus developing an understanding of that goal’s desirability, raise entirely different issues. A highly desirable objective might make worthwhile costly methods for implementation. Ackerman does not address whether, apart from issues of practicability, this counterfactual—that is, identifying the choices the sovereign living People would make if they engaged in constitutional politics—might constitute a conceptually ideal goal for constitutional interpretation. Beyond this, Ackerman dismisses this interpretive goal in the context of assuming a particular interpretive method—that is, making such predictions “*on the basis of* the ‘soft’ opinions expressed during a period of normal political life.”⁹⁶ He does not address whether such an interpretive goal might be more attainable if pursued on bases deeper than the ebb and flow of “soft” opinions in normal politics.⁹⁷

for the process benefits of participation, but for the *results*—the choices—emanating from their constitutional politics.

94. THE FEDERALIST NO. 10, *supra* note 90, at 75 (James Madison).

95. ACKERMAN, *supra* note 56, at 263 (emphasis added).

96. *Id.* (emphasis added).

97. Other legal contexts require counterfactual speculation, and relevant frames of reference provide sufficiently reliable guidance. Determining whether a defendant’s negligent conduct was a cause-in-fact of a plaintiff’s injury requires answering a counterfactual question—whether, but for the defendant’s breach, the plaintiff’s injury would not have occurred. Perhaps a better analogy: Determining whether an employer engaged in illegal discrimination can require answering the counterfactual question—whether, but for

Still, one might suppose that any interpretive method in pursuit of my suggested interpretive mission necessarily can promise only contingent answers within a range of plausible interpretive results. Compounding this indeterminacy are questions about ultimate rules of recognition—that is, the procedures the People today would choose, if they thought about it, for creating their preferred constitutional policy. How can one contemplate the choices the People today would make in constitutional politics if, as some appropriately argue, they could make constitutional choices through as-yet unspecified amendment procedures?⁹⁸

These indeterminacies confirm that any use of Article III to achieve the same ends as those served by Article V (or other) amendment procedures must be far from the preferred option. The more one seeks to fulfill this interpretive mission by reference to some process of constitutional politics that contemplates counting votes—as does Article V itself—the more indeterminate the results must be. One should note, however, that common law courts have managed to serve their political community without referring to voting procedures.⁹⁹ For better or worse, the common law provides its own rule of recognition: the decisions of judges, guided by—and in service of—the court’s relevant political community and that community’s prevailing values.¹⁰⁰

racism (or but for whistleblowing, or other prohibited reasons), the employer would not have fired an employee. If in an equal protection claim, the challenger proves that a racially discriminatory purpose was “a motivating factor” for a facially neutral policy, the government must prove that “the same decision would have resulted even had the impermissible purpose not been considered.” *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 & n.21 (1977).

98. See Amar, *Popular Sovereignty and Constitutional Amendment*, *supra* note 88, at 89, 90, 104. Indeed, Ackerman’s suggestion that the People amended the inherited Constitution through the 1936 elections without considering and ratifying constitutional text implies a move toward an unwritten constitution, or a Constitution with unwritten components politically created by the people. See Ackerman, *supra* note 59, at 81–82 (discussing three fundamental changes in American political life that led to Court opinions that “operate today as the functional equivalent of formal constitutional amendments”). Such nontextual constitutional decisions by a sovereign people who do not reveal their presence through clearly identified procedures themselves would seem to require a new concept of both constitutional creation and interpretation.

99. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUES* (1992) (arguing that common law courts can serve their relevant community’s norms by “updating” statutes that no longer fit the legal landscape).

100. See, e.g., OLIVER WENDELL HOLMES, *THE COMMON LAW* 123–24 (Dover Publications, Inc. 1991) (1881) (A common law judge should decide questions of law by representing “the common sense of the community.”). In the common law context, courts interpret community norms by presuming fundamental societal continuities with respect to which incremental adjustments in law, responding to incremental social change, might

An imperfect route to a well-defined destination might be better than a clear route to an ill-conceived end. Methodological imperfections cannot be identified, let alone cured, unless the governing mission has been specified. Toward identifying the choices the living People would make if they engaged in constitutional politics, might the aging Constitution provide imperfect, but meaningful evidence, so that such counterfactual speculation can be based on much more than "the 'soft' opinions expressed during a period of normal political life?"¹⁰¹ If so, responding to the Antifederalists, one might have the beginnings of a rationale for constraining the legislative expression of the sovereign living electorate's right of self-governance by reference to the aging Constitution. Furthermore, responding to the Formalists' rule of law concerns, one might have the beginnings of a methodological framework for determining how past constitutional choices provide evidence of the choices the living People would make if they engaged in constitutional politics.¹⁰² Finally, one might have a

be made. Cf. CALABRESI, *supra* note 99, at 3–4 (discussing "organic" and "incremental" common law change in a context of stare decisis "to meet the needs of changing times and . . . the demands of changing majorities").

101. ACKERMAN, *supra* note 56, at 263.

102. One might question whether my posited goal for judicial review—to identify the choices that the sovereign living electorate would make if it engaged in constitutional politics—is a conceptually coherent goal for interpreting legal text. It seeks the counterfactual intentions of people who did not choose the interpreted text. In this way, it has connections to Andrei Marmor's "third meaning of meaning":

Given that x is the meaning attributed to, for instance a text T , and x is not the literal meaning of T , nor is it the meaning intended by its author, then the attribution of meaning x to T can only be understood . . . on the basis of certain assumptions a certain fictitious or stipulated speaker would have meant x by expressing T . In other words, an interpretive statement is either a statement on the communicative intentions of the actual speaker, or else it must be a counterfactual statement, characterizing the communication intentions of a stipulated hypothetical speaker, whose identity and nature are either explicitly defined or, as is more often the case, presupposed by the particular interpretation offered.

MARMOR, *supra* note 17, at 23 (footnote omitted). For further discussion of Marmor's views about interpretation as identifying the counterfactual intentions of a hypothetical speaker, see *infra* notes 376–78 and accompanying text. My suggested interpretive mission does not seek the counterfactual intent the People today would have, if they were to choose the Constitution's text. Rather, it seeks the counterfactual intent the People today would have, if they were to engage in the politics of constitutional creation. For Marmor's third meaning of meaning, the interpretive goal is to ascertain the meaning of text. For the mission of identifying the choices the living electorate would make if they engaged in constitutional politics, constitutional text is not an *a priori* starting point; rather, its relevance and significance remains to be explored. Whether the inherited text is relevant to that interpretive mission, and *how* such counterfactual intentions of the People today might plausibly be ascertained, are questions of interpretive *method*, to which this article now turns.

frame of reference for identifying and evaluating other methods for better serving this interpretive ideal, while better serving the rule of law.¹⁰³ In what follows, we will consider whether positing a goal for Article III interpretation that is the same as the systemic goal for Article V amendment (all in service of the sovereign living electorate) is practicable.

IV. BEFORE INTERPRETATION AND BEYOND ANTIFIDELITY: IS THE AGING CONSTITUTION RELEVANT FOR IDENTIFYING THE CHOICES THE SOVEREIGN LIVING PEOPLE WOULD MAKE IF THEY ENGAGED IN CONSTITUTIONAL POLITICS?

If one contemplates a goal of identifying the choices the sovereign living People would make if engaged in constitutional politics not only for Article V creation, but also for Article III interpretation, the question arises: Must each generation of the People's Jeffersonian agents create a new Constitution, or might their Hamiltonian agents somehow approach such an interpretive agenda with the inherited aging Constitution?

The Antifidelistes deny that there is sufficient similarity between past constitutional electorates and the People today as to make the aging Constitution an appropriate basis for current governance.¹⁰⁴ Klarman asserts that the Constitution does not "deserve our fidelity at all," because there is no reason to believe "that Framers who lived two hundred years ago, inhabited a radically different world, and possessed radically different ideas would have anything useful to say about how we should govern ourselves today."¹⁰⁵

Klarman focuses on certain stark differences between the eighteenth-century Framers and modern Americans—in values, ma-

103. As I argued two decades ago, if judicial supremacy were challenged and superseded—for example, by a regime of congressional supremacy—the problems of interpretive indeterminacy could be mitigated. Despite having become so dysfunctional, Article I processes could play a role in declaring what the People today would choose for their constitutional policies, could render Article III interpretations more legitimate, and could mitigate the concerns of those seeking a more determinate rule of recognition. *See generally* Chang, *Critique*, *supra* note 8. Others have proposed different procedures by which the People's agents might supersede judicial interpretations without changing constitutional text through Article V (or other) procedures.

104. *See* Klarman, *supra* note 15, at 381 (arguing that "today's generation [should not] be ruled from the grave").

105. *Id.*

terial circumstances, and factual assumptions.¹⁰⁶ On material circumstances, he makes familiar observations about changes in technology and the evolution of a national economy.¹⁰⁷ On factual assumptions, Klarman contends that the Framers (wrongly) believed that “the Southern population would grow more quickly than the Northern” and that political parties would not dominate the shape of national politics.¹⁰⁸ On values, he points to the racism and sexism of the Framers—many of whom embraced or tolerated notions of blacks as the property of whites and wives as the property of husbands.¹⁰⁹ Klarman suggests that these differences “might have inspired different constitutional commitments.”¹¹⁰ Do these differences justify rejecting originalism—and even the inherited Constitution itself?

Societal change proceeds within a context of fundamental continuities. There are, of course, continuities of human nature, with its contending characteristics of altruism and self-interest, caution and recklessness, optimism and fear, trust and suspicion, rationality and superstition, kindness and cruelty, diligence and sloth, and so on. There are continuities of popular culture, such that one can recognize *Uncle Tom’s Cabin*, *Porgy and Bess*, or *West Side Story* as part of American culture, and the *Geisha*, or the Samurai, or *Godzilla* as part of Japanese culture. There are continuities of political culture, as one recognizes love for the stars and stripes, commitment to individual liberty, declaration that “all men are created equal,” and defense of a right to bear arms as ongoing American strains.

Many disciplines of political science and history posit significant continuities in American political culture, such that it makes sense to explore an ongoing “liberal tradition,”¹¹¹ or ongoing pat-

106. *See id.* at 383–87.

107. *Id.* at 384–85.

108. *Id.* at 385–86.

109. *Id.* at 383–84.

110. *Id.* at 384–85. By this, he seems to posit that the Framers might have made different choices if their world had been ours.

111. *See generally* LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955). Hartz posited that American political culture developed enduring characteristics from a starting point of Lockean liberalism and the absence of feudal hierarchies. *See id.* at 46. Indeed, he saw a “fixed, dogmatic liberalism of a liberal way of life.” *Id.* at 9. At other points, Hartz was more explicit in presuming fundamental continuities in American political culture. Discussing the absence of religious messianic spirit animating the American Revolution, Hartz said:

terms of “American political development,”¹¹² or ongoing facets of “the political character of American citizens,”¹¹³ or ongoing “multiple traditions in America.”¹¹⁴ These schools of thought posit such continuities despite obvious changes through the generations in physical circumstances, political issues, policy responses, and Ackerman’s “soft” variations in public opinion. Important for present purposes is not which among these different views might be correct, but that each posits the existence of an American political culture, or a public American character, that manifests fundamental thematic continuities across generations.¹¹⁵

Not only traditionalists, but progressive constitutional scholars as well, recognize meaningful continuities between the first and the current generations of Americans. Larry Simon recognizes that the Constitution, “by virtue of our culture and its socialization processes,” is a manifestation of values that “are embedded in our consciousness as constituent parts of our self-identities.”¹¹⁶

For if the messianic spirit does not arise in the course of a country’s national revolution, when is it ever going to arise? . . . The fact that the Americans remained politically sober in 1776 was, in other words, a fairly good sign that they were going to remain that way during the modern age which followed

. . . .
Id. at 43.

112. See generally KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004) (positing the study of “American political development” as a search for themes of continuity and change in relating current practices and structures to a “historical construction of politics”).

113. See generally ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* (1985) (discussing the role of individualism in shaping American political culture); ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (1992) (discussing the institutions Americans have developed for living together).

114. See, e.g., Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 558–63 (1993) (challenging interpretations of American political culture as homogeneously “liberal” or “republican” with an alternative interpretation positing an ongoing competition between liberalism versus prejudices based on race, ethnicity, religion, and gender); see also LAWRENCE FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE* 2–6 (1990) (discussing how Americans from diverse backgrounds formed a political culture).

115. Indeed, some of the differences among these disciplines are of emphasis only. Orren and Skowronek, as well as Rogers Smith, take Hartz to task for his emphasis of American consensus, and neglect of real conflict. See ORREN & SKOWRONEK, *supra* note 112, at 56–60; Smith, *supra* note 114, at 563–64. But Hartz cautioned that his views were not intended “to obscure or to minimize the nature of the internal conflicts which have characterized American political life.” HARTZ, *supra* note 111, at 14.

116. Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1506 (1985). Ultimately, however, Simon raises questions similar to those posed by Klarman: How to know what the consensus was; how to determine whether it had changed; and what those changes imply about what

Positing both continuity and change, he suggests that “we might favor some sort of rebuttable originalist presumption,” based on “the probable falsity of claims that the deep consensus had changed.”¹¹⁷ Simon deems it “reasonable to [posit] that any deep consensus that generated adoption of some provision of the Bill of Rights (or an amendment) would have some duration through time,” while acknowledging that “it seems entirely unlikely that it would remain fixed forever.”¹¹⁸ Jack Balkin and Reva Siegel write of a “redemptive constitutionalism” that seeks “a new constitutional vision that better articulates *enduring* constitutional values.”¹¹⁹

Indeed, on the most fundamental facet of the constitutional design, our prevailing political culture manifests an ongoing belief in the People’s sovereignty. We recently have sought to export popular governance to people with cultures and traditions very different from our own.¹²⁰ Beyond this, it hardly seems plausible that our political culture has changed so much that the People reject the dualist idea that there should be a body of supreme law constraining the everyday discretion of government officials and the voters they represent.¹²¹ Madison’s discussion of minority faction resonates as if he were writing today about “special interests” and their pernicious influence on government.¹²² His concept

the Constitution should be deemed to mean. *Compare id.* at 1508, with Klarman, *supra* note 15, at 402, 406.

117. Simon, *supra* note 116, at 1507–08.

118. *Id.* at 1507.

119. Jack Balkin & Reva Siegel, *Introduction* to THE CONSTITUTION IN 2020 1, 6 (Jack Balkin & Reva Siegel eds., 2009) (emphasis added).

120. *See, e.g.*, George W. Bush, President, United States of America, Remarks at the 20th Anniversary of the National Endowment for Democracy (Nov. 6, 2003), *available at* <http://www.ned.org/george-w-bush/remarks-by-president-george-w-bush-at-the-20th-anniversary> (discussing America’s commitment to democracy in the Middle East).

121. True, they might not adopt the specific amendment procedures of Article V. *See supra* notes 86, 90; *infra* note 337. They might not adopt equal representation of each state in the Senate. Perhaps they would. Tradition has an intrinsic appeal.

122. *See* THE FEDERALIST NO. 10, *supra* note 90, at 72 (James Madison). In *The Federalist No. 10*, James Madison defined a “faction” as “a number of citizens . . . actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *Id.* He urged that “secur[ing] the public good” against the danger of majority factions, in a manner consistent with popular sovereignty, was “the great object” of the constitutional design. *Id.* at 75. Hamilton relied on political self-constraint in justifying the enforcement of constitutional mandates by judges who hold office “during good behavior.” THE FEDERALIST NO. 78, *supra* note 90, at 463–65 at 469 (Alexander Hamilton) (emphasis omitted); *see id.* at 468 (Judicial independence is needed to guard the Constitution from the effects of “ill humors . . . among the people themselves.”).

of majority faction and Hamilton's admonition about the dangerous "arts of designing men, or the influence of particular conjunctures"¹²³—the propositions that political majorities might support policies "adverse to the . . . permanent and aggregate interest of the community"¹²⁴—are familiar in a nation struggling with (at least temporary public support for) deficit spending, offshore oil drilling, Guantanamo Bay incarcerating, and Muslim scapegoating, to name just a few issues.¹²⁵

The dualist idea of a superior law to secure a greater commitment to selected values than Congress might be trusted to respect not only is part of the American tradition, but also seems part of the ongoing mindset of the American people.¹²⁶ The polity considers *new* amendments to the Constitution—protecting the flag, protecting the unborn, protecting traditional marriage, and so on. Each of these proposals seeks to entrench selected values, securing them from potential dilution or repeal by a Congress that represents a predictably fickle national electorate. The Equal Rights Amendment ("ERA") was not ratified for many reasons—but it is implausible to suppose that among them was the sovereign People's categorical rejection of political self-constraint through constitutional dualism.¹²⁷

123. THE FEDERALIST NO. 78, *supra* note 90, at 468 (Alexander Hamilton).

124. THE FEDERALIST NO. 10, *supra* note 90, at 72 (James Madison).

125. The Senate's six-year terms reflect precommitment to a dynamic of accountability enabling Senators to exercise judgment more insulated from momentary political pressures. See THE FEDERALIST NO. 63, *supra* note 90, at 382–83 (James Madison) (defending bicameralism, and the Senate's six-year term, as providing a "temperate and respectable body of citizens . . . to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind"); see also ELSTER, *supra* note 75, at 91 ("[P]eriodic elections are [viewed as] the *electorate's* method of binding itself and of protecting itself against its own impulsiveness."). But see JON ELSTER, ULYSSES UNBOUND 90 (2000) [hereinafter ELSTER, ULYSSES UNBOUND] (explaining that periodic elections might be devices to protect politicians from voters, rather than voters from themselves).

126. Hartz views Madison's notions about the factional pursuit of passion or interest as an erroneous conceptualization of human nature. HARTZ, *supra* note 111, at 84. In so critiquing Madison, Hartz emphasizes his own views that the Constitution has survived so long "because fundamental value struggles have not been characteristic of the United States." *Id.* at 85. Many would disagree that America was a land without conflict—including, foremost, those who were enslaved and others who were concerned about slavery. See *supra* notes 114–15. What is important for our purposes is not Hartz's view that the system the Federalists created was predicated on false premises, but that there are fundamental characteristics of this political culture that are historically identifiable, explainable, and persistent through the generations.

127. See Chang, *Conflict*, *supra* note 33, at 865. Thirty-five states voted to ratify the proposed amendment. Under Article V, thirty-eight were required for ratification. The

Indeed, nowhere (but in law review articles) do people seriously urge abandoning constitutionalism. A provocative Attorney General might question judicial supremacy;¹²⁸ a President might seek to pack the Court.¹²⁹ But even these end-runs around the fundamental principles for enforcing Article VI constitutional supremacy through Article III adjudication fall flat against the wall of conventional wisdom. These observations do not preclude speculation that the sovereign living People—if they engaged in constitutional politics—might repudiate constitutionalism, or even popular sovereignty. But they support at least a presumption of an ongoing sovereign embrace of these fundamentals of our political culture.

Might there be continuities in the *particular* values selected by ratification generations for special constitutional protection? Despite the obvious changes in material circumstances on which Klarman focused,¹³⁰ people today relate to their material circumstances as did those in the eighteenth century. In our culture, commerce, transportation, communication, production, consumption, and other economic activities, continue to define the relationship between people and the material world. One would suppose that the Constitution’s creators valued speed, wealth, and work, and in this sense, were not so different from people today.¹³¹

most likely reason the amendment “failed” involved recognition that the Court had already interpreted the equal protection clause *as if* the ERA had been ratified. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976) (subjecting gender classifications to “intermediate scrutiny”); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (subjecting gender classifications to “strict scrutiny”). People might well have feared what more the Court might do if the ERA actually were ratified.

128. During the Reagan Administration, Attorney General Meese challenged judicial supremacy:

What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. . . . To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.

Edwin Meese III, Attorney General, United States of America, Address Before the American Bar Association (July 9, 1985), *available at* <http://www.fed-soc.org/resources/id.49/default.asp>.

129. *See, e.g.*, Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043 (1994) (analyzing Roosevelt’s attempt “to pack the Court”).

130. Klarman, *supra* note 15, at 384–85.

131. *See* HARTZ, *supra* note 111, at 135 (“[T]he dream of a new and greater wealth doubled the desire to protect wealth in general, so that the acceptance of the Hamiltonian restraints was based, half-consciously, on a judgment of the future.”). Today, the American

People egoistically valued their own convenience and comfort more than that of their neighbors, then as now. As rational cost-benefit calculators, people sought more of society's benefits, and fewer of society's burdens, then as now.¹³² Such are the fundamental behavioral premises on which deterrence and incentive policies have been predicated, then as now.¹³³

Consider values beyond wealth creation. In particular, consider the normative *discontinuity* on which Klarman especially focuses: the Framers' views that blacks and women should be treated as the property of white men.¹³⁴ These views were challenged even in their time. They were challenged by the competing norm that all humans—"created equal, . . . [and] endowed by their Creator with certain unalienable Rights"—have equal moral worth.¹³⁵ It is true that the People of 1787, and even those who ratified the Equal Protection Clause in 1868, implemented "created equal" in deeply flawed ways, because they were so captured by racism and sexism.¹³⁶ In this sense, indeed, those generations seem very different from the People today.

Yet, implementation of "created equal" today, though improved, remains woefully incomplete. Though it no longer misshapes pub-

debate between those favoring "free trade" and those favoring "fair trade" reflects an ongoing consensus that wealth creation is good for the permanent and aggregate interests of the community—despite differences about the relative merits of unbridled competition versus protectionism as a means to that end.

132. Hartz views the failure of Marxism to make inroads in America during the Depression as "illustrat[ing] the persistence of the American liberal habit in the face of the most serious economic difficulties." HARTZ, *supra* note 111, at 282–83. Right or not, there is, at least, another side to the proposition that variations in material circumstances through time preclude a continuity of fundamental, constitutive components of American political ideology.

133. Compare James R. Acker, *The Death Penalty: An American History*, 6 CONTEMP. JUST. REV. 169, 173 (noting that the founding generation "subscribed to the general deterrence value of the death penalty"), with REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 79 (2004) (explaining that "the best way to deter crime is to enforce existing laws . . . [such as] the death penalty in murder cases"). The copyright power was justified by the Constitution's text as a means to "promote the Progress of Science and the useful Arts," see U.S. CONST., art. I, § 8, and continues to be exercised toward those behavior-influencing ends today, see, e.g., *Apple v. Franklin*, 714 F.2d 1240, 1254 (3d Cir. 1983) (declaring that 1980 amendments to the Copyright Act reflected "Congress' receptivity to new technology and its desire to encourage, through the copyright laws, continued imagination and creativity in computer programming").

134. Klarman, *supra* note 15, at 383–84.

135. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 235–36 (1992).

136. See WOOD, *supra* note 135, at 236.

lic policy, racism is far from a mere memory.¹³⁷ Sexism was dominant until broadly challenged during the 1960s and 1970s.¹³⁸ Homophobia remains widespread.¹³⁹ Discrimination because of appearance, weight, and other intrinsic attributes of personhood remain untouched by law, and pervasive in social intercourse.¹⁴⁰ Someday, our posterity might view the tolerance for poverty, homelessness, and unequal access to medical care as our own failures to fulfill “created equal.”¹⁴¹ From this broader perspective, in this area where Klarman sees irretrievable discontinuity,¹⁴² we again are *like* the People of 1787 and 1868. What has persisted through the generations is a matrix of *starkly competing values*—the “created equal” ideal compromised by the racism, sexism, homophobia, and the egoism that allow the smug and the comfortable to tolerate, and sometimes even to reinforce, the desperate circumstances of others.¹⁴³

137. Newly enacted racial classifications are still closely scrutinized because of a probability they were enacted because of racial prejudice. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.”).

138. Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1396 (1997).

139. *Id.* at 1427.

140. *Id.* at 1423–24.

141. See Deborah J. Schildkraut, *Defining American Identity in the Twenty-First Century: How Much “There” is There?*, 69 *J. POL.* 597, 602 (2007). Schildkraut’s studies suggest a continuing consensus on “constitutive norms” of American ideology—such as liberalism (i.e., respecting American institutions and the rule of law; pursuing economic success through hard work; and tolerance for offending views); civic republicanism (i.e., public service; being informed about public affairs; and being involved in local and national politics); and ethnoculturalism (i.e., being born in America; being Christian; and being white). *Id.* at 602 tbl.1. She sees a stable “collective identity” even in the face of increased immigration and diversity of origin. See *id.* at 598, 611. She notes that “there is a great deal of consensus on the norms, values, and behaviors that constitute American identity,” *id.* at 605, and that while there is some variation among different racial and ethnic groups, a majority of each group shares these “constitutive norms.” *Id.* at 606. Explanation for this continuity is perhaps suggested by another “constitutive norm” that she identifies—“incorporationism”—which she defines as an effort to balance concerns for “carrying on the cultural traditions of one’s ancestors” with an effort to “[b]lend [] into the larger society.” *Id.* at 602 tbl.1.

142. See Klarman, *supra* note 15, at 387, 411.

143. See Smith, *supra* note 114, at 549 (contesting interpretations of American political culture as predominantly “liberal,” and positing, instead, American political ideologies simultaneously embracing equality and “other fixed, ascriptive systems of unequal status”). “At its heart, the multiple-traditions thesis holds that the definitive feature of American political culture has been not its liberal, republican, or ‘ascriptive Americanist’ [that is, racist and sexist] elements, but, rather, this more complex pattern of apparently inconsistent combinations of the traditions, accompanied by recurring conflicts.” *Id.* at 558. Smith sees this American pattern “[i]n all eras, including our own.” *Id.* at 559.

These points involve the interpretation not simply of the Constitution, but of American political culture.¹⁴⁴ There may be differences over the centuries, but there are fundamental continuities as well—in a commitment to popular sovereignty, to constitutional dualism, and even to particular values, and *relationships* among starkly competing values, that underlie the substantive and strategic components of original meanings. While political details and manifestations evolve, *fundamentals* may endure—fundamentals potentially significant in establishing original constitutional meaning as a serviceable point of departure for identifying the choices the sovereign living People would make if engaged in constitutional politics.¹⁴⁵

V. TOWARD SERVING “WE THE PEOPLE” TODAY BY INTERPRETING THE AGING CONSTITUTION

A. *Complete Constitutional Meaning*

1. The Under-Considered Strategic Component Implicit in Dualism

Suppose that the Supreme Court decided *Brown* in a way that enforced what is conventionally viewed as the original meaning of equal protection—states remained free to mandate racial segregation.¹⁴⁶ Consider the implications of such a decision. Although it is conceivable that the People in 1954, if engaged in constitutional politics, might have framed their supreme law as permitting such discrimination, this counterfactual speculation seems far less plausible for the People in 1964—let alone 1974, much less today.¹⁴⁷ Congress enacted the Civil Rights Act of 1964, which not

144. They concern an interpretation of our “preconstitutional” rule[s]—that is, a principle of political philosophy that justifies our obedience to the Constitution.” Klarman, *supra* note 15, at 382.

145. Whittington states that “living constitutionalism hinges the legitimacy of judicial review and constitutional law on its consistency with present desires and needs. Determining present desires and needs, however, requires no reference to past intentions of either the founders or of judges.” WHITTINGTON, *supra* note 51, at 199. This article’s reconceptualized originalism contests this proposition.

146. See BERGER, *supra* note 43, at 265–66; Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 25 (1955); *infra* text accompanying notes 204–06.

147. If it is plausible that the living electorate would fail to “correct” *either* an originalist decision rejecting *Brown’s* doctrine, *or* the nonoriginalist *Brown* as actually decided, then failure to use the corrective process of Article V cannot be a basis to infer the sove-

only prohibited state action that was permitted by the Fourteenth Amendment’s original meaning, but also reached private racial discrimination.¹⁴⁸ It is not plausible that the sovereign living electorate, through its representatives in Congress, could simultaneously enact such legislation governing the nation, while remaining committed to the noncoherent Dworkinian “checkerboard” of racial equality established in the Equal Protection Clause by the People of 1868.¹⁴⁹ On matters of racial justice, the conventional account of the Fourteenth Amendment’s original meaning cannot be justified as providing the best available reading of the choices the living People today would make if engaged in constitutional politics.

Conventional originalism’s problem is not only its failure to identify the living electorate as the sovereign that Article III agents should feel bound to serve, but also its failure to account for the dualist agenda in fulfilling the interpretive task. Constitutional mandates establish national law, whether limiting the discretion of states (such as through section 1 of the Fourteenth Amendment) or the federal government (such as through the Tenth Amendment). Why would a sovereign People not choose simply to create a national Congress, create procedures through which that Congress could enact legislation, and then unleash that Congress to enact whatever policies it wished—including changes in the original instrument of creation?¹⁵⁰ This question seeks a *systemically strategic* reason for constitutionalizing national policy—that is, for differentiating Article I from Article V (and VII) procedures for making national law, for defining law made through Article V (and VII) as supreme, and for designating

reign living electorate’s endorsement of constitutional meaning, as judicially construed. Similarly, failure to amend the Constitution to supersede the decidedly nonoriginalist decision in *Roe v. Wade*, 410 U.S. 113 (1973), no more validates *Roe* than failure to amend the Constitution would, if *Roe* were overruled.

148. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201–02, 78 Stat. 241, 243–44 (codified as amended at 42 U.S.C. §§ 2000a, 2000a-1 (2006)).

149. See RONALD DWORKIN, *LAW’S EMPIRE* 178–83 (1986) (characterizing commitment to a principle with exceptions that compromise that principle as a “checkerboard” solution). Perhaps reference to “lower track” enactments such as the Civil Rights Act of 1964 is a “foolish” basis on which to speculate about choices the sovereign living electorate would make if it engaged in constitutional politics. ACKERMAN, *supra* note 56, at 263. But such enactments are, at least, windows on the prevailing values and preferences of the national electorate. See *supra* text accompanying notes 95–98.

150. See MARMOR, *supra* note 17, at 149.

as invalid Article I (and other) creations that are inconsistent with mandates created through Article V (and VII).¹⁵¹

A systemically strategic reason for constitutionalizing national policy is to secure a greater commitment to constitutionally selected values than Congress—more precisely, the Article I legislative process—might be trusted to respect.¹⁵² The People choose to constitutionalize the procedures for enacting legislation, immunizing them from reform by mere congressional choice, to secure a greater commitment to values and policies relevant to politically accountable lawmaking than the Article I legislative process might be trusted to respect. The substantive principle that Congress is a limited government of enumerated powers is constitutionalized to secure a greater commitment to state autonomy than the Article I legislative process might be trusted to respect.¹⁵³ Substantive protections for the freedom of speech are

151. Andrei Marmor identifies similar essential attributes of a written constitution. *See id.* at 142–43 (identifying five main features of a written constitution: supremacy, longevity, rigidity, moral content, and generality or abstraction).

152. Because all constitutional constraints, whether on Congress directly, on the President, or on the states, establish national law, all can be understood as substitutes for simply empowering Congress (again, more precisely, Article I actors) to enact any desired policy—whether about congressional power, the President's, or that of the states. *See infra* notes 260. Marmor recognizes this point. *See MARMOR, supra* note 17, at 149 & n.16. Thus, the President may make treaties only with the advice and consent of the Senate. This restriction on the President may reflect the substantive judgment that committing the nation to obligations with foreign nations should not be the product of the President's judgment alone, because the President alone is not a sufficiently reliable representative of the national electorate for such purposes. But this substantive policy is *constitutionalized* to prevent Congress from enacting legislation delegating such treaty power to the President alone. Again, the strategic function of constitutionalism is derived from considering why people would choose to establish one process for creating one kind of rule, and another process for creating another kind of rule. The relevant national rulemaking processes are Article I and Article V (and, originally, Article VII), and a strategic reason for establishing national policies as constitutional mandates—even when the substance of those policies restricts actors other than Congress—is to secure a greater commitment to selected values than the Article I legislative process might be trusted to respect. *See Chang, Conflict, supra* note 33, at 767–68; Chang, *Critique, supra* note 8, at 286–87.

153. Constitutionalism—or the supremacy of law created by Articles VII and V over that created by Article I—is merely one device in our system designed to secure the permanent and aggregate interests of the community against the short-term and particular interests of the part. *See THE FEDERALIST NO. 10, supra* note 90, at 71 (James Madison); ELSTER, *supra* note 75, at 91 (“Periodic elections are the electorate’s method of binding itself and of protecting itself against its own impulsiveness.” (emphasis omitted)). Later, Elster repudiated this notion of periodic elections, deeming them instead as devices to protect politicians from voters, rather than voters from themselves. *See ELSTER, ULYSSES UNBOUND, supra* note 125, at 90. Yet, a conventional understanding of why the Senate was created with six-year terms is precisely the notion of precommitment to a structure of accountability that would allow senators to exercise judgment from more insulated from momentary political pressures. *See THE FEDERALIST NO. 63, supra* note 90, at 384 (James

constitutionalized to secure a greater commitment to reasons for valuing that freedom than the Article I legislative process might be trusted to respect. This strategic function underlies the choices to constitutionalize the President’s power as Commander-in-Chief; and to constitutionalize substantive protections for the free exercise of religion, for equal protection by the states, for the rights of criminal suspects—indeed, it underlies all of the Constitution’s mandates.¹⁵⁴ What Elster calls “precommitment,” Ackerman calls “dualism,” and others have called “political self-constraint,” is a strategy for people who question their own ability in ordinary political contests to subordinate short-term personal interests and to account adequately for the long-term general welfare.¹⁵⁵

Conventional originalism, as conceptualized by proponents (such as Robert Bork and Keith Whittington) and detractors (such as Michael Klarman), focuses exclusively on *substantive*

Madison) (defending bicameralism, and the Senate’s six-year term, as providing a “temperate and respectable body of citizens . . . to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind”).

154. See *supra* note 152.

155. ELSTER, ULYSSES UNBOUND, *supra* note 125, at 99 (discussing “precommitment”); Ackerman, *supra* note 18, at 1039 (discussing constitutional “dualism”); Chang, *Conflict*, *supra* note 33, at 767–84 (discussing “political self-constraint”); Chang, *Critique*, *supra* note 8, at 293–95 (same). James Madison’s prescriptions for curbing governance by majority faction were predicated on a notion of constitutionalism as political self-constraint, as was Alexander Hamilton’s rationale for enforcing the Constitution’s mandates through Article III judicial review. See *supra* note 122. Hamilton said: “This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves” THE FEDERALIST NO. 78, *supra* note 90, at 468 (Alexander Hamilton) (emphasis added).

Beyond the People’s political self-constraint, a second reason for securing a greater commitment to selected values than Congress may be trusted to respect rests in concerns that officials might seek to insulate themselves from electoral retribution for deviating from prevailing norms. Thus, constitutional dualism can seek to secure optimal representative accountability. See *id.* (explaining that judicial independence is needed to guard the Constitution against “the cabals of the representative body”); Chang, *Critique*, *supra* note 8, at 295–99 (discussing constitutionalism as a device to ensure optimal governmental accountability). See generally Michael Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997) (discussing judicial review as a device to thwart efforts by government officials to entrench themselves in power). A third reason people might have for constitutional dualism depends on an opportunistic effort to perpetuate an extraordinary political advantage. Indeed, this is a plausible understanding of at least part of the strategic rationale for the Equal Protection Clause of the Fourteenth Amendment. See Chang, *Critique*, *supra* note 8, at 290–93 (noting that equality policies were established as constitutional mandates to prevent legislative erosion once southern states were readmitted to Congress).

constitutional policies.¹⁵⁶ For conventional originalism, the interpretive issue posed by *Brown* asks simply whether the People of 1868 intended to prohibit racial segregation by state governments. Yet, one might also account for the *systemically strategic* reasons for making national policy as supreme constitutional mandates when characterizing a constitutional provision's original meaning. Once accounting for this strategic component—to secure a greater commitment to selected values than Congress might be trusted to respect—could one better connect Ackerman's focus on dualism in Article V (or other modes of) constitutional *creation* to matters of Article III *interpretation*?¹⁵⁷ In particular, might one reconceptualize an interpretative *method* for translating original meaning toward serving the interpretive *mission* of identifying the choices the sovereign living People would make if they engaged in constitutional politics?

2. An Enriched Understanding of the Substantive Component: Accommodating *Starkly Competing Values*

People might choose precommitment for self-constraint when they have starkly competing values, deem one side more pressing in the short-term, another side more important in the long-term, and choose a device to encourage a greater commitment to long-term concerns than they otherwise trust themselves to maintain.¹⁵⁸ Familiar examples of contexts in which individuals might make choices to constrain their own discretion include joining Weight Watchers or Alcoholics Anonymous and getting married. Where people have tempting everyday concerns (the desire to eat too much, drink too much, or philander) that compete with, and undermine, more vulnerable long-term interests (the interest in health or a healthy relationship), they rationally might choose to create mechanisms that encourage, or even force, a greater commitment to their long-term welfare than they otherwise trust themselves to maintain.¹⁵⁹

156. See BORK, *supra* note 9, at 144; WHITTINGTON, *supra* note 51, at 168; Klarman, *supra* note 15, at 381.

157. See ACKERMAN, *supra* note 56, at 139.

158. See Chang, *Conflict*, *supra* note 33, at 767–69, 773–74.

159. See *id.* (discussing choices for self-constraint to secure long-term and vulnerable objectives from erosion by short-term and pressing desires).

In the governmental context, underlying their choices for political self-constraint, a community’s majority might feel an intense impulse for vengeance against those they suspect committed an infamous crime, yet also believe that the long-term interests of the community would be compromised if punishment were inflicted without substantial proof of guilt. A majority might feel offended by minority religious practices, yet also believe as a matter of principle that people should be free to practice religion as conscience requires. A majority might feel immediately offended by minority viewpoints, yet also believe as a matter of principle that all people should be free to express their opinions.

Thus, protections for the freedom of speech accommodated the starkly competing substantive concerns of vigorous political debate versus the natural inclination to suppress obnoxious ideas when one has the power to do so, and strategically sought to secure a greater commitment to the former than Congress was trusted to respect.¹⁶⁰ The principle that Congress is a limited government of enumerated powers accommodated the starkly competing substantive concerns of state autonomy versus a natural inclination of a current congressional majority to pursue its preferred policies to govern the nation, and strategically sought to secure a greater commitment to retained state discretion than Congress was trusted to respect.¹⁶¹

The original meaning of equal protection provides another vivid example. The People in 1868 decided to prohibit the states from pursuing racial discrimination only in particular contexts.¹⁶² States were not to be prohibited from mandating racial segregation, criminalizing interracial marriage, and otherwise reinforcing concerns for social inequality.¹⁶³ The substantive considerations underlying this Dworkinian “checkerboard” involved a compromise between *starkly competing values*—the proposition that all men, created equal, ought to be treated by law as having equal moral worth *versus* the impulses of persistent racism. They chose to constitutionalize this substantive accommodation between starkly competing values for the strategic reason of secur-

160. See *infra* Part V.B.4 (discussing political speech and *Citizens United*).

161. See *infra* Part V.B.3 (discussing federalism and the Commerce Clause).

162. See Bickel, *supra* note 146, at 11–12 (noting that these contexts include: making and enforcing contracts; conveying property; seeking legal redress through the judicial process; and enjoying the protection of a state’s criminal law).

163. *Id.* at 58–59.

ing a greater commitment to equality than Congress was trusted to respect.

This conceptual portrayal of choices to constitutionalize policy might provide a framework for crafting an interpretive method, based on the aging Constitution, for fulfilling the interpretive mission of identifying the choices the sovereign living People would make if they engaged in constitutional politics. Past constitutional choices might provide a basis for actualizing the living People's potential Article V sovereignty through Article III interpretation to the extent that there are meaningful continuities in a commitment to constitutional dualism through the generations, and to the particular values—among starkly competing values—to which past generations of the People chose a greater commitment than they trusted Congress to respect.

3. Intended “Applications” and “Levels of Generality”

Before further exploring methods for “translating” complete original meaning—comprised of both substantive and strategic components—to serve an interpretive mission of identifying choices that the sovereign living People would make if they engaged in constitutional politics of their own, one must confront a position that seeks to escape the frequently inconvenient substance of original meaning. Michael McConnell asserts that “no reputable originalist . . . takes the view that the Framers’ ‘assumptions and expectation about the correct application’ of their principles is controlling.”¹⁶⁴ In McConnell's view, constitutional text should be interpreted “in light of the moral and political *principles* they intended to express.”¹⁶⁵ From this perspective, the original understanding that the “principles” of equal protection did not “apply” to invalidate miscegenation statutes would not necessarily warrant enforcement in post-ratification generations.

The purported distinction between “principle” and “application intentions” begs several questions. First, what does one mean by suggesting that the people created a “*principle*” in ratifying a con-

164. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1284 (1997).

165. *Id.* (emphasis added); see also Mitchell N. Berman, *Originalism and its Discontents (Plus a Thought or Two about Abortion)*, 24 *CONST. COMMENT.* 383, 384 (2007) (“[A]lmost nobody espouses fidelity to the originally expected applications.”).

stitutional provision? Second, what considerations determine how the ratified principle “*applies*” to some challenged policy or practice? Third, and most fundamental, why should original meaning *in any form* be enforced in post-ratification generations?

The Nature of Ratified “Principle.” McConnell himself suggests that the ratifiers’ intent is determinative for identifying the ratified “principle.”¹⁶⁶ Discussing one whose views are far from originalist, McConnell declares that Ronald Dworkin’s embrace of “semantic intention” is consistent with the “mainstream originalist view.”¹⁶⁷ McConnell suggests, for example, based on this concept of “semantic intention,” that the Constitution’s Ex Post Facto Clause “should be read as confined to criminal laws,” because “[w]e know from Madison’s notes . . . that the Framers understood this term to be [so] limited.”¹⁶⁸

McConnell’s focus was to reveal inconsistency in Dworkin’s views.¹⁶⁹ But it also revealed vulnerability in the sweeping proposition that the People’s “application intentions” need not be treated as a component of original meaning. McConnell might have differently stated his contention that the Ex Post Facto Clause “should be read as confined to criminal laws”¹⁷⁰ based on the creators’ intent: The Ex Post Facto Clause should be interpreted to “*apply*” only to criminal laws, because such was the creators’ intent. Although McConnell framed his discussion in terms of the Framers’—rather than the sovereign ratifiers’—semantic intention, the more fundamental proposition seems clear.¹⁷¹ The meaning of broadly framed constitutional text—the meaning of the “principle” created—is a function of the creator’s intent. Such meaning includes unstated but intended “checkerboard” exceptions to a “principle” that the creator could have pursued more broadly—but chose not to.¹⁷²

One can make a similar point about the “level of generality” at which a constitutional provision ought to be construed. McCon-

166. McConnell, *supra* note 164, at 1292.

167. *Id.* at 1280.

168. *Id.*

169. *Id.* at 1269–70.

170. *Id.* at 1280.

171. *See id.* at 1278.

172. *See id.* at 1279; *see also* DWORKIN, *supra* note 149, at 179–81 (discussing “checkerboard” solutions).

nell appropriately connects the “level of generality” question to the “application intention” question.¹⁷³

A genuine commitment to the semantic intentions of the Framers requires the interpreter to seek the level of generality at which the particular language was understood by its Framers. Just as the Ex Post Facto Clause should be read as confined to criminal laws, other provisions of the Constitution should be read in light of their intended scope.¹⁷⁴

Indeed, through his efforts to demonstrate that the Framers of the Equal Protection Clause intended to prohibit racial segregation in public education,¹⁷⁵ McConnell implicitly acknowledges that so-called “application intentions” were an essential component of the constitutional “principle” intended by the creators.

For Whittington, determining the ratifiers’ understanding of a clause, *their* intent as to its scope, and the level of generality *they* understood, supersedes the proposition that their “application intentions” are irrelevant.¹⁷⁶ “[T]he search for intention must be guided by the historical evidence itself. The level of generality at which terms were defined is not an *a priori* theoretical question but a *contextualized historical one*.”¹⁷⁷ This follows naturally from Whittington’s rationale for originalism.¹⁷⁸ If enforcing original meaning is rooted in the People’s actually exercised constitutional sovereignty, demonstrating that they bargained toward an original understanding of “equal protection” that prohibits racial discrimination in all—but only—areas covered by the Civil Rights Act of 1866 renders that position not merely their “application expectation,” but their intended *definition* of constitutional meaning.¹⁷⁹

173. McConnell, *supra* note 164, at 1280–81.

174. *Id.* at 1280.

175. *See id.* at 1283. *See infra* note 206.

176. *See* WHITTINGTON, *supra* note 51, at 58.

177. *Id.* at 187 (emphasis added).

178. *See id.* at 61 (discussing the underlying justifications for originalism).

179. Even revisionist views of equal protection do not claim an original intent to prohibit miscegenation laws. *See* McConnell, *supra* note 164, at 1283 (explaining that the framers intended to prohibit segregated public education); *infra* text accompanying notes 215–20. *Supporters* of the Equal Rights Amendment argued that it would *not* prohibit states from failing to provide for same-sex marriage. *See, e.g., Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 123 (1978) [hereinafter *Equal Rights Amendment Extension*] (testimony of Thomas I. Emerson, Professor, Yale University School of Law); Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at

The Meaning of “Application.” Much of the debate over “application intentions” has responded to Justice Scalia, who suggests that the Constitution’s provisions should be construed as establishing “abstract principles,” but principles with respect to which all “open, widespread, and unchallenged [traditions] that date[] back to the beginning of the Republic” must be deemed permissible.¹⁸⁰ Scalia has said, “I . . . believe that the Eighth Amendment is no mere ‘concrete and dated rule’ but rather an abstract principle. . . . What it abstracts, however, is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel.”¹⁸¹

In an influential critique, Mark Greenberg and Harry Litman conclude that Scalia’s approach of “[d]eriving principles from practices requires the possibility of rejecting practices. . . . Once we are committed to interpreting the . . . Constitution as standing for abstract principles, original practices will have an important role as evidence of the principles, but they cannot be inviolate.”¹⁸² They suggest that for applying a principle in post-ratification generations—e.g., prohibiting “cruel and unusual punishment”—a current perspective about relevant facts *and* values should govern.¹⁸³

For some, the Greenberg-Litman analysis has “demolished” the significance of the ratifiers’ “expected applications” for enforcing original meaning in post-ratification generations.¹⁸⁴ But from the perspective of the sovereign People, as suggested above, any putative distinction between a “principle” as created and their intended “applications” depends on the nature of the principle they

A21. This limited coverage was a function of competing values—“created equal” versus sexism. Chang, *Conflict*, *supra* note 33, at 867. Sometimes people might create unadulterated principles. The First Amendment’s protection of speech might be an example, where *any* content-motivated regulation is prohibited; alternatively, the People might have intended to prohibit content-motivated regulation, except with respect to messages that society views as beyond the pale. *Cf.* LEE BOLLINGER, *THE TOLERANT SOCIETY* 8–9 (1986) (discussing challenges in justifying interpretations of the First Amendment as protecting “extremist” speech).

180. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

181. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 13, 145 (Amy Gutmann ed., 1997).

182. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *GEO. L.J.* 569, 617 (1998).

183. *Id.* at 607.

184. *See, e.g.*, Berman, *supra* note 165, at 385.

intended to create.¹⁸⁵ From the perspective of the ratification generation's judicial agents, where intended original meaning was a

185. See *supra* text accompanying notes 165–68. Greenberg and Litman consider “application expectations” for a statute

requiring people with “contagious diseases” to be quarantined before entering the United States. At the time [of enactment], psoriasis is believed to be contagious. If it is later discovered that it is not, few would consider it inconsistent with originalist principles to allow that people suffering from the disease are not subject to quarantine.

Greenberg & Litman, *supra* note 182, at 585. “Once the original meaning of a provision has been determined, it is difficult to justify failing to determine how that meaning applies to the present case in accordance with the best [i.e., current] understanding of the facts.” *Id.* at 599. Thus, “there must be a flaw in the initially persuasive idea that fidelity to a text’s original meaning requires fidelity to the practices that were originally understood to be consistent with the text.” *Id.* at 586. Identifying this “flaw,” they posit a conflation of two senses in which *words* have meaning. *Id.* One is a word’s meaning established through definition, which they call “strict” meaning. *Id.* at 586–87. A second, which they call “less strict” or “application” meaning, is established through definition, supplemented by the “objects to which a speaker or community of speakers actually applies the term.” *Id.* at 587. They argue that if fidelity to original meaning can entail departing from application expectations—such as whether psoriasis is covered by the quarantine statute—it is because the *words* of the statute (or the notion of “abstract principle” that they attribute to Scalia) have some meaning independent of the creators’ expected applications. *Id.* at 592.

The analysis overlooks the distinction between the meaning of *words* used in a legal provision, and the meaning of *the legal provision itself*. Interpreting the meaning of a legal provision entails more than arithmetically summing or mechanically joining the meaning of individual words. It requires accounting for the context in which the words were used—specifically, that the users of the words intended to create some legal rule. It entails defining the *policy* (or principle) that the words *together* were intended to establish. Thus, on the quarantine statute, one might ask *why* it would be uncontroversial to refrain from enforcing “application expectations” based on changed factual views about what diseases are “communicable.” The intended scope of a rule (or principle), or its intended “application,” depends not only on perceived legislative *facts*, but also on accommodating competing *values*.

Underlying the quarantine statute might be the competing normative concerns for public health and individual liberty. These values imply a concomitant value of accurate fact-finding—not only facts about specific individuals who seek to enter the United States (i.e., judicial facts), but also facts as to what diseases or conditions are, in fact, communicable (i.e., legislative facts). For determining the proper treatment of a condition once thought to be communicable, and now viewed as *not* communicable, it would make sense for *no one* to argue for the earlier, less-well-informed judgment of legislative fact that a particular disease is communicable. The changed factual presupposition renders the public health value not served at all by the original understanding that the statute would cover psoriasis; continuing to so construe the statute would compromise liberty for no reason. Here, fidelity to original values implies departures from original understandings of fact.

But people might disagree not simply about *whether* a disease *is* communicable, but also how communicable and serious a disease *ought* to be before it is *appropriate* to subject a carrier to the quarantine mandate. If *normative* contest and accommodation were the basis for *original intent* about the scope of the quarantine statute’s coverage of, say, syphilis, an interpretive exclusion of that disease based on *values* other than those originally accommodated bears a far more problematic relationship to a goal of interpretive “fidelity.” If *normative* contest and accommodation were the basis for *original intent* about the scope of a constitutional rule or “principle”—such as the competition between a born equal value and racism—discounting the intended “checkerboard” based on values other than those

Dworkinian “checkerboard” forged from starkly competing values—whether the Eighth Amendment’s tolerance for the death penalty, or the Fourteenth Amendment’s tolerance for racial segregation—no plausible judicial *interpretation* would fail to frame doctrine accordingly.

4. A Rationale and Structure for Interpretive “Translation”

For judicial servants of the sovereign People in post-ratification generations, whether aging constitutional provisions should be construed as the “checkerboard” intended by their creators depends on *why* the meaning of aging constitutional provisions matters at all. Lawrence Lessig proposes linguistic translation as a “heuristic device” to consider analogous problems in two interpretive contexts—translating text from one language to another and translating constitutional meaning from one generation to another.¹⁸⁶ He recognizes that “the first choice that a translator must make is . . . about the end that his translation is to serve.”¹⁸⁷ Yet, toward exploring how constitutional translation should be achieved, Lessig adopts the interpretive goal of fidelity to original meaning more as an *a priori* matter than as derived from any identified foundational norm.¹⁸⁸ More specifically, he frames the interpretive goal—the end for translation—as determining how *the originals* would have resolved a question of constitutional policy, *had they decided under current circumstances*.¹⁸⁹

originally accommodated is similarly problematic, if one’s interpretive goal is “fidelity.” Greenberg and Litman do consider whether “we should . . . be cautious in substituting our beliefs about political and ethical matters for historical ones,” *id.* at 604, more so than about scientific or factual matters, *id.* at 605–06. At this point, however, the failure to consider why *any* version of original meaning should be enforced in post-ratification generations becomes critical, for their inquiry has shifted from examining the *nature* of the original meaning created—“principles,” not “applications”—to examining the *manner* in which such meaning should be translated in post-ratification generations.

186. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1189–90 (1993).

187. Lessig, *supra* note 138, at 1371.

188. See *id.* at 1376. It is unclear whether Lessig intends to be prescriptive, or merely descriptive. “The test of translation . . . hangs upon . . . how well it fits, *and justifies*, the history of our constitutional practice; and upon how well it helps us to understand how best to go on.” *Id.* (emphasis added). At other times, he explicitly eschews a claim that courts ought to interpret the Constitution with fidelity to original meaning. “My aim . . . is not to argue for or against fidelity as an interpretive ideal. . . . [G]iven the judiciary’s (at least feigned) commitment to fidelity as its goal . . . [I] ask simply what . . . a practice of fidelity would have to be.” Lessig, *supra* note 186, at 1173.

189. See Lessig, *supra* note 186, at 1237.

Lessig suggests that fidelity “needs a way of reading that preserves meaning despite changes in context.”¹⁹⁰ By context, he means the “range of facts, or values, or assumptions, or structures, or patterns of thought that are relevant to an author’s use of words to convey meaning.”¹⁹¹ Relevant components of context—or “presuppositions”—are those such that, “had they been other than they were when the author first used these words, then the author would have used words other than she did.”¹⁹² Thus, Lessig suggests, interpretation with fidelity to the original meaning requires two steps: first, understanding the original context relevant to the original legal choices; and second, understanding the current context, *with all its relevant changes*, to translate the original meaning appropriately into the current context.¹⁹³ The “two-step” originalist seeks to identify, and to account for, relevant changes between the time of creation and that of application.¹⁹⁴

Lessig imposes a critical limitation for such “translation.” Relevant “presuppositions” are factual propositions on which constitutional policies were predicated, but do not include normative propositions.¹⁹⁵ “[T]here will be some propositions that will be considered truth propositions, and some that will be considered value propositions[.] . . . [T]he more a proposition seems to be a value proposition . . . , the less the translator constrained by structural humility may account for it.”¹⁹⁶

Michael Klarman rejects translated original meaning, based on not only normative concerns about the “dead hand,” but also methodological skepticism.¹⁹⁷ On the latter, he poses three chal-

190. *Id.* at 1177.

191. *Id.* at 1178.

192. *Id.* at 1179–80 (emphasis omitted); *see id.* at 1214. He recognizes that this counterfactual invites charges of hopeless indeterminacy. *Id.* at 1181. He responds that determinacy is not the first goal for interpretation; rather, the first interpretive virtue is that of “fidelity to meaning.” *Id.* at 1181.

193. *Id.* at 1184–85.

194. *See id.* at 1212. For discussion of the distinction between “applying” and defining a constitutional mandate, *see supra* text accompanying notes 164–85.

195. Lessig, *supra* note 186, at 1254–55.

196. *Id.* at 1255; *see id.* at 1259 (“[T]he two-step . . . is not allowed to make changes that turn on changing . . . moral or political presuppositions. Tracking morality . . . is the duty of the political branch; structural humility, the duty of the translative branch.”); *see also id.* at 1213 (contending that it is the translator’s duty “to . . . make[] the *smallest* possible change . . . and still achieve[] fidelity”).

197. *See* Klarman, *supra* note 15, at 387.

lenges: First, “when asking what the Framers would have done under modern circumstances, which aspects of their world do we vary and which do we leave in place?”¹⁹⁸ Second, “how do we calculate what the Founders would have done in light of those changes? That is, in which direction and to what extent do changed circumstances cut?”¹⁹⁹ Third, “even if we could agree on which changed circumstances are relevant and in which direction they cut, we would still need to figure out whether the extent of the change has been sufficient to justify a translation.”²⁰⁰ As we shall see, these methodological objections have traction, especially against Lessig’s fundamental distinction between factual presuppositions (accounted for) and normative presuppositions (not accounted for).

Like Lessig, Klarman frames the interpretive goal for “translation” as determining “what the Framers would have done under modern circumstances.”²⁰¹ I posit the very different interpretive goal of identifying the choices the sovereign living People would make if they engaged in constitutional politics. At first glance, my suggested interpretive goal might seem no more practicable than Lessig’s.²⁰² The following case studies will consider whether—with careful attention to the substantive *and* strategic components of original meaning, and a sensitive exploration of relevant continuities and changes—a reconceptualized interpretive translation might address the Antifederalists’ normative and methodological challenges, as well as the Formalists’ concerns with the rule of law.

Toward these ends, the case studies will elaborate on the following methodological propositions: Fundamental continuities in our constitutional culture suggest an ongoing commitment to

198. *Id.* at 402.

199. *Id.*

200. *Id.* at 406; *see also id.* at 395 (arguing that originalist “translation” suffers hopeless indeterminacy).

201. *Id.* at 402.

202. Klarman connects translation methods to the conceptualization of interpretive goal:

If we treat *all* changed circumstances as relevant variables, then we simply will have converted the Framers into us, and asking how they would resolve a problem is no different from asking how we ourselves would resolve it. Yet a decision to treat some changed circumstances as variables and others as constants seems entirely arbitrary.

Id.

popular sovereignty, to strategic constitutional dualism, and to the particular values that ratifying generations chose to secure against Article I erosion. Furthermore, the People today seek “a more perfect union”—a more perfect pursuit of their constitutionally secured ideals—to much the same extent as did the framers and ratifiers who made the choices originally established through our inherited constitutional text. Thus, if the values originally limiting the ratifiers’ pursuit of their constitutionally secured ideals have since evolved—as, for example, the People today are markedly less captured by the extreme and pervasive racism that originally limited the substantive reach of the Equal Protection Clause in 1868—those posited fundamental continuities suggest that the sovereign living People would choose a proportionately evolved set of constitutional mandates. Properly framed, judicially translated constitutional mandates would serve the same strategic function for the sovereign living People in their political context as the original mandates served for the ratifiers in theirs—securing a greater commitment to the constitutionally favored values than Congress might be trusted to respect. Absent relevant changes in normative or factual presuppositions underlying original meaning, however, one would suppose that if the sovereign People of 1787, 1791, or 1868 made constitutional choices accommodating starkly competing values in a particular way, so would the sovereign living People, if engaged in constitutional politics today.²⁰³

Can interpretation of the aging Constitution serve the strategic constitutionalism of the sovereign living People—albeit imperfectly through Article III—rather than perfectly by creating their own Constitution?

203. Making judgments about the choices the living People would make in constitutional politics based on the concepts and structures’ introduced in the text above, would involve far more than the approach about which Ackerman expressed concern—“predict[ing] the outcome of this hypothetical higher lawmaking process on the basis of the ‘soft’ opinions expressed during a period of normal political life.” ACKERMAN, *supra* note 56, at 263. To be sure, public policies enacted during ordinary political life could be relevant for identifying the choices the People today would make in constitutional politics, but their relevance is cabined by a premise of fundamental continuities in our political culture, and by the clearly framed structure for constitutional policies (starkly competing substantive values and a strategic judgment by the People to secure a greater commitment to one side of that normative competition than they trust Congress to respect).

B. *Case and Context Studies: Continuity of Complete Constitutional Meaning for Post-Ratification Generations*

1. Equal Protection: “Created Equal” Versus Racism, Sexism, and Homophobia

Equal Protection and Conventional Original Meaning. As conventionally understood, the Equal Protection Clause originally was intended to prohibit racial discrimination by the states only in contexts addressed by the Civil Rights Act of 1866: making and enforcing contracts, owning and conveying property, gaining access to civil courts, and securing the protection of the criminal law.²⁰⁴ These were characterized as matters of “civil equality.”²⁰⁵ On matters of “political equality” (voting) and “social equality” (nonsegregated social interaction), the original meaning permitted states to discriminate because of race.²⁰⁶

Lawrence Lessig’s “Translations.” Lessig has developed two rationales justifying *Brown* as two-step translation. First, Lessig sees *Plessy v. Ferguson*²⁰⁷ (and its characterization of original meaning) as predicated on factual presuppositions that had changed by the time *Brown* was decided.²⁰⁸ Lessig focuses on *Plessy*’s factual denial “that the enforced separation of the two races stamps the colored race with a badge of inferiority.”²⁰⁹ If blacks felt such a badge, Justice Brown asserted, “[I]t is not by reason of anything found in the act, but solely because the colored race

204. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957–58 (1995); see Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (current version at 42 U.S.C. § 1981 (2006)).

205. BERGER, *supra* note 43, at 201.

206. See *id.*; Bickel, *supra* note 146, at 12–13; John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 50 COLUM. L. REV. 131, 136 (1950). This facet of original meaning is not an interpretive “hard case” in the sense of having been unanticipated, or glossed over, at the time of ratification. Cf. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 19–20 (1994) (ascertaining legislative intent impossible for “hard cases” that were “unanticipated or conflictual”). But see McConnell, *supra* note 204, at 1094–95. McConnell contends that the Equal Protection Clause originally prohibited racial segregation, at least in the context of public education. He examines congressional deliberations preceding enactment of the Civil Rights Act of 1875. He infers from the fact that majorities (but not the needed supermajorities) supported various motions prohibiting racial segregation in public schools that most in Congress believed that the Fourteenth Amendment itself prohibited such segregation. *Id.*

207. 163 U.S. 537 (1896).

208. See Lessig, *supra* note 186, at 1242–44.

209. *Id.* at 1244 (quoting *Plessy*, 163 U.S. at 551).

chooses to put that construction upon it.”²¹⁰ Lessig characterizes Justice Brown’s conclusion: “[B]ecause the stigma was self-created, it was not a *burden* requiring remedy under the Equal Protection Clause.”²¹¹

Lessig argues that by 1954, self-created stigma had been rejected as a fiction.²¹² “In light of that changed presupposition, the application of the Equal Protection Clause had to change. If it changed to accommodate the change in presupposition, then it changed as an act of fidelity.”²¹³ Because Lessig rejects relying on changed normative presuppositions as a basis for interpretive translation, identifying a changed factual presupposition was critical for validating *Brown*.²¹⁴

Yet, the choice by the People of 1868 to prohibit racial discrimination as to matters of “civil equality,” but not as to matters of “social equality,” is not plausibly explained by their *factual* judgments about whether, and in what contexts, the stigma blacks felt from discrimination was merely self-created, or was intended by the lawmaker as well. Originally permitted “social” discrimination—the criminalization of interracial marriage, for example—was no less rooted in judgments about the relative moral worth of whites and blacks than was originally prohibited “civil” discrimination. Thus, originally permitted discrimination in “social” contexts could hardly have been understood as less intended by the People to stigmatize blacks than was the originally prohibited discrimination in “civil” contexts, nor, therefore, as less a “burden requiring remedy under the Equal Protection Clause”—if the putative source of stigma was, indeed, the principle with respect to which the reach, and the limits, of equal protection was framed.²¹⁵

What more plausibly explains the “checkerboard” prohibition of racial discrimination was the stark *competition* between two sets of the governing People’s *values*. The reason for the limited com-

210. *Plessy*, 163 U.S. at 551.

211. Lessig, *supra* note 186, at 1244.

212. *See id.* at 1245 (“It was (at least) by then clear that . . . the social meaning of inferiority was not constructed, or reconstructable, by any one individual acting alone.”).

213. *Id.* at 1246.

214. *See supra* notes 195–96 and accompanying text.

215. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that Virginia’s statutory scheme prohibiting interracial marriage for the purpose of preserving the “integrity” of the white race violated the Equal Protection Clause of the Fourteenth Amendment).

mitment to equality as a constitutional mandate was, simply put, *racism*—despite the Declaration that “all men are created equal.”²¹⁶ The reason was a persistence of the racism that Justice Taney described in 1857, explaining why “the class of persons . . . imported as slaves, [and] their descendents” were not intended by the People of 1787 to be included as “citizens”—that they were “regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations.”²¹⁷ Between 1787 and 1868, more people were placing more weight on that normative Declaration that all men are “created equal.” But it was the persistence of those racist *values* that competed with “created equal”—the persistence of starkly competing normative traditions—that most plausibly explains the Fourteenth Amendment’s original “checkerboard” of mandates.

Indeed, in another *Plessy* passage, Justice Brown also proclaimed:

The object of the amendment was undoubtedly to enforce the *absolute equality* of the two races before the law but, *in the nature of things it could not have been intended to abolish distinctions based upon color*, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.²¹⁸

This reveals the substantive component of the Fourteenth Amendment’s limited prohibitions—not in the arid terms of formal doctrine, but in the more richly normative terms of starkly competing political values. On one side is a constitutionally favored ideal—*absolute equality before the law*. On the other side are the impulses of racism—the “*nature of things*”—that made racial commingling unsatisfactory to most among the People who created the Fourteenth Amendment.

Because Lessig’s “humility” does not permit translations based on changes in moral presuppositions,²¹⁹ *this* interpretation of original meaning could not be translated—despite the fact that an overwhelming majority of Americans today reject the racist values that made “commingling” so unsatisfactory to the representa-

216. See Smith, *supra* note 114, at 549; *supra* text accompanying notes 162–63.

217. *Dred Scott*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

218. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (emphasis added).

219. See Lessig, *supra* note 138, at 1431–32.

tives of the white electorate who framed and ratified the Fourteenth Amendment. It seems an odd translation of original meaning that fails to account for the *values* that actually motivated the People in creating such significant “open squares” in their “checkboard” commitment to equality. It seems a fatally confining notion of interpretative translation that defines as out-of-bounds an evolution in those values on which the limits of a constitutional policy originally were predicated.²²⁰

Lessig’s second account of *Brown* as “translation” explains the Fourteenth Amendment’s original meaning as resting on “uncontested” racism.²²¹ “For the intellectual elite of the nineteenth century, . . . [r]acism constituted how . . . normal people saw the world. To deny or question racism didn’t make you curious, or clever. To deny it made you weird.”²²² Lessig notes that this putative consensus eroded: “The old views were rejected, or at least contested. Slowly, the natural of before now became simple prejudice.”²²³ In consequence, the “contestation” of traditional racism made *Brown* “all the more likely.”²²⁴

Lessig presents a similar account of constitutional issues surrounding gender and sexual orientation.²²⁵ He notes that in the late nineteenth century, there was consensus about the “rules, both legal and social, that kept women in the home.”²²⁶ This consensus was challenged throughout the twentieth century. Because “what was undebatable before was now, at a minimum, quite debated,” the Court worked its way toward “recogniz[ing] that laws that continued to rely upon these principles of inequality violated the Fourteenth Amendment’s command.”²²⁷ Furthermore, he says:

220. Lessig elsewhere characterized *Plessy* and the Fourteenth Amendment’s original meaning as predicated on science, which “told judges that interracial sex produces degenerate children.” Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 424 (1995). Thus, the transition from *Plessy* to *Brown* “turned on changes in social science.” *Id.* at 426. This account also pushes relevant values to the background.

221. See Lessig, *supra* note 138, at 1420–21.

222. *Id.* at 1421.

223. *Id.* at 1422.

224. *Id.*

225. See *id.* at 1425–28.

226. *Id.* at 1425.

227. *Id.* at 1426.

the battle over sexual orientation is the starkest example of the pattern that I am sketching. There can be no doubt that sexual orientation will enter the realm of protected equal protection classes. . . . [M]ore importantly, there can be no doubt that it should, under a faithful reading of the equal protection right.²²⁸

Lessig posits a “pattern” involving changes in what is recognized to be discrimination:

It only appears as discrimination . . . as discourses that were before relatively uncontested become contested. . . . [T]his contestation . . . increases, again, the burden on a court that is called upon to continue to support a discrimination. And at some point, the burden forces the court to flip; to find as “discriminatory” what before could not have even been seen as discrimination.²²⁹

His theory seems to be that when a form of discrimination becomes recognized, and its justice becomes contested, it ought to be deemed unconstitutional “at some point” as a matter of fidelity to the original meaning of equal protection. This seems problematic, for at least two reasons. First, when discrimination moves from unnoticed to noticed, and from uncontested to contested, there generally has been an evolution in prevailing social *values*. Issues about the propriety of discrimination based on gender and sexual orientation became prominent because political activists pressed arguments not only about facts, but about variations on the value of equality as well.²³⁰ By suggesting that such changes provide the occasion for interpretive translation, the analysis deviates from

228. *Id.* at 1427.

229. *Id.* at 1423–24.

230. On gender equality, for example, Justice Bradley’s classic statement validating gender discrimination is predicated on both factual and normative propositions about the two genders, and reveals the political views of his time. *See Bradwell v. State*, 83 U.S. 130, 141–42 (1872) (Bradley, J., concurring). Justice Bradley discussed the “natural and proper timidity and delicacy which belongs to the female sex” as making it unfit for many of the occupations of civil life. *Id.* at 141. What is putatively “natural” is a factual proposition. What is putatively “proper” is a normative proposition. Similarly, Bradley declared that man “is, or should be, woman’s protector and defender.” *Id.* What man “is,” is a factual proposition. What man “should be,” is a normative proposition. Justice O’Connor’s constitutional repudiation of gender discrimination rejected both stereotyping (factual propositions associated with gender) and role-typing (normative prescriptions about the proper place of the genders in society), and reveals the prevailing political perspective of our time. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–26 (1982). She declared that “if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.” *Id.* at 725. Rejecting a view of inherent handicap involves an evolution in factual propositions. Rejecting a view of innate inferiority involves an evolution in normative propositions.

Lessig's resistance to translation based on changed normative presuppositions.²³¹

Second, when the Fourteenth Amendment was ratified, the racism underlying segregation *was* challenged, and challengers such as Frederick Douglass, Thaddeus Stevens, and Charles Sumner hardly were viewed as beyond the range of plausible debate, or “weird.”²³² Indeed, the *contest* between starkly competing *values*—“created equal” versus racism—did underlie the original checkerboard commitment to equality.²³³ To suggest that fidelity supports invalidating a form of discrimination which moves from uncontested to contested ignores not only that racial segregation and criminalized miscegenation *were* contested in 1868, but also that despite this contestation, the People through Article V determined that states should remain free to pursue such policies.²³⁴ Thus, far from the “humility” he otherwise urges, here, by suggesting that once discrimination becomes noticed and contested it should be deemed constitutionally prohibited, Lessig does attach significance to evolved normative presuppositions. Indeed, he attaches more significance to smaller changes in normative presuppositions than may be warranted.²³⁵

Similarly, *opponents* of the Equal Rights Amendment, toward frightening its potential supporters, argued that it would prohibit states from discriminating against same-sex couples with respect to marriage. *Proponents* argued that it had no such application.²³⁶ This discrimination was recognized, and it was contested. But its

231. See *supra* text accompanying notes 195–96, 214.

232. See CONG. GLOBE, 39TH CONG., 1ST SESS. 3148 (1866) (noting that Thaddeus Stevens, while lamenting that his high hopes for quick and radical justice were not met by the Fourteenth Amendment, stated, “Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels”); Chang, *Conflict*, *supra* note 33, at 833 & n.268, 849 n.323 (noting Senator Charles Sumner’s view that “[a]ny discrimination based on normative judgments about race violated the notion that race is irrelevant to human worth”); *id.* at 889 n.453 (referring to Thaddeus Stevens).

233. See *supra* text accompanying notes 134–36, 179, 215–20.

234. But see Lessig, *supra* note 220, at 441, 452 (noting that when presupposition moves from uncontested to contested, courts should “retreat from the arena of contest”). But true judicial “retreat” would imply that legislatures remain free to decide the area of contest as they see fit.

235. See *supra* text accompanying notes 195–96.

236. Cf. *Equal Rights Amendments Extension*, *supra* note 179, at 123 (“[I]n view of the legislative history the courts are not going to say that the ERA requires homosexual marriages. If you can be sure of one thing in the law, I would be sure of that.”) (testimony of Thomas I. Emerson, Professor, Yale University School of Law).

propriety was predominantly accepted—in ways closely reminiscent of prevailing views on racial segregation and miscegenation statutes in 1868.²³⁷ When discrimination is recognized and its propriety disputed, a majority of the national electorate still might not believe that the discrimination should be prohibited. Under these circumstances, the contestation theory is a problematic basis for judicial “translation” of equal protection’s mandates.

Lessig’s translations seem vulnerable to Klarman’s methodological challenges: How does one know which changed presuppositions to account for, in what direction, and to what extent?²³⁸ These weaknesses seem rooted in the *a priori* embrace of fidelity as an interpretive goal.²³⁹ Without justifying fidelity as the interpretive goal, the interpreter not only is left without guidance on methods for translation, but also invites the “dead hand” normative challenge.

Equal Protection for the Sovereign Living Electorate. If the living electorate is the rightfully governing sovereign, the goal for Article III judicial review can be understood to be the same as the goal for Article V constitutional creation: to identify the choices the sovereign living People would make if they engaged in constitutional politics.²⁴⁰ Fulfilling this interpretive mission is necessarily daunting, but can be facilitated by recognizing that constitutional meaning is essentially comprised of a substantive component and a strategic component. The substantive component involves an accommodation between starkly competing values. The strategic component involves a choice to secure a greater commitment to the constitutionally favored value(s) than Congress might be trusted to respect.²⁴¹

Exploring fundamental continuities in American political culture suggests propositions that one can test against standards of plausibility. First, beginning with the most fundamental, past ra-

237. See, e.g., Ginsburg, *supra* note 179. Proponents of the ERA, such as Ginsburg, with an eye toward facilitating ratification also argued that it could not prohibit public restrooms segregated by gender on a “separate but equal” basis. *Id.*

238. See Klarman, *supra* note 15, at 402, 406.

239. See Lessig, *supra* note 138, at 1382; see also William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 861 & n.372 (1995).

240. See *supra* Part III.

241. See *supra* Part V.A.1.

tification generations believed in the People's sovereignty; so do the People today. Second, past ratification generations believed in constitutional dualism; so do the People today. Third, the ratifiers of the Equal Protection Clause accommodated the starkly competing substantive values of "created equal," and impulses insisting that some are born having less moral worth than others; strategically, they sought to secure a greater commitment to the "created equal" value than Congress might be trusted to respect. Fourth, substantively, the People today have a similar commitment to "created equal" and to starkly competing impulses that deny such intrinsic human equality. Fifth, strategically, the People today, if engaged in constitutional politics, like those before us, would choose to secure a greater commitment to "created equal" than Congress might be trusted to respect.²⁴²

In 1868, racism competed starkly with the "created equal" ideal.²⁴³ But the racism that limited the willingness of so many people in 1868 to prohibit racial segregation, or to prohibit miscegenation statutes, or otherwise to fulfill the Declaration, has since receded from commanding majorities to bedeviling a paranoid fringe.²⁴⁴ This *evolution* in the *normative* presuppositions that *limited* the extent to which the People of 1868 were willing to embrace specific policies of racial equality should be accounted for in interpreting the choices the sovereign living People would make in constitutional politics.²⁴⁵

For the People today (and in 1964, if not 1954), if the particular substantive prohibitions of equal protection (that is, the original "application intentions") were not enhanced—for example, by

242. Rogers M. Smith characterizes Gunnar Myrdal on the competing American norms of equality and racism. Smith, *supra* note 114, at 551. Myrdal explained that the moral equality of all humans "represented 'valuations preserved on the general plane,' which Americans knew to be *morally higher* than their discriminatory valuations. The latter were . . . known to be 'irrational' even by many who harbored them." *Id.*; see also *id.* at 556 (positing inconsistent but ongoing American endorsement of "liberal precepts" and "patriarchy").

243. Despite viewing American politics as rooted in the propositions that America lacked a feudal past, Hartz sees polar conflicts in public values as endemic to the American political character. HARTZ, *supra* note 111, at 63. "American political thought . . . is a veritable maze of polar contradictions . . . : pragmatism and absolutism . . . materialism and idealism, individualism and conformism." *Id.*

244. See Chang, *Conflict*, *supra* note 33, at 858–60. Through the last decades of the twentieth century, one could not imagine a single state that would persist in mandating racial segregation or criminalizing interracial marriage.

245. For a discussion of "application intentions," see *supra* text accompanying notes 164–85.

prohibiting racial segregation or miscegenation statutes (and more)—equal protection no longer would serve its essential *strategic* function. Rather than securing a greater commitment to the “created equal” value than Congress might be trusted to respect, rather than providing for a “more perfect” pursuit of “created equal,” the Equal Protection Clause would be *politically irrelevant*—dead as the hand that created it. This would represent a discontinuity, a change in constitutional meaning. This less plausibly would serve the strategic constitutionalism of the sovereign living electorate than did decisions such as *Brown* and *Loving v. Virginia*²⁴⁶—decisions that pushed the “created equal” norm into originally unintended contexts.²⁴⁷

Today, the Court has interpreted the Equal Protection Clause as prohibiting laws rooted in sexist values or stereotypes.²⁴⁸ Such decisions also are supportable by reference to the interpretive mission of identifying the choices the sovereign living People would make in constitutional politics, and the interpretive method of reconceptualized originalism here under consideration. In 2011, interpreting the Equal Protection Clause as prohibiting all laws adopted because of purposes rooted in racial prejudice would still leave it largely irrelevant to the values prevailing today in the enactment of law. Thus, because the values underlying the

246. 388 U.S. 1 (1966) (holding that Virginia’s statutory scheme prohibiting interracial marriage for the purpose of preserving the “integrity” of the white race violated the Equal Protection Clause of the Fourteenth Amendment).

247. See Smith, *supra* note 114, at 557 (“Karst does not explain why, given the contradictory elements of our ideology, only conformity with the egalitarian ones counts as consistency . . .”). Reconceptualized originalism helps explain why the equality ideal ought to be viewed as constitutionally favored: it was the value to which the People sought to secure a greater commitment than Congress was trusted to respect. It also helps explain why, and how, interpretations ought to account for ongoing nonliberal impulses (of racism or sexism), such that *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Bradwell v. Illinois*, 83 U.S. 130 (1872), were “correctly” decided in their time (“correct” in the sense of discerning the policies the sovereign living electorate would make if engaged in constitutional politics), while *Loving*, 388 U.S. 1 (1966), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), were “correctly” decided in our time (again, “correct” in the sense of interpreting—based on exploring the implications of fundamental continuities—the hypothetical, counterfactual constitutional commitments of the contemporary political culture). See Chang, *Conflict*, *supra* note 33, at 850–55; cf. Lessig, *supra* note 220, at 424 (“At the time *Plessy* was decided, science supported the racist status quo.”); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 786–87 (1992) (discussing Ackerman’s argument that both *Plessy* and *Brown* were correctly decided).

248. See *Hogan*, 458 U.S. at 725 (“[I]f the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.”).

limited commitment to “created equal” in 1868 have so subsided in politics today, toward serving the strategic constitutionalism of the sovereign living electorate—by ensuring that equal protection continues to secure a greater commitment to “created equal” than Congress might be trusted to respect—the clause is quite properly construed as prohibiting intrusions on “created equal” beyond those inflicted by racism.²⁴⁹

Sexist values, like racist values, contradict “created equal” by prescribing the roles that people should play in society because of intrinsic traits they bring to the world at birth. Like racism, sexism has been a longstanding source of political struggle.²⁵⁰ Like racism, sexism has been increasingly rejected by conventional wisdom as a proper predicate for law. Like private racial discrimination, much private gender discrimination has been prohibited by Congress, and by law among the states. As the People of 1868 sought to secure a greater commitment to “created equal” against racism than Congress was trusted to respect, so one can infer, based on exploring fundamental continuities in American political culture, that the People today, if engaged in constitutional pol-

249. See Chang, *Conflict*, *supra* note 33, at 855–68; *cf.* *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting argument that equal protection prohibits facially neutral laws enacted for permissible purposes that unnecessarily impose discriminatory effects on blacks). While this analysis relies on evidence of prevailing public values other than the living electorate’s actual constitutional choices, it at least addresses Ackerman’s concerns about “predicting” the People’s potential constitutional choices “on the basis of the ‘soft’ opinions expressed” during normal politics. ACKERMAN, *supra* note 56, at 263; *see supra* text accompanying notes 95–97. First, it identifies potentially relevant public values by reference to actual constitutional choices made by past generations of the People. Second, it does so in a structured context that conceptualizes constitutional choices—past actual and present potential—in terms of a substantive component comprised of starkly competing values and a strategic component seeking to secure a greater commitment to selected values (here, “created equal” normative equality) than the Article I legislative process is trusted to respect. Now, one surely might raise questions about the extent to which such relevant values must have evolved, and the strength of the evidence required to establish such evolution, to differentiate fleeting variations in public opinion from the sort of entrenchment of public values that likely would precede actual choices by the People to create constitutional mandates. Perhaps, for example, an interpreter might want to see three-fourths of the states adopting antidiscrimination statutes. Perhaps the interpreter would want to see such consensus for such a period of time that would suggest its stability. In any event, by framing the interpretive mission as identifying the choices the living People would make if they engaged in constitutional politics, by conceptualizing constitutional choices in terms of a clear normative structure, and by positing continuity in the relationships among the substantive and strategic components of constitutional meaning, one would be “predicting” or interpreting the constitutional choices the living electorate would make based on much more than merely “soft” opinions expressed” during normal politics. See Chang, *Conflict*, *supra* note 33, at 855–70.

250. See Chang, *Conflict*, *supra* note 33, at 864, 866–67.

itics, would choose to secure a greater commitment to “created equal” against sexism than Congress might be trusted to respect.²⁵¹

Toward fulfilling this interpretive mission for serving the sovereign living People, however, an interpretation of equal protection as prohibiting gender discrimination to the extent of requiring states to make marriage available to same-sex couples would be questionable. So far, only Vermont has provided for same-sex marriage by legislation.²⁵² Congress enacted the Defense of Marriage Act not so long ago.²⁵³ While the homophobia that still competes starkly with “created equal” will likely further dissipate with time—as it has so substantially in the past three decades—this resistance has roots deep *within* the movement for gender equality. As previously noted, in trying to placate an ambivalent electorate with a moderate “checkerboard” version of constitutionally mandated equality, *proponents* contended in ratification debates that the ERA would not require states to make marriage available to same-sex couples—just as proponents of the Fourteenth Amendment recognized that the Equal Protection Clause would not prohibit racial segregation or miscegenation laws.²⁵⁴

Indeed, continuities in our dualist culture suggest that the People today would seek a “more perfect” pursuit of “created equal” to the same *imperfect* extent as did the People of 1868. As

251. This proposition is supported by the near-ratification of the Equal Rights Amendment—despite the proposal’s failure to meet all Article V requirements. Thirty-five of the required thirty-eight states voted to ratify. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 92 HARV. L. REV. 386, 393 (1983). Because the Court had begun to interpret the Equal Protection Clause to prohibit gender discrimination by 1973, fewer viewed the ERA as necessary to achieve constitutionally mandated gender equality, and more feared that the ERA would license the Court to push such equality to undesired extremes. *See supra* note 127; *see also* William Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributing of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 212 (1983).

252. VT. STAT. ANN. tit. 15, § 8 (West, Westlaw through 2010 Adjourned Sess.). Massachusetts and Connecticut provide for same-sex marriage, but through judicial decision. *See Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). California’s judicially established provision for such marriage was overturned by a referendum submitted to the people. CAL. CONST. art. 1, § 7.5.

253. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419–20 (1996) (codified at 1 U.S.C. § 7; 28 U.S.C. § 1738C (2006)).

254. *See supra* notes 232–35 and accompanying text. Debate over the ERA helps to confirm fundamental continuities in American political culture. *See Chang, Conflict, supra* note 33, at 867 & n.379. For a discussion of discrimination based on sexual orientation as gender discrimination, *see, for example, id.* at 825–26.

has been true for each generation, the living People's commitment to their constitutionally secured values—including that of “created equal”—is limited by starkly competing values, and this competition cabins the contexts into which they would choose to extend their constitutional mandates.²⁵⁵ Once authoritative political actors in many more states have provided for same-sex marriage, they will have established at least part of the necessary predicate to support a plausible determination that the sovereign living People, if they engaged in constitutional politics, would choose to prohibit such discrimination toward their own “more perfect” vindication of “created equal.”

2. Substantive Due Process: “Liberty” Versus Social Order

According to some, the People of 1868, in ratifying the Fourteenth Amendment's Due Process Clause, intended to incorporate against the states the prohibitions originally established against the federal government by the first eight amendments.²⁵⁶ Only some liberties were deemed worthy of special insulation against state intrusion. Such a “checkerboard” protection for liberty can be explained by the People's starkly competing values—specifically, competing against “liberty,” the concern for democratically defined social order.²⁵⁷ They viewed the individual's

255. The rationale for these new interpretations has nothing to do with the putative irrelevance of original “application” intentions, and little to do with prevailing arguments about how the appropriate interpretive “level of generality” ought to be identified. *Cf. supra* notes 173–79 and accompanying text. Rather, the additional prohibitions—their extent and their limits—are justified by replicating in law and politics today the *strategic function* of original meaning in its original political context, based on exploring the implications of fundamental continuities in American political culture. The additional prohibitions are justified by the interpretive mission of identifying the choices the sovereign living People would make if they engaged in constitutional politics, and the proposition that the People today seek “a more perfect union”—a more perfect pursuit of their higher ideals—to much the same extent as did those who actually made constitutional choices. *See supra* text accompanying notes 202–03.

256. *Adamson v. California*, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting) (“[T]hose responsible for [the Fourteenth Amendment's] submission to the people” thought that “thereafter no state could deprive its citizens of the . . . protections of the Bill of Rights.”). *But see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949) (arguing that the “record of history” is against Justice Black's position). Others view these choices as having been made through the Privileges and Immunities Clause. *See, e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866) (statement of Senator Howard that the Privileges and Immunities Clause in Article IV, section 2 incorporated the first eight amendments).

257. *See Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (positing “the balance which our Nation . . . has struck” between “respect for the liberty of the individu-

pursuit of happiness as particularly important for some liberties—exercising religion, speaking opinions, or enjoying the home as sanctuary—and in those selected contexts, more important than the social order that could be established by regulating freely.²⁵⁸

Beyond substance, there is the strategic component of constitutional meaning. The liberties specified by the first eight amendments were favored, yet viewed as vulnerable to “the arts of designing men, or the influence of particular conjunctures, sometimes disseminate[d] among the people themselves.”²⁵⁹ Thus, in these selected contexts, the People sought to secure a greater commitment to the individual’s liberty to pursue happiness than Congress might be trusted to respect.²⁶⁰

What does this imply about the choices the sovereign living People would make if they engaged in constitutional politics in our time? Unlike the dissipation of racism underlying the original “checkerboard” commitment to “created equal,” the various political impulses competing with the original protections of “liberty” seem as much a part of the American character today as they were in 1787 or 1868. People *still* have impulses to suppress ideas they find offensive; to impose their faith on others; to demean the faith of others;²⁶¹ to investigate the suspected crimes of others

al” and “the demands of organized society”). Although Harlan recognized the competing concerns for liberty and order in this political culture, he rejected the notion of an originally intended incorporation of the Bill of Rights as defining the meaning of “substantive” due process. *See id.* at 541–42.

258. *See* Chang, *Conflict*, *supra* note 33, at 837 n.284 (citing *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896)).

259. THE FEDERALIST NO. 78, *supra* note 90, at 468 (Alexander Hamilton).

260. Again, in characterizing the strategic component of constitutional meaning in terms of anticipated congressional policymaking as the baseline, I recognize, of course, that provisions such as the Due Process Clause were intended to constrain state discretion. But state discretion could have been constrained simply by authorizing Congress to define national standards protecting individual liberty by statute. The decision to limit state discretion by constitutional mandate pursuant to Section 1 of the Fourteenth Amendment, rather than simply empowering Congress to do so, such as through Section 5 of the Fourteenth Amendment, implies the strategic objective of securing a greater commitment to individual liberty than Congress (and, of course, the states) were trusted to respect. *See supra* notes 150–53 and accompanying text.

261. *See generally* Michelle Boorstein, *The Response to Islam from the Write Wing; Bloggers and Pundits Helped Stir Opposition to Manhattan Mosque*, WASH. POST, Aug. 19, 2010, at C01 (discussing organization of a rally protesting the Islamic center near Ground Zero); Damien Cave, *Far From Ground Zero, Obscure Pastor is Ignored no Longer*, N.Y. TIMES, Aug. 26, 2010, at A14 (discussing Florida pastor’s threats to burn Korans if Muslim center is built at Ground Zero); Fernando Santos, *From the Other Side of Ground Zero, Anti-Muslim Venom*, N.Y. TIMES, Sept. 6, 2010, at A15 (discussing internet preacher’s desire to build a Christian center to oppose mosque near Ground Zero); Paul Vitello, *Islamic*

with intrusive abandon; and to punish the commission of infamous crimes with swift vengeance—much the same as did the People of 1787 and 1868. Because the substantive values *competing* with the particular liberties selected for special security have remained largely *unchanged*, enforcing all—and only—the incorporated Bill of Rights against the states *still* would secure a greater commitment to “liberty” than Congress might be trusted to respect. Fourteenth Amendment “liberty” would serve much the same systemic strategic function today as it did in 1868.

Thus, toward identifying the choices the sovereign living People would make in constitutional politics through this reconceptualized originalism, *Roe v. Wade*'s principle bears a very different relationship to due process than *Brown*'s principle bears to equal protection. Identifying new substantive prohibitions (e.g., a prohibition of racial segregation) has been necessary to *maintain* the strategic component of constitutional meaning for equal protection—securing a greater commitment to equality than Congress might be trusted to respect. In contrast, identifying new protected liberties (e.g., the liberty to terminate a pregnancy) is not necessary to maintain that strategic function for due process. If exploring the implications of fundamental continuities in America's constitutional culture is a sensible interpretive point of departure, then decisions like *Brown*, *Loving*, and *University of Mississippi for Women v. Hogan* seem to have been necessary for Article III agents to serve the sovereign living People and their constitutional commitment to “created equal”; to serve the living People's constitutional commitment to “liberty,” a decision like *Roe* was not.²⁶²

Center Exposes Mixed Feelings Locally, N.Y. TIMES, Aug. 20, 2010, at A1 (discussing intense local debate over building a Muslim community center close to Ground Zero).

262. Compare *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the Due Process Clause of the Fourteenth Amendment substantially limits state discretion to regulate abortion), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1953) (holding that the Equal Protection Clause prohibits racially segregated public schools), *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding that Virginia's statutory scheme prohibiting interracial marriage for the purpose of preserving the “integrity” of the white race violated the Equal Protection Clause), and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–26 (1982) (declaring a statutory objective based on viewing one gender as inferior to another to be constitutionally illegitimate).

To justify *Roe* as serving the sovereignty of the living People, one might argue that the People today, if engaged in constitutional politics, would choose not only to secure a greater commitment to liberty than Congress might be trusted to respect—but also to secure a *larger* “greater commitment” to liberty than the People of 1868 chose. This would posit not continuity of constitutional culture, but change. Perhaps an interpreter could establish

3. Federalism and the Commerce Clause

Lawrence Lessig has characterized the original meaning of federalism as accommodating two objectives, *very* broadly characterized: “protecting states” versus “protecting federal interests.”²⁶³ “Originally there was a balance between the federal and state powers—this is the ‘original balance.’”²⁶⁴ The balance struck was predicated, he says, on factual presuppositions which have since changed—in particular, “the relative integration of social and economic forces,” resulting in an expansion of federal power.²⁶⁵ With the integration of local activities in a national economy, “even if the test were limited just to commerce that traveled in interstate commerce, it is certain that the scope of Congress’ [commerce] power would be far greater than the framers imagined.”²⁶⁶

Lessig views the nationally restrictive doctrines developed in *United States v. E.C. Knight Co.*²⁶⁷ and *Hammer v. Dagenhart*²⁶⁸ (around the turn of the twentieth century), and the line of cases culminating with *Carter v. Carter Coal Co.*²⁶⁹ (early in the New Deal), as “translations,” decided “in the name of a founding vision of federal power,” to maintain “the original balance” in the new context of economic integration.²⁷⁰ He views the nationally empo-

such an enhanced status of liberty in our political culture and, if so, perhaps she could relate such change to the choices the living electorate would make if engaged in constitutional politics. Perhaps one could do so based on more than merely the “soft” opinions expressed during a period of normal political life.” ACKERMAN, *supra* note 56, at 263.

Positing change in the degree to which the People seek a “more perfect” pursuit of a constitutionally secured value must overcome reasons to suppose fundamental continuities through time. Demonstrating such a change seems particularly difficult in the abortion context, as the People of 1868 chose to secure not only a greater commitment to “liberty” than Congress might be trusted to respect, but also a greater commitment to the “life” of each “person” than Congress might be trusted to respect. This facet of the Fourteenth Amendment’s original meaning further challenges a proposition that the sovereign living People would choose to protect “liberty” to a greater extent than did the People of 1868, and, in particular, that they would choose to protect—against electorally accountable policymaking—the liberty to terminate a pregnancy.

263. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 135 (1995).

264. *Id.* at 145.

265. *Id.* at 137–38.

266. *Id.* at 141.

267. 156 U.S. 1 (1895).

268. 247 U.S. 251 (1918).

269. 298 U.S. 238 (1936).

270. Lessig, *supra* note 263, at 150–52. Under *Knight* and *Carter*, Congress could regulate a subject other than interstate commerce—such as manufacturing—*only if* that regulated subject “directly” affects interstate commerce. See *Carter*, 298 U.S. at 290 (1936);

wering doctrines developed in *NLRB v. Jones & Laughlin Steel Corp.*²⁷¹ and *United States v. Darby*²⁷²—in which the Court rejected *Carter's* “translated” restrictions—not as corrective translation, but as a Bickelian variation on the political question doctrine.²⁷³ In Lessig’s view, judicial doctrine had come to “appear political,” as “efforts at preserving a conservative status quo.”²⁷⁴ Finally, Lessig portrays *United States v. Lopez*²⁷⁵ as re-translation toward original meaning, but doomed to fail because, in his view, its doctrines cannot be applied predictably.²⁷⁶ Yet, for all of this, he does not explain *why* economic integration amounts to a changed presupposition—that is, a change (in factual premises on which the People originally predicated their chosen constitutional boundaries) which must be accounted for in interpretive translation—nor does he examine whether any of the putative translations successfully preserved original meaning.

Randy Barnett has addressed the original meaning of the commerce power with more particularity. Rather than pursuing a holistic and functional interpretation of the *power* specified by terms, however, he focuses on the original meaning of *terms*—of “commerce,” of “among the several states,” and of “to regulate.”²⁷⁷

Knight, 156 U.S. at 12. *Knight* suggested that a monopoly in manufacturing (the regulated subject) directly affects interstate commerce where a restraint on such commerce was the “object” of the regulated “combination, or conspiracy.” *Id.* at 16. *Carter* defined a “direct” effect as one caused without any “intervening agency or condition,” and one irrespective of degree. 298 U.S. at 307–08. *Hammer* involved a challenge to a regulation prohibiting the interstate shipment of goods produced by children. 247 U.S. at 253. Although the statute formally regulated commerce among the several states, the Court focused on the purpose for which it was enacted—it “aims to standardize the ages at which children may be employed.” *Id.* at 271–72. Lessig characterizes this—correctly, in my view—as “the pretext analysis, suggested in *McCulloch*.” Lessig, *supra* note 263, at 151.

271. 301 U.S. 1, 34–36 (1937).

272. 312 U.S. 100, 124–26 (1941).

273. Lessig, *supra* note 263, at 153. “There was no radical shift in . . . integration in 1937 through 1941.” *Id.* at 154. Thus, the doctrinal shift could not “be explained by anything internal to the idea of translation If anything changed, it was the ability of the Court to continue this effort of translation.” *Id.*; cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111–98 (Yale Univ. Press 2d ed. 1986) (1962) (positing “passive virtues” to preserve the Court’s authority by not deciding controversial issues).

274. Lessig, *supra* note 263, at 177. Although “faithful translation of the framers’ conception of federalism would have required that the Court continue to do something to assure that . . . the original balance was preserved . . . the Court is excused from effecting that translation” where doing so would “appear” political. *Id.* at 178.

275. 514 U.S. 549 (1995).

276. Lessig, *supra* note 263, at 214–15.

277. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 (2001).

In his view, “commerce” meant trade,²⁷⁸ and included shipping,²⁷⁹ but excluded agriculture, manufacture, and the much broader concept of “any gainful activity.”²⁸⁰ “Among the several states” meant between states, or from one state to another; it did not mean entirely within one state.²⁸¹ “To regulate” meant “to make regular,” or to prescribe the manner in which something should be done, but did not include the power to prohibit.²⁸²

Barnett recognizes that defining Congress’s Commerce Clause discretion requires considering the Necessary and Proper Clause.²⁸³ Here, he again seeks the original meaning of particular words, rather than of the power—the concept—that the words together were intended to create.²⁸⁴ In Barnett’s view, “necessary” originally meant “*really* necessary” (i.e., to the execution of some specifically enumerated power).²⁸⁵ Barnett interprets “proper” as originally meaning, essentially, *otherwise constitutionally permissible*—that is, “consistent with principles of separation of powers, principles of federalism, and individual rights.”²⁸⁶

Barnett argues that the Court’s Commerce Clause doctrine has strayed far from a plausible reading of original meaning, and that this doctrinal departure is irretrievable.²⁸⁷ As Klarman noted, Barnett suggests that as “*compensat[ion]* . . . for the relative demise of federalism constraints on the national government[,] [c]ourts should expand individual rights protections by supplying a robust interpretation of the Bill of Rights, including the Ninth Amendment.”²⁸⁸

278. *Id.* at 112, 125.

279. *Id.* at 122–23.

280. *Id.* at 129–32.

281. *Id.* at 132.

282. *Id.* at 139–42. Barnett believes that the power to regulate commerce with foreign nations did include the power to prohibit. *Id.* at 143–44.

283. *Id.* at 138.

284. He suggests that “the requirement of ‘necessity’ requires a showing, not merely an assertion, of means-end fit, while ‘propriety’ requires a showing that the exercise of power lies properly within the jurisdiction of Congress.” *Id.*

285. Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 763–64 (1997).

286. *Id.* at 773 (quoting Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993)).

287. Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 25–26 (1988).

288. Klarman, *supra* note 15, at 399 (emphasis added); *see also* Barnett, *supra* note 287 (calling for an invigorated interpretation of the Ninth Amendment).

Giving up on restoring a putatively correct interpretation of Article I and the Tenth Amendment, and instead seeking a rough compensation through a similarly unlikely invigoration of the Ninth Amendment seems, at best, “translation” in only the crudest way.²⁸⁹ It seems more a route to an end that one might pursue on independent (instrumentally libertarian) grounds. Indeed, elsewhere, Barnett calls for a general “Presumption of Liberty,” and justifies originalism not on grounds of popular sovereignty and the interpretation of law as politically created, but on the coincidental ground that originalism adequately serves “natural rights” derived from the philosopher’s perspective.²⁹⁰

Klarman’s methodological critique of constitutional “translation” has traction against both Lessig’s and Barnett’s approaches to interpreting the Commerce Clause.²⁹¹ It is less helpful to talk about a vague “original balance” (Lessig) than about the *particular* balance that was struck, and why. Similarly, it is less helpful to talk about the meaning of particular *words* (Barnett) than about the meaning of the particular *power* that was given, and why. Because a sense of the People’s originally chosen values, policies, and rationales is missing, and because the rationale for translation is missing (Lessig—translation pursued on *a priori* grounds) or flawed (Barnett—translation justified as serving a contestable philosophy of libertarianism), neither Lessig’s nor Barnett’s “translations” effectively engage the questions of what changes to account for, and how, in translating original meaning.²⁹²

Reconceptualizing the interpretive mission for Article III as serving the choices the living electorate would make in constitutional politics can provide a rationale for the translation of original meaning rooted in the foundational norm of the living

289. See *infra* note 339.

290. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 259–69 (2004); *id.* at 109–17. For further consideration of Barnett’s “translation,” see *infra* note 339.

291. Challenging Barnett’s “compensation,” Klarman notes that national power increased “because of a widely perceived need for such power.” Klarman, *supra* note 15, at 400. “The creation of new individual rights” would remove “with one hand what had just been granted with the other.” *Id.* Thus, Klarman suggests, “[t]he translation question is whether the Framers, placed in our current circumstances, would continue to share Barnett’s strong aversion to expansive national power. . . . There is absolutely no way to tell for sure.” *Id.* at 400–01.

292. See *supra* text accompanying notes 197–201 (discussing Klarman’s methodological objections to constitutional “translation”).

People’s sovereignty. Furthermore, by accounting for both the strategic component of constitutional meaning, and a more completely framed substantive component, while positing meaningful continuities in our constitutional culture, one might frame structures and boundaries for an interpretive method.²⁹³ Strategic rationales for constitutional dualism contemplate a choice to secure a greater commitment to selected values than Congress might be trusted to respect. The substantive component accommodates starkly competing values—the constitutionally favored value versus the value(s) pressing insistently in ordinary politics, threatening the constitutionally favored ideal, and limiting the extent to which people choose to commit themselves to that ideal. Exploring the implications of fundamental continuities in our constitutional culture supports a presumption that the People today seek a “more perfect” pursuit of their constitutionally secured ideals to the same extent as did those who actually made constitutional choices. Within this structure, one might construct the original meaning of the Commerce Clause toward identifying a political content and normative soul that both Lessig’s and Barnett’s accounts might lack.

The initial dynamic of federalism concerns a sovereign’s decision about whether to cede autonomy and to become a part of a larger sovereign. To join is to seek benefits that could not be achieved alone while sacrificing self-governance immune from outside interference.²⁹⁴ One can elaborate on Lessig’s (too broadly stated) competing goals—to empower the federal government where the prospect of coordinated action provided anticipated benefits that outweighed the loss of state autonomy, and to preserve state discretion where such national action did not.²⁹⁵ In defining the scope of an enumerated national power, one should account not only for the People’s reasons to *limit* that power, but the reasons to *grant* that power as well.²⁹⁶ Toward inferring the original meaning of the Commerce Clause, one might begin by fo-

293. See *supra* text accompanying notes 146–57 (strategic); *supra* text accompanying notes 158–63 (substantive).

294. This political dynamic has played out in a variety of contexts—including the European Union, the North American Free Trade Agreement, and the United Nations.

295. See *supra* text accompanying notes 263–70.

296. This is unlike the decisions of the People of each state when empowering their state governments with general police powers, or the decisions of the People in imposing affirmative restrictions on governmental discretion (such as those of the First Amendment).

cusing not so much on the various original definitions of words in the Commerce Clause, as does Barnett,²⁹⁷ but on why commerce was viewed by the People of 1787 as valuable.

Why was commerce—an exchange or trade between parties (even as defined by Barnett)—valued in 1787? People trade when each anticipates being better off after the bargain than before. Commerce enhances the welfare of participants and, in the aggregate, enhances the welfare of society. From this perspective, commerce is good, and more commerce is better.²⁹⁸

Why was commerce between people in different states particularly valuable? Goods or services in one state might not be available in another; or might be better; or might be cheaper. If a person can trade for products otherwise unavailable in his own state, or better or cheaper than in his own state, he is better off than if his trading options were restricted. Interstate commerce is a means toward the end of more commerce. Again, more commerce is better than less.²⁹⁹

How would a national power to regulate commerce among the several states provide more commerce through interstate commerce? First, national regulation could remove protectionist barriers that various states had imposed.³⁰⁰ Second, national regulation might affirmatively promote interstate commerce.³⁰¹ Com-

297. See Barnett, *supra* note 277, at 111. For a discussion of the pitfalls in interpreting legal provisions by mechanically summing the putative definitions of words, rather than seeking the functional meaning of the governmental power (or prohibition) that the words together were intended to create, see *supra* note 185.

298. See THE FEDERALIST NO. 10, *supra* note 90, at 73 (James Madison) (positing the desire for property as an essential element of self-interest); THE FEDERALIST NO. 11, *supra* note 90, at 84 (Alexander Hamilton) (discussing wealth creation through commerce affirmatively promoted by government). See generally ALEXANDER HAMILTON, *Report on the Subject of Manufactures*, in THE WORKS OF ALEXANDER HAMILTON 157 (1810) (same); ADAM SMITH, THE WEALTH OF NATIONS (Harriman House 2007) (1776) (discussing wealth creation through commerce guided by the “invisible hand”).

299. See THE FEDERALIST NO. 12, *supra* note 90, at 86 (Alexander Hamilton) (“The prosperity of commerce is . . . the most productive source of national wealth By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate all the channels of industry and to make them flow with greater activity and copiousness.”).

300. See THE FEDERALIST No. 22, *supra* note 90, at 140 (Alexander Hamilton) (“The interfering and unneighborly regulations of some States . . . if not restrained by a national control, would be multiplied and extended till they became . . . injurious impediments to the intercourse between the different parts of the Confederacy.”).

301. See HAMILTON, *Report on the Subject of Manufactures*, *supra* note 298, at 157 (challenging “invisible hand” with proposition that industry will better develop with go-

peting with the desirability of more commerce through national superintendence is the value of state autonomy.³⁰² Whether seeking to achieve police objectives, or its own economic objectives, a state’s preferred policy would be preempted if in conflict with federal law.³⁰³ People would have understood that by empowering Congress toward affirmatively promoting interstate commerce, they would risk sacrificing more state discretion than by empowering Congress simply to eliminate protectionism. Either choice would have been plausible, to the extent that more trade over the longer term seems unambiguously valuable.

With this view of substance, one can return to the strategic component of original meaning. The commerce power was created with limits. Substantively, these limits were designed to serve the value of retained state discretion.³⁰⁴ Strategically, these limits were defined as constitutional mandates to secure a greater commitment to state autonomy than Congress was trusted to respect. The “arts of designing men, or the influence of particular conjunctures,” could tempt Congress to aggrandize its reach; to regulate in ways or toward ends that did not promise the benefits that the People created the commerce power to achieve—thereby preempting state discretion without compensation.³⁰⁵

From this portrait of the People’s intended original meaning of the commerce power, it remains to construct formal judicial doctrine for its enforcement. The proper terms of judicial doctrine defining a power depend not only on the scope of the national objectives the People sought to achieve—*how* economically ambitious they were, and *how* willing to risk retained state sovereignty—but also on the way in which they intended to structure the powers given. Did they, for example, intend to define congressional

vernmental support and regulation); *id.* at 237 (advocating federal inspection of manufactured products to ensure quality, to promote public trust, and thereby to promote commerce). Hamilton alluded to an economic potential “far into the regions of futurity” that national superintendence could create:

Europe . . . by force and by fraud [has] extended her dominion over them all. Africa, Asia, and America . . . It belongs to us to vindicate the honor of the human race, and to teach that assuming brother moderation. . . . Let the thirteen States, bound together in a strict and indissoluble Union, . . . dictate the terms of the connection between the old and the new world!

THE FEDERALIST NO. 11, *supra* note 90, at 85–86 (Alexander Hamilton).

302. See Lessig, *supra* note 263, at 135.

303. U.S. CONST. art. VI, § 1, cl. 2.

304. See *supra* text accompanying notes 263–66.

305. See THE FEDERALIST NO. 78, *supra* note 90, at 468 (Alexander Hamilton).

powers in terms of limited authorized objects (that is, purposes) for regulating, or in terms of limited authorized subjects of regulation?³⁰⁶

In *McCulloch v. Maryland*, Marshall defined the structure of the enumerated powers (other than the Necessary and Proper Clause) in terms of limited purposes that the People intended to authorize Congress to pursue.³⁰⁷ Related to his construction that “necessary” means “convenient,” Marshall determined that Congress could choose *any* means of regulation (not affirmatively prohibited) so long as it pursued an end or “object”—that is, a *purpose*—authorized by the People through an enumerated power.³⁰⁸ “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”³⁰⁹ Marshall followed a similar approach in *Gibbons v. Ogden*.³¹⁰ Referring to the Commerce Clause, Marshall asked, “What is this power?” His answer: “[T]he sovereignty of Congress, though *limited to specified objects*, is *plenary as to those objects*.”³¹¹ Marshall did not, however, specify his view of the particular limited objects that the People of 1787 authorized Congress to pursue under the commerce power.³¹²

Perhaps because original meaning was indeterminate even in 1824, Marshall, elsewhere in *Gibbons*, defined Commerce Clause discretion not in terms of authorized objects (i.e., purposes), but

306. See David Chang, *Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review*, 58 RUTGERS L. REV. 777, 886–902 (2006) [hereinafter Chang, *Structuring Constitutional Doctrine*].

307. 17 U.S. (4 Wheat.) 316, 405 (1819).

308. *Id.* at 421, 423.

309. *Id.* at 421.

310. 22 U.S. (9 Wheat.) 1 (1824).

311. *Id.* at 196–97 (emphasis added).

312. Consistent with the foregoing discussion, however, one might identify two plausible alternatives. First, Congress may choose any means of regulation (under the Necessary and Proper Clause) if its purpose (under the Commerce Clause) is to eliminate protectionist trade barriers. Second, Congress may choose any means of regulation if its purpose is to promote commerce among the several states. These views of the original meaning of the commerce power (supplemented with Necessary and Proper Clause discretion) posit that the People transferred to the Congress the authority to make political judgments, according to prevailing circumstances, about how best to achieve the constitutionally limited purposes of eliminating protectionist barriers, or of affirmatively promoting interstate commerce. See *infra* text accompanying notes 317–19.

subjects.³¹³ Marshall began his *Gibbons* analysis by considering whether ship navigation falls within the *subject* of commerce.³¹⁴ “The *subject* to be regulated is commerce *If commerce does not include navigation, the government of the Union* has no direct power over that subject, and *can make no law prescribing* what shall constitute American vessels, or requiring that they shall be navigated by American seamen.”³¹⁵ This analysis, defining “commerce” and “among the several states” as *subjects* of regulation, is inconsistent with that part of his opinion, discussed above, defining the power “to regulate.”³¹⁶ If Congress may choose *any means* of regulation in pursuit of an authorized end—as Marshall had suggested in *McCulloch*,³¹⁷ and in the later part of *Gibbons*³¹⁸—the assertion that Congress could make no law regulating vessels or seamen “[i]f commerce does not include navigation” would simply be wrong.³¹⁹

Thus, in particularizing formal doctrine for defining the original meaning of Congress’s power under the Commerce Clause, one must address two ambiguities: First, did the People of 1787 create the commerce power merely to eliminate protectionist trade barriers, or, more broadly, to promote interstate commerce affirmatively? Second, did the People intend to create such power defined in terms of limited authorized objects (that is, authorized purposes), or limited authorized subjects?³²⁰

313. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

314. *Id.* at 189–90.

315. *Id.* (emphasis added). Marshall pursued a similar subject-centered inquiry into whether the navigation of vessels within a state’s waters is encompassed by “commerce among the several states.” *Id.* at 194–95 (emphasis added).

316. *Id.* at 196–97.

317. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 423 (1819).

318. *Gibbons*, 22 U.S. (9 Wheat.) at 196–97.

319. *Id.* at 190 (emphasis added). Although Marshall might be suggesting that Congress could have “*indirect*” power over navigation, perhaps derived from the Necessary and Proper Clause, he nevertheless asserts that if “commerce” does not include navigation, Congress could “*make no law*” regulating vessels or seamen—a proposition that necessarily must take account of Congress’s Necessary and Proper Clause discretion. *Id.* (emphasis added). Thus, Marshall’s characterization of Congress’s discretion under the Commerce Clause in this portion of *Gibbons* is at odds with that developed in *McCulloch* and in the later, purpose-focused portion of *Gibbons*. See Chang, *Structuring Constitutional Doctrine*, *supra* note 306, at 886–902 (comparing Marshall’s view in *McCulloch* to the two approaches he pursued in *Gibbons*).

320. Barnett conceptualizes Congress’s commerce power in terms of authorized *subjects* of regulation. See Barnett, *supra* note 277, at 112. Indeed, by pursuing the original meaning of the terms “commerce” and “among the several states,” Barnett’s approach echoes

It might be very difficult for an interpreter to ascertain whether there was a meeting of the minds on the plausible alternatives of seeking the broader (more ambitious) economic objectives, or merely the narrower. Furthermore, the People might not have thought much about whether Congress's power should be defined doctrinally in terms of objects or subjects. These indeterminacies must somehow be confronted, whether pursuing conventional originalism, or the "translations" of Lessig and Barnett, or an interpretive approach designed to serve the strategic constitutionalism of the sovereign People today through a reconceptualized originalism.

With some analytical license, one can understand *Knight* and *Carter* as authorizing the regulation of any subject, if Congress pursues a purpose of eliminating protectionist trade barriers.³²¹ One can understand *Jones & Laughlin* as authorizing the regulation of any subject, if Congress pursues a purpose of promoting interstate commerce.³²² One can understand *Darby* as abandoning

the portions of Marshall's *Gibbons* opinion that were inconsistent with *McCulloch*. See *supra* note 297 and accompanying text.

321. In determining whether the regulated intrastate activity had the required "direct" effect on interstate commerce, the Court suggested that the "object" (or purpose) of those engaged in the regulated activity "to restrain" interstate commerce is determinative. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895). A purpose to restrain interstate commerce is the essence of protectionism. Thus, Congress may regulate intrastate activity if its purpose is to prohibit protectionist barriers to interstate commerce. Decades later, the Court defined a "direct" causal connection between a regulated activity and its effect on interstate commerce as one caused "proximately. . . . It connotes the absence of an efficient intervening agency or condition." *Carter v. Carter Coal Co.*, 298 U.S. 238, 307–08 (1936). Exactly what this means is a bit opaque, but one might reasonably suppose that by such definition of "direct," Justice Sutherland meant, at a minimum, a chain of causation between the regulated activity and an effect on interstate commerce that does not involve some intervening human actor exercising will. It is difficult to conceive of a regulated activity that would affect interstate commerce without an intervening human actor in the chain of causation, except if the regulated activity involved discrimination against interstate commerce. A public tariff on out-of-state commerce, or a private rate structure charging more to ship goods across rather than within state lines, would affect the volume of interstate commerce simply by discouraging buyers from purchasing out of state, or shippers to ship out of state. These altered choices are themselves the effect on interstate commerce about which Congress might be concerned, and they are "directly" caused—that is, without intervening human choice—by the regulated activity (the discriminatory treatment of interstate commerce). Thus, both the *Knight* and *Carter* definitions of "direct" at least connect with a congressional power to target protectionism and, perhaps, other affirmative impediments to interstate commerce.

322. Justice Hughes defined Congress's power in terms he labeled as "the fundamental principle"—"that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection or advancement.'" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870)); see Chang, *Structuring Constitutional Doctrine*, *supra* note 306, at 904–06.

the concept of constitutionally limited purposes, and framing doctrine in terms of authorized subjects: Congress may pursue any purpose, so long as the *subject* regulated is, or substantially affects, interstate commerce.³²³ Which doctrine most plausibly identifies the choices that the People of 1937—or, far more importantly, the People of 2011—would make if engaged in constitutional politics?

Choosing Between Knight-Carter and Jones & Laughlin. Lessig suggests that given “the relative integration of social and economic forces” during the nineteenth and early twentieth centuries, continued enforcement of the commerce power according to its original meaning would have authorized Congress to do far more “than the framers imagined.”³²⁴ On this basis of this changed factual presupposition, he posits the need for interpretive translation to maintain the “original balance.”³²⁵

But the economic integration on which Lessig focuses was not accompanied by an explosion of state and local *protectionist* policies.³²⁶ Thus, if original meaning authorized Congress to regulate only for the purpose of eliminating protectionist barriers—the *Knight-Carter* definition of congressional power—such economic integration would not have increased the occasion for *constitutionally permissible* national regulation; it would not have authorized Congress to do far more “than the framers imagined.” In relation to such a view of original meaning, therefore, economic integration would not have constituted a changed factual presupposition warranting interpretive translation to restore Lessig’s “original balance.”

Because of economic integration, however, many aspects of local production, in the aggregate, *affected* interstate commerce to an unprecedented extent.³²⁷ Thus, if original meaning authorized

323. Justice Stone indicated that when Congress regulates interstate commerce, “motive and purpose” are irrelevant. *United States v. Darby*, 312 U.S. 100, 115 (1941). Furthermore, Congress may regulate a subject, other than interstate commerce, that has a substantial effect on interstate commerce, regardless of whether that effect is economic or morally evaluated. *Id.* at 122; see Chang, *Structuring Constitutional Doctrine*, *supra* note 306, at 910–13.

324. Lessig, *supra* note 263, at 137, 141 (alteration in original); see *supra* text accompanying notes 267–76.

325. Lessig, *supra* note 263, at 134; see *supra* text accompanying notes 263–66.

326. See Lessig, *supra* note 263, at 138–39.

327. See Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 647, 660–61 (1946).

Congress to regulate for broader purposes of promoting interstate commerce—the *Jones & Laughlin* definition of congressional power—economic integration opened up so much for Congress to target within the boundaries of its granted power. In relation to *this* posited original meaning, economic integration—as Lessig suggests—could constitute a changed factual presupposition relevant for interpretive translation.³²⁸ But, as discussed above, it remains unclear whether *Knight-Carter* or *Jones & Laughlin* enforced a correct definition of original meaning. Can one know which factual changes to account for in translating original meaning if one does not know the original meaning subject to translation?

Consider the implications of potentially changed *normative* presuppositions. Lessig suggests that accounting for such changes is illegitimate for interpretive translation.³²⁹ I have questioned that proposition. In support of my view, I have presented as an example the original meaning of equal protection, and the dissipation of racism as a normative force shaping law.³³⁰ In relation to the commerce power, one might plausibly identify a very different kind of relevant normative evolution.

The normative evolution relevant to equal protection was *reduced* commitment to the *values that competed with* the constitutionally secured value—racism diminished in relation to the “created equal” value. Plausible normative evolution relevant to the commerce power might entail *increased* commitment to the *values that competed with* the constitutionally secured value—trade and wealth creation more valued in relation to (the constitutionally secured value of) state autonomy. Unlike Hamilton and the People of 1787, whose visionary glance saw only the vaguest sense of America “in futurity,” the People today know the national economic potential, hold the national government accountable for economic boom and bust alike, and understand the potential economic benefits of national regulation.³³¹ Because of this, and

328. It seems unlikely, for example, that the People of 1787 expected that Congress would be concerned with terms of employment; it seems unlikely they expected that authorizing Congress to choose its preferred means toward the end of promoting interstate commerce would open the door to federal policies, like health insurance reform, that could preempt so much corresponding state discretion.

329. See Lessig, *supra* note 186, at 1252–53.

330. See *supra* text accompanying notes 243–47.

331. See *supra* note 301 and accompanying text. In a relatively recent consideration of Congress’s discretion under the Commerce Clause, Justices Kennedy and O’Connor ex-

because the People today probably are not less materialistic than were those of 1787, one might reasonably suppose that the living electorate, if engaged in constitutional politics, could more highly value national regulation affirmatively to promote interstate commerce than did the ratification generation in 1787.

The reason for considering these normative presuppositions, and plausible changes, is not to pinpoint what the People of 1787 originally intended. Rather, it is to interpret the choices the sovereign *living* electorate would make if it engaged in constitutional politics, based on inferences rooted in the original meaning of the aging Constitution. If one views *Knight-Carter* and *Jones & Laughlin* as equally plausible interpretations of the commerce power in 1787, positing that the People today might be somewhat less concerned about retained local discretion (in relation to the benefits of economic development) and more sanguine about national regulation (as a source of economic development), provides a tie-breaker for otherwise indeterminate original meaning. *Jones & Laughlin* emerges as the more plausibly correct application of reconceptualized constitutional meaning today. In other words, still positing fundamental continuities in America’s political culture, *Jones & Laughlin* emerges as more plausibly correct in identifying the choices *the sovereign People today* would make for defining national legislative power if engaged in constitutional politics.

Choosing Darby—Necessary Interpretive Predicates. *Darby* can be understood as authorizing Congress to pursue the full range of moral and police power purposes, so long as the subject regulated is, or substantially affects, interstate commerce.³³² This does not seem a plausible interpretation of the People’s values in 1787. When the national government regulates for a purpose of promoting interstate commerce, any loss of state discretion would be compensated by the anticipated creation of wealth. Empowering the national government to pursue police objectives at best enables people to trade occasions of imposing their morality (when in the majority) on other states, and having the moral

plored the implications of modern conditions and values, and declared: “Congress can regulate in the commercial sphere on the assumption that we have a single national market and a unified purpose to build a stable national economy.” *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

332. See *supra* note 323 and accompanying text.

standards of others imposed on them (when in the minority).³³³ Trading occasions for being a moral governor versus being morally governed is, at best, ambiguously desirable.

But suppose there has been substantial evolution in the *normative* presuppositions on which the “original balance” was struck.³³⁴ Suppose that the national electorate today has an increased inclination for congressional legislation to achieve not merely economic growth, but moral or other police objectives *beyond* those that the People of 1787 viewed as justifying the preemption of state discretion. Furthermore, suppose the People today have less concern for their own retained state discretion than did those of 1787. Suppose they value the opportunity to be a morality exporter more than they are concerned about being morally imposed upon.³³⁵

If such suppositions were established, one might view *Darby's* doctrine as successfully identifying the choices the sovereign living electorate would make in constitutional politics. But establishing this evolution is more difficult than establishing that the racism once underlying Jim Crow has receded, and that the “created equal” values underlying equal protection have the continued (if not enhanced) commitment of the American people. Although Congress does seem far more inclined today to pursue police objectives than in 1787, this does not necessarily indicate a fundamental shift in the *relative* desires to pursue moral objectives through national *versus* state law. State governments regulate a much broader array of matters today than in 1787—a point that Barnett recognizes, and bemoans.³³⁶ Thus, the greater inclination today (than in 1787) of the People to pursue broad police regulations through Congress could well reflect a greater comfort with regulation in general, rather than a shift from the state toward a national political identity.

333. See *supra* notes 300–05 and accompanying text.

334. For implications of evolved national values in a *decreased* inclination to intrude on state autonomy—the federalism analog to diminished racism for equal protection—see *infra* note 338.

335. The Reconstruction amendments imposed new national mandates limiting state discretion across a broad range of policies. Furthermore, one might posit that through two centuries of the nation's existence, the People have developed a national identity they could not have had in 1787, which perhaps has reduced fears about the unknown consequences of sacrificing state sovereignty by empowering the national government.

336. See *supra* text at notes 288–90; *infra* note 339.

Furthermore, the political gamesmanship underlying the original dynamic of federalism remains in play today. What a citizen could gain through imposing his moral concerns on other states *still* is not unambiguously more significant than what he could lose if Congress were to impose an unwanted moral policy on his own state. If a person, as part of a state majority (as is required for such state’s vote to ratify a constitutional amendment under Article V)—whether on abortion, gay marriage, or health care (as a matter of morality, rather than economic productivity)—is confident of having his preferred policy within his own state, would he risk having that preference preempted by a contrary national standard for the opportunity to have his own sense of justice imposed on other states? The answer (most probably) was *no* in 1787. It is hardly evident that the answer is different today.³³⁷

For translation based on a reconceptualized originalism in service of the sovereign living electorate—the interpretive method in service of the interpretive mission urged here—one must overcome a presumption of fundamental continuities in America’s political culture to deny that the People today, like those of 1787, would empower the national government to legislate only if doing so promised unambiguous benefits that could not be achieved by the states independently, and that make worthwhile the loss of state autonomy. While the idea that we all are *American* has appeal, ongoing lip service to federalism, to preserving state discretion, and to limiting the national apparatus raises substantial doubts about the fully nationalized polity that *Darby’s* move to a national police power would imply.³³⁸ Changes in values relevant

337. This analysis presupposes that the People today would choose a process for constitutional amendment or creation that, like Article V, politically organizes the electorate by states, and that the People today continue to value governmental autonomy within their respective states, as did the People of 1787. The calculus of self-interest and political gamesmanship would be very different, however, if the People today choose an amendment process that abandoned the significance of state identity. For pursuing the mission of identifying the choices the sovereign living electorate would make in constitutional politics, through interpreting aging constitutional provisions based on exploring the implications of fundamental continuities in our political culture, the more supportable frame of reference is that developed in the text, above—that the People today, like those of 1787, continue to value federalism, continue to value state autonomy, and remain concerned about national intrusions on state autonomy that cannot be justified as providing benefits (within their respective states) unattainable without a uniform national policy.

338. For equal protection, a critically changed normative presupposition was the substantial mitigation of the political impulse (racism) that starkly competed with the constitutionally secured value (“created equal”). For defining national legislative power, the analogous evolution would be a substantial diminution in the political impulse (to impose national standards on states) that starkly competed with the constitutionally secured val-

to original meaning should be considered in identifying the choices the sovereign living electorate would make in constitutional politics. But one strains to find evidence of changes in relevant normative presuppositions sufficient to support the tidal changes implied by *Darby*.³³⁹

4. Speech: Political Advocacy by Corporations

In *Citizens United v. FEC*, the Supreme Court invalidated provisions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which prohibited nonmedia corporations from using general treasury funds to pay for political advertisements about political candidates.³⁴⁰ Among the justifications asserted, the government claimed the BCRA reduced the distortion of political debate that could result from the participation of “immense aggregations of wealth . . . accumulated with the help of the corporate form.”³⁴¹

The Court’s Analysis. Justice Kennedy roots his opinion for the majority in the classic notion that speech is constitutionally protected because it “is an essential mechanism of democracy—it is

ue (retained state autonomy). The interpretive move in the context of national legislative power analogous to that with respect to equal protection would be to extend the constitutionally secured value (state autonomy) to contexts from which it had originally been excluded—that is, to expand the intrusions of the Tenth Amendment into Congress’s enumerated powers as originally defined. Of course, positing evolved values of this sort—a *reduced* inclination to establish national standards through legislation—is entirely implausible.

339. This does not mean that the Fair Labor Standards Act was unconstitutional; the Act readily could have been upheld under *Jones* as having been enacted for purposes of promoting interstate commerce. See Chang, *Structuring Constitutional Doctrine*, *supra* note 306, at 910–17. Least plausible is Barnett’s position that the Ninth Amendment should be invigorated as a source of new individual rights as “compensation” for “erroneous” but *entrenched* judicial interpretations of Article I powers. See Barnett, *supra* note 285, at 28–29. Current doctrine denying Ninth Amendment rights is entrenched as well. The first priority should identify which—if any—entrenched doctrine is wrong. Perhaps more significant, Barnett suggests invigorating the Ninth Amendment to limit both Congress and the states. See *supra* notes 288–90 and accompanying text. Such an invigorated Ninth Amendment would establish national standards that *further* intrude on state discretion. As a means to enforce constitutional federalism—as a means to compensate for “the exponential growth in national government power during the twentieth century”—Barnett’s call for an invigorated Ninth Amendment seems perverse. Klarman, *supra* note 15, at 398–99; see Barnett, *supra* note 287, at 25–26.

340. 558 U.S. ___, ___, 130 S. Ct. 876, 913, 917 (2010) (invalidating Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b(b)(2) (2006))).

341. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 903 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 558 U.S. ___, 130 S. Ct. 876).

the means to hold officials accountable to the people.”³⁴² In an important concession, Kennedy does not posit an original view about the speech rights of profit-seeking corporations. Instead, after acknowledging that “[t]he Framers may not have anticipated modern business and media corporations,” he asserts: “Yet television networks and . . . media corporations *have become* the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media.”³⁴³ Then, based on the doctrinal proposition that government may not discriminate among speakers, Kennedy suggests that all corporations have an equivalent constitutional status and equivalent immunities from regulation. “There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”³⁴⁴ Thus, Kennedy suggests, the government has no more latitude to suppress the political advocacy of Exxon than it has for regulating CBS.³⁴⁵

Under well-established doctrine, if a regulation of speech is adopted for content-motivated purposes, it is an unconstitutional abridgement of the freedom of speech.³⁴⁶ But in concluding that the BCRA is unconstitutional, Kennedy does not rely solely on a finding that it was enacted for such a prohibited content-motivated purpose.³⁴⁷ Rather, he identifies a new constitutional

342. *Id.* at ___, 130 S. Ct. at 882. For a classic statement of the democratic self-governance rationale for protecting speech, see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26–27 (The Lawbook Exchange, Ltd. 2002) (1948).

343. *Id.* at ___, 130 S. Ct. at 906 (emphasis added).

344. *Id.* at ___, 130 S. Ct. at 905. Indeed, in a proposition not about original meaning, but implicating translated meaning today, Kennedy acknowledges the potential interpretive significance of changes in factual presuppositions—here, the fact that “television networks and media corporations *have become* the most important means of mass communication in modern times.” *Id.* at ___, 130 S. Ct. at 906 (emphasis added).

345. *See id.* at ___, 130 S. Ct. at 905. Kennedy posits that all political speech is equally valuable; that more political speech is better than less; and that a purpose of preventing distortion would reduce the quantity of political speech. *See id.* at ___, 130 S. Ct. at 904. But this begs the question: What is political speech? Defining political speech—i.e., valuable speech—depends on why speech is valued. *See infra* note 366.

346. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414, 416 (1989) (explaining that speech may not be prohibited “simply because society finds the idea itself offensive,” or because the Government “disagrees with its message”).

347. Prohibited content motivation comes in two varieties. First, a statute might be rooted in an electoral majority’s desire to suppress offensive viewpoints. *See id.* at 414 (explaining that speech may not be prohibited “simply because society finds the idea itself

prohibition: a governmental purpose of preventing the “distortion” of political discourse by powerful speakers who otherwise have an “unfair advantage in the political marketplace” is constitutionally impermissible.³⁴⁸ In establishing this new category of prohibited purpose, the Kennedy opinion rests entirely on the proposition that nonmedia, capital-seeking corporations possess First Amendment rights to participate in America’s political discourse that may not be constrained by Congress.³⁴⁹

An Analysis for the Sovereign Living Electorate. This article has suggested that the living electorate is sovereign, in both its

offensive”); cf. BOLLINGER, *supra* note 179, at 8–9 (discussing contemporary interpretations of the freedom of speech, particularly with regard to “extremist” speech). Second, a statute might be rooted in the desire of a majority of legislators to shield themselves from electoral accountability and retribution. See Klarman, *Majoritarian Judicial Review*, *supra* note 155, at 497–98. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (discussing judicial review as a means toward “representation reinforcement”). It seems implausible that the BCRA was enacted because of the first type of prohibited purpose. By their nature, successful capital-seeking corporations cater to what many people value; an effort to reduce their political influence hardly suggests the intolerance implicated when Communists, Nazis, or gay student organizations were suppressed. It is plausible, however, to suppose that the BCRA might have been enacted, in part, because of the second established category of prohibited purpose—to protect incumbents from electoral scrutiny and retribution. See *infra* note 367.

348. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 804 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990), *overruled by Citizens United*, 558 U.S. ___, 130 S. Ct. 876). Kennedy’s opinion developed two additional, and less significant, points: First, a governmental purpose of preventing corruption or the appearance of corruption, while constitutionally permissible, did not validate this intrusion on protected speech. *Id.* at ___, 130 S. Ct. at 908–10. Second, a governmental purpose of protecting dissenting shareholders, while constitutionally permissible, did not validate this intrusion on protected speech. *Id.* at ___, 130 S. Ct. at 911.

349. In dissent, from a different reading of the original view, Justice Stevens canvassed positions taken through time by Congress and the Court about the rights of corporations to engage in political speech. *Id.* at ___, 130 S. Ct. at 948–61 (Stevens, J., concurring in part and dissenting in part). Originally, corporations were distrusted, and not viewed as endowed with the unalienable rights of persons. *Id.* at ___, 130 S. Ct. at 949–50. For a century, Congress had regulated “corporate participation in candidate elections to [p]reserv[e] the integrity of the electoral process, preven[t] corruption, . . . sustai[n] the active, alert responsibility of the individual citizen, protect the expressive interests of shareholders, and [p]reserv[e] the individual citizen’s confidence in government.” *Id.* at ___, 130 S. Ct. at 960 (alterations in original) (internal quotation marks omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 206–07 n.88 (2003), *overruled in part by Citizens United*, 558 U.S. ___, 130 S. Ct. 876). And through time, the Court had upheld regulations of political speech by corporations that were “aimed at the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” *Id.* at ___, 130 S. Ct. at 957 (internal quotation marks omitted) (quoting *McConnell*, 540 U.S. at 205, *overruled in part by Citizens United*, 558 U.S. ___, 130 S. Ct. 876). In the end, Stevens portrayed three different perspectives, each putatively arriving at the same point, but taking different and apparently unconnected paths. See *id.* at ___, 130 S. Ct. at 938–79.

actual legislative expression and its potential constitutional expression; that the interpretive mission for Article III agents should be conceptualized as is the political mission for Article V (and other constitutional) agents—to identify the choices the sovereign living People would make in constitutional politics. Measured against this interpretive mission, and the suggested interpretive method, the Kennedy opinion probably was a bad miss.

Kennedy notes that the First Amendment was originally “[p]remised on [a] mistrust of governmental power.”³⁵⁰ He suggests that laws burdening political speech might be subject not merely to “strict scrutiny” but, rather, that such “speech simply cannot be . . . restricted as a categorical matter.”³⁵¹ Thus, echoing Justice Black, “no law” means *no law*—at least for political speech—and the reason is prophylactic.³⁵² A Congress that cannot take the first step toward abridging political speech cannot take the worst step.

To elaborate a characterization of original meaning, one might posit that Congress was likely distrusted for two reasons. First, Congress might accurately represent a national majority’s desire to suppress offensive ideas; second, a majority of legislators might seek to insulate themselves from electoral retribution when the political winds inevitably shift.³⁵³ To have created constitutional mandates addressing the first source of distrust sounds in pre-commitment or political self-constraint—where the People anticipate their own censorial intolerance as a majority faction, and determine that securing a commitment to free political discourse would better serve the permanent and aggregate interests of the community.³⁵⁴ Targeting the second source of distrust seeks to ensure legislative accountability—where the People anticipate excesses not from their own values, but from the self-interest of their Article I agents acting as a minority faction.³⁵⁵ These propositions all are consistent with prevailing doctrine.³⁵⁶

350. *Id.* at ___, 130 S. Ct. at 898 (majority opinion).

351. *Id.* at ___, 130 S. Ct. at 898.

352. *See* *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

353. *See supra* notes 155, 347.

354. *See* Klarman, *supra* note 155, at 507–08.

355. *See id.* at 507–08; *see also supra* note 347.

356. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414, 416 (1989) (noting the established principles that speech may not be prohibited “simply because society finds the idea itself offensive,” or because the government “disagrees with its message”).

Toward specifying relevant starkly competing values underlying the substantive component of constitutional meaning, one must define the norms explaining why the People would deem speech worthy of protection—that is, the particular substantive values to which the People sought a greater commitment than Congress was trusted to respect. Kennedy’s version of the story—that the People viewed speech as necessary for democratic self-government—is an inadequate sketch. This is an instrumental rationale for valuing speech. As such, it can be enhanced by considering why democratic self-government—the end toward which speech is instrumental—is valued, and how speech serves that end.

Today so much an article of faith, at its origin democratic self-governance established a new sovereign to replace the monarch who claimed divine ordinance—the People, comprised of equals, who are both the rulers and the ruled.³⁵⁷ Democratic self-government was (and surely is) valued because it provides for the resolution of social conflict in a way that is viewed as just—just, in large part, because it accords roughly equal status to the views of each citizen.³⁵⁸ From the perspective of our dualist tradition, such conflict might be resolved in democratically better or worse ways, measured by whether they involve a republican pursuit of the “permanent and aggregate interests of the community,” or a factional and pluralist pursuit of short-sighted and selfish concerns.³⁵⁹

Speech is necessary to enable citizens to persuade their fellows to adopt their view of things, and to enable each voter to account for the views of her fellows toward deciding whether and how to compromise. From this perspective, speech is most valuable when it truthfully expresses the views of the political community’s members.³⁶⁰ A (majority faction’s) regulation of speech that prohi-

357. MEIKLEJOHN, *supra* note 342, at 11; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 602–03 (1998).

358. See MEIKLEJOHN, *supra* note 342, at 25–26.

359. THE FEDERALIST NO. 10, *supra* note 90, at 72 (James Madison).

360. See David Chang, *Selling the Market-Driven Message: Commercial Television, Consumer Sovereignty, and the First Amendment*, 85 MINN. L. REV. 451, 543–44 (2000) [hereinafter Chang, *Selling the Market-Driven Message*]. Meiklejohn believed that the democratic rationale for protecting speech implies that all viewpoints should have the opportunity to be communicated, rather than that all speakers should have the opportunity to speak. See MEIKLEJOHN, *supra* note 342, at 45–46. Thus, at a town meeting, a speaker

bits members from expressing offensive minority positions undermines the political function of revealing views that the majority might need to accommodate. A (minority faction’s) regulation of speech that insulates representatives from electoral scrutiny defeats democratic self-governance at its root.

For Justice Kennedy, the original distrust of government power underlies his determination that nonmedia, capital-seeking corporations are constitutionally indistinguishable from media corporations and, therefore, that a purpose of preventing the “distortion” of political discourse by powerful corporate speakers who otherwise have “an unfair advantage in the political marketplace” is constitutionally impermissible.³⁶¹ But even if a distrust of governmental power was the original view underlying a prophylactic restriction on regulatory power, changes in relevant factual presuppositions could support an inference that the People today, if engaged in constitutional politics, might well choose quite different boundaries on Congress’s powers.

In 1791, government was the most significant concentration of power, and government officials, through their potential abuse of the power to control political debate, were the greatest threat to popular self-governance. Today, however, there are other significant concentrations of communicative power—domestic corporations, foreign corporations, and even foreign governments—that also can threaten our popular self-governance.³⁶² Through “the arts of designing men,” corporate managers can use that concentrated power in pursuit of corporate interests in ways that could undermine public debate by preventing citizens from effectively identifying and accounting for each other’s views.

Indeed, one could interpret the BCRA as having been enacted because of just such concerns. Given this reading of the BCRA,

next in line might properly be skipped in favor of someone else, if the former’s position had previously been fully vetted.

361. *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S. Ct. 876, 904 (2010) (internal quotation marks omitted) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990), *overruled by Citizens United*, 558 U.S. ___, 130 S. Ct. 876).

362. Kennedy reserved the issue “whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.” *Id.* at ___, 130 S. Ct. at 911. Where political speech is defined by content, rather than speaker traits, and where the benchmark is the quantity of political speech to which the listener has access, Kennedy’s rationale for finding no constitutional space between Exxon and CBS leaves precious little space for distinguishing the right of foreign corporate speakers to participate in American political debate. *Id.* at ___, 130 S. Ct. at 905–11.

the interpretive issue should be framed as whether the living People would exercise their sovereign right of self-governance *in its constitutional expression* to prohibit their *legislative agents* from endeavoring to preserve public discourse for individuals and for domestic organizations that are animated primarily for purposes of engaging in political debate.³⁶³ Would the sovereign living People, if engaged in constitutional politics, prohibit their Article I agents from regulating efforts by nonmedia, profit-seeking corporations (like Exxon or British Petroleum) to buy political commercials advocating the election or defeat of candidates to federal office?

To be sure, a profit-seeking corporation is comprised of stockholders and management, all of whom might be citizens. But a person might hold stock in Exxon based on short-term financial interests, yet favor candidates who advocate “cap and trade” as a matter of public policy. From the perspective of Ackerman’s private citizen, the private stockholder decides how her money is invested; as a citizen voter, she decides how her values are publicly deployed.³⁶⁴ The accumulation of wealth by profit-seeking corporations serves one set of social interests. When such wealth is deployed in the realm of political discourse, its effects could well be viewed by the People as an undesirable distortion. If there is any cure for unbridled private power other than the exercise of government power—or self-help through violence—it is difficult to imagine.

Thus, to the extent that the original bar against government intrusion on political discourse in the public square was predicated on suspicion of unbridled power, the relevant distribution of public versus private power has changed. These changed factual presuppositions provide a basis for inferring that the sovereign living electorate could well view concentrations of private economic power as relevant to their calculus about how to structure

363. This does not suggest that the First Amendment should be construed as licensing Congress to regulate speech by capital-seeking corporations, or even foreign governments, for traditionally prohibited censorial or incumbent-protecting purposes. Based on the implications of fundamental continuities in America’s constitutional culture, absent *relevant* changes in normative or factual presuppositions underlying original meaning, one would suppose that if the sovereign electorate of 1791 made these constitutional choices, so the sovereign living electorate, if engaged in constitutional politics today, would similarly choose to prohibit their Congress from regulating speech for the two well-established factional categories of purpose. *See supra* text accompanying notes 202–03; *infra* note 360.

364. *See* ACKERMAN, *supra* note 56, at 297–98.

the freedom of speech. It seems entirely plausible that the living People, if engaged in constitutional politics, would authorize their Article I representatives to legislate for purposes of preventing concentrations of private economic power from distorting political discourse.³⁶⁵ In balancing risks, toward serving the living People’s sovereignty, both as potentially expressed in constitutional form and as actually expressed in legislative form, the living People’s Article III agents should lift the prophylactic bar against Article I choices to distinguish among the speech rights of different categories of corporation.³⁶⁶

* * *

The decision in *Citizens United* denied the sovereign living electorate, in its legislative expression, not merely the BCRA, but also perhaps any other more precisely fashioned congressional effort to protect the People’s political discourse from participation by actors that have no electoral status, no claim of membership among the People, and that have aggregated wealth and power for societal ends other than political participation.³⁶⁷ As a result, the Court’s decision could well prevent the true constituent mem-

365. Indeed, even if an interpreter were to determine that capital-seeking corporations do not possess a right to participate in the nation’s political discourse, it does not necessarily follow that the government has unfettered discretion to regulate their speech. A regulation with permissible effects on the communication interests of corporations might nevertheless be deemed invalid if enacted for purposes prohibited by the original concerns about (majority faction) censorship and (minority faction) incumbency protection. See Chang, *Selling the Market-Driven Message*, *supra* note 360, at 569–75 (arguing that content-motivated regulation of unprotected speech—such as “fighting words”—has been, and should be, deemed prohibited, but that government has a free hand to regulate unprotected speech for permissible purposes). As Justice Scalia has stated: “[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.). . . . [T]hey may [not] be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (emphasis omitted).

366. I have elsewhere questioned the extent to which profit-seeking media corporations should be viewed as engaging in constitutionally protected speech. See Chang, *Selling the Market-Driven Message*, *supra* note 360, at 460–61.

367. Based on the details of the BCRA, however, the Court could have determined that this particular statute was enacted to protect incumbents from electoral scrutiny and retribution. If so, there would be a basis for *its* invalidation, under established and uncontroversial doctrine. Indeed, the BCRA prohibited political speech by corporations other than those wealthy capital-seekers that present significant dangers of distortion. Justice Kennedy recognized that “restrictions based on the identity of the speaker are all too often simply a means to control content.” *Citizens United*, 558 U.S. at ___, ___, 130 S. Ct. 876, 899.

bers of the sovereign People from communicating effectively with each other ever again—at *both* levels of their dualist politics. How much more injury to “We the People of the United States” could an exercise of Article III power do? How much less likely might such an injury be if the Court explicitly were to pursue the interpretive mission of identifying the choices the sovereign living People would make in constitutional politics?

VI. THE RULE OF LAW: OBJECTIONS AND RESPONSES

The foregoing case studies explored whether, and how, by reference to the aging Constitution, Article III agents might pursue this posited interpretive mission toward serving the living People’s right of sovereign self-governance in its constitutional expression. They considered an interpretive method which begins with the structural notion that constitutional meaning is, at its essence, comprised of strategic and substantive components. The strategic component—to secure a greater commitment to selected values than Congress might be trusted to respect—explains why a substantive policy is created as a constitutional mandate, rather than through simply authorizing the national legislature to create that policy by statute. The substantive component is comprised of starkly competing values—the value to which the People seek to secure such greater commitment, versus the values that limit the extent to which the People are willing to push that secured value. A decision to accommodate these starkly competing values in a chosen constitutional policy reveals the aspiration for a “more perfect,” despite still imperfect, realization of the constitutionally favored norm—whether “created equal,” “liberty,” retained state sovereignty, or uncensored political debate.

These reconceptualizations of constitutional meaning and the judicial role provide a structural frame of reference for defining a constitutional provision’s original meaning, and identifying the normative and factual presuppositions on which that original meaning was predicated. By accounting for this complete original meaning, and exploring fundamental continuities in American political culture, the interpreter who seeks to serve the sovereign living People in their constitutional capacity has a basis for identifying which changes in prevailing public values or circumstances are relevant for interpretive “translation,” and for determining how those changes ought to be accounted for in defining

the coverage of a constitutional mandate. As the foregoing case studies suggest, depending on the issue, the interpretive mission and method here developed might result in more restrictions on legislative discretion than recognized by conventional originalism (equal protection), or an unchanged scope of prohibition (“liberty” and substantive due process), or perhaps fewer such restrictions (the freedom of speech).

For Bork and Scalia, however, conventional originalism is justified because it best serves the rule of law by preventing “legislating policy from the bench.”³⁶⁸ For Klarman, judicial interpretation of the aging Constitution is equivalent to “rule of men” arbitrariness, because neither original meaning, nor its “translation,” can yield determinate answers.³⁶⁹ By such standards, reconceptualizing judicial review as a search for the choices the sovereign living People would make in constitutional politics cannot be satisfying. But all versions of interpretation require fallible humans to exercise judgment. Proponents of conventional originalism promise more determinacy than they deliver. Antifidelity requires constitutional action by the living People, and provides no approach for interpretation in the ongoing context of the sovereign’s constitutional inertia.³⁷⁰ Most significantly, determinate answers to misdirected questions are pointless.³⁷¹

Indeed, the “rule of law” is not an *a priori* benchmark against which governmental practices must be measured. Rather, as suggested above, in a system predicated on the sovereignty of the People, the “rule of law” encompasses a range of concepts and norms that are significant only to the extent that one can posit their embrace by the sovereign People.³⁷² It is *that sovereign*—the

368. BORK, *supra* note 9, at 16, 159–60; Scalia, *supra* note 10, at 854.

369. Klarman, *supra* note 15, at 381–82, 395, 411.

370. *See id.* at 382–83.

371. *See supra* text accompanying notes 24–60. Eskridge suggests that rule of law values can be served even if one views law as not comprised of “preexisting and objectively determinable rules.” ESKRIDGE, *supra* note 206, at 175. Rather, such values also are served when law is viewed “as a professional or social practice that respects commonly held conventions, traditions, and priorities.” *Id.*; *cf.* MARMOR, *supra* note 17, at 95 (Positivism “involves the assumption that judges can . . . identify the law and apply it without reference to considerations about what the law ought to be in the circumstances.”) (emphasis omitted).

372. Eskridge’s tentative framework for “dynamic” statutory interpretation contemplates “not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society.” ESKRIDGE, *supra* note 206, at 50 (internal quotation marks omitted) (quoting

living electorate, in both its legislative and constitutional representations—for whose benefit judicial discretion is limited. Thus, going beyond formalism, those pressing the “rule of law” can maintain their insistence only by positing and supporting (to the degree possible) their own implied counterfactual proposition—that the sovereign living People, if they thought about it, would reject certain interpretive practices, and embrace others, based on the extent to which such practices constrain judicial decision-makers.³⁷³

Is my posited interpretive goal—identifying the choices the sovereign living People would make in constitutional politics—somehow *conceptually* objectionable on rule of law grounds? Andrei Marmor considered, and rejected, an analogous interpretive goal of serving the present electorate through statutory interpretation. “It is this principle of majority rule that often motivates intentionalism. But this line of thought is [not] promising . . . particularly when the law is relatively old.”³⁷⁴ When a discontinuity between past and present preferences might exist, Marmor says:

Relying on the principle of majority rule would force one to choose the *contemporary* constellation of the legislators’ intentions as the one which should be followed. . . . But this . . . extends to intentions which have not been expressed in any institutionalized way. . . . [C]onsiderations belonging to the concept of law render this option unacceptable.³⁷⁵

Elaborating, he states, “The legislators’ thoughts about how their subjects ought to behave are legally irrelevant, unless they have

Arthur Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 469 (1950)). But Eskridge does not specify an authoritative perspective with respect to which the interpreter ideally would determine what current needs are, and what the law ought to be in response. Instead, in presenting his “hermeneutic model” of statutory interpretation, he seems to suggest that interpretation largely will work itself out as it should in the end. *Id.* at 58–65.

373. At some point, the Formalist must make the value judgment as to why, and from whose perspective, the rule of law is to be deemed important. If the Formalist chooses the past constitutional electorate, her position merges with the Faithful Dualist’s, and would be vulnerable to similar objections. If the Formalist chooses the present electorate as actually represented by legislation, her position merges with the skeptical monist’s (Klarman), and would verge on collapsing—unless she could somehow link governance under the existing Constitution as consistent with, and in service of, the sovereignty of the people as legislatively represented.

374. MARMOR, *supra* note 17, at 133.

375. *Id.* at 133 (emphasis added); cf. CALABRESI, *supra* note 99, at 6–7 (1982) (advocating a function for common law courts of “updating” aging statutes that no longer fit the legal landscape).

been expressed, that is, communicated, in one of the established ways *recognized by the legal practice*.³⁷⁶

Yet, what constitutes conventionally recognized legal practice can change. One should note, most significantly, that common law principles, when first expressed, are expressed by judges purporting to interpret the values, priorities, and perceptions of their relevant community.³⁷⁷ Such common lawmaking has never been understood to violate “the concept of law.” By analogy, one might similarly understand the proper relationship between judges exercising Article III power and the sovereign living electorate in its potential constitutional capacity. As common law judges have always been viewed as agents for their relevant political community, so Article III judges, when exercising the power of judicial review, can—and should—be viewed as agents for *their* relevant political community: the version of the sovereign living People that *would* emerge *if* engaged in the politics of constitutional creation.

The most critical concepts underlying the “rule of law” are an identified authority external to the judicial agent, and an accepted methodology for the judicial agent to identify that authority’s will.³⁷⁸ For the vision presented here, the living electorate is

376. MARMOR, *supra* note 17, at 133–34 (emphasis added).

377. See HOLMES, *supra* note 100, at 123–24 (A common law judge should decide questions of law by representing “the common sense of the community.”); *supra* note 100 and accompanying text.

378. Ironically, Marmor suggests a Dworkinian interpretive ideal for *constitutional* interpretation: “[T]he courts should strive to interpret the constitution according to their best possible understanding of the moral/political issues involved, striving to reach the best possible moral decision under the current circumstances.” MARMOR, *supra* note 17, at 159. He rests on two propositions: first, that a court’s constitutional interpretations are “authoritative”—that is, “[t]he court’s interpretation of the law actually *determines what the law is*,” *id.* at 165; and, second, that “in the realm of constitutional interpretation, there is hardly any alternative to sound moral deliberation,” *id.* at 168. On this second point, I have tried to develop an alternative to both dead-handed conventional originalism, and a judicial moralizing that abandons the basic rule of law concern that officials must view themselves as agents for an identified external authority. On the first point, “[t]he court’s interpretation of the law actually *determines what the law is*” for statutes as well—subject to correction through subsequent legislative enactments. *Id.* at 165. Yet, in Marmor’s view, a court’s *determination* of statutory meaning—by positing a legislative intent that has not been expressed through recognized channels—would be inconsistent with “the concept of law.” See *id.* at 136–39. Furthermore, constitutional interpretation through judicial moralizing was not accepted as authoritative in 1803 (*Marbury*), or in 1857 (*Dred Scott*); rather, Justices Marshall (in 1803) and Taney (in 1857) both purported to identify the will of the People of 1787. Indeed, Marmor’s advocacy of a very different approach to constitutional interpretation confirms that “established ways *recognized by the legal practice*” for expressing lawmaking intentions could change. *Id.* at 134 (emphasis added). Thus,

the rightfully governing sovereign—not only if it actually creates constitutional provisions under Article V (or otherwise), but also when its Article I agents enact law, *and* when its Article III agents exercise the power of judicial review.

The sovereignty of the living People implies that the living electorate's legislative preferences are superior to a past electorate's constitutional choices. This is not to say that past constitutional choices are irrelevant; nor—emphatically—is it to imply the monist charge that judicially identified restrictions on legislative discretion are necessarily illegitimate. Indeed, in our political culture, the sovereignty of the living People also can imply that the living electorate's potential constitutional will—their potential exercise of sovereign self-governance in its constitutional form—is superior to the actual exercise of such sovereignty in its legislative form.³⁷⁹ Thus, toward justifying governance by reference to past constitutional choices, toward justifying judicially imposed restrictions on present legislative choices—while fully respecting the sovereignty of the living electorate—one indeed can frame an ideal interpretive mission for Article III judicial review: to identify the choices the sovereign living People would make toward achieving their own strategic objectives of constitutionalism.³⁸⁰

A substantial portion of this article has been concerned with developing methods for fulfilling that interpretive mission. Perhaps those efforts missed, more than hit the mark. Perhaps others could better explore the implications of meaningful continuities in our constitutional culture, or better characterize the original point of departure from which to identify the choices the sovereign living People would make in constitutional politics. Perhaps one might consider whether congressional supremacy could serve the sovereignty of the living People better than the

a court's search for the counterfactual intentions of a hypothetically constructed authoritative constitutional electorate does not, on this ground, violate "the concept of law." Beyond this, to ask the Aristotelian question—what the enacting legislator would have decided, had it confronted a current issue—also could be viewed as seeking unexpressed legislative thoughts about how their subjects should behave. *Id.* at 129–30. But as this is a rather standard concept of statutory interpretation, it would satisfy Marmor's "concept of law" test for the expression of the legislators' intent "in one of the established ways recognized by the legal practice." *Id.* at 134.

379. *See supra* Part II.

380. *See supra* Part III.

presently accepted practices of judicial supremacy.³⁸¹ But these are all matters of interpretive method, and no method can be evaluated effectively without first defining the interpretive mission.

VII. CONCLUSION: THE LIMITS, AND THE POTENTIAL, OF INTERPRETATION

A constitutional law representing the choices the sovereign living electorate actually has made is ideal for anyone who bemoans the dead hand, or who recognizes the living People’s sovereignty. Short of this, a constitutional law that represents the choices the sovereign living People *would* make *if* they engaged in constitutional politics—and that is understood as such by the People—can stake a claim as a second best approximation of the ideal. Given an aging Constitution, an interpretive goal for Article III that replicates the political goal for Article V (or other amendment processes) reveals judicial review as a means—an inferior means, yet, still, *a* means—toward the sovereign living People’s constitutional actualization. Given an aging Constitution, this interpretive goal would seem to express the best to which judicial review could aspire.

How a court reasons about the interpretive task can frame the way in which the living People view their relationship with the law—both as the subjects on whom law acts, and as the sovereign in whose name law is made. To ask simply what the dead-handed ratifiers decided does not serve the sovereign living People. To pose the Aristotelian variation, and ask what these ratifiers would decide if—by magic or resurrection—they faced some question of constitutional law today, also does not serve the sovereign living electorate.³⁸² But to ask what the sovereign living People would decide—if they engaged in constitutional politics—frames an ideal interpretive goal that eliminates the problematic dead hand, at least conceptually. It is an ideal interpretive goal that, although counterfactual speculation, at least contemplates a real world possibility.

381. By congressional supremacy, I mean a regime in which Congress and the President, by statutes enacted through Article I, could supersede Article III interpretations of inherited constitutional text. *See generally* Chang, *Critique*, *supra* note 8, at 285.

382. *See supra* text accompanying notes 201–03.

Consider how differently the Court's opinions could be read were Justices to explain their decisions in relation to this interpretive ideal. Judicial opinions could give expression to the concept of the living electorate's sovereignty. The Court's words could crystallize what otherwise is only latent and vague—both the strategic function of constitutionalism, which seeks to secure a greater commitment to selected values than Congress might be trusted to respect; as well as the substantive component of constitutional meaning, comprised of starkly competing values. They could portray original meaning not as some ancient and final governing truth to be unquestioningly obeyed, but as a window revealing insights about our contemporary political culture. Their conclusions could be tested against an evocative benchmark—the interpretive mission of identifying the choices the sovereign living People would make in constitutional politics. Political response to judicial interpretations with which people disagree could be encouraged, and fully legitimized, as the People could view themselves as better situated to declare their actual constitutional desires than are judges who seek to infer their constitutional will by reference to choices made generations ago.³⁸³ Indeed, as suggested in this article's Introduction, there is only so much that pursuing the Article V mission through Article III interpretation could possibly achieve, especially when exploring the implications of fundamental continuities in our political culture. Constitutional departures remain in the People's hands, to be achieved politically.

Despite its limits, interpretation inevitably addresses a significant governmental function. Article III interpretation could remain part of what makes our popular self-governance dysfunctional, as in *Citizens United*, or it might become a well-conceived part of evolving redress and reform in service of the sovereign living People.³⁸⁴ Indeed, this proposed reconceptualization of interpretive mission and method for the People's Article III agents addresses the dead hand, while recognizing that the sovereign living electorate still embraces constitutional dualism. It confronts the fact that because a dualist living People have not created their own Constitution, they must rely on judges to interpret the implications of political change in a context of fundamental continui-

383. See KRAMER, *supra* note 8, at 207–21 (arguing that early generations of the American people understood and asserted their authority to define the Constitution's meaning through political action).

384. See *supra* Part V.

ties. It provides a rationale for an intergenerational translation of original meaning, which otherwise begs the question: *Why?* It provides a clearer conceptual framework for achieving such translation, which otherwise begs the question: *How?* If indeterminacy renders this interpretive method problematic, it seems unproductive to revert to conventional originalism (which constrains Article III discretion largely for the sake of preserving the discretion of national and state political actors),³⁸⁵ to pursue Faithful Dualist originalism (which denies the People's sovereignty unless they are engaged in constitutional creation); to advocate radical monism (which denies the living People's commitment to constitutional dualism); or to pursue some other method merely on grounds of practicability.

Any proposed method for constitutional interpretation should be measured against the *living* electorate's world: *their* actual Article I sovereignty and *their* potential Article V sovereignty—*their* right to government according to *their* values at *both* levels of their constitutional dualism. If it makes sense to posit a unitary goal both for Article V (and other versions of) constitutional politics and for Article III interpretation, then one might ask for evaluating any posited interpretive method: How well does it fulfill an interpretive mission of identifying the choices that the sovereign *living People* would make if they engaged in *constitutional* politics?

385. See *supra* text accompanying notes 150–53, 262 (noting that constitutional mandates, whether limiting the discretion of states or the federal government, establish national substantive standards which, apart from the strategic objectives of constitutional dualism, otherwise could have been established simply by having authorized Congress to act).