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# The Constitution Is the Social Contract So It Must Be a Contract ... Right? A Critique of Originalism as Interpretive Method

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**THE CONSTITUTION IS THE SOCIAL CONTRACT SO IT  
MUST BE A CONTRACT . . . RIGHT? A CRITIQUE OF  
ORIGINALISM AS INTERPRETIVE METHOD**

Paul Lermack<sup>†</sup>

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I. INTRODUCTION

Originalism perseveres, and it is becoming increasingly dangerous. The doctrine of originalism,<sup>1</sup> in its strong or pure

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1. The term “originalism” is credited to Paul Brest. Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43, 43 n.1 (1987) (pointing out that “originalism” was first used in Paul Brest, *Misguided Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980)). Earlier discussions

form, maintains that judges have no power to interpret the United States Constitution except in accordance with the substantive intent of the people who created it at the end of the eighteenth century.<sup>2</sup> Although many scholars have little respect for the doctrine of originalism, it retains a hold on the legal and general public.

The notion of limiting a court's power to the principles accepted long ago resonates with the general public and it legitimizes court rulings.<sup>3</sup> Distinguished law professor Earl Maltz observed that "the concepts embodied in originalism rather plainly reflect views on the nature of judging which have a strong intuitive

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sometimes used the terms "interpretivism" or "intentionalism" as synonyms. *Id.*

2. "Strong" originalists insist that the founding generation had substantive intentions about the way the Constitution was to be interpreted and applied, and this substantive intent can be determined by examining the voluminous literature, historical records, and ratification debates left to us by the framers. At its extreme, "strong" originalism assumes that the framers anticipated or at least said something relevant about a wide range of modern policy issues. "Those who framed the Constitution chose their words carefully . . . . The language they chose meant something." Edwin Meese III, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 704 (1985). Meese further wrote that:

[T]he Founders believed [the judges] would not fail to regard the Constitution as 'fundamental law' and would 'regulate their decisions' by it . . . . The judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.

*Id.* at 701. Edwin Meese III, Matthew Spalding, and David F. Forte edited a book of short essays that purport to give the original meanings of each clause of the constitution. THE HERITAGE GUIDE TO THE CONSTITUTION (Meese III et al. eds., 2005).

A somewhat weaker, or less "pure," form of originalism is described approvingly by Judge Bork: "What distinguishes interpretivism [or intentionalism] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the [C]onstitution." Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1-2 (1980)). For a recent and comprehensive discussion of the history of originalism as a legal doctrine, see JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005). See also Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1164-1214 (2003); Michael W. McConnell, *The Importance of Humility in Judicial Review*, 65 FORDHAM L. REV. 1269 (1997).

3. See Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); see also John Brigham, *Original Intent and Other Cult Classics*, GOOD SOC'Y, 2002, at 13-17, available at <http://www-unix.oit.umass.edu/~jbrigham/Original.html>.

appeal to many Americans.”<sup>4</sup> Chief Justice William Rehnquist thought it a fatal flaw that “[o]ne senses no . . . connection with a popularly adopted constituent act” among the opponents of the originalist interpretive method.<sup>5</sup>

The doctrine of originalism intuitively seems necessary to the rule of law, limited governance, and the avoidance of judicial decisions based on personal ideology, bias, or simple caprice.<sup>6</sup> Above all, originalism rests on the fundamental notion of a contract. The existence of a contract reveals that at some point in the past, promises were made, limits were willingly agreed to, and a deal was struck.<sup>7</sup> The contract compels us to accept that once made, we ought to keep our promises.<sup>8</sup> Once accepted, we ought to obey the agreed-to limits. A deal is a deal, and we ought to respect it even if, after the passage of time, it does not turn out as we expected. These are the underlying principles of a contract.

Associating the Constitution with these widely accepted principles allows originalism to ignore several practical problems with the doctrine. The founding generation does not have a

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4. Maltz, *supra* note 1, at 44. Tim LaHaye, a minister, political activist, and co-author of the *Left Behind* series of Biblical prophecy novels writes that

[t]he supreme issue of our day is whether or not we shall continue to allow unelected liberal *judicial activists* to make laws that were never in the minds of our Founding Fathers. Shouldn't these judges utilize *judicial restraint* and base their decisions on what the [C]onstitution means, leaving the lawmaking and constitutional changes up to Congress and the voters, through the constitutionally mandated process?

Tim LaHaye, *The Colossal Battle*, ESQUIRE, Sept. 2004, at 179 (emphasis added).

5. William H. Rehnquist, *The Notion of a Living Constitution*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 141, 144 (David M. O'Brien ed., 1997).

6. Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 568 (1991). The need to control otherwise uncontrollable judges is a major thrust behind the political advocacy of originalism. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

7. Among the synonyms for “contract” are words like promise, commitment, obligation, pact, pledge, vow, and “gave their word.” James McElhaney, *The Right Words*, A.B.A.J., Jan. 2005, at 24–25.

8. A contract consists of a promise that is made in such a way that it creates a legally enforceable obligation. See generally 17 C.J.S. *Contracts* § 2 (1999) (describing legal characterizations of contracts). The positive law makes rules governing the kinds of promises that are legally enforceable and the ways in which they must be made. *Id.* However, the moral force of contract law, the feeling that it is right and proper for the government to compel their enforcement, is based on the moral obligation to keep promises. See CHARLES FRIED, *CONTRACT AS PROMISE* 9–21 (1981).

singular voice. Instead, the framers at the 1787 Convention, the kibitzers arguing in newspaper editorials, and the individuals responsible for the Constitution's ratification sometimes said contradictory things.<sup>9</sup> Consequently, difficulties arise in defining the deal and negotiations agreed to by the founding generation. Likewise, originalists are not able to identify which sources should be used to determine what these founding parties actually said<sup>10</sup> or what was actually meant.<sup>11</sup>

Supporters of originalism ignore other practical flaws. The framers themselves "did not believe such an interpretive strategy to

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9. Much of the surviving record comes from newspaper editorials. Alexander Hamilton, John Jay, and James Madison tried to describe how the constitutionally created government would work and to explain why it would be an improvement while allaying fears about a devolution into tyranny. The scope of the constitutional debate is illustrated by their eighty-five editorials collected as *The Federalist*. ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, *THE FEDERALIST* (George W. Carey & James McClellan eds., 2001) (1788). Opponents of the Constitution replied with equally persuasive documents. See, e.g., *THE COMPLETE ANTI-FEDERALIST* (Herbert Storing ed., 1981). They quoted Locke as well as other philosophers and historians who commented on the proper scope and nature of government. Ministers searched for relevant biblical passages, and businessmen must have pondered, as businessmen always do, what arrangements would be most favorable to businesses. In letters, diaries, and journals, members of the founding generation communicated their questions, reservations, doubts, fears, and recriminations. See generally DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 177 (Merrill Jensen ed., 1976); Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3 (1988).

10. Cf. Kesevan & Paulsen, *supra* note 2 (discussing the interpretive significance of the limited records extant from the 1787 Constitutional Convention). The authors explain that since the convention kept its proceedings secret, Madison's notes and other records were not available to the ratifiers. *Id.* Thus, the record reflects the intent of the drafters, but they can have no relationship to the intent of the larger group of ratifiers.

11. See Judith A. Baer, *The Fruitless Search for Original Intent*, in JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING 49 (Michael W. McCann & Gerald Houseman eds., 1989); Ira C. Lupu, *Textualism and Original Understanding: Time, the Supreme Court, and the Federalist*, 66 GEO. WASH. L. REV. 1324 (1998) (on the changing attitudes toward *The Federalist*); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). In addition to the canonical and easily available writings of the founding generation, historians have brought to light an enormous mass of details that were previously unknown. This material is arcane, unclear, and often contradictory, revealing, if anything, that the founders were themselves unsure of their purposes and often disagreed. See JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE UNITED STATES CONSTITUTION* 1–22 (1990). Originalists have been accused, with good reason, of radically oversimplifying this record. DAVID A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 17 (2002); Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1423 (1990).

be appropriate.”<sup>12</sup> There is no practical way to adjust the eighteenth-century concepts, even if they were precisely known, to the world of the twenty-first century, and trying to do so could lead to such limited choices for policymakers that it would give rise to bad government and bad law.<sup>13</sup> Trying to consistently apply a single interpretive method, although superficially plausible and even attractive, is ultimately doomed to fail when it meets the complexity of the modern real world.<sup>14</sup> Indeed, supporters of originalism have been accused of inconsistency and even incoherence,<sup>15</sup> while the singular interpretive method has been labeled too facile, unworkable, and undesirable.<sup>16</sup>

Originalists reply to such practical objections by retreating to even weaker versions of the theory.<sup>17</sup> In weak forms of originalism, contemporary judges do not need to do exactly what the framers would have done. They merely need to consider what the framers might have thought about some modern problem or to give some level of respect to the Constitution’s formation and some doctrinal

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12. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985); see also Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1089–95 (1989).

13. See Richard S. Kay, *Adherence to the Original Intent in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 237–57 (1988). But see Brigham, *supra* note 3, at 13–17 (observing that at least in its strong form, originalism “sets the heavy hand of the dead to control the choices of the living”).

14. See FARBER & SHERRY, *supra* note 11 (arguing that “foundationalism” will lead to “radical results”). These critiques are purely practical in nature, and they demonstrate the difficulties in employing originalism and the undesirable consequences that may result. But they do not counter the normative desirability of originalism that supports the need to keep promises and to live up to a deal once made. Scholars have not presented clear reasons why we should refrain from framing constitutional questions with reference to the founders, why we should not at least try our best to determine what the founders agreed to, and why we should not consider ourselves bound by whatever glimmerings of original intent we can find. Richard S. Kay shows how some of the practical objections to originalism can be rebutted and he makes clear that the preference for a single interpretive method is a value choice that cannot be rebutted by showing that the chosen method is impractical. Kay, *supra* note 13. For further discussion on the lack of a definitive principled rebuttal to originalism, see Maltz, *supra* note 1. See also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 137, 138 (1996).

15. J. D. Droddy, *Originalist Justification and the Methodology of Unenumerated Rights*, MICH. ST. L. REV. 809, 810–12 (1999).

16. BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 7 (1999); see also Brest, *supra* note 1.

17. But see Kesavan & Paulsen, *supra* note 2, at 1114, 1134–48 (tracing the history of this devolution and arguing that originalism is “a theory working itself pure” rather than an idea being watered down by its supporters to save it from its detractors).

effect to the motives of the people who staged its creation. Thus, original intent has given way to “moderate originalism,”<sup>18</sup> “original meaning,”<sup>19</sup> “original public meaning,”<sup>20</sup> “core meanings,”<sup>21</sup> “interpretive constitutional textuality,”<sup>22</sup> and analogized “objectified intent.”<sup>23</sup> At the very least, originalists can invoke the ghost of Churchill, who famously observed that democracy is a very bad form of government whose only redeeming virtue was that all the other forms were much worse, in order to argue that however much originalism falls short in practice, it remains the least-worst form of constitutional interpretation.<sup>24</sup> As a result, originalism persists.

In its weakened form, originalism may represent the dominant paradigm utilized by the judiciary. It is capable of being stretched to any extreme. American legal scholar Robert Bork claims to have found some original principle or intent placed into the Constitution by eighteenth-century slave owners that is consistent with our contemporary abhorrence of racism.<sup>25</sup> He argues that the

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18. Brest, *supra* note 1, at 222–23, 231–34.

19. See Barnett, *supra* note 3, at 611, 621. Barnett eventually presents a weak form of originalism, which he argues meets most of the practical scholarly objections. *Id.* See also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds* (Boston Univ. Sch. of Law, Working Paper No. 05-08, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=714982](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=714982).

20. Kesavan & Paulsen, *supra* note 2, at 1146–47.

21. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971). *But see* McConnell, *supra* note 2; Jack M. Balkin, *Abortion and Original Meaning* (Yale Law Sch., Pub. Law Working Paper No. 119, 2006), available at <http://ssrn.com/abstract=925558>.

22. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 120–21 (2005).

23. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1997).

24. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (“Having described what I consider the principal difficulties with the originalist and nonoriginalist approaches, I suppose I owe it to the listener to say which of the two evils I prefer. It is originalism.”)

25. BORK, *supra* note 21, at 30–31. If Robert Bork believes that the Constitution contains some tangible provisions that forbid slavery, it is because he is a decent person who cannot bring himself to believe that the Constitution does not share his abhorrence of slavery. Indeed, Ronald Dworkin has argued that Bork’s approach is so loose that both liberal and conservative agendas could use the same arguments. Ronald Dworkin, *Bork’s Jurisprudence*, 57 U. CHI. L. REV. 657, 658 (1990); see also Ronald Dworkin, *The Bork Nomination*, N.Y. REV. BOOKS, Aug. 13, 1987, at 3. Dworkin himself illustrates this looseness of fit. He finds only the most general and abstract principles in the Constitution, but uses them to cover specific recent cases. RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985). Thus, on the assumption that the founders meant to protect some minority interests from

founders neglected to specify who is entitled to equality within the Constitution, but they nonetheless adhered to a general, abstract principle requiring equality under the law.<sup>26</sup> Furthermore, Bork argues that the founders would have made slavery yield to equality if they had known what we know about the evil effects of segregation.<sup>27</sup>

These arguments are facially inconsistent with the forms of inequality dictated by the founders, including the notorious clause that labels individuals of certain races as counting as only three-fifths of a person.<sup>28</sup> Such arguments also show the length to which originalism can be stretched. Bork contends that the flexibility and apparently infinite scope of originalism can be limited by finding the intent of the founders at a required level of generality and then requiring consistent application.<sup>29</sup> But it is up to the interpreter, presumably a judge, to choose the proper level of generality.<sup>30</sup>

Originalism represents the most dangerous kind of interpretation. It invokes popular support by claiming to embrace aspects of the founders' agreement while falsely purporting to be applied in a consistent manner.<sup>31</sup> At the same time, the originalist method is so flexible that judges can use it to fulfill their whims and political ideology. It is hard to imagine anything less likely to

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the tyranny of the majority, Dworkin generates a principle that forbids "appealing to the majority preferences about . . . what sort of lives their fellow citizens should lead." *Id.* at 68. He applies this principle to conclude that the Constitution forbids laws that discriminate against homosexuals, calling it an "application of original intent." *Id.*

26. BORK, *supra* note 21, at 30–31.

27. *Id.*

28. Bernard Schwartz details the extremely tenuous rationalization needed for Bork and Meese to reconcile the views of the founders with contemporary notions of racial equality. SCHWARTZ, *supra* note 16, at 22–25.

29. BORK, *supra* note 2.

30. Consequently, we must ask, on what principle can we conclude that an eighteenth-century white man would have believed that an abstract commitment to equality somehow trumped everything he had learned about the inferiority of other races, the need for slaves in the tobacco and cotton industries, or his own economic concerns? And, on what principle of textual explication do we place a vague principle, perhaps dimly glimpsed in letters or editorials, above specific textual examples of inequality?

31. Research indicates that jurists who embrace the doctrine are hardly consistent in their application of it. *See generally* Jason Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841 (2006); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002); Phelps & Gates, *supra* note 6; Joshua Ferguson et al., *Behind the Mask of Method* (Ohio State Pub. Law, Working Paper No. 41, 2005), available at <http://ssrn.com/abstract=800833>.



protect us from the abuses of judicial supremacy.

Originalism should be rejected as an interpretive method not merely because it is impractical and will lead to bad public policy but simply because it is *wrong*. It is inconsistent with the government that the Constitution creates. It rests on a false analogy, a metaphor pushed too far. The next section of this Article will investigate the nature of social contracts and the extent to which the Constitution can be categorized as a social contract.<sup>32</sup> The following sections will examine what our political ancestors thought they were doing as they created the Constitution<sup>33</sup> and the ways that the Constitution has been used in the years since its ratification.<sup>34</sup> Finally, it will be argued that originalism does not provide a suitable method for understanding the Constitution.<sup>35</sup>

## II. THE HISTORY OF THE SOCIAL CONTRACT

The social contract is a metaphor. It solidifies the important principle that governmental power comes from the people and rests on the consent of the governed. It leads to the important normative conclusion that because the people have given their consent to the existence and powers of the government, they have also created an obligation to obey it. Political obligation, like a contractual obligation, is grounded in the promise to keep one's word, to live up to the deals that were consented to, and to follow the accepted order of society.

### A. *The Social Contract of Thomas Hobbes*

The central and defining moment for social contracts in modern history occurred in 1651 when Thomas Hobbes published his *Leviathan*.<sup>36</sup> In a single, vivid piece of work, *Leviathan*

32. See *infra* Parts II, IV.A.3.

33. See *infra* Part III.

34. See *infra* Part IV.

35. See *infra* Parts IV.B.2, V.

36. THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed., Penguin Books 1985) (1651). Scholars have traced the roots of the social contract back to antiquity and to biblical notions of covenant. Sir Ernest Barker found ideas of the social contract in Plato's Athens and during the Middle Ages. Ernest Barker, *Introduction to JOHN LOCKE, DAVID HUME & J. J. ROUSSEAU, SOCIAL CONTRACT* vii–xliv (Ernest Barker ed., Oxford University Press 1947) [hereinafter Barker Introduction]. The social contract was also a central figure of Richard Hooker's 1594 text, *The Laws of Ecclesiastical Polity*. See GEORGE H. SABINE & THOMAS L. THORSON, *A HISTORY OF POLITICAL THEORY* 408 (Hinsdale ed., Dryden Press 4th ed. 1973).

summarized previously published ideas about political obligation. The then-prevailing theories contended that people were obliged to obey the government because it was God's will for the ruler to rule<sup>37</sup> or because the ruler was viewed as having the same level of authority over society as a patriarch had over his family.<sup>38</sup> The chaos and regime changes produced by the English civil wars, however, had made thoughtful people question the existing bases for political obligation.

Thomas Hobbes provided an alternate basis for the public's compulsion to obey the government beyond mere moral obligation.<sup>39</sup> He offered a series of deductions based on the assumption that all people, at all times, are motivated by the same small number of drives, urges, and needs.<sup>40</sup> When life is threatened, self-preservation is the strongest of motivations.<sup>41</sup> Indeed, Hobbes argued that this interest cannot be trumped by any other obligation.<sup>42</sup> Short of a life-threatening situation, the strongest drive is the personal desire to exercise freedom of motion.<sup>43</sup> In Hobbes' colorful language, people are said to have an "appetite" to seek "delight" through movement, exertion and acquisition.<sup>44</sup> In a natural state, without government or any other social organization, this movement inevitably brought each person into conflict with others who were similarly motivated. Each person could respond violently to the attempts of others to place barriers on their freedom of movement, causing life in this natural state to

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37. See generally MULFORD SIBLEY, *POLITICAL IDEAS AND IDEOLOGIES: A HISTORY OF POLITICAL THOUGHT* 316–17, 345, 372 (1970).

38. This was the position of Sir Robert Filmer's *Patriarchia*, which John Locke ridiculed and demolished in his *Treatises on Government*, but it was also the position of Jean Bodin's *Six Livres de la Republique*, which remains plausible and influential. See SABINE & THORSON, *supra* note 36, at 374–79 (1973).

39. When Hobbes based political obligation on the social contract, people who were used to relying on a divinely inspired moral obligation as the basis for compliance had no choice but to consider the now-commonplace idea that power comes from the people themselves. *Leviathan* was widely read and it continues to fascinate because it proposed the idea, now universally accepted, that the government must be based on the consent of the governed. See generally SIBLEY, *supra* note 37, at 292–93.

40. See HOBBS, *supra* note 36, at 81–83. But see LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS: ITS BASIS AND ITS GENESIS* 151 (1963).

41. "A Covenant not to defend my selfe from force, by force, is alwayes voyd. For (as I have shewed before) no man can transferre, or lay down his Right to save himselfe from death . . . ." HOBBS, *supra* note 36, at 199.

42. *Id.*

43. *Id.* at 118–30.

44. *Id.*

be characterized as “the warre . . . of every man, against every man.”<sup>45</sup> Life, in the natural state, would be “solitary, poore, nasty, brutish and short.”<sup>46</sup> It is the worst state of existence imaginable.

According to Hobbes, the drive for freedom yields at that point to the stronger drive for self-preservation.<sup>47</sup> To end the war of “every man against every man,” people agreed to create an organization that could use compulsion to end the violence.<sup>48</sup> Hobbes defines this social contract:

*I Authorize and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner. This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latine, CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of that Mortall God, to which we owe under the Immortall God our peace and defence.*<sup>49</sup>

This agreement creates a sovereign, but the sovereign is not a party to the agreement. It owes the citizens nothing. The sovereign’s interest, however, like those agreeing to be bound, lies in preserving order and avoiding life-threatening violence.<sup>50</sup>

The sovereign can be expected to use the obedience of its subjects to stamp out any threat of violence or disorder. It could issue draconian edicts coupled with brutal punishments to ensure compliance.<sup>51</sup> By the terms of the agreement, the subjects are not only required to enforce these edicts, but it is in their interests to do so. If an individual’s resistance is not punished it could lead to group rebellion. If rebellion shakes the sovereign’s power, it threatens to propel the whole population back into the violent, natural state.

Hobbes offers little evidence. He only “models.” From simple

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45. *Id.* at 185.

46. *Id.* at 186.

47. *Id.* at 225–26.

48. *Id.* at 226–27.

49. *Id.* at 227.

50. See generally Claire Finkelstein, *Hobbes and the Internal Point of View*, 75 *FORDHAM L. REV.* 1211, 1227 (2006).

51. In a Hobbesian state, the torturer will be efficient and the executioner zealous. See José Brunner, *Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham*, *THEORETICAL INQUIRIES LAW*, 2007, at 277, 282 (stating the belief uniformly held by Hobbes, Locke, and Bentham that the sovereign holds power over individuals based on its ability to instill the fear of punishment).

premises about human nature, he deduces that certain human responses are necessary and automatic. The result is a bare schematic drawing. The actors are one-dimensional, motivations are limited to a few hierarchical drives, and society consists only of the relations between the individuals and the sovereign, free from other human relationships including family, church, and voluntary organizations. The sovereign gives orders and the subjects obey. No emotions of kindness or compassion are strong enough to overcome the drive for self-preservation that is embodied by the state.

*B. John Locke's Natural Law and the Social Contract*

John Locke's *Second Treatise on Government*<sup>52</sup> is best viewed as a parallel theory meant to modify Hobbes' model. Locke offers a set of deductions, which reach a more benign conclusion about society because they are based on a more benign set of assumptions about the people who comprise it. Locke relaxed the rigid assumption that the strength of human instinct prevents the person within its grip from fighting against it.<sup>53</sup> Locke further argued that people were compassionate, sociable, and could see the dangers of unchecked conflict.<sup>54</sup>

People are capable of perceiving and being guided by natural law.<sup>55</sup> To Locke, natural law guarantees a bundle of inalienable rights, chiefly the right to acquire property.<sup>56</sup> It also presents a set of normative prescriptions designed to maintain order and harmony, which is in everyone's long-term interest. Under natural law, people will order their behavior to avoid the destructive conflict that Hobbes thought was inevitable. If some individual threatened the peace, the others would enforce it, for "every man has a right to punish the offender and be executioner of the law of nature."<sup>57</sup> Thus, the natural state would not be brutish or inherently unpleasant. Nevertheless, it remains far from ideal.

The natural state is marred by certain practical limitations. Impartial judges would not be available to adjudicate the inevitable

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52. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (Peardon ed., Liberal Arts Press 1952) (1690).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 8.

property conflicts. Ad hoc efforts to resolve these problems or acts of vigilantism do not provide an efficient response or alternative to governance. People, therefore, create government by agreeing to obey a sovereign. They give up their power to privately punish violators of natural law. But that is all they give up. People cannot bargain away their natural rights. Indeed, the purpose of government is to protect these rights.<sup>58</sup>

The social contract, therefore, creates only a limited obligation to obey. As long as the sovereign governs in accordance with natural law, people must accept governmental action. If the sovereign violates natural law, people are relieved of the obligation of obedience. Indeed, Locke argued that people possess a natural right to rebel against a tyrannical government.<sup>59</sup> Locke's conclusions allowed the social contract to evolve and become associated with rights, limits on government, and the sense that the government may use brute force only in an exercise to achieve what is right and just.<sup>60</sup> Locke turned the social contract into a powerful means of legitimizing the government. Government must serve the people, so we are obliged to obey it. If government does not serve the people, we can rebel. The fact that we are not rebelling becomes evidence that the government has not become abusive.

Eighteenth-century America was strongly influenced by Locke.<sup>61</sup> The theory advanced by Locke's *Second Treatise on Government* "was commonplace doctrine, everywhere to be met with."<sup>62</sup> Thomas Jefferson asserted that Locke's arguments were "expressed in conversation, in letters, printed essays, or the elementary books of public right."<sup>63</sup> Along with Whig and Classical ideas about republican citizenship, Locke's commentary was the intellectual furniture available to the founding generation.<sup>64</sup>

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58. *Id.* at 70–72.

59. *Id.* at 123–25.

60. See Barker, *supra* note 36, at viii. To the extent that all people have the same natural rights, social contract theory has also been used to justify the important principle of equality. See RON REPLOGLE, *RECOVERING THE SOCIAL CONTRACT* 4 (1989).

61. See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 5–6 (1955); JEROME HUYLER, *LOCKE IN AMERICA* (1995).

62. CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY ON THE HISTORY OF IDEAS* 79 (Vintage Books ed., 1970) (1922).

63. *Id.*

64. The prevailing view of contemporary historians is that although numerous concepts of what a republic should be like were circulating at the time

C. *The Social Contract of Jean-Jacques Rousseau*

The writings of Jean-Jacques Rousseau, including *The Social Contract*, are perhaps best remembered for rhapsodizing on the nobility of people living in a pastoral state of nature.<sup>65</sup> Though Native Americans possessed very sophisticated governments of their own and were not living in a purely natural state, they fascinated the colonists who came to think of them as noble savages.<sup>66</sup> Rousseau saw the natural state and their presence within it as unstable and incomplete.<sup>67</sup>

Though compassionate, people in a natural state could only pursue their own goals.<sup>68</sup> They could not aid one another or even socialize because there was no society to create rules of socialization.<sup>69</sup> Rousseau argued that the “noble savages” felt this lack.<sup>70</sup> They yearned for society.<sup>71</sup> They, therefore, created it, with each person giving up virtually all their natural rights to others.

In this self-created society, each person retains only the right to equally participate in the making of necessary community decisions.<sup>72</sup> For Rousseau, this participation is properly limited to helping the community discover, in each case, the one course of

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of the Revolution, these were all generally compatible in their insistence on limited government and participation. See Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 1 (1986); Kramnick, *supra* note 9, at 3–32.

65. E.g., JOHN LOCKE, DAVID HUME & J.J. ROUSSEAU, in SOCIAL CONTRACT (1947).

66. The portraits drawn by George Catlin and the descriptions of Native American customs offered by such diverse writers as James Fenimore Cooper and Francis Parkman illustrate America’s fascination with the vanishing Native American populations in the nineteenth century. National Gallery of Art, <http://www.nga.gov/kids/catlin/catlin1.html> (George Caitlin) (last visited Apr. 5, 2007); American Studies, University of Virginia, <http://xroads.virginia.edu/~HYPER/HNS/Indians/cooper.html> (James Fenimore Cooper) (last visited Apr. 5, 2007); American Studies, University of Virginia, <http://xroads.virginia.edu/~HYPER/HNS/Indians/parkman.html> (Francis Parkman) (last visited Apr. 5, 2007).

67. JEAN-JACQUES ROUSSEAU, *A Discourse on the Origin of Inequality*, in THE SOCIAL CONTRACT AND DISCOURSES 199–234 (E. P. Dutton & Co. ed., G. D. H. Cole trans., 1950) (1974).

68. *Id.*

69. *Id.*

70. Rousseau discusses human nature and the need for society most extensively in the first part of *A Discourse on the Origin of Inequality*. See *id.* at 177–206.

71. *Id.*

72. JEAN-JACQUES ROUSSEAU, *The Social Contract*, in THE SOCIAL CONTRACT AND DISCOURSES 13, 13–16, *supra* note 67.

action that benefits the best interests of everyone in the long run.<sup>73</sup> To this general will, each citizen must sacrifice his own short-term interests and desires.<sup>74</sup> Citizenship, therefore, requires a type of self-abnegation that is not called for in the natural state. The act of creating and maintaining a civilized society creates citizens out of mere individuals.

The sovereign in each community consisted of nothing more than citizens making important policy decisions. Functionally, the sovereign consisted only of “us,” and there is no entity capable of exacting tyranny from which the people needed to be protected. Consequently, neither limits on governmental powers nor guarantees of rights are found in Rousseau’s system.

Americans have never found Rousseau’s views on government congenial. They tend to think of his descriptions of personal participation in small communities as sentimental at best, and at worst, as encouraging totalitarianism.<sup>75</sup> Nevertheless, Rousseau’s acknowledgement of our natural inclination to be sociable and people’s ability to be transformed by social deeds is extremely insightful. It insists that citizens can be shaped by public work. From this type of public or social work, the founding generation created the Constitution, as well as the identity of Americans and America as a nation.

### III. FOUNDING DOCUMENTS

The belief that the founders were responsible for creating something new and essentially different is a key part of the American colonial experience. A new society was coming into being. As the colonials moved throughout North America, which they saw as wilderness, they occasionally found themselves beyond the reach of familiar civil institutions. In such cases, they came to think of themselves as being in a state of nature.

As late as 1777, settlers in a then-isolated Vermont declared their independence from the organized colonies of New Hampshire.<sup>76</sup> In language clearly echoing Thomas Jefferson’s more

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73. *Id.*

74. *Id.* Rousseau postulates that this general will always exists. *Id.*

75. The debate over Rousseau’s compatibility with totalitarianism is summarized by R.A. LEIGH, *Liberty and Authority in On Social Contract*, in ROUSSEAU’S POLITICAL WRITINGS 232–44 (Alan Ritter & Julia Conway Bondanella eds., 1988) (1762).

76. DANIEL J. ELAZAR, *THE AMERICAN CONSTITUTIONAL TRADITION* 32–33 (1988)

famous declaration, the settlers proclaimed, we “are at present without law or government, and may be truly said to be in a state of nature; consequently a right remains to the people of said Grants to form a government best suited to secure their property, well being and happiness.”<sup>77</sup> The model for this claim, predating Locke, was the Mayflower Compact.<sup>78</sup>

#### A. *The Mayflower Compact*

Finding themselves on a ship beyond the reach of British authority, the Pilgrims looked into the face of the state of nature and recoiled.<sup>79</sup> They believed that government was necessary to keep people from yielding to the depravity in their nature, and they knew that they would need leadership to deal with the harsh winter ahead. On November 21, 1620, the Pilgrims formed themselves into a “civill body politick” and drafted a written agreement.<sup>80</sup> They promised to obey civil officials when they enforced “such just and equal lawes, ordinances . . . as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.”<sup>81</sup>

Significantly, the brief document does not detail the specifics of the government it created. To the extent that the Mayflower Compact reveals the signers’ expectation that magistrates would govern justly and “for our better ordering and preservation,”<sup>82</sup> the Mayflower Compact anticipates the limited agreements of Locke. The Mayflower Compact, however, is an open-ended foundation covenant<sup>83</sup> without explicit limits or a written bill of rights, and it is more Hobbesian than the documents that followed.

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(quoting the settlers).

77. *Id.*

78. WILLIAM BRADFORD, MAYFLOWER COMPACT (1620).

79. Locke noted that history recorded many instances of people renouncing allegiance to an existing civil society and founding a new one from scratch. LOCKE, *supra* note 52, at 66. He saw the phenomenon as evidence that obligation is not eternal or perpetual, but based on contract. *Id.*

80. ANDREW M. SCOTT, POLITICAL THOUGHT IN AMERICA 7 (1959) (quoting BRADFORD, *supra* note 78).

81. *Id.*

82. *Id.*

83. Contractual or covenant ideas pervaded the Puritan social thought of 1701, which in turn served as a “seedbed” for many American ideas of liberty and democracy. John Witte, *Covenant Liberty in Puritan New England*, in JURISPRUDENCE, POLITICAL THEORY AND POLITICAL THEOLOGY (Frederick S. Carney et al. eds., 2004).



### B. Colonial Charters

New governmental ventures customarily began with written authorizing documents. Colonial charters served as grants of authority for the erection of governments and the foundation for institutions and written laws.<sup>84</sup> The most famous of these charters, William Penn's 1681 Charter for Pennsylvania, set rough boundaries authorizing the proprietor to transport colonists and to lay out towns and counties.<sup>85</sup> The proprietor was authorized to appoint judges and other necessary officials to enforce criminal justice in all but the most serious cases and to make laws consistent with reason and not inconsistent with the laws of England, but only after gaining the "advice, assent and approbation of the Freemen" in a legislature.<sup>86</sup>

Charters were issued unilaterally by the Royal Crown and could be, and frequently were, altered in the same way.<sup>87</sup> They were scarcely negotiated. Colonists, however, gained bargaining power as it became clear that the King needed them. Only they could transform the unproductive wilderness into orderly, tax-paying communities. It was customary, therefore, for the charters to provide for limited self-government.<sup>88</sup> At a minimum, colonies would have legislatures elected by freeholders.<sup>89</sup> Later, an explicit bill of rights was added to some charters. Pennsylvania's Charter of Privileges guaranteed the freedom to participate in an elected legislature to all Christians who were living peaceably in the colony and guaranteed persons accused of crimes the right to trials in the "ordinary course of justice," including the same "Privileges of Witness and Council as their Prosecutors."<sup>90</sup>

As the colonists saw it, the benefit of their obedience,

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84. See generally, The Avalon Project, <http://www.yale.edu/lawweb/avalon/states/statech.htm>.

85. Pa. State Archives, *The Charter to William Penn, March 4, 1681*, <http://www.doheritage.state.pa.us/documents/charter.asp>.

86. *Id.*; see also CHARTER FOR THE PROVINCE OF PENNSYLVANIA (1861), available at <http://www.yale.edu/lawweb/avalon/states/pa01.htm>.

87. In comparison, the colonists of Connecticut seemed to have organized themselves into a body politic first and then petitioned for a charter. The Avalon Project, <http://www.yale.edu/lawweb/avalon/states/ct03.htm> (including the Charter of Connecticut, 1662) (last visited Apr. 5, 2007).

88. See, e.g., CHARTER FOR THE PROVINCE OF PENNSYLVANIA, *supra* note 86.

89. See *id.*

90. CHARTER OF PRIVILEGES GRANTED BY WILLIAM PENN, ESQ. TO THE INHABITANTS OF PENNSYLVANIA AND TERRITORIES, OCTOBER 28, 1701, available at <http://www.yale.edu/lawweb/avalon/states/pa07.htm>.

diligence, and hard work was that the King would leave them alone to govern their internal affairs. Many of the grievances listed in the 1776 Declaration of Independence were violations of rights ostensibly guaranteed by the charters.<sup>91</sup> The King was accused of dissolving representative assemblies when they disagreed with him, making them meet in inconvenient places, refusing to allow properly made laws to go into effect, and subjecting them to appointed civil and military authorities whose jurisdiction was “foreign to our Constitution, and unacknowledged by our Laws.”<sup>92</sup> The King was accused, in effect, of violating a contract implied by the charters. He made himself a tyrant by “taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government.”<sup>93</sup>

### C. *State Constitutions*

After the Declaration of Independence, many states revised or rewrote their charters into true constitutions. These were often explicitly Lockean in their language. For example, a 1780 draft composed by John Adams for Massachusetts stated:

The body politic is formed by a voluntary association of individuals. It is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may, at all times, find his security in them.<sup>94</sup>

Such state constitutions did not create government from a natural state. Their most important function was to reauthorize existing governments by stating that their authority came directly from the people rather than the King. To this extent, we can think of the state constitutions as authorizing documents.

State constitutions often added explicit blueprints for

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91. See, e.g., THE CHARTER OF FUNDAMENTAL LAWS OF, WEST NEW JERSEY, AGREED UPON - 1676, available at <http://www.yale.edu/lawweb/avalon/states/nj05.htm> (providing an example of the rights created and guaranteed by colonial charters).

92. See THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

93. *Id.*

94. 8 PAPERS OF JOHN ADAMS 237 (Gregg L. Lint et al. eds., 1989).

government institutions. These blueprints depict the state's varied choices, illustrating the overwhelming goal of limiting government power and preventing tyranny. The "Plan or Frame for the Commonwealth or State of Pennsylvania" was genuinely innovative, though the structure it created was unwieldy.<sup>95</sup> The freemen were to elect a House of Representatives whose members would serve two-year terms and were subject to term limits.<sup>96</sup> An executive council would be chosen to represent the counties, and the terms of its members were to be staggered.<sup>97</sup> Each year, the legislature and the executive council together would choose a president and a vice president, with the former exercising the enumerated powers of the governor with the assistance of the committee.<sup>98</sup> The natural tendency was to rotate the presidency among the members of the committee, which would also rotate it among the counties.<sup>99</sup> The council could outvote its president and thus control any descent into tyranny.<sup>100</sup>

South Carolina's Constitutional Convention constituted itself as a legislature.<sup>101</sup> The General Assembly authorized the election from among its members of an upper house called the legislative council and authorized the council to elect a president and vice president who would have the powers formerly exercised by the royal governors.<sup>102</sup> No separation of powers was provided. The legislature could politically control any president. In contrast, the Massachusetts Constitution of 1780 anticipated the United States Constitution, expecting safety to come from a conventional separation of powers and a careful enumeration of the powers of each branch, especially the executive.<sup>103</sup>

In addition to the listing of powers and prohibitions,<sup>104</sup> all the

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95. America's History in the Making, *Original State Constitution for Virginia and Pennsylvania*, [http://www.learner.org/channel/courses/amerhistory/resource\\_archive/resource.php?unitChoice=4&ThemeNum=3&resourceType=2&resourceID=10081](http://www.learner.org/channel/courses/amerhistory/resource_archive/resource.php?unitChoice=4&ThemeNum=3&resourceType=2&resourceID=10081).

96. PA. CONST. (1776), available at <http://yale.edu/lawweb/avalon/states/pa08>.

97. *Id.* § 11.

98. *Id.* § 19.

99. *See id.*

100. *Id.*

101. S.C. CONST. arts. II, III (1776), available at <http://www.yale.edu/lawweb/avalon/states/sc01.htm>.

102. *Id.*

103. *See* 8 PAPERS OF JOHN ADAMS, *supra* note 94, at 237-61.

104. Substantive provisions may also be placed in state constitutions in the form of limitations on powers. Many states have limitations on taxation. *E.g.*, CAL.

state constitutions from this period provide a bill of rights.<sup>105</sup> These were frequently lengthy and elaborate. In fact, all the provisions of the 1791 federal Bill of Rights are anticipated in one or another of the state drafts.<sup>106</sup> We can infer from the length of these documents, and from the fact that they are usually placed at the beginning of the state constitutions, that the protection of individual rights was a primary purpose of the government.<sup>107</sup> These state constitutions served as a blueprint for the objectives of the newly created government, the means by which officials would be selected, and the limitations on their powers. When these details are added to the explicit authorizations, we can best describe the new state constitutions as founding or foundational documents.

#### D. *The Articles of Confederation*

The Articles of Confederation served as a founding document, differing from the others only in that its authority came from the states by delegation, rather than from the people directly.<sup>108</sup> The national government it created was only to have necessary powers, which were to be understood as those powers that the states were willing to give up. Though this national government was capable of certain achievements, it proved inadequate for the defense, economic, and regulatory challenges of the 1780s.<sup>109</sup>

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CONST. art. XIII A; ILL. CONST. art. IX, § 3. These resemble the provisions in Article 1 of the United States Constitution forbidding taxes on exports and requiring direct taxes to be apportioned among the states. U.S. CONST. art. I. Maryland still forbids persons who belong to subversive organizations from holding any office or position of trust in state or local governments. MD. CONST. art. XV, § 3. Several states now forbid recognition within the state of any marriage except those contracted between one man and one woman. *E.g.*, KAN. CONST. art. XV, § 16; LA. CONST. art. XII, § 15. Kansas long ago forbid the existence within the state of any lotteries. KAN. CONST. art. XV, § 3. Various pro-gambling constituencies, however, have developed within the state. *Id.* § 3A. (amending state constitution to permit bingo); *Id.* § 3B (allowing horse and dog racing); *Id.* § 3C (permitting a state-run lottery).

105. ELAZAR, *supra* note 76, at 111–12.

106. *Id.*

107. *Id.*

108. See THE ARTICLES OF CONFEDERATION (1777), available at <http://www.usconstitution.net/articles.html>.

109. See MERRILL JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION (1964); FORREST McDONALD, E PLURIBUS UNUM: THE FOUNDATION OF THE AMERICAN REPUBLIC, 1776–90, at 7 (1975); CLINTON ROSSITER, 1787: THE GRAND CONVENTION (1966).

*E. The United States Constitution*

The 1787 Constitutional Convention was convened to explore ways to fix the defects that had become apparent in the Articles of Confederation.<sup>110</sup> Delegates revisited principles, discussing what they knew of the history of republican institutions<sup>111</sup> in the context of what they had learned from Hobbes and Locke. Then, the delegates made congress bicameral and strengthened its military and regulatory powers as part of an extensive list of enumerated powers; created an independent executive who could respond to emergencies quickly and who possessed significant military power; and provided for an independent judiciary.<sup>112</sup>

The United States Constitution, drafted by the Convention, is extremely specific on details relating to the qualifications of officeholders, selection methods, powers, and procedures. The delegates wrangled, in committees and on the floor, over the length of the President's term,<sup>113</sup> as well as the length and rotation period of a senator's term.<sup>114</sup> George Washington, the elected presiding officer, spoke from the floor only once during the Convention.<sup>115</sup> He gave his opinion on the hotly debated representation formula for the House of Representatives.<sup>116</sup> As to the legislators, the eventual draft is extremely specific, imposing age and residency requirements,<sup>117</sup> identifying and sometimes limiting the legislature's power to choose its leaders,<sup>118</sup> and delineating quorum requirements, internal disciplinary powers, and lawmaking procedure including "presentment" to the executive.<sup>119</sup> All of these details were debated.<sup>120</sup> Each provision

110. For a general discussion of the Constitutional Convention, see ROSSITER, *supra* note 109.

111. *Id.*

112. *Id.*

113. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97, 134, 493, 497 (Max Farrand ed., 1966) (1911).

114. 1 *id.* at 23; 1 *id.* at 64, 289.

115. 2 *id.* at 97, 134, 493, 497.

116. 2 *id.* at 643-44. A more comprehensive description of the issue is found in a document by James Wilson, 3 *id.* at 159-60.

117. U.S. CONST. art. I, §§ 2-3.

118. *Id.*

119. *Id.* art I.

120. *E.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 113, at 140, 155, 156, 245, 567, 592, 611 (on expulsion of members of congress); 2 *id.* at 158, 231 (on choosing a speaker); *Id.* at 21 (on bill-passing procedures); 2 *id.* at 181, 200, 298-302, 585-587 (on presentment). The requirement that legislators be paid is part of the initial Virginia scheme. *But see* 1 *id.* at 20. Other innovations

was the product of thought and reflection. Not a single procedural clause was adopted casually.

Even more significant than the details governing each branch is the structure of the edifice as a whole. All of the institutions are limited. Government power comes from “we the people” who retain the Lockean right to take it back. Each institution can exercise only its few enumerated powers, and each must obey various explicit limits. The national government was created to establish a balance of power among the executive, legislative, and judicial components, which would politically limit their ability to oppress the people. The Constitution includes other power-controlling balances as well. For example, within the legislature, there are two equal Houses, which must agree.<sup>121</sup>

Individual rights, perhaps neglected in the 1787 draft, were added in near-absolute form in the Bill of Rights.<sup>122</sup> The guarantees of the Bill of Rights, added in 1791, are either limiting or absolute substantive provisions.<sup>123</sup> Political rights are expressed as limits on the kinds of laws congress can create.<sup>124</sup> For example, the First Amendment declares, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>125</sup> Substantive clauses were partially included to meet political objections of groups whose opposition could imperil ratification. Such details as the eminent domain clause,<sup>126</sup> the protection of property under the due process clause,<sup>127</sup> the right to hire counsel in criminal cases,<sup>128</sup> and even the protection of a free press<sup>129</sup> probably respond to the

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were considered and rejected. 2 *id.* at 97, 102, 134 (term limits for the president); 1 *id.* at 20 (term limits for the House of Representatives and recall of house members).

121. U.S. CONST. art. I, § 7.

122. *Id.* amends. I–X. Cf. Hugo L. Black, *The Bill of Rights*, in GARY L. MCDOWELL, *TAKING THE CONSTITUTION SERIOUSLY* 253, 254 (1981). Slavery was abolished by the Thirteenth Amendment. U.S. CONST. amend. XIII. Other substantive provisions have been added in the years since, the best known being the Fourteenth Amendment’s definition of citizenship and the Eighteenth Amendment’s imposition of prohibition on alcoholic beverages. *Id.* amends. XIV, XVIII.

123. See U.S. CONST. amends. I–X.

124. The rights of criminally accused persons and the eminent domain clause, however, are expressed in positive language. See *id.* amends. V, VI.

125. *Id.* amend. I.

126. *Id.* amend V.

127. *Id.*

128. *Id.* amend VI.

129. *Id.* amend. I.

concerns of the affluent.

As the delegates debated, their conflicting substantive concerns<sup>130</sup> were often remedied by structural responses.<sup>131</sup> This is certainly true of the Constitution's most explicit substantive concern, the protection of slavery. The Constitution gave state legislators tools that they could use to prevent congressional interference with slavery. The three-fifths compromise,<sup>132</sup> the fugitive slave clause,<sup>133</sup> and the ban on ending the importation of slaves before the year 1808<sup>134</sup> are the most unambiguous provisions in the Constitution. Only here does substance takes priority.

The Constitution was innovative and controversial. The ratification process was deliberately designed to encourage

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130. Only a few clauses of the draft dealt with substantive details of public policy. Aware of the historical abuses of the law of treason in Europe to suppress political dissent or seize the property of the wealthy, the drafters defined treason very narrowly and required restrictive court procedures to prove it. *See id.* art. III, § 3. The new government was responsible for the existing public debt and allaying the fears of bondholders and of state governments that Revolutionary War debt might be repudiated. *See id.* art. VI, cl. 1. Additionally, both the nation and the states are forbidden to interfere with the obligation of contracts. *Id.* art. I, §§ 9–10 (prohibiting ex post facto laws under Section 9 applying to the federal government provision and barring congressional authority to impair contracts at the state government level under Section 10).

131. Nearly half of the articles contained in *The Federalist* justify a structural feature of the proposed government. HAMILTON ET AL, *supra* note 9. Six articles discuss the federal balance, confronting objections to lodging some powers in the federal government or to limiting it in some respect. THE FEDERALIST No. 41 (James Madison). Thirty articles justify such structural features as the separation of powers, checks and balances, the ratio of representatives to citizens, qualifications required of representatives and the President, the novel method of choosing the President, the absence of term limits for the President, and the independence of the judiciary. THE FEDERALIST Nos. 41–58 & 62–63 (James Madison), Nos. 59–61, 65–73, 78–79 & 82 (Alexander Hamilton); No. 64 (John Jay). When the authors discuss substantive concerns, their arguments often revert to questions of structure or procedure. James Madison's tenth essay is well known for decrying the "violence of faction." THE FEDERALIST No. 10 (James Madison). The political parties of Madison's day were small groups of influential persons, including representatives, united in supporting some course of action not necessarily in the public interest. If such a group could control a legislature, it would raise significant danger of tyranny. Madison's essay warned against this danger. It also argued that the remedy was already at hand in the structure of the proposed government. *Id.* Madison argued that factions would not be able to work their mischief if there was just the right number of public-spirited representatives to oppose them. *Id.* The cure for the violence of factions, therefore, rested in the ratio of representation. *See* U.S. CONST. art I, § 2, cl. 3 (setting a maximum number of representatives at one per thirty thousand).

132. U.S. CONST. art. I, § 2, cl. 3.

133. *Id.* art. IV, § 2, cl. 3.

134. *Id.* art. I, § 9, cl. 1.

participation and to make the consent of the governed overt and explicit.<sup>135</sup> People debated and discussed the draft at great length.<sup>136</sup> Referring to the constant conversation overheard in public places, Richard Butler wrote that “[t]he new Constitution for the United States seems now to engross the attention of all ranks.”<sup>137</sup>

The memory of these public discussions quickly became the founding story of the new nation. Indeed, if the Constitution is considered a national founding document, then the period of debate from 1787 to 1789 can be described as a founding moment. The Constitution is, in a sense, testimony to the fact that our country once did something as “The People.” “[W]e are a people who constitute ourselves as a people in and through the terms of a fundamental text.”<sup>138</sup>

Not long after ratification, politicians were talking about our *sacred* Constitution.<sup>139</sup> It came to be an American symbol, like the American eagle or flag.<sup>140</sup> It has become a repository of our ideals. Supreme Court Justice William Brennan explained, “The Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being . . . . [W]e are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations.”<sup>141</sup>

#### IV. CONSTITUTIONAL INTERPRETATION

People do not always agree on what the Constitution means or,

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135. *See id.* art. VII.

136. *See* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 57–98 (2006).

137. Letter from Richard Butler to William Irvine (Oct. 11, 1787), in 2 *DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 177, *supra* note 9.

138. GOLDFORD, *supra* note 22, at 16–17 (2005). It is in this sense that James Madison called the Constitution “the cement of the union.” MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 61 (1986).

139. ELAZAR, *supra* note 76, at 124–77.

140. Today we preserve a vellum copy of the Constitution, battered and ancient, in the National Archives and Records Administration. The U.S. Constitution Online, <http://www.usconstitution.net/constpix.html#const> (last visited Apr. 3, 2007). It is displayed under climate-controlled conditions, and with great security, like the irreplaceable bones of some saint.

141. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986).



indeed, even understand what it says, but they generally agree that the Constitution should be obeyed. A 1997 survey commissioned by the National Constitution Center revealed that although respondents knew little about the specific details of the Constitution, “[t]he vast majority of Americans fe[lt] that the Constitution is important to them, makes them proud, and is relevant to their daily lives.”<sup>142</sup> Policy advocates, therefore, want the Constitution on their side. They explain and justify their policy proposals in terms of what the Constitution allows or forbids, and their supporters and opponents argue over whether they are correct. In America, the phrase “popular constitutionalism” has a tangible meaning.<sup>143</sup>

As constitutional questions arise over congressional or private actions, the courts make the final determination about what is constitutionally permissible.<sup>144</sup> Judges are called upon to use some interpretive method or principle independent of their own political backgrounds, political goals, or personal preferences.<sup>145</sup> After all, the “[C]onstitution is not an instrument for the realization of any political faction’s goals.”<sup>146</sup> Rather, it is “a set of structures within which political factions can fairly compete.”<sup>147</sup> In attempting to provide objective rulings and allow controversies to be fairly adjudicated, judges are ultimately responsible for creating

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142. THE CONTEMPORARY CONSTITUTION: MODERN INTERPRETATIONS 5 (2006); see also National Constitution Center, <http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCNationalPoll/TheAnswers.shtml> (last visited Apr. 3, 2007) (containing archived survey data).

143. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004), available at <http://www.law.northwestern.edu/mainpages/curriculum/colloquium/Larry%20Kramer.pdf>.

144. Tradition, springing from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), reveals that it is the province and duty of judges to “say what the law is.” When the Constitution becomes a source of litigation, it must be interpreted. Its terms must be defined, implied powers must be inferred, and the language of the eighteenth century must be related to situations, problems, and policy options of today. This is a vast task for the judicial branch. Such judicial analysis inevitably considers the Constitution as a source of law. Philip Bobbitt has argued that “[e]veryone agrees the Constitution is law.” PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION xiv (1991); see also JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 123–25 (Beacon Press, 1982) (1921) (explaining that it is up to judges to give the Constitution legal effect). By its own terms, the Constitution is the highest source of law, trumping federal legislation and state-made law including state constitutions. See U.S. CONST. art. VI, § 2.

145. Edwin Meese III, *Politics and the Constitution, in* POLITICS AND THE CONSTITUTION: THE NATURE AND EXTENT OF INTERPRETATION 53, 55 (1990).

146. *Id.* at 57.

147. *Id.*

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ORIGINALISM AS INTERPRETIVE METHOD

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or choosing an interpretive model for understanding and applying the Constitution.<sup>148</sup>

#### A. *Contractual Interpretation*

Originalists claim that the Constitution is analogous to other contracts. Consequently, they argue that the Constitution should be interpreted in the same manner as other contracts:

[A] written constitution is like a trust agreement. It specifies what powers the trustees are to have and it endows these agents with certain authority delegated by the settlor who created the trust. [I.e., the sovereign public, which created and imposed limits on the government.]

....

... Thus the methods hitherto used to construe deeds and wills and contracts and promissory notes, methods confined to the mundane subjects of the common law, became the methods of constitutional construction once the state itself was put under law.<sup>149</sup>

Significantly, this is a lawyerly elaboration.

According to this argument, the Constitution is not just a deal that people make with one another. Rather, it is analogous to a highly formalized kind of deal, specifically the trust agreement. The technical language of the law governs this form of agreement, where the parties receive formal titles such as trustee or testator, their intentions are reduced to boilerplate clauses with names, and the rights and duties they create can be specifically delineated.

##### 1. *Formal Contracts*

Formal contracts are the kinds of contracts that lawyers are familiar with. They are not ordinary agreements that people merely make with one another on their own, but rather a small fragment of agreements that become formalized when the parties consult their lawyers. In shorthand, we can refer to these formal

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148. A strong argument can be made, however, that any single interpretive method will always be inadequate. Cf. FARBER & SHERRY, *supra* note 11.

149. BOBBITT, *supra* note 144. Compare with the comments of Justice Antonin Scalia in an address sponsored by the Federalist Society, "The Constitution is not a living organism, it is a legal document. It says something and doesn't say other things." *Scalia Blasts Advocates of 'Living Constitution,'* MSNBC, Feb. 14, 2006, <http://www.msnbc.msn.com/id/11346274>.

contracts as lawyers' contracts. As sources of law, lawyers' contracts have certain features. They are made all at once, in a contractual moment signifying agreement, and the agreement is reduced to writing. They specify each party's rights and duties in relation to some promise or performance.<sup>150</sup>

## 2. *Relational Contracts*

Some *formal* contracts are relational. These contracts try to fix the terms of some ongoing business relationship. Typically, they try to preserve some mutually advantageous relationship into a relatively predictable future.<sup>151</sup> The Constitution is closest in nature to relational contracts. Just as a relational contract attempts to provide predictability into the future, the Constitution offered stable guidance to an evolving nation.

By making relational contracts, a business tries to make some ongoing activity reliable and controllable. For example, a box manufacturing company can agree to deliver a certain gross of boxes to a trinket factory each Monday morning. The trinket maker can then be reasonably certain of having the packing materials it needs to make its weekly shipments. In exchange, the trinket maker agrees to pay the contract price on a regular basis. In addition, the relational contract could provide for various foreseeable future events by including contingent clauses. If the trinket factory's business increases, it can increase the number of boxes in its standing order by providing two weeks notice. Changing circumstances can be dealt with by various contract clauses defining the appropriate kind of notice and response.

The very reason that the parties make any lawyers' contract is to project their intentions into the future. Thus, the appropriate interpretive method is for the courts to enforce that original intent. "The primary and overriding purpose of contract law is to ascertain and give effect to the intentions of the parties, and the parties' intent controls the interpretation of a contract as far as that may be

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150. See 17 C.J.S. *Contracts* § 2 (1999) (describing legal characterizations of contracts).

151. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 4 (1980) (defining a contract as "the relations among parties to the process of projecting exchange into the future"). An employment contract is an example of a relational contract. In an employment contract, the employee agrees to perform certain duties. In exchange, the employer agrees to a certain salary and benefits. The contract often anticipates a relationship of extended duration.

done consistently with legal principles, statutes, good morals, or public policy.”<sup>152</sup> Traditional contracts are lengthy and technical because the lawyers who draft them believe that they have to sweat the details in order to ensure that the intent of the maker is properly captured. This has long been understood. In his 1833 commentary on the Constitution, Justice Joseph Story explained, “The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.”<sup>153</sup>

### 3. *The Constitution as a Contract*

An analogy between contracts and social contracts may come easily to lawyers,<sup>154</sup> but it is clearly erroneous when applied to the Constitution. The analogy trivializes the Constitution, the symbol of our unity and the repository of our ideals, by reducing it to a mere instrument. No one marches off to war or lays down their life for a promissory note. It is even more demeaning to analogize the founding of our nation, our transforming moment, to the creation of a business contract intended only to insure dependable, future profits.

The very language of a lawyer’s contract may not be compatible with the expressions of the philosophers who gave us our basic ideas about social contracts.<sup>155</sup> Hobbes, for example,

152. 17A C.J.S. *Contracts* § 308 (1999) (footnotes omitted).

153. COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES viii (3d ed. 1858). Indeed, interpretation may be defined as attempting to discern this original intent. Lino A. Graglia, “*Interpreting*” the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1024 (1992).

154. Lawyers are tempted by the analogy because the word “contract” is used in both cases. Also, legal education offers detailed descriptions about what lawyers’ contracts must include. Significantly, Rousseau’s *Contrat sociale ou Principes du droit politique* is conventionally translated as *Social Contract*, but one translator translates the same term as *Social Compact* and another writes *Social Pact*. THE SOCIAL CONTRACT AND DISCOURSES, *supra* note 72, at 13 (social compact); Jean-Jacques Rousseau, *On Social Contract or Principles of Political Right*, in ROUSSEAU’S POLITICAL WRITINGS 84, 92 (1988) (social pact).

155. J. W. GOUGH, THE SOCIAL CONTRACT 5–6 (1936).

“[T]o express political obligation in the legal terminology of contract is to use a legal analogy, and no doubt in some ways an unfortunate analogy . . . . Many [social contract theorists] were not lawyers but men of letters, or frankly pamphleteers, and we need not suppose that they always used these terms in the strictest legal senses.”)

*Id.* Locke’s limited social contract would seem at first glance to be an exception. His language is more legalistic than other social contract theorists. In various places, he discusses such legal matters as wills and inheritances, and he often uses

distinguished ordinary business contracts from what he explicitly referred to as compacts or pacts.<sup>156</sup> A contract is a “mutual transferring of Right[s],” a reciprocal agreement to be bound.<sup>157</sup> Both sides agree to make a promise or perform some specified action for their mutual benefit. The obligation is discharged when all of those actions are performed.<sup>158</sup> In contrast, Hobbes’ compacts are perpetual and open-ended. The subject matter is “always something that falleth under deliberation . . . and is therefore always understood as something to come.”<sup>159</sup> Thus, even if people perform specified tasks, their obligation to obey the sovereign remains. The obligation devolves to future generations.<sup>160</sup> In such cases, something is going on that is well beyond the routine legal enforcement of lawyers’ contracts.

When we call popular sovereignty a social contract, “what we really mean is not that political obligation implies a contract so-called, but that it involves a relationship which resembles or is analogous to a contract in some respects but not in others.”<sup>161</sup> Some overriding power provided for in the compact is vested in the deliberative and policymaking procedure of the sovereign.<sup>162</sup> The

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legal metaphors. LOCKE, *supra* note 52. For example, when he discusses the ability of a citizen to renounce obligation to a government by leaving its territory, he analogizes this to abandoning real estate by sale or otherwise quitting it. *Id.* at 69. But Locke’s language must be understood in the context of the late seventeenth century. Locke’s intended audience used the word contract to refer to several different kinds of documents. When Parliament accused King James II of breaking the “original contract between king and people” by leaving the country in 1688, it was referring to a tacit bargain more vague and open-ended than any lawyer’s contract. See MARTYN P. THOMPSON, IDEAS OF CONTRACT IN THE AGE OF JOHN LOCKE 12 (1987). Similarly, the period’s writers distinguished between foundational contracts, moral contracts, and unbreakable, eternal “contracts before god.” *Id.* at 40 (discussing the book ROBERT JENKIN, THE TITLE OF AN USURPER (1690)). These are distinguishable from wills and promissory notes. In context, Locke’s view of social contracts more closely resembles that of Hobbes. It is similarly general, ongoing and open-ended.

156. HOBBS, *supra* note 36, at 192.

157. *Id.*

158. *Id.*

159. *Id.* at 193.

160. *Id.* The fact that the obligation to obey is thus handed down, “which republican writers would never allow,” and persists even after regime changes have obliterated the original sovereign, is the major flaw which David Hume used to attack contract theory in 1752. David Hume, *Of the Original Contract*, in HUME: THEORY OF POLITICS 193, 198 (1951).

161. GOUGH, *supra* note 155.

162. For Locke, this power is not absolute. As Thomas Jefferson understood Locke, the power is very great and discretionary. Only if the sovereign commits

compact imposes an ongoing obligation on behalf of the people even as it disregards some of their substantive intent. The compact's lack of reciprocity in obligation makes it unlike an ordinary contract. For the purpose of legal interpretation, the social contract is simply not similar enough to the close-ended lawyers' contract.

Indeed, the varying perspectives of the constitutional generation do not lend themselves to the close-ended nature of the lawyers' contract. The people who negotiated, drafted, and ratified the Constitution had multiple policy goals.<sup>163</sup> Some wanted to create a moral government, open to Christian religious influence; others had visions of ideal societies based on manufacturing, or even Biblical organizing principles; still, others sought the protection and perfection of natural rights, or a Lockean government in which the principles of the Declaration of Independence would be worked out.<sup>164</sup> These goals, and others, conflicted.

Moreover, to the extent that these were long-term goals, they could not be realized by mere contract clauses. The solution provided by a social compact was to create a government open to influence where individuals could pursue these goals. Once created, however, the government would be autonomous and not under the control of the framers. Consequently, the framers paid attention to the structure of government, trying to maximize fairness and openness.<sup>165</sup>

In this respect, contemporary state constitutions are typically, markedly different. They are rich sources of substantive provisions.<sup>166</sup> Education is the most ubiquitous example. The

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wholesale violations of natural rights are the people justified in disregarding that prudence that makes it unwise to lightly dissolve the bonds of an established society and in resorting to their right of revolution.

163. See *supra* note 10 and accompanying text.

164. *Id.*

165. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) (envisioning how a constitutional convention might work when parties try to maximize the chances of eventually reaching diverse and conflicting policy goals). Attempts have been made to model the actual 1787 Convention. See, e.g., Robert A. McGuire & Robert L. Ohsfeldt, *An Economic Model of Voting Behavior over Specific Issues at the Constitutional Convention of 1787*, 46 J. ECON. HIST. 79, 79–111 (1986); William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 AM. POL. SCI. REV. 1, 1–16 (1984).

166. The substantive provisions of state constitutions range in purpose and scope. For example, in Indiana, “the penal code shall be founded on the

Constitution of Illinois says that “[t]he state shall provide for an efficient system of high quality public educational institutions” that shall be free to the students.<sup>167</sup> Other states have similar provisions.<sup>168</sup> California required the legislature to provide funding for education in an amount not less than \$180 per student each year.<sup>169</sup> The state’s schools must also be open and funded for at least six months per year.<sup>170</sup>

Similarly, many states are constitutionally required to manage, regulate, or conserve resources in the public interest.<sup>171</sup> Illinois mandates the maintenance of a healthy environment.<sup>172</sup> This may involve developing water resources in a controlled manner, protecting waterways from exploitative forms of commercial fishing,<sup>173</sup> or instituting specific protections for hunting.<sup>174</sup> Public utilities must also be managed.<sup>175</sup>

These examples indicate the difference between constitutions and contracts. The substantive provisions of the state constitutions reflect public policy. Different constituencies are either benefited or harmed by them, and they fight over them just as they fight over ordinary legislative policy. Not surprisingly, state constitutions are frequently tinkered with, amended, or rewritten entirely.<sup>176</sup> Alabama, for example, has had six constitutions since it became a state.<sup>177</sup> Changes to constitutions are proposed by legislatures, special convention, and lobbying efforts.<sup>178</sup> In many states, these

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principles of reformation and not of vindictive justice.” IND. CONST. art. I, § 18. Also, the Minnesota legislature is required to pay a bonus to veterans of the Vietnam and first Persian Gulf conflicts. MINN. CONST. art. XIII, § 8.

167. ILL. CONST. art. X, § 1.

168. *E.g.*, KAN. CONST. art. VI, § 1; LA. CONST. art. VIII pmbl § 1; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1. Some require the state to provide free textbooks to the students. *E.g.*, CAL. CONST. art. IX, § 7.5 (for students in grades 1–8); VA. CONST. art. VIII, § 3.

169. CAL. CONST. art. IX, § 6.

170. *Id.* art. IX, § 5.

171. *E.g.*, LA. CONST. art. IX, §§ 1, 2.

172. ILL. CONST. art. XI, § 1.

173. *E.g.*, CAL. CONST. art. XI, § 1.

174. *E.g.*, MINN. CONST. art. XIII, § 12; LA. CONST. art. I, § 27.

175. *E.g.*, CAL. CONST. art. XII. Public utility management may be seen to include railroads. TEX. CONST. art. X, § 2.

176. deTocqueville noted this tendency as long ago as 1830. ALEXIS DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 249 (J.P. Mayer ed., Doubleday 1975) (1966).

177. *An Overview of Alabama’s Six Constitutions*, <http://www.legislature.state.al.us/misc/history/constitutions/constitutions.html> (last visited Apr. 4, 2007).

178. For example, the Illinois Constitutional Convention of 1970 has been

efforts are part of the ordinary political process. These constitutions resemble relational contracts of medium-term duration. By contrast, the United States Constitution has rarely been amended, and any attempt to change the wording is met with the attitude that it ought not be tinkered with lightly. The government that it creates has endured longer than any such government. Although it does things differently than it used to, its structured provisions remain little changed.

Even if we were to read the Constitution as nothing more than a promise that creates a legally enforceable obligation, it is clear that the Constitution creates a much different kind of obligation than is created by the ordinary lawyers' contract. The latter is an attempt to bring the future under the control of the present, while the former is an arrangement to create a polity capable of dealing with an evolving future.<sup>179</sup>

*B. Original Intent As An Interpretive Method*

Originalists do not see this distinction.<sup>180</sup> Since the

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extensively studied by political scientists. *See generally* IAN D. BURMAN, LOBBYING AT THE ILLINOIS CONSTITUTION (1970); ELMER GERTZ & JOSEPH P. PISCIOFFE, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (1980); SAMUEL W. WITWER, CON CON DIARY: REFLECTIONS OF SAMUEL W. WITWER (1996). The delegates had to cope with high-pressure lobbying campaigns by, among others, downstate banks who wanted to preserve arrangements contained in the old Constitution that made it difficult for big-city banks to establish branches in small towns. BURMAN, *supra* note 178. The most effective lobbying was done by various elected and appointed public officials who had varying goals but were typically well organized and wielded considerable political power. *Id.*

179. WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 1 (1993) (stating that the Constitution "narrates the polity into existence"). A polity, by its nature, is the political expression and behavior of a group of people thus unified.

180. Robert Bork, *Styles in Constitutional Theory*, 26 S. TEX. L. REV. 383, 385 (1985). Randy Barnett, who has probed the analogy most deeply, concedes its limitations. Barnett, *supra* note 3, at 635. Barnett proposes a novel theory that would justify at least limited originalism because he claims that it is the only interpretive method that will do justice, which he defines as protecting those natural rights that Locke argued people could not bargain away. *Id.* Such a government would be perceived as just. Thus, people will accept it as legitimate. Since the creation of a legitimate government is the overriding goal of the Constitution, use of the originalist method maximizes the likelihood that the Constitution will be successful. Randy E. Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY iv, v (2003). Barnett does not argue that judges must use originalism because the Constitution is a contract. He cannot, however, entirely avoid reliance on the metaphor. In fact, Barnett has argued that "something like a parole evidence rule is needed to preserve the



Constitution requires proper, legal interpretation, they make the ratifiers of the Constitution and the newly created government the two parties to the Constitution's agreement. Fidelity to the original intent becomes the touchstone of all constitutional legitimacy. Former Attorney General Ed Meese III stated, "The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law."<sup>181</sup> To further clarify, "[i]f judges get their authority from the Constitution, and the Constitution gets its authority from the majority vote of the ratifiers, then the role of the judge is to carry out the will of the ratifiers."<sup>182</sup>

### 1. Framers' Intent

The framers of the Constitution are often presumed to have had specific intentions relevant to the substance of legal issues and disputes arising long after ratification. In this respect, David Steinberg explored the roots of the Fourth Amendment. He concludes that the Fourth Amendment was intended to focus strongly, if not solely, on searches of residences and real estate generally.<sup>183</sup> This is the "original public meaning" originalism. To support this conclusion, Steinberg relies on several historical arguments. Initially, when members of Congress debated the text of the Fourth Amendment, their language gradually narrowed to focus on real estate.<sup>184</sup> Additionally, a study of early analogous state law reveals a focus on residences.<sup>185</sup> Although Steinberg stops short

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*original meaning* of the writing and enable it to fulfill the . . . clarification functions of formality." Barnett, *supra* note 3, at 630–31.

181. Ed Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986).

182. Farber, *supra* note 12. U.S. Supreme Court Justice Antonin Scalia explained:

[T]here really is nothing else . . . . The Constitution should be read like any other statute . . . . You either tell your judges, "Look, this is a law like all laws. Give it the meaning it had when it was adopted." Or you tell your judges, "Govern us . . . . You make these decisions for us."

Margaret Talbot, *Supreme Confidence*, NEW YORKER, Mar. 28, 2005, at 40 (quoting Justice Scalia).

183. David Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1061 (2004).

184. *Id.* at 1064–68. Steinberg also argues that the British law of the period, including the controversies over John Wilkes's case and the use of writs of assistance, focused on searches of residences. *Id.*

185. *Id.*

of concluding that all cases applying the Fourth Amendment beyond residential searches are wrongly decided, he does argue that contemporary search and seizure doctrine is “incoherent” because courts have improperly stretched the boundaries of the Fourth Amendment.<sup>186</sup> He further comments, “Justices may restore sensibility to Fourth Amendment analysis only by returning to the original understanding of the amendment.”<sup>187</sup>

Rigorous adherence to this kind of analysis has fixed some policy preferences of the past eternally on the present. For example, the United States Supreme Court has held that the Seventh Amendment right to a jury trial in “suits at common law” applies to “the kinds of cases that ‘existed under the English common law when the amendment was adopted,’” or to “newly developed rights that can be analogized to what existed at that time.”<sup>188</sup> But even a civil litigant’s right to a jury is not guaranteed “if one cannot find eighteenth century precedent for jury participation” in analogous cases.<sup>189</sup> Some scholarly disputes exist over the historical basis for this ruling, but they do not critique the originalist approach.<sup>190</sup>

Freezing the right to a jury trial, as it was defined in 1791, fixes the dead hand of the past on the living.<sup>191</sup> This emphasis on legal history and the insistence that present-day legal issues can be resolved based on ratification-era thought is characteristic of the originalist approach. It makes sense only on the assumption that the framers were wise enough to foresee and preemptively respond to problems that would surface today.

If the job of a judge is to find and to give effect to the intent of the contracting parties, then good judges do so faithfully and bad judges do not. “When [the Constitution’s] intent and meaning is discovered,” then “nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended.”<sup>192</sup> In *Sober as a Judge: The Supreme Court and Republican*

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186. *Id.* at 1077–79, 1083.

187. *Id.* at 1096.

188. Meese III et al. eds., *supra* note 2.

189. *Id.*

190. See Suja A. Thomas, *The Seventh Amendment, Modern Procedures and the English Common Law*, 82 WASH. U. L.Q. 687, 690–91 (2004); see also Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 1 (2006).

191. Brigham, *supra* note 3, at 13.

192. SOBER AS A JUDGE: THE SUPREME COURT AND REPUBLICAN LIBERTY (Richard G. Stevens & Mathew Frank eds., 1999) (hereinafter “SOBER AS A JUDGE”). The editors take their text from Justice William Johnson’s concurring opinion in

*Liberty*, the authors use the terms “restrained” and “sober” to refer to those Supreme Court Justices who ignored their own policy preferences and instead attempted to give effect to the original intent of the parties.<sup>193</sup> The list of “sober” judges<sup>194</sup> gives praise to those who think that fidelity to original intent takes precedence over a display of initiative, imagination, and independent intelligence that the judge might otherwise display. Notably, the list excludes legal visionaries including Brennan the civil libertarian, republican-minded Holmes, or even the lawyerly and property-minded Taft.

## 2. *Rejecting the Originalist Interpretation*

An originalist might respond that the inability to make the contract analogy exact and the bad effects that follow from applying originalism do not change the obligation to follow the method. The Constitution, they might say, is a deal, an agreement between governors and the governed. How else can a deal be interpreted except by looking to specific intent? In fact, there are certain types of deals that are judicially interpreted and applied by courts with little, if any, attention to the specific intent of the parties that made them. These deals are true civil contracts, not necessarily akin to ordinary lawyers’ contracts. Perhaps the most extreme example is the marriage contract.<sup>195</sup>

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*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

193. *Id.* at 20.

194. The list of “sober” judges excludes a series of concededly great legal scholars. It also does not focus on courageous judges, like Marshall or Taney, who took personal risks.

195. Marriage contracts are not the same as prenuptial agreements. *See, e.g.*, Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 698–702 (2001) (discussing the mechanics and policy of prenuptial agreements). Lawyers draw up “prenups” to create a sphere of individual responsibility outside of a marriage itself. *Id.* Prospective spouses can agree, for example, that each of them will continue to be solely responsible for debts contracted before the marriage. *Id.* Conversely, each can retain control of property acquired before the marriage. *Id.* Personal property, they can agree, will not automatically convert into marital property. *Id.*

A prenup can also provide for the orderly disposition of marital property in case the marriage fails, and it can provide an orderly plan for such things as alimony and child support that inevitably arise out of the detritus of a collapsed marriage. The Uniform Premarital Agreement Act, in effect in many states, lists a variety of property-related affairs about which prospective spouses may contract. *E.g.*, 750 ILL. COMP. STAT. ANN. 10/4 (1999 & Supp. 2006). These provisions generally deal with the “rights and obligations of each of the parties in any of the property [possessed before the marriage] of either of them” and with advance

A marriage contract is an agreement to create an association.<sup>196</sup> Though originally a religious ritual, marriage gradually became a secular, civil arrangement.<sup>197</sup> It is now recognized as a true contract in which the parties agree to be bound and accept the legal obligation to remain bound to one another.<sup>198</sup> “Marriage is a personal relations[hip] arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.”<sup>199</sup> The parties “contract towards each other obligations of mutual respect, fidelity and support.”<sup>200</sup>

Marriage admits the parties to the status of married people with a corresponding position in society. This position conveys significant, tangible economic benefits.<sup>201</sup> Once a marriage is

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planning for dissolution decrees. *Id.* See also MINN. STAT. § 519.11 (2006).

Prenups rarely concern themselves with the marriage itself. Restrictions on the marital relationship are generally held unenforceable as tending to derogate or disrupt marriages and hence are considered counter to the public policy of encouraging stable unions. See generally 17A C.J.S. *Contracts* § 245 (1999) (stating that agreements that include restrictions on marriage are contrary to public policy and are thus illegal and void). For example, several states have held unenforceable premarital agreements not to have children. *Id.* § 246. In California, “[e]xcept as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property.” CAL. FAM. CODE § 1620 (2004 & Supp. 2007).

196. “The essence of marriage [is] the voluntary bargain struck between two parties who wanted to come together into an intimate association.” JOHN WITTE, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION 10 (Don S. Browning & Ian S. Evison eds., Westminster John Knox Press 1997); cf. Thomas W. Joo, *The Discourse of “Contract” and the Law of Marriage* (U.C. Davis Legal Studies Research Paper Series, Paper No. 95, 2006) (explaining that by focusing on the voluntary aspect of the marriage contract, it is usually ignored that contract law often imposes obligations without consent).

197. See generally WITTE, *supra* note 196 (tracking the evolution of marriage in several Christian traditions); cf. SIR HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 149–54 (1901) (discussing the gradual evolution of marriage contracts in Roman law from religious rituals to something more like civil contracts).

198. In Missouri, for example, “[m]arriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential.” MO. ANN. STAT. § 451.010 (2004 & Supp. 2007); see generally MINN. STAT. § 517.01 (2006).

199. CAL. FAM. CODE §§ 300, 720.

200. *Id.* § 720. In *A Treatise of Spousals, or Matrimonial Contracts*, written in London in about 1600, H. Swinburne observed, “A present and perfect consent alone maketh matrimony, without either public solemnization or carnal copulation, for neither is the one nor the other the essence of matrimony, but consent only.” LAWRENCE STONE, THE ROAD TO DIVORCE 67 (1990). These ideas led to the collapse of religious control of marriage in the western world. *Id.*

201. Ontario Consultants on Religious Tolerance, *Legal and Economic Benefits of Marriage*, [http://religioustolerance.org/mar\\_bene.htm](http://religioustolerance.org/mar_bene.htm) (listing various legally

formed, society has some interest in preserving it. It cannot be dissolved except by court action.<sup>202</sup>

Like all civil contracts, marriage is regulated by the government.<sup>203</sup> At a minimum, attention is given to the competence of the parties.<sup>204</sup> Governments may require licensing, a showing of the ability of the husband to support a family, proof that neither party has a contagious or sexually transmitted disease, or any number of other specific details.<sup>205</sup> Invariably, the marriage

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guaranteed rights and benefits of marriage) (last visited Apr. 16, 2007). The benefits most likely to be unique to marriage, and not available by or difficult to protect by other forms of civil contract, include Social Security, Medicare, and veterans' benefits; the presumption of inheritance of jointly owned property through the right of survivorship, thus avoiding probate; status of kinship for making decisions about the care of incompetents; and various tax breaks.

202. During some historical periods, divorce has been relatively difficult to obtain, requiring a public showing that one or both of the parties had breached the contract in some way. At other times, during the late stages of the Roman Empire and in Islamic tradition, divorces have been easier to obtain for the husband. Even in no-fault American states, where divorces can be had on the simple statements of the parties that the marriage has broken down, the dissolution of a marriage, with the concomitant untangling of finances, duties, and family ties, becomes an expensive and time consuming process.

203. At various times, initiating a marriage has been a complex process, involving negotiations over the formation of marital property, transactions among matchmakers and lawyers, and even consultations with shamans and soothsayers. Ancient contracts went into great detail about dowries and bride-prices, about where and in what conditions the husband and wife were to live, and even about how many children were to be raised. In one Assyrian document from the nineteenth century B.C., the wife agrees that if she does not produce offspring, "she herself will purchase a slavewoman, and later on, after she has produced a child by him he may then dispose of her by sale wherever he pleases." Alan Humm, *Marriage and Divorce Documents from the Near East*, <http://ccat.sas.upenn.edu/humm/Topics/Contracts/marri02.html> (last visited Mar. 21, 2007). Notably, however, there is some ambiguity in the syntax, and it is not clear which woman can be disposed of by sale after the child is born. Sloppy legal drafting, it seems, is not entirely a modern problem.

Western contracts were similarly complex during the early modern period. For a discussion of early-modern European marriage contracts see MERRY S. WIESNER, *WOMEN AND GENDER IN EARLY MODERN EUROPE* 37 (2d ed. 2005) and MARTHA HOWELL, *THE MARRIAGE EXCHANGE: PROPERTY, SOCIAL PLACE AND GENDER IN CITIES OF THE LOW COUNTRIES* (1998). For an archive of eighteenth-century dowry contracts, see <http://www.era.anthropology.ac.uk/> (follow "Ascoli" hyperlink; then follow "Continue looking at the Ascoli Project" hyperlink) and Humm, *supra* note 203 (archiving historical marriage contracts). Insight can also be gleaned from fictional treatments of marriage. See KATHERINE ELIZABETH JACOBS, *MARRIAGE CONTRACTS FROM CHAUCER TO THE RENAISSANCE STAGE* (2001).

204. MO. ANN. STAT. § 451.010 (2004 & Supp 2007); MINN. STAT. § 517.01 (2006).

205. Lee E. Teitelbaum, *Family History and Family Law*, 2006 UTAH L. REV. 197, 221 (2006) (discussing public restrictions on marriage including disease

must be publicly proclaimed, which may be accomplished by conducting a commitment ceremony before witnesses.<sup>206</sup>

Many marriage contracts are reduced to writing. Positive law may require the writing,<sup>207</sup> or it may simply be part of the tradition of a wedding ceremony.<sup>208</sup> Beyond general vows, however, the intent of the parties is not recorded. That is not to say that specific intent does not exist. In some cases, marriage may be motivated by a desire to strongly improve one's career, to create an entitlement to tangible benefits including better housing and tax benefits, or to establish a foundation for a family. Some people have no intent other than to gain the status of a married person and whatever social world marriage will open up. In these ways, marriage is transformative. It turns bachelors and bachelorettes into husbands and wives, allowing them to behave, and even to think, in different ways.

Sometimes the parties expect the marriage to produce very specific benefits. The parties may have specific ideas about what sexual relations will be like, how housekeeping arrangements will be made, and how finances will be handled. In plain English, the parties have expectations. Their intentions are not typically enumerated, but there are exceptions.<sup>209</sup>

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regulations).

206. Some states require the solemnization of a marriage and the presence of witnesses. See, e.g., MINN. STAT. § 517.10 (2006). In comparison, an eighteenth-century A.D. provision of Byzantine law required a written contract specifying the wife's dowry and three witnesses. *The Contract of Marriage, in the Ecloga of Leo III*, in PAUL HALSALL, *MEDIEVAL SOURCEBOOK: BYZANTINE MARRIAGE CONTRACT* (1997), <http://www.fordham.edu/halsall/source/byz-marr726.html> (last visited Apr. 16, 2007).

207. See MO. ANN. STAT. § 451.220 (2003 & Supp. 2007) (requiring writing if the status of property is altered by the marital agreement).

208. Marriage contracts create a general association expected to last "as long as you both shall live." Unlike business contracts, which try to control the future, marriage contracts do not typically provide many specifics. Marriage contracts are universally understood to create sexual exclusivity. The parties promise to forsake all others and cleave only to the spouse. Even polygamous marriages control, to some extent, future permissible sexual partners. Beyond this, most marriage vows are sparse and very general. Both parties promise to love, honor, and cherish the other. Although these words have dictionary meanings, they are used in many different contexts and are capable of such stretching that in practice, they are as vague as typical constitutional words like "due process of law."

209. In Islamic tradition, for example, where marriages are not treated like sacraments but instead more like other kinds of civil contracts, the parties are encouraged to add stipulations to the deal. Beliefnet.com, *Sample Stipulations for Marriage Contracts*, [http://www.beliefnet.com/story/73/story\\_7377\\_1.html](http://www.beliefnet.com/story/73/story_7377_1.html) (last visited Mar. 21, 2007) (listing sample stipulations that have or could be used).

Marital expectations cannot deal with the kinds of problems that inevitably arise in new marriages. The counseling profession and the clergy invariably encourage all newlyweds to discuss finances, work arrangements, housekeeping, and the like before marriage. Some do. Some do not. Regardless, the disruption that occurs whenever new associations are created guarantees that conflicts will arise even when the spouses are prepared. As the poet Ogden Nash put it, “marriage is a legal and religious alliance entered into/ by a man who can’t sleep with the window shut/ and a woman who can’t sleep with the window open.”<sup>210</sup>

Governments offer little support to parties who are trying to adjust to marriage. Although they extensively regulate marriages, they initially did so in pursuit of public, as opposed to marital goals.<sup>211</sup> Over time, the strengths of the various public interests have waxed and waned.<sup>212</sup> Government regulation of marriage has correspondingly altered.<sup>213</sup> For example, nineteenth-century

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These may include the husband’s promises to employ a maid, to learn to speak and read Arabic, to share home management including child care and cleaning whether or not the wife works outside the home, to not beat the spouse or the children, and to discuss finances openly. *Id.* The wife may reserve the right to come and go as she pleases, to work outside the home, provided the husband has a veto over the choice of a job, to retain some property of her own, to visit her parents whenever she chooses, and to divorce the husband on favorable financial terms if he brings another wife into the home. *Id.* The wife may promise that she will not become pregnant until the husband, or both spouses, complete some level of education. *Id.* She may insist, and the husband must agree, to allow her to bring “all twenty of her cats to live in her husband’s house.” *Id.* *But see* FEMINIST SEXUAL ETHICS PROJECT, *Marriage Contracts in Islamic Jurisprudence*, <http://www.brandeis.edu/projects/fse/Pages/marriagecontracts.html> (last visited Mar. 21, 2007).

210. OGDEN NASH, *I DO, I WILL, I HAVE* (1949), available at <http://www.aenet.org/poems/ognash8.htm>.

211. Teitlebaum, *supra* note 205. For a variety of public health and eugenic reasons, states may prohibit marriages between close relatives or people with sexually transmitted diseases, and they may forbid legally incompetent persons to marry entirely. *Id.* Because the government has an interest in sexual morality, and because its general interest in encouraging stable marriages is threatened by infidelity, it may forbid adultery or bigamy. *See id.* For similar reasons, and because governments retain some interest in the welfare of children, states forbid cruelty or neglect of dependents in marriage and require school attendance, immunization, and sometimes sequestration of the individual property of children. *Id.* Finally, states may make it easier or harder to divorce and may retain some control over the “disposition” of children after a divorce. *Id.*

212. For example, the government’s interest in private sexual morality.

213. LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS AND THE LAW* 44–47 (2004). Harald Fuess has recently argued that similar changes occurred in nineteenth-century Japanese society. HARALD FUESS, *DIVORCE IN JAPAN: FAMILY,*

notions of racial purity, once popular, fell into disrepute during the twentieth century. Laws that prohibited cohabitation and marriage between people of different races were gradually repealed or struck down.<sup>214</sup> Still, the government enforces regulations for its own purposes.

Courts will not enforce the specific intent of the couple when it is called upon to adjudicate issues within the marital relationship. For example, the court cannot be petitioned to resolve a husband's complaint regarding the lack of sexual affection in the marriage, and a wife's disapproval that her husband is not doing his share of the housework will likewise be unavailing. There is a presumption that the intimate details of any marriage are, or should be private, and that they should not be discussed in a public forum.<sup>215</sup> It is believed that exposing the intimate details of a marriage to public scrutiny tends to weaken the marriage and, thus, is contrary to the public policy of encouraging strong marriages.<sup>216</sup> When spouses cannot achieve their specific goals on their own and the courts refuse to interfere, the relationship may break down entirely, resulting in divorce. Ironically, divorce inevitably requires some level of governmental response. Divorce, however, is not an improvement or correction to a relationship. It is the obliteration of a marriage.

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GENDER AND THE STATE (2004).

214. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (cohabitation); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage). In California, no marriage regulation may ever require that an applicant state his or her race or color "for any purpose." CAL. FAM. CODE § 354(d) (2004). Similarly, most states have now repealed requirements that the parties obtain blood tests to detect sexually transmitted diseases before marriage licenses could be issued. See generally *U.S. Marriage Laws*, <http://usmarriagelaws.com> (collecting state licensing requirements).

215. In *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965), the Court forbid states from inquiring into decisions to use birth control:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? *The very idea is repulsive to the notions of privacy surrounding the marriage relationship.* We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.

*Id.* (emphasis added). See also CAL. FAM. CODE § 162.

216. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.4 (3d ed. 1999) (stating that contract provisions counter to public policy will not be enforced by civil courts); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 2, 19 (3d ed. 1987).



In this way, a marriage contract is the counter-example to the insistence that the enforcement of a contract requires a court to put into effect the specific intent of the parties. The box company can invoke the assistance of a court in making the contractual relationship what the makers intended it to be while the unhappy spouse is left to his or her own devices. Courts can regulate the marital relationship, but they do so in ways that have everything to do with the public interest and little to do with the specific intentions of the husband and wife.<sup>217</sup>

The United States Constitution is much more like a marriage contract than it is like an ordinary contract such as a promissory note, deed, or will. It is a foundation document that establishes an open-ended association and transforms its parties in relation to that association. Accordingly, it may be possible to take one more step and argue that because the Constitution functionally creates a marriage, it must be interpreted in courts as though it were a marriage contract. But that argument merely repeats the mistake of the originalists who over-generalize from the metaphor.

In many respects, however, the Constitution is different from a marriage contract. That is the point. The Constitution is unique. It is a document, but it also houses ideas and our national spirit. As an idea, it is also a symbol to which people attach loyalty and patriotism. The Constitution is not just a symbol, like the flag. It is to be applied in courts according to its hierarchical status as the “supreme” source of law.<sup>218</sup> Nevertheless, it is not just a legal

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217. Since no argument is ever truly new, it is not surprising that at least once before a writer has resorted to the marriage metaphor to suggest the proper interpretation of a foundation contract. In his exploration of what Locke’s contemporaries understood when the word contract was used in political discourse, Martyn P. Thompson discusses the work of Robert Jenkin, a long-forgotten Jacobite pamphleteer. See THOMPSON, *supra* note 155, at 40 (discussing ROBERT JENKIN, THE TITLE OF A USURPER AFTER A THOROUGH SETTLEMENT EXAMINED, IN ANSWER TO DR. SHERLOCK’S CASE OF ALLEGIANCE (1690)). After Parliament decided, in 1688, that Catholic King James II had broken the original contract of government by fleeing the country, Jenkin tried to show that King James remained the legal King because the contract could not be broken. *Id.* He argued that unlike ordinary contracts the original contract was made “before god” and it was like a marriage in being solemnized. *Id.* Therefore, like a marriage it could never be broken. Jenkin used the analogy to argue, as here, that there are different kinds of contracts. But his specifically Catholic view of marriage probably failed to convince the great majority of English citizens, whose Protestant political consciousness included the divorces of Henry VIII.

218. The Supremacy Clause of the United States Constitution declares that “[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.” U.S. CONST. art. VI, § 2.

document. No method of interpretation is complete unless all the various facets of the Constitution are considered.

## V. CONCLUSION

Courts must give the Constitution a legal effect, so their decisions are partial. They deal with immediate details, not broad generalities. That does not mean that their decisions must follow the framers' original intent. Originalists argue that no great mischief comes from pursuing the intent of the framers and that some good may come of the exercise. In this view, if judges limit their decisions to enforcing original intent, they are enforcing a sort of self-restraint. This will keep them from distorting the law with their own policy preferences.<sup>219</sup> To this argument, two replies may be given. First, adherence, or at least lip service, to originalism has not prevented considerable distortion.<sup>220</sup> Second, relationships necessarily evolve.<sup>221</sup> The parties must necessarily be allowed to

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219. BORK, *supra* note 6; Richard G. Stevens, *Introduction* to SOBER AS A JUDGE, *supra* note 192, at 1–24. The notion that only judges can save our ancient liberties, by saving them from themselves, has been the originalists' political battle cry. *Id.*

220. See *supra*, Part IV.B.3 (discussing the evolving nature of the marital relationship).

221. This argument may be difficult to place in its legal context. The marriage contract metaphor may suggest a way to grasp it. For we may ask again, why do courts refuse to enforce specific intent within marriages? Surely the reason is that relationships necessarily evolve, and the decision-making structure that evolves within any marriage is intimately connected with the task of planning for, or adapting quickly to, unforeseen change. Change may come from within the parties themselves as they age. For example, sexual appetites naturally wane or are transformed, infirmities and unplanned diseases interfere with a spouse's ability to perform chores or provide economic support, and new interests develop while old attachments fade. The metaphor reminds us that it is the working out of the change through intimate discussions that is the very heart of the marriage relationship. Change may also come from changing circumstances. Children arrive and make their own demands on time and finances. Relatives may make still other demands. Fortune smiles, or perhaps richer becomes poorer.

Finally, change can be the result of adaptation to changes in the larger world. The 1960s encouraged greater social experimentation, while political and financial changes in the 1970s made it necessary for more women to secure jobs outside middle-class households. Had courts enforced the specific intent of newlyweds of 1955 on families of the 1970s, 1980s, and 1990s, it might have frozen marriages and prevented any evolution at all. The new middle-class husband of 1955 was proud that his wife did not need to work outside of the home. It reflected well on his ability to "provide." If that intent had been enforced when the economy weakened after 1970, then that marriage may have fallen on disastrously hard times. Something even worse would have occurred. The court would have substituted itself, and a mechanical rule, for the process of intimate decision making that would have made it possible for the marriage to adapt.

respond to changed intentions, perspectives, and circumstances. The nation must also be allowed to adapt to changes in the larger world.

Originalism is simply the wrong interpretive method to use for a document that creates a participatory government designed to respond to and deal with change. Originalism looks to the past when courts should be contemplating the future. It stiffens what should be flexible and substitutes a process of judicial archaeology for the kind of vigorous public debate embraced during the Constitution's ratification.

The need for flexibility in facing unplanned and unexpected change is the most significant argument in favor of an adaptive or evolutionary method of interpreting the Constitution. Some of the founders seem to have been aware of this. Chief Justice John Marshall explained in *McCulloch v. Maryland*:<sup>222</sup>

[The Constitution is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur.<sup>223</sup>

The founders understood that much of their work from 1787 to 1789 was driven by immediate political need. Many of the framers eschewed the original intent approach.<sup>224</sup> Thomas Jefferson warned against attributing to the people of the past a wisdom more than human.<sup>225</sup>

No form of interpretation can be legitimate unless it gives

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222. 17 U.S. (4 Wheat.) 316 (1819).

223. *Id.* at 415.

224. *See supra* notes 9–11 and accompanying text.

225. *See RAKOVE, supra* note 11, at 367 (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in WRITINGS OF THOMAS JEFFERSON 40 (1903)). Even so, in the course of our public dialogue regarding the scope and proper application of the Constitution, we should still review certain artifacts of the founding generation. We should review these artifacts not because we must be bound by the original intent but because they offer valuable insight. As Jack Rakove suggests, “the meditations about popular government that we encounter there remain more profound than those that the ordinary politics of our endless democratic present usually sustain.” *Id.* at 368.

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effect to the overriding intent of the founders to create a participatory government.<sup>226</sup> The government cannot be understood without reference to the citizenry to which it is linked. Supreme Court Justice Stephen Breyer has written that the Constitution is basically “a set of detailed provisions designed to create democratic political institutions that will last . . . . A participatory democracy that has those attributes is really what the Constitution is trying to create.”<sup>227</sup>

The people need to address the exigencies that arise through discussions on an individual basis and with their elected representatives.<sup>228</sup> Additionally, judicial review “forces a conversation within the polity about what the Constitution should mean.”<sup>229</sup> This serves a useful function. The dialogue initiated by a court case can lead to changes in public opinion, backlash, explicit constitutional modification, or even reversal.

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226. HARRIS, *supra* note 179 (stating that the Constitution “narrates the polity into existence”).

227. Stephen G. Breyer, *Reflections of a Junior Justice*, 54 *DRAKE L. REV.* 7, 12–13 (2005); *see also* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 17–35 (2006) (explaining the need for Justices to look at cases in light of how their decisions will promote the Constitution’s aim of promoting participation by citizens in the processes of government, or what Justice Breyer calls “active liberty”).

228. *See* Meese, *supra* note 145, at 53, 57 (1990) (explaining that the Constitution offers a set of structures within which political factions can fairly compete).

229. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 *U. CIN. L. REV.* 1257, 1259 (2004).