

# Maxim Constitutionalism: Liberal Equality for the Common Good

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*This Article argues that the central purpose of U.S. constitutional governance is the protection of individual rights for the common good. Members of all three branches of government must fulfill that public trust through just policies and actions. The maxim of constitutional governance establishes a stable foundation for the rule of law, requiring government to function in a nonarbitrary manner. It provides the people with consistency and predictability about the scope of governmental powers and responsibilities.*

*The foundational dictate of governance is incorporated into the U.S. constitutional tradition through the Declaration of Independence and the Preamble to the Constitution. Those two documents reflect the national commitment to promulgating laws that are conducive to both the public good and the personal pursuit of happiness. The federal legal system must integrate protections of rights for the common good into statutes, regulations, and judicial opinions that address a plethora of social demands and problems.*

*The project of maxim constitutionalism runs counter to positivist skepticism about the validity of fundamental constitutional principles. This Article seeks to demonstrate that maxim constitutionalism reflects the normative underpinning of legal order that is compatible with pluralistic self-governance. The protection of rights for the common good facilitates the workings of a polity that tolerates debate and deliberation. The administration of laws for the public benefit enjoins tyrannical majoritarianism and abuse of state authority.*

*Like originalism, maxim constitutionalism utilizes historical analysis. But it departs from originalism by denying that the original meaning of the Constitution's text should be determinative. Maxim constitutionalism is a binding norm that is independent of any individual mind frame, whether past or present. In addition, though the forward progress of constitutionalism is informed by judicial opinions, it is not defined by them alone. Congress must also play a central role in identifying rights and promulgating statutes for their protection. Recognizing this bedrock purpose of governance distinguishes maxim constitutionalism from prominent strands of living constitutionalism by furnishing an objective and enduring standard for evaluating the legitimacy of governmental actions. The assessment of public conduct is not procedurally*

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*neutral but substantively rich in its account of how governmental actors should further the public good through a legal system designed to secure life, liberty, and the pursuit of happiness for an equal citizenry.*

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## I. Introduction

Modern dilemmas about national politics, interstate commerce, antidiscrimination laws, and a host of other matters simply cannot be resolved by resort to the constitutional text alone. But where to turn for clarity? Surely the text must be the starting point, else the Constitution ceases to be the highest law of the land. Yet the myriad judicial doctrines, such as the reasonable protection of privacy, that have become part of the constitutional narrative are binding even though they recognize unenumerated interests.<sup>1</sup>

The Judiciary has been the final arbiter of the Constitution's obscure passages since *Marbury v. Madison*.<sup>2</sup> Yet the Court has not always been objective in its reading of the Constitution, often issuing political opinions influenced by the leanings of its members.<sup>3</sup> Its opinions and doctrines have

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1. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Writing for the Court, Justice Douglas declared:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. . . . Yet the First Amendment has been construed to include certain of those rights.

*Id.*

2. 5 U.S. (1 Cranch) 137, 178 (1803) (“The judicial power of the United States is extended to all cases arising under the constitution.”).

3. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 53–54 (2005) (asserting that “landmark Supreme Court decisions of the past one

often been influenced by political and social proclivities and contemporary trends.<sup>4</sup> Its ideological and doctrinal fluctuations clearly distinguish the entity from the fundamental U.S. law that is to guide its decision making. Stability of constitutional norms, therefore, cannot be based exclusively on judicial pronouncements.

The Legislative Branch has even less claim to constitutional objectivity than the Judiciary because senators and representatives are overtly interested in pursuing popularly supported policies, particularly during election years. While Congress is directly elected by the people to represent their interests, the Constitution's internal structure—particularly the separation of governmental functions—creates checks on lawmakers and their constituents that are meant to prevent tyrannical majorities from running roughshod over the rights of minorities.<sup>5</sup> Indeed, the colonists made their initial protests, which eventually led to independence and, consequently, constitutional ratification, against laws passed by the British Parliament,<sup>6</sup> evincing their rejection of legislative supremacy.

The notion that the Framers might have placed constitutional definition in the hands of the President is, of course, entirely specious. Of the three branches of government, the Framers believed the Executive Branch to be most prone to corruption.<sup>7</sup> The Declaration of Independence is a litany of accusations against the monarch.<sup>8</sup> A firm constitutional structure delimiting presidential powers and demarcating rights and principles is necessary to prevent the exploitation of military command to maintain autocracy.<sup>9</sup>

Checks and balances on the powers of all three branches limit government, setting limits on legitimate exercise of powers. The three

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hundred years” would have likely come out differently if the Court had “been differently but no less ably manned”).

4. See, e.g., BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 6 (2010) (describing the concept of “balanced realism,” which understands judges as being influenced by their own political and moral views and personal biases, but also as constrained by social and institutional factors).

5. See generally THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961) (articulating the general need for a separation of powers to preserve liberty as well as the specific need to counteract the inevitable predominance of Congress with bicameralism, different methods of election, and different principles of action).

6. Widespread colonial opposition to authoritarian British legislation began with objections to the Revenue Act of 1764, followed by protests against the Stamp Act of 1765 and the Townshend Duties of 1767. DAVID J. BODENHAMER, *THE REVOLUTIONARY CONSTITUTION* 27–29 (2012); JOHN FERLING, *JOHN ADAMS: A LIFE* 37–58 (1992); see ALEXANDER TSEHIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 18 (2008).

7. See THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 306 (“In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.”).

8. THE DECLARATION OF INDEPENDENCE paras. 3–29 (U.S. 1776).

9. See generally THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 5 (responding to critical misrepresentations of the new presidential power by listing the specific powers granted to the Executive under the Constitution).

branches of government are not only bound by their separate spheres of authority but also, and more importantly, as this Article seeks to demonstrate, by the central purpose of protecting rights for the general welfare. By itself, structural design does not set values, like privacy and justice, that society requires judges, congresspeople, and presidents to safeguard against arbitrary intrusions. Substantive public values are necessary for resolving the conflicts of interest that are inevitable in a pluralistic society.

The Constitution, therefore, provides not merely rules of administration but also of social ethos. We might expect the underlying purpose of government to be based on some general principles, exclusive of written laws; on some intent of the framing or contemporary generation; on the will of national and state leaders; or on some combination of those factors. In a representative democracy with a written constitution, the document is a codification of social ethics conducive to the betterment of the populace as a whole.<sup>10</sup> This perspective differs from the originalist point of view, which emphasizes the subjective original intents of the Framers, the text's public meaning at the time of ratification, or some hypothetical reasonable Framer.<sup>11</sup> By embracing an overarching and enduring principle of representative governance, my approach also differs from that of living constitutionalists, who believe progress can be made through judicial precedents with essentially no reference to constitutional text.<sup>12</sup> Furthermore, I seek to identify a substantive meaning for the U.S. legal identity that undergirds procedural justice.

In this Article, I posit that a simple maxim is at the root of the Constitution. I will be using "maxim" to refer to the directive of constitutional authority. That maxim is informed by values the people

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10. See JOHN RAWLS, A THEORY OF JUSTICE 196 (1971) ("The citizen accepts a certain constitution as just, and he thinks that certain traditional procedures are appropriate."); Justice William J. Brennan, Jr., Speech Given at the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), available at [http://www.pbs.org/wnet/supremecourt/democracy/sources\\_document7.html](http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html) (sharing his view that constitutional interpretation requires consideration of "substantive value choices" and highlighting their application to modern circumstances); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasizing that the exercise of constitutional interpretation must involve a consideration of the written text but also expressing the view that what the text tells us is necessarily limited).

11. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (discussing the defects and benefits of originalism as opposed to other methods of constitutional interpretation).

12. See generally DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1726 (2003). Professor Strauss writes:

[I]t is a persistent feature of American constitutional law that while arguments based on a careful parsing of the text of the Constitution sometimes play a large role in resolving relatively unimportant issues, the text plays essentially no operative role in deciding the most controversial constitutional questions (about discrimination, fundamental rights, and freedom of expression, for example), which are resolved on the basis of principles derived primarily from the cases.

*Id.*

adopted into the Declaration of Independence and the Preamble to the Constitution. It mandates the proper scope of sovereign authority, setting and ordering its priorities. All three branches of government must abide by its formula for representative governance. Stated briefly, I claim that maxim or directive for legitimate authority to be: *The underlying purpose of government is to secure equal rights for the common good.*

That is the people's charge to their representatives and judicial appointees through the original Constitution and its amendments. And it is that mandate by which the legitimacy of all federal and state conduct should be judged.

I begin this Article by laying out the structure of effective social maxims. I am interested in the extent to which a society can construct a social ethos through constitutional structure. Part II further examines the rhetorical effectiveness of maxims as well as how their inclusion in the Preamble and Declaration have influenced American constitutional history. Part III places my proposed constitutional maxim within the context of two constitutional interpretive methods: originalism and living constitutionalism. The Article ends by demonstrating the maxim's relevance to contemporary legal issues.

## II. Constitutional Maxim

I begin this part of the Article by developing a general theory of legal maxims. After defining the concept, I discuss the seminal sources of what I call American maxim constitutionalism: the Declaration of Independence and the Preamble to the Constitution. Finally, I formulate a universal maxim that is derived from their general statements on rights and the common good.

The efficacy of any theory of constitutional interpretation will depend, in no small part, on its ability to appeal to common opinion without being in flagrant conflict with existing jurisprudence. This Article examines whether a unified constitutional maxim can appeal to the commonly accepted principles of normative, procedural, and structural justice.

### A. *Maxims*

Maxims are rules for governing public or private behaviors. In this section I will speak of maxims in general terms and will flesh out their relation to the Constitution in greater detail later in the Article.<sup>13</sup>

In the private realm, maxims are ethical postulates for interpersonal behaviors. For anyone living in a community, maxims provide normative baselines for interacting with others. They are general statements of ethics that are applicable in specific circumstances. Their generality is likely to generate differences of opinion about content, relevance, and scope. Such differences are acceptable and, indeed, to be expected in a pluralistic society

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13. See *infra* subpart II(C).

that treats individuals with respect. Government (with its constitution, statutes, regulations, judicial opinions, and directives) is created, in part, to establish the extent to which ethics are to be enforceable by public institutions. It must provide individuals with the opportunity to develop private moralities, be they religious or secular, that they consider to be uniquely favorable in their pursuits of happiness. Public obligation, on the other hand, in the form of laws that provide avenues of redress to prevent and punish disobedience, such as the protection of political involvement or the enjoyment of public spaces, also places restraints on personal choices deemed deleterious to some higher purpose.

In the public sphere, where maxims are the sources of laws and regulations, they are impartial statements of rules that establish the baselines for legal justification, government structure, and individual rights.<sup>14</sup> At the foundation of legal authority, that is, in the constitutional context, a universal rule must be proscriptive on government as a whole, setting a baseline for legitimate restraints and powers.<sup>15</sup>

Philosophers often associate the term “maxim” with Kantian philosophy,<sup>16</sup> so to avoid confusion, it is important at the outset for me to briefly differentiate my use of the term from its most common usage. Immanuel Kant used the term in relation to his categorical imperative: “Act according to a maxim which can at the same time make itself a universal law.”<sup>17</sup> My explanation of constitutional maxims is related to, but not identical to, Kant’s definition. He refers to a maxim as “a subjective principle of action.”<sup>18</sup> Subjective states of mind help individuals in their

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14. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829) (stating that the “rights of personal liberty” apparently must be protected under “[t]he fundamental maxims of a free government”); Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 7 n.8 (1955) (asserting that political maxims about government structure were among the principles embodied “in concrete political forms” that are tied to the populace); Horace H. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 9, 22 (1911) (stating that legislative infringements of “fundamental maxims of a free government” generally conflict with positive provisions “of both State and National organic law”); see D.S. Shwayder, *Moral Rules and Moral Maxims*, 67 ETHICS 269, 275 (1957) (“[M]axims . . . will include principles of impartiality, universality, and the like. Learning the very language of ‘right’ and ‘wrong’ is conjugate with learning maxims. Functioning as they do, maxims want no moral justification, for they set the boundaries of moral justification.”).

15. See THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297–99 (defending the Constitution’s separation of powers by arguing that it is consistent with the separation-of-powers maxim as conceived by Montesquieu).

16. H.J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT’S MORAL PHILOSOPHY* 135–37 (Univ. of Pa. Press 1971) (1947) (explaining the centrality of maxims to Kant’s doctrine).

17. IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* 53 (Thomas K. Abbott trans., The Liberal Arts Press 1949) (1785) (emphasis omitted) (setting out the form, subject, and characterization of maxims).

18. *Id.* at 38 n.7; see also PATON, *supra* note 16 (explaining the relation of Kant’s subjective maxims to objective principles); cf. CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 57 (1996) (asserting that Kant’s introduction of the “subjective principle” definition of a maxim was clumsy (internal quotation marks omitted)).

daily decision making and vary from person to person based on inclinations, while objective reasoning pertains to the conduct of all rational beings as moral agents using human reasoning to govern conduct.<sup>19</sup> A maxim is subjective if it is something that cannot be generalized and objective when it can be made an obligatory rule of conduct for all rational beings.<sup>20</sup> This distinction strikes me as unconvincing because no rational being can act on an objective imperative without filtering it through some form of individual consideration.<sup>21</sup>

The constitutional maxim I propose is more closely related to what Kant calls the “objective principle,” by which he means “practical law.”<sup>22</sup> In this Article, I do not discuss the subjective bases for rational and irrational moral actions; my focus is rather on a public, social maxim that establishes an aspirational goal for policy making. The constitutional maxim I formulate in this Article is that of a public ethos underlying the structural basis of governance. It is objective but not expected, or even anticipated, to produce uniform conduct (e.g., never lying, irrespective of the consequences), but rather complex, contextual thinking about ideals like liberty, equality, and justice that forces each generation to reassess and evaluate its legal culture embodied in policies, laws, judicial opinions, and other public practices.

The maxim I formulate need not be connected with Kantian philosophy or any advancement of it, such as Alan Gewirth’s Principle of Generic Consistency: “Act in accord with the generic rights of your recipients as well as of yourself.”<sup>23</sup> Benjamin Cardozo, before he had become a Supreme Court justice, may have been correct to say: “Our jurisprudence has held fast to Kant’s categorical imperative . . . . We look beyond the particular to the universal, and shape our judgment in obedience to the fundamental interest of society that contracts shall be fulfilled.”<sup>24</sup> But I do not think it necessary to import Kantianism into constitutional law; indeed, there are too many raging debates about Kantian notions of personal autonomy and its obligation to public duties for me to do them any justice in an article of this scope.<sup>25</sup> Jeremy Waldron has recently pointed out that personal autonomy deals with a person’s decision to follow certain desires, while Kantian moral autonomy

19. See Ping-cheung Lo, *A Critical Reevaluation of the Alleged “Empty Formalism” of Kantian Ethics*, 91 ETHICS 181, 185 (1981) (differentiating Kantian subjective and objective ends).

20. Peter Welsen, *Schopenhauer’s Interpretation of the Categorical Imperative*, 61 REVISTA PORTUGUESA DE FILOSOFIA 757, 761 (2005).

21. See Reginald Jackson, *Kant’s Distinction Between Categorical and Hypothetical Imperatives*, 43 PROC. ARISTOTELIAN SOC’Y 131, 155–56 (1943) (arguing that Kant’s differentiation between maxims as subjective and law as objective should be rejected).

22. KANT, *supra* note 17, at 38 n.7.

23. ALAN GEWIRTH, REASON AND MORALITY 135 (1978) (emphasis omitted).

24. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 139–40 (1921).

25. For an exposition of this debate and an attempt to reconcile personal autonomy by theorists like Joseph Raz and contemporary Kantians like Onora O’Neill, see generally Robert S. Taylor, *Kantian Personal Autonomy*, 33 POL. THEORY 602 (2005).

relates to an individual's universal obligation to other rational persons.<sup>26</sup> This Article deals with neither of those two subjects. I am, rather, concerned with the central obligation of representative democracy in general and its application to the United States in particular.

The maxim that undergirds the Constitution is not a statement of personal obligations to autonomous, moral others; rather, it is a statement of the people's expectations from a representative government answerable to the will of its constituents and meant to benefit the public good. From the moral standpoint, the obligation accrues from the nature of each individual being's ability to act autonomously; from the constitutional standpoint, the maxim is binding on government actors and concerns their use of power to fulfill obligations as citizens exercising the public trust. The maxim of constitutional governance is a general statement of purpose, public objective, and aim that universally applies to all public action.

A prescriptive maxim in a representative polity dictates universal governmental obligations but does not provide the detailed content that the Constitution fills out, statutes detail, and judicial rulings interpret. Maxims' statuses as the undergirding precepts of governance place a duty on all three branches of government to set policies consistent with their dictates.<sup>27</sup> James Madison, in a similar vein, related his hope that the American people would demonstrate "their devotion to true liberty, and to the [C]onstitution" by establishing a national government that would maintain "inviolably the maxims of public faith, the security of persons and property, and encourage[], in every authori[z]ed mode, that general diffusion of knowledge which guarantees to public liberty its permanency, and to those who possess the blessing, the true enjoyment of it."<sup>28</sup> The nature of government must be described in general terms against which the uses and abuses of authority can be tested.

The Constitution sets mandatory guidelines against which ordinary statutes and government actions must be evaluated. Any state conduct that violates its precepts is illegitimate either on its face or in its application.<sup>29</sup> The lasting effect and influence of a constitutional principle are based not merely on its written authority but on its grounding in acceptable legal mores, which are themselves predicated on decades, or sometimes even

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26. Jeremy Waldron, *Moral Autonomy and Personal Autonomy*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS* 307, 307 (John Christman & Joel Anderson eds., 2005).

27. For a helpful definition of maxims in the moral realm, see Talbot Brewer, *Rethinking Our Maxims: Perceptual Salience and Practical Judgment in Kantian Ethics*, 4 *ETHICAL THEORY & MORAL PRAC.* 219, 222 (2001) ("Maxims . . . come into view when we adopt the interpretive posture that construes behavior as action, hence as morally assessable.").

28. James Madison, *President's Message*, N.Y. *COM. ADVERTISER*, Dec. 6, 1816, at 2.

29. For divergent views on facial and as-applied constitutional challenges, compare Scott A. Keller and Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto*, 98 *V.A. L. REV.* 301 (2012), with Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 *STAN. L. REV.* 1209 (2010).



centuries, of cultural, political, and judicial developments. A Constitution that benefits only the few—one that the majority of the population does not wish and that favors just the privileged—has failed to live up to the common good by excluding segments of society from the equality of goods.

A written Constitution and its implicit norms must be universal in their treatment of people in ways that enable society to shed past practices of discrimination, chauvinism, bigotry, and other historical forms of intolerance. The Equal Protection Clause, Privileges and Immunities Clause, Due Process Clause, Guarantee Clause, and a host of other portions of the Constitution that I will discuss later in more detail, play a role in fleshing out the contours of representative democracy. They are general and require the wisdom of all segments of society, and they benefit from a history of legal trial and error.<sup>30</sup> Respect for tenets best assures compliance with constitutional norms, which nevertheless remain ineffective without the regulations needed to morph ideals into enforceable policies. Without civil rights laws—be it the Civil Rights Act of 1964,<sup>31</sup> the Voting Rights Act of 1965,<sup>32</sup> or the Americans with Disabilities Act of 1990<sup>33</sup>—those clauses of the Constitution remain naught but unfulfilled generalities. The simple maxim, “Treat other people equally,” is meaningful but publicly unenforceable unless legislators through statutes, judges through judgments, and the executive through administrative agencies parse who is subject to the imperative (is it all three branches of government or just some of them?), what treatment is due (is it action or inaction?), whom “people” refers to (is it all people or only a certain class of them?), and how equality should be interpreted within the context of various social and individual interests. Specific laws are elaborations on more general clauses of the Constitution—like the Equal Protection and Necessary and Proper Clauses—and overarching principles of government—like each person having a coequal entitlement to a fair administration of the laws. The elements of statutes, therefore, need not be explicitly stated in the Constitution. In enacting them, Congress should flesh out its explicit and implicit Article I powers, without abridging the underlying purpose of representative democracy. The Judiciary, in turn, should either defer to the legitimate compromises that

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30. Compare, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) (“[W]e think the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . .”), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[W]e hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

31. Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h-6 (2006).

32. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

33. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, 47 U.S.C. §§ 225, 611 (2006).

lawmaking requires or strike laws that cater to special interests in violation of constitutional limits.

People are more likely to abide by reasonable proscriptions that positively affect the common good and protect individual rights.<sup>34</sup> Government institutions enjoy broader support through consistent and neutral application of fair statutes that protect constitutional entitlements.<sup>35</sup> Legislation consistent with constitutional mores is more likely to receive widespread support and compliance, even when it places limits on conduct.<sup>36</sup>

For the sake of predictability and clarity, maxims must be based on some authoritative text that supplies key aspects of governance. Even democracies that have no written constitutions have some statement of purpose. For instance, in England the Magna Carta sets the baseline for procedural fairness and bars executive tyranny.<sup>37</sup> Israel, another representative democracy that operates without a written constitution, holds to a principle of equality found in its Declaration of Establishment, which requires the nation to “ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.”<sup>38</sup> Israel’s Basic Law also sets the ideal that in a Jewish and democratic state, “All persons are entitled to protection of their life, body and dignity.”<sup>39</sup>

34. See Aziz Z. Huq, *Enforcing (but Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1057–58 (2012) (referring to social theory, which posits that states are more likely to elicit compliance when they rely on legitimacy—established through fairness and consistency).

35. *Id.* at 1052–58 (surveying research showing “that it is common for people to evaluate institutions, including governmental entities, not solely on the basis of the goods they produce, but also on the basis of whether they behave in a consistent, neutral fashion”).

36. I am here extending Immanuel Kant’s concept of moral sensitivity and justified “moral salience” to the constitutional realm. See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 78, 83 (1993) (explaining that a “Kantian moral agent” must be “trained to perceive situations in terms of their morally significant features” and that “[g]ross failures of perception . . . would be counted as marks of moral pathology”).

37. See *Hurtado v. California*, 110 U.S. 516, 531–32 (1884) (asserting that the Magna Carta “[a]ppplied in England only as a guard against executive usurpation and tyranny”); *Gardner v. Trs. of the Vill. of Newburgh*, 2 Johns. Ch. 162, 165–66 (N.Y. Ch. 1816) (stating that a riparian right is “an ancient and fundamental maxim of common right to be found in *magna charta*”); FRANCIS STOUGHTON SULLIVAN, *LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND* 368 (2d ed. 1776) (reviewing the Magna Carta “maxim” that “no man shall be taken and committed to prison, but by *judicium parium, vel per legem terrae*, that is, by due process of law”); Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 602 (2008) (stating that an “ancient maxim of fairness” is contained in “the Magna Carta’s injunction that justice delayed is justice denied” (citing MAGNA CARTA cl. 40 (1215) (“To no one will we sell, to no one deny or delay right or justice.”))).

38. Declaration of the Establishment of the State of Israel, 5708–1948, 1 LSI 3 (1948).

39. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391. Several other pluralist democracies have religious clauses as universal protections of rights within their written constitutions. For instance, the Constitution of Ireland is promulgated, “[i]n the Name of the Most Holy Trinity, from Whom is all authority and to Whom . . . all actions . . . must be referred,” and acknowledges, “all our obligations to our Divine Lord, Jesus Christ.” IR. CONST., 1937, pmb., available at [http://www.taoiseach.gov.ie/eng/Historical\\_Information/About\\_the\\_Constitution\\_Flag,\\_Anthem\\_Harp/Constitution\\_of\\_Ireland\\_August\\_2012.pdf](http://www.taoiseach.gov.ie/eng/Historical_Information/About_the_Constitution_Flag,_Anthem_Harp/Constitution_of_Ireland_August_2012.pdf). The Polish constitution asserts that the

Even a system governed with a unified central purpose requires a multiplicity of precepts to guide more specific areas of law: To state the obvious, a one-clause statement of national purpose would never be sufficient to provide the accountability required of representative governance. Constitutional principles in a representative democracy must be general enough to cover a wide variety of foreseeable and unexpected circumstances that are likely to affect the populace as a whole, rather than only a portion of the population.<sup>40</sup> The Preamble, the Equal Protection Clause, and the Due Process Clause are pregnant with notions of public safety, evenhandedness, and fair administration but on their face are too broad to apply to specific cases without additional elaboration.<sup>41</sup> Those portions of the Constitution embody ideals that the nation has recognized through a complicated system of ratification<sup>42</sup> for the benefit of its citizens and the polity as a whole. The Supremacy Clause holds all levels of government—the federal, state, and local levels—to some nationally recognized norms.<sup>43</sup> Parts of the Constitution are purposefully formulated in

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country's "culture [is] rooted in the Christian heritage of the Nation and in universal human values." KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] pmb., available at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. The Greek Constitution sets out that it is written, "[i]n the name of the Holy and Con-substantial and Indivisible Trinity." 2008 SYNTAGMA [SYN.] [CONSTITUTION] pmb., available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20agglisko.pdf>. For a more complete list and discussion of religious clauses in constitutions see SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 64–70 (2012).

40. R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 36 (1981) ("A principle which is going to be useful as a practical guide will have to be unspecific enough to cover a variety of situations all of which have certain salient features in common."); Ray Nichols, *Maxims, "Practical Wisdom," and the Language of Action: Beyond Grand Theory*, 24 POL. THEORY 687, 691 (1996) ("Maxims' brevity, pith, and point enable them to catch attention and catch in the memory. When formulated as terse tropes, they compress much into little, so that they can be variously acted on.").

41. See U.S. CONST. pmb.; *id.* amend. XIV, § 1 (Due Process and Equal Protection Clauses); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181 (1999) (relating the principles of the Preamble "to the principle of universal human rights justifiable by reason in the service of self-government"); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 711 (2000) (stating that racial profiling "violates fundamental principles of human dignity at the core of the Equal Protection Clause"); Alexander Tsesis, *Contextualizing Bias Crimes: A Social and Theoretical Perspective*, 28 LAW & SOC. INQUIRY 315, 334 n.26 (2003) (reviewing FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999)) (asserting that the Due Process and Equal Protection Clauses are meant to protect human rights).

42. U.S. CONST. art. V (establishing the process for amending the Constitution); *id.* art. VII (providing the process for initial ratification of the Constitution).

43. Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007 n.177 (2007) ("Supreme Court review of state court judgments and the availability of the inferior federal courts to assure the constitutionality of state laws and the states' compliance with federal norms under the Supremacy Clause are fundamental to the overall operation of the U.S. Constitution and the American court systems."); Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 236 (2012) ("From a purely structural standpoint, Supreme Court review of state court decisions under the

general terms to grant federal and state governments interpretational and experimental latitude while staying true to national ideals.<sup>44</sup>

Ordinary people untrained in the law need not remember the precise language of the Constitution. However, for the principles to have widespread impact, the public must have an accurate understanding of its substance to hold government accountable to established standards of public conduct. Such an understanding is critical for the internalization of ideals that can help evaluate the legitimacy of state and private conduct. For the people to accept a public policy, they must regard it to be in accordance with some broadly conceived ideal of governance, such as fairly apportioned representative democracy. That ideal encompasses a generally accepted public norm of political self-determination, given more specificity in the Fifteenth and Nineteenth Amendments, from which more detailed legal prescriptions, like the Voting Rights Act of 1965, can be developed.

In a federal system, the Constitution has a binding effect, setting common norms for state and federal governments.<sup>45</sup> States can diverge widely in their specific policies, but courts remain essential to deciding whether states' laws violate baseline structural tenets, such as those of democratic representation;<sup>46</sup> substantive principles, such as those of racial equality;<sup>47</sup> and procedural limitations on the use of power, such as personal jurisdiction.<sup>48</sup> Those basic elements of government can be modified or

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Supremacy Clause might be sufficient to prevent state courts from straying too far from desirable national norms or engaging in questionable interpretations of the federal Constitution.”).

44. States are often regarded as laboratories of political experimentation. This view comes from Justice Louis D. Brandeis's statement in a case about Oklahoma's right to pass a regulation for the ice industry. *New State Ice Co. v. Liebmann* has become best known for the statement: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Scholars tend to quote that passage without continuing on to what comes after it, which points to the supremacy of certain federal standards: “This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable.” *Id.* (footnote omitted).

45. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (incorporating the Sixth Amendment protection requiring states to provide legal counsel for defendants in criminal cases who cannot afford to pay for an attorney); *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (incorporating the Fourth Amendment protection against unreasonable searches and seizures to state proceedings); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment protection of free speech against the states).

46. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (holding that state congressional districts must adhere to the principle of “equal representation for equal numbers of people”); *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960) (holding that an Alabama law should be overturned if it were proven that it redrew voting lines to exclude black voters).

47. See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (declaring Virginia's antimiscegenation statute unconstitutional); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (overturning the Topeka school district's policy of racial segregation).

48. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing the minimum contacts standard for personal jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S.

wholly changed by Article V amendments, not ordinary statutory initiatives.<sup>49</sup>

The Constitution has so rarely been altered, with only twenty-seven amendments having been ratified in the course of the document's two-and-a-quarter centuries of existence, that a response to contemporary conditions has often required a modified understanding of the ancient text.<sup>50</sup> Any alteration of meaning through the common law, statutes, or executive orders must nevertheless maintain fidelity to the Declaration of Independence and Constitution's main purpose of securing the common good by protecting inalienable rights.<sup>51</sup> This cornerstone of expanding constitutional doctrine provides a focal point for differentiating between legitimate and illegitimate changes. A maxim of constitutional government establishes consistent, fundamental standards for rational social advancement.

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462, 472–75 (1985) (determining that jurisdiction over a defendant can be established through purposeful availment, reasonable anticipation, and relatedness).

49. In this Article I do not have space to address whether so called “superstatutes” may also achieve constitutional change. For an expostulation of superstatutes, see WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010). They argue that “[a]s a matter of law’s hierarchy of formal authority, superstatutes are subordinate to the Constitution—but in the functional terms of public values and social norms, superstatutes resemble Constitutional rules” in a variety of ways. *Id.* at 27. Jack Balkin, while not using the term “superstatute,” gives examples of entitlements that have become so fundamental to the United States’ “constitutional regime”:

Social Security, Medicare, and other social safety-net programs; national fair labor and consumer protection standards; federal workplace safety and environmental protection regulations; a large federal bureaucracy to carry out these programs; centralized fiscal and monetary policies; an enormous peacetime defensive capability complete with elaborate intelligence programs and permanent standing armies . . . ; civil rights laws . . . ; the Voting Rights Act and other regulations of democratic practice; equal rights for women; elaborate rules of criminal procedure; and robust free-speech protections.

Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1135–36 (2012). To this list of statutes born on the convictions of social conscience should be added immigration and naturalization regulations, the Federal Reserve system, the administration of public safety measures with national implication through the Food and Drug Administration, the national aviation system, interstate highways, and a variety of programs regarded as essential federal entitlements. But I remain unconvinced that these carry constitutional force because any of them can be modified, tweaked, or even altered without going through the complexities of the amendment process.

50. See *Brown*, 347 U.S. at 489–90, 492–93 (discussing how changes in public education required a different reading of the Fourteenth Amendment).

51. Jack Balkin has similarly explained that constitutional law develops through “various constructions, institutions, laws, and practices that have grown up around the text.” JACK M. BALKIN, *LIVING ORIGINALISM* 35 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]. Balkin is informed by the aspirational values that are embedded in the semantics of the constitutional language. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 231–32 (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*] (“Fidelity to original semantic meaning is consistent with a wide range of possible future constitutional constructions that implement the original meaning and that add new institutional structures and political practices that do not conflict with it.”). This Article, on the other hand, claims there is a universal principle of liberal equality for the common good that undergirds the text of the Constitution and governs constitutional heuristics.

Inevitably, in a pluralistic democracy like the United States, differences will arise in emphasis and understanding of history and constitutional norms. To avoid endless conflicts and constitutional crises, the Supreme Court sets authoritative definitions of constitutional meaning.<sup>52</sup> Several scholars, however, have argued against judicial supremacy in interpretation, expressing the view that the Necessary and Proper Clause, the Commerce Clause, the Reconstruction Amendments, and several other constitutional provisions empower Congress to also identify and enact laws for the protection of fundamental rights.<sup>53</sup> More legislative involvement in interpretation would allow ordinary citizens to further engage in the development of policies for the protection of rights and the advancement of general welfare.<sup>54</sup>

While maxims are overarching legal standards, they are not identical to legal rules. Maxims are first-order generalizations. They provide broadly worded principles for governance, not algorithms for proscribing specific conduct or elements of liability.<sup>55</sup> Maxims provide the background information for consistent, coherent, predictable, and procedurally even-handed governance. Take, for instance, the maxim that all people have inalienable rights. For the time being, I am taking this as a given to set the parameters of the argument, but will link it to the Declaration of Independence and analyze it later in the Article.<sup>56</sup> Such a concept is necessary for determining whether *Brown v. Board of Education*<sup>57</sup> or *Plessy*

52. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”). The Supreme Court claims to itself the exclusive prerogative to define substantive rights implicit in Section One of the Fourteenth Amendment, leaving to Congress the subordinate power of correcting state violations of rights that the Court has previously identified. See *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) (“Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law.”).

53. See, e.g., TUSHNET, *supra* note 41, at 13 (arguing that responsible public officials can repudiate the theory of judicial supremacy); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–23 (1999) (criticizing the Court for narrowly construing congressional power under Section Five of the Fourteenth Amendment); Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 697, 732, 736 (2009) (exploring the basis for legislative development of civil rights laws that further fundamental constitutional principles without violating Supreme Court precedents).

54. See Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 718 (2012) (criticizing the Supreme Court’s decision in *City of Boerne* as “effectively restrict[ing] the people from developing constitutional values through their elected representatives and plac[ing] the exclusive power to protect rights in the only unelected branch of government”).

55. See Nancy Sherman, *Wise Maxims/Wise Judging*, 76 MONIST 41, 41 (1993) (describing the categorical imperative in nonalgorithmic terms as requiring assessment of “the salient features of complex situations,” but not as determinative of precise conduct divorced from relevant specificity).

56. See *infra* section II(B)(1).

57. 347 U.S. 483, 493 (1954) (holding that segregation of children in public schools based solely on race denies equal protection of the laws guaranteed under the Fourteenth Amendment). If the Court had stopped with *Brown*, an outside observer might have said that segregation was only

*v. Ferguson*<sup>58</sup> is the correct interpretation of the Equal Protection Clause. When the Equal Protection Clause is taken to mean each person is equal to others by virtue of his or her humanity and is an intrinsic member of the community whose collective good composes general welfare, then systematic separation and degradation of the races runs counter to a core constitutional value.

Maxims are statements of overarching legal commitments to principles like sovereignty, federalism, justice, and equality. By themselves, maxims and principles are morally and socially pregnant; however, they only become enforceable through specific laws and judicial opinions. This is as much true of the civil rights clauses, such as the Equal Protection Clause, as it is for structural parts of the Constitution, such as the multiple clauses defining the functions of the three branches of government.<sup>59</sup>

The maxim that government must treat people with equal dignity for the common good, which I claim is at the root of U.S. constitutionalism, acquires meaning within the context of specific constitutional clauses and their legal and cultural interpretation. Legal meaning partly becomes ingrained in precedent. Standing alone, maxims are necessary to resolving legal disputes, but they are not sufficient for deciding outcomes. Precedents establish

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prohibited at public elementary and secondary schools. Instead, drawing on the decision's principles of equality and civic participation, rather than narrowly corraling it within the confines of the specific holding, the Court followed up with a series of per curiam desegregation opinions that often cited *Brown* but rarely gave any analysis for extending its holding to segregated facilities unrelated to education. See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 61–62 (1963) (per curiam) (relying on *Brown* to find that the segregation of public facilities, such as courtrooms, is constitutionally impermissible); *Turner v. City of Memphis*, 369 U.S. 350, 351, 353 (1962) (per curiam) (holding that public segregation in airport dining facilities violates the Fourteenth Amendment); *Holmes v. City of Atlanta*, 223 F.2d 93, 94–95 (5th Cir.), *vacated per curiam*, 350 U.S. 879 (1955) (vacating a decision that had declared the segregation of public golf courses to be constitutional); *Dawson v. Mayor of Balt. City*, 220 F.2d 386, 387 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (finding that racial segregation of public beaches and bathhouses was not constitutionally permissible); *Bynum v. Schiro*, 219 F. Supp. 204, 205–06 (E.D. La. 1963), *aff'd per curiam*, 375 U.S. 395 (1964) (granting injunctive relief for the desegregation of a city auditorium).

58. 163 U.S. 537, 548 (1896) (deciding that forced segregation on public carriers did not violate the Equal Protection Clause).

59. The failure to mention state sovereignty in the text of the Constitution is in contrast with the Articles of Confederation which stated: "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION OF 1781, art. II. However, given passages like the Tenth Amendment and the Senate Composition Clause of Article One, Section Three, that presume sovereign states and the federal government's relationship to them, federalism is clearly embedded into the Constitution. And while separation of powers is not explicitly named in the Constitution, the document's structure and history justify it. See *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (holding that in judicial determinations of whether Congress can restrict the President to remove executive officers, the analysis must be "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed'"); *INS v. Chadha*, 462 U.S. 919, 957–59 (1983) (holding a legislative veto provision to be an unconstitutional violation of the doctrine of separation of powers).

analytical tools—such as balancing tests<sup>60</sup> and levels of scrutiny<sup>61</sup>—for constitutional construction. For instance, the truism that courts must protect constitutional rights against government intrusion provides the necessary condition for legitimate adjudication<sup>62</sup> but by itself is insufficiently detailed for resolving specific property, contract, estate, and other disputes. Stare decisis provides specificity for achieving the ends established through general statements of socio-legal norms. In the courts, the people effect constitutional change through individual cases or class actions that are ripe for adjudication, brought by those with proper standing.

The people also play a legislative role by lobbying their representatives. The maxim that “state actors treat similarly situated people alike”<sup>63</sup> sets a broadly stated norm of governmental action. Its enforcement is made possible by the Equal Protection Clause, which, in turn, statutes translate into a cognizable cause of action. Title VII,<sup>64</sup> for instance, creates a claim with

60. For a history of the evolution of the judicial balancing tests see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 18, 28, 131 (1992).

61. See G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1184–85 (2005) (relating the evolution of the tiered scrutiny standards from *Carolene Products* through the Warren, Burger, and Rehnquist Courts).

62. This maxim is embodied in the seminal *Carolene Products* footnote. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). At its core, Justice Harlan F. Stone’s famous statement asserted the legitimacy of judicial oversight of state actions that arbitrarily harm minority interests: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Id.* at 153 n.4. That dictum later became the cornerstone for heightened judicial scrutiny. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1288 (2007) (following the development of the Court’s position that some rights enjoy a preferred position).

63. See *McDonald v. City of Saint Paul*, 679 F.3d 698, 705 (8th Cir. 2012) (“In general, the Equal Protection Clause requires that state actors treat similarly situated people alike.” (internal quotation marks omitted)); *Rylee v. Chapman*, 316 F. App’x 901, 907 (11th Cir. 2009) (per curiam) (“The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people alike.”). The Supreme Court regards the Equal Protection Clause to be “essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). This maxim is fleshed out in a variety of other cases holding that the state cannot treat similarly situated persons differently absent some reason. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 597 (2008); *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). The maxim of equality evolved significantly earlier than the ratification of the Fourteenth Amendment. More than two thousand years ago, the philosopher Aristotle wrote that, “Democracy . . . arises out of the notion that those who are equal in any respect are equal in all respects; because men are equally free, they claim to be absolutely equal.” 2 ARISTOTLE, *Politics*, in *THE COMPLETE WORKS OF ARISTOTLE* V.1.1301a28–1301a30, at 1986, 2066 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation).

64. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination:

(a) Employer Practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,



specific elements and available remedies meant to hold responsible employers for violating the maxim of equality by infringing the rights of employees because of their sex, race, religion, color, or national origin.<sup>65</sup> On the structural side, federalism is nowhere explicitly found in the Constitution, but precedent and U.S. culture have made it among the most stable constitutional values for gaining an individual voice in the administration of goods and services. This unwritten, structural constraint on the uses of federal power is linked to specific provisions of the written Constitution, such as the Tenth Amendment,<sup>66</sup> Guarantee Clause,<sup>67</sup> Necessary and Proper Clause,<sup>68</sup> and Supremacy Clause.<sup>69</sup> At a more concrete level, the Court has found that Congress cannot commandeering state legislatures to avoid violating the sovereignty of the states.<sup>70</sup> Congress may nevertheless set limits in safeguarding individuals' ability to enjoy the benefits of organized society

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conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2006).

The Supreme Court upheld Title VII under the Commerce Clause, but Congress passed the statute pursuant to that and its Fourteenth Amendment enforcement power. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Brennan, J., concurring) ("Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause and in § 5 of the Fourteenth Amendment." (citation omitted)); *Jones v. Am. State Bank*, 857 F.2d 494, 498–99 (8th Cir. 1988) ("Title VII was passed pursuant to congressional authority under section 5 of the fourteenth amendment.").

65. 42 U.S.C. § 2000e-2 (2006).

66. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (asserting that the Tenth Amendment differentiates between the powers of the federal and state sovereigns).

67. The Supreme Court has stated that the Guarantee Clause "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414–15 (1938)).

68. *See United States v. Comstock*, 130 S. Ct. 1949, 1967–68 (2010) (Kennedy, J., concurring) (stating that the "essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; [this] is a factor suggesting that the power is not one properly within the reach of federal power").

69. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (asserting that "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause").

70. *See New York v. United States*, 505 U.S. 144, 161 (1992) (asserting that Congress cannot "commandeer" the state legislative process (internal quotation marks omitted)).

through laws like the Patient Protection and Affordable Care Act<sup>71</sup> and Medicaid.<sup>72</sup>

*B. Textual Source of Constitutional Directive*

Authoritative text is needed to transform maxims from a series of unrealized goals into enforceable norms. In the United States, the Constitution is regarded to be the sole fundamental law with supreme authority over any other public mandate. Its provisions incorporate the more fundamental principles of justice and political accountability, which predate the Constitution and are predicated on the postulate that all people have equal intrinsic rights (to such conduct as travel, speech, the formation of relationships, safety, etc.) that government must protect for the public good.<sup>73</sup> Official misconduct that violates this objective of governance is illegitimate and undermines the people's sovereign directive to form government responsible for representing their interests and protecting their individual, nonintrusive pursuits of happiness.

The maxim of equal rights for the public good is an abstract concept, one that has moral or philosophical value but only becomes a constitutional norm through formal adoption. At the country's founding, the Declaration of Independence adopted a normative structure that recognized the equality of human rights,<sup>74</sup> asserted that the people are the source of sovereignty,<sup>75</sup> and required public officers to answer to the will of their constituents.<sup>76</sup>

The Declaration's statement of national principles is often overlooked in constitutional discourse but should be understood to be relevant to interpretation of the Constitution's text and ethos.<sup>77</sup> The Declaration of Independence is a substantive statement of rights and representative democracy. The Preamble to the Constitution is likewise typically thought to be unenforceable,<sup>78</sup> despite its overarching statements of national purposes

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71. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (asserting that "[n]othing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use" but prohibiting Congress from penalizing nonparticipating states).

72. See *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 512 (1990) (determining that a "provision of federal funds is expressly conditioned on compliance with the amendment and the Secretary is authorized to withhold funds for noncompliance with this provision").

73. See Alexander Tsesis, *Undermining Inalienable Rights: From Dred Scott to the Rehnquist Court*, 39 ARIZ. ST. L.J. 1179, 1184–86 (2007) (surveying Revolutionary literature and determining that "an undeniable commitment to inalienable rights permeated early American theory of government").

74. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

75. *Id.*

76. *Id.*

77. See Tsesis, *supra* note 54, at 701–10 (discussing the legitimate role of the Declaration of Independence in constitutional interpretation).

78. Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 119–23, 123 n.22 (1990) (explaining the "uncontroversial and perfectly consistent" proposition—argued by

and governmental obligations. These two texts jointly require all three branches of government to protect rights for the common good. Both the Declaration and the Preamble contain guiding principles about governmental powers, duties, and limitations. Despite the Supreme Court's relative neglect of those documents, throughout the nation's history progressive movements have incorporated them into their demands for social change.<sup>79</sup>

1. *Declaration of Independence.*—The Continental Congress adopted the Declaration of Independence to explain the purposes of the American Revolution and set norms for representative politics.<sup>80</sup> A review of principles the nation espoused in this statement of its ideals reveals contours of the founding social maxim to safeguard inalienable rights and the pursuit of happiness through representative governance.<sup>81</sup> The Declaration asserted some of the ideals of representative governance that were often voiced in the colonies prior to its adoption.<sup>82</sup> It left a deep imprint on the civic expectations of its contemporaries and those of future generations.<sup>83</sup>

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Justice Harlan and reiterated by other courts—that the Preamble to the Constitution “has never been regarded as the source of any substantive power conferred on the Government of the United States”).

79. See, e.g., Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 38–41 (2005) (highlighting Virginia and Francis Minor's use of the Preamble to support their argument for women's suffrage); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 362 (1993) (referencing famous speeches that invoked the “eternal” language of the Declaration of Independence—Lincoln's Gettysburg Address and Martin Luther King Jr.'s speech at the Lincoln Memorial—and their associated social movements to show that “[t]hroughout our history, most Americans have regarded the Declaration of Independence as expressing the greatest ideals of this country”).

80. CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 6 (1922) (“The ostensible purpose of the Declaration was, therefore, to lay before the world the causes which impelled the colonies to separate from Great Britain.”); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 IOWA L. REV. 1177, 1222 (1987) (discussing the “basic normative principles” announced in the Declaration of Independence).

81. See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

82. Two signers of the Declaration commented on the document's reliance on commonly accepted colonial thought. Richard Henry Lee and John Adams asserted that the document was unoriginal. To their claims, Jefferson responded that he had all along wanted it to reflect the political climate of America rather than his personal views. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 342, 343 (Paul Leicester Ford ed., N.Y.C., G.P. Putnam's Sons 1899) (stating that the Declaration of Independence “was intended to be an expression of the American mind”). Adams, who would later serve as President of the United States, and one of the most powerful representatives to the Continental Congress, wrote that there “is not an idea in [the Declaration] but what had been hackneyed in Congress for two years before.” 2 *JOHN ADAMS, Autobiography*, in *THE WORKS OF JOHN ADAMS* 503, 514 n.1 (Charles Francis Adams ed., Bos., Charles C. Little & James Brown 1850).

83. See ALEXANDER TESIS, *FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* 1 (2012) (“A closer look at more than two centuries of speeches and writings reveals that the Declaration of Independence has had a remarkable influence on American policy making.”).

The Declaration's statements against George III contrasted the policies of autocratic rule with the newly founded country's duty to safeguard the inalienable rights of the people.<sup>84</sup> Some paragraphs condemned the British monarch for refusing to respond to colonists' petitions for representation in Parliament.<sup>85</sup> Colonial representatives also adopted the statement that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."<sup>86</sup> Thomas Hartley, a member of the Pennsylvania ratifying convention, explained the meaning of this section of the Declaration:

As soon as the independence of America was declared in the year 1776, from that instant all our natural rights were restored to us, and we were at liberty to adopt any form of government to which our views or our interests might incline us.—This truth, expressly recognized by the act declaring our independence, naturally produced another maxim, that whatever portion of those natural rights we did not transfer to the government, was still reserved and retained by the people . . . .<sup>87</sup>

Elsewhere, an unidentified author wrote that the United States determined that "if universally embraced, . . . the maxim, that 'all men are born free, equal, and independent'" would "render the human race secure and happy."<sup>88</sup> These statements were only the first attempts at understanding the Declaration's implications for constitutional democracy. Every generation since then has put effort into explaining and defining the document's meaning.<sup>89</sup>

The Declaration's axiomatic statement about human nature and government obligations was inspirational to a variety of progressive social movements, like the feminist movement and the abolitionist movement, who understood its ideology to apply to all the people, not merely to white men.<sup>90</sup>

84. THE DECLARATION OF INDEPENDENCE paras. 6–7 (U.S. 1776).

85. *Id.* paras. 5, 30.

86. *Id.* para. 2.

87. *State Convention, Friday, November 30*, INDEP. GAZETTEER (Phila.), Jan. 3, 1788, at 2.

88. *From the Republican Ledger*, The Examiner, No. VII, CONST. TELEGRAPHE (Bos.), Feb. 1, 1800, at 1 (asserting this statement of human rights in defense of the French Revolution).

89. See Colloquy, *Fidelity as Synthesis*, 65 FORDHAM L. REV. 1581 (1997).

90. See, e.g., DECLARATION OF SENTIMENTS AND CONSTITUTION OF THE AMERICAN ANTI-SLAVERY SOCIETY 3–4 (Phila., Anti-Slavery Soc'y 1861), available at <http://archive.org/stream/declarationofsen00amer#page/n5/mode/2up> (calling the Declaration of Independence and its guarantee of "life, LIBERTY, and the pursuit of happiness" the "corner-stone" of the country); THE PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 15TH AND 16TH, 1851, at 11 (N.Y.C., Fowlers & Wells 1852), available at <http://memory.loc.gov/cgi-bin/query/r?ammem/naw:@field%28DOCID+@lit%28rbnawsan8287+div1%29%29>. The resolution advanced at that convention stated:

*Whereas*, according to the Declaration of Independence of the United States, all men are created equal and endowed with inalienable Rights to Life, Liberty, and the pursuit of Happiness; therefore, *Resolved*, That we protest against the injustice done to Woman, by depriving her of that Liberty and Equality which alone can promote

While their views did not figure into antebellum government decisions, these social activists were instrumental in developing the cultural progress needed for formulating the Due Process, Citizenship, Privileges or Immunities, and Equal Protection Clauses of the Fourteenth Amendment.<sup>91</sup>

Prior to the ratification of the Constitution, the Declaration clearly committed the nation to rely on the “just [P]owers” derived “from the Consent of the Governed” in order “to secure” equal liberty for all Americans, irrespective of their state of origin.<sup>92</sup> The purpose for consenting to a unified national authority was clearly to establish safeguards for the inalienable rights that the document acknowledged to be the birthright of all people. The Declaration of Independence was a sophisticated compact that explained the unity of liberty and equality into “a maxim worthy of the dignity of man.”<sup>93</sup> This commitment to joint government united all thirteen colonies.

Contrary to the claims of some scholars, the founding generation understood the Declaration of Independence to be more about equality than a collective right to oppose tyranny, although that certainly was part of the manifesto’s meaning.<sup>94</sup> For some of the most influential Founders, the Declaration was more than a statement of sovereignty. It expressed universal principles about intrinsic human worth. James Wilson, who was later a member of the Constitutional Convention and then the Supreme Court of the United States, asserted that the statement of equality and inalienable rights found in the second paragraph of the Declaration of Independence provided the “broad basis on which our independence was placed.”<sup>95</sup> He further asserted that the system of the Constitution was erected “on the same certain and solid foundation.”<sup>96</sup> On this reading, the Constitution’s specific grants of

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Happiness, as contrary alike to the Principles of Humanity and the Declaration of Independence.

*Id.*

91. *See, e.g.*, TESIS, *supra* note 6, at 100 (claiming that the terms of the Fourteenth Amendment incorporated traditional abolitionist natural rights views, allowing the Amendment’s future reach to extend far past the contemporary sensibilities of the Framers).

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

93. *See New-York, October 2*, YOUTH’S NEWS PAPER (N.Y.C.), Oct. 7, 1797, at 16 (asserting that “[l]iberty and equality well explained and understood” is such a maxim).

94. *See, e.g.*, Jack Rakove, *Fitly Spoken*, NEW REPUBLIC, Aug. 9, 2012, <http://www.tnr.com/book/review/liberty-equality-alexander-tesis?page=0,1> (rejecting the view that the Declaration was meant to be a universal statement of equality and arguing for the more narrow reading). While colonists sought primarily to assert their independence by explaining the rationale for the revolution, they also thought it of vital importance to explain the principles for governance binding on the newly independent nation. *Cf.* DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 21 (2007) (asserting that “[t]he primary purpose of the American Declaration . . . was to express the international legal sovereignty of the United States” and thus claiming less import for the statements of universal rights).

95. 1 DEBATES OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, ON THE CONSTITUTION, PROPOSED FOR THE GOVERNMENT OF THE UNITED STATES 59, 63 (1788).

96. *Id.* at 63.

power were predicated on the principles adopted into the Declaration of Independence. Samuel Adams, one of the most influential Revolutionary leaders and a signer of the document, was more specific in explaining how the Declaration helped frame U.S. social ethics. As acting governor for the state of Massachusetts, he asserted to both branches of the state's legislature that when "the Representatives of the United States of America" agreed "all men are created equal, and are endowed by their Creator with certain unalienable rights," they proclaimed "the doctrine of liberty and equality" to be part of the "political creed of the United States."<sup>97</sup>

The great Quaker abolitionist Anthony Benezet wrote that the guarantees of the U.S. creed covered all colonial inhabitants, irrespective of race and class. The Declaration's statements about the people's right to separate from Great Britain, he wrote, "apply to human nature in general, however diversified by colour and other distinctions."<sup>98</sup> Just two years after the Continental Congress adopted the Declaration of Independence, Benezet already believed that its statement about "all [m]en [being] created equal" with the inalienable rights of "Life, Liberty, and the Pursuit of Happiness" placed certain moral demands on the nascent nation.<sup>99</sup> The document's binding recognition of rights and statement against political oppression were also a telling condemnation "against the slavery of the Negroes."<sup>100</sup> In the same year, 1778, Jacob Green delivered a sermon in New Jersey. Like Benezet, Green expostulated about the incompatibility of the Declaration's statements of human equality and entitlement to liberty with the retention and promotion of slavery.<sup>101</sup> Understanding of the Declaration as a statement of the nation's commitment to the universal rights continued into the next decade. In a two-column side-by-side presentation, New Jersey Quaker

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97. Samuel Adams, Mass. Lieutenant Governor, Speech to the Massachusetts House of Representatives and Senate (Jan. 17, 1794), in *MASS. MAG.*, Jan. 1794, at 59, 63 (emphasis omitted).

98. ANTHONY BENEZET, *SHORT OBSERVATIONS ON SLAVERY* 2 (Phila., Joseph Crukshank 1781). For a similar reliance on the Declaration as a statement of national principle, see *THE CONSTITUTION OF THE PENNSYLVANIA SOCIETY, FOR PROMOTING THE ABOLITION OF SLAVERY, AND THE RELIEF OF FREE NEGROES, UNLAWFULLY HELD IN BONDAGE* 21 (Phila., Francis Bailey 1788); JAMES DANA, *THE AFRICAN SLAVE TRADE. A DISCOURSE DELIVERED IN THE CITY OF NEW-HAVEN, SEPTEMBER 9, 1790, BEFORE THE CONNECTICUT SOCIETY FOR THE PROMOTION OF FREEDOM* 28 (New Haven, Thomas & Samuel Green 1791); WARNER MIFFLIN, *A SERIOUS EXPOSTULATION WITH THE MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* 9 (Phila., Poughkeepsie, Dutchess Cnty. 1794).

99. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

100. ANTHONY BENEZET, *SERIOUS CONSIDERATIONS ON SEVERAL IMPORTANT SUBJECTS; VIZ. ON WAR AND ITS INCONSISTENCY WITH THE GOSPEL. OBSERVATIONS ON SLAVERY. AND REMARKS ON THE NATURE AND BAD EFFECTS OF SPIRITUOUS LIQUORS* 28 (Phila., Joseph Crukshank 1778).

101. JACOB GREEN, *A SERMON DELIVERED AT HANOVER (IN NEW-JERSEY) APRIL 22D, 1778. BEING THE DAY OF PUBLIC FASTING AND PRAYER THROUGHOUT THE UNITED STATES OF AMERICA* 12–13 (Chatham, N.J., Shepard Kollock 1779).

David Cooper drew readers' attention to the Declaration of Independence's statement of rights and obligations, while on the right-hand column he wrote:

If these solemn truths, uttered at such an awful crisis, are self-evident: unless we can shew that the African race are not men, words can hardly express the amazement which naturally arises on reflecting, that the very people who make these pompous declarations are slaveholders, and, by their legislative conduct, tell us, that these blessings were only meant to be the rights of whitemen not of all men. . . .<sup>102</sup>

Taking the Declaration outside the realm of religious dialogue, in a speech before the American Philosophical Society, George Buchanan quoted the document to demonstrate that its principles were incompatible with the oppression of the “[u]nfortunate Africans.”<sup>103</sup> These antislavery views were by no means held by all Americans, but they demonstrated that from the time of the nation's founding, a variety of visionary thinkers regarded the Declaration to be an inspirational statement of government obligation to protect intrinsic human freedom on an equal basis.

The Declaration of Independence so quickly gained colonial assent because its author, Thomas Jefferson, drew his inspiration from ideas about governance that enjoyed widespread support throughout the colonies.<sup>104</sup> His contemporaries distinguished the “maxim” of “[l]iberty and equality,” which was thought to be “worthy of the dignity of man,” from the privileges of European nobility.<sup>105</sup>

The Declaration's maxim of universal rights set a norm that made government beholden to the people and their will to pursue happiness and the general welfare.<sup>106</sup> Writing in a weekly Philadelphia newspaper, a

102. DAVID COOPER, A SERIOUS ADDRESS TO THE RULERS OF AMERICA, ON THE INCONSISTENCY OF THEIR CONDUCT RESPECTING SLAVERY: FORMING A CONTRAST BETWEEN THE ENCROACHMENTS OF ENGLAND ON AMERICAN LIBERTY, AND, AMERICAN INJUSTICE IN TOLERATING SLAVERY 12 (Trenton, N.J., Isaac Collins 1783) (emphasis omitted).

103. GEORGE BUCHANAN, AN ORATION UPON THE MORAL AND POLITICAL EVIL OF SLAVERY 13–14 (Balt., Philip Edwards 1793).

104. Letter from Thomas Jefferson to Henry Lee, *supra* note 82, at 343 (asserting that he did not seek “to find out new principles, or . . . merely to say things which had never been said before[,] but to place before mankind the common sense of the subject” that reflected the “sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right”).

105. *New-York, October 2, supra* note 93; see also *Hints for a Form of Government for the State of Pennsylvania*, PA. EVENING POST (Phila.), July 16, 1776, at 351 (proposing the formation of a Legislative Council in order to give “great security to public counsels, and prevent[] rash acts of government”).

106. I make no attempt here to fully define the terms “happiness” and “general welfare.” Stated briefly, my position is neither empirical utilitarianism, hedonism, nor deontology. I have adopted the term maxim constitutionalism to designate my approach, which claims that following a maxim committed to the protection of fundamental human entitlements is most likely to lead to general welfare. My approach is closely analogous to rule utilitarianism but differs from it because I rely on a fundamental maxim of conduct rather than a plethora of rules.

I believe that the public sphere requires the principled administration of law. The equitable exercise of government authority to protect individuals is necessary for the elevation and expansion

contributor stated that the same “[s]ages, who penned the Declaration of Independence, laid it down, as a fundamental principle, that government derives its just powers from the *consent of the people* alone.”<sup>107</sup> Prior to the ratification of the Bill of Rights, and later the Reconstruction Amendments, the Declaration of Independence was the most detailed statement of the directive for government to safeguard liberty and equality.<sup>108</sup> Echoing the sentiments of the Declaration, an author calling himself simply “A Ploughman” wrote in a Philadelphia newspaper, “It is a general maxim that government was instituted for the protection and happiness of the people.”<sup>109</sup> The idea of popular government was very different for the revolutionary generation than for us—they accepted and participated in conduct toward women and minorities that we are now aware violated the very principles laid down<sup>110</sup>—but the shortcomings of their conduct does not gainsay the continued worthiness of the universal ideals for governance they established.

The act of independence was meant to grant the people power over their political, civil, and social destinies. Constituting a government to effect the people’s “Safety and Happiness”<sup>111</sup> required the passage of laws that foreseeably placed limits on individual liberty to protect the common good. In the words of a contemporary, a “fundamental maxim” of lawmaking was “that a part of our liberty must be given up for the security of the rest.”<sup>112</sup> Limits on liberty were necessary for securing civil equality. Natural liberty, as Samuel Adams explained, could be “abridged or restrained, so far only as

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of public happiness and overall welfare. Checks and balances on the three branches of government are made to protect the individual from official overreaching and to facilitate debate about how best to achieve the public good. Respect for individuals and a rational policy for achieving social improvement are intrinsic to the pursuit of happiness. Certain rules of social conduct, developed through representative governance, are critical to the pursuit of the common good.

Constitutionally protected well-being is the integration of social satisfactions, obtained through public institutions like representative governance, and personal satisfaction with one’s life and available opportunities for succeeding. Without reasonable regulation for justly resolving conflicts of interest, powerful interests can exploit their positions to unfairly, inequitably, and arbitrarily amass goods at the expense of outside groups. The pursuit of happiness, thus, requires fair laws that benefit the common good by protecting individuals’ quest for personal aspirations.

107. *American Intelligence*, FREEMAN’S J.; OR, N.-AM. INTELLIGENCER (Phila.), Aug. 24, 1791, at 3.

108. See *Debates in the Pennsylvania State Convention, For and Against the Federal Constitution*, WORCESTER MAG., Dec. 1787, at 163, 164 (arguing that the first two paragraphs of the Declaration of Independence better protect people’s rights than the original Constitution).

109. A Ploughman, *To the People*, INDEP. GAZETTEER (Phila.), Oct. 5, 1782, at 1.

110. See, e.g., U.S. CONST. art. I, § 2, cl. 3, *repealed* by U.S. CONST. amend. XIV (providing that the whole number of “free Persons” and three-fifths of persons who are not free be added for purposes of legislative apportionment); MARY BETH NORTON, *LIBERTY’S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750–1800*, at 45–46 (1980) (commenting that colonial common law did not give married women the right to “sue or be sued, draft wills, make contracts, or buy and sell property”).

111. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

112. *Miscellanies*, NEW-HAVEN GAZETTE & CONN. MAG., Mar. 1, 1787, at 9 (internal quotation marks omitted).



is necessary for the great end of society.”<sup>113</sup> According to this model, legal limits should provide the preconditions necessary for each person to be able to improve his or her capabilities to live a fulfilling life. For instance, property rights place limits on acquisition, use, and control of chattel and real estate.<sup>114</sup> These limits are necessary for each person to be safe in the enjoyment of possessions knowing that legal prescriptions place reciprocal obligations on each member of society.<sup>115</sup>

A representative republic’s ultimate goal was to provide laws conducive to happiness. Because they constituted the final authority, the people could steer government to develop opportunities for living contentedly. John Adams expressed an oft-stated theme in his *Thoughts on Government* that “happiness of society is the end of government.”<sup>116</sup> Along these lines, Dickinson thought the “right to be happy” was attainable only in a free society.<sup>117</sup> Indeed, where a government did not promote the welfare and happiness of the people, it was their right to “amend, and alter, or annul, their Constitution, and frame a new one.”<sup>118</sup> Years before the Revolution, James Otis Jr. eloquently described the government’s duty “to provide for the security, the quiet, and happy enjoyment of life, liberty, and property. There is no one act which a government can have a *right* to make, that does not tend to the advancement of the security, tranquility and prosperity of the people.”<sup>119</sup>

On a structural level, the Declaration established several key components of constitutional governance over a decade before the Philadelphia Constitutional Convention. The Declaration of Independence’s recitation of reasons for independence made clear that the new government would need to separate the responsibilities of the Executive and Judicial Branches of government<sup>120</sup> and the Executive and Legislative Branches of

113. Samuel Adams, *The Rights of the Colonists, A List of Violations of Rights and a Letter of Correspondence* (Nov. 20, 1772), available at [http://www.constitution.org/bcp/right\\_col.htm](http://www.constitution.org/bcp/right_col.htm).

114. See RESTATEMENT (SECOND) OF TORTS §§ 157–66, 222A–42 (1965) (outlining causes of action for trespass to land and conversion).

115. GEWIRTH, *supra* note 23, at 240–41.

116. 4 JOHN ADAMS, *Thoughts on Government*, in THE WORKS OF JOHN ADAMS 193, 193 (Charles Francis Adams ed., Bos., Charles C. Little & James Brown 1865).

117. 1 JOHN DICKINSON, *An Address to the Committee of Correspondence in Barbados*, in THE WRITINGS OF JOHN DICKINSON 251, 262 (Paul Leicester Ford ed., Phila., Historical Soc’y of Pa. 1895) (arguing that “[i]f there can be no happiness without freedom, I have a *right to be free*”) (emphasis omitted).

118. Letter from Samuel Adams to John Adams, (Nov. 25, 1790), in 4 SAMUEL ADAMS, THE WRITINGS OF SAMUEL ADAMS 344, 344 (Harry Alonzo Cushing ed., 1908).

119. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 10 (Bos., Edes & Gill 1764).

120. See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (asserting several condemnations against the King of England: “He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries”).

government.<sup>121</sup> The separation of the Legislative and Judicial Branches would come later, in the text of the Constitution. But the ideal of separating the function of the three branches came even before July 4, 1776, with some in the popular press going so far as to call it a maxim of governance.<sup>122</sup> Recognizing separation of powers to be fundamental for government, a citizen from Pennsylvania wrote that, “It is a determined maxim in politics, that the legislative and executive powers of government should be carefully kept separate and distinct.”<sup>123</sup> James Madison likewise took the “political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct” to be essential for constitutionalism.<sup>124</sup>

Among other elements of the future Constitution that the Continental Congress first set down in the Declaration was the requirement that a representative polity must be beholden to the will of the people.<sup>125</sup> In this, the document adopted an accepted maxim that wisdom of governance lies with the body of the people.<sup>126</sup> A decade later, in the 1780s, a New York

121. See *id.* para. 7 (“He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.”). The reverse is also true. Congress cannot use its authority to infringe on Article II powers. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (“Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.”).

122. For a contemporary example of an author who regarded political-branch separation to be “a maxim in government,” see *American News*: Philadelphia, Feb. 11, PA. MERCURY & UNIVERSAL ADVERTISER (Phila.), Feb. 11, 1785, at 3. See also Instructions to the Representatives of the Town of Boston, NEW ENG. CHRON. (Bos.), May 30, 1776, at 2 (“’Tis essential to Liberty, that the legislative, judicial and executive Powers of Government, be, as nearly as possible, independant [sic] of, and separate from each other.”); *Williamsburg, May 24*, PA. EVENING POST (Phila.), June 6, 1776, at 281 (reprinting the Virginia Declaration of Rights, which included a provision “[t]hat the legislative and executive powers of the state should be separate and distinct from the judicative”).

123. A Citizen, A Word of Advice: or, The Pennsylvania Assemblyman’s *Vade Maeum*, PA. PACKET (Phila.), Nov. 5, 1785, at 2.

124. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297. In *Federalist* 48, James Madison pointed out that the concentration of power in the hands of the Executive or Legislative Branches can lead to tyranny. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 306–07. Alexander Hamilton, writing in *Federalist* 73, pointed out that the Judiciary too can become a tool for tyranny if it becomes overly entangled in executive politics. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 5, at 445. Hamilton argued against Anti-Federalists who were concerned that the exclusive concentration of power in the Supreme Court to interpret the Constitution would result in an entity that could mold the meaning of the document to its own opinion with no possibility of revision by the Legislature. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 5, at 481–90.

125. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring it to be “the Right of the People to alter or to abolish” tyrannical government “and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness”). A contemporary expounded on the relation of the Declaration’s statement between “self-evident” truths and voting by quoting from the document and then asserting: “This equality and—what is consequential to it—the unerring maxim that governments derive their just powers from the people, have been maintained by those great and good men of all nations whose labours have benefitted mankind . . .” *To the Legislature of the State of New-York, Letter II*, REPUBLICAN WATCH-TOWER (N.Y.C.), Mar. 5, 1803, at 2.

126. A Dialogue Between a *Ruler* and a *Subject*, ESSEX GAZETTE (Salem), Mar. 24, 1772, at 138 (“[I]t is an old maxim, that the body of the people never can be deceived; that the wisdom of

author explained that it was well-established that, “it is a fundamental maxim in this government, that the people should chuse [sic] their . . . magistrates.”<sup>127</sup> The Declaration made clear that a representative government must respond to political petitions.

The Declaration of Independence set a baseline expectation of representative governance.<sup>128</sup> The document was still a rough sketch with much need of elaboration. Professor Jack Balkin has similarly asserted, “American constitutionalism is and must be a commitment to the promises [of] the Declaration.”<sup>129</sup> Details of how the Declaration’s visionary statements might be carried out would come first and foremost from the Constitution, which defined the powers of government and proclaimed its purpose to be the protection of liberty and the promotion of the general welfare.

*2. Preamble to the Constitution.*—The Declaration of Independence was written by Thomas Jefferson, adopted by the Continental Congress, and approved by the states,<sup>130</sup> but the power to pass it came from the people, who emerged from colonialism into a newly formed national community.<sup>131</sup> The

the state lies with them, and they always judge right with regard to the conduct of their rulers.”); *By the Great and General Court of the Colony of Massachusetts-Bay*, PA. EVENING POST (Phila.), Feb. 27, 1776, at 99. The author noted:

It is a maxim that in every government, there must exist somewhere, a supreme, sovereign, absolute, and uncontrollable [sic] power: But this power resides always in the body of the people; and it never was, or can be delegated to one man, or a few; the great Creator having never given to men a right to vest others with authority over them, unlimited either in duration or degree.

*Id.*; *Litchfield*, April 12, WKLY. MONITOR (Litchfield, Conn.), Apr. 12, 1785, at 3 (“That, ‘the supreme power in a republican government must ever remain with the people,’ is a maxim no less rational than necessary . . .”).

127. Cato, *From the New-York Packet: To the Considerate Citizens of the State of New-York*, INDEP. GAZETTEER (Phila.), Dec. 6, 1786, at 3.

128. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 4–5 (1991) (“The principal drafter of the Declaration of Independence held the view—indeed was the architect of its expression, for the Declaration is the political basis for the idea of the constitution—that the state was the creation of sovereign power, not the other way around.”).

129. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 51, at 18.

130. TESIS, *supra* note 83, at 12–31 (narrating events surrounding the drafting, adoption, and acceptance of the Declaration).

131. See THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (declaring independence “in the Name, and by Authority of the good People”); *id.* para. 1 (“[I]t becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them . . .”); *id.* para. 2 (“[W]hensoever . . . Government becomes destructive . . . , it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”); *id.* para. 30 (“A Prince whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.”). One of the functions of the Constitution, as James Madison explained it, is to protect the aggregate interest of the community against political factions. See THE FEDERALIST NO. 10 (James Madison), *supra* note 5, at 75–79 (noting that a republican government, which the Constitution

Constitution, which Congress passed eleven years after independence, was a more pragmatic document than its 1776 progenitor, but it retained the people's will to establish a government favorable to their collective interests.<sup>132</sup> The Constitution sets out the structure of government while the Declaration remains the source of ideals that should inform the exercise of authority. The Declaration remains a statement about the legitimacy of revolution in response to tyranny and oppression, while the Constitution establishes institutional powers for the exercise of public offices.<sup>133</sup>

With no bill of rights in the original Constitution, the Preamble set a national norm for government to safeguard liberty for the general welfare. The Preamble asserted that the good to be achieved by government should inure to the population of all the states.<sup>134</sup> According to an accepted maxim of interpretation, contemporaries of the Constitution believed that the Preamble asserted the primary objectives of the Constitution as a whole.<sup>135</sup> Those objectives included the security of inalienable rights.<sup>136</sup> While it did

would empower, could help guard the public good against harm from factions regardless of whether they make up a minority or a majority of citizens).

132. See Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 597 (2011) ("The 'We the People' of the Preamble is manifestly an expression or instantiation of a people's fundamental right, proclaimed in the Declaration of Independence, 'to alter or to abolish [governments], and to institute new government . . .'" (alteration in original)).

133. Alex Gourevitch recently described an on-point dichotomy between the Declaration of Independence as a revolutionary document, to which progressive social movements turned for ideas, and the Constitution, which he refers to as "a body of established doctrine and law" that demands "authoritative interpretation." Alex Gourevitch, *The Contradictions of Progressive Constitutionalism*, 72 OHIO ST. L.J. 1159, 1159–60 (2011) (emphasis omitted).

134. One of the Preamble's greatest contemporary expositors, James Wilson, delegate to the Pennsylvania constitutional ratifying convention, explained the great balance between state sovereignty and the good of the nation: "[W]hat is the interest of the whole, must, on the great scale, be the interest of every part. It will be the duty of a State, as of an individual, to sacrifice her own convenience to the general good of the Union." James Wilson, Speech to the Pennsylvania Convention (Dec. 11, 1787), in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 391 (John Bach McMaster & Frederick D. Stone eds., Phila., Historical Soc'y of Pa. 1888).

135. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 (Bos., Billiard, Gray & Co. 1833) (asserting that "[i]t is an admitted maxim in the ordinary course of the administration of justice" that preambles to statutes, and accordingly, the Preamble to the Constitution, are "a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions"); see also G.W.F. MELLE, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY 344, 363–64 (Bos., Saxton & Peirce 1841) (asserting that "judges of the courts of New York and Pennsylvania referred directly to the preamble of the Constitution as the basis on which the government was to be founded" and providing an example of this occurring).

136. Some state constitutions of the Revolutionary Era also contained preambles asserting that the social contract required government to protect society, individual rights, and to provide for safety and happiness. A well-known example of a preamble stating that representative government is developed to protect people's equal, natural rights is that of the 1776 Constitution of Virginia:

A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

not confer specific powers, as Justice Joseph Story wrote in his commentary to the Constitution, statesmen and jurists referred to the Preamble when interpreting the Constitution.<sup>137</sup> Professor Charles Black pointed out that the Declaration of Independence and the Preamble are “[t]he two best sources” for “striving toward rational consistency, . . . keeping the rules of legal decision in tune with the society’s structures and relationships, . . . [and]

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SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

SEC. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

VA. CONST. of 1776, Declaration of Rights §§ 1–2, *available at* <http://www.nhinet.org/ccs/docs/va-1776.htm>. Another example is the Preamble to the Massachusetts Constitution of 1780, which continues to be in force today, declaring:

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

MASS. CONST. pmbl. The Pennsylvania Constitution of 1776 contained a closely related preamble tying government to the promotion of welfare by the protection of individual rights:

WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness.

PA. CONST. of 1776, pmbl., *available at* [http://avalon.law.yale.edu/18th\\_century/pa08.asp](http://avalon.law.yale.edu/18th_century/pa08.asp). While the wording of the Preamble to the Vermont Constitution of 1777 was not identical, it is conceptually alike in its regard for rights and the general welfare:

WHEREAS, all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.

VT. CONST. of 1777, pmbl., *available at* [http://avalon.law.yale.edu/18th\\_century/vt01.asp](http://avalon.law.yale.edu/18th_century/vt01.asp). In addition, the Maryland Constitution of 1776’s first paragraph condemns Great Britain, and the second paragraph introduces the structure of state government in these words, “That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.” MD. CONST. of 1776, Declaration of Rights, art. I, *available at* [http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp). Like the U.S. Constitution’s Preamble, Maryland’s preamble commits government to follow the people’s will to secure the common good. North Carolina’s vested power in the people at the beginning of its Declaration of Rights. N.C. CONST. of 1776, Declaration of Rights, art. I, *available at* [http://avalon.law.yale.edu/18th\\_century/nc07.asp](http://avalon.law.yale.edu/18th_century/nc07.asp).

137. See 1 STORY, *supra* note 135, at § 460 (“There does not seem any reason why, in a . . . constitution . . . , an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in [interpretation].”).

reaching toward higher goals.”<sup>138</sup> Along the same lines, Professor Mark Tushnet has stated, “The Declaration and the Preamble provide the substantive criteria for identifying the people’s vital interests.”<sup>139</sup> To elaborate on the significance of national consistency in substantive criteria, Charles Black posited that even without a First and Fourteenth Amendment it is not fathomable to think a law prohibiting the public from discussing political candidates for Congress could be remotely valid, given the importance of public communication to our “national government.”<sup>140</sup> The Declaration and the Preamble are at the root of the written Constitution’s meaning, and their core directive is for government to secure equal rights for the common good.

Similar to my earlier examination of the Declaration’s directive, a historical analysis of the Preamble to the Constitution is critical to understanding the governing principles of U.S. constitutionalism. History, however, is the starting point. If it were the end point of analysis, Americans would surely benefit from the wisdom of the Framers but also be burdened by their narrow-mindedness.

The Preamble establishes that government must make an effort to advance general welfare by eschewing the racism, ethnocentrism, and sexism of the past. The framing generation failed to fully exercise the implicit values of the Preamble’s promise to “secure the Blessings of Liberty.”<sup>141</sup> Racialism is only the most glaring example of its shortsightedness and outright hypocrisy. Northern states ended slavery,<sup>142</sup> but on a national level the Founders made no constitutional or statutory effort to abolish the institution.<sup>143</sup> Many, indeed, viewed the Constitution as a license for slavery because of its Three-Fifths, Fugitive Slave, and Importation Clauses. On the other hand, John Parrish, a Maryland antislavery advocate, asserted that it would be “ignoble” and “below the dignity” of politicians to define the

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138. Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUEST OF LAW* 187, 192 (Myers S. McDougal & W. Michael Reisman eds., 1985).

139. TUSHNET, *supra* note 41, at 13; *see also* H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 28 (2008) (“The Preamble states the purposes of the instrument, or rather of the decision to make the instrument law, in terms most of which seem oriented toward human good broadly conceived rather than toward institutional goals narrowly defined.”); Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 *CARDOZO L. REV.* 1049, 1053–54 (1995) (“[W]hen placed in its proper historic setting, ‘We The People,’ far from expressing a genuine unity, actually embodies a stark contradiction. The meaning of ‘We The People’ in the Preamble to the 1787 Constitution cannot be grasped without reference to the proposition that ‘all men are created equal’ . . .”).

140. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 42–43 (1969).

141. *See supra* note 103 and accompanying text; U.S. CONST. pmbl.

142. TESIS, *supra* note 6, at 31–33.

143. *See* James P. Parke, *Review of ‘Memoirs of the Life of Anthony Benezet,’* 6 *CHRISTIAN DISCIPLE* 65, 69 (1818) (“[W]e formed a Constitution ‘to promote the general welfare and secure the blessings of liberty to ourselves and our posterity;’ but in which we also took care to hold in absolute slavery . . . !” (emphasis omitted)).

Preamble as a license for states to persist in slavery.<sup>144</sup> He believed that the Preamble should be understood within the context of the Declaration of Independence's proclamation "that all have an unalienable right to life, liberty, and the pursuit of happiness."<sup>145</sup>

The Preamble begins by announcing that the people at large, not the states, ordained the creation of the Constitution.<sup>146</sup> It thereby reestablishes the directive of the Declaration that government's primary obligation is to the people. All legitimate uses of power derive from their original grant of authority, not beyond it. Anti-Federalists, who were opposed to ratification of the Constitution, warned that the Preamble's use of "We the People" rather than "We the States" demonstrated the plan to establish "a compact between individuals entering into society, and not between separate States."<sup>147</sup> For those disposed against stronger national government than existed under the Continental Congress, there was indeed much to be concerned about because the Constitution expressly failed to use wording comparable to the Articles of Confederation, which had explicitly reserved state sovereign independence.<sup>148</sup> This omission indicates a greater centralization of power, social norms, and structural provisions. Only with the ratification of the Tenth Amendment would the states' retained, reserved powers be mentioned, and even then unspecifically and only in the context of national authority.<sup>149</sup>

The Anti-Federalists and Federalists did agree that the Preamble was meant to be a statement that the people would retain their natural rights in the newly formed republic, but many Anti-Federalists thought the original Constitution was insufficient for safeguarding those rights.<sup>150</sup> Opponents of

144. JOHN PARRISH, REMARKS ON THE SLAVERY OF THE BLACK PEOPLE 8 (Phila., Kimber, Conrad & Co. 1806).

145. *Id.* at 8–9.

146. U.S. CONST. pmb. ("We *the people* of the United States . . . do ordain and establish this Constitution . . .") (emphasis added).

147. *Philadelphia, December 8*, CUMBERLAND GAZETTE (Portland, Me.), Jan. 3, 1788, at 1 (emphasis omitted).

148. ARTICLES OF CONFEDERATION of 1781, art. II ("Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."); *State Convention*, SALEM MERCURY, Feb. 5, 1788, at 1 (describing an effort to include an addendum into the Constitution explicitly asserting the continued independence of the states); *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania, to Their Constituents*, PROVIDENCE GAZETTE & COUNTRY J., Jan. 26, 1788, at 1 (asserting an anti-federalist complaint at the omission of state independence).

149. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

150. *State Convention*, PA. HERALD & GEN. ADVERTISER (Phila.), Dec. 8, 1787, at 2 (providing a transcript of ratification debate arguments concerning the sufficiency and insufficiency of the Preamble to protect natural rights, including a claim that the Declaration better protects rights than the Preamble); A True Friend, *To the Advocates for the New Federal Constitution, and to Their Antagonists*, INDEP. GAZETTEER (Phila.), Dec. 22, 1787, at 2 (pressing for adding a new preamble

ratification warned that the federal government's power to "provide for the common defence [and] promote the general Welfare"<sup>151</sup> might allow the nation to negatively impact "the personal rights of the citizens of the states, and put their lives in jeopardy."<sup>152</sup> Naysayers were unable to prevent its ratification. In response to the Anti-Federalists, the Constitution's supporters defended the power of Congress to "promote the general Welfare" through national legislation arguing that states were just as prone to corruption as the federal government.<sup>153</sup> Alexander Hamilton, in *Federalist No. 84*, wrote that the Preamble's assertion that "'We the people of the United States'" established a federal government "'to secure the blessings of liberty to ourselves and our posterity'" should be understood to be a "recognition of popular rights."<sup>154</sup> With this assurance, Hamilton continued, no "minute detail of particular rights" was needed because the people never gave up their rights through the Constitution, but only meant the instrument to "regulate the general political interests of the nation."<sup>155</sup> Better to give power to the wisest of the nation, so another author argued, to set unified policies for the whole.<sup>156</sup> The first ten amendments, known as the Bill of Rights, gave more express content to the Preamble's protection of rights for the promotion of the general welfare.<sup>157</sup>

The Preamble established the object of national governance to be the welfare of the people of the United States.<sup>158</sup> The creation of the national

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to the Constitution, which would enumerate rights). It was precisely the broad power to "promote the general Welfare" without any limiting bill of rights that concerned some of the Constitution's opponents. One opponent of ratification raised the concern in these terms:

To judge of what may be for the general welfare, and such judgments when made, the acts of congress become supreme laws of the land. This seems a power co-extensive with every possible object of human legislation. Yet there is no restraint in form of a bill of rights, to secure . . . that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose.

*Miscellany: From the Virginia Gazette: Copy of a Letter from the Hon. Richard Henry Lee, Esq., one of the Delegates from This State in Congress, to his Excellency the Governor, Oct. 16, 1787, N.Y. J. & DAILY PATRIOTIC REG., Dec. 22, 1787, at 2.*

151. U.S. CONST. pmbl.

152. Speech of John Williams, in *THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF NEW-YORK, ASSEMBLED AT POUGHKEEPSIE, ON THE 17TH JUNE, 1788*, at 91 (N.Y.C., Francis Childs 1788), available at [http://www.constitution.org/rc/rat\\_ny.htm](http://www.constitution.org/rc/rat_ny.htm).

153. M'Kean, *Federal Constitution*, SALEM MERCURY, Jan. 15, 1788, at 1.

154. THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 5, at 512 (emphasis omitted).

155. *Id.*

156. M'Kean, *supra* note 153.

157. *See To the Public*, PHILA. GAZETTE, Jan. 1, 1794, at 1 ("THE PEOPLE, whose rights are protected, will be the friends and supporters of a Constitution established by *themselves*, for the express purpose of promoting the 'General Welfare.'").

158. Poplicola, *For the Herald of Freedom*, HERALD FREEDOM, & FED. ADVERTISER (Bos.), Aug. 18, 1789, at 178 ("[T]he present national government is the people's government: that from them it originated . . . for the great and beneficial purposes expressed in the preamble to the constitution. Every lodgment of power, every relinquishment of natural right, . . . has the welfare of the people of the United States for its ultimate object . . .").



community, as lexicographer Noah Webster explained in a tract, meant for “government to be established to secure to individuals their natural rights, their liberty and property.”<sup>159</sup> The integration Webster saw of individuals and the community as a whole is an example of the commonly held view that public policy should protect the right to achieve private benefits for the common good.<sup>160</sup>

Standing on their own, the Preamble’s statements on the overall purpose of government were insufficient for governance. The remainder of the Constitution gave content to the people’s will to form a union for the general welfare and common defense, where just governance would facilitate the enjoyment of individual liberty. The Constitution likewise set a structure for the governed to enjoy their inalienable rights of life and liberty in safety and happiness. Together the Declaration of Independence and the Preamble asserted the purpose of national government: The protection of inalienable rights for the general welfare became the social ideal for both the founding and subsequent generations. Like its earlier counterpart, more specific clauses of the Constitution detailed how the three branches of government were to achieve the Preamble’s asserted aims. Specific clauses of the Constitution, in turn, were themselves only starting points for developing the statutes, precedents, and executive orders necessary for fleshing out the contours of federal government.

One structural protection of these rights, as James Madison wrote, was “the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct.”<sup>161</sup> This was not an abstract commitment but an “essential precaution in favor of liberty.”<sup>162</sup> Madison made this statement at a time when he had not fully agreed to the addition of a bill of rights, of which he would eventually become the chief architect. Needed instead, he believed, were strong checks and balances capable of restraining

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159. Noah Webster, Jun., *A Letter to the President of the United States*, in MISCELLANEOUS PAPERS, ON POLITICAL AND COMMERCIAL SUBJECTS 33, 34 (N.Y.C., E. Belden & Co. 1802).

160. See, e.g., NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 116–17 (Rutland, J. Lyon 1793) (arguing that humans are social beings who agree to constitutional governance for the common good to protect their rights).

161. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297; see also *Politics: From the NEW YORK EVENING POST*, An Examination of the President’s Message, Continued (Phila.), Mar. 20, 1802, at 85, *reprinted in* 2 PORT FOLIO 85 (Oliver Oldschool ed., Phila., H. Maxwell 1802) (“It is a fundamental maxim of free government, that the three great departments of power, legislative, executive, and judiciary, shall be essentially distinct and independent the one of the other.”). Madison recognized that the separation of powers requires checks and balances among the three branches of government. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 305 (“[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”).

162. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297–98; see also James Madison, *The Letters of Helvidius, No. II*, in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST ON THE NEW CONSTITUTION app., at 482 (Hallowell, Glazier, Masters & Co. 1831) (discussing the maxim of the separation of powers).

the will of tyrannical majorities.<sup>163</sup> The structural solution combined the need for efficient governance with the “intrinsic value” of preserving innate liberty.<sup>164</sup> The institutional processes of lawmaking, enforcement, and adjudication were tied to the protection of inalienable rights.

### C. *Maxim Constitutionalism*

Fair administration of the three branches of government, exercising their separate powers in accordance with impartial social rules, is only one aspect of unwritten constitutionalism<sup>165</sup> subject to the overarching purposes of the maxim constitutionalism adopted in the Declaration of Independence and the Preamble.<sup>166</sup> Both of these documents, I suggest, describe representative governance committed to the protection of justice and furtherance of the common good, which constitute the object of U.S. constitutional law. That objective derives from the people’s collective will to be governed according to laws that protect their fundamental rights and further public well-being in a manner that benefits the common interests of the populace. However, the Declaration’s and the Preamble’s statements of national purpose, neither of which contained any specific enumeration of powers, were too nebulous for effectuating the maxim of constitutional purpose; the ethos of governance did not by itself give any indications of who was to promulgate laws, execute them, and adjudicate legal conflicts. The Constitution supplied the administrative details missing from the Declaration and the Preamble. The combination of a workable structure and a national purpose served to create a functioning government, albeit one that each generation would need to interpret to achieve the central goal of protecting rights for the common good.

In his dissent to *Poe v. Ullman*,<sup>167</sup> Justice John Harlan spoke of the dual ethical aspects of U.S. constitutionalism: “[T]he balance which our Nation,

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163. Jack N. Rakove, *Parchment Barriers and the Politics of Rights*, in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991*, at 98, 134 (Michael J. Lacey & Knud Haakonssen eds., 1991) (listing Madison’s ultimately abandoned proposals for curbing majoritarian abuses).

164. THE FEDERALIST NO. 47 (James Madison), *supra* note 5, at 297–98.

165. See Richard A. Paschal, *Congressional Power to Change Constitutional Law: Three Lacunae*, 77 U. CIN. L. REV. 1053, 1108 (2009) (“[O]ne of the most prominent examples of an unwritten structural principle in American constitutionalism is the separation of powers.”); Garrick B. Pursley, *Federalism Compatibilists*, 89 TEXAS L. REV. 1365, 1387 (2011) (book review) (“[T]he Constitution’s broad structural norms entrenching the separation of powers and federalism are not communicated directly by any single textual provision.”).

166. See BILL WHITEHOUSE, REFLECTIONS ON EDUCATION AND LEARNING 25 (2009) (“The separation of powers among the Executive Branch, the Legislature, and the Judiciary was intended as a system of procedural checks and balances to protect the integrity of the principles and purposes inherent in the Preamble.”); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 407 & n.67 (1996) (providing examples of provisions in “the Declaration of Independence [that] condemned England’s tyrannical violation of separation of powers”).

167. 367 U.S. 497 (1961).

built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”<sup>168</sup> Harlan located this balance between individual and social rights in the Due Process Clause of the Fourteenth Amendment,<sup>169</sup> whose source I believe should be traced even further back to the Declaration of Independence and the Preamble to the Constitution. In a different opinion, the Court struck down a racist municipal ordinance against Chinese immigrants, quoting a portion of the Declaration of Independence and placing its statement of rights in the context of constitutional society: “[F]undamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws . . . .”<sup>170</sup> The penumbras of the Bill of Rights, on which Justice William O. Douglas pinned the right to privacy in *Griswold v. Connecticut*,<sup>171</sup> and the unenumerated rights, on which Justice Goldberg relied in his concurrence to that case,<sup>172</sup> are based on interests retained by the people and their limited grant of governmental authority.<sup>173</sup>

This balance of public and private interests is both a semantic part of the Constitution and one that the Court should aim to achieve in constructing (that is, applying) the Constitution to specific cases; any distinction between interpretation and construction on the matter of highest constitutional importance is artificial when it comes to the judicial obligation to protect fundamental rights and to balance individual interests with public policy, safeguarding the good of the whole.<sup>174</sup> All judges are products of their own time, and none can be sure of the original semantic meaning of any clause of the Constitution. All that can be done is fair and just application of specific clauses on the basis of legislative intent or countermajoritarian construction.<sup>175</sup> However, significant deviation from the underlying purpose of national union, which requires public actors to protect individuals for the benefit of the common good, violates the organizing principle to which the

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168. *Id.* at 542 (Harlan, J., dissenting).

169. *Id.* at 540, 543.

170. *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 374 (1886).

171. 381 U.S. 479, 483–84 (1965).

172. *Id.* at 486–87 (Goldberg, J., concurring).

173. *See id.* at 486–88 (“[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”).

174. For a definitional distinction between constitutional interpretation and constitutional construction see Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (“*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances.”). More convincing than this differentiation, which tends to separate a joined effort of applying textual semantics, is John Hart Ely’s distinction between “interpretivism” and “noninterpretivism.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980).

175. *See infra* subpart III(A).

people pledged their lives, fortunes, and honor.<sup>176</sup> Antidiscrimination laws are built on the predicate that the protection of individual rights is essential to social life. As Justice Kennedy explained in a case finding unconstitutional a majoritarian initiative against antihomophobic regulations, a state's interest in its citizens' well-being is meant to protect "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."<sup>177</sup> The Declaration of Independence and the Preamble to the Constitution jointly announce that the people have granted power to public servants for the purpose of furthering general welfare through a representative government whose aim is to safeguard inalienable rights in order to facilitate the equal pursuit of happiness. Together they compose a statement of secular morality, stated in terms of reciprocal demands and obligations needed for a pluralistic society each of whose members has a unique vision of what constitutes the good life. They do not create the right to freedom and well-being, to which all humans are entitled by birth, but formally adopt it as the core obligation of federal government. The Declaration's reference to "unalienable Rights"<sup>178</sup> takes for granted that people retain human dignity and create a representative government to protect those entitlements. The Preamble's General Welfare Clause expands on statements in the Declaration predicating the need for government to protect the public good.<sup>179</sup>

A constitutional maxim relevant to any representative democracy that is committed to citizens' equality must respect different, often contradictory, religions, aesthetics, and practices. This is a universal predicate of all representative democracies, with the Declaration and the Preamble providing the people's binding decision to institute it in the United States. Any nation committing itself to representing the interests of all its people—not merely a few, as is the case with plutocracies, autocracies, tyrannies, and aristocracies—on a procedurally equal basis must create a structure of governance with the power to protect and further interests likely to achieve the public good. Representational democracy enables ordinary constituents to participate in voting and lobbying for change. Law must reflect mutually respectful and accommodating social attitudes that only resort to coercion, through criminal and civil penalties, when the agent commits intentional or negligent harms. The maxim of freedom and general welfare has remained stable, thanks in no small part to its codification in the Declaration and the Preamble, but generations have grappled with its meaning and the nation's failure to live up to its stated ideals. Americans have come to the point in

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176. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.").

177. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

178. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

179. *See id.*

their history where much of the public recognizes morally, religiously, and ethnically diverse people's correlative right to live a satisfying life in a politically engaged society that tolerates secular and religious education,<sup>180</sup> male and female aspirations<sup>181</sup> and sexual practices,<sup>182</sup> and a host of other interests necessary for self-fulfillment, even though they are not explicitly enumerated in the Constitution.

A central principle of moral governance interlinks a wide community of equals. A society committed to benefitting individuals for the common good is inherently tolerant, pluralistic, and respectful of human beings. Any other policy is contradictory of maxim constitutionalism because it would deny the rights of individuals and thereby decrease the general welfare. The rights that maxim constitutionalism protects are generic—such as liberty and well-being—and belong to everyone equally by their very humanity, as volitional beings seeking goods and benefits.<sup>183</sup> Government's obligation in such a social environment is to account for and respond to the interests of everyone as they are expressed through constitutionally predictable structures for assimilating collective wisdom into nondiscriminatory laws. The representative process is meant to give practical effect to the people's will.

In the United States, general statements about norms, such as freedom of speech and religion or the freedom from unreasonable searches and seizures, are integrated into the Constitution's structural provisions, such as those limiting executive, legislative, or judicial powers.<sup>184</sup> People are more likely to subject themselves to authority when they have accurate reason (based on past practices and policy statements) to believe that political power will be used to safeguard their fundamental liberties on an equal footing with similarly situated persons.<sup>185</sup> One seeks to contribute to social success where

180. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–36 (1925) (holding that parents have the right to choose whether to send their children to public or parochial school).

181. See *United States v. Virginia*, 518 U.S. 515, 519 (1996) (finding the Equal Protection Clause applicable to gender classification of a military education institution).

182. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the Due Process Clause protects sexual privacy).

183. The public position I am adopting is closely related to Alan Gewirth's private Principle of Generic Consistency: "*Act in accord with the generic rights of your recipients as well as of yourself.*" GEWIRTH, *supra* note 23. This precept requires "action in accord with the recipients' generic rights of freedom and of well-being," which Gewirth calls "*generic rules.*" *Id.*

184. See Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1023 (2011) ("The Bill of Rights is centrally concerned with allocation and separation of powers . . ."); *id.* at 1039–40 (arguing that the Fourth Amendment is fundamentally a limit on executive power). See also Rosenkranz, *supra* note 29, at 1252–53 (arguing that the First Amendment is expressly a limit on congressional power).

185. See Luis E. Chiesa, *Outsiders Looking In: The American Legal Discourse of Exclusion*, 5 RUTGERS J.L. & PUB. POL'Y 283, 309 (2008) ("[O]bedience to authorities and cooperation with the government decreases as the perceived legitimacy of law enforcement agencies diminishes."); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1161 (2000) ("A legitimate form of government receives obedience not for its policy choices, the charisma of its leaders, or the internalized moral values of a given individual; rather, government decisions are deferred to and its commands obeyed because the State has the 'right' to demand compliance.").

she and those close to her stand to benefit from the protection of laws that place just limits on their personal choices without interfering with the core right of free personal development. For instance, the right to compulsory public education places limitations on those parents who would prefer to keep their children home, but society limits familial choice in this regard because the state's functions include the protection of minors' eventual ability to function outside the home after reaching the age of majority.<sup>186</sup> In order to enjoy their liberties on an equal footing with others, some amount of education must be compulsory to enable children to pursue public and personal goals. Put in general terms, the majority in *Plyler v. Doe*<sup>187</sup> recognized that "[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."<sup>188</sup> (The Court's later assertion that public education is not a constitutional value,<sup>189</sup> therefore, deflates its earlier pronouncement on the role of schooling as an individual right essential in a polity committed to public good.<sup>190</sup>) Maxim constitutionalism is a value in many other opinions. The legitimacy of seminal decisions like *Heart of Atlanta Motel, Inc. v. United States*,<sup>191</sup> *Tennessee v. Lane*,<sup>192</sup> and *National Federation of Independent Business v. Sebelius*,<sup>193</sup> and of footnote four of *United States v. Carolene Products Co.*<sup>194</sup> does not rest on the composition of the political majority, nor even on the specific constitutional clauses Congress relied upon to pass laws, but on the extent to which the upheld legislation protected individual rights and advanced general welfare. This is not an ends-justifies-the-means argument; instead, it requires policymakers to rely on the directive of constitutional

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186. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

187. 457 U.S. 202 (1982).

188. *Id.* at 222–23 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (internal quotation marks omitted).

189. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.").

190. *Id.* at 110–11 (Marshall, J., dissenting) ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." (quoting *Brown*, 347 U.S. at 493) (internal quotation marks omitted)). Even as the majority in *Rodriguez* rejected the claim that education is a constitutional right, it admitted that "'the grave significance of education both to the individual and to our society' cannot be doubted." *Id.* at 30 (majority opinion) (quoting *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971)).

191. 379 U.S. 241, 261–62 (1964) (holding that Title II was an appropriate exercise of the commerce power when applied to a public accommodation serving interstate travelers).

192. 541 U.S. 509, 524–29 (2004) (upholding Congress's Fourteenth Amendment Section Five authority to pass Title II of the Americans with Disabilities Act, which created a private cause of action against states for disability discrimination).

193. 132 S. Ct. 2566, 2595–96, 2600 (2012) (finding that the Patient Protection and Affordable Care Act's mandate to buy health insurance or pay a tax penalty is within Congress's taxing power).

194. 304 U.S. 144, 153 n.4 (1938) (stating that heightened scrutiny may be appropriate in cases involving interference with the political process and discrimination against "discrete and insular minorities").

governance set down in the Preamble and Declaration to rely on specific constitutional clauses to exercise their separate powers and to act for social betterment while not violating the people's intrinsic rights.

This exercise of authority is the procedurally neutral means of seeking to fulfill the ideal running through the normative and structural parts of the Constitution: Protection of liberties as the only legitimate means of advancing the common good.<sup>195</sup> I call this ideal of representative governance "maxim constitutionalism." It prohibits the exploitation of any person or group of persons to benefit some other corporate or natural party. It is the foundational standard of constitutionalism, which sets that baseline norm against which all statutes, judicial rules, and executive orders must be evaluated. I believe that the underlying purpose of unified government is the protection of individual rights to secure the public good. Put in the negative, where individuals are denied the ability to exercise their correlative right to equal liberty, the common good suffers at least by the diminished happiness of those who are negatively affected by the injustice. The general directive of governance combines the inalienable-rights statement of the Declaration of Independence and the general-welfare statement of the Preamble to the Constitution into a unified norm of national purpose: The protection of rights for the public benefit. This norm plays a legitimizing function, providing a universal principle for public debates about refining or altogether abolishing past legal practices.<sup>196</sup> The ultimate purpose of representative governance plays a justificatory role necessary for evaluating what Joseph Raz has called "non-ultimate goods."<sup>197</sup> The existence of a central norm disciplines interpretation of the Constitution, the enactment of law, and the exercise of executive authority.

A maxim that is suitable for constitutional governance must be elegant, pithy, and general. Elegance is needed to capture the attention of ordinary people, who might otherwise find the subject too dull, turgid, and esoteric. Brevity is requisite for collective memorization, which becomes unsustainable as the maxim becomes too lengthy. Finally, generality is

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195. Alasdair MacIntyre, to the contrary, believes that constitutional decision making should neither try to invoke presumed "shared moral first principles" nor try to create them. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 253 (3d ed. 2007). For a refutation of MacIntyre, see POWELL, *supra* note 139, at 103–16.

196. My approach rejects a nihilistic perspective and adopts an objective understanding of constitutional interpretation. See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) ("Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation."); see also *id.* at 762–63 (arguing against a nihilistic interpretation of the Constitution that would drain it of meaning); THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 5, at 27 (asserting that the "public good" is the "true interest[]" of choosing whether to adopt the Constitution).

197. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 200 (1986) ("The relation of ultimate values to intrinsic values which are not ultimate is an explanatory or justificatory one. Ultimate values are referred to in explaining the value of non-ultimate goods.")

essential for consistent dealing with a plethora of disputes; developing a variety of principles, rules, and regulations stemming from the constitutionally granted authority to the three branches of government; and finding consensus in a common-sense public morality that does not deteriorate into a democratic tyranny targeting minorities and otherwise disempowered persons.

As Mark Tushnet pointed out, “[t]he Declaration’s principles define our fundamental law.”<sup>198</sup> He further drew attention to how these “principles” should rest on the Declaration and the Preamble, which together obligate “the people of the United States . . . [to realize] universal human rights.”<sup>199</sup> Both the Declaration and the Preamble imply that persons are volitional agents who willingly participate in representative government to achieve a collective purpose. That collective purpose is the protection of the human entitlement to strive for self-fulfillment. The statement “life, liberty, and the pursuit of happiness” provides a reference point for identifying the inalienable rights of people and then holding government accountable for their protection.

The intersection between the Declaration of Independence and the Preamble to the Constitution is evident through a number of their passages. The “Pursuit of Happiness”<sup>200</sup> described in the former should be understood as well-being, and the Preamble’s use of “general Welfare” makes the federal government responsible for its promotion through official measures.<sup>201</sup> The latter provision is also tied to the Declaration’s mandate to institute a government that is “most likely to effect” the people’s “Safety and Happiness.”<sup>202</sup> The Declaration speaks in clear terms on the innate nature of life, liberty, and the pursuit of happiness that is relevant to understanding the Preamble’s stated goal of laying out a constitutional order capable of

198. TUSHNET, *supra* note 41, at 14.

199. *Id.* at 51, 53.

200. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

201. Justice Louis D. Brandeis’s dissent in an overruled case nicely merges the Declaration’s recognition of human aspirations with the constitutional grants of authority:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things.

*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

202. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration’s second paragraph provides:

[W]hensoever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

*Id.*



securing liberty.<sup>203</sup> Independent states are described as having the “Power to levy War, conclude Peace, [and] contract Alliances” in the Declaration.<sup>204</sup> While the Preamble states that the national government is formed in part to “provide for the common defence,”<sup>205</sup> the meaning does not differ from its predecessor. A portion of the Declaration of Independence condemns the British monarch because “[h]e has refused his Assent to Laws, the most wholesome and necessary for the public Good.”<sup>206</sup> The implication is that the people have a right to make laws for the public good, and the Preamble echoes that sentiment by asserting that the people formed the federal government to “promote the general Welfare.”<sup>207</sup> The documents complement each other, with the Preamble being the segue to the written Constitution from the Declaration’s promises of liberal equality.

The general statements found in the Declaration of Independence and the Preamble cannot provide concrete answers about the specific responsibilities allotted severally to the three branches of government. Pregnant terms like safety, happiness, general welfare, liberty, and equality have always required elaboration.<sup>208</sup> Without legal detail these broad terms can mean different things to various interest groups who can seek to manipulate them for mere rhetorical effect.<sup>209</sup> What’s more, these social concepts lack the requisite prioritization needed to resolve the inevitable conflicts of pluralistic society.<sup>210</sup> This is not to say that they do not place imperative obligations on government actors and institutions but that the details must be fleshed out in accordance with some central maxim that must guide state actors to formulate policy, choose between differing courses of action, and enforce enacted decisions.

The significance of government deriving its power from the people, for instance, clearly requires the administration of representative government. While “the people” is an abstract construct for representative governance, not necessarily tied to a specific generation of Americans but to the ideal of an

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203. U.S. CONST. pmb. (asserting the people’s decision to develop a constitution “in Order to form a more perfect Union . . . and secure the Blessings of Liberty to ourselves and our Posterity”).

204. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

205. U.S. CONST. pmb.

206. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

207. U.S. CONST. pmb.

208. Cf. RAZ, *supra* note 197, at 91 (discussing how “various attitudes towards society . . . can all be regarded as so many variations on a basic attitude of identification with the society, an attitude of belonging and of sharing in its collective life”).

209. Cf. John Hayakawa Török, *Freedom Now!—Race Consciousness and the Work of De-Colonization Today*, 48 HOW. L.J. 351, 394 n.277 (2004) (recalling that Fidel Castro used the Declaration of Independence in his own legal defense and noting the power of “invoking the American Revolution for rhetorical effect, while redefining its meaning”).

210. See Martin Edelman, *Written Constitutions, Democracy and Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 592 (2005) (stating that while constitutions “proclaim all the values their framers believe essential to a good society,” they do not prioritize those values, leaving that job to “implementers and interpreters”).

engaged political community, what is clear is that government institutions were created for their benefit. That end is furthered through the administration of laws prohibiting certain government conduct, such as intrusion into bodily integrity,<sup>211</sup> and enabling other action, such as the distribution of vaccinations,<sup>212</sup> and the provision of social security benefits<sup>213</sup> and affordable health care.<sup>214</sup> The details of such negative and proscriptive laws are worked out through political debates, judicial deliberation, and executive enforcement.<sup>215</sup>

The sovereignty of the people is announced in the Constitution even before the functions of the three branches of government are enumerated.<sup>216</sup> The separation of powers, therefore, is a structure of governance for exercising public functions for the betterment of the population as a whole. Where any branch—be it legislative, executive, or judicial—acts solely to compound its authority or to augment the aggrandizement of its officeholders, the real interest of constitutional self-governance, which is the protection of the people's interests for the betterment of the whole, is violated. Officials who seek their personal interests or who overreach into the province of the other two coequal branches of government engage in the type of autocracy that the statements of independence and constitutional norms enjoin.

Binding details on the exercise of power are necessary because an overgeneralized maxim of liberal equality would allow for radically subjective decision making. The Declaration of Independence and the Preamble to the Constitution assert nationally recognized norms to which citizens can refer in order to examine the legitimacy of government conduct. The conversation of constitutional law—in which ordinary citizens and government officials participate—requires a clearly organized principle to provide for a common structure. This structure allows like-minded as well as adversarial parties to understand each others' meanings, no matter how

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211. See *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (reaffirming the “well-established, traditional rights to bodily integrity”).

212. See *Jacobson v. Massachusetts*, 197 U.S. 11, 27–29, 38–39 (1905) (upholding the constitutionality of wide-scale vaccination).

213. See *Helvering v. Davis*, 301 U.S. 619, 634–36, 640–41 (1937) (upholding the constitutionality of the Social Security Act).

214. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) (finding the individual mandate of the Affordable Care Act to be constitutional).

215. The Patient Protection and Affordable Care Act presents an example of this process. See *id.* (ruling on the constitutionality of the law); Sarah Kliff, *For Obamacare, Four More (Uncertain) Years*, WONKBLOG, WASH. POST (Jan. 21, 2013, 12:42 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/21/for-obamacare-four-more-uncertain-years/> (describing the Executive-centered process of implementing the law); Emily Smith, *Timeline of the Health Care Law*, CNN (June 17, 2012, 11:16 AM), <http://www.cnn.com/2012/06/17/politics/health-care-timeline> (recounting the long legislative road to passing the law).

216. See U.S. CONST. pmbl. (setting forth at the outset that “[w]e the People” establish the Constitution and therefore possess sovereign authority).

different their backgrounds or perspectives.<sup>217</sup> A unified maxim defining national norms establishes a term of reference for all public conduct. Clauses of the Constitution flesh out the specifics set out more broadly in the Declaration's and the Preamble's statements of legitimacy.

Yet, particular clauses of the Constitution are subordinate to the single most important purpose of governance, the protection of rights for the common good. A universal maxim provides a determinate basis for governance while allowing divergent interpretations to play themselves out in litigation and legislative policy. Given the racialist and sexist lenses of constitutional construction of the framing generation, some principle was needed for future change, and, yet, that change could not be made without reference to the history and progressive trajectory of the nation.<sup>218</sup> Even a comprehensive directive for the exercise of authority is useless unless it informs practical judgment, and an independent decision maker without a fixed aspiration is blown about by the whims of present circumstances. As the philosopher Richard Hare wittily put it,

It would be foolish, in teaching someone to drive, to try and inculcate into him such fixed and comprehensive principles that he would never have to make an independent decision. It would be equally foolish to go to the other extreme and leave it to him to find his own way of driving.<sup>219</sup>

Professor Lawrence Lessig makes a similar point, asserting that legal interpretation requires fidelity to founding principles in the context of contemporary circumstances unforeseen in the founding era.<sup>220</sup> A basis of authority is essential for consistency, predictability, and reliability, but so too is independent judgment about how to apply it.

Where specific clauses of the Constitution fail to achieve this ultimate purpose—as was the case with the Three-Fifths,<sup>221</sup> Fugitive Slave,<sup>222</sup> and Importation Clauses<sup>223</sup>—the people can use the amendment process to correct deficiencies and guarantee norms. First, the Bill of Rights enumerated some

217. H.P. Grice has characterized the process through which participants in a communication, such as a dialogue about the meaning of the Constitution or about a mundane subject, agree to advance the conversation along a mutually accepted trajectory. H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975).

218. See, e.g., BALKIN, *LIVING ORIGINALISM*, *supra* note 51, at 249–55 (affirming the Fifth Amendment's role in desegregation and rejecting that succeeding generations are bound by the "expected application of 1791," so long as the "proposed construction . . . makes the most sense of the clause in the context of the larger constitutional plan").

219. R.M. HARE, *THE LANGUAGE OF MORALS* 76 (1952).

220. See Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1367–86 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 401–07, 410–14 (1995).

221. U.S. CONST. art. I, § 2, cl. 3, *repealed* by U.S. CONST. amend. XIV.

222. *Id.* art. IV, § 2, cl. 3, *amended* by U.S. CONST. amend. XIII.

223. *Id.* art. I, § 9, cl. 1.

of the most important rights guaranteed by the blueprint of governance found in the Declaration and the Preamble.<sup>224</sup> None of the first ten Amendments, however, guaranteed the right to vote or the protection of speech against state, as opposed to federal, intrusion; more conspicuously, a nation founded on the notion that everyone was born equal did not even mention equality, which until ratification of the Fourteenth Amendment would remain a constitutional ideal determinately stated only by the Declaration. The Reconstruction Amendments were a correction to the injustice of inequality that was endemic to the original Constitution. Many of the Thirteenth, Fourteenth, and Fifteenth Amendments' framers regarded them as reparative of the initial Framers' failure to live up to the country's founding principles.<sup>225</sup> The Nineteenth Amendment was likewise meant to correct a deficiency of the original constitutional compact<sup>226</sup>—a deficiency that discounted the inalienable and political rights of half the adult population of the United States—and helped steer the country in the direction of the promises embodied in the Declaration of Independence and the Preamble. Other Amendments, such as the Twelfth Amendment and Twenty-Seventh Amendment, are more focused on the proper workings of government. But they also warded off corruption, with the Twelfth Amendment designed to prevent the intrigues that were corrosive to President John Adams's administration<sup>227</sup> and the House run-off election that resulted in the election of President Thomas Jefferson and the tainted vice presidency of Aaron

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224. I develop this concept on the basis of Justice Brennan's idea that the original Constitution provided the structure for government, and the Bill of Rights and the Civil War amendments augmented the text to have a "sparkling vision of the supremacy of the human dignity of every individual" that fosters and protects "the freedom, the dignity, and the rights of all persons within our borders." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEXAS L. REV. 433, 439–41 (1986).

225. See TESIS, *supra* note 6, at 91–93, 99–109.

226. See Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2177–78 (1993) (stating that the "conceptual underpinnings" of the Nineteenth Amendment were "not only . . . a means to improve women's lives, but also . . . symbolize[d] recognition of women's equal personal rights and equal political privileges with all other citizens" (internal quotation marks omitted)).

227. See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 60 (2008) (discussing how the Twelfth Amendment altered presidential elections); Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 931 n.23 (2001) ("The Framers of the Twelfth Amendment obviously had the then-recent Adams-Jefferson administration to look back on, and may have rejected [the runner-up] alternative for similar reasons.").

Burr.<sup>228</sup> The Twenty-Seventh meant to prevent legislative corruption through irregular compensation.<sup>229</sup>

Implicitly, the Amendment Clause of the Constitution<sup>230</sup> contains the power to effectuate positive change for achieving social progress. But how can we know whether society is progressing to the promise of liberty and the common good? Progress is made for the people as a whole, not only for some segments of society.<sup>231</sup> Favoritism for only some classes of the population, or for some individuals to the arbitrary exclusion of others, neither protects the collective rights of the people nor is conducive to the general welfare, which is a collective, not a balkanized, term. Balance and context are requisite for each decision made by each of the three branches of government. If the people disagree with the balance, they can elect new politicians and press for the appointment of judges more true to maxim constitutionalism and the Constitution as a whole.

The statement of national purpose found in the Declaration of Independence presupposes that all humans have innate rights, and the Preamble establishes one of the country's principal aims as the protection of the general welfare.<sup>232</sup> Public policy must aim to further the common good through institutions working to protect essential human entitlements. This, no doubt, is a very broad directive of governance in need of much

228. See Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 HOFSTRA L. REV. 497, 573 (2011) (“[T]he Twelfth Amendment was a direct response to the electoral crisis that erupted in the presidential election of 1800 pitting then-Vice President Thomas Jefferson against Aaron Burr.”); Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 84 IND. L.J. 1337, 1353 (2009) (“The Twelfth Amendment was added to the Constitution in the aftermath of the fiasco of 1800, where Thomas Jefferson and Aaron Burr tied for first and Thomas Jefferson was chosen only two days before inauguration on the thirty-sixth ballot.”).

229. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 502–08 (1992) (discussing the origin and the development of the Twenty-Seventh Amendment and noting its purpose as a restraint on Congress's ability to set its own wages).

230. U.S. CONST. art. V.

231. See U.S. CONST. pmb. (enumerating the purposes of the Constitution as including promotion of the *general* welfare); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (recognizing the equality of all men and stating that governments are established to ensure the unalienable rights of all).

232. The Declaration of Independence derives from a natural-rights theory that ties duties, responsibilities, and entitlements to attributes that are intrinsic to human nature. See Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1382 (2010) (discussing “American natural-rights morality” within the context of “the theory of unalienable and natural rights set forth in the Declaration of Independence”); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 425 (2012) (mentioning the “Declaration of Independence[s] . . . grand proclamation of natural rights”). Natural law philosophy ties norms to human characteristics. See Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2023 (2012) (“Natural law norms are natural because they are tied to human nature: they identify which actions are right and wrong by reference to a being with human characteristics.”).

elaboration, but the same can be said of subordinate constitutional principles. For instance, the general tenets of the Equal Protection and Due Process Clauses are clearly binding and supreme over any violative state action, but their wording is indeterminate without the added specificity provided by statutes, regulations, and judicial decisions. The American constitutional project, then, is an evolving process of identifying, developing, negotiating, and working out reasonable policies likely to benefit private and public interests. The constitutional text is a necessary component of this deliberative process,<sup>233</sup> as is the aspirational directive to pursue justice and equality.<sup>234</sup> The text does not, however, have a static meaning but is malleable enough to react to collective wisdom through legislative debate, judicial deliberation, and administrative regulation.<sup>235</sup> The anchor for constitutional evolution this Article seeks to demonstrate is the maxim that government must “promote the general [w]elfare”<sup>236</sup> through laws and policies that the people, through their elected representatives, regard as “most likely to effect their Safety and Happiness.”<sup>237</sup> This is the framing standard against which all other policies must be evaluated. Each generation of Americans seeks to disambiguate this broad purpose of governance through political debate, compromise, experimentation, and reconsideration.

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233. The Supreme Court has often recognized that liberty claims can arise “from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’ or [they] may arise from an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citation omitted); *see also* *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (finding that Congress is implicitly prohibited from passing laws violative of the Constitution and from enabling states to commit such violations); *Printz v. United States*, 521 U.S. 898, 907 (1997) (asserting that certain judicial power was “perhaps implicit in one of the provisions of the Constitution, and was explicit in another”); *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970) (concerning the due process required before welfare entitlements are abridged).

234. The ambiguity of some of the most indeterminate portions of the Constitution led Justice Oliver Wendell Holmes to throw up his hands and declare that equal protection claims were “the usual last resort of constitutional arguments.” *Buck v. Bell*, 274 U.S. 200, 205, 208 (1927). Refusing to parse fundamental rights and equal protection, Holmes countenanced popular prejudice against black voters in *Giles v. Harris*, 189 U.S. 475 (1903), and against the reproduction of the allegedly mentally handicapped in *Buck*. *See Giles*, 189 U.S. at 486–88 (refusing to balance the private interest to vote against the public interest of efficient administration of the franchise); *Buck*, 274 U.S. at 205–06 (presuming that “experience has shown that heredity plays an important part in the transmission of insanity [and] imbecility”). Holmes’s Social Darwinistic notion of popular governance sought to legitimize the exercise of popularly passed laws even when they were meant to further class prejudice and disregard the political will of disempowered individuals. Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 765–70 (2000). It was his skepticism about broad principles of rights that also led Holmes to declare: “Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.” *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

235. *See Fiss, supra* note 197, at 753–54 (defending a view that public morality is embodied in the text of the Constitution and necessary for explaining why the Constitution should be obeyed).

236. U.S. CONST. pmbl.

237. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

### III. Theoretical Context

The Declaration of Independence and the Preamble to the Constitution declared the people to be sovereign and set normative limits on the administration of government.<sup>238</sup> The central purpose of governance, to safeguard the people's rights on an equal basis for the betterment of society, is the duty of all three branches of government. Constitutional interpretation should play a role in exercising each of the Branches' respective functions.

Most theories of constitutional interpretation, nevertheless, focus almost exclusively on various methodologies of judicial interpretation.<sup>239</sup> This Part of the Article analyzes three prominent theories of interpretation: originalism, living constitutionalism, and proceduralism. I make no effort to provide an exhaustive analysis of any of these three schools of thought. The discussion of maxim constitutionalism in the context of other interpretative methods is rather meant to examine whether there is any advantage to relying on a central constitutional ethos of national purpose. This Part of the Article concludes with an analysis of whether a process-based understanding of the Constitution is sufficiently robust to formulate civil rights policy.

#### A. *Originalism*

In the last four decades, originalism has left a significant mark on academic and judicial writings.<sup>240</sup> The stated aim of its supporters is for judges to interpret the Constitution according to the Framers' initial meaning

238. *See id.*; U.S. CONST. pmbl.

239. *See* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 3 (2009) ("The initial problem is that when Americans think of constitutional change, they focus on judicial interpretations, not on the role of their elected representatives or of citizens themselves."); Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 629 (2012) ("[T]he assumption that legislatures are incapable of taking the Constitution seriously is, as Judge Posner's treatment illustrates, even more taken for granted and less examined by legal scholars today than judicial supremacy. It needs and deserves more serious treatment.").

Philip Bobbitt has identified the six legitimate modalities (i.e., forms) of constitutional interpretation to be textual, historical, structural, prudential, ethical, and doctrinal arguments. BOBBITT, *supra* note 128, at 11–22. By legitimate, Bobbitt refers to the grammatically correct methods for courts to understand the Constitution. *Id.* at 23. But for him, unlike me, legitimate does not refer to any overarching constitutional ethos. *See* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEXAS L. REV. 1771, 1775–76 (1994). Professors Balkin and Levinson note:

The lay reader is apt to be confused by Bobbitt's use of "legitimacy," for there is an almost irresistible temptation to impute a moral valence to something that is "legitimate." However, Bobbitt insists that this temptation must be resisted, at least if we want to understand how our constitutional grammar works.

*Id.*

240. *See, e.g.*, BALKIN, LIVING ORIGINALISM, *supra* note 51, at 3 (arguing that originalism and living constitutionalism are compatible); Scalia, *supra* note 11, at 864 (analyzing nonoriginalism and originalism and classifying himself as a "faint-hearted originalist"); Strang, *supra* note 233, at 2003–14, 2026–39 (discussing the history of originalism and its innate virtue); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1162 (2012) (challenging originalism as a way of interpreting the Constitution).

or intent.<sup>241</sup> This method is meant to prevent judges from rendering decisions on the basis of political predispositions.<sup>242</sup> Early originalists like Judge Robert Bork argued that judicial restraint required judges to “stick close to the text and the history, and their fair implications.”<sup>243</sup> “[T]he only legitimate basis for constitutional decisionmaking,” Bork wrote, is “original intent.”<sup>244</sup> For Bork and other early expositors of this schema, much of the Warren Court’s legacy was based on faulty reasoning rather than verifiable “meaning attached by the framers to the words they employed in the Constitution.”<sup>245</sup> Reagan Administration Attorney General Edwin Meese III took this line of thought into the public sphere. Meese advocated a “jurisprudence of original intention” requiring judges to consult “the original intent of the Framers.”<sup>246</sup> Scholars, judges, and politicians who promoted the intentionalist branch of originalism believed the Framers established interpretive standards that they intended to be binding on their own and future generations.<sup>247</sup>

Intentionalists’ historical claims came under fire for being inferential, driven by legal and political agenda, and often historically inaccurate. The record of ratification conventions, Madison’s notes of the Constitutional Convention, and political pamphlets of the day are too inconsistent, incomplete, and partisan to make incontrovertible or decisive conclusions about their contribution to contemporary debates.<sup>248</sup> Furthermore, the Framers were not intellectually unified. Simply put, it is disingenuous to

241. See BALKIN, *LIVING ORIGINALISM*, *supra* note 51, at 7–9 (discussing the version of originalism popularized by Justice Scalia, which uses the “original meaning” to interpret the Constitution (citing Scalia, *supra* note 11, at 862–64)).

242. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 195 (2008) (“Justice Scalia has long advocated originalism on the grounds that it constrains judicial discretion and so enables judges to enforce the Constitution as law, not politics.”); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 248 (2008) (stating that Justice Scalia’s “interest in originalism is explicitly connected with his interest in rule-bound law and in constraining judicial discretion; on his account, originalism is uniquely capable of ensuring that constitutional law is not a matter of judicial will or ad hoc, case-by-case judgments”).

243. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

244. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

245. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 108 & n.71, 402 (2d ed. 1997).

246. The Hon. Edwin Meese III, Att’y Gen. of the U.S., Address before the D.C. Chapter of the Federalist Society Lawyers Division at the Golden Palace 8, 10, 12–13 (Nov. 15, 1985), *available at* <http://www.justice.gov/ag/aghistorical/meese/1985/11-15-1985.pdf>. Concerning the importance that Meese’s public adoption of originalism played in the growth of this intellectual movement, see Ian Bartrum, *Originalist Ideology and the Rule of Law*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 1, 1–2 (2012).

247. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985) (distinguishing the intentionalist branch of originalism).

248. See Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 46 (2012) (discussing the incompleteness of the historical record of the constitutional period).



ascribe a collective conscience to individuals as disparate in their views as Alexander Hamilton and Thomas Jefferson.<sup>249</sup> While at the time of ratification, the Early Republic only had one political party, the acrimonious disputes between Federalists supporting the Constitution and Anti-Federalists opposing it without changes to the Philadelphia Convention's formuli were anything but unified.<sup>250</sup> Sometimes there was overlap even among rivals, which allowed Hamilton and Jefferson to work in the Washington administration and Federalists to acquiesce to Anti-Federalists' demands for a written bill of rights, but there were also profound differences of opinion, such as Hamilton's preference for strong national government and Jefferson's advocacy for local agronomic self-government, or the Federalists' willingness to ratify the original Constitution with only implicit protections of rights and the Anti-Federalists' condemnation of the omission of those written guarantees.<sup>251</sup> Some of the most influential Framers' views evolved, indeed morphed, after ratification. Jefferson, for instance, clearly changed his view about the capacity of the United States to expand territorially without constitutional amendment after France agreed to sell the Louisiana Territory.<sup>252</sup> James Madison initially argued against inclusion of a bill of rights in the Constitution, fearing that it would be construed to only protect enumerated rights and thereby leave other natural rights unprotected against government intrusion.<sup>253</sup> But he later served as the floor leader in the House of Representatives<sup>254</sup> on behalf of adopting the Bill of Rights.<sup>255</sup> This

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249. See NOBLE E. CUNNINGHAM JR., *JEFFERSON VS. HAMILTON: CONFRONTATIONS THAT SHAPED A NATION* (2000) (discussing their divergent views).

250. See, e.g., 1 *FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION* (John P. Kaminski & Richard Leffler eds., 1989) (compiling writings by some of the leading scholars and theorists of the eighteenth century to highlight the intense constitutional debate among Federalists and Antifederalists); DAVID J. SIEMERS, *RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME* (2002) (confirming as much).

251. See Powell, *supra* note 247, at 891 & n.31, 904–14 (detailing the hermeneutical views of Federalists and their Anti-Federalist opponents).

252. HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON 363–64* (Library of Am. ed., Penguin Books 1986) (1889).

253. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *THE PAPERS OF JAMES MADISON* 295, 297 (Robert A. Rutland & Charles F. Hobson eds., Univ. Press of Va. 1977) (conditioning any support for a bill of rights on whether “it be so framed as not to imply powers not meant to be included in the enumeration” and noting the inefficacy of state bills of rights in preventing government intrusion); *Amendments to the Constitution* (June 8, 1789), in 12 *THE PAPERS OF JAMES MADISON* 196, 206–07 (Robert A. Rutland & Charles F. Hobson eds., Univ. Press of Va. 1979) (calling the enumeration argument “one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system”).

254. See Carey Roberts, *James Madison in the U.S. House of Representatives, 1787–1797: America's First Congressional Floor Leader*, in *A COMPANION TO JAMES MADISON AND JAMES MONROE* 127, 127–42 (Stuart Leibiger ed., 2012) (discussing Madison's role as floor leader).

255. See Letter from James Madison to Thomas Jefferson, *supra* note 253, at 295, 297–99 (“My own opinion has always been in favor of a bill of rights.”).

fluctuating political landscape did not alter the nation's permanent commitment to the maxim of individual rights for the common good.

There is, further, no reason for most Americans to seek a return to an era when racism, chauvinism, and classism were regarded as legitimate standards for political and social exclusion. The failures of the founding generation did not gainsay the nation's obligation to abide by the constitutional directive of socially responsible governance. In the post-Reconstruction and post-Civil Rights Era, a vastly more inclusive comprehension of fundamental rights and the common good has become part of federal law through statutes like the Civil Rights Act of 1964,<sup>256</sup> the Voting Rights Act of 1965,<sup>257</sup> the Age Discrimination in Employment Act,<sup>258</sup> and the Americans with Disabilities Act.<sup>259</sup> The Declaration of Independence, Bill of Rights, and the northern manumission acts<sup>260</sup> of the post-Revolutionary Era are just some examples of accomplishments of the framing generation from which we stand to learn. But they also pursued inimical policies, like passage of the Fugitive Slave Act of 1793<sup>261</sup> and ratification of the Importation Clause<sup>262</sup> and the Three-Fifths Clause,<sup>263</sup> that raise some serious doubt about their judgments and motivations. History is a tool for understanding various advancements of and failures to live up to the core commitment of U.S. constitutionalism, but no generation is required to adopt the complete will of its predecessors, warts and all.

Moreover, given that the Declaration of Independence and the Preamble attribute sovereignty to the people rather than the Framers of the Constitution—as might have been the case had the country become a plutocracy or aristocracy—it's unclear why the views of prominent men of the day should be more determinative than those of ordinary persons living during that period.<sup>264</sup> Presumably the preferences of persons engaged in drafting, writing, and ratifying the Constitution through state ratifying conventions should receive great weight with respect to the document's

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256. Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h-6 (2006).

257. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

258. Age Discrimination in Employment Act, 29 U.S.C. §§ 625–26 (2006).

259. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, 47 U.S.C. §§ 225, 611 (2006).

260. See, e.g., Act of Feb. 24, 1820, 1820 N.J. Laws 74; Act of Mar. 1, 1780, ch. 146, 1780 Pa. Laws 282; see also David Menschel, Note, *Abolition Without Deliverance: The Law of Connecticut Slavery 1784–1848*, 111 YALE L.J. 183, 184 nn.3–4 (2001) (collecting various abolition measures in Massachusetts, Vermont, New Hampshire, Pennsylvania, New Jersey, New York, Connecticut, and Rhode Island); A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “*Yearning to Breathe Free*”: *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1257–69 (1993) (discussing the Virginia Manumission Act of 1782).

261. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793).

262. U.S. CONST. art. I, § 9, cl. 1.

263. *Id.* art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.

264. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15, 220–21 (1980) (discussing the difficulty original intentionalists face in defining the class of people who adopted the Constitution and then applying it to cases in controversy).

meaning to the founding generation. But if the Declaration and the Preamble are to be taken at their word, then a much greater number of people's views should be taken into account for determining constitutional intentions and meanings. Professors Keith Whittington and Michael McConnell have gone further, arguing that originalist judges must give effect to the will of the people living at the time of ratification.<sup>265</sup> But even if that were normatively correct, the ideas, opinions, and leanings of such a diffuse group cannot be ascertained with certainty, neither from our vantage point, almost two-and-a-half centuries later, nor at the time of ratification.

"The People" is, instead, a dynamic constitutional concept embracing the idea that each generation is obligated to identify rights intrinsic to the pursuit of happiness and to demand that government provide the legal means of achieving the general welfare.<sup>266</sup> The structural parts of the Constitution provide the means for the three branches of government to pursue those ends. The people have exercised their sovereignty not only at the constitutional ratifying convention: their will is a continuously evolving force that is exercised through elective politics and representative governance. Understanding statements about unalienable rights found in the Declaration or the general welfare in the Preamble certainly requires retrospection. They are clauses that owe their existence to a specific colonial conflict with Britain. But like the abstract statements of the Bill of Rights and Reconstruction Amendments, such as those found in the Ninth Amendment<sup>267</sup> and the Equal Protection Clause,<sup>268</sup> our constitutional tradition is a steady stream of concretizing through Article V amendments and, to a less binding degree, precedent, legislation, and regulation. The broadly stated directive for government to protect rights—in the form of life, liberty, and the pursuit of happiness—for the general welfare—through substantive and procedural due process—invites debate and resolution, not stasis. The concrete structures of the Constitution, such as the age at which a person can become president<sup>269</sup> or the number of senators who represent each

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265. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 124–25, 155–56 (1999) (discussing originalism in the context of popular sovereignty); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1529 (1989) (book review) ("The force of the originalist argument is that the people had a right to construct a Constitution, and that what they enacted should therefore be given effect . . .").

266. See *supra* subpart II(C).

267. See U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.").

268. See *id.* amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

269. See *id.* art. II, § 1, cl. 5 ("No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . .").

state in Congress,<sup>270</sup> are there to provide a framework for achieving the underlying purpose of representative governance.

Finding themselves in the crosshairs of historical and analytical criticism, originalists shifted their attention to structural originalism, the focus of which was on the text and design of the Constitution; consequentialism, with an emphasis on beneficial results; and “popular-sovereignty” originalism.<sup>271</sup> The most prominent, and currently most influential, branch draws its inspiration from the presumed original public meaning.<sup>272</sup> That shift did not obviate the problem of identifying an unambiguous source and understanding of the founding generation. An advocate for classic originalism critically pointed out that “public meaning originalism will generate more cases of constitutional indeterminacy than will the originalism of original intentions.”<sup>273</sup> There is, furthermore, disagreement among public-meaning originalists. As Professors Thomas Colby and Peter Smith recently pointed out, original-meaning scholars are split between those that credit original understanding to ratifiers, the public, drafters, or hypothetical reasonable persons at the time of ratification.<sup>274</sup> There is little in common among these disparate camps of originalism except, as Professor Lawrence Solum has synthetically stated, that they all maintain there is a fixed-in-time constitutional meaning that constrains modern interpretation,<sup>275</sup> but they vociferously differ about the details. Professor Andrew Koppelman has stated that, ironically, while “[o]riginalists do not think that their field is in crisis[, t]hey should,” because their approaches are

270. See *id.* amend. XVII, § 1, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . .”).

271. See Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEXAS L. REV. 1843, 1870–71 (2013).

272. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92–93 (2004) (asserting that originalism has itself changed from a focus on original intention to original meaning and using Robert Bork and Antonin Scalia as examples of originalists seeking the original meaning of the text); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447–71 (2006) (emphasizing that originalism is part of the Constitution’s original meaning); Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250–51 (2010) (defending an original meaning interpretation of the First Amendment); Randy E. Barnett, Op-Ed., *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, <http://online.wsj.com/article/SB121452412614009067.html> (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”).

273. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 721 (2009).

274. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 251–52, 254–55 (2009).

275. See Larry B. Solum, *What Is Originalism?: The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY 12, 36 (Grant Huscroft & Bradley W. Miller eds., 2011).

so methodologically fragmented.<sup>276</sup> The different meanings of the “originalism” label renders untenable the central claim of the movement that it provides certainty in adjudication.<sup>277</sup> The reality, to the contrary, is that, as with all other approaches, judges who adhere to originalism must make normative decisions where constitutional clauses are not fully explained by the historical record, which is often ambiguous or plain nonexistent.<sup>278</sup>

The ideology most originalists espouse is too closely related to the conservative political agenda to ignore the overlap between it and party partisanship.<sup>279</sup> An originalist judge, whether relying on intentionalism or public meaning, cannot avoid exercising discretion when deciding facial or as-applied challenges.<sup>280</sup> Conservatives tend to think the federal government has overextended its regulatory reach into areas that the Constitution has left to state decision makers. Hence an eighteenth- and nineteenth-century mentality, that idealized a period of balanced federalist powers, goes hand-in-hand with a nostalgic, albeit unworkable, method for understanding the Constitution. That notion of the past is more ideological than it is historical.

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276. Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1918 (2012); see also Colby & Smith, *supra* note 274, at 244 (“A review of originalists’ work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.”).

277. It is important to mention, although I am unable to deal with it at any depth in this paper, that an emerging line of reasoning shared among some post-intentionalist originalists no longer adopts their forerunners’ claims of adjudicatory certainty, but rather claims a more modest proposition that the Constitution is binding and no changes to it can be made without the Article V process. See, e.g., Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1563 (2012) (“I am in no position to make strong claims about the degree of interpretative determinacy of reasonable-person originalism, either absolutely or comparatively . . . . [I]t requires a specification of a standard of proof for interpretative claims; the extent of interpretative indeterminacy will vary, perhaps wildly, with changes in the standard of proof.”); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43, 50–52 (1987) (admitting that originalist theory cannot provide absolute certainty but disputing that this is fatal to the originalist position); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing A “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1494 (2012) (“Indeed, the irony of the originalist school of interpretation is that an interpretive paradigm supposedly so committed to the unchanging goals of the Constitution has itself been subjected to more stylistic changes than spring fashion design.”).

278. See BALKIN, *LIVING ORIGINALISM*, *supra* note 51, at 48, 92.

279. See Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1192–94 (2011) (arguing that originalism ties conservative politics to the Constitution). As Justice William J. Brennan Jr. put it, originalism “feigns” deference to the Constitution’s Founders, “[b]ut in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.” Brennan, *supra* note 224, at 435. Frank Cross has pointed out that liberal judges, just as their conservative counterparts, have often deployed originalist arguments for ideological reasons. Cross, *supra* note 249, at 49–50.

280. See Colby & Smith, *supra* note 274, at 292 (“[O]riginalism often fails to constrain judges because the process of applying the original meaning . . . to the particular problem at hand still leaves room for substantial discretion on the part of the judge to follow her personal preferences—especially when that meaning . . . is articulated at a broad level of generality.”).

For instance, as Jamal Greene has pointed out, Justice Antonin Scalia's originalist proclamation in *District of Columbia v. Heller*<sup>281</sup> that the Second Amendment protects the right to private gun ownership<sup>282</sup> is rejected by almost all historians of the eighteenth century.<sup>283</sup> For originalists, then, the ideological value of labeling something as historical can be of greater value than analyzing the matter according to the historical record.

History is of vital importance to the interpretation of the Constitution. However, sifting through precedents, social developments, statutory emendations, social and political advocacy, and other relevant data of legal culture does not call for blind adoration of the past. Indeed, the use of constitutional language appears too rarely in the historical record, often in contexts unrelated to interpretive canon, to provide definitive answers to disputes about textual meaning.<sup>284</sup> Rather, the previous generations' legal conclusions, insights into human behavior, legislative enactments, constitutional adjudications, administrative changes, and the plethora of other achievements best make sense within a unified framework of national ethos. That framework is neither beholden to the intent of the founding generation nor to the public meaning of the Constitution's wording. Originalism requires inferences outside its stated purpose when addressing questions far beyond the Framers' foresight, such as the Fourth Amendment's application to searches and seizures using global positioning systems (GPS),<sup>285</sup> thermal imaging devices,<sup>286</sup> and telephone booths.<sup>287</sup> Sometimes resort to the historic record by both the majority and dissent amounts to two reasonable interpretations of the extant sources that arrive at opposite conclusions. This was the case in *U.S. Term Limits, Inc. v. Thornton*,<sup>288</sup> which held unconstitutional a state's limitations on the number of terms representatives

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281. 554 U.S. 570 (2008).

282. *Id.* at 636. Scalia calls himself a "faint-hearted originalist." Scalia, *supra* note 11, at 864. And Barnett has critically asserted that "Justice Scalia is simply not an originalist" because of the Justice's willingness to sometimes be pragmatic about allowing precedents to override original meaning. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006). *But see* Antonin Scalia, *Response, in A MATTER OF INTERPRETATION*, *supra* note 272, at 138–39 ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.").

283. Greene, *supra* note 279, at 1193.

284. Redish & Arnould, *supra* note 277, at 1502 (noticing that original meaning suffers from "an overwhelming archaeological problem due to the simple lack of relevant data" and the ambiguous use of words "in entirely unrelated contexts").

285. *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (holding that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" (footnote omitted)).

286. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of a thermal heat device to ascertain behavior occurring inside a home was a search for Fourth Amendment purposes).

287. *Katz v. United States*, 389 U.S. 347, 353 (1967) (deciding that people have a reasonable expectation of privacy in phone booths, where they are protected against unreasonable searches).

288. 514 U.S. 779 (1995).

and senators could serve in the U.S. Congress.<sup>289</sup> Legitimacy of constitutional determinations is, rather, based on whether government action or inaction is made in accordance with the underlying directive of representative democracy, established in the Declaration of Independence and the Preamble, to protect individual rights for the common good. And that judgment is a contested one. The details must be hashed out in legislative debates, judicial conferences, and presidential cabinet meetings. If the people dislike the conclusions reached by powerful actors, they can vote them out of office and start afresh in the next election cycle. Elected officials can then engage in the appointment of judicial candidates committed to the maxim of representative governance.

Jack Balkin has recently proposed a “living originalism” approach, which frames the Constitution in general terms, based on original “semantic content.”<sup>290</sup> He bases the approach on neither the original intent nor the original expected application of the Founding Fathers. Living originalism, instead, requires fidelity to the content of provisions like the Equal Protection Clause,<sup>291</sup> but recognizes that “changing social demands and changing social mores” should influence constitutional construction.<sup>292</sup> This is a welcome understanding that mores play a central role in decision making. Balkin writes that future generations must abide by the Constitution’s original framework.<sup>293</sup> This “framework consists of the original semantic meanings of the words in the text (including any generally recognized terms of art) and the adopters’ choice of rules, standards, and principles to limit, guide, and channel future constitutional construction.”<sup>294</sup>

This approach provides Balkin with a method of explaining the legitimacy of modern precedents like *Roe v. Wade*,<sup>295</sup> despite the dearth of grounding that opinion has in any original semantic meaning of the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>296</sup> Social mobilization is crucial to his model “in building the Constitution” and shaping constitutional construction.<sup>297</sup> Balkin does not, however, adopt a central principle for judicial review and all other functions of governance to

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289. *Id.* at 783.

290. BALKIN, LIVING ORIGINALISM, *supra* note 51, at 12–13.

291. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551–53 (2009).

292. *Id.* at 551.

293. See BALKIN, LIVING ORIGINALISM, *supra* note 51, at 4 (“The text of our Constitution is a framework. . . . The ratification of the Constitution begins a constitutional project that spans many generations. Each generation must do its part to keep the plan going and to ensure that it remains adequate to the needs and the values of the American people.” (citation omitted)).

294. Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 817.

295. 410 U.S. 113 (1973).

296. See BALKIN, LIVING ORIGINALISM, *supra* note 51, at 215–18 (“[T]he right to abortion had not . . . gained the status of a privilege or immunity of national citizenship, when the Court decided *Roe* . . .”).

297. *Id.* at 81–82.

help explain, justify, or condemn any given trajectory of U.S. social, political, and constitutional change. A unified principle of governance provides a grounding on which social groups can demand change. Its simple ideals do not require advocates for change to be specialists in constitutional law, they need only seek the protection of individual rights in order to further the general welfare, where everyone is treated as an equally valuable member of society regardless of ethnic background, affluence, or political clout. I agree with Balkin's model of social advocacy but believe that maxim constitutionalism adds a necessary grounding for construction left out of his formulation of constitutional advancement.

In this Article I suggest that the central purpose of government is contained in the maxim that the people have created a representative polity whose *raison d'être* is the use of constitutional powers to safeguard inalienable rights to further public good. This is a normative matter, not merely a semantic one. That norm is stable and provides the initial constitutional content to publicly eschew intolerance and group animus. The protection of rights is viewed under my maxim-constitutional approach to be essential for pluralism because it requires the Executive, Legislative, and Judicial Branches to respect individual difference while administering just laws for the betterment of the whole. While Balkin is correct that the Constitution provides the aspiration for "higher law,"<sup>298</sup> it is not the document itself but the human aspiration to live in a society obligated to protect the individual's unobtrusive pursuit for the good life that is at the core of legitimate state power.<sup>299</sup> That will to power is best exercised through a representative government, responsive to the will of constituents but not beholden to the discrimination of the majority. Freedom of human sexuality, which the Court recognized under the term "privacy" in *Griswold v. Connecticut* and *Lawrence v. Texas*,<sup>300</sup> is an example of one constitutional right that is based on innate human aspirations instead of textual semantics, original intents, or original meanings. Maxim constitutionalism, then, regards key constitutional provisions, foremost paragraph two of the

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298. Balkin, *Nine Perspectives*, *supra* note 295, at 846 (emphasis omitted). Balkin further writes that some are "underlying principles" of the Constitution that are "implied from various parts of the text" while others, "like equal protection [and] freedom of speech" appear in the text. BALKIN, *LIVING ORIGINALISM*, *supra* note 51, at 259. All this is convincing. My difference with this reading is first that there is a central maxim of constitutional construction that gives meaning to all the other written and unwritten principles of the Constitution. Secondly, the maxim of government's obligation to protect individual rights for the common good does not derive from text but from the people's innate rights to freedom and well-being. The text of the Declaration of Independence and Constitution binds the federal government to protect and enforce the people's will through specific constitutional clauses, statutes, judicial decisions, and executive action.

299. Put into the formulation of the Declaration of Independence, the people "institute" government on the "Foundation o[f] such Principles" and organize "its Powers in such Form, as to them . . . seem most likely to effect their Safety and Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

300. 539 U.S. 558 (2003).



Declaration of Independence and the Preamble to the Constitution, to be defined by ontological human rights, not determinative of them. The maxim of individual rights for the common good is that principle upon which all other constitutional principles must be justified, and it owes its authoritative place to neither historic semantics nor extant text but to the rational worth of people establishing a government capable of protecting their essential interests as the best means of enjoying well-being. Put another way, the rights protected by the Constitution are preconstitutional.

### B. *Living Constitutionalism*

In response to Balkin's living originalism, a proponent of a rival school of interpretation asserted that any form of originalism that calls for "constitutional construction . . . is not originalist; it is living constitutionalist."<sup>301</sup> The leading theory of living constitutionalism contends that judicial precedent is the primary means for evolving and adapting the Constitution to social progress without needing to formally amend its antedated provisions.<sup>302</sup> Balkin, in response, suggested that judges should be unwilling to defend decisions that are not faithful to the Constitution's original framework.<sup>303</sup> Original intent and original meaning proponents would be even more averse than Balkin to following precedents that deviated from the will of the Founding Fathers or the framing generation.<sup>304</sup>

Living constitutionalism is usually associated with judicial decisions that redefine the meaning of the Constitution. Scholars and judges in this school of thought argue that constitutional meaning resides not in the text nor can it be construed through any form of originalism; rather, they seek to demonstrate how precedents define and alter the significance of various clauses.<sup>305</sup> The Supreme Court is regarded as the locus of constitutional change, redefining the Constitution through major precedents during the New Deal, the Civil Rights Era, and throughout the course of U.S. history.<sup>306</sup> The Judiciary is therefore responsible for updating constitutional principles. Justice William Brennan cautioned that when judges rely on judicial review to guide constitutional meaning they should act "with full consciousness that

301. Strauss, *supra* note 241, at 1166.

302. STRAUSS, *supra* note 12, at 1, 3 (defining the living Constitution as "one that evolves, changes over time, and adapts to new circumstances, without being formally amended").

303. See BALKIN, LIVING ORIGINALISM, *supra* note 51, at 123–24.

304. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 983 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Roe was plainly wrong—even on the Court's methodology of 'reasoned judgment,' and even more so (of course) if the proper criteria of text and tradition are applied.").

305. See STRAUSS, *supra* note 12, at 3, 4 ("Our constitutional system . . . has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself.").

306. E.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

it is . . . the community's interpretation that is sought."<sup>307</sup> Brennan recognized the value of reviewing the history of the framing, but wrote that the "ultimate question" is what the words of the Constitution mean today.<sup>308</sup>

Brennan's approach left undefined how a Justice should pick among contradictory community opinions to decide which is worthy of her or his attention. The maxim of constitutional interpretation I have developed in this Article might help to fill that gap and prevent exclusionary members of the community from having too much influence on the Court's reasoning. The maxim of liberal equality for the common good can provide structure, requiring the President and Congress to likewise be aware and direct their public conduct in a manner likely to protect fundamental interests for the general welfare. As Balkin pointed out, living constitutionalism can also be associated with the other branches of government guiding constitutional development.<sup>309</sup> Similarly Professor Bruce Ackerman praised the common law approach to adaptation but criticized the judge-centered approach for slighting "the central importance of popular sovereignty."<sup>310</sup>

Balkin's and Ackerman's criticisms about placing too much trust in judges to guide constitutional evolution reject Professor David Strauss's vigorous defense of common law constitutionalism. Strauss believes that in the United States "precedent and past practices are, in their own way, as important as the written U.S. Constitution."<sup>311</sup> He further argues that Supreme Court decisions should be at the forefront, or, as he puts it, should be the "all-but-exclusive" means, of constitutional change, even when the precedents are not clearly based on the text of the Constitution.<sup>312</sup> This precedent-centered model emphasizes the importance of building on past understandings and altering them in light of new sensibilities.<sup>313</sup> It takes for granted the progressive nature of *stare decisis* and puts resolution of political disagreement into the hands of unelected judges.<sup>314</sup> One limitation with such an approach is that it overlooks analytically faulty precedents and the

307. Brennan, *supra* note 224, at 434.

308. *Id.* at 438.

309. Balkin, *supra* note 291, at 561.

310. Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1801 (2007).

311. STRAUSS, *supra* note 12, at 3.

312. *Id.* at 116. As Professor Strauss writes:

The mechanisms of constitutional change that make up the living Constitution—the evolution of precedents and traditions—are much more important. The living Constitution is the primary—I will go so far as to say the all-but-exclusive—way in which the Constitution, in practice, changes. The formal amendments are a sidelight.

*Id.* As examples of common law progress made without reliance on originalist or textualist bases, Strauss names school desegregation, gender equality, checks against state racial discrimination, and voting apportionment. *Id.* at 12–15.

313. *Id.* at 34–36, 38.

314. Judge Wilkinson has stated that living constitutionalists' reliance on judicial supremacy for achieving social improvement is antidemocratic. J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 19–20 (2012).

Judiciary's periodic regressive decision making. The resolution of disputes between different democratic factions are typically thought to be in the realm of bicameral conferences and congressional–executive deal making, not judicial oversight.<sup>315</sup> Strauss's defense of the gradual common law process of precedents does not gainsay the fault of a system that would have to rely on judges almost exclusively for progress.<sup>316</sup>

Supreme Court precedents have well-known high and low points. Some of the most obvious examples of judicial manipulation of the Constitution to suit justices' political and economic world views were *Dred Scott v. Sandford*<sup>317</sup> and *Lochner v. New York*.<sup>318</sup> In both cases, the Court construed substantive due process to impede legislators from safeguarding the rights of vulnerable groups and to address a public crisis—the crisis of slavery in the first and public health in the second.<sup>319</sup> In the case of slavery, it was Article V of the Constitution that eventually facilitated change, through passage of the Reconstruction Amendments.<sup>320</sup> Even after the ratification of the Amendments, the Court denied the constitutionality of a federal statute that prohibited the segregation of public places of accommodation, like inns

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315. See *id.* at 21 (critiquing living constitutionalism for relying on judges to achieve functions ordinarily left for the political branches of government); see also *id.* at 22 (“America would be a much impoverished country if the political branches and the states surrendered all constitutional discourse to the courts, yet that is exactly what living constitutionalism has encouraged them to do.”). Strauss's passing suggestion that living constitutionalism could be advanced “without judicial review” does not fully resolve the difficulty of overreliance on the courts. STRAUSS, *supra* note 12, at 48. He immediately follows that statement by suggesting that the alternative to common law living constitutionalism is for Congress to “conscientiously” apply “earlier decisions and understandings,” which begs the question of whose “decisions and understandings” other than judges would become the authoritative voice on constitutional meaning. *Id.* Strauss doesn't answer this question, so a bit of conjecture is necessary: If it is the past “decisions and understandings” of Congress itself, then some central meaning other than simply the abstract notion of updating the Constitution is necessary to avoid fundamental changes with each election cycle. If the Executive Branch's “earlier decisions and understandings” could guide the evolution of constitutional meaning, the risk of autocracy would be heightened contrary to the warnings of the Declaration of Independence.

316. As examples of gradual change Strauss discusses how Supreme Court doctrine evolved from *Plessy v. Ferguson* to *Brown v. Board of Education* and beyond. STRAUSS, *supra* note 12, at 77–80, 85–92. That the Court eventually got it right is no justification for the personal and social harms of state Jim Crow practices that were justified on the basis of the *Plessy* rationale.

317. 60 U.S. (19 How.) 393 (1857).

318. 198 U.S. 45 (1905).

319. *Dred Scott*, 60 U.S. at 450 (“[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law.”); *Lochner*, 198 U.S. at 64–65 (finding unconstitutional a statute that regulated the working hours of bakers for being an abridgment of the right to contract). In *Dred Scott* the Court struck down the Missouri Compromise, which Congress had enacted to accommodate Northern efforts to limit, and Southern efforts to facilitate, the expansion of slavery. See TESIS, *supra* note 6, at 66–68. The New York law struck down in *Lochner* addressed the high mortality and epidemic rate among bakers resulting from their long exposure to airborne flour dust. 198 U.S. at 70–72 (Harlan, J., dissenting).

320. See U.S. CONST. amends. XIII, XIV, XV.

and theaters,<sup>321</sup> and in another case turned back a private claimant's assertion that women have the same privilege and immunity as men to pursue careers, over the lone dissent of Chief Justice Chase.<sup>322</sup> With *Lochner*, the abandonment of judicial manipulation came through presidentially initiated programs during the New Deal. At first, the Court refused to go along with the increased nationalization of economic regulations and only conceded the validity of federal economic stimulus after striking several pieces of legislation that had been aimed at ending the Great Depression.<sup>323</sup> The interpretational finality that the Court has bestowed upon itself has sometimes led to social uplift but at other times hung like a millstone around the necks of progressive social movements. One of the Constitution's structural complications is the difficulty of ratifying amendments under Article V—an even greater complication when the Court prevents the advancement of civil rights and by its narrow interpretation harms classes of people seeking to pursue their equal right to happiness.

That said, it is incontrovertible that the Court has also played a visible role in advancing general welfare and the equal protection of fundamental rights. But in contrast to Strauss's model, progress has often occurred through cases that broke with past precedents rather than through gradual, inevitable change. *Brown v. Board of Education* was one of the decisions in which the Court overtly helped end a social evil by relying on the public value of democracy and the individual value of equal treatment.<sup>324</sup> In that case, the Court cited previous decisions that required limited desegregation, like *McLaurin v. Oklahoma State Regents*<sup>325</sup> and *Sweatt v. Painter*,<sup>326</sup> but those two cases were still rooted in the *Plessy v. Ferguson* regressive doctrine of separate but equal accommodations.<sup>327</sup> The moral clarity of

321. The Civil Rights Cases, 109 U.S. 3, 17 (1883) (finding the Civil Rights Act of 1875 to be unconstitutional); *see also* the Civil Rights Act of 1875, ch. 114, §§ 1–2, 18 Stat. 335 (creating a private cause of action and making it a misdemeanor to deny any U.S. citizen “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement”).

322. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 137–39, 142 (1873) (holding that women were not entitled to enter occupations of their choice on the basis of a national privilege protected by the Fourteenth Amendment).

323. *See* DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 323–24 (1999) (relating how the Roosevelt administration's economic policies were efforts to end the Great Depression and provide the impoverished with the opportunity to prosper); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940*, at 231–37 (1963) (discussing Roosevelt's response to the Supreme Court's initial undermining of his reform efforts and the gradual break from past precedents).

324. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

325. 339 U.S. 637, 641–42 (1950) (holding that a university's segregation policy requiring a black student to sit apart from other students violated his right to equal protection under the law).

326. 339 U.S. 629, 633–34 (1950) (holding that a newly constructed segregated law school for blacks did not provide blacks with an equal educational opportunity).

327. *Brown*, 347 U.S. at 493; *see also* Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt's Theory of the Constitution*, 17 WM. & MARY BILL RTS. J. 157, 181 (2008) (“*Sweatt* (and *McLaurin*, decided the same day) simply concluded that the particular acts of segregation did

*Brown* came from its deviation from precedent to protect the right of each student to an equal education and the common value of informed politics. The unanimous majority recognized that a pluralistic society's obligation to secure the common good of educated, political participation required the equal protection of minorities.<sup>328</sup> When Herbert Wechsler criticized *Brown* for not being based on a neutral principle<sup>329</sup> he was correct, but his criticism of the Court's value-rich approach was off target. *Brown* was in keeping with the dual constitutional aim of protecting individuals for the mutual good of the population as a whole. The Declaration of Independence was first to place civic morality into political discourse. The Constitution later openly recognized the public's interest in federal enforcement of individual rights through a variety of amendments, beginning with the Bill of Rights. What the Bill of Rights failed to require of the states was supplied by incorporation through the Fourteenth Amendment, with its grant of congressional authority to enforce national, constitutional norms and judicial authority to apply them to the states. The philosopher John Rawls explained the intertwining of personal and civic interests in education, stressing the "important . . . role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of his own worth."<sup>330</sup> Similarly, Justice Brennan, writing in a concurrence, explained that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."<sup>331</sup>

Just as *Brown* was a definitive break, so too the abandonment of *Lochner* made a sharp turn from previous common law constitutionalism. In *West Coast Hotel Co. v. Parrish*,<sup>332</sup> the Court belatedly acknowledged that legislators can pass minimum wage laws for the sake of "public interest with respect to contracts between employer and employee."<sup>333</sup> In short order, the Court followed up in *United States v. Darby*,<sup>334</sup> upholding the Fair Labor

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not satisfy the *Plessy* doctrine."). Strauss contends that while *Plessy* remained the law of the land after *McLaurin* and *Sweatt* "the legal landscape" had changed so much "that this progression of precedents had left separate but equal hanging by a thread." STRAUSS, *supra* note 12, at 90. There is no indication, however, that the South understood *McLaurin* and *Sweatt* to mandate desegregation as *Brown* required. To the contrary, the Court signaled in *McLaurin* and *Sweatt* that a truly equal system of accommodations that separated blacks and whites would not violate the Equal Protection Clause. See *McLaurin*, 399 U.S. at 640–41 ("State-imposed restrictions which produce inequalities cannot be sustained." (emphasis added)); *Sweatt*, 339 U.S. at 633–34 (stating that the two law schools were not "substantially equal").

328. See *Brown*, 347 U.S. at 493–95.

329. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–34 (1959).

330. RAWLS, *supra* note 10, at 101.

331. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

332. 300 U.S. 379 (1937).

333. *Id.* at 392–93.

334. 312 U.S. 100 (1941).

Standards Act of 1938.<sup>335</sup> This new line of cases, then, carved a legislative path for Congress to use its Commerce Clause power to set policies for the general welfare that could better the conditions of individual workers. The Court recognized the constitutionality of protecting workers by enforcing statutes that were rationally designed to expand ordinary people's ability to participate in a national economy.<sup>336</sup> Some judicial opinions, congressional statements, and academic publications in the late 1930s and early 1940s claimed a connection between increasing the wages of economically disempowered individuals and the improvement of living conditions in the United States as a whole.<sup>337</sup> This too was the connection between individual rights and the general welfare that I argue is at the forefront of legitimate-exercise governmental authority.

The possibility of change through the constitutional maxim interlinking the constitutional values of rights and general welfare, which are set down in the Declaration of Independence and the Preamble to the Constitution, is even more readily visible in the gender equality cases. That is, underlying common law constitutionalism is a maxim that creates the reaches of legitimacy for the exercise of federal power. The Court only began to adequately address the endemic harms of gender stereotypes in 1971, with its decision in *Reed v. Reed*.<sup>338</sup> Decisions that followed discarded the Court's previous tolerance for chauvinistic policies, such as it had upheld in *Bradwell v. Illinois*<sup>339</sup> and *Minor v. Happersett*.<sup>340</sup> Without overturning either decision, since the 1970s the Court has swept away its previous rationalizations for

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335. *Id.* at 114 ("Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles . . . injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.").

336. *See id.* at 109–10, 115 (recognizing Congress's power to prohibit interstate shipment of goods produced under conditions that perpetuate workers receiving substandard wages).

337. *See, e.g., Andrews v. Montgomery Ward & Co.*, 30 F. Supp. 380, 384 (N.D. Ill. 1939) ("Certainly it cannot be maintained now that Congress may not, in the interests of the general welfare of the country, prohibit the shipment in interstate commerce of the products of under paid and sweated labor."); *To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States: Hearing on H.R. 9072 Before a Subcomm. of the H. Comm. on Labor*, 74th Cong. 1 (1936) (discussing "[a] bill to rehabilitate and stabilize labor conditions in the textile industry of the United States; to prevent unemployment, to regulate child labor, and to provide minimum wages, maximum hours, and other conditions of employment in said industry; to safeguard and promote the general welfare; and for other purposes"); David Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. CHI. L. REV. 607, 647 (1939) ("It may be relatively simple to demonstrate that the wage and hour law has a reasonable relationship to the health of male workers, the harmonious functioning of industry and the general welfare of the community.").

338. *See* 404 U.S. 71, 74 (1971) (holding that a statutory preference for male estate administrators violated the Equal Protection Clause).

339. *See* 83 U.S. (16 Wall.) 130, 139 (1873) (rejecting a Fourteenth Amendment claim that prohibiting women from practicing law was a violation of the Privileges or Immunities Clause).

340. *See* 88 U.S. (21 Wall.) 162, 174–75 (1874) (holding that the Fourteenth Amendment did not protect women's right to vote).

arbitrary treatment of women in professional and political life.<sup>341</sup> The change was not based on the text of the Constitution, nor can the advancement of women's rights be readily explained as judicially spearheaded progress. In fact, it was the outcome of advocacy that had begun with first- and second-wave feminists, not judicial leadership.<sup>342</sup> In cases like *Nevada Department of Human Resources v. Hibbs*,<sup>343</sup> which held states were not immune from the Family and Medical Leave Act,<sup>344</sup> the Court followed the evolution of more evenhanded family, professional, and political norms;<sup>345</sup> the Justices did not set them. To put it another way, the correctness of the Court's recognition of women's equality is not based on the Justices' discursive reliance on past precedents but on the constitutional value of laws safeguarding intrinsic human equality to enjoy the benefits of living in a representative republic.<sup>346</sup> If the Court had remained recalcitrant in upholding states' uses of gender stereotypes, its decision making would have been better adjudged by the maxim of constitutional governance, which sets the ethos of national constitutionalism, rather than past precedents, which have sometimes been mired in longstanding prejudices.<sup>347</sup>

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341. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that laws that establish classifications based on gender must serve important governmental objectives and must be substantially related to the achievement of those objectives to be constitutionally in line with the Equal Protection Clause); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (stating that classifications based on sex are inherently suspect and must be subjected to close scrutiny).

342. Cf. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1034 (2002) ("Like the gains won by the civil rights movement, constitutional protections for women's right to vote grew out of decades of social movement activity; but unlike the gains the civil rights movement won, constitutional protections for women's right to vote were secured through Article V lawmaking."); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 297-98 (2001) (discussing the first and second waves of the feminist movement and arguing that the text plays a role).

343. 538 U.S. 721 (2003).

344. *Id.* at 725.

345. See *id.* at 729-35 (describing severe state law restrictions on women's employment sanctioned by earlier Courts, crediting Congress for propelling reform, and upholding the FMLA as a reasonable legislative response to testimony about continued discrimination through family leave policies).

346. See *id.* at 736 (commenting that stereotypes about women in the home and in the workplace have caused "subtle discrimination"). Lower courts have also recognized "that because sex-based classifications may be based on outdated stereotypes of the nature of males and females, courts must be particularly sensitive to the possibility of invidious discrimination in evaluating them." *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292, 1300 (8th Cir. 1973); see also *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 860 (9th Cir. 2001) (finding "the stereotypical assumption that women are marginal workers whose fundamental responsibilities are in the home" to be illegitimate), *aff'd*, 538 U.S. 721 (2003); *Faulkner v. Jones*, 10 F.3d 226, 231 (4th Cir. 1993) (holding that while legislative distinctions based on sex may be upheld for important governmental interests, gender stereotypes could not overcome intermediate scrutiny).

347. See *supra* p. 1614 (positioning the maxim of constitutional governance within a general theory of legal maxims as one that creates a series of binding obligations on the government to its citizens).

Strauss's common law living constitutionalism is significant because it draws attention to the important role precedents play in constitutional change. But to his account should be added a stable principle against which developing doctrine must be tested. The principle cannot come solely from historical sources, many of which are tainted with discriminatory intents and meanings of the past. Even the text of the Declaration of Independence and the Preamble to the Constitution are not transparent.

### C. *Normative Compass*

The directive for government to protect equal rights for the betterment of the whole lays a constitutional foundation on which each generation can build a legal infrastructure for personal achievement and social improvement. A maxim grounded in the principles of the Declaration of Independence and the Preamble to the Constitution establishes a consistent, stable, and reliable standard for regulation and policy making. But these documents' directive of governance will not always provide lawmakers and judges with obvious answers to pressing dilemmas. Rather, the maxim of governance is the people's overarching directive that government must follow, be it the legislature in enacting laws, the executive in enforcing them, or the judiciary in adjudicating their validity or application.

When confronted with conflicting constitutional pressures from the public and private sectors, a well-established principle of adjudication requires the Court to balance relevant interests.<sup>348</sup> In the previous Supreme Court term, for instance, the Justices found that even though the majority of states and the federal government permitted mandatory lifelong incarcerations for juveniles convicted of murder in adult courts, the punishment violated the Eighth Amendment.<sup>349</sup> The Court earlier had held unconstitutional the statutes of thirty-seven states, the District of Columbia, and the federal government that provided life-without-parole sentences for some juveniles convicted of nonhomicidal offenses.<sup>350</sup> The lesson from these decisions is that the effort to achieve social justice—in these cases retribution and deterrence for crimes—cannot be based on procedures that inadequately guard an individual's ability to expect a sentence commensurate with his or

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348. The Court announced the best known constitutional balancing test for civil cases in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Due Process requires the following three considerations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

349. See *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2471–73 (2012).

350. *Graham v. Florida*, 130 S. Ct. 2011, 2023, 2034 (2010).



her culpability. While incarceration is a necessary restraint on liberty to protect the public, it does not follow that lifelong deprivation of liberty, with its negative impact on juvenile convicts' ability to pursue a good life, is justified.

In both cases, the Court assessed the social standard and national consensus for heavy punishments against juvenile offenders but found that the dominant statutory regime was an unconstitutional deprivation of liberty without sufficient judicial latitude to engage in individualized reflection on a juvenile defendant's lower blameworthiness.<sup>351</sup> A stable principle of justice exercised in a civil society should recognize the directive of balancing a state's need to safeguard public peace and an individual's need for fair treatment that does not arbitrarily deprive one of the ability to pursue happiness. Justice Brennan, though a living constitutionalist, recognized that the Constitution contained "substantive value choices" that prevent legislatures from being hijacked by majoritarian processes.<sup>352</sup>

Thus, as many scholars have pointed out, the Court has often functioned as a countermajoritarian institution.<sup>353</sup> But the judiciary is not entirely immune from political influences,<sup>354</sup> as the Court demonstrated in its adoption of the gun lobby's interpretation of the Second Amendment<sup>355</sup> and its order in favor of the Republican Party to stop the Florida ballot recount during the George Bush–Al Gore presidential election of 2000.<sup>356</sup> Additionally, the Supreme Court has also periodically given more weight to state policies than civil rights legislation. For instance, a bare majority decided that sovereign immunity trumped the rights of the disabled under the

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351. See *Miller*, 132 S. Ct. at 2468 (stating that previous juvenile-conviction precedents and "our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult"); *Graham*, 130 S. Ct. at 2030 (commenting that the "irrevocable judgment" accompanying a sentence of life without parole is inappropriate "in light of a juvenile nonhomicide offender's . . . limited moral culpability").

352. Brennan, *supra* note 224, at 437.

353. For some of the voluminous literature on the Court's role in preventing majorities harming minorities see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986) (arguing that the "root difficulty" of judicial review is that it is a "counter-majoritarian force in our system"); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 523–607 (2002) (describing a wide variety of countermajoritarian approaches); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1340–41, 1351–52 (2004) (arguing that "taking political ignorance into account severely weakens the claim that judicial review of federalism is . . . countermajoritarian").

354. See Posner, *supra* note 3, at 52–53 (discussing political motivations in the judicial process).

355. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the Second Amendment guarantees a private right to gun ownership); see also Siegel, *supra* note 242, at 237–39 (tracking the historical ideals and influence of the gun lobby and attributing their influence to the *Heller* majority).

356. *Bush v. Gore*, 531 U.S. 98, 110–11 (2000).

Americans with Disabilities Act<sup>357</sup> and the elderly under the Age Discrimination in Employment Act.<sup>358</sup> In these cases, the Court wasn't acting as a countermajoritarian institution, preventing minority abuse; to the contrary, it struck down legislation that protected members of vulnerable groups' abilities to participate in the common good of civil society.

The Supreme Court has increasingly limited Congress's ability to perform its functions "in [a] manner most beneficial to the people," a policy concern long recognized to be a legitimate use of legislative authority.<sup>359</sup> In Chief Justice Marshall's structural scheme, the Court has for more than two centuries retained the right to determine whether a law was "repugnant to the constitution" because "the constitution controls any legislative act repugnant to it."<sup>360</sup> In a Warren Court decision, *Cooper v. Aaron*,<sup>361</sup> the Supreme Court asserted even more clearly that the "federal judiciary is supreme in the exposition of the law of the Constitution"<sup>362</sup> and ordered that the South desegregate pursuant to the earlier holding in *Brown v. Board of Education*. While the Court identified its power to review government conduct in order to preserve the Constitution as the supreme law against overreaching of either of the other two branches of government or the states,<sup>363</sup> nothing in either of those cases asserted that the Court was the exclusive interpreter of the document. Indeed, such an exclusive grant of power to the unelected judiciary seems to be counterintuitive given that the obligation to safeguard rights for the general welfare places duties on all three branches. In *Cooper*, in particular, the point was that no state entity should undermine a Supreme Court holding interpreting the Constitution,<sup>364</sup> but that decision did not remove from Congress or the President any authority to initiate policies furthering constitutional values.

Justice William Brennan's majority opinion in *Katzenbach v. Morgan*,<sup>365</sup> decided eight years after *Cooper*, brought the point home, finding

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357. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that state employers are immune from private monetary damages claims under the ADA).

358. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that state employers are immune from private monetary claims under the ADEA).

359. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("[W]e think the sound construction of the constitution must allow to the national legislature that discretion, . . . which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.").

360. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803) (establishing judicial review).

361. 358 U.S. 1 (1958).

362. *Id.* at 18.

363. *Id.* (stating that "[e]very state legislator and executive and judicial officer" is bound to support the Constitution, which includes the interpretations handed down by the Court in its decisions).

364. *Id.* at 18–19 (explaining that in order for the Constitution to remain the "supreme law of the land," no exercise of state power may contravene the judgments of the courts of the United States).

365. 384 U.S. 641 (1966).

that Congress had the authority to explore and exercise the range of its Fourteenth Amendment Section Five power.<sup>366</sup> The express constitutional grant of authority in the Enforcement Clause did not, the Court found, relegate Congress “to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional.”<sup>367</sup> Instead the Court took a position, which the Rehnquist Court later repudiated,<sup>368</sup> that Section Five “is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”<sup>369</sup> Taken together, *Cooper* and *Morgan* required Congress to follow judicial interpretation but also recognized that legitimate congressional initiative can be based on the independent exercise of constitutional authority, without having to wait for judicial guidance.

Judicial deference to congressional expansion of rights coupled with its interpretational assertiveness required a balanced effort for safeguarding constitutional rights and structural integrity for governing a pluralistic society, committed both to popular representation and countermajoritarian norms. According to the *Cooper–Morgan* line of reasoning, the Constitution grants the Judicial and Legislative Branches separate powers to protect rights against state practices that arbitrarily exclude some segment of the population or individual from enjoying the basic rights of education and political participation.

In several subsequent cases, the Court augmented its power and, in the process, diminished Congress’s ability to set agendas in keeping with the maxim directive of the Declaration of Independence and the Preamble to the Constitution. Beginning with *City of Boerne v. Flores*,<sup>370</sup> the Rehnquist Court systematically narrowed Congress’s Section Five powers.<sup>371</sup> It implicitly overruled *Morgan*, holding, instead, that Congress cannot rely on Section Five to investigate and promulgate laws to expand rights beyond those the Court previously determined to be protected by the Constitution.<sup>372</sup>

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366. *See id.* at 650 (“By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.”). *Morgan* arose as a challenge to Congress’s earlier reliance on Section Five for passing the Voting Rights Act’s prohibition against a state’s use of literacy tests as a precondition of voting. *Id.* at 643–46.

367. *Id.* at 648–49.

368. *See infra* text accompanying notes 371–85.

369. *Morgan*, 384 U.S. at 651. In *Morgan*, the Court adopted Brennan’s earlier concurrence, which had asserted that the “proper perspective [views] § 5 of the Fourteenth Amendment . . . as a positive grant of legislative power.” *United States v. Guest*, 383 U.S. 745, 784 (1966) (Brennan, J., concurring in part and dissenting in part).

370. 521 U.S. 507 (1997).

371. *Id.* at 519.

372. *See id.* at 536 (holding that the RFRA is unconstitutional because it cannot be considered enforcement legislation under Section Five of the Fourteenth Amendment).

Congress may only pass laws that are congruent and proportional to a judicially defined constitutional violation.<sup>373</sup>

This rule of interpretation should have rung hollow in a representative democracy founded on the notion that the people are sovereign. But here, in *Boerne*, the Court was announcing that it would have none of it. Henceforth, only the unelected guardians seated on the Court would announce what constituted a constitutionally protected right; and, while litigants could engage the federal judiciary, the people would be excluded from that process.

The Court then continued on the same trajectory in *Kimel*, which found Congress could not impose the private monetary remedy of the Age Discrimination in Employment Act (ADEA) on state employers.<sup>374</sup> The majority in *Kimel* invoked state sovereign immunity against private-party causes of action by citizens of their own state.<sup>375</sup> As Justice David Souter pointed out in a previous dissent, the doctrine of sovereign immunity was judge-made common law that the Supreme Court had elevated to a constitutional doctrine<sup>376</sup> and, in *Kimel*, employed to trump Congress's Section Five authority to provide relief against state employer discrimination.<sup>377</sup> So too in *University of Alabama v. Garrett*,<sup>378</sup> the majority rejected Congress's power to require that state agencies abide by the national norm for the treatment of the disabled as it was codified in the Americans with Disabilities Act (ADA).<sup>379</sup> Resorting to its self-proclaimed exclusivity of constitutional interpretation, the Court rejected Congress's capacity to advance and protect the ability for a vulnerable group—the disabled—to bring claims against state employers.<sup>380</sup>

In another blow to popular sovereignty, the Court, in *United States v. Morrison*,<sup>381</sup> struck down a law passed by Congress with widespread bipartisan support, the Violence Against Women Act (VAWA).<sup>382</sup> Congress

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373. *Id.* at 519–20.

374. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

375. *Id.*

376. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 183–84 (1996) (Souter, J., dissenting) (asserting that while “[t]he *Hans* doctrine was erroneous . . . it has not previously proven to be unworkable or to conflict with later doctrine” and hence is a part of *stare decisis* but arguing that where Congress clearly abrogated that sovereign immunity, as it did with the ADEA, the restriction against federal courts hearing private suits does not govern); *Hans v. Louisiana*, 134 U.S. 1, 14–15 (1890) (holding that states are immune from federal suits brought by private parties who are citizens of that state). *But see Alden v. Maine*, 527 U.S. 706, 733 (1999) (“Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.”).

377. *Kimel*, 528 U.S. at 92.

378. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

379. *Id.* at 374.

380. *See id.* at 365 (prefacing its analysis with reference to the “long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees”).

381. 529 U.S. 598 (2000).

382. *Id.* at 605, 627; Preeta D. Bansal, *The Supreme Court's Federalism Revival and Reinvigorating the “Federalism Deal,”* 21 ST. JOHN'S J. LEGAL COMMENT. 447, 451 (2007)

passed the statute to protect the victims of sexual violence against gender discrimination in state courts.<sup>383</sup> This was the sort of Section Five use of power that *Morgan* envisioned to be at the discretion of Congress.<sup>384</sup> It involved the protection of victims of violence and aimed at social welfare by providing a remedy for individual litigants and preventing the drain of billions of dollars from the national economy resulting from battered women missing work and receiving healthcare.<sup>385</sup>

The principal problem with the rules announced in the *Boerne* line of cases was not simply that they were not originalist<sup>386</sup> nor that they were inconsistent with prior precedent like *Morgan* and, therefore, out of step with living constitutionalism.<sup>387</sup> The Court's main failing in *Kimel*, *Garrett*, and *Morrison* was to reject that Congress could use its Section Five power to act as a coequal player for the expostulation of the constitutional directive for protecting liberal equality for the common good.

The Declaration's directive for government to set policies "most likely to effect [the people's] Safety and Happiness"<sup>388</sup> and the Preamble's mandate to "promote the general Welfare"<sup>389</sup> place an obligation on all three branches of government. The Court is not exclusively responsible for identifying fundamental rights essential for the pursuit of happiness and engagement in the common good of social governance. Indeed, the Legislative Branch will often have more resources and hear from far more constituents,<sup>390</sup> making it

("[A] . . . coalition of states supported the creation of a federal civil cause of action against gender violence enacted by an overwhelming bipartisan majority of Congress in the [VAWA]."); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1766 (2012) ("VAWA passed Congress with bipartisan support.").

383. J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 435 (2003) (recounting the congressional purpose behind the passage of VAWA).

384. *Katzenbach v. Morgan*, 384 U.S. 641, 651, 658 (1966) (finding constitutional the Voting Rights Act provision prohibiting enforcement of the English literacy requirement and citing it as a correct exercise, under Section Five of congressional discretion in determining whether particular legislation secures the guarantees of the Fourteenth Amendment).

385. *Morrison*, 529 U.S. at 632–33 (Souter, J., dissenting) (citing congressional findings that "violent crime against women costs this country at least [\$] 3 billion . . . a year. . . . [E]stimates suggest that we spend \$5 to \$10 billion a year on health care, criminal justice, and other social costs of domestic violence" (alteration in original) (internal quotation marks omitted)).

386. For a discussion of reasons why *Boerne*'s interpretation of Section Five is not historical, see Erwin Chemerinsky, *Politics, Not History, Explains the Rehnquist Court*, 13 TEMP. POL. & CIV. RTS. L. REV. 647, 650–51 (2004).

387. See *supra* text accompanying notes 371–85; cf. Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 676–77 (2006) (characterizing Justice Kennedy's *Boerne* decision as narrowing former interpretations of constitutional rights).

388. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

389. U.S. CONST. pmb1.

390. See Mary B. Mazanec, CONG. RESEARCH SERV., ANNUAL REPORT OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR FISCAL YEAR 2011, at 1, 26 (2012), available at [http://www.loc.gov/crsinfo/about/crs11\\_annrpt.pdf](http://www.loc.gov/crsinfo/about/crs11_annrpt.pdf) (stating that the

critical for the people to engage in the popular sovereignty guaranteed by these statements of constitutional governance. The judicial-centered approach announced in *Boerne*, *Kimel*, *Garrett*, and *Morrison* forecloses constituents who wish to effectively lobby their congressional representatives to advocate for laws necessary for eradicating historical or novel forms of discrimination from doing so. The Supreme Court's narrow reading of Section-Five-reconstructed federalism disrupts the structure of governance set by the Declaration of Independence and the Preamble to the Constitution.

The Constitution—the structure of which I believe allows the Supreme Court and Congress to uphold and identify fundamental rights essential for the public good—provides a balanced approach to protecting the common social interests in equality, life, liberty, and the pursuit of happiness. The balance is between the Court's countermajoritarian function and Congress's representative role. This balance provides official channels for carrying out the Declaration and the Preamble's directive to protect individual rights for the general welfare. It is, therefore, essential that neither the Court nor Congress hamstring the other's authority to safeguard essential rights for pursuing the common good. When Congress passes a law, such as Title VII of the Civil Rights Act of 1964,<sup>391</sup> that is rationally related to the socially beneficial goal of protecting civil rights, the Court lacks the authority to strike it. Likewise, when it is the Court that asserts a right, such as privacy,<sup>392</sup> it is not within Congress's power to override the ruling.

#### D. *Neutral Principles*

An evaluation of whether public policies and judicial opinions protect the people's pursuit of happiness and provide for the general welfare can be either normative or procedural. This section analyzes a number of neutral standards of interpretation and evaluates them in light of the substantive maxim constitutionalism that I have proposed in this Article.

Professor Philip Bobbitt developed a discursive analysis for judicial reasoning. His six modalities—historical, textual, structural, doctrinal, ethical, and prudential—of legitimate legal analysis provide no normative foundation for interpretation.<sup>393</sup> Bobbitt articulated the rationales judges

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Congressional Research Service, an organization whose mission is to provide Congress with policy research and analysis, had a Fiscal Year 2011 appropriation of \$111 million).

391. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000e (2006).

392. The Supreme Court has identified a variety of privacy rights in a series of cases. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (finding that the Due Process Clause encompasses a right to sexual privacy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing reproductive privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding it unconstitutional for a state to intrude into the privacy of marital contraceptive decisions).

393. BOBBITT, *supra* note 128, at 12–13; *see* Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEXAS L. REV. 1869, 1913–14 (1994) [hereinafter Bobbitt, *Reflections*] (refusing to make normative claims about the legitimacy of the modalities of argument as an abstract principle and explaining that a “proposition of constitutional law is true if it forms part of the rationale offered in

provide for their holdings, but he recognized no value to a metatheory.<sup>394</sup> The modalities are descriptive, but Bobbitt's methodology contained no underlying constitutional purpose for determining whether a judge's reliance on them is purely formalistic or substantively valid.

The inquiry that I have suggested is at the root of maxim constitutionalism, of whether policy protects individual rights for the common good, plays no explicit role in his modalism. Even if it falls under Bobbitt's "ethical" mode,<sup>395</sup> it is *one* value rather than, as I suggest, the *core* value of the Constitution. Hence a judge applying any or several of the six accepted rationales need not reflect on whether a law infringes on fundamental rights and excludes a group from the enjoyment of mutual benefits of representative democracy. The modes do not discriminate between their proper use by proslavery antebellum judges, by judges in Jim Crow courtrooms, or by judges in post-Civil Rights Era settings. The ethical semantic in his system lacks an objective component that could be used to test a judge's use of normative language against some ontological norm of human nature or empirical analysis of representative democracy.<sup>396</sup>

The modal approach only allows for neutral rather than normative criticism of judicial opinions. Bobbitt's discussion of Chief Justice Taney's opinion in the *Dred Scott* case, for instance, did not criticize the Court for the faulty holding that free and enslaved blacks were an "inferior class of beings" who could not hold citizenship in the United States.<sup>397</sup> Bobbitt only drew attention to the textual implications of Taney's reasoning:

A *textual* modality may be attributed to arguments that the text of the Constitution would, to the average person, appear to declare, or deny, or be too vague to say whether, a suit between a black American citizen resident in a state and a white American citizen resident in another state, is a "controversy between citizens of different states." I would imagine that the contemporary meaning of these words is rather different than that which Taney found them to mean to the framers and ratifiers of 1789.<sup>398</sup>

This retrospective statement left unexamined whether Taney's assertion that the Constitution precluded blacks from being citizens violated their

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support of a legal decision and if that rationale is composed of the kinds of arguments recognized in legal practice as legitimate").

394. See BOBBITT, *supra* note 128, at xii–xvii (explaining how turning the modalities of interpretation into tools for validating ideological preferences undermines the legitimating force the modalities strived to find in constitutional law).

395. *Id.* at 13 (defining the "ethical" modality as based on "deriving rules from those moral commitments of the American ethos that are reflected in the Constitution").

396. See Bobbitt, *Reflections*, *supra* note 393, at 1914 (denying that the types of constitutional argument are capable of being validated through his theory in a way external to the arguments' use in practice).

397. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1856).

398. BOBBITT, *supra* note 128, at 14 (involving Article III's provision for federal diversity jurisdiction).

inalienable and political rights and, thereby, diminished their opportunity to enjoy the common good.

Contemporary critics of *Dred Scott*, like abolitionists and the then newly formed Republican Party, certainly thought Taney to be acting against the nation's normative standards.<sup>399</sup> A meeting of "colored" citizens in New Bedford, Massachusetts determined that *Dred Scott* was not merely a wrong statement as a matter of interpretation but substantively flawed.<sup>400</sup> Their meeting convened with a statement that "colored people of this country have ever prove[n] . . . their loyalty to its interests and general welfare."<sup>401</sup> Participants resolved that "the infamous 'Dred Scott' decision is a palpably vain, arrogant assumption, unsustained by history, justice, reason[,] or common sense."<sup>402</sup> The New Hampshire Senate and House of Representatives jointly issued a statement that the people of that state confirmed their "devoted attachment to the principles embodied in the Declaration of Independence" and the Preamble to the Constitution and, therefore, rejected the *Dred Scott* decision as "subversive."<sup>403</sup>

Merely looking at the text, without reflecting on national ideals, Bobbitt's description of the case leaves the impression that it is contemporary linguistic usage that should be determinative of constitutional meaning rather than some central purpose of representative constitutionalism or intrinsic dignity of humans, irrespective of their race. A normative approach to interpretation makes clear that *Dred Scott* is not only a textual misreading of

399. A Milwaukee newspaper summed up a Republican Convention that had convened in Madison, Wisconsin at the end of summer 1857:

Our Platform, too, is as good as our ticket. It reaffirms the principles upon which the original organization of our party was based; renews the pledges of opposition to the extension of slavery, to the Fugitive Slave Act, and to the admission of any more slave States into the Union; denounces all proscription on account of birth, creed, or color: declares for equal rights to all citizens of the Republic, native, or foreign-born; takes high and impregnable grounds against the Dred Scott decision, and on that issue appeals from the *dicta* of partizan Judges to the great tribunal of THE PEOPLE. We stand, therefore, in this canvass as the advocates of FREE SOIL and FREE LABOR, of EQUAL RIGHTS and CIVIL and RELIGIOUS LIBERTY, of STATE SOVEREIGNTY and the true Interpretation of the Federal Constitution; and as the opponents of slavery aggression and slavery extension, of political proscription, and of judicial misconstructions of the great charter, ordained and established by the fathers and founders of our Republic "to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of LIBERTY to ourselves and our posterity."

*The Republican Ticket and Platform*, MILWAUKEE DAILY SENTINEL, Sept. 8, 1857, at 2. Southern newspapers took a decidedly states' rights view of *Dred Scott*, and rejected abolitionist claims of individual rights and general welfare. See, e.g., *The Fruits of Constitutional Construction*, CHARLESTON MERCURY, Apr. 22, 1857, at 2 (characterizing the Northern position with respect to *Dred Scott* as "consolidatio[n]ist" and rejecting abolitionism in the name of the general welfare as "a simple question of a grant of power").

400. W.C.N., *Meeting of Colored Citizens*, LIBERATOR (Bos.), July 9, 1858, at 112.

401. *Id.*

402. *Id.*

403. *National Resolves*, N.H. STATESMAN (Concord), Aug. 13, 1859, at 4.



the Declaration of Independence,<sup>404</sup> the nation's history,<sup>405</sup> and judicial authority.<sup>406</sup> Taney's principal flaw was normative: His opinion denied that the "general welfare" of the nation must apply to all persons in the United States, not merely those of European descent.<sup>407</sup>

Following the Civil War, textual formalism led to the Court's adoption of a narrow reading of the state action requirement in the *Civil Rights Cases*.<sup>408</sup> In that case, the Court interpreted the words of the Fourteenth Amendment—"[n]o state shall"<sup>409</sup>—to mean that the Amendment applies only to public forms of discrimination.<sup>410</sup> That decision struck down a national desegregation statute, undermining the purposes of Reconstruction, in the name of literal textualism.<sup>411</sup> The historian Eric Foner asserted that the doctrine remains "a major barrier" to the promotion of racial equality.<sup>412</sup> And Michael Klarman similarly asserted that the state action requirement is "among the most formidable barriers to securing racial justice."<sup>413</sup> Several scholars—including Robert Glennon, John Nowak, Charles Black, William Van Alstyne, Ken Karst, and Harold Horowitz<sup>414</sup>—have suggested a

404. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (asserting that the Framers regarded the Declaration of Independence to only apply to whites and not to blacks).

405. Chief Justice Taney claimed misleadingly that at the time of the Articles of Confederation blacks were neither citizens of the United States nor of their own states. *Dred Scott*, 60 U.S. at 418–19. But see *id.* at 572–73 (Curtis, J., dissenting). Justice Curtis corrected Taney, listing several states as examples:

At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

*Id.*

406. In his opinion, Chief Justice Taney determined that a federal court could not hear *Dred Scott*'s freedom suit on the basis of diversity jurisdiction because he and his family could not acquire state citizenship. *Id.* at 454 (majority opinion).

407. For a more thorough discussion of *Dred Scott* and Chief Justice Taney's flawed reasoning, see TESIS, *supra* note 6, at 77–82.

408. 109 U.S. 3 (1883).

409. U.S. CONST. amend. XIV, § 1.

410. *The Civil Rights Cases*, 109 U.S. at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."); see also *id.* at 19 ("This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force.").

411. See *id.* at 25 ("[N]o countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void . . .").

412. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1604 (2012).

413. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 152 (2004).

414. See Robert J. Glennon Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 225–26 (noting that the

descriptive way for courts to surmount that barrier by conceiving certain forms of private discrimination to be tied with state involvement, such as a court's enforcement of racist real estate covenants.<sup>415</sup> These scholars have offered an analytically sound position, given the oft ambiguity of the public-private dichotomy. Licensing, for instance, is required of most business activities, from running a hot dog stand to trading secured instruments.<sup>416</sup> But the Court has maintained the validity of the state action doctrine, partly relying on it in *Morrison* to strike down the civil action provision of the Violence Against Women Act.<sup>417</sup>

The core problem with the state action doctrine is not only that it often leads courts to overlook the role of states in private-business discrimination, but also that it prevents Congress from passing laws to protect an individual's right to enjoy public accommodations on the basis of equality. Current public-accommodations laws can only be passed to regulate activities with a substantial effect on the national economy.<sup>418</sup> This is unfortunate because Congress may find that certain wrongs that bear little or minimal economic harm—such as discrimination against a sparse, geographically isolated, unincorporated organization; be they committed to humanism, the rights of the handicapped, or some other lawful association<sup>419</sup>—require action to abide by the directive of constitutional governance of the Preamble and Declaration.

On the ethical side, Bobbitt recognized that the Declaration of Independence provides the “political basis for the idea of the constitution.”<sup>420</sup> To him, the Declaration's guarantee of “[u]nalienable rights” means that the people have not, and indeed cannot, renounce their sovereignty over state

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traditional “all-or-nothing theory” of state action became increasingly difficult to accept); Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) (contemplating the consequences of a shift away from strict state action doctrine); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 5–8 (1961) (addressing the ad hoc state action doctrines protruding from Fourteenth and Fifteenth Amendment cases); Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 218 (1957) (stating that a private corporation may be an unconstitutional state actor even though it is not a state agent).

415. Their suggestions tie back to the Court's holding that court enforcement of racial covenants is a form of state action. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

416. *See, e.g.*, 15 U.S.C. § 78(a)(1) (2006) (requiring brokers and dealers of securities to register with the Securities and Exchange Commission); Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 873 (1998) (stating that operating a hot dog stand on a New York City street requires a license).

417. *United States v. Morrison*, 529 U.S. 598, 621–23 (2000).

418. *United States v. Lopez*, 514 U.S. 549, 560 (1995) (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”).

419. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 275 (1964) (Black, J., concurring) (“I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce . . .”).

420. BOBBITT, *supra* note 128, at 4–5.

power.<sup>421</sup> Bobbitt is certainly basing this point on the people's retention of sovereignty. He did not, however, take the Declaration to be an overarching statement of national purpose to protect intrinsic human rights and thus did not couple it with the Preamble's mandate that government "promote the general Welfare[] and secure the Blessings of Liberty."<sup>422</sup> This is the maxim-based approach I have developed in this Article. But for Bobbitt, "American constitutional ethos" is of a more limited nature, "confined to the reservation of powers not delegated to a limited government."<sup>423</sup> His ethical modality refers to the "characterization of American institutions and the role within them of the American people."<sup>424</sup> But Bobbitt provided no metamethod for identifying whether, at any given point in history, American institutions and the people involved in them aimed to protect fundamental rights for the general welfare or were energized into relying on a modal judgment by prejudice and exclusion. Without acknowledging an underlying purpose, Bobbitt's modes of legal practice provide no means of deciding whether judicial holdings and explanations are formalistically logical but unfaithful to the nation's core commitment to sustaining equal liberty for the common good. The modalities, then, are not means of determining whether a judicial rationale is true to an underlying constitutional purpose but "no more than instrumental, rhetorical devices to be deployed in behalf of various political ideologies."<sup>425</sup>

Bobbitt is, of course, not the first to defend neutral principles. Professor Herbert Wechsler's exposition of neutral principles was not only descriptive but also required a court to parse the meaning of the Constitution and apply it to specific cases without being influenced by the judge's personal and political convictions.<sup>426</sup> In his best known exposition of this line of reasoning, Wechsler critiqued the Court's principled holding against school segregation in *Brown v. Board of Education*.<sup>427</sup> Legitimacy lies in a judge's following precedents announced in previous decisions, applying the doctrine of stare decisis, without deviating from them to achieve desired ends.<sup>428</sup> And with the *Brown* decision, Wechsler wrote that, as much as he supported the sentiment for desegregating schools, he could find no neutral constitutional principle for the decision.<sup>429</sup>

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421. *Id.* at 5 (internal quotation marks omitted).

422. U.S. CONST. pmbl.

423. BOBBITT, *supra* note 128, at 21 (endnote omitted).

424. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 94 (1982).

425. BOBBITT, *supra* note 128, at 22.

426. *See* Wechsler, *supra* note 329, at 19 (repeating that "even though [an] action involves value choices" courts have the duty to treat constitutional cases in an "entirely principled" manner without regard for "any immediate result that is involved").

427. *Id.* at 32–33.

428. *Id.* at 16.

429. *Id.* at 34.

Wechsler's reasoning was suspect for a number of reasons. For one, certain portions of the Constitution—like the Equal Protection Clause, the Eighth Amendment prohibition against cruel and unusual punishment, and the First Amendment protections for speech and religion—appear to be value rich, in need of interpretation, and not neutral in value. Their evaluation and the reevaluation of past interpretations of them—like *Plessy v. Ferguson*, which *Brown* functionally overturned<sup>430</sup>—are based on a deep understanding of the entire structure of popular governance, with a concomitant respect for inalienable rights and equal legal status. The Equal Protection Clause was one of the great culminations of the Union victory over the Confederacy, and, even under the most minimal reading, it secured equality of citizenship for blacks and persons of all races. Although not explicitly mentioned in *Brown*, the right to civic participation also played a role in the Court's reasoning. The First Amendment secured political speech, and its safeguards were incorporated through the Fourteenth Amendment. And the *Brown* Court found that integrated education was essential for equality and civic dialogue.<sup>431</sup> Where a new case before the Court concerns a moral dilemma for society, the Supreme Court must stay true to stare decisis but also choose whether to overrule its past error or to broadly interpret its previous decisions.<sup>432</sup>

Furthermore, where previous decisions have misguided constitutional law—as was the case with *Plessy v. Ferguson*—a new course must be steered, one that deviates from past precedents but is true to constitutional principle. This position bears some overlap with Ronald Dworkin's assertion that the Supreme Court should make decisions on the basis of the principle “that government must treat people as equals.”<sup>433</sup> The analysis in this Article demonstrates that the nation adopted the equality principle of the Declaration of Independence into the Constitution and made it a directive to govern the conduct of all three branches. This is by no means neutral but instead maxim oriented.

I disagree with Dworkin, however, that reflection “about how the general welfare is best promoted” should play no role in constitutional interpretation.<sup>434</sup> To the contrary, the Preamble mandates policy reflections on the general welfare, and such reflection allows for the differentiation between the exclusionary reading of equality in *Plessy* and the inclusionary

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430. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 490–91, 495 (1954) (noting that the “separate but equal” doctrine made its first appearance at the Court in *Plessy* and stating that this doctrine “has no place” in the field of public education (internal quotation marks omitted)).

431. See *id.* at 493 (stating that equal education is the “very foundation of good citizenship”).

432. Mark Tushnet has pointed out how every new case is distinct from past relevant holdings, requiring judges to decide between various possible constructions—narrow and broad—of old principles when applying them to new dilemmas. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 814–15 (1983).

433. RONALD DWORKIN, A MATTER OF PRINCIPLE 69 (1985).

434. *Id.*

version in *Brown*. It was only in the latter that the Court formally recognized that equality must include the ranks of all Americans, joined together in the pluralistic efforts of representative governance.<sup>435</sup> The task of identifying how the maxim of equal liberty for the common good applies to specific social dilemmas requires a balance of authority between the President, Congress, and the Supreme Court. It is for all of us as a people to determine, reconsider, and hone the meaning of representative democracy. The balance of rights and public needs remains a policy-by-policy, case-by-case, law-by-law, and regulation-by-regulation determination. All of these avenues of lawmaking must be undertaken without offending the central maxim of constitutionalism. There will inevitably be conflicts between the branches. As I have explained elsewhere, in these interbranch policy disputes, legislative expansion of equal rights to discrete and insular minorities should take precedence over constitutional common law that constricts national authority.<sup>436</sup> Congress as well as the Court can identify groups that have historically been persecuted and are covered by Thirteenth and Fourteenth Amendment enforcement clauses. But space constraints in this Article do not allow me to elaborate any further on this balance of powers.

### Conclusion

The core purpose of representative constitutionalism is the protection of individual rights for the general welfare. This maxim of governmental purpose for adjudication, regulation, and legislation is incorporated into the Declaration of Independence and the Preamble to the Constitution. That ideal purpose of representative democracy is at the core of U.S. governance. It sets the directive for all three branches to legitimately exercise their respective powers. The historical failures to live up to that standard did not alter the Constitution's aspirational value and objective. To the contrary, its existence provides the stable, public goal of legitimate progress within a verifiable legal norm. The specific powers enumerated in the Constitution and allocated to the several branches of government provide the structure to achieve the aim for which the people have established these United States.

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435. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 81–82 (2000) (arguing that *Brown* “sought to bring people together in inclusive institutions”).

436. Tsesis, *supra* note 54, at 735–41.