

## PREMODERN CONSTITUTIONALISM

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### ABSTRACT

*The traditional concept of American constitutionalism has long been a basic assumption not subject to tremendous examination. For generations, scholars have understood our Constitution to be the byproduct of a revolutionary war fought for representation and a founding generation concerned with preventing tyranny in any form. The traditional understanding of American constitutionalism thus consists of two elements: the underlying principle of skeptical optimism, which can be found in the historical context within which the Framers gathered to draft the Constitution, and the political apparatus effectuating that idea—countermajoritarian constraint set against majoritarian power—which reveals itself through reverse engineering from the structural Constitution.*

*Over the last few decades, two sets of modernist scholars have attacked the activating devices that deploy the traditional vision of American constitutionalism. “Constitutional realists” do not claim to dispute the animating purpose of American constitutional governance, but they claim that the complete American Constitution is represented by more than just the entrenched written document. “Departmentalists” and “popular constitutionalists” also claim to accept the animating purpose of American constitutionalism, but they also claim that the written Constitution forbids judicial supremacy, or at least that it is neither constitutionally required nor normatively desirable.*

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*Neither group acknowledges the other, presumably because they assume they are attacking entirely different aspects of our constitutional structure. But by exposing the fundamental flaws of these two theories and how they irremediably contradict the underlying principle and apparatus, this Article shows modernist attacks on the two primary activating devices of our constitutional government—the singular written document and its prophylactic, insulated judicial interpreter—are attacks on American constitutionalism itself. We therefore develop a more complete, revamped theoretical explanation of traditional constitutionalism that incorporates this understanding. “Premodern constitutionalism” understands that the core of American constitutionalism has a tripartite theoretical foundation. It is the principle of skeptical optimism as well as the political apparatus of countermajoritarian constraint of majoritarian power structures, which implements the principle. And it is the two key structural elements necessary to activate the political apparatus—an entrenched written constitution and a prophylactic, insulated judiciary empowered to interpret it.*

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## INTRODUCTION

When we embark on the task of answering constitutional questions or teaching constitutional law, most of us start from the sensible position that our Constitution is interpretable positive law whose dictates must be respected. This requires us to accept three basic premises: first, that the written document is our supreme positive law; second, that the judiciary is empowered to interpret it; and third, that the judiciary's interpretation represents the final word as to its meaning. We *must* start from here; otherwise, there would be no purpose to engaging in the study of our founding document and the rules of governmental ordering that it sets forth, nor could we place any faith in the study of Supreme Court case law defining and demarcating the boundaries of federal power contained within our Constitution. Upon this foundation, we have built entire worlds of doctrine and constitutional theory.

It may come as something of a surprise, then, that a number of highly respected constitutional scholars have, in recent years, sought to undermine these premises.<sup>1</sup> We call these scholars “modernists” because they remind us of the architectural modernists who defiantly spurned tradition in favor of naked—and aesthetically displeasing—functionalism in the early twentieth century.<sup>2</sup> Architectural modernism was known for its determined rejection of history and tradition, free from the “idealization and imitation of

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1. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 3-4 (2014) (asserting that the American people have amended the Constitution by popular movement (outside of Article V) numerous times, and that the Constitution is more than merely the document itself); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 454 (2007) (arguing that there exists an “extracanonical” Constitution in the United States); see also, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 246-48 (2004) (arguing that the Constitution does not necessarily vest the judiciary with interpretive authority, and that because the judiciary is an undemocratic institution, interpretive power should be transferred to “the people”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217, 228-29, 240 (1994) (claiming that the “coordinacy” of the three branches of government envisioned by the Framers and enshrined in the Constitution forbids judicial supremacy and allows the executive to exercise final interpretive power).

2. See Steven C. Bourassa, *Postmodernism in Architecture and Planning: What Kind of Style?*, 6 *J. ARCHITECTURAL & PLAN. RES.* 289, 294 (1989).

some past era.”<sup>3</sup> It disclaimed ornamentation and symbolism, which for centuries had been rightly understood as central to architecture’s identity as a practice of aesthetic—a practical and necessary craft of urban design that was also, at its roots, steeped in artistry.<sup>4</sup>

Similarly, two sets of modernist constitutional commentators have proposed theories that reject the long-accepted tradition of American constitutionalism on the basis of different forms of naked functionalism. In one camp, self-described “constitutional realists” have variously claimed different positions on one basic assertion: that constitutions are composed of those laws, norms, and practices that principally define the relationship between the people and their government and set forth a nation-state’s power structure. As such, they argue, the American Constitution is simultaneously more and less than the piece of parchment upon which the Framers scribed our supreme law in the late eighteenth century. It is less, insofar as some provisions of the Constitution are neither respected nor closely followed, and have thus been effectively written out of the Constitution by oversight or indignity. It is more, insofar as other laws and movements—powerful and meaningful ones that the American public views as fundamental to our relationship with our government, but have never been codified in the document—are nonetheless appropriately deemed to possess constitutional status. Surely no one can dispute, for example, that on a purely practical level the Civil Rights Act of 1964 has had a more profound impact on social and governmental ordering in the United States than, say, the Third Amendment<sup>5</sup> or the Emoluments Clause.<sup>6</sup>

Also in the contrarian modernist camp are those scholars who, while not denying the unique supremacy of the Constitution, nevertheless challenge the premise that our constitutional regime

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3. *Id.* at 293; see Jürgen Habermas, *Modernity Versus Postmodernity*, 22 NEW GERMAN CRITIQUE 3, 3-4 (1981).

4. See Robert Maxwell, *Modern Architecture After Modernism*, 1 ANY: ARCHITECTURE N.Y. 36, 36-37 (1993).

5. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

6. U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

provides for a judiciary that is uniquely empowered and specially equipped to serve as the final arbiter of constitutional interpretation. Whether by legal or originalist argument,<sup>7</sup> or by observational or normative means,<sup>8</sup> these “departmentalists” and “popular constitutionalists” contend that the constitutional democracy the Framers devised was not built to support effective, enforceable judicial review. Departmentalists make the descriptive originalist argument that the Constitution envisioned all three branches as possessing equivalent power, and that allowing the judiciary’s interpretation of the Constitution to bind the other two branches upsets the balance of coequal power.<sup>9</sup> Popular constitutionalists, on the other hand, make the normative argument that judicial supremacy is deleterious to the democratic vision of American constitutionalism.<sup>10</sup> Observing that judicial review and supremacy were not explicitly provided for in the Constitution, and that courts often act in concert with majority views despite their freedom from democratic oversight, these scholars understand our constitutional system to accept majoritarian authority over constitutional meaning and enforcement.<sup>11</sup>

This is uncharted territory to be sure; constitutional realists, departmentalists, and popular constitutionalists are nothing if not innovative. But there is, we believe, a reason that this territory has remained uncharted for so long: those who would depart from the premises that have long served to undergird American constitutional law fundamentally misunderstand the unique virtues of American constitutionalism. Our Constitution was specially designed with an eye toward protecting the American people against tyranny in all its possible forms, including majoritarianism. Theories that either obscure the nature of the Constitution or misunderstand its structural guarantee undermine America’s most meaningful and significant contribution to political theory. This Article urges a return to a sort of traditionalism that uniquely

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7. See Paulsen, *supra* note 1, at 227; see also *infra* Part II.

8. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 9, 12-13 (2006); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 26 (1999); *infra* Part II.

9. See *infra* Part II.B.1.

10. See *infra* Part II.B.2.

11. See *infra* Part II.B.2.

understands that our Constitution (1) was written down, (2) in a single place, (3) to enshrine a constitutional democracy that would effectively balance our competing interests in celebrating majority interests with the need to protect minority rights.

The traditionalist view of American constitutionalism, however, was a premise rather than a reasoned conclusion. Literature explicating the traditionalist view is sparse because it has always gone without saying that our Constitution was ... well, our Constitution. But if we are to ask the question, “What *is* the American Constitution?,” we will find the answer by examining how our Constitution came to be, and why the government was formed in the way that it was formed. What were the Constitution’s causes, and what were its aims?

This ought not be an “originalist” inquiry, in which we seek to discern original intent or original meaning purely by way of excavation and historical research. An originalist inquiry inherently gives rise to often insurmountable archaeological difficulties and requires a different kind of scholarly methodology than is consistent with our lawyerly training.<sup>12</sup> The historical origins of our constitutional system lend some clarity in defining the borders of our constitutional framework, but simple reverse engineering does more of the theoretical work. Traditionalist theory glances at the broad, animating purpose of the Constitution and concludes, based on an assessment of the document’s historical context and structural design elements, that the American method is a very particular type of constitutionalism, uniquely defined by its countermajoritarianism.<sup>13</sup>

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12. See Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1491, 1495 (2012) (expounding upon the variety of archaeological difficulties that confront each type of originalist interpretation).

13. John McGinnis and Michael Rappaport have persuasively argued that the basic character of the American Constitution is “supermajoritarian.” John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 710 (2002). Professors McGinnis and Rappaport concern themselves mostly with explicating the value of supermajoritarian lawmaking and how different iterations of supermajoritarianism present themselves in our constitutional framework. In a way, their analysis fits comfortably with our view, for we see any lawmaking apparatus that empowers the populace but slows simple majorities as somewhat countermajoritarian. The use of supermajoritarian elements is one method by which our Constitution serves as a check against pure majoritarianism. Supermajoritarianism is thus one *type* of countermajoritarianism, the political apparatus that we explain is central

We call our theory “premodern” because it presents a defense of the traditionalist view that probably could not have been fashioned prior to the modernist revolution. Modernist constitutionalism argues that American constitutionalism is not fundamentally defined by a single written proclamation of the supreme positive law of the land, one that is entrenched against majoritarian choices and pathology by providing for a prophylactically insulated judiciary empowered with the final say as to the document’s meaning. But both types of modernism misconceive the nature of the American system. Our theory revives the traditionalist view, advancing its underlying values and rejecting modernist alternatives.<sup>14</sup> The premodern view fortifies traditionalism by articulating the essence of American constitutionalism: it explores the logical missteps at the heart of modernist theories and the dangerous consequences that would flow if they were accepted. Premodern constitutionalism thus adds theoretical richness to the traditionalist model by carefully dissecting the serious defects in the modernist attacks on traditionalist American constitutionalism.

The Framers made a conscious, affirmative decision to write our Constitution down, intentionally breaking away from British tradition. Founding-era America’s rejection of the British tradition of “unwritten” constitutionalism<sup>15</sup> was truly striking, and should play a meaningful role in forming a present-day understanding of the American Constitution. America’s decision to break from the British model has been hailed as the impetus for our great constitutional revolution; many in the nineteenth century trumpeted the work of the Founders as out-of-nowhere, momentary brilliance.<sup>16</sup> But the

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to American constitutionalism.

14. Cf. Bourassa, *supra* note 2, at 295 (“[M]odernists’ indifference—indeed hostility—to harmonious continuity comes from the modernists’ violent denunciation of derivative architectural forms.’ [Post-modern] [a]rchitects now appreciate the symbolic function of architecture and the symbolism of historic forms and ornamentation.” (quoting BRENT BROLIN, *THE FAILURE OF MODERN ARCHITECTURE* 7 (1980))).

15. Here it should be noted that the British “unwritten constitution” is not, in fact, unwritten. Rather, it is a collection of laws and pronouncements, like the Human Rights Act of 1998, that the country views as elements of its constitution. See David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1188 (2011). “Unwritten,” then, signifies the absence of a single formal document.

16. Herman Belz, *The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship*, 13 AM. J. LEGAL HIST. 110, 114 (1969) (“J. Franklin Jameson, in the preface to a book of essays dealing with constitutional developments in the

truth is that, in the words of Hermann Eduard von Holst, the American Constitution came to be in a manner no different from other constitutions around the world, as “a result of actual circumstances of the past and present, and not a product of abstract political theorizing.”<sup>17</sup> In fact, the idea of employing a single written document has been attributed to the existence of state constitutions and corporate charters at the time of the framing.<sup>18</sup> The Constitution “was no empty product of political theory,” but was rather “a growth, or ... a selection from a great number of growths then before the Convention.”<sup>19</sup>

The animating force behind this growth was the pervasive fear of tyranny. *The Federalist* paints a picture of a Founding-era obsession with tyranny; Hamilton and Madison saw it lurking behind every corner and under every bed.<sup>20</sup> Each measure the Founders took in the course of building the new federal government was directed toward safeguarding the nascent country and future generations of Americans against oppression in any form—tyranny of the majority, of the minority, of the aristocracy, of the plutocracy, or of the intellectual elite. When the Framers gathered in Philadelphia in 1787 to reconstitute the federal government, they sculpted a constitutional document that would be entrenched against simple majoritarian change, provide for checks and balances between the branches of government, and serve as the supreme law against which the validity of government action could be measured. The

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Confederation period, stated that many educated persons “think of our Constitution as having sprung full-armed from the heads of Olympian conventioners.”)

17. *Id.* at 113-14 (citing 1 HERMANN VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* (John J. Lalor & Alfred B. Mason trans., Chicago, Callaghan & Co. 1889) (1876)).

18. See Belz, *supra* note 16, at 114 (“Explaining that the charters of English trading companies were the embryo of American constitutions, [Brooks] Adams concluded, ‘Americans are subject to the same general laws that regulate the rest of mankind; and accordingly ... they have worked out their destiny slowly and painfully, ... and ... far from cutting the knot of their difficulties by a stroke of inventive genius, they earned their success by clinging tenaciously to what they had.’” (quoting Brooks Adams, *The Embryo of a Commonwealth*, 64 ATLANTIC MONTHLY 610 (1884))) (footnote omitted) (omissions in original).

19. Alexander Johnston, *The First Century of the Constitution*, 4 NEW PRINCETON REV. 175, 176-78, 186-87 (1887).

20. See, e.g., THE FEDERALIST NOS. 48, 49 (James Madison) (Isaac Kramnick ed., 1987); see also McGinnis & Rappaport, *supra* note 13, at 722 (advancing an originalist argument that supermajoritarian governance was a uniquely American creation devised to avoid tyranny).

written Constitution itself, and the fact of its “writteness,” inescapably demonstrate the Founders’ unique appreciation of humankind’s potential for both flourish and folly.

This is not to say that citizens of countries with “unwritten” constitutions—such as England, Israel, and New Zealand—are necessarily wrong to refer to their constitutions as “constitutions.” It is likewise not to say that a country like China, whose constitution does not feature countermajoritarian checking,<sup>21</sup> has no constitution at all—though, for reasons we will explain, both of these types of constitutions are highly prone to charges of illegitimacy. As we will discuss, constitutionalism as a general political philosophy is not focused on whether a constitution mirrors the American Constitution, but rather on what methodology a country uses to create public power structures that are legitimate according to some method of valuation.<sup>22</sup> In fact, the unwritten and unentrenched norms and laws that together form the “constitutions” of some countries might indeed be more legitimate than written and purportedly entrenched “sham constitutions” in other countries.<sup>23</sup>

In the United States, however, the Constitution is positive law. It does not merely set forth and structure the exercise of public power; rather, it establishes and imposes on the polity a set of rules and norms. Moreover, it designates enforcement mechanisms against both its subjects and its implementers. For a nation primarily concerned at the Founding with prophylactic avoidance of tyranny in a largely heterogeneous society, the writteness and countermajoritarian entrenchment of the Constitution are both logical and fundamental. There was real structural brilliance to the

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21. See *infra* Part IV.

22. See *infra* Part I.

23. See David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 873-75, 877-78 (2013); see also Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 679-80 (2009) (explaining that even a written constitution is not legitimate if it cannot be positively measured through (1) nationalist constitutionalism, which finds its values “in the transcendent genius of the people of the nation itself”; (2) transnational constitutionalism, which determines a regime’s legitimacy based on the community of nations’ expression of universal values; (3) natural law constitutionalism, centered on “universal values based on humanity’s nature or aspirations”; (4) theocratic constitutionalism, whose values derive from the imperatives of some particular religious system; or (5) rationalist constitutionalism, which evaluates constitutional regimes according to “higher order rational systems” like free-market capitalism or Leninism).

constitutional regime that was created when our Constitution was ratified. For Americans, the Constitution performs four vital and overlapping functions: the document is descriptive, aspirational, structural, and checking. The descriptive Constitution sets forth the purposes of our constitutional regime. The structural Constitution sets up the processes of our government. The aspirational Constitution aims to achieve certain ideals. And the checking Constitution preserves the democratic process through the supermajoritarian limitation on majority rule.

The prophylactically insulated judiciary is the beating heart of the structural brilliance that defines American constitutionalism. Indeed, once the nation chose to adopt a written, mandatory, countermajoritarian Constitution, vesting the final say as to the document's meaning as well as the authority to enforce its provisions in the insulated judiciary became essential. This nation was born of a revolution fought for political accountability, and yet the Framers chose to make one of the three branches of our fledgling national government completely insulated from public accountability. That was no accident: only by including an entirely insulated judicial branch could this democratic republic be protected from itself. Democracy inherently embodies a belief in human flourishing and in the people's ability to control their own destinies by participating and believing in their representative government. But by establishing a politically unaccountable coequal judiciary branch, the Framers acknowledged that human flourishing could not be optimally accommodated if majorities were permitted to rule unchecked.<sup>24</sup> The Framers, concerned primarily with thwarting the threat of tyranny in any form, built a Constitution that enshrined as supreme law a uniquely American form of what we refer to as "skeptical optimism"—optimism that an empowered majority could achieve both great prosperity and personal growth, tempered by recognition that majorities trend toward oppressing minorities. To implement this skeptical optimism, our Constitution was structured around the political apparatus of countermajoritarian checking of majoritarian power. The choice to include an insulated judiciary was a meaningful one, and that judiciary's ability to provide prophylaxis

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24. See THE FEDERALIST NO. 78, *supra* note 20, at 438 (Alexander Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

was the keystone to the archway of achieving the Constitution's devised ends. Without a countermajoritarian judiciary armed with the power of judicial review, the entire design of our national government would be meaningless—or worse. Without the insulated judiciary authoritatively interpreting the Constitution, our structural Constitution would create the *appearance* of countermajoritarian checking against majoritarian impulses that, in reality, would amount to nothing more than illusion.

This Article proceeds in four parts. In Part I, we describe what we view as the traditional conception of American constitutionalism. Traditionalism depends upon historical context to define the principle at the core of our form of constitutionalism and depends upon reverse engineering from the structural Constitution to pinpoint the apparatus fundamental to converting that idea into political philosophy.<sup>25</sup> We can (and do) look to *The Federalist* and other early texts to develop the traditionalist model of American constitutionalism, but much of our explanation of traditionalism relies on straightforward examination of both the historical context within which the Constitution came into existence, and the structures embedded within it. In this way, we focus on the core principle animating our constitutional regime without reliance on the type of archaeological excavation required to advance an originalist argument.<sup>26</sup> The traditionalist model of American constitutionalism, we explain, is the common sense explanation for our structural Constitution.<sup>27</sup> The system designed within our unique written document can only be explained by the notion that the core of American constitutionalism is skeptical optimism driving the balancing of representative governance against meaningful countermajoritarian checks designed to control that government. It places the principle and the political apparatus at the core of American constitutionalism and

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25. See *infra* Part I.A.

26. We must strongly emphasize that we do not view traditionalism as synonymous with originalism, nor do we believe that espousing a traditionalist view of our Constitution's animating principles necessitates originalist interpretation. *But see* Steven E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POLY 817, 857 (2015). We do not rely on the original meaning of the Constitution's text or the original intent of the Framers to demonstrate that countermajoritarianism is the core element of our constitutional regime; instead, we view the structural Constitution as itself proof positive of the countermajoritarian principle at its heart. See *infra* Part I.

27. See *infra* Part I.B.

understands the activating mechanisms of a singular written Constitution and a prophylactically insulated judiciary as logical outgrowths of a system built on these premises.<sup>28</sup>

In Part II, we explore the two prominent modernist attacks on the traditional view of American constitutionalism. By “modernist,” we refer to revisionist views of American constitutionalism proposed in recent years by a number of highly respected constitutional theorists. This Part first examines constitutional realism and its argument that the entrenched, written Constitution does not comprise the totality of higher law in the United States.<sup>29</sup> In addition to being problematic from a practical perspective (and thus being undesirable from a normative standpoint), the realist argument is theoretically indefensible. In fact, as the discussion will show, in their efforts to recognize a realist form of constitutionalism, these scholars have—ironically—been wholly unrealistic because both the American people and the courts categorically reject the constitutionalization of nonconstitutional law.<sup>30</sup> Part II will then proceed to confront the modernist theories that challenge not whether the written Constitution represents the full extent of our higher law, but rather whether American constitutionalism requires, or even permits, ultimate majoritarian enforcement and interpretation. We will explain why departmentalists are wrong to oppose the idea that countermajoritarian judicial supremacy is fundamental to American constitutionalism,<sup>31</sup> and how popular constitutionalists err in arguing that majorities are better suited to interpret our supreme law.<sup>32</sup>

Part III explains the meaning of what we label “premodern” constitutionalism. Our position is that American constitutionalism is properly defined not only by skeptical optimism and countermajoritarianism, but also by the two activating mechanisms that have come under modernist attack. The Constitution is a written document that serves descriptive and prescriptive purposes, provides for the mutual checking of powers among the branches, and balances

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28. See *infra* Part I.B.

29. See *infra* Part II.A.

30. See *infra* Part II.A.

31. See *infra* Part II.B.1.

32. See *infra* Part II.B.2.

the ideals of human flourishing against the evils inherent in human nature. The written document is entrenched against the choices of temporary majorities, and the prophylactically insulated judiciary is designed to protect constitutionally guaranteed minority interests. Whereas historical context, common sense, and reverse engineering form the theoretical proof-points for the traditionalist model of American constitutionalism, the premodern model of constitutionalism urges a revival of traditionalism based on a critique of, and reaction to, the problems associated with both forms of modernism, as well as the troubling consequences that would inevitably flow from the adoption of either of them.

Finally, in Part IV we will demonstrate the correctness of the premodern view of American constitutionalism by contrasting it with foreign regimes whose constitutional models more closely align with the precepts of modernist constitutionalism.<sup>33</sup> This Part will examine the handful of “unwritten” constitutions that realist scholars have suggested can assist American constitutionalists in understanding the American regime. It will also examine an unapologetically majoritarian constitutional regime to demonstrate, as a practical matter, why departmentalist and popular constitutionalist theories are wrong to suggest that the activation devices of a singular written constitutional document subject to formal alteration only through supermajoritarian process and to final interpretation by prophylactically insulated judicial review do not lie at the core of American constitutionalism. We will explain why some of these foreign constitutional systems might be adequately suited to constitute the governments of more homogeneous or less cynical nations, but are by their very nature inconsistent with American constitutionalism and not properly engineered to address the American constitutional concern—namely, successfully securing prophylactic protection against the tyranny of majorities.

Some might read this Article as a thinly veiled assertion of American exceptionalism. In a manner of speaking, it is: we believe that the American constitutionalism we identify was uniquely tailored to safeguard our generative values, and that America’s major contribution to legal and political thought is constitutional

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33. See *infra* Part IV.

democracy, thoughtfully engineered to ensure freedom from the potential tyranny of unconstrained majoritarianism. This is not to say that the insulated judiciary always checks majoritarian action perfectly, or even effectively; indeed, the Supreme Court's actions have all too often demonstrated that it is far from infallible and may fail to protect minority interests against majority oppression.<sup>34</sup> But we argue that despite these lapses, the judiciary for the most part does abide by our Constitution as higher law. At the very least, unlike the executive branch, the judiciary does not threaten to impose its will through sheer military force, and unlike the legislative branch, it is not directly subject to the political pressures imposed by the whims and prejudices of the electorate. The system our Constitution deploys, through an entrenched countermajoritarian document and a prophylactically insulated judiciary empowered to interpret and enforce it, represents a structurally superior method of protecting against majoritarian choices and tyranny.

Our goal is to define clearly what American constitutionalism is and not necessarily to explain why it is plainly superior to all other forms of constitutionalism. It may be that other systems of governmental ordering more productively advance the shared interests of their governed. But if the skeptical optimism at the heart of our constitutionalism grows out of recognition of some reality of human nature, if there is some truth to the notion that humankind has extraordinary potential both to flourish and to oppress, then the traditionalist form of American constitutionalism—fundamentally, countermajoritarian checking of majoritarian power designed to preserve the rule of law activated through a written, supreme positive law and a prophylactically insulated judicial interpreter—is well tailored to implement it.

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34. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of same-sex sodomy laws); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of imprisoning persons of Japanese descent in internment camps during the Second World War); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of state laws mandating racial segregation).

## I. TRADITIONALIST CONSTITUTIONALISM REVISITED: STRUCTURAL CHOICES WITH HISTORICAL EXPLANATIONS

One of the most challenging tasks we face in developing a premodern theory of American constitutionalism is pinpointing the traditionalism to which we urge a return. There is no rich literature devoted to the defense or development of the traditionalist model. Our Constitution employs a variety of tools and structures as means to achieve its underlying aim of defining a balance of powers built to avoid tyranny. For years, the scholarly debate focused squarely on what those tools and structures were, what their nature and limitations were, and how those tools were to be properly utilized.<sup>35</sup> Formalists argued with functionalists over the best use of our constitutional regime's implementational tools, but they never argued about the underlying principles for which those tools existed in the first place.<sup>36</sup> The traditionalism to which we refer has long been essentially a root assumption, not a logically reasoned conclusion.

For this reason, before examining the development of the two modernist views of American constitutionalism, we must explicate our traditionalist model. This traditionalist theory holds that the core of American constitutionalism is countermajoritarian checking of majoritarian power. In order to implement this vision, our regime relies upon a structural, written Constitution subject only to supermajoritarian modification, and a prophylactically insulated judiciary, which is to act as the final arbiter of the document's meaning. This structure is uniquely suited to strike a crucial balance embodying what we call skeptical optimism. On the one hand, our

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35. See, e.g., LEVINSON, *supra* note 8; H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (1995).

36. Compare REDISH, *supra* note 35, Gary Lawson, *In Praise of Woodenness*, 11 *GEO. MASON L. REV.* 21 (1988), and Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 *DUKE L.J.* 449 (1991) (all advocating various degrees of formalism), with JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980), and MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982) (both championing functionalism).

Constitution optimistically establishes representative government through the granting of a series of majoritarian powers: recognizing the continuing value of republican state governments in a federalist system, granting legislative authority to a representative Congress, and extending executive power to an elected President. Empowering majorities in this fashion grants freedom to the People to realize their potential and to flourish. On the other hand, our Constitution provides a series of countermajoritarian checks, the most important of which is the insulated Article III judiciary designed to safeguard minority views against majoritarian overreach and ensure that the supreme law—against which the legality of all other laws is measured—may be formally altered only by legal supermajoritarian action.

Put differently, the traditionalist view of American constitutionalism understands our nation's contribution to political theory as the construction of a regime that, due to its dedication to countermajoritarianism, uniquely implements its optimism that humankind can flourish if empowered. That same dedication to countermajoritarianism is due to its skepticism that unchecked empowerment will naturally devolve into tyranny.

#### *A. The Core Principle: Skeptical Optimism*

Traditionalist constitutionalism consists of two fundamental elements. The first is the core principle at the heart of American constitutionalism, which can be found within the historical context from which our Constitution sprang forth. The second is the political apparatus effectuating that principle, which is embedded in the structural Constitution itself and is best proven by a form of reverse engineering. We address each of these in turn.

First, reference to the historical context within which the Framers operated to develop our Constitution reveals the principal concerns that guided its construction. Two shadows loomed over the Framers when they gathered in Philadelphia to devise a new national charter in 1787. One was the memory of a revolution fought for the notion of “no taxation without representation”<sup>37</sup>—the new

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37. See J. Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 Hous. L. Rev. 1377, 1378-79 (2008).

Constitution would need to enshrine representative government to ensure that power belonged, first and foremost, to the People themselves. The other was the failure of the Articles of Confederation, the original national charter that established a comically weak and ultimately dysfunctional federal government whose flaws gave rise to the convention in the first place.<sup>38</sup>

Breaking free from Britain was not merely an act of defiance against the antics of King George. It was also an act of defiance against a system of governance that was unacceptably unrepresentative of American colonists and unconcerned with protecting minority interests against majority rule.<sup>39</sup> Britain was a monarchy, of course, but its governmental structure was at the time one which granted supremacy to its majoritarian branch. Parliamentary sovereignty firmly defined the British system of governance. Britain had no written constitution or formally entrenched higher law.<sup>40</sup> Legal change in Britain was left entirely to the discretion of Parliament, a legislative body empowered to enact ordinary legislation *and* to ultimately determine the legality and legitimacy of such legislation,

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38. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11-12, 21 (1996). The mission of the convention had originally been to amend the Articles of Confederation, but the Framers quickly realized that more sweeping change was necessary. *Id.* at 102. Even those who expressed concern that the convention was acting outside the Articles' express instruction as to amendment did so halfheartedly—the clear aim of the convention was to break from the disastrous Articles and establish a meaningfully empowered national government. *Id.* at 102-03, 123.

39. See Richard R. Johnson, "Parliamentary Egotisms": *The Clash of Legislatures in the Making of the American Revolution*, 74 J. AM. HIST. 338, 338-39 (1987). Johnson explains that the taught version of American history is not per se wrong to lay blame at the feet of King George, but that it fundamentally misses the point insofar as the only reason the monarch moved the needle was that Parliament acquiesced in his exercise of power and was constitutionally incapable of checking either itself or the monarch. *Id.* at 341-42; see also Paul Langford, *Old Whigs, Old Tories, and the American Revolution*, 8 J. IMPERIAL & COMMONWEALTH HIST. 106, 110-11 (1980) (espousing a similar view that the American Revolution was not merely a rebuke of monarchical rule, but also—and perhaps more importantly—a rebuke of the politics of parliamentary sovereignty).

40. See Johnson, *supra* note 39, at 343 ("There remained a tradition of belief in a fundamental law that placed limits on the exercise of arbitrary power by any branch of government, a tradition that was to find a receptive audience—and, eventually, a permanent home—in the American colonies. In England, however, political theory and reality moved in tandem toward a magnification of parliamentary power. The Glorious Revolution of 1688 confirmed Parliament's power as guardian and interpreter of the ancient constitution.").

for the same majority necessary to pass legislation had the power to override any judicial determination of illegality.<sup>41</sup>

Soon after the colonies won their independence, the failed experiment of the Articles of Confederation began.<sup>42</sup> In many respects, the Articles were doomed from the start; intentionally devised to establish a feeble national government, they featured no presidency and a diffuse, largely impotent legislature.<sup>43</sup> Within less than a decade, the confederacy of states had functionally collapsed, and the states sent their delegates to Philadelphia with full knowledge that the result of the convention would have to be a stronger national government with meaningful legislative and executive capacities.<sup>44</sup>

The Constitution thus was developed within the context of two countervailing sentiments. On the one hand, the framing generation knew that in order to facilitate the human capacity for flourishing and to ensure that American society could achieve its potential, our new nation would need a strong, majoritarian, representative government that empowered the people.<sup>45</sup> On the other hand, the Framers were well aware of both world history and their nation's own recent history. They understood that humankind is just as disposed to folly as to flourish and that concentration of power in the majority, even when representative, could easily devolve into tyranny.<sup>46</sup> This "skeptical optimism" became the core driving force of American constitutionalism.

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41. See Lori Ringhand, *Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain*, 43 COLUM. J. TRANSNAT'L L. 865, 873-74 (2005) (discussing Parliament's supremacy over judicial review in Britain).

42. Though they ultimately proved incapable of properly constituting our national government and securing our constitutional vision, through their use of supermajority rules, the Articles were perhaps our country's first attempt to implement the countermajoritarianism that would come to define our Constitution. See McGinnis & Rappaport, *supra* note 13, at 717.

43. See Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 253-54 (1997).

44. See RAKOVE, *supra* note 38, at 23-34; Smith, *supra* note 43, at 254 n.11; see also THE FEDERALIST NO. 40, *supra* note 20 (James Madison) (explaining that fixing our national system was going to require a more massive overhaul than simply improving and amending the Articles of Confederation).

45. See THE FEDERALIST NO. 39, *supra* note 20, at 255 (James Madison) (describing a government "which derives all its powers directly or indirectly from the great body of the people").

46. See Redish & Cisar, *supra* note 36, at 451.

*B. The Apparatus: Countermajoritarian Checking of Majoritarian Power*

The second element of the traditionalist model is the political apparatus devised to implement the skeptical optimism at the heart of our form of constitutionalism. The Framers' skeptical optimism is readily apparent in Founding Era literature and is embedded in the history of both the American Revolution and the Founding. But its political apparatus is best explicated by reverse engineering from the structural Constitution itself.

With the historical realities motivating their skeptical optimism in full view, the Framers made two crucial decisions about how the American constitutional system would be shaped. First, in a decisive break from the British tradition, America would have a written Constitution that would serve as its singular, supreme law. And second, that Constitution would, by its terms and design, establish an empowered but limited federal government.<sup>47</sup> The Constitution the Framers produced was a direct response to parliamentary sovereignty's potential for tyranny,<sup>48</sup> an affirmative statement of the new republic's constitutive law, and an effort to balance the states' interests in maintaining a degree of autonomy while establishing a strong enough national government to preserve national economic and political health within the global community.<sup>49</sup>

The structures that were chosen to implement this vision of American governance are themselves quite revealing of the principles at the heart of our constitutionalism. The Constitution was foundational, prescriptive, and aspirational, but it was primarily built to deter the accumulation of power in a single branch or system.<sup>50</sup> Although dedicated to preserving state sovereignty, the

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47. See THE FEDERALIST NO. 78, *supra* note 20 (Alexander Hamilton) (describing a constitution of limited government); THE FEDERALIST NO. 48, *supra* note 20 (James Madison) (arguing for structural checks to ensure limits on executive and legislative power).

48. See Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 415 (2003) (arguing that the United States rejected congressional supremacy because of the potential that tyranny would ensue).

49. See THE FEDERALIST NO. 51, *supra* note 20 (James Madison) (expounding upon the system of checks and balancing that would come to define our constitutional structure).

50. See THE FEDERALIST NO. 48, *supra* note 20, at 309 (James Madison) (claiming that "assembling all power in the same hands must lead to ... tyranny"); THE FEDERALIST NO. 62, *supra* note 20, at 366 (James Madison) (describing "the propensity of all single and numerous

Constitution vested executive power in an elected President<sup>51</sup> and vested legislative authority in a full-fledged, permanent, bicameral Congress.<sup>52</sup> Although it foundationally empowered each of the majoritarian branches, it sought to guard against domination by faction and, shortly after ratification, codified a Bill of Rights affirmatively setting forth a list of negative individual rights based on the most cherished bedrock principles of our new constitutional republic.<sup>53</sup> And most important of all, despite their unwavering commitment to representative democracy and political accountability, the Framers conferred the judicial power, in writing, to a judicial branch that would, for all practical purposes, be politically unaccountable.<sup>54</sup>

As we will show later, perhaps the simplest way to prove the correctness of the traditional understanding of American constitutionalism is by examining and disproving modern challenges to the traditional theory. But without reference to modernist arguments, traditionalism finds its strongest support in basic logic grounded in reverse engineering: there is simply no good alternative explanation for the momentous decision to break from the British tradition and write our Constitution down in mandatory language, proclaim the supremacy of the Constitution as positive law, make it subject to alteration only through a complex supermajoritarian process, and create a politically unaccountable judiciary charged with constitutional interpretation. Creation of one of the three branches as a prophylactically insulated body in a nation created on the promise of representationalism was no accident. The political apparatus at the core of our constitutionalism was quite clearly a system of countermajoritarian checking of majoritarian power.

This continued to be true even as other nations experimented with new, different constitutional regimes deploying different political apparatuses and cherishing different central animating principles. The American Constitution was the first of its kind, so it

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assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions”).

51. U.S. CONST. art. II, § 1.

52. *Id.* art. I, § 1.

53. *Id.* amends. I-X; see Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 762 (2001).

54. U.S. CONST. art. III, § 1.

is no exaggeration to say that from the late eighteenth century through the nineteenth century, asking whether a regime was constitutionalist was the equivalent of asking whether it had adopted the same constitutional structure employed by the United States.

The word *constitution* derives from the Latin *constitutio*, meaning “enactment,” and original understanding of the word did not suggest the embodiment of a state’s highest law.<sup>55</sup> As early as the second century, however, the plural *constitutiones* was used to describe a collection of sovereign enactments or even church-enacted canonical law.<sup>56</sup> Accordingly, the idea of the word “constitution” meaning higher, foundational law framing the exercise of public power stretched back several centuries before the Founders gathered in Philadelphia, but constitutionalism as a political philosophy really took hold and blossomed in the wake of the American Constitutional Convention.

Constitutions continued to spring up throughout the world, employing alternative methods of government ordering, political organization and structure, and protection of individual liberties.<sup>57</sup> As a result, the definition of constitutionalism broadened to capture these constitutional structures.<sup>58</sup> Today, constitutionalism is a political philosophy wherein good government requires promulgation of a code of bedrock principles that defines the relationship between government and the governed both by defining the scope and limitations of government power and by securing individual rights and liberties.<sup>59</sup> As a discipline of political discourse, constitutionalism is the “systematization of thinking about constitutions grounded in the development since the [mid-twentieth] century of supranational normative systems against which constitutions are

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55. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 853 (1962).

56. *Id.*

57. See Steven Mintz, *The Survival of the US Constitution*, GILDER LEHRMAN INST. AM. HIST., <http://www.gilderlehrman.org/history-by-era/creating-new-government/resources/survival-us-constitution> [https://perma.cc/5GMA-GBJ3]; see also *infra* notes 165-69 and accompanying text.

58. See Sartori, *supra* note 55, at 862-63.

59. See Law & Versteeg, *supra* note 15, at 1188 (advocating a functional definition in the determination of whether a legal instrument is constitutional or could be considered a constitution).

legitimated.”<sup>60</sup> Broadly defined, constitutionalism is a method of understanding the orderly, civilized profiling of the interface between the people and their government, subject to the rule of law.<sup>61</sup>

There are, to be sure, a variety of ways in which constitutional regimes may practice constitutionalism. This is because constitutionalism is defined simply by the existence of a code of clear and identifiable foundational principles of government and social ordering, not by the means a regime uses to establish, implement, and enforce that code.<sup>62</sup> Whether a constitution is written or unwritten, or whether it provides for pure majoritarian rule or envisions a countermajoritarian check, it can still, potentially, constitute a legitimate exercise of constitutionalist governance.<sup>63</sup>

Modernist constitutional scholars celebrate general substance over particular form, holding that constitutions are the laws and norms structuring a people’s relationship with its government and defining how government can exercise public power.<sup>64</sup> John Ferejohn and Lawrence Sager have noted that “constitutional practices can

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60. Backer, *supra* note 23, at 676.

61. See Vicki C. Jackson, *What’s in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1254 (2008) (“Constitutionalism entails a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation.”).

62. Backer, *supra* note 23, at 679 (defining constitutionalism as “(1) a system of classification, (2) the core object of which is to define the characteristics of constitutions (those documents organizing political power within an institutional apparatus), (3) to be used to determine the legitimacy of the constitutional system as conceived or as implemented, (4) based on rule of law as the fundamental postulate of government (that government be established and operated in a way that limits the ability of individuals to use government power for personal welfare maximizing ends), and (5) grounded on a metric of substantive values derived from a source beyond the control of any individual”) (emphasis omitted).

63. For reasons we shall explain later, we believe that constitutions that do not formally provide a countermajoritarian check to majoritarian power by way of a politically unaccountable judiciary are more likely to devolve into illegitimacy. See *infra* Part IV. But we acknowledge that even nations that do not employ this system of constitutionalism can operate legitimate, constitutional governance, even if that governance is not “constitutional” in the American sense of the word. See *infra* Part III.

64. See, e.g., David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 854 (2012); Law & Versteeg, *supra* note 15, at 1188 (in an empirical study, counting as constitutionalist any regime with written law that could be designated “constitutional,” including both legal constitutionalist regimes, like the United States, and diffuse political constitutionalist regimes, like the United Kingdom).

usefully be understood as commitment devices,” methods for governments to express to both citizens and outsiders their commitments to protecting private property, recognizing unpopular minorities, or furthering the rule of law.<sup>65</sup> David Law has likewise defined constitutions “as the set[s] of rules and practices—written or otherwise—that allocate[], and structure[] the exercise of, public power.”<sup>66</sup>

Structuring a nation’s political powers, defining a nation’s most cherished individual rights, and ensuring that the government provides a mechanism for protecting liberty are all key aspects of the process of codifying government power and limitation through constitutionalism.<sup>67</sup> But today’s understanding of constitutionalism suggests that nations have a variety of options to effect this purpose. Ultimately, whether a regime employs a form of constitutionalism and whether a constitutional regime is legitimate are entirely different questions. Some regimes that employ a written constitution with affirmative guarantees as to government structure and individual rights fail to live up to the promises enshrined in their constitutions.<sup>68</sup> Other regimes with no bill of rights or designated higher law have proven “legitimate” by constitutionalist standards because they otherwise identify the principles of law that constrain their governments and provide for the wellbeing of their governed.<sup>69</sup>

We mention all this to emphasize that, despite the changing conception of what a nation must actually do to have a constitution and adhere to constitutionalism as a political dogma, American

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65. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1929 (2003).

66. David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 GA. L. REV. 407, 416 (2006); see also Frank I. Michelman, *What Do Constitutions Do that Statutes Don't (Legally Speaking)?*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 273, 283-86 (Richard W. Baumann & Tsvi Kahana eds., 2006) (arguing that even systems with written constitutions invariably rely on unwritten constitutions to find their rules of recognition).

67. See Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1128-29 (2006) (“[Constitutionalism] should be understood as entailing that states are obligated to ensure that all citizens enjoy those basic capabilities necessary to lead a decent life.”).

68. See Law & Versteeg, *supra* note 23, at 872 (noting socioeconomic and group rights are often widely violated).

69. See *id.* at 882 (pointing out that Australia, despite lacking a bill of rights, respects “a panoply of rights”).

constitutionalism has always been defined by its structural design and underlying goods.<sup>70</sup> The two are inseparable. The American Constitution was not written simply to establish and define the relationship between the government and the governed, though it surely does that; rather, it was written primarily to effectuate a very particular relationship premised on a form of universal and mutual distrust.

Other nations have chosen alternative ways to establish, implement, and enshrine their codes of bedrock principle, and this variation does not automatically make them any less “constitutionalist,” at least on an abstract, definitional level. But the traditionalist view recognizes that American constitutionalism is, at its core, about enshrining countermajoritarianism. One can strip away whatever else one wishes from our constitutional design, but our Constitution ceases to implement American constitutionalism the moment one undermines the principal activating force of our system: an entrenched, written, countermajoritarian statement of positive law subject to interpretation and enforcement by a prophylactically insulated judiciary.

We readily acknowledge that merely providing for an insulated judiciary is not necessarily the same thing as providing for prophylactically insulated judicial review or judicial supremacy. Scholars have puzzled over the basis of judicial review for quite some time. Nothing expressly written into the American Constitution explicitly states that there shall be judicial enforcement of the metes and bounds of constitutional directives, either between the states and the federal government or between the federal government’s coequal branches. It seems as though, in order for traditionalism to carry any water, there must be some textual basis for judicial review. Here, we briefly explain why the structural Constitution necessarily demands judicial review.

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70. See Vasiliy A. Vlasihin, *Political Rights and Freedoms in the Context of American Constitutionalism: A View of a Concerned Soviet Scholar*, 84 NW. U. L. REV. 257, 258 (1989) (“Making up the core of [American] constitutionalism are the ideas of ‘popular sovereignty’ and a social contract as the source of the government; the principles of republicanism, federalism, separation of powers, and government limited by law; respect for the rights and liberties of citizens and the protection of private property; the rule of law and the supremacy of the Constitution; and independence of the judiciary and judicial review.”).

It is worth noting that judicial review appeared to be assumed by the Framers at the time of ratification. Alexander Hamilton consciously sought to switch the textual inertia in *The Federalist No. 78*, taking notice of the importance of judicial review and essentially suggesting that unless the text of our new Constitution foreswore judicial review, it should logically be deemed part and parcel of the exercise of judicial power under Article III.<sup>71</sup> But, judicial review might also find its textual basis in the “arising under” language of Article III: by giving the judiciary the power to adjudicate “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,”<sup>72</sup> the Constitution empowered the judicial branch to enforce the Constitution’s limits and ensured both vertical power checking (constitutional federalism and supremacy enforcement) and horizontal power checking (separation of powers).

Yet another textual basis for at least the bulk of judicial review is the guarantee of due process contained in the Fifth and Fourteenth Amendments.<sup>73</sup> Both amendments forbid governmental deprivation of life, liberty, or property without due process of law.<sup>74</sup> The argument that these provisions codify judicial review can be framed in one of two ways. First, it could be asserted that any time individual rights to liberty, property, or life are placed at risk, a neutral, independent adjudicator is a fundamental component of the due process guarantee. This rationale works well when a right guaranteed by the Constitution is at stake. But the direct link between a structural breach (by one branch upon another or by the federal government upon the states) and the infringement of a liberty interest protected by the Due Process Clause is, some might argue, problematically attenuated.

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71. THE FEDERALIST NO. 78, *supra* note 20, at 437, 440 (Alexander Hamilton) (“[Judicial review] is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body.... [T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments.”).

72. U.S. CONST. art. III, § 2.

73. Some have argued that just by setting forth both a Bill of Rights and an article devoted to establishing a judiciary, the Constitution implicitly established judicial review for the primary purpose of rights enforcement. See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1534-35 (2000).

74. U.S. CONST. amend. V; *id.* amend. XIV.

The other way to frame due process as the textual basis for judicial review is to argue that any litigant who satisfies Article III's standing requirement of injury in fact or who stands to lose property by way of a damages award in a case or controversy has a due process right to an independent adjudicator. Due process, then, is not triggered by the nature of the particular claim being brought, but by the fact that a property interest is at stake—regardless of the substantive basis for a claim. Alternatively, it could be argued that judicial review arises out of constitutional due process in two other, related ways: first, in disputes with or between governmental branches, adjudication must be neutral; and second, under Chief Justice Marshall's private rights model, deciding constitutional meaning is incident to deciding cases in which constitutional issues are raised.<sup>75</sup>

Herbert Wechsler proposed the Supremacy Clause<sup>76</sup> as the textual anchor for judicial review.<sup>77</sup> His argument was that, in textually declaring the Constitution the supreme law of the land, the Constitution itself demanded judicial review.<sup>78</sup> Yet this theory is problematically question begging. Yes, the Supremacy Clause dictates that the Constitution shall be the supreme law of the land, but that says nothing about which branch gets to say what that Constitution means. It can sensibly be read to imply the judiciary's role in enforcing vertical power checking, but, without the logical implication that Hamilton recognized in *The Federalist No. 78*,<sup>79</sup> the question of the judiciary's role as a means of prophylaxis against horizontal breaches remains unresolved.

In truth, the most logical explanation of judicial review is, as described in our earlier discussion, common sense, a conclusion derived through both logic and reverse engineering from the structural Constitution itself. The Constitution was the product of debate and coordination among a group of people who sought respite from

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75. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457, 481 (1986).

76. U.S. CONST. art. VI, cl. 2.

77. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-5 (1959).

78. See *id.* at 3.

79. See *supra* notes 71-72 and accompanying text.

the unrepresentative government of England,<sup>80</sup> feared faction,<sup>81</sup> and worried about the tyranny of accumulated power.<sup>82</sup> Yet, despite the Framers' deep-seated belief in representative government, the Constitution set forth a federal judiciary that was thrice insulated from majoritarian whim: the judicial branch would be staffed by unelected judges, serving lifelong terms with salary protections, and only removable by impeachment for bad behavior.<sup>83</sup> In other words, the judiciary would be completely politically unaccountable. No logical explanation exists for the provision of an unaccountable judiciary *except* the obvious one: that the entrenched, countermajoritarian Constitution would need such an insulated, prophylactic judiciary to police its structural mandate and ensure its supremacy.<sup>84</sup>

The defining goal of American constitutionalism is to strike a balance between democracy and distrust.<sup>85</sup> Our constitutionalism is concerned with fulfilling the promise of an American dream and rewarding communitarianism. The Constitution trusts majorities to elect representatives who will legislate and a President who will execute laws in accordance with the will of the people on a day-to-day basis, and trusts the states to serve as laboratories of democracy and capitalist experimentation.<sup>86</sup> But it leaves no room for the power of the majority to overtake minority interests. By defining our

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80. See *supra* note 39 and accompanying text.

81. See THE FEDERALIST NO. 10, *supra* note 20 (James Madison).

82. See *supra* note 46 and accompanying text.

83. See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 668-69 (2001) (citing U.S. CONST. art. II, §§ 2, 4; *id.* art. III, § 1).

84. Prophylaxis need not necessarily be activist. See John F. Manning, *The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 67-68 (2014). Professor Manning argues that the Constitution creates a sort of deference regime in favor of congressional interpretation. *Id.* at 60-65. He says that the Constitution affords great discretion to Congress to do what is necessary and proper to effectuate its delegated power, so the courts should not step in to police the boundaries of congressional power unless Congress has applied a clearly violative interpretation of necessary and proper. *Id.* at 83. This may or may not be right, but even if it is assumed to be correct, Professor Manning's approach still charges the judiciary with the duty to determine when another branch's interpretation is clearly violative of the Constitution. See *id.* Thus regardless of whether the judiciary is deferential to congressional or executive interpretation, even a deference regime implies that the judiciary retains the last word on issues of constitutional interpretation.

85. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 183 (1980) (“[C]onstitutional law appropriately exists for those situations where representative government cannot be trusted.”).

86. See Manning, *supra* note 84, at 44, 56, 83.

supreme law in a single Constitution that provides for countermajoritarian checks by a prophylactically insulated judiciary, American constitutionalism is uniquely tailored to create a formal barrier against slipping into tyranny.

## II. THE MODERNIST DEPARTURES FROM THE TRADITIONALIST POSITION

In Part I, we described what we have labeled the “traditionalist” view of American constitutionalism. American constitutionalism is, at its core, the embodiment of skeptical optimism in a political apparatus of countermajoritarian checking of majoritarian power. Our skeptical optimism is effectuated by enshrining our highest law in an entrenched written document subject to formal revision only by means of supermajoritarian amendment and whose limitations are subject to enforcement by an insulated countermajoritarian interpreter—the judiciary. Subsequent debates about the mechanics of implementing this vision typically skip explaining or defending this first step because it is simply taken for granted.

In recent years, however, scholars have developed two forms of what can be called modernist theory. Although acceptance of these theories in the courts is all but nonexistent, highly esteemed commentators have taken up their cause, and a wealth of literature has sprung forth advancing their arguments. Modernist scholars have engaged in an attack on the theoretical foundations located in step one, essentially challenging the nature of our constitutionalism itself. “Constitutional realists” and proponents of the “extracanonical constitution” challenge the premise that the complete American constitutional regime is set forth in the singular written document we identify as the Constitution.<sup>87</sup> “Departmentalists” and “popular constitutionalists,” on the other hand, acknowledge the value and weight of our written Constitution as the complete source of our supreme positive law, but dispute the role of the judiciary and thus our Constitution’s countermajoritarian roots.<sup>88</sup>

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87. See ACKERMAN, *supra* note 1, at 32-36 (advocating for a living constitution that incorporates other important legal documents into the constitutional canon); Young, *supra* note 1, at 413; *infra* Part II.A.

88. See KRAMER, *supra* note 1, at 246-48 (discussing scholars that dispute the counter-

Puzzlingly, scholars in each of these two camps devote virtually no attention to one another. But they are more alike than they realize, for they both misidentify the fundamental characteristic that makes our constitutionalism ours. We refer to both of these classes of scholar as “modernists” because both mark a clear break from the “traditionalist” view of American constitutionalism we have identified.<sup>89</sup> Unfortunately, both scholarly groups advocate approaches that, for reasons outlined below, we must largely reject.

A. “*Against the Constitution as Our Unique Supreme Law*”—  
*Constitutional Realism and the Extracanonical Constitution*

The classical story of American constitutionalism should be familiar to anyone who has ever graduated from grade school in the United States: In 1787, the Founders gathered in Philadelphia to reconstitute the federal government in the wake of the failure of the Articles of Confederation.<sup>90</sup> They crafted a written document designed to set forth the rule of law, define the order of legal supremacy, and construct our federal governmental structure. The document was ratified and amended shortly thereafter to include a list of negative rights.<sup>91</sup> Over the next two hundred years, the document was amended seventeen more times, and judicial interpretation of the document and its amendments helped the American people and their representatives understand the scope and limitations of constitutional governmental power.<sup>92</sup>

This was how early American legal theorists defined our constitutional government. In the late eighteenth century, the Founders understood the Constitution to embody the sum total of American supreme law.<sup>93</sup> One hundred years later, as the people rejoiced in

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majoritarian premise of American constitutionalism); TUSHNET, *supra* note 8, at 26 (arguing that Congress and U.S. citizens should be skeptical of the Supreme Court’s judicial supremacy and its decisions defining the scope of its own power); Paulsen, *supra* note 1, at 221 (advocating that no department has exclusive authority over saying what the law is); *infra* Part II.B.

89. See *supra* Part I.

90. See *supra* notes 37-38 and accompanying text.

91. See Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 *BYU J. PUB. L.* 87, 87-88 (2011).

92. See *id.* at 87-88, 118.

93. See Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique*

the centennial anniversary of the Constitution's ratification, commentators hailed the uniqueness of the American constitutional regime.<sup>94</sup> The power of the American Constitution, they wrote with reverence, came in its brilliant duality: a written document enacted by the people, but entrenched against change and not subject to the shifting choices of momentary majorities.<sup>95</sup> Use of the written format was key, "for how would it be possible to argue upon the constitutionality of any measure, when there was no constitution in existence?"<sup>96</sup>

The story of the American Constitution told by a number of highly regarded twentieth- and twenty-first century constitutional scholars, however, is strikingly different. Starting with Karl Llewellyn, the twentieth century saw scholars adopt what they termed a "realist" view of the Constitution.<sup>97</sup> Llewellyn argued that the Constitution's text and the system set forth therein constitutes our government only insofar as modern practice and conventions continue to perpetuate their reign.<sup>98</sup> His primary argument was that the only elements of the Constitution that live on today are those to

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*of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1931, 1957 (1999) ("Fixated as ... Madison was on the belief that the interested, opinionated, and impassioned impulses of the people would be the preponderant sources of constitutional disequilibria, the last possibility that he wanted to contemplate was that the people would ever be called upon to speak so vigorously again. In the womb of time, no one could predict what future decades, generations, or centuries would produce; but to the extent that Madison gazed into the future, he seemed to hope that all future constitutional change would occur within the *exclusio alterius* bounds of Article V.").

94. See Belz, *supra* note 16, at 113-14.

95. See 1 HERMANN VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* (John J. Lalor & Alfred B. Mason trans., Chicago, Callaghan & Co. 1889) (1876).

96. FREDERICK GRIMKE, *CONSIDERATIONS UPON THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 127 (New York, Derby & Jackson 2d ed. 1856); see Belz, *supra* note 16, at 111 ("For most students of American government in the first half of the nineteenth century the chief fact about the American constitution was, in the words of Francis Lieber, that 'It was the positive enactment of the whole at one time, and by distinct authority.' This quality of being an 'enacted or written constitution,' said Lieber, 'distinguishes it especially from the English polity with its accumulative constitution' consisting in 'usages and branches of the common law, in decisions of fundamental importance, in self-grown and in enacted institutions, in compacts, and in statutes embodying principles of political magnitude.'" (quoting 1 FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 131, 221 (Philadelphia, Lippincott, Grambo & Co. 1853))).

97. See generally K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

98. *Id.* at 12.

which modern Americans continue to adhere.<sup>99</sup> Moreover, he argued, the Constitution itself was merely an experimental first step toward creating a constitutional institution—a broad code of behavior and norms that structures the relationship between the people and their government.<sup>100</sup>

Recent constitutional history contributed to the scholarly shift to constitutional realism as well. This country has changed profoundly over the last 150 years, but change has largely been effected *outside* of the constitutional amendment procedure. Article V was written to require supermajoritarian action to achieve constitutional amendment precisely because the Constitution was our supreme law.<sup>101</sup> Those elements of positive law that we mustered the strength to etch into stone would be emblematic of our most cherished values and would safeguard the spoils of social progress against arbitrary repeal or reversal. Yet the reality is that since the years following the Reconstruction Amendments, most—though by no means all—of our greatest political and legal achievements have been implemented by ways other than resort to the amendment process of Article V.<sup>102</sup>

Over the last century and a half, the constitutional amendment process has given Congress the power to levy an income tax,<sup>103</sup> established direct election of the Senate by popular vote,<sup>104</sup> granted women the right to vote,<sup>105</sup> enacted<sup>106</sup> and discarded prohibition on the manufacture and sale of alcohol,<sup>107</sup> changed the date the

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99. *Id.*; cf. Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) (voicing the political scientist's view of constitutionalism writ large that, despite the Supremacy Clause's declaration that the Constitution is supreme law, "it is only through a history of continuing assent or acquiescence that the document could become law," and our constitutional tradition is not concerned with "the document alone").

100. Llewellyn, *supra* note 97, at 17-18.

101. See U.S. CONST. art. V.

102. In other words, the last time that the United States implemented dramatic social or federal governmental change by way of the Article V amendment process was during Reconstruction from 1865 to 1870, through the Thirteenth, Fourteenth, and Fifteenth Amendments. See U.S. CONST. amends. XIII, XIV, XV.

103. *Id.* amend. XVI.

104. *Id.* amend. XVII.

105. *Id.* amend. XIX.

106. *Id.* amend. XVIII.

107. *Id.* amend. XXI.

President takes office<sup>108</sup> and limited the number of terms he could serve,<sup>109</sup> granted electoral college votes to the District of Columbia,<sup>110</sup> and established the order of presidential succession.<sup>111</sup> Meanwhile, the country's changing perspective on individual liberties—which were quite clearly the focus of the Bill of Rights and the Reconstruction Amendments—has become the law of the land mostly by way of statutes,<sup>112</sup> treaties,<sup>113</sup> and judicial decisions.<sup>114</sup> And the nation has implemented major changes to the general structure of the federal government outside of the constitutional amendment process as well, most notably in the broad expansion of the administrative state throughout the New Deal.<sup>115</sup> Article V amendment simply has not been the primary mechanism by which post-Reconstruction America implements major structural change or enshrines civil liberties.<sup>116</sup>

That great change has taken place without constitutional amendment to facilitate it is one of the central proof points for constitutional realists: because the American people have come to understand new constraints on government power without Article V amendment, the written document and its subsequent amendments and judicial interpretations cannot possibly form the

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108. *Id.* amend. XX.

109. *Id.* amend. XXII.

110. *Id.* amend. XXIII.

111. *Id.* amend. XXV.

112. *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-532, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

113. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

114. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (determining that sodomy laws violate the Fourteenth Amendment's guarantee of due process); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that the Constitution protects an individual's right to privacy); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that public school segregation violates the Equal Protection Clause).

115. *See generally* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 509-10 (2002).

116. This is not uniformly true, as the Nineteenth, Twenty-Fourth, and even the Twenty-Sixth Amendments each arguably served to enshrine new individual rights or civil liberties. Yet even these amendments are illustrative: certainly the Civil Rights Act of 1964 did more for the rights of African Americans than did the Twenty-Fourth Amendment; and although the Nineteenth Amendment provided for women's suffrage, the Equal Rights Amendment never quite made the cut. Ultimately, the majority of advances in minority rights over the last 150 years occurred outside of Article V amendment.

complete American Constitution.<sup>117</sup> Instead, constitutional realists assert that the complete American Constitution must consist of something more diffuse and difficult to ascertain. Realist commentators throughout the academy have thus taken to challenging the value of the written Constitution, variously claiming that American constitutionalism consists of the founding document *and* some combination of statutes, judicial precedents, treaties, constitutional understandings, social norms, movements, and conventions.<sup>118</sup>

To the extent that the realists are arguing that widespread *societal* practice may effectively *repeal* provisions contained in the formal document, their argument may well give rise to serious moral problems. By that reasoning, presumably the longstanding existence of Jim Crow laws in the post-Civil War South would constitute a repeal—at least regionally—of the Fourteenth Amendment’s Equal Protection Clause.<sup>119</sup> This form of “repeal by adverse possession” would of course defeat the purposes of having a written constitution in the first place. To the extent the realists are arguing, not that the written Constitution may be *reduced* by widespread practice but rather that it may be augmented by such practice, however, the issue becomes more complex. That the United States has a written Constitution is beyond dispute. But that the document written in 1787 and subsequently amended twenty-seven times represents the complete “United States Constitution” is, remarkably, far from settled.

Modernist theorists have argued that the *complete* American Constitution is broader than the written document. Todd Pettys, for example, has described the written Constitution as a “myth” because the three chief functions the American Constitution serves—(1) creating, empowering, and limiting the branches of the federal government; (2) establishing basic rights that may be asserted against government action; and (3) providing rules of recognition—are often accomplished by statutory or other non-constitutional means.<sup>120</sup> He writes:

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117. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 51-52 (1991).

118. See, e.g., ACKERMAN, *supra* note 1, at 32; Matthew S.R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587 (2006); Young, *supra* note 1.

119. U.S. CONST. amend. XIV, § 1.

120. Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991,

If a newcomer to the United States wished to understand the structure of the federal government, the powers of its institutions, the content of its citizens' rights, and the rules and principles from which Americans ultimately draw when determining whether the government has behaved permissibly in a given instance, he or she would need to do much more than merely study the texts that the American people formally have assigned constitutional status.

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... To many Americans today, individual rights conferred by such statutes as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Americans with Disabilities Act of 1990 are every bit as important as many of those that are explicitly conferred by the formally ratified constitutional texts. In these respects, the 1787 document and its enumerated amendments do comparatively little of the actual work of constituting the nation's government and of protecting individual rights that the citizenry deems important.<sup>121</sup>

Bruce Ackerman takes a similar "alien visitor" angle.<sup>122</sup> In the latest addition to his *We the People* collection, Ackerman begins with a fictional account of a conversation between himself and a hypothetical Middle Eastern scholar who is ignorant of the Constitution and the history of American social change, but is an otherwise brilliant and capable constitutional interpreter.<sup>123</sup> Professor Ackerman's imaginary student walks through the Constitution, article by article and amendment by amendment, but cannot glean from the Constitution alone how modern Americans understand their relationship with the federal government.<sup>124</sup> Ackerman rightly points out that an alien with no knowledge of American history or custom could learn a great deal about American constitutional law by reading the original document and Bill of Rights, but would likely give added weight and faulty historical significance to provisions that are either unimportant or misleading.<sup>125</sup> Likewise, he says, so limited a

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1000 (2009).

121. *Id.* at 1001-02 (footnotes omitted).

122. ACKERMAN, *supra* note 1, at 23-26, 32.

123. *Id.*

124. *Id.*

125. *Id.* at 32.

reading would fail to recognize the way major social movements since the founding have informally amended the Constitution.<sup>126</sup>

Professor Ackerman's theory revolves around the idea that on occasion popular sovereignty leads to a groundswell, from movement to party to president, and that at the end of a five-step process of signaling, proposal, triggering, ratifying, and consolidation, the people engage in informal constitutional amendment.<sup>127</sup> These "constitutional moments" change the meaning of the Constitution in some permanent way.<sup>128</sup> He argues that one such moment occurred through the legislative action that took place during the brief window in time from 1935-1938, after which Americans accepted the New Deal and the basically limitless nature of the Commerce Clause.<sup>129</sup> Professor Ackerman sees signaling in the election of Roosevelt and the popular movement behind him; he sees the growth of an active federal government that can truly regulate commercial activity as the proposal; triggering in Roosevelt's first reelection; ratification in Roosevelt's second reelection (even in spite of his court-packing plan); and consolidation when, in later years, even the Republicans simply accepted the new Rooseveltian federal government as constitutionally permissible.<sup>130</sup> In his latest volume, Ackerman argues that the civil rights movement and the passage of the Civil Rights Act together form another of his "constitutional moments."<sup>131</sup> Asserting that the same five-step process of informal amendment occurred in the 1960s, he says the Voting Rights Act, the Civil Rights Act, and the progress this country made during the civil rights revolution have been constitutionalized—even though they appear nowhere within the text of the document.<sup>132</sup> "I am taking the next step," he says, "urging you to discard the residual *quasis* and other hesitations and grant *full constitutional status to the landmark statutes of the civil rights revolution*. Otherwise, our view of this great American triumph will be profoundly distorted."<sup>133</sup>

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126. *Id.*

127. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1762 (2007).

128. *Id.* at 1763.

129. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 257 (1998).

130. *Id.* at 256-58.

131. ACKERMAN, *supra* note 1, at 118-19.

132. *See generally id.*

133. *Id.* at 34 (emphasis added) (footnote omitted).

Ernest Young has similarly employed Llewellyn's realist logic to pinpoint what he calls "the constitution outside the Constitution."<sup>134</sup> According to Professor Young, because some statutes, treaties, conventions, and norms are "constitutive" in their form and their function, they can be said to be part of the broader American Constitution.<sup>135</sup> Specifically relying on Llewellyn and other early constitutional realists, Professor Young argues that "the role of ordinary law in constitutional ordering is pervasive" and thus a complete understanding of the American Constitution requires interpreters to look beyond the Constitution as formally enacted.<sup>136</sup> He points to a handful of statutes, including the Clean Water Act of 1976, and explains that because they serve a government-ordering function and help to define our relationship with our government, they form part of the American Constitution.<sup>137</sup> Professor Young and other realists argue that because other statutes share traits with the Constitution—by creating government, conferring individual rights, and being at least somewhat entrenched against change—they can be said to be part of the broader constitutional picture in the United States.<sup>138</sup>

All of this amounts to self and public deception. Constitutional realists challenge the fundamental import of the Constitution's writtenness while purporting to leave intact the underlying principles at the core of the American vision. They do not assert, for example, that the judiciary is not possessed of interpretive power, that the structures contained within the document fail to serve checking purposes, or that the convention failed to produce a document of meaningful constitutive value. Indeed, proponents of constitutional realism and the extracanonial constitution would likely not dispute the fundamental elements of the traditional view of American constitutionalism—that the written Constitution implemented American skeptical optimism through a political apparatus comprised of countermajoritarian checking against majoritarian power—as an assumed premise. Even if all of this is true, however,

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134. Young, *supra* note 1, at 473.

135. *Id.* at 454.

136. *Id.*

137. *Id.* at 415-16.

138. *Id.*

they argue that we have not necessarily located all of our nation's constitutive law in the written document.

The trouble with this argument, however, is that in order to arrive at their conclusion that the written document need not embody the entirety of American constitutive law, constitutional realists necessarily disclaim skeptical optimism and countermajoritarianism as defining characteristics of American constitutionalism. Professor Pettys's three chief functions of the American Constitution are fine descriptions of some of the Constitution's principal attributes,<sup>139</sup> but ordinary legislation enacted by the majoritarian process of bicameralism<sup>140</sup> and presentment<sup>141</sup> serves those functions in a categorically different fashion. Unlike rights and dictates actually grounded in the text of the Constitution, all of these statutes, no matter how fundamental we currently deem them to be, may be repealed by the traditionally majoritarian legislative process, which requires only bicameralism and presentment. And we know this to be true—ironically—because the *real* Constitution tells us so.

The idea that much of our politically and legally transformative law has been subconstitutional is perfectly consistent with the concept of constitutional democracy. The formal amendment process was purposely made extremely difficult in order to prevent the current views of the prevailing majority from being constitutionalized because such change binds future majorities.<sup>142</sup> It is only when the alteration is truly foundational that it is to receive formal constitutional status. As a result, on most occasions when majoritarian preferences are transformed into law, they are just as easily subject to future modification due to changes in those preferences. Except for truly foundational matters that have received formal constitutional status, democracy permits nothing else.

Perhaps the modern realists are engaged in a game of semantics. Perhaps they have chosen simply to equate law that is so ingrained within our nation's tradition that it is reasonably characterized as "fundamental" with law dictated by the Constitution. But while both forms of law could plausibly be characterized as "fundamental," that does not mean the two forms of law are legally and structurally

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139. Pettys, *supra* note 120, at 1000.

140. U.S. CONST. art. I, § 1.

141. *Id.* art. I, § 7.

142. *See supra* note 101 and accompanying text.

identical. For example, the 1964 Civil Rights Act can be repealed if majorities in both houses of Congress vote to do so, and the President signs that bill. The First Amendment, in stark contrast, may *not* be repealed in this manner. Rather, it may be repealed only by compliance with the extremely demanding requirements of Article V. We presume that even Professors Ackerman and Young would have to concede as much. Indeed, if they are unsure of this conclusion, a recent graduate of an eighth-grade civics course could confirm it for them.<sup>143</sup>

Insofar as ordinary legislation limits federal governmental power or establishes basic rights that may be asserted against the government, one must ask how truly effective those limits are and how basic the rights established actually are if temporary majorities can easily erase them. To be sure, the Civil Rights Act of 1964 was a powerful piece of legislation that inarguably expanded minority rights and took a dramatic step toward perfecting the vision of the Reconstruction Amendments. And it is true that given current political realities, it is highly unlikely, if not unthinkable, that it will be subject to repeal, at least in the foreseeable future. But American constitutionalism is premised on the idea that mere political improbability is not sufficient to safeguard against the tyranny of temporary majorities. Every trace of the prophylactic skepticism that the traditionalist view places at the heart of our constitutionalism vanishes when one ascribes constitutional weight to ordinary legislation.

Moreover, any new federal power established by majoritarian act can be nullified by the Supreme Court for noncompliance with the enumerated powers contained within the written Constitution. It is easy to say that, because of its profound impact on the process of selecting the people who will serve as our representatives in the federal government and its powerful role in defining the relationship between people of color and their government, the Voting

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143. Professors McGinnis and Rappaport argue that the requirement of bicameralism and presentment is itself a tool of supermajoritarian rulemaking. See McGinnis & Rappaport, *supra* note 13, at 712-13, 770-73. It may be true that the requirements of bicameralism and presentment require more than a straight up-or-down democratic vote, but we believe that to the extent that supermajoritarian effort is needed to enact ordinary legislation, it is of an altogether different character from the supermajoritarian movement necessary to amend the entrenched written Constitution and thereby safeguard a rule against easy repeal or revision.

Rights Act is a piece of constitutive law.<sup>144</sup> But reality belies realism, as was made clear by the Court in *Shelby County v. Holder*, in which the Court held unconstitutional Congress's method of implementing a key provision of the Voting Rights Act because it violated the structural federalism set forth in the Constitution.<sup>145</sup>

One might reasonably suggest that if we want to insulate legislation such as the Civil Rights Act of 1964 from the choices of future majorities, we should constitutionalize it through Article V's formal amendment process. But purely as a matter of streetwise politics, it is virtually inconceivable that this would ever happen at any time in the foreseeable future. The reason, ironically, is that as presently structured, the current Congress would probably never provide the requisite majority, and if it were to do so, it is extremely doubtful that the requisite supermajority of state legislatures would concur.

Constitutional realism is not only descriptively wrong, but also normatively undesirable if for no other reason than that it renders ambiguous at best and incoherent at worst a constitutional regime whose core simplicity is one of its great virtues. If the Voting Rights Act was part of an informal process of constitutional amendment or is part of our broader American Constitution, was *Shelby County* also a judicial act of constitutional amendment? Who gets to decide when a "constitutional moment" has taken place?<sup>146</sup>

Moreover, the danger of ideological manipulation plagues any attempt to extend the "constitutional" label beyond the four corners of the actual document.<sup>147</sup> It is perhaps telling that Professor Ackerman grants constitutional significance to the New Deal and the legislation arising out of the civil rights movement,<sup>148</sup> but not to

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144. Indeed, Professors Ackerman and Pettys have argued as much. See ACKERMAN, *supra* note 1, at 160-61; Pettys, *supra* note 120, at 1001-02; *supra* notes 117-133 and accompanying text.

145. 133 S. Ct. 2612, 2630-31 (2013).

146. See Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. 1067, 1067 (2009) ("Constitutional moments are momentous, but they are not irregular. To the contrary, they are *routine*. In particular, the changeover of executive power that we are undergoing right now bears witness to a simple proposition: *every presidential transition is a constitutional moment.*").

147. This is not to suggest that our approach dictates a historically based or originalist mode of interpretation. It means only that to have "constitutional" status, a dictate or precept must have grounding in the terms of the document.

148. See ACKERMAN, *supra* note 1, at 18-19, 160-61.

the Alien and Sedition Acts,<sup>149</sup> the Internal Security Act of 1950,<sup>150</sup> or the USA PATRIOT Act<sup>151</sup>—all three of which served to change the nature of the relationship between the government and the governed, had profound impacts on the exercise of federal power, and contravened liberal values.<sup>152</sup> Because of its inherently vague contours, constitutional realism provides the opportunity for people to engage in all sorts of definitional subterfuge to advance their own political ideals.

What is most striking about the realist approach is, ironically, just how unrealistic it is. Realist scholars assert that some aspects of the written Constitution are borderline irrelevant because they are not significant in defining the way the government executes public power.<sup>153</sup> Likewise, they say, some extracanonical laws and norms are now to be deemed woven into the Constitution itself.<sup>154</sup> But one need look no further than the Supreme Court Reporter to see how our Supreme Court engages in all kinds of contortionism just to stay within the boundaries set up by the written document.<sup>155</sup> The very purpose of realism is to look past formality to acknowledge what is actually happening in the world and describe things as they are,<sup>156</sup> but neither citizens nor the Court understand the statutes, movements, or social norms that supposedly comprise the American “constitution outside the Constitution” to actually function as our constitutive law in the same way the Constitution does. If the Court understood our Constitution as the realists do, the Court would have no reason to search for an individual right to bear arms in the Second Amendment<sup>157</sup> or a right of privacy in the penumbras of the

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149. An Act Respecting Alien Enemies (Alien Act), ch. 66, 1 Stat. 577 (1798).

150. Subversive Activities Control Act of 1950 (Internal Security Act), Pub. L. No. 81-831, 64 Stat. 987.

151. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered statutes).

152. *Cf., e.g.,* Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453, 475 (2007) (characterizing the post-9/11 reaction as one that “emphasize[d] the incursion on rights and values in the United States, most often affecting immigrants, Muslims, and political dissenters”).

153. *See* Young, *supra* note 1, at 413, 432.

154. *See id.* at 410.

155. *See infra* notes 157-60 and accompanying text.

156. *See* Young, *supra* note 1, at 410 (citing Palmer, *supra* note 118, at 592-93).

157. *See* *District of Columbia v. Heller*, 554 U.S. 570, 592, 595, 625 (2008).

Bill of Rights.<sup>158</sup> Nor would there have been a reason for either conservative Justices to have grounded the concept of economic freedom—anomalously—in the Due Process Clause,<sup>159</sup> or later decisions to reject that doctrine for the very reason that it had no basis in text.<sup>160</sup>

All told, constitutional realism is unrealistic because it minimizes the role of our written Constitution and extends constitutional status to laws that can indisputably be altered or repealed by majoritarian action.<sup>161</sup> It therefore confuses the boundary between supreme and inferior law in this country. Lawmakers, the American people, and the Supreme Court have always understood the Constitution as setting forth a dictated framework that, although subject to changing interpretation by a countermajoritarian judiciary, at its outer limits may only be changed by a difficult supermajoritarian process.<sup>162</sup> The American Constitution has always been accepted as specifically removed from change by majoritarian process, and even in the context of the New Deal—the closest thing to majoritarian process changing our constitutional framework America has experienced—the Court never openly ignored this directive.<sup>163</sup> A somewhat later example is *Griswold v. Connecticut*: even when recognizing rights *never before found and with no textual basis in the Constitution*, the Court went out of its way to ground its decision in the written Constitution (in that case, finding an individual right to privacy embedded somewhere between the lines of the Bill of Rights).<sup>164</sup>

In some ways, constitutional realism is merely a byproduct of the increasing number of constitutions in existence throughout the world. Since the Philadelphia convention in 1787, hundreds of national constitutions have been drafted and ratified in countries as far-flung and varied as China,<sup>165</sup> South Africa,<sup>166</sup> Spain,<sup>167</sup> and

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158. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

159. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905).

160. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

161. See Young, *supra* note 1, at 410.

162. See U.S. CONST. art. V.

163. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

164. 381 U.S. 479, 484-85 (1965).

165. See generally XIANFA (1982) (China).

166. See generally S. AFR. CONST., 1996.

167. See generally C.E., B.O.E. n.311, Dec. 29, 1978 (Spain).

Argentina.<sup>168</sup> Different regimes have deployed different structures to effectuate constitutional governance and to enshrine a wide range of values and national goals.<sup>169</sup> As a result, the scholarly conception of what defines constitutionalism has evolved to capture a wide range of regime choices.<sup>170</sup> Constitutional realism seems logically to spring from the changing global perspective on what, generally speaking, comprises a constitution.

This is how the divergent theories of political constitutionalism and legal constitutionalism came to be viewed as concurrently legitimate despite their seemingly contradictory designs. Elements of each appear within the other, but the two approaches to constitutionalism are, at their roots, diametrically opposed to one another.<sup>171</sup> In her recent article about the British judiciary, Professor Erin Delaney described the fundamental difference between legal constitutionalism and political constitutionalism as “the institution or institutions entrusted with the responsibility for ensuring both accountability and governmental (and possibly societal) fidelity to the constitutional order.”<sup>172</sup> She wrote:

Legal constitutionalists maintain that constitutional goods are best guaranteed through the articulation of rights-protecting fundamental law, a law that stands superior to and apart from daily political machinations and to which all governmental institutions are bound, primarily through the mechanism of judicial review. In contrast, political constitutionalists argue that resting ultimate authority in a democratic parliament better achieves the “constitutional goods of rights and the rule of law,” by protecting values of democracy and republican non-domination.<sup>173</sup>

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168. See generally CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

169. Compare XIANFA arts. 1, 6 (1982) (China) (establishing socialist state), with C.E., B.O.E. n.311, arts. 1-2, Dec. 29, 1978 (Spain) (establishing a “social and democratic State” governed by a parliamentary monarchy).

170. See *supra* notes 57-61 and accompanying text (chronicling this evolution).

171. See Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543, 548 (2014).

172. *Id.*; see also Paul Craig, *Political Constitutionalism and Judicial Review*, in EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE 19, 32 (Christopher Forsyth et al. eds., 2010) (observing that political constitutionalism employs “non-judicial mechanisms for securing accountability”).

173. Delaney, *supra* note 171, at 549 (quoting RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM 10 (2007)).

Importantly, political constitutionalism is almost invariably “unwritten,” or more precisely, written in scattered sources rather than a single comprehensive written document.<sup>174</sup> In contrast, legal constitutionalism tends to look to a single source of supreme law.<sup>175</sup> There are, to be sure, contrarian voices on both sides.<sup>176</sup> Some scholars have argued that political constitutional regimes might have a role for courts to play and that political and social realities create a dynamic within these regimes that might expand and calcify the judicial role; some others have offered that majoritarian influences should play a more significant role, and courts a lesser one, in legal constitutional regimes.<sup>177</sup> Thus, perhaps as a general, nation-agnostic assessment of what comprises a constitution, realism makes some sense. But constitutional realism has led to what should be an impermissible logical next step: the practice of drawing lessons and importing values from nations for whom constitutionalism is not defined by the same core principles as is our own.

Scholars lean on Llewellyn, Ackerman, Young, William Eskridge, and John Ferejohn to point out that a constitution is above all else—and perhaps *without* all else—the set of rules, standards, practices, and norms that compose the continuing understanding of how the government exercises power.<sup>178</sup> If that is true, then the American Constitution might look a lot more like the British or Israeli constitutions than we realize, and might include a variety of ordinary laws and norms outside of our constitutional document. But as a matter of *American* constitutionalism, it seems at the very least misleading, and more likely just categorically wrong, to ascribe constitutional significance to extracanonial elements of our legal regime.

The word “Constitution” has traditionally possessed special meaning in the United States.<sup>179</sup> It is a powerful word whose usage in political speech and legal argumentation amounts to a trump

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174. *Id.* at 550-51.

175. *Id.* at 553.

176. See Miguel Poiars Maduro, *In Search of a Meaning and Not in Search of the Meaning: Judicial Review and the Constitution in Times of Pluralism*, 2013 WIS. L. REV. 541, 542-43.

177. See, e.g., *id.* at 551-52.

178. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1248-49, 1248 n.149, 1258 n.194, 1269-71 (2001).

179. See, e.g., U.S. CONST. art. VI, cl. 2 (stating that the U.S. Constitution is the “supreme Law of the Land”).

card.<sup>180</sup> It is understood to be higher law, or the ground rules of the game, and it limits the scope of all other discussion of American law.<sup>181</sup> A word might have a variety of definitions throughout the world, but merely sharing traits with the Constitution does not make these statutes part of the American Constitution. This is precisely because the United States Constitution is contained within a single document that provides for interpretation and enforcement as supreme by the insulated judiciary.<sup>182</sup> That design lays the foundation for entrenchment, creation of government, and conferral of individual rights upon which politics, social movements, and legislation can build other elements of public power. By diminishing the importance of the written Constitution and ascribing constitutional significance to extraconstitutional directives, realist scholars destabilize a constitutional regime that is uniquely situated to achieve a very particular American constitutional mission. The “complete” American Constitution cannot include statutes such as the USA PATRIOT Act,<sup>183</sup> the Civil Rights Act,<sup>184</sup> or the Clean Water Act<sup>185</sup> without diluting the power of our constitutional regime, especially because each of these laws can legally be displaced by simple majoritarian act.<sup>186</sup>

Constitutional realists conflate the idea of constitutionalism evolving to accommodate other constitutional regimes with American constitutionalism evolving to include the other pieces of our code that implement our bedrock principles. But what they fail to recognize is that our form of constitutionalism does not allow for acknowledgment of bedrock principles in ordinary statutes.<sup>187</sup> This is because our method of promulgating a code that includes our bedrock principles and determining how we would like to create, implement, enforce, and protect that code is by means of a single

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180. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 378 (1819).

181. *See id.*

182. *See* U.S. CONST. art. VI, cl. 2.

183. *But see* Palmer, *supra* note 118, at 628 (implying that the USA PATRIOT Act is constitutional in nature).

184. *But see* ACKERMAN, *supra* note 1, at 18 (arguing that the Civil Rights Act is the “centerpiece of the living constitution”).

185. *But see* Young, *supra* note 1, at 416, 433.

186. *See* McGinnis & Rappaport, *supra* note 13, at 782, 797 n.398.

187. *See* U.S. CONST. art. VI, cl. 2.

comprehensive document that establishes a checking branch.<sup>188</sup> Including other forms of law under the constitutional heading minimizes the uniqueness of our contribution to political theory, threatens to dilute the force of the *real* Constitution, and gives rise to at best enormous confusion, and at worst, cynical political manipulation.

Given the traditional American understanding of the term “constitution,” our concern is more than semantic, for to attribute constitutional weight to noncountermajoritarian elements of our legal and governmental system, regardless of the phrasing one uses, is downright deceptive. To the extent that the words “constitutional” and “constitution” retain their long-accepted American meaning, the realists are simply wrong. American constitutionalism is, at its core, the practice of codifying countermajoritarian limits on majoritarian government. So long as those laws and norms that realists deem part of the extracanonical constitution are subject to modification by majoritarian processes,<sup>189</sup> realists cannot be describing the Constitution in the American sense of the word. And we know the elements of the extracanonical constitution are subject to majoritarian change, ironically, because the Constitution itself authorizes majoritarian processes to change them.<sup>190</sup>

*B. “Against the Ultimate Countermajoritarian Check of Judicial Supremacy”—Departmentalism and Popular Constitutionalism*

Constitutional realists take a modernist position that the use of a singular written document to set forth the totality of our supreme constitutive law need not be viewed as a core characteristic of American constitutionalism.<sup>191</sup> But these scholars do not purport to challenge the root principle or political apparatus embedded in the Constitution. We think it unlikely that many of these scholars would deny that the document we call our Constitution contains a system of countermajoritarian checks to majority power, although, as noted earlier, if one took literally the realist’s identification of constitutionalism with accepted practice, this would not be true.

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188. See Young, *supra* note 1, at 410.

189. See U.S. CONST. art. I, § 7.

190. See Belz, *supra* note 16, at 121-22.

191. See *supra* Part II.A.

Instead, they primarily focus their energy on arguing that the written Constitution is an incomplete capsule of our supreme law, both because some elements contained within it are unimportant or defunct and because various laws and movements outside the document are politically entrenched and thus serve to define the relationship between the government and the governed.<sup>192</sup>

In contrast, another group of modernist scholars claims to understand and accept the countermajoritarian design of our Constitution as well as the value such an apparatus advances, but proposes that another of the key methods of activating this countermajoritarian apparatus should not be considered central to our constitutionalism and therefore should be abandoned.<sup>193</sup> Rather than challenging whether the written Constitution is the sole source of our nation's supreme law, these scholars challenge the validity and worth of both judicial review and judicial supremacy.<sup>194</sup> These scholars may generally be sorted into two subcategories: "departmentalists" and "popular constitutionalists." Departmentalists are those scholars who suggest that the Constitution neither commands nor permits judicial supremacy.<sup>195</sup> They argue for equal measures of interpretive authority across all three branches of the government and particularly emphasize the role of the executive in constitutional interpretation.<sup>196</sup> Popular constitutionalists, on the other hand, do not argue that judicial supremacy is unconstitutional, but instead maintain that it is normatively undesirable and that, because judicial review is not explicitly provided for in the Constitution's

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192. See *supra* notes 97-118 and accompanying text.

193. See, e.g., Paulsen, *supra* note 1, at 221, 325 (arguing that the executive branch has a right to interpret the law that is equal to and coordinate with that of the judiciary).

194. See *id.*

195. See *id.*

196. Although he is perhaps the best known among them, Michael Stokes Paulsen is not the only champion of departmentalism; however, different scholars often advocate different forms of the theory. See, e.g., Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1421 (1999); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 352 (1994); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 783 (2002). It remains unclear, however, whether Professor Paulsen would view other departmentalists as such, seeing as many of them either espouse disbelief in judicial review (Paulsen does not) or reject presidential authority to refuse enforcement of judicial decrees in particular cases—something Paulsen refers to as the *Merryman* power, which he views as a valid exercise of executive interpretive power. See Paulsen, *supra* note 1, at 223.

textual directives, constitutional interpretive authority can and should be transferred from the unrepresentative judiciary back to the people.<sup>197</sup>

Both theories should be viewed with skepticism and concern. The prophylactically insulated judiciary is both an essential complement to and a logical outgrowth of the explicit textual commitment to the precept of countermajoritarianism. This nation was born of a revolution fought for political accountability, yet we quite consciously chose to make one of the three branches of our fledgling national government completely insulated from public accountability.<sup>198</sup> This decision was the result of recognizing that only by inclusion of an entirely insulated judicial branch could this democratic republic be protected from itself.<sup>199</sup>

Democracy embodies a belief in human flourishing—that the people can control their own destiny by participating and believing in their representative government.<sup>200</sup> But by establishing a federal government featuring a politically unaccountable coequal judicial branch, the Framers effectively acknowledged that unchecked majoritarian government would allow temporary majorities to stifle unpopular opinions and oppress minorities. The Framers, concerned primarily with thwarting the threat of tyranny in any form, built a Constitution that enshrined as supreme law our uniquely American skeptical optimism. Including a judiciary both entirely insulated from political influence and equipped with interpretive authority was the keystone to the achievement of the Constitution's devised ends. Without a countermajoritarian judiciary armed with the power of judicial review, the entire design of our national government would be meaningless. Unfortunately, neither the departmentalists

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197. See KRAMER, *supra* note 1, at 8; TUSHNET, *supra* note 8, at 194; see also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1028-29 (2004). As Professors Prakash and Yoo have noted, the line between departmentalism and popular constitutionalism is blurry, in large part because the scholars who worked to formulate these theories have often only vaguely defined them. Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1543-44 (2005) (reviewing KRAMER, *supra* note 1).

198. See U.S. CONST. art. III, § 1 (placing all judicial power in the Supreme Court and in any inferior courts established by Congress and granting life tenure to judges of such courts).

199. See CHOPER, *supra* note 36, at 5-7.

200. See ELY, *supra* note 85, at 181 (arguing that the core idea at the heart of American constitutionalism is democracy and that organizing our country around democratic principles is normatively desirable).

nor the popular constitutionalists recognize this foundational insight.

*1. Departmentalism: A Historical and Doctrinal Argument  
Against Judicial Supremacy*

Departmentalism, in its various forms, denies that the judiciary is supreme in saying “what the law is,”<sup>201</sup> and instead asserts that each department—legislative, executive, and judicial—has equal authority to engage in constitutional interpretation in fulfilling its respective constitutional role and performing its assigned duties.<sup>202</sup> This theory is based on the idea of “coordinacy”: our system, they argue, is primarily designed to achieve the independent, coordinate status of coequal branches.<sup>203</sup> Accordingly, the three coordinate branches were intended to serve as checks on one another, and no single one was meant to reign over the other two.<sup>204</sup> At its core, departmentalism is focused on undermining the role of the judiciary as the ultimate arbiter of constitutional meaning and on locating that final interpretive authority in the executive branch.<sup>205</sup>

Departmentalism’s most vocal and extreme proponent, Michael Stokes Paulsen, begins by arguing that the President has a large degree of interpretive power.<sup>206</sup> He says the rationales for executive review are the same as the rationales for judicial review set forth in *Marbury v. Madison* and *The Federalist No. 78*.<sup>207</sup> Those rationales, he argues, explain why executive review is equally as valid in the context of vetoes and pardons as it is in faithful execution of the law and the enforcement of judicial final judgments.<sup>208</sup> Paulsen then asserts that because the rationale for executive review is the same as the rationale for judicial review, any counterarguments against

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201. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

202. See, e.g., Paulsen, *supra* note 1, at 221, 325.

203. See *id.* at 228-29, 235.

204. See *id.* at 221, 325.

205. See *id.* at 221.

206. See *id.* at 219-20.

207. *Id.* at 241-45.

208. *Id.* at 224; see also Eisgruber, *supra* note 196, at 348 (agreeing with Paulsen that Chief Justice Marshall’s logic in *Marbury* can be said to justify executive review just as capably as it explains judicial review, and that judicial supremacy is thus not the exclusive outcome of his reasoning).

executive review are equally applicable to judicial review.<sup>209</sup> One cannot believe in one without believing in the other, he reasons, and the ultimate power of judicial review cannot be “supreme” to the power of executive review without undermining the argument for judicial review in the first place.<sup>210</sup> Thus, because the judiciary lacks the authority to execute its own final judgments, it is the *executive* that holds the ultimate power of interpretation. According to Professor Paulsen, this should mean that the President can defy judicial rulings without upsetting the constitutional balance of powers.<sup>211</sup>

This view problematically understands coordinacy to require that the executive branch possess the same type of *power* as the judiciary, when in fact coordinacy requires only that the branches possess the same *quantum* of constitutional authority.<sup>212</sup> By this we mean that the mere fact that the branches are designed to possess equal *levels* of power in no way necessarily implies that they possess *identical* power. Indeed, no one suggests that the judiciary has power to assert executive power vested by Article II in the President. There is, then, no reason to assume that the executive logically must possess the equivalent of the judiciary’s authority. Framers wrote about the concept of “coordinacy” in *The Federalist*, but it was a means to the structural end that became our Constitution.<sup>213</sup> It is

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209. See Paulsen, *supra* note 1, at 224.

210. *Id.* at 224; see also Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373 (1994) (agreeing that the logic of judicial review applies in equal measure to executive review); cf. Geoffrey P. Miller, *The President’s Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35, 40 (1993) (“The Constitution itself does not subordinate the president to the courts in matters of constitutional interpretation. On the contrary, the text and structure of the Constitution establish the president as head of a coordinate branch of the government.”).

211. Paulsen, *supra* note 1, at 266-67.

212. See Eisgruber, *supra* note 196, at 352. Professor Eisgruber urges a reading of *Marbury* that favors neither judicial supremacy nor institutional coordinacy, but that instead views the duty of constitutional interpretation as pragmatically vested to varying degrees in each of the three branches of government according to their “comparative institutional competence.” *Id.* As we argue throughout this Section, Professor Eisgruber is right to challenge Professor Paulsen’s view that institutional coordinacy requires identity of power in the three coequal branches. However, Professor Eisgruber is as off base as Professor Paulsen insofar as he argues that judicial supremacy is not part and parcel of American constitutionalism, and his pragmatism comes at the expense of principle.

213. Paulsen, *supra* note 1, at 229 (“It is the idea of *coordinacy*, even more than the cognate concept of separation on which it depends and builds, that fuels the system of ‘checks and balances’ that guards against ‘a tyrannical concentration of all the powers of government in

folly to suggest that the separation of powers and the system of checks and balances that the Framers built to advance the goal of coordinacy allow the executive to control the entirety of our legal process, empowering it to (1) choose whether to execute the law as promulgated by Congress; (2) execute that law; and (3) ignore an Article III court's judgment as to that law's constitutionality.<sup>214</sup> This seems to be the very definition of "a tyrannical concentration of all the powers of government in the same hands"<sup>215</sup>—what James Madison viewed as the primary evil our Constitution would need to guard against.<sup>216</sup>

Interestingly, it is Madison's own written expressions of commitment to the notion of coequal authority that, Paulsen argues, demonstrate the validity of departmentalism.<sup>217</sup> Paulsen acknowledges that Madison eventually conceded that judicial interpretation would typically constitute the "final resolution" of constitutional issues because "the judiciary generally would be the *last* branch to act on a particular question by virtue of the order in which the branches' respective powers would be exercised."<sup>218</sup> Yet Paulsen insists that Madison adopted this position reluctantly while remaining committed to the concept of coordinacy, and that just because the judiciary would often interpret last did not necessarily require

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the same hands." (quoting THE FEDERALIST NO. 48, *supra* note 20 (James Madison)).

214. This recalls the maxim *nemo iudex in sua causa*, the oft-recited axiom that "no man should be a judge in his own case." See *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113 b, 118 a (Lord Coke, C.J.); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). Professor Adrian Vermeule has challenged whether this mantra espouses a "bedrock principle of natural justice and constitutionalism." Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 384 (2012). But considering the core principle of skeptical optimism we have identified as central to *American* constitutionalism—and considering the catholic devotion our Supreme Court has shown to the concept through frequent reference to and reliance upon it—so sharp a contradiction is striking.

215. THE FEDERALIST NO. 48, *supra* note 20, at 312 (James Madison).

216. *Cf.* THE FEDERALIST NO. 10, *supra* note 20, at 125 (James Madison) ("When a majority is included in a faction, the form of popular government ... enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.")

217. Paulsen, *supra* note 1, at 221-22.

218. *Id.* at 235.

that its interpretation should bind.<sup>219</sup> Empowering the judiciary with the authority to bind other branches by its interpretation, Paulsen contends, would contravene *The Federalist No. 49's* instruction that no branch was to have “an exclusive or superior right of settling the boundaries between their respective powers.”<sup>220</sup> Ultimately, “[t]o hold that one branch’s interpretation controls another is to bestow a practical and real omnipotence on the controlling branch.... [T]o grant the *courts* interpretive supremacy would be to give *them* a practical and real omnipotence.”<sup>221</sup>

Departmentalists such as Paulsen fail to understand that the whole point of coordinacy, especially as it is implemented through our Constitution, is countermajoritarianism.<sup>222</sup> The structural allocation of power set forth in the Constitution, the series of checks and balances it provides, and the salary and tenure protections it grants the judiciary all exist to ensure that both the document and the courts serve countermajoritarian roles.<sup>223</sup> It makes eminent sense for the sole branch that is insulated from majoritarian pressures to render the final and binding interpretive judgments of the foundational countermajoritarian document. If the very majoritarian bodies that the Constitution limits may have final say as to the meaning of those limits, the Constitution is no limit at all.<sup>224</sup> It would make no sense for checked branches to have the final say as to what the checks on them mean.<sup>225</sup> The judiciary *is* “the least

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219. *Id.* at 235-36.

220. THE FEDERALIST NO. 49, *supra* note 20, at 313 (James Madison).

221. Paulsen, *supra* note 1, at 244.

222. *Cf.* McGinnis & Rappaport, *supra* note 13, at 720 (arguing that Madison’s primary goal in designing the structural Constitution was to establish a series of supermajoritarian lawmaking apparatuses).

223. See Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1373 (1998) (“The constitutional text’s overarching concern is with questions of institutional competence, and its main theme is the division and allocation of power with a focus on who decides what questions and [is] subject to what checks and balances.”).

224. See THE FEDERALIST NO. 78, *supra* note 20, at 438 (Alexander Hamilton) (“By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”).

225. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (describing the

dangerous branch”<sup>226</sup> insofar as it has no power to execute or legislate. It therefore makes sense, structurally, to give final interpretive authority of the Constitution to the branch least capable of compulsion or coercion, and to insulate that branch from the evils of temporary political movement. This is what makes the branches coordinate. Put another way, without judicial supremacy, coordinacy would be impossible. Without the authority to exercise its countermajoritarian power and definitively determine “what the law is,” the judiciary would not be merely the least dangerous branch—it would arguably be no branch at all. At the very least, it would be impossible to call it a “coordinate” branch.

It is no coincidence that the judiciary is the last branch to analyze the constitutionality of legislation. Departmentalists seem to view it as a happy accident that the judiciary gets the final word because it typically happens to decide constitutional questions last in time. But none of this is coincidental. The Framers created a republic with a legislative branch possessing limited power whose job it is to promulgate legislation that both complies with the Constitution and serves majoritarian interests.<sup>227</sup> To avoid placing too much power in one single branch of government, the Constitution denied the legislative branch power to execute those laws, placing executive power in the hands of the executive branch.<sup>228</sup> And ultimately, after the legislature passed a law and the President executed it, a third branch would be able to pass on the law’s legality.<sup>229</sup>

Interestingly, Professor Paulsen diverges from other critics of judicial supremacy by drawing a distinction between judicial *supremacy* and judicial *review*.<sup>230</sup> Professor Paulsen does not argue

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Constitution as setting forth limited government, and explaining that those limits are meaningless if the majoritarian branches may transcend them at any time).

226. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

227. See *Marbury*, 5 U.S. (1 Cranch) at 176-77 (explaining that the United States government is a limited government that is partly comprised of a legislature that has defined, limited powers).

228. U.S. CONST. art. II, § 1, cl. 1 (vesting executive power in the President, not in the legislature).

229. See *Marbury*, 5 U.S. (1 Cranch) at 177-78 (noting that it is the judiciary’s duty to “say what the law is” and to determine the constitutionality of certain actions taken by the other branches).

230. Paulsen, *supra* note 1, at 240 (recognizing that judicial review exists, but that the executive’s power to determine the constitutionality of acts is of equal power and authority,

against judicial review. In fact, he pledges a degree of allegiance to the idea, explicating *Marbury v. Madison*'s logic and explaining why it also supports his theory.<sup>231</sup> He calls his analytical method "Euclidean"<sup>232</sup>: *Marbury*, he says, rests on (1) the major premise that when ordinary law conflicts with the Constitution, the Constitution prevails; and (2) the minor premise that the judiciary has the authority to interpret the rule of law in the course of applying the rule of law.<sup>233</sup>

Instead of arguing against judicial review, he asserts that both the major and minor premises of *Marbury* support his theory that the judiciary is not the *exclusive* arbiter of constitutional interpretation.<sup>234</sup> After all, the President and Congress take an oath just like the judiciary to protect and defend the Constitution;<sup>235</sup> they are in an equally good position to interpret the law as the judiciary. And the executive applies the rule of law when it takes care to faithfully execute the laws of the United States<sup>236</sup>—the President, too, could be deemed competent to interpret the laws he applies.

Professor Paulsen's proof is anything but Euclidean. First, to say that the coordinate branches are equally capable and equipped to interpret the Constitution and "say what the law is" by virtue of the ubiquity of oaths of office completely ignores the structural reality that gave rise to judicial review in the first place. Yes, the President and Congress also take an oath to protect and defend the Constitution, and should act within its bounds at all times. In a vacuum, the idea of coordinacy would suggest that all three branches should have the exact same power to determine what those bounds are. But that is in a vacuum, and the vacuum ignores the harsh political realities of our system. The President and Congress are not only accountable to the Constitution; they are, by design, accountable as well to their constituents. The judiciary, in contrast, was *uniquely*

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thus meaning that judicial supremacy does not exist).

231. *Id.* at 244-45.

232. *Id.* at 226.

233. *Id.* at 242-43.

234. *Id.* at 244-45.

235. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 8 (requiring the President to take an oath prior to entering office which states, in part, that the President will "preserve, protect and defend the Constitution of the United States").

236. U.S. CONST. art. II, § 8.

and purposefully insulated from political influence.<sup>237</sup> Its commitment is to the Constitution alone, not to the people and their constantly evolving majoritarian choices.<sup>238</sup>

The Framers' choice reveals a commitment to judicial review, and judicial review requires judicial supremacy. The simple and inescapable fact is that vesting final say as to the meaning of the Constitution in a different branch effectively undermines—if, indeed, it does not completely destroy—the countermajoritarianism that is so fundamental to our form of constitutionalism.

In his quest to demonstrate the validity and worth of executive interpretation in our constitutional regime, Professor Paulsen urges that the Constitution should be understood to permit the President not only to interpret the Constitution when he takes care to faithfully execute the laws Congress promulgates, but also to refuse to enforce particular judicial decrees.<sup>239</sup> Analyzing James Wilson's writings on the limits of judicial power, Paulsen writes:

The Constitution has given one rule. The Court, a subordinate power, has given a contradictory rule. The former is the law of the land; the court decision is void and has no operation. The judicial infringement should not be abetted by the executive but rather "discountenanced and declared void." Unless one assumes that the courts always interpret correctly, Wilson's defense of judicial review—like Hamilton's and like Marshall's—leads inexorably to the equal validity of executive review of the courts' decisions.<sup>240</sup>

Paulsen's analysis suffers from a fatal circularity. Of course, he is right that a court's decision that is counter to the Constitution is

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237. See Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 33-34 (2000) (describing the Federalists' goal of insulating the judiciary from "party politics").

238. See THE FEDERALIST NO. 78, *supra* note 20, at 440-41 (Alexander Hamilton) (discussing the importance of independent judges and their duties as "faithful guardians of the Constitution").

239. Paulsen, *supra* note 1, at 221-22; cf. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1279-80 (1996) (examining the textual bases for executive interpretation and urging that the President is authorized to engage in constitutional interpretation independent from the judiciary's exercise of interpretive authority).

240. Paulsen, *supra* note 1, at 254 (quoting 1 THE WORKS OF JAMES WILSON 300 (Robert Green McCloskey ed., 1967)).

invalid because the Constitution is our supreme law and trumps any action of a subordinate that the Constitution has itself ordained with power.<sup>241</sup> But to assume the court's decision is incorrect is to beg the question: How are we to know, *ex ante*, that it is the President's interpretation that is correct and the court's interpretation that is incorrect? Moreover, we are left asking the same initial question: How does the Constitution indicate that the President should be empowered to determine whether the judiciary has given a "contradictory" rule to the Constitution? When the judiciary interprets the Constitution differently from the way the political branches believe it should, the judiciary is not "acting unconstitutionally," much like a President who vetoes a bill because he does not think the bill is constitutional (even though Congress or the Court might) is not "acting unconstitutionally."

There exists an even more fundamental problem with departmentalist analysis: it ignores Lord Coke's famed warning that, for obvious reasons, no man can be a judge in his own case.<sup>242</sup> The idea that a branch of government may have final say as to the constitutionality of its own actions effectively guts any notion of limited power, ignores the mutual mistrust that serves as the foundation for the Constitution, and renders wholly illusory the concept of inter-branch checking.<sup>243</sup>

Departmentalism can be framed slightly differently in order to avoid some of our most direct criticisms, but such framing nonetheless ultimately leads to similar results. In a way, departmentalism describes nothing more than the political question doctrine, pursuant to which the Court occasionally refuses to rule on constitutional challenges and instead defers to the branch whose actions have been challenged.<sup>244</sup> Professor Paulsen notes that the political question

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241. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned.")

242. See *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113 b, 118 a (Lord Coke, C.J.).

243. The judiciary is, to some extent, an exception to this dictate because under the model of judicial supremacy, the courts retain authority to determine the constitutionality of their own actions. However, such an exception may be justified on a principle of necessity because vesting the authority to determine the constitutionality of judicial action in the political branches would effectively destroy the countermajoritarian check on the majoritarian branches.

244. See, e.g., *Nixon v. United States*, 506 U.S. 224, 233, 235 (1993) (holding that the

doctrine makes sense insofar as there are some things that should evade judicial review and be left entirely to the executive to determine.<sup>245</sup> From there, he observes that scholars have rightly pointed out how difficult it is to confine the political question doctrine to a clearly delimited collection of areas falling exclusively within the executive's purview of interpretation.<sup>246</sup> Instead of viewing the blurred limits of the doctrine's scope as indicative of its fragility, he posits that there are no clear limits because executive interpretive authority cannot be readily confined in a principled fashion, and it should thus be functionally limitless.<sup>247</sup>

Rather than granting the political question doctrine's logic and holding that it must allow for majoritarian control over the interpretation of our countermajoritarian Constitution—the precise opposite of the document's structural vision—we suggest that the judiciary is fit to police the boundaries *actually contained within the Constitution* or necessary to achieve its structural aims. True, the political question doctrine is problematic because it claims that some constitutional provisions do not lend themselves to clear and measurable standards, but it makes no principled distinction between those provisions that can be distilled down to standards and tests and those that cannot.<sup>248</sup> A more logical form of the political question doctrine asks only whether the text of the Constitution explicitly places the action or decision in question within the cognizance of the judiciary, or is instead agnostic as to the manner in which a particular constitutionally granted power is exercised. For example, a court may consider whether the executive has complied with the Constitution's directive that the President may block legislation by veto, for in saying what the Constitution means, the Court will be forced to determine the meaning of the term "veto" within Article II.<sup>249</sup> But Article II is agnostic as to permissible rationales for

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question of whether the Senate had properly tried an impeachment was a political question that was to be left entirely to the Senate because under the Constitution it alone had the power to try impeachments).

245. Paulsen, *supra* note 1, at 286.

246. *Id.* at 286-87.

247. *Id.* at 287.

248. See Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1045-46 (1985).

249. Indeed, the Supreme Court nearly did pass on this issue. In *Barnes v. Kline*, the Court of Appeals for the District of Columbia Circuit held that the President had unsuccessfully

exercising the veto power.<sup>250</sup> Nowhere does it indicate that a validly effectuated veto may be issued only for good cause or that a President must reasonably believe the statute is unconstitutional; nowhere does it indicate any criteria whatsoever.<sup>251</sup>

Suppose Congress passed a bill forbidding flag burning and the President, remembering the holding of *Texas v. Johnson*,<sup>252</sup> decided he would veto the bill because he deemed it unconstitutional. Suppose further that the way the President chose to veto the bill was by sticking it in his desk drawer, climbing to the roof of the White House, and shouting into a loudspeaker, “Today feels like a good day to veto some unconstitutional legislation!” No other branch is empowered to determine whether the President’s rationales are correct or motivations are pure when the President vetoes the legislation. That is because the Constitution does not provide that the President may veto bills only when those bills defy the Constitution; instead, it simply empowers the President to veto bills, presumably for whatever reason he deems appropriate.<sup>253</sup> The Constitution requires that the President actually veto those bills in order to block their passage, so it seems logical for the courts to pass on whether the President’s method of effectuating his intent to veto constitutes a “veto” according to the text of the Constitution. But it is the Constitution’s unambiguous provision of the veto power unconditionally to the President that removes the question of the legitimacy of the motivating force from the Court’s purview.

This is the most important point. When the political branches exceed their constitutional authority, they pose a great risk to the people and to our constitutional regime.<sup>254</sup> Our structural Constitution

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vetoed a bill when he “pocket vetoed” legislation that would condition continued military aid to El Salvador on the President certifying El Salvador’s progress towards protecting human rights. 759 F.2d 21, 41 (D.C. Cir. 1984), *vacated as moot sub nom.* *Burke v. Barnes*, 479 U.S. 361 (1987). Because the legislation expired before the case arrived at the Supreme Court, the Court reversed the D.C. Circuit on mootness grounds. *Burke*, 479 U.S. at 363-65.

250. This is because the Framers left the President’s veto power open ended, merely stating its existence and not the reasons for its usage. See U.S. CONST. art. I, § 7, cl. 2.

251. See Carl McGowan, *The President’s Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 792 (1986).

252. 491 U.S. 397 (1989).

253. U.S. CONST. art. I, § 7, cl. 2.

254. See Elizabeth Price Foley, *Presidents Cannot Ignore Laws as Written*, N.Y. TIMES (Jan. 29, 2014), <http://www.nytimes.com/roomfordebate/2014/01/29/presidential-power-vs-congressional-inertia/presidents-cannot-ignore-laws-as-written?emc=eta1> [<https://perma.cc/>

seems to understand this by ordaining a judiciary branch as the final arbiter of the constitutionality of government action.<sup>255</sup> But the judicial branch is completely insulated from majoritarian impulses and political pressure, and it has authority over neither purse nor sword.<sup>256</sup> It is unlikely to breach its constitutional duty because, at least for the most part, political pressures—the winds that blow the political branches toward ultra vires action—do not exist for judicial officers in our government.<sup>257</sup> And even if the courts do breach their duties, such breach carries with it relatively limited risk to our institutional structure because the judiciary is so strapped for power.<sup>258</sup> This is why, for example, the courts are in the appropriate position to define the bounds of their own jurisdiction while Congress is not in the appropriate position to define the bounds of its own power. Frankly, necessity requires that *someone* define the contours of these powers. But our structural Constitution understands that the judiciary is less positioned to undermine the system than are the political branches.<sup>259</sup>

Does this mean that there exists absolutely no danger of judicial excess? Surely it would be wrong to make such an assumption. The era of the Supreme Court's specious economic substantive due process during the early twentieth century certainly stands as evidence to the contrary.<sup>260</sup> But at least in a relative sense, this danger is far less likely to lead to embedded tyranny than excesses by one or both

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BC8U-2THR] (“When one branch of government exceeds its authority, separation of powers is violated, and representative government breaks down.”).

255. See William H. Rehnquist, *Whither the Courts*, 60 A.B.A. J. 787, 787 (1974).

256. See THE FEDERALIST NO. 78, *supra* note 20, at 437 (Alexander Hamilton) (“The judiciary, on the contrary, has no influence over either the sword or the purse.”).

257. Even the judiciary is not *entirely* insulated from the power of popular majority, as the Appointments Clause vests the President with the authority to appoint federal judicial officers with the advice and consent of the Senate. See U.S. CONST. art. II, § 2, cl. 2; see also Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) (“Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”).

258. See THE FEDERALIST NO. 78, *supra* note 20, at 437 (Alexander Hamilton) (“[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

259. See *id.*

260. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905) (determining that the “liberty of contract” was implicit in the Due Process Clause and that Congress’s ability to regulate employment and working conditions was severely limited).

of the political branches. Whatever the Court does or does not hold, the majoritarian branches invariably will possess far more power.<sup>261</sup> Moreover, eventually the makeup of the Court will change to reflect the views of current majorities.<sup>262</sup> At the very least, unlike the political branches (particularly the executive), it is all but inconceivable that the judiciary will seize power and impose tyrannical rule by exercising brute force.

Professor Paulsen insists that as long as the President has complete power to veto or pardon based on his interpretation of the Constitution, it must be true that the President has interpretive and thus discretionary authority as to the execution of statutes, abidance to judicial precedent, and the enforcement of judicial decrees in specific cases.<sup>263</sup> He argues that there is no principled distinction warranting interpretation of the Constitution to accord absolute authority to the executive regarding vetoes and pardons while denying such authority elsewhere, and that executive defiance of judicial interpretation in the context of a veto is just as nefarious as in the context of legislation or court decree.<sup>264</sup> “If Supreme Court precedents are otherwise ‘supreme’ in the sense of being binding law for the other branches,” he writes, “then the President’s refusal to adhere to such law simply because the courts cannot (or will not) review his actions does not make those actions lawful and legitimate, but rather the cynical actions of a Holmesian bad man.”<sup>265</sup> But once again, his reasoning is faulty.

It makes sense that the President possesses complete control over a veto or pardon so long as it is done by constitutionally valid means.<sup>266</sup> The Constitution gives the President the “Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment,”<sup>267</sup> and empowers the President to

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261. See THE FEDERALIST NO. 78, *supra* note 20, at 437 (Alexander Hamilton) (comparing the power of the legislature and executive to the power of the judiciary, and arguing that the judiciary has less power).

262. See David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 664 (noting that research supports the view that the Supreme Court’s decisions and ideological makeup follow the election returns).

263. Paulsen, *supra* note 1, at 266.

264. See *id.* at 264-67.

265. *Id.* at 266.

266. See *id.* at 264-65.

267. U.S. CONST. art. II, § 2.

consider bills approved by both houses of Congress: “If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated.”<sup>268</sup> Neither of these provisions affixes a legal obligation to the President’s discretion; if he so chooses, he may pardon an offender against the United States based on that offender’s hair color, and he may veto legislation for using verbiage he finds irritating—even in spite of the law’s likely efficacy, social utility, and obvious compliance with constitutional law.<sup>269</sup>

However, the President lacks similar discretion in deciding whether or not to execute the law. The President is obligated to “take Care that the Laws be faithfully executed.”<sup>270</sup> Read in conjunction with the Supremacy Clause,<sup>271</sup> it is sensible to conclude that this constitutional dictate requires that the President execute the law of the land unless higher law requires otherwise. If the President can justifiably assert that the ordinary federal law he refuses to execute is unconstitutional, then the President is faithfully executing the law by adhering to the Constitution. But if a court empowered to interpret and enforce the Constitution decrees in the adjudication of a case or controversy that the law in question is in fact constitutional, the President may no longer rely on his position that the law is unconstitutional as a justification for his refusal to enforce it.<sup>272</sup> To allow the President to continue in his refusal would provide an easy subterfuge for any President who is politically disinclined to enforce a particular statute.

Departmentalism’s entire foundation—that the theory of coordinacy empowers the executive to ignore the judiciary’s interpretation of the Constitution in favor of its own—thus sprouts from poisoned roots. When the President interprets the Constitution in the course of vetoing or pardoning, he does so in the context of a process of constitutionally delegated decision making that, according to the document, requires no lawful motive or explanation. By contrast, when the President executes ordinary legislation, he does so in the process of taking care that the laws—all of them, including especially and

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268. *Id.* art. I, § 7, cl. 2.

269. See McGowan, *supra* note 251, at 807-08.

270. U.S. CONST. art. II, § 3.

271. *Id.* art. VI, cl. 2.

272. See *supra* Part I.B.

supremely the Constitution—are faithfully executed. Contrary to Professor Paulsen’s argument, whether the President may refuse to execute a statute has nothing to do with how important or valuable certain constitutional grounds might be.<sup>273</sup>

The President is presumably empowered to refuse to execute a law that he reasonably believes does not comport with the Constitution’s instructions. That is what it means to faithfully execute the law: if the President is faithful to his oath, his office, and the Constitution, he will refuse to execute inferior laws not authorized by the supreme law of the land. But if the courts have declared that the inferior law is constitutional, he cannot simply ignore such a decree and refuse to execute the law.<sup>274</sup>

This also explains why judicial review resulting in a declaration of unconstitutionality must bind the executive. In the exercise of its authority to adjudicate cases and controversies, the judiciary is necessarily tasked with the final round of interpretation and declaration of what the law is. The judiciary exists as a check upon the legislative and executive branches, for if they are so consumed by popular sentiment or momentary majoritarian interests that they promulgate inferior law that is noncompliant with the Constitution, the judiciary can protect minority and countermajoritarian interests by declaring the inferior law invalid.<sup>275</sup> If the executive can defy this pronouncement, the judiciary becomes functionally irrelevant; it is then a mere instrument of the executive designed to offer advisory opinions that the President may acknowledge or ignore.

Thus, the established implications of Article III’s “case-or-controversy” requirement inescapably dictate that the President—like everyone else—must comply with a court’s order that is the product of an adverse adjudication based on that court’s interpretation of the Constitution.<sup>276</sup> Otherwise, the speculative nature of the President’s response fatally denies that decision the element of “redressability” that is an essential element of the judiciary’s authority to act pursuant to Article III’s “case-or-controversy” requirement.<sup>277</sup> When the Court declares a law constitutional, the President might

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273. *Contra* Paulsen, *supra* note 1, at 270-71.

274. *Contra id.* at 276-77.

275. *See supra* Part I.B.

276. *See* U.S. CONST. art. III, § 2, cl. 1.

277. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568 (1992).

have the opportunity in future cases to refuse to execute that law on the grounds that an as-applied challenge would succeed. In other words, the executive may continue, in a way, to check the judiciary where the judiciary *permits* legislative and executive action. But where the judiciary *rejects* legislative and executive action as unconstitutional—that is, *serves its countermajoritarian purpose*—providing for an executive override completely contravenes the Constitution’s structural design.

If the Supreme Court rules a particular presidential action unconstitutional, is the President constitutionally bound not to take the identical action against a distinct private party under parallel circumstances? Assuming the two situations are, in fact, legally identical, it is probably accurate to conclude that the President is bound in this manner on both ethical and moral levels.<sup>278</sup> As a constitutional matter, however, it is probable that the President technically is not bound in case two to refrain from even identical behavior found unconstitutional in case one. Using Holmes’s “bad man” theory,<sup>279</sup> perhaps the President can play hardball by complying only with a direct order of the court.<sup>280</sup> But at worst, such presidential behavior would require the private challenger to pursue case two to resolution, which would of course lead to the same conclusion as in case one. Alternatively, the President could be subjected to an equitable class action,<sup>281</sup> thereby subjecting the President to a formal court order controlling her behavior as a general matter. But it is important to recognize that even were the President permitted to play the law so close to the line, in the end she remains subject to judicial directive, thereby maintaining judicial supremacy.

Not everyone who sympathizes with Paulsen’s theory of executive interpretive power is prepared to reject judicial supremacy while granting the value or correctness of judicial review itself. Professor

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278. Rule 11 of the Federal Rules of Civil Procedure requires an attorney of record to sign every pleading and motion certifying that “the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law” and that the document “is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.” FED. R. CIV. P. 11(b)(1)-(2).

279. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 459 (1897).

280. *Contra* Paulsen, *supra* note 1, at 266.

281. *See* FED. R. CIV. P. 23(b)(2) (providing for class-wide injunctive relief).

Steven Calabresi, for example, has applauded Professor Paulsen for making clear that the President has just as much a right and obligation to interpret the Constitution as do the courts,<sup>282</sup> but emphatically rejects the notion that the executive can simply offer its own interpretation and ignore the judiciary once a court issues judgment in a case.<sup>283</sup> We agree that Professor Paulsen's argument is plainly wrong, and that, as Professor John McGinnis has also pointed out, such a design would render the judiciary meaningless and place it in a position of merely offering advisory opinions,<sup>284</sup> which we know to be contrary to the judiciary's constitutionally ordained mission and purpose.<sup>285</sup> But given our understanding of the term, we believe it is inaccurate to characterize scholars like Calabresi or McGinnis as true "departmentalists." Far and away the most controversial element of the theory is Paulsen's assertion that, because the executive and the judiciary are to be deemed equal as constitutional interpreters, the President may ignore judicial decisions interpreting the Constitution when he disagrees.<sup>286</sup> Because both Calabresi and McGinnis understand and accept the authority of a court to bind the President to its constitutional interpretation, their approach does not differ substantially from the foundational elements of the traditionalist model.<sup>287</sup>

## 2. *Popular Constitutionalism: A Normative Attack on Judicial Supremacy*

Other opponents of judicial supremacy make a different argument: regardless of whether the Constitution can be read to provide for judicial review, judicial supremacy does not protect the virtues we think it does or should, and entrusting either the people or their

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282. Calabresi, *supra* note 196, at 1421.

283. *See id.* at 1424-25; cf. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 79 (1993) (challenging the scholarly justifications supporting both executive acquiescence and executive nonacquiescence theories).

284. *See* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 394-95 (1993).

285. *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 567 (2006).

286. *See* Paulsen, *supra* note 1, at 321; *see also* Calabresi, *supra* note 196, at 1422.

287. *See* Calabresi, *supra* note 196, at 1425; McGinnis, *supra* note 284, at 391-92.

chosen representatives—the President or Congress—with interpretive authority would be preferable because such a practice aligns more closely with our first principles and is grounded in precepts of representative democracy.<sup>288</sup> Pioneered by Larry Kramer, its most vocal and consistent champion, popular constitutionalism (again, in various forms) struggles to combat the descriptive truths of the structural Constitution by devoting little energy to description and focusing almost exclusively on observational and normative argument. Professor Kramer argues that the notion of judicial supremacy is highly antagonistic to the democratic values that are core to the American vision, supported only by “aristocrats”<sup>289</sup> who have “deep-seated misgivings about ordinary citizens”<sup>290</sup> and view “democratic politics as scary and threatening.”<sup>291</sup> Accordingly, he urges that final interpretive authority be given to “the people themselves,” who should have “active and ongoing control over the interpretation and enforcement of constitutional law.”<sup>292</sup>

Comparison of Professor Kramer’s approach to the true foundations of our form of constitutional democracy readily demonstrates the serious flaws in his analysis. The very notion of a counter-majoritarian Constitution belies Professor Kramer’s normative claim. Permitting governmental branches that are electorally responsive to majority impulses to exercise interpretive authority is inherently dangerous, for those branches cannot be constrained by a constitutional document whose limitations they can freely interpret without consequence.<sup>293</sup> Transferring interpretive authority to the diffuse

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288. See, e.g., LEVINSON, *supra* note 8, at 16 (arguing that the Constitution has not lived up to its promise and proposing a shift to a new constitutional regime with more limited judicial power); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 960 (2004); Post & Siegel, *supra* note 197, at 1029; cf. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2050 (2010) (advocating for popular constitutionalism based on the effectiveness of equivalent judicial majoritarianism in states with elected judiciaries).

289. Kramer, *supra* note 288, at 1008.

290. *Id.* at 1005.

291. *Id.* at 1003.

292. *Id.* at 959.

293. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (“[C]onstitutionalism entails, among other important things, protection of the individual and of minorities from democratic governance over certain spheres. When those charged with checking the majority are themselves answerable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured.”).

and unidentifiable mass that is “the People”—a concept left consistently vague in Kramer’s analysis—carries with it similar definitional dangers while also being virtually impossible to implement or confine.<sup>294</sup> One need look no further than the several states with elected judiciaries to observe the troubling juxtaposition of tasking politically accountable judges with neutral adjudication and constitutional interpretation.<sup>295</sup>

The argument Kramer and others advance is not only normatively unpersuasive, it is also logically untenable in light of the structural Constitution and the basic premises of American constitutionalism. As we explained in Part I, the traditionalist view understands the value of countermajoritarian checking as a political mechanism for enshrining skeptical optimism, which can be readily deduced from the Constitution’s structural design. Our constitutionalism is thus principally concerned with facilitating democracy while promoting rule of law values and protecting minorities.<sup>296</sup> The reality is that any argument that temporary majorities—or the governmental bodies that are directly accountable to those majorities—are either more capable or more suitable arbiters of constitutional meaning ignores the careful framework for promoting these values that was etched into our supreme law at the constitutional convention. Our proclaimed unflagging commitment to due process

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294. See Prakash & Yoo, *supra* note 197, at 1546 (“None of the popular actions Kramer lauds, however, enables the people to regularly establish the Constitution’s meaning. Voting, petitioning, and mobbing permit people to express their general preferences, but they do not enable the people to clearly express the fine distinctions often necessary in constitutional law.”); see also Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1015 (2004) (“Failing to define his crucial concept ... not only permits an abstract, glorified view of the public, it also obscures what is fundamentally at risk: weakening constitutional limits on the actions of elected and unelected officials; eroding constitutional protections for unpopular, marginalized groups; increasing discordant constitutional interpretations across the branches of the federal government and the states; and relegating constitutional interpretation by the judiciary to advisory status within the federal scheme.”).

295. See generally Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1 (2014) (describing the ways the majoritarian process of election and retention of state court judges runs counter to the American concept of due process of law).

296. See Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1366 (2010). See generally ELY, *supra* note 85.

of law, the existence of a supreme document ratified by supermajoritarian movement and subject to formal alteration only through a supermajoritarian process, and our provision of a politically insulated judiciary are all brightly flashing signals that our system understands the importance of speed bumps to slow majorities down. Popular constitutionalism seems to forget—or intentionally ignore—all of this.<sup>297</sup>

Mark Tushnet's case against judicial supremacy directly takes on Larry Alexander's and Frederick Schauer's defense of judicial review.<sup>298</sup> Alexander and Schauer assert that without judicial supremacy we would have a system of "interpretive anarchy" on our hands.<sup>299</sup> The role of the Supreme Court, say Alexander and Schauer, is to provide a "single authoritative interpreter to which others must defer," to serve the "settlement function" of the law.<sup>300</sup> Tushnet responds that when it declares that Congress has overstepped its bounds, the Court justifies its behavior using the self-interestedness of the Congress: "Congress is self-interested when it defines the scope of its own power. Members of Congress have an interest in maximizing their own power by expanding their sphere of power and responsibilities. *Any* decision [Congress] make[s], no matter how fully deliberated, will be shaped, and perhaps distorted, by this self-interest."<sup>301</sup> But "this is an objection equally available to those who would question the Court's version of judicial supremacy," because the judiciary is just as apt to act self-interestedly and expand its own power.<sup>302</sup>

This position runs directly contrary to the basic principles underlying the structural Constitution. Tushnet's argument essentially ignores the fact that the judiciary was built to be (1) limited in active power, and (2) countermajoritarian, staffed by insulated judges with salary and tenure protections. With the exception of issues surrounding its own powers, the judiciary is uniquely positioned to

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297. For a deeper treatment and critique of the popular constitutionalism espoused by Professors Kramer, Pozen, and Siegel, see Redish & Aronoff, *supra* note 295, at 39-46.

298. TUSHNET, *supra* note 8, at 27-30.

299. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1378-79 (1997); *see also* Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1046 (2004).

300. Alexander & Schauer, *supra* note 299, at 1378 n.80.

301. TUSHNET, *supra* note 8, at 26.

302. *Id.*

serve as the neutral adjudicator that can settle disputes as to the boundaries between executive and legislative, as well as federal and state branches. More importantly, if the judiciary were not tasked with settling the boundaries of majoritarian power, there would be no countermajoritarian check at all, and the Constitution would essentially be meaningless. And even as to its own power, the Court's authority—unlike that of Congress or the President—is confined to a passive role, awaiting cases to adjudicate.<sup>303</sup> It therefore makes sense to give the Court final say as to its own constitutional power in order to protect its countermajoritarian role.<sup>304</sup>

Under a regime of judicial supremacy, the judiciary is no more capable of aggrandizement than is Congress. Professor Tushnet looks to *City of Boerne v. Flores* to show how the Court gives deference to Congress and assumes laws are constitutional because Congress has a duty to support the Constitution, but the Court does not give deference to congressional redefinitions of its own power because Congress is self-interested.<sup>305</sup> But, he argues, the Court is no less self-interested because every institution with both power and the ability to aggrandize it will seek to expand or enhance that power.<sup>306</sup>

Both of Professor Tushnet's proof points are flawed. The Court is no more empowered to engage in self-aggrandizement than is Congress, considering that Congress is arguably capable of simply stripping the federal courts of jurisdiction (within constitutional limits) whenever it chooses.<sup>307</sup> Why would it be, under Tushnet's theory,

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303. See Redish & Kastanek, *supra* note 285, at 549 (“As the one branch not representative of or accountable to the populace, the judiciary may threaten core democratic values unless its actions are tied to performance of the traditional judicial function of dispute resolution. To allow the judiciary to act in any other manner threatens to usurp the lawmaking and law-enforcing powers of the other two branches of the federal government. Moreover, given the judiciary's inherently passive role in the adversary system, absent the incentives to compile and present evidence and argument created by the adverseness requirement, we cannot be assured that a court will have sufficient information to enforce the laws fashioned by the other branches.”).

304. See *supra* notes 83-84 and accompanying text.

305. TUSHNET, *supra* note 8, at 26 (observing the Court's view that Congress is inherently self-interested when defining its own power, but that “[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution” (quoting *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997))).

306. *Id.*

307. The extent of congressional power in this realm is, of course, a hotly debated topic.

that the Framers would devise a constitutional system in which the Congress could be trusted to determine the scope of its own power, disregarding judicial pronouncements of the limits of that power, and then could strip the courts of jurisdiction to hear any challenges to such self-aggrandizement? Tushnet has effectively written Article III out of the Constitution. And although he focuses his attention on the fact that the Court is no more a “single authoritative interpreter” than is Congress—or maybe even less singular, because each individual voice is so much more meaningful on the Court<sup>308</sup>—Tushnet forgets that Congress represents hundreds of millions of people and is, at some level, subject to their momentary preferences. What makes the Court uniquely capable of serving as the final voice of constitutional interpretation—the “single authoritative interpreter” that Alexander and Schauer describe and that the Framers envisioned—is that it is insulated from such political pressure.<sup>309</sup>

Arguing that judicial supremacy distorts legislation, Professor Tushnet suggests that without it, Congress would act more responsibly in interpreting and abiding by the Constitution.<sup>310</sup> For example, in the context of flag burning, he contends that judicial supremacy problematically prevented Congress from doing what its members and the people wanted—namely, passing an effective law against the burning of the American flag.<sup>311</sup> But that is exactly the point. Presumably by the exact same reasoning, it could have been argued that during the McCarthy era, the judiciary should not have been allowed to prevent the majority from doing what it wanted to do—namely, suppress left-wing dissenters. The entire purpose of our structural Constitution is to embed Founding-era American skeptical optimism and force the majority, if it wishes to circumvent

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See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 51-52 (1975); Louise Weinberg, *The Article III Box: The Power of “Congress” to Attack the “Jurisdiction” of “Federal Courts”*, 78 TEX. L. REV. 1405 (2000).

308. TUSHNET, *supra* note 8, at 27-30.

309. *See id.* at 28.

310. *Id.* at 60.

311. *Id.*

those fundamental truths, to garner enough supermajoritarian support to change them. If the American people are so concerned with flag burning, it is a good thing to require them to amend the Constitution—formally, by means of the prescribed supermajoritarian process<sup>312</sup>—to render constitutional those state or federal laws that ban it. If burning the flag is a method of expression, and laws forbidding it are contrary to the First Amendment because of their “communicative impact,” the people may amend the Constitution to declare that flag-burning laws are an exception to the Amendment’s general coverage.<sup>313</sup> Tushnet believes that lawmakers may apply their own conception of the Constitution if they are “conscientious” and if their interpretation is “reasonable,”<sup>314</sup> but this begs the question: Who is to decide whether a lawmaker has “conscientiously” considered and “reasonably” interpreted the Constitution? The lawmaker himself? Our constitutional democracy cannot survive such constant, momentary, self-interested reinterpretation.

Tushnet says it is wrong to assume that members of Congress are inherently incapable of interpreting the Constitution.<sup>315</sup> But the traditionalist view of American constitutionalism in no way stands for the position that Congress is incapable of properly exercising interpretive authority. To the contrary, we both hope and assume that Congress is doing just that in deciding whether to enact legislation. The Constitution does not in any way prohibit the majoritarian branches from ever exercising interpretive authority; in fact, as Professor Paulsen discusses with great alacrity, each and every politically accountable member of the federal government takes an oath to support the Constitution.<sup>316</sup>

Congress might be undereducated about the Constitution, and it might be that Congress would improve without the judiciary as a backstop, especially if given the same kind of institutional support

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312. See *supra* notes 122-33 and accompanying text (describing Bruce Ackerman’s theories of informal amendment outside of Article V’s prescribed means of constitutional change).

313. See TUSHNET, *supra* note 8, at 58.

314. See *id.* at 33, 54-71.

315. See *id.* at 62-63.

316. Paulsen, *supra* note 1, at 257; see U.S. CONST. art. VI, cl. 3; Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 388-92 (2003) (discussing the historical importance of legislative and executive officer oath-taking). See generally MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH* (1999) (providing a historical account of the President’s oath and pledge to protect and defend the Constitution).

that the executive receives in its endeavors of constitutional interpretation, such as the Solicitor General's Office and the Department of Justice's Office of Legal Counsel.<sup>317</sup> But this misses the point entirely. The problem is not that Congress is *bad* at constitutional interpretation—it is that because of its inherently majoritarian nature, Congress is *structurally incapable* of effectively policing majoritarian threats to the values and dictates embodied in the countermajoritarian Constitution. This is especially true when Congress itself creates those threats. Thus, our structural Constitution does not envision Congress as the *final* interpreter, and for good reason. The people's elected representatives exist to advance the current and future interests of their constituents; the courts exist to ensure that those current and future legislative and policy choices adhere to foundational principles embodied in the nation's countermajoritarian supreme law.

### III. FASHIONING THE THEORY OF PREMODERN CONSTITUTIONALISM

We urge a return to the once-cherished traditionalist approach that for years stood unchallenged as accepted truth. Until the rise of modernist theories of American constitutionalism, the traditionalist view was essentially assumed and thus went largely unexplained and undefended. As we explained in Part I, the best defense of the traditionalist understanding without reference to or reliance upon later competing theories is through a focus on historical context and a process of reverse engineering. The traditionalist view defines the core of American constitutionalism as consisting of two fundamental elements: the foundational principle of skeptical optimism (revealed through examination of the historical context within which our constitutional democracy was established), and its implementer, the political apparatus of countermajoritarian checking of majoritarian powers (revealed through reverse engineering from the structural Constitution). Historical context suggests that the Constitution was born out of skeptical optimism. We were optimistic that humankind had great potential to flourish when empowered and encouraged to work together and form movements. But at the same time, we were dubious that majoritarian movements, if left unchecked, could avoid

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317. See TUSHNET, *supra* note 8, at 61-62.

devolving into chaos or tyranny. Reverse engineering from the structures created in our Constitution, then, revealed the essence of American constitutionalism to be countermajoritarian checking of majoritarian governmental action. After all, no other reasonable explanation exists for pledging commitment to representative government, creating powerful majoritarian legislative and executive branches, and then establishing a judiciary that is insulated from political pressure.

The traditionalist view of American constitutionalism understands the import of both our written Constitution and prophylactically insulated judicial review because those methods of activating our form of constitutional governance logically connect to the principle and actuate the political apparatus. But without the benefit of modernism as a foil, traditionalism's descriptive power can go only so far in placing the principle and the apparatus at the core of American constitutionalism. Standing on its own, the traditionalist view is equipped only to observe the value, both normative and structural, of each of the two methods of activation that the two camps of modernists seek to undermine. As a descriptive matter, nothing inherent to the traditionalist approach requires that these mechanisms be deemed a part of the core of American constitutionalism.

On the other hand, our premodern approach to understanding the fundamental characteristics of American constitutionalism is descriptive and analytical at every level. It recognizes the tripartite core of our constitutionalism as consisting of principle, political apparatus, *and* activating mechanisms. Historical context reveals American skeptical optimism as the guiding principle. Structural reverse engineering demonstrates that this skeptical optimism inexorably leads to countermajoritarian checking of majoritarian power as the political apparatus at the heart of American constitutionalism. Grasping the inherent fallacies that plague the modernist analysis further demonstrates that the underlying principle and apparatus are not the only aspects of American constitutionalism inextricably tied to it. In fact, so too are the two particular characteristics of the Constitution through which the principle and apparatus are manifest: the Constitution's writtenness and the provision of judicial review by a prophylactically insulated judiciary. By responding to the various modernist alternatives, premodernism

necessarily articulates the rationale for the formation of the traditionalist model while simultaneously pointing out the serious flaws in models that have sought to displace it.

We believe that historical and contextual evidence strongly favors the traditionalist view of American constitutionalism. But the virtue of premodern constitutionalism is that, in addition to relying on strong historical and contextual evidence, it draws strength from consideration and rejection of competing modernist theories. In this sense, those of us who believe in the notion of constitutional text as the countermajoritarian supreme law that is to be definitively interpreted and enforced by a prophylactically insulated judiciary owe a backhanded thanks to the modernist theorists with whom we so strongly disagree. In the classic Millian sense in which true ideas become sharper and more persuasive when contrasted to false ideas,<sup>318</sup> understanding the fundamental flaws of modernist theories sharpens our understanding of the force of the logic underlying the traditionalist model. While its conclusion is largely identical to that of the traditionalist model, it has considerably strengthened that model in its careful and detailed response to the dangerous fallacies of the modernists.

Perhaps the two classes of modernists do not recognize themselves as two sides of the same coin because they do not view themselves as challenging the values that underlie the American constitutional system, but only the devices used to effectuate those values. But by examining modernist theories and uncovering their basic inconsistency with the fundamental principles animating our Constitution, premodernism rightly places both sets of scholars in the same modernist box and identifies an additional indispensable aspect of American constitutionalism. What through the lens of traditionalism was a premise (that the American Constitution is defined by countermajoritarian limitation on majoritarian government powers) can be transformed into a reasoned conclusion—that is, the fundamental components of the Constitution are thus its writtenness and the provision of a prophylactic, insulated judiciary to interpret it.

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318. See JOHN STUART MILL, *ON LIBERTY* 53 (Stefan Collini ed., 1989) (1859) (“[E]ven if the received opinion be ... the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will ... be held in the manner of a prejudice, with little comprehension or feelings of its rational grounds.”).

Ultimately, premodern constitutionalism recognizes that structure is imbued with inherent meaning. Perhaps the American Constitution could have been fashioned in unwritten form, and not structured as it was. *But it was written*, and for good reason. The fear of tyranny in Founding-era America permeated the four corners of the document, and as a result the structural Constitution was born. Shortly after winning a war to free the colonies from Britain's insufficiently representative rule, our fledgling nation enacted a singular, written Constitution that provided for a republican form of government with majoritarian, representative branches structured to impose a system of mutual checking and a prophylactically independent judiciary. The legislature would promulgate legislation, the executive would execute it, and the judiciary would check the danger that the majoritarian branches might tend toward tyranny. To be sure, this judiciary itself was not built to be totally trusted—hence the structural choice to withhold all lawmaking and executive authority from the judicial branch and to provide the accountable branches with some level of control of judicial jurisdiction. But the foundational assumption was that *none* of the branches could be fully trusted, and judicial review was the best available option as one element in the intricate checking process to which the Constitution gave rise.

#### IV. THE FUNDAMENTAL GAP BETWEEN AMERICAN CONSTITUTIONALISM AND “UNWRITTEN” OR “INSUFFICIENTLY COUNTERMAJORITARIAN” CONSTITUTIONS

As we have demonstrated, constitutionalism as a general political philosophy concerns the power systems and structures of governmental ordering that organize societies and define the relationships between governments and their governed. A state with constitutive higher laws should not necessarily be characterized as a nonconstitutional nation just because those constitutive higher laws are unwritten or unentrenched.<sup>319</sup> It is, however, a nation with constitutional priorities and concerns much different from our own, with a set of constitutional mechanisms that might be well tailored to

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319. See *supra* notes 62-70 and accompanying text.

accomplish those priorities while being poorly tailored to accomplish ours.

We have also explained why modernists are wrong to claim either that the existence of a singular, written, positive supreme law or the use of our judiciary as a countermajoritarian limitation on majoritarian government is not—or should not be—fundamental to American constitutionalism.<sup>320</sup> In this Part, we briefly examine constitutions that lack in these particular qualities. We first discuss the “unwritten” constitutional regimes in the United Kingdom, Israel, and New Zealand in order to explain that while the unwritten, unentrenched constitutions these countries have chosen for themselves may not be per se illegitimate, they are also not possessed of the same structural guarantees that American constitutionalism envisions for a constitutional democracy. We then consider the Chinese Constitution, which is contained in a singular written statement of China’s supreme law but which permits majoritarian overpowering of any purported countermajoritarian checking it might provide on paper.

The characteristics that are notably absent in these regimes—most importantly, in our view, documentary definiteness, a requirement that formal modification come only as a result of a supermajoritarian process, and an effective apparatus for guaranteeing countermajoritarian judicial review—are not mere technicalities or American quirks. Instead, because these features are the tools employed to safeguard against the prospective tyrannies the Framers so rightly feared, they are the fundamental elements of our structural Constitution, and quite probably the nation’s greatest contribution to political thought.

### A. *Unwritten Constitutions*

Constitutional governance—in the broad sense of the phrase—is not unique to the United States. There are constitutional monarchies and dictatorships, sham constitutional regimes, and true constitutional democracies strewn across the globe.<sup>321</sup> Undoubtedly, constitutional dictatorships and countries whose constitutions are

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320. See *supra* Part III.

321. See, e.g., *infra* notes 322-60 and accompanying text.

unenforced or fraudulent share little in common with American constitutionalism, and to the extent that they purport to espouse American values, they do so either disingenuously or half-heartedly. But even some constitutional democracies, closer in kind to our constitutional ideal, practice a significantly different form of constitutionalism than ours because they often feature (1) unwritten constitutions that provide for (2) parliamentary sovereignty or some facsimile that permits majoritarian rule with little checking.

The United Kingdom's Constitution, for example, is unwritten in any formal sense and based on custom, deriving from a wide range of sources including not only conventions of ancient vintage, but also acts of Parliament, treaties, common law, and European Union law.<sup>322</sup> The country's democratic roots stretch at least as far back as the Magna Carta of 1215, which professed a commitment to due process and ordered liberty.<sup>323</sup> Until the early seventeenth century, power was split evenly in England between the monarchy, the House of Lords, and the House of Commons.<sup>324</sup> The checks and balances of this system of separation of powers were often unforgivingly rigid—in the early days of the kingdom, the parliament deposed and executed five different English kings—but never featured judicial review as a method of enforcement against Parliament.<sup>325</sup> The English Civil War of the 1640s (upon conclusion of which yet *another* English king lost his head) and the Glorious Revolution of the 1680s brought about immense change in England.<sup>326</sup> But despite ebbs and flows in the quantum of authority allocated each branch of the government, the basic structure of the English state stayed somewhat constant.

Along the way, numerous statutes were passed that to this day bear constitutional weight. The Petition of Right (1628) vested the taxing power in the parliament,<sup>327</sup> the Habeas Corpus Act (1679)

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322. JOHN GARDNER, *Can There Be a Written Constitution?*, in *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* 89, 90-91 (2012).

323. *Id.*

324. England is discussed separately because it is where the constitutional monarchy was born; Great Britain, as a unified entity, came later. *See infra* note 330 and accompanying text.

325. *See* IAIN MCLEAN, *WHAT'S WRONG WITH THE BRITISH CONSTITUTION?* 20 (2d ed. 2012).

326. *See* John Phillip Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 *N.Y.U. L. REV.* 963, 971-72 (1989).

327. *See* Elizabeth Read Foster, *Petitions and the Petition of Right*, 14 *J. BRIT. STUD.* 21, 45 (1974); J.A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 *HIST. J.* 289, 298 (1982).

provided for writs of *habeas corpus* in the courts,<sup>328</sup> and the English Bill of Rights (1689) set forth a number of rules and individual rights of a Lockean tilt, including the right to petition the king without retribution and the freedom from monarchical interference in parliamentary elections.<sup>329</sup> These laws formed the basis of the English constitutional monarchy prior to unification in the eighteenth century.

In 1707, the Act of Union fused Scotland, England, and Wales into Great Britain.<sup>330</sup> The Act marked the birth of the unitary state, which centralized power in a British national government led by the Parliament in Westminster and the monarchy, and which has now defined British governmental structure for nearly 300 years.<sup>331</sup> The laws set forth above and the Act of Union, together with the Parliament Acts of 1911 and 1949 (governing the means by which legislation may be passed in either the House of Commons or a combination of the House of Commons and the House of Lords), the Human Rights Act of 1998 (incorporating the laws of the European Convention on Human Rights), and the Equality Act of 2010 (the British equivalent of America's Civil Rights Act) are today considered the main framing documents of the British Constitution.<sup>332</sup>

The British courts are capable of determining the validity of legislation in the United Kingdom as the "principal arbiters of the constitutional status of legislation in the UK."<sup>333</sup> In a manner of speaking, they serve a role resembling judicial review. But the United Kingdom is fundamentally a *political* constitutional regime, for "the heart of the UK constitution is the doctrine of Parliamentary Sovereignty."<sup>334</sup> By design, the United Kingdom has placed ultimate authority, both legislative and interpretive, in the people's

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328. See Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527, 529 (1960).

329. See Joyce Lee Malcolm, *The Creation of a "True Antient and Indubitable" Right: The English Bill of Rights and the Right to Be Armed*, 32 J. BRIT. STUD. 226, 246 (1993).

330. See Richard Elliott, *Iain McLean on Constitutionalism, Scottish Secession, and Engagement with Political Theory: Do We Need a Codified Constitution for the (Rest of the) United Kingdom?*, OXPOL (Dec. 13, 2013), <http://politicsinspires.org/iain-mclean-constitutionalism-scottish-secession-engagement-political-theory-codified-constitution-rest-united-kingdom/> [https://perma.cc/E7AU-FR49].

331. *Id.*

332. See GARDNER, *supra* note 322, at 90-91.

333. *Id.* at 94.

334. *Id.* at 95.

representatives.<sup>335</sup> Judicial review, and thus constitutional interpretation, in the United Kingdom is, at its heart, majoritarian.<sup>336</sup>

Somewhat similarly, Israel features a constitutional democracy with neither a comprehensive written constitution nor an entrenched countermajoritarian judiciary. United Nations Resolution 181 established the State of Israel in 1948 and required the State to promulgate a constitution that would include protections of basic human rights.<sup>337</sup> The Declaration of Independence of May 14, 1948 proposed that a “Constituent Assembly” should be elected to draft and enshrine a singular written constitution.<sup>338</sup> Within days, however, the country found itself under attack by its Arab neighbor states, and the enactment of an Israeli constitution got lost in the shuffle.<sup>339</sup> As a result, the Constituent Assembly merely adopted the Transition Law, deeming itself the State’s “First Knesset,” and failing in its mission to craft a comprehensive written constitution.<sup>340</sup>

The Supreme Court of Israel was established in 1948 as well, but was neither provided for by constitutional text nor enshrined in any Basic Law until almost forty years later.<sup>341</sup> Instead, the Supreme Court began as a remnant of British rule until, in 1957, the Knesset replaced British Mandatory legislation with the Courts Law, an ordinary statute, which dictated the maintenance of the judicial structure that had been implemented under British rule.<sup>342</sup> Mirroring the British structure that existed before partition created

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335. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37-41 (7th ed. 1908); see also RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 4-5 (2007) (defending parliamentary sovereignty as normatively superior to legal constitutionalism due to the fact that it privileges the voice of the people over the voices of unaccountable jurists).

336. GARDNER, *supra* note 322, at 95 (“[T]he courts determine the legal effect of Acts of Parliament but Parliament may always re-legislate to overrule the courts, subject again to the courts’ determining the legal effects of the re-legislation. Parliament can always get its way in the end by progressively more definite reiteration. Unless Parliament tires of the process, the courts only get to postpone their own defeat.”).

337. Yoseph M. Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements*, 53 AM. J. COMP. L. 77, 78 (2005).

338. *Id.* at 80.

339. Mark Goldfeder, *The State of Israel’s Constitution; A Comparison of Civilized Nations*, 25 PACE INT’L L. REV. 65, 69-70 (2013).

340. *Id.* at 80.

341. See Basic Law: The Judiciary, 5744-1984, SH No. II 10 p. 78 (Isr.).

342. DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 10-11 (2002).

the Jewish State, the original Israeli Supreme Court was designed to act in two primary capacities: as the court of appeal for decisions rendered in district courts and as the High Court of Justice.<sup>343</sup> In 1984, the Knesset passed Basic Law: The Judiciary, officially vesting the judicial power in the Supreme Court, district courts, magistrate courts, and other courts designated by law as courts.<sup>344</sup>

Without a comprehensive written constitution and without any higher law to dictate which rights the courts were devised to protect or what comprised judicial power or its limitations, the judiciary's status as enforcer or arbiter of constitutional law was initially dubious.<sup>345</sup> Even the justices of the Israeli Supreme Court initially expressed doubt that the judiciary was capable of engaging in boundary setting through judicial review.<sup>346</sup> It was not until the Knesset, in 1992, narrowly passed two basic laws establishing a code of individual rights—"Basic Law: Human Dignity and Liberty" and "Basic Law: Freedom of Occupation"—that the Supreme Court finally found its authority to review whether ordinary legislation contravened Israeli higher law.<sup>347</sup> Today the Court has the authority to decide constitutional questions, but the degree to which judicial review is available as a constitutional definition mechanism is highly impacted by the court's nebulous understanding of Israeli justiciability doctrine.<sup>348</sup>

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343. See Goldfeder, *supra* note 339, at 73.

344. Basic Law: The Judiciary, 5744-1984, SH No. II 10 p. 78 (Isr.).

345. To be sure, there were voices calling for judicial review. The earliest jurists on the Israeli Supreme Court and the prominent scholarly voices in the Israeli legal community were typically educated outside of Israel, often in central Europe. See KRETZMER, *supra* note 342, at 4. Some of these jurists and scholars passionately called for the judiciary to defend individual liberties or quash legislative acts they deemed inconsistent with Israeli values. See, e.g., Edrey, *supra* note 337, at 83 ("It is found that the loyalty to justice is superior to the loyalty to such law, or more precisely the fidelity to the sacred principles of democracy and human rights rejects the fidelity to oppressing laws of a tyrant legislature." (quoting Haim Cohen, *Meaning of the Triple Fiduciary of the Judiciary*, 7 MISHPATIM 5, 8 (1976))).

346. Edrey, *supra* note 337, at 83 ("Justice Bernzon indicated in the mid-1960s: 'I very much doubt we have the authority to nullify the effectiveness of the law, or part of, if it has been legislated by the Knesset in due process, even if it is clear to us that it contains a factual error or it is based on a false assumption.'" (quoting H CJ 188/63 Bazul v. Minister of Interior Affairs 19(1) PD 337 (1963) (Isr.))).

347. *Id.* at 85.

348. See Margit Cohn, *Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, 59 AM. J. COMP. L. 675, 699-700 (2011) (outlining Israel's approach to justiciability and discussing the doctrine's limiting effects on judicial review).

New Zealand is an even more curiously constructed constitutional democracy. There, “little effort has been made ... to determine which legal instruments are part of its constitution and which are not.”<sup>349</sup> New Zealanders do not know what is and what is not their constitution; most constitutional interpretation is undertaken by public officeholders, not the judiciary,<sup>350</sup> and the regime is one of parliamentary sovereignty, not popular sovereignty or judicial supremacy.<sup>351</sup> What is clear is that there is no written constitution in New Zealand.<sup>352</sup> “The basic legal rule of our constitution is that parliament is supreme. When it passes legislation that is the law. There is no higher law. There can be no argument that any statute parliament passed is unconstitutional.”<sup>353</sup>

Nevertheless, New Zealanders view their courts as “exert[ing] an important checking function on the executive and on parliament.”<sup>354</sup> On rare occasions, New Zealand’s highest court has held the acts of the prime minister to defy the word of either the old laws of the British Parliament or the new laws of New Zealand’s Parliament, and although enforcement of these decrees poses significant challenges, the people and the Parliament seem to accept the court serving in this capacity.<sup>355</sup> Ultimately, however, parliamentary sovereignty severely limits the New Zealand Supreme Court’s power to check executive decisions and renders the court completely incapable of checking legislative decision making.<sup>356</sup>

Each of these countries has demonstrated, to some degree, its commitment to individual rights and liberties. No one seriously

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349. Palmer, *supra* note 118, at 609.

350. *Id.*

351. *Id.* at 619.

352. GEOFFREY PALMER, UNBRIDLED POWER?: AN INTERPRETATION OF NEW ZEALAND’S CONSTITUTION AND GOVERNMENT 126 (1979) (“Some existing elements [of our Constitution] are in acts of parliament; others are not written down in any law. Indeed, some of the most important points in our constitution depend upon customs known as conventions.”).

353. *Id.* at 110.

354. *Id.* at 109.

355. *See id.* at 110-14 (describing the New Zealand Supreme Court’s decision in *Fitzgerald v. Muldoon* [1976] 2 NZLR 615 as demonstrating “that the courts can be bold in checking the excesses of executive power,” and explaining that the case “was an example of how the courts can uphold fundamental principles”).

356. *Id.* at 120 (“The government can change any regulation at will. And it can amend statutes with only a little more trouble. It is common in New Zealand for governments to react swiftly and decisively against judicial decisions which are unacceptable to them.”).

suggests that the constitutional regimes in any of these countries are illegitimate by virtue of their design or status.<sup>357</sup> But in all of these countries, constitutional democracy exists without a written constitution and, ultimately, is subject to parliamentary supremacy. This poses two problems with which American constitutionalism is explicitly concerned. First, it treats government as though the gradual or sudden onset of tyranny is of no concern. And second, even if we assume that individual rights crises have not yet arisen in these states—indeed, even if they *never* actually arise—this design element allows for precisely the type of individual rights risk-potential that American constitutionalism was uniquely devised to eradicate. The foundational premise of American constitutionalism is fear and mistrust,<sup>358</sup> while the foundational premise of these systems seems to be faith in the pursuit of common purposes.

Take New Zealand as a most extreme example, where a diffuse and unidentifiable constitution empowers majoritarian branches to rule without any entrenched counter-majoritarian check.<sup>359</sup> New Zealand takes this approach because its constitutionalism is concerned with building a large, unconstrained, benevolent government with wide latitude to influence the citizenry. In the words of one commentator:

In some other countries, notably the United States, people tend to regard government as a necessary evil which should use and be invested with powers to the most limited extent possible.

New Zealand, almost since its beginning, has never followed that view. To the New Zealander, the government is his friend.<sup>360</sup>

It should be noted that the judiciary in the United Kingdom hears cases and determines the validity of laws that jeopardize individual rights or civil liberties.<sup>361</sup> Both formally and descriptively, both the

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357. Again, Israel is a unique case; we do not mean to suggest that no serious scholars or political voices challenge the legitimacy of the Jewish State. We mean only to say that it is a close question whether Israel espouses some form of “constitutionalism” or whether its constitutionalism evinces some degree of commitment to fundamental rights.

358. See *supra* note 20 and accompanying text.

359. PALMER, *supra* note 352, at 127 (“At present we have no supreme law. Parliament can pass any law without being subject to any higher law enshrined in a constitution.”).

360. *Id.* at 6.

361. See *supra* note 333 and accompanying text; see also Po Jen Yap, *The U.K. Supreme Court at War*, 24 WASH. INT’L L.J. 363, 381 (2015) (discussing *Gillan v. Commissioner of Police*

British judiciary and the European Court of Human Rights hold a stronger position to check executive or legislative activity than does the New Zealand Supreme Court.<sup>362</sup> Formally, the laws that are viewed as comprising the British Constitution are more numerous and easier to identify than the norms and conventions that comprise New Zealand's. As a descriptive matter, the British judiciary might enjoy enhanced credibility to enforce constitutional boundaries due to its position in what looks like a federal structure.<sup>363</sup> Professor Delaney has written about the federalism facsimile that has rapidly developed in the United Kingdom over the last few years, noting that between the adoption of the European Convention of Human Rights and the continued devolution of power to Scotland, the British Supreme Court has been positioned to enforce vertical power boundaries.<sup>364</sup> Building on earlier work suggesting that courts in a federalist system empowered with enforcing vertical power boundaries can earn the legitimacy to enforce horizontal power boundaries,<sup>365</sup> Professor Delaney argues that judicial supremacy might well be on the rise in Great Britain.<sup>366</sup>

This descriptive explanation, however, does little to address the underlying structural problem.<sup>367</sup> Professor Delaney seems to think that these new developments have strengthened the British judiciary such that it will soon be capable of enforcing horizontal power boundaries and undermining parliamentary sovereignty.<sup>368</sup> We are not so sure. After all, the British Parliament is still very much

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*for the Metropolis & Anor* [2006] UKHL 12, [2006] 2 AC 307 (HL), wherein the House of Lords “unanimously upheld Section 44 of the Terrorism Act 2000, which provided that a senior police officer could authorize the use of blanket stop and search powers” in certain situations).

362. See *supra* notes 333-36, 349-53 and accompanying text.

363. See Delaney, *supra* note 171, at 573-74.

364. See *id.*

365. See Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1142, 1193 (2011) (arguing that in the United States, the Supreme Court earned credibility and legitimacy necessary to enforce horizontal power boundaries thanks largely to the federalist structure that required the Court to enforce vertical power boundaries).

366. Delaney, *supra* note 171, at 574.

367. Other prominent scholars who support and defend political constitutionalism and parliamentary sovereignty think these developments pose little threat to Diceyan constitutionalism in the United Kingdom. See ALISON L. YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT 68-72 (2009); Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L J. CONST. L. 86, 87-88 (2011).

368. See Delaney, *supra* note 171, at 604-05.

supreme, and the judiciary is still subject to parliamentary control. But whether the court is poised to serve a stronger role is irrelevant to the question of whether political constitutionalism can structurally accommodate countermajoritarian checking. At any time, the Parliament can impose its will in the United Kingdom because the nation's form of political constitutionalism permits such majoritarian course correction. In striking contrast, our Constitution has been built explicitly to limit majoritarian power and permit countermajoritarian checking.

All three of these countries guarantee salary and tenure protections to supreme court justices.<sup>369</sup> Or, we should say, they purport to do so: majoritarian legislation secures these protections, and all three of these countries could, by an act of ordinary legislative power, repeal or amend the laws or norms that provide for insulated judicial review.<sup>370</sup> And all three of these countries can, by majoritarian choice, overrule judicial pronouncements without any fear of reproach.<sup>371</sup> In Israel, judicial review exists because the court delegated itself that power when the Knesset legislated into effect two basic laws relating to human rights and individual liberties;<sup>372</sup> the Knesset remains empowered to disband the court, curb its jurisdiction, redefine its purpose, or eviscerate the rights it codified in the two basic laws that spawned the state's judicial review doctrine.<sup>373</sup>

Whether these countries employ a legitimate form of constitutional governance is therefore not the relevant question. Legitimacy is a subjective concept; if the legitimacy of these regimes lies in how well they effectuate the goal of recognizing the voice of the people,

369. See Constitutional Reform Act, 2005, c. 4, §§ 33, 35 (granting life tenure to British Supreme Court justices); Judicial Pensions and Retirement Act, 1993, c. 8, § 26 (creating mandatory retirement at age seventy for British Supreme Court justices); Basic Law: The Judiciary, 5744-1984 S.H. No. II 10 p. 78 (Isr.) (granting life tenure to Israeli Supreme Court justices); *The Judiciary: The Court System*, ISR. MINISTRY FOREIGN AFFS., <http://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx> [<https://perma.cc/2YEE-XZHG>] (last updated January 2015) (explaining that Israeli Supreme Court justices have a mandatory retirement age of 70); Constitution Act 1986, s 23 (granting life tenure to New Zealand Supreme Court justices).

370. See *supra* notes 335, 350-53 and accompanying text.

371. See *supra* notes 335, 350-53 and accompanying text.

372. See Myron J. Aronoff, *The "Americanization" of Israeli Politics: Political and Cultural Change*, 5 ISR. STUD. 92, 92 (2000).

373. SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 119 (2007).

then it is difficult to challenge the legitimacy of political constitutionalism because it quite effectively empowers the people to rule based on the interests espoused by the majority of the governed. The relevant question, in our view, is whether these unwritten political constitutions are legitimate insofar as they advance the goals of *American* constitutionalism; if they are not, then it seems perverse to either claim our constitutional regime resembles them or draw lessons for our constitutional system from them.

As we have made clear throughout this Article, the principal concern of our founding document was to prevent majority rule from railroading minority interests or jeopardizing future generations by acting on momentary majoritarian choices. A system in which the complete constitution is scattered, difficult to identify, and easily subject to majoritarian modification or repeal cannot effectively guarantee the people's protection from the accumulation of power in a tyrannical government. Political constitutionalism offers to secure minority interests by crossing its fingers and hoping the political realities that make infringement unlikely will continue to morally tie the government's hands indefinitely. This is directly contradictory to our legal constitutionalism's formal methods of enshrining the protection of minority rights through a countermajoritarian check contained in a comprehensive statement of supreme law.

### *B. Insufficiently Countermajoritarian Constitutions*

Although the dangers inherent in the unwritten constitutions of political constitutionalist regimes are subtle and creeping, the perils of pure, unadulterated majoritarianism are clear on their face. The validity of the premodern view of American constitutionalism and the absurdity of modernism are obvious when one examines regimes that plainly adopt either pure majoritarianism or toothless countermajoritarian judicial review. China is one such nation, and a brief examination of its mode of judicial review further bolsters our premodernist claim that the core of American constitutionalism is countermajoritarian checking of majoritarian power, manifested through a singular written constitution and a prophylactically insulated judiciary empowered as final constitutional interpreter.

Early constitutional development in China began in the latter half of the nineteenth century.<sup>374</sup> Throughout the entirety of its constitutional history, the Chinese Constitution has existed in a state of tumult. Since 1908, China has deemed itself governed by a series of twelve different constitutions.<sup>375</sup> But despite having a written constitution in some format for over a century, China's Constitution does not provide for countermajoritarian checking in any form, either by separation of powers, federalism, or prophylactic judicial review. Indeed, "the Supreme People's Court is not the ultimate arbiter of the constitutionality of legislation."<sup>376</sup> In the words of one commentator:

Political rights were guaranteed under the Chinese constitutions to all citizens aged eighteen and over as "the right to vote and stand for election." ... Under the current 1982 Constitution, the right to strike contained in the 1975 and 1978 Constitutions was ... eliminated.

Moreover, those civil and political rights formally guaranteed were subject to a number of crucial limitations that effectively undermined the guarantee. First, like other communist countries, China was a state operating according to concepts of civil law that saw law itself as based on the will of the state and the legislative provisions made by it. Since the Constitution was not judicially actionable, the state was not obliged to put the guaranteed rights into action. Second, the socialist emphasis on the supremacy of the state over the individual strengthened the existing historical bias toward the dependence of the individual on the state for rights, the view of law as an instrument of the state, the emphasis on a citizen's responsibility to the state rather than on his rights, and the view of human rights as a matter of domestic jurisdiction as well as a potential threat to state sovereignty.

....

...[As] of 1989, the informal condition of liberalization did not have any corresponding support in the existing constitutional,

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374. See JINSONG JIANG, *THE NATIONAL PEOPLE'S CONGRESS OF CHINA* 18-19 (2003); M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43, 45 (2005).

375. Killion, *supra* note 374, at 51-52.

376. Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 COLUM. J. ASIAN L. 152, 160 (2005).

legal, and institutional framework.... As in the past, freedoms were still granted, or rescinded, at the whim of the state.<sup>377</sup>

In fact, under Chinese law, only the National People's Congress possesses authority to interpret the Constitution.<sup>378</sup> The courts in China are forbidden from invalidating statutes, and have no authority to define the bounds of their own jurisdiction.<sup>379</sup> And, most importantly of all,

Chinese courts issue their rulings under the supervision of government officials.... [I]ntense supervision of the courts by other political institutions is a hallmark of the Chinese legal system. In the name of "supervision," legislatures intervene in the judicial process at their respective administrative levels. Courts do not review any issue without guidance from the Chinese Communist Party, but are guided toward their decisions, particularly in deciding cases deemed as "complex" or "big," by adjudication committees staffed by Party personnel at each court. Supervision by the adjudication committees is justified as a check on judges by "the masses."<sup>380</sup>

As a matter of common sense, this constitutional regime should appear to us as diametrically opposed to our own. Without an insulated judiciary that can effectively activate a countermajoritarian check, the Chinese system hardly resembles the American system. Businesses and individuals cannot ensure that their economic<sup>381</sup> and liberty<sup>382</sup> interests will be secure against infringement, and the bounds of governmental power can change at the whim of the ruling party. The skeptical optimism at the heart of our constitutionalism is nowhere to be found in China's: their unchecked majoritarian

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377. ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE 29-31 (1999) (footnote omitted).

378. Lee, *supra* note 376, at 161.

379. *Id.* at 165.

380. *Id.* at 166.

381. See, e.g., Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT'L L. & BUS. 107, 108-09 (2003) (explaining that the weak judiciary renders antitrust enforcement meaningless and thus discourages competition and new entry into China's capital markets).

382. See, e.g., KENT, *supra* note 377, at 30; Katie Hunt & Shen Lu, *Fighting for Their Rights Landed These Young Chinese Feminists in Jail*, CNN (Apr. 10, 2015, 3:57 PM), <http://www.cnn.com/2015/04/10/asia/china-five-women-activists/> [<https://perma.cc/Z9HJ-KK2V>].

regime undercuts the human capacity for flourishing and permits government overreach.

This is why the premodernist analysis is really the only way to adequately conceptualize American constitutionalism: if the modernists are correct that the principles of American constitutionalism can be achieved even without their necessary activating devices, the forms of constitutionalism examined in this Part logically contain transferable lessons about our own related constitutionalism. If American constitutionalism is not defined in part by the activating device of a singular, entrenched, written constitution, then the unwritten political constitutions of England, Israel, and New Zealand are essentially cousin constitutionalisms to our own despite the inherent structural deficiencies that render these countries incapable of guaranteeing individual liberties. Likewise, if American constitutionalism is not partly defined by the activating device of a prophylactic, insulated judiciary, then the unchecked majoritarian Constitution of China is not so different from our own. The power of the premodernist view is its descriptive power to theorize the gut reaction that anyone remotely familiar with the American Constitution and the principles it seeks to protect would be sure to exhibit in the face of such comparisons.

## CONCLUSION

It has been suggested that America has no ideology whatsoever, that pragmatism is this country's guiding principle.<sup>383</sup> When Madison was chastised for refusing to design a federal government whose branches were completely separated as Montesquieu had advised, his response was pragmatic: a system of checks and balances was more important than maintaining complete separation.<sup>384</sup> But this rolled-up sleeves American pragmatism is appropriately viewed as an ideology in itself. It represents first the cold, hard, "street-wise" recognition of the danger of accumulated and unchecked power, and second, a belief in the power of a written, entrenched document to both empower the majority and protect that majority

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383. See generally DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* (1973); HENRY STEELE COMMAGER, *THE AMERICAN MIND* (1950).

384. See *THE FEDERALIST* NO. 48, *supra* note 20 (James Madison).

from itself. Constitutionalism—*American* constitutionalism—is this country's great contribution to political thought, borne not out of the postulates of theorists but out of the depths of necessity, the mother of invention. We risk modifying or reshaping it—particularly in the ways suggested by the modernists—at our peril.