Cornell Law Review

Volume 102
Issue 6 *September 2017*

Article 4

Debate

Richard Primus
University of Michigan Law School

Kevin M. Stack
Vanderbilt Law School

Christopher Serkin
Vanderbilt Law School

Nelson Tebbe
Cornell Law School, nt277@cornell.edu

Follow this and additional works at: https://scholarship.law.cornell.edu/clr


Part of the Constitutional Law Commons, and the Legal Writing and Research Commons

Recommended Citation
Richard Primus, Kevin M. Stack, Christopher Serkin, and Nelson Tebbe, *Debate*, 102 Cornell L. Rev. 1649 (2017)
Available at: https://scholarship.law.cornell.edu/clr/vol102/iss6/4

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

DEBATE

INTRODUCTION

In 1890, Louis Brandeis wrote *The Right to Privacy*.[1] Within a matter of years, the courts began adopting his theory, creating a newly articulated legal right. This article likely represented the high-water mark of legal academia in terms of real world impact. In recent years, the academy has lost much of its relevance. Chief Justice Roberts ridiculed academic work, suggesting that legal scholarship has become esoteric and irrelevant.[2]

This should not be the case. The quality of legal scholars is higher than it has ever been—young scholars now often enter the academy with doctoral degrees in related fields. Likewise, technology has placed a world of information at our fingertips. Scholars can write pieces that react to quickly changing events at an unprecedented speed.

Yet the speed of publication in flagship print editions has lagged behind the speech of scholarship itself. By the time a piece of writing is published, almost a year has passed since it was submitted. And if the piece elicits a response, it would come out a year after that. At this point, two years have gone by since submission and in the fast paced world of legal scholarship, a final riposte will often not be relevant. The end result is, that aside from the occasional citation, most scholarly debates are obsolete or irrelevant by the time they appear in print. This should be unacceptable given that our profession is, at its core, adversarial.

Adversity can help make legal scholarship more relevant. Although a legal practitioner can easily research the case law, she cannot as easily identify the points of interpretive conflict. Now more than ever, it is essential for academic works to present the competing views of a theory in a package that identifies where the real points of reasonable disagreement lie. Yet

---

1 Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2 *See* Chief Justice of the United States John G. Roberts, Jr., Interview at Fourth Circuit Court of Appeals Annual Conference (June 25, 2011), http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts at approx. 30:40 ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.").

this is a difficult task for any single scholar. All minds are subject to bias, even more so when the subject has already stoked scholarly passions. And even in the cases where a scholar can fairly present disagreements, there is simply no way for a practitioner to identify an exceptional piece from the volumes of scholarship without significant expertise in the field.

Unfortunately, this means that despite the skill and best intentions of legal scholars, the solution to this problem is largely out of their hands. Further, the students that comprise the editorial boards of America's legal journals do not have the knowledge to consistently ensure that an article includes voices of reasonable opposition.

This "debate" is an attempt to remedy the problem. Instead of imposing our opinions on the academy, the editors of the *Cornell Law Review* have decided to facilitate what is essentially a public peer review process of an article published in a previous volume of our journal.

In Volume 101, we published an article by Professors Christopher Serkin and Nelson Tebbe entitled *Is the Constitution Special?*[3] This article argued that, contrary to common belief, it is difficult to justify lawyers' distinct interpretive approach to the Constitution, as opposed to statutory or common law. This was a novel and controversial claim that begged to be subjected to heightened scrutiny. After an extensive selection process, the senior editorial board invited Professors Richard Primus and Kevin Stack to act as critics of the Serkin and Tebbe piece, and they graciously accepted.

Over the course of the past year, these four scholars have engaged in a written exchange debating Serkin and Tebbe's argument. It begins with Primus and Stack's critiques of the article and then carries on for a total of six critiques and responses (two from each critic and two from the authors). While the result of this experiment will be determined by its readership, we believe that it has been a success. As will be seen in the pages that follow, the initial theory has been clarified and elevated while the facets of disagreement have been cleaved for both future scholars and practitioners.

---

3 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

THE COST OF THE TEXT

Richard Primus†

Christopher Serkin and Nelson Tebbe's *Is the Constitution Special?*[4] explores many facets of constitutional interpretation. I will focus here on their observation that constitutional interpretation is "less textual" than statutory interpretation. I place the expression "less textual" in quotation marks because "textual" could mean many things, such that it would often be problematic to characterize one interpretive exercise as more or less textual than another. In Serkin and Tebbe's view, as I understand it, mainstream constitutional interpretation is "less textual" than statutory decisionmaking in that it is less constrained by the words of particular enacted clauses.[5] As a convenient shorthand, I will refer to the phenomenon that Serkin and Tebbe observe—that lawyers and judges are more prone to hew closely to the language of particular clauses in statutory cases than in constitutional ones—as the "textualism gap."

I suspect that Serkin and Tebbe are right to think that the textualism gap exists. And a rich literature offers reasons why legal practitioners *should* treat statutory and constitutional

† Theodore J. St. Antoine Collegiate Professor, The University of Michigan Law School. Thanks to Nicholas Bagley, Will Baude, and Mitchell Berman for suggestions about this paper and to Christopher Serkin, Nelson Tebbe, and Kevin Stack for their roles in this conversation.

4 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

5 To adapt a term from John Hart Ely, we might say that the kind of textualism that is at issue here is the "clause-bound" kind. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 11–42 (1980) (describing and criticizing "clause-bound interpretivism" in constitutional law).

text differently.[6] For present purposes, however, I am less interested in whether interpreters *should* treat statutory language differently from constitutional language than I am in explaining observed patterns in how practitioners *actually do* treat the two kinds of text. If practitioners do treat the two kinds of text differently in the ways that prescriptive theories advocate, it is possible that the persuasive power of the theories explains, or helps to explain, the observed differences. But it is also possible that the observed differences in practice are largely independent of what judges and professors say ought to be done. Indeed, the textualism gap might not reflect—or might not *merely* reflect—any conscious choices among practitioners to treat the different kinds of text differently. Perhaps the reasons for decisionmaking that does not hew closely to the words of enacted clauses are roughly the same in the statutory and constitutional contexts, but, for a combination of reasons, the circumstances in which those reasons apply are more common in constitutional cases than in statutory ones.

Consider three reasons why judges decide cases on bases other than the wording of particular enacted texts.[7] (1) Sometimes there is no enacted text directing a determinate answer to the question that must be decided. (2) Sometimes prior courts have decided cases that bear on the question at issue, such that courts decide by reference to precedent rather than by reference to an enacted text. (3) Sometimes the decision to which enacted language points is simply unacceptable, such that judges feel it would be irresponsible to follow the words of a text meekly down the road to perdition.

Serkin and Tebbe have the first reason firmly in view.[8] The Constitution contains many broadly worded standards, and cases calling for the application of those standards require something beyond textual reasoning. I suspect, however, that the textualism gap is mostly a product of the other two reasons—the role of precedent and the costs of adhering to the wording of enacted texts.

---

6 *See, e.g.*, Kevin Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, *supra* (responding to Serkin & Tebbe, *supra* note 4).

7 By setting out these three reasons, I do not mean to suggest that decisionmaking by direct reference to enacted text is the normal or the default mode of judicial decisionmaking in the American system.

8 *See, e.g.*, Serkin & Tebbe, *supra* note 4, at 751 (identifying several broadly worded constitutional clauses that might give rise to nontextual interpretation in constitutional law).

Consider the role of precedent first. Most constitutional litigation occurs in a small number of doctrinal categories, each of which is piled high with case law. As a result, judges rarely have occasion to recur to the underlying text. Statutory litigation also has many domains with richly developed case law, and in those domains, it is similarly true that decisionmaking proceeds on the basis of case law more than by reference to enacted text. But because the U.S. Code is sprawling and prolix, and because its text changes much more frequently than the text of the Constitution does, statutory litigation features orders of magnitude more opportunities for decisionmaking in areas of first impression. As a result, more statutory cases are decided by reference to the text directly.

Next, and perhaps most interestingly, consider the costs of adhering strictly to the wording of enacted texts. Constitutional law, I suggest, is more prone than statutory law to furnish occasions on which following a text woodenly would yield an unacceptable result in a high-stakes case. It does so not because the Constitution is especially poorly drafted but because Americans in each generation have a way of making their most salient issues into issues of constitutional law, whether or not prior generations would have recognized them as such. That means that constitutional law regularly presents highly salient issues that the text of the Constitution was not written to address. There is a persistent mismatch between the text of the document and the set of concerns that well-socialized American lawyers expect the Constitution to vindicate. Constitutional interpretation responds to that mismatch by deciding cases nontextually—by which I mean, in this paper, deciding cases in ways other than by reading enacted language to mean something that might occur to a competent reader of English who did not share the substantive expectations of American constitutional lawyers.[9]

I
OF NONTEXTUAL STATUTORY INTERPRETATION

Courts sometimes depart from the words of enacted clauses in statutory cases, not just in constitutional ones. Serkin and Tebbe give the example of the Sherman Act, under which courts have elaborated doctrine that particularizes a general standard but without being guided by specific statutory

9 *See* Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91 (2010) (describing the role of the expectations of constitutional lawyers in shaping the accepted readings of the Constitution's text).

language.[10] In other words, decisionmaking under the Sherman Act does not proceed on the basis of close readings of enacted text, and the reason why might be (most commentators just say that it is) the first of the reasons for "nontextual" decisionmaking given above: the text is not specific enough to resolve the issues presented.

In a different vein, consider the status of workplace affirmative action under Title VII of the Civil Rights Act of 1964. The wording of 42 U.S.C. § 2000e-2(a) does not contain vague language about equality that courts have particularized in a way that permits affirmative action. On its face, 42 U.S.C. § 2000e-2(a) seems to prohibit affirmative action, because it clearly and flatly prohibits employers from distinguishing among employees or applicants on the basis of race or sex.[11] Nonetheless, courts construe Title VII to permit affirmative action on the basis of race and sex when certain conditions are met.[12] Note that courts do not pretend that the specific words of Title VII permit affirmative action under those conditions as an exception to its otherwise general rules prohibiting discrimination on the basis of race and sex. Nor do courts claim that the wording of Title VII is indeterminate on the point. They simply proceed under established doctrine that treats affirmative action as permissible under Title VII when the given conditions are met, irrespective of what the words of the statute say.[13]

In other cases, courts wrestle with the meaning of words in statutes, and even read the words closely, but then decide that the words mean something that might surprise competent readers of English. Consider *King v. Burwell*.[14] The Supreme Court in that case asked whether the phrase "an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act"[15] refers only to exchanges es-

---

10 Serkin & Tebbe, *supra* note 4, at 752.

11 *See* 42 U.S.C. § 2000e-2(a) (2012) ("Employer practices. It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

12 *See, e.g.*, Johnson v. Santa Clara Cty., 480 U.S. 616 (1987) (sex); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (race).

13 *See* United Steelworkers v. Weber, 443 U.S. 193 (1979) (initiating this approach).

14 135 S. Ct. 2480 (2015).

15 *Id.* at 2487 (emphasis omitted); 26 U.S.C. § 36B(b)-(c) (2012).

tablished by state governments or also to certain exchanges established by the federal government. The Court in *King* devoted considerable effort to a close reading of the statute, taking fourteen paragraphs to find the relevant language "ambiguous" as between the two possibilities[16] and then explaining at similar length why the ambiguity should be resolved in favor of reading "an Exchange established by the State" to include exchanges established by the federal government.[17]

In my view, *King* was rightly decided, and obviously so. But the Court's characterization of the phrase "an Exchange established by the State" as "ambiguous" requires critical scrutiny. Ordinarily, to say that a phrase is ambiguous is to say that it admits of two different meanings. As applied here, the suggestion would be that the words "the State" in section 1311 could mean either "the state" or "the state or the federal government." But the expression "the State" does not normally admit of that second meaning.[18] Moreover, the Affordable Care Act (ACA) defines the term "State" to mean "[(a)] each of the 50 states [of the United States,] and [(b)] the District of Columbia."[19] Whatever problems the wording of section 1311 might have raised, a lack of semantic clarity rooted in multiple possible meanings of the term "State" was not among them.

The decision in *King* makes sense not because a competent reader of English who came across section 1311 standing alone might wonder whether "the State" meant "the state" or "the state or the federal government" but because the overall statute of which section 1311 is a part—the Patient Protection and Affordable Care Act—would make no sense if the phrase "an Exchange established by the State" were given its plain meaning. Common sense therefore required implementing the statute as if section 1311 contained different words from the words Congress actually enacted. But the Court was not confronting statutory language whose meaning was relevantly indeterminate and choosing one of the plausible meanings of that language. It was confronting words that had a clear meaning and rejecting that meaning—correctly, in my view—in order to prevent those words from defeating the purpose of the statute

16 *King*, 135 S. Ct. at 2489–92.

17 *Id.* at 2492–95.

18 To be sure, there is a generic sense of "state" in which the word just means something like "government." But that is not the normal meaning of "state," much less "State," in American law.

19 *See* 42 U.S.C. § 18024(d) (2012) (defining "State").

overall.[20] In other words, the Court rejected the plain meaning of a textual clause in favor of other, more important considerations, but when it did so it purported to be interpreting the language rather than disregarding it.[21]

The point of the foregoing examples is not to deny the textualism gap. I agree with the conventional wisdom on which statutory decisionmaking today is, on the whole, more governed by the wording of specific enacted clauses than constitutional decisionmaking is. But the fact that various areas of statutory law depart from the wording of enacted clauses as

---

[20] This understanding supports the Court's choice not to afford the Internal Revenue Service *Chevron* deference in its construction of the language at issue in *King*. *See King*, 135 S. Ct. at 2488–89 (refusing, on a rationale different from the one explained here, to afford *Chevron* deference). *Chevron* deference applies when statutory language could reasonably be given legal force in more than one way. In *King*, the plain meaning of section 1311 pointed to a certain way of giving legal force to the statute, and the overall plan of the statute pointed to another. But the fact that the plain meaning of section 1311 and the overall plan of the statute pointed in two different directions does not mean that there were two reasonable interpretations of the law. Given the statute overall, giving legal force to the plain meaning of section 1311 would have been unreasonable. Put differently, the interpretation of the ACA proffered by the *King* challengers was not one reasonable interpretation out of some larger set of plausible reasonable decisions. It was just wrong, despite the fact that it would have given the statute a meaning that accorded with the plain meaning of section 1311's language.

One could also shed light on this point by asking about the locus of the alleged "ambiguity" in *King*. What, precisely, was ambiguous? The answer cannot be section 1311 standing alone. Standing alone, the words of section 1311 unambiguously point to the meaning for which the challengers contended. The Court's reasoning might accordingly be taken to mean that section 1311 was ambiguous *in context*—that when the ACA is considered as a whole, the meaning of section 1311 becomes less clear. But it is not correct, I suggest, to think that there was any relevant ambiguity at the level of the statute as a whole. Considered as a whole, the ACA clearly points to the result sought by the government.

The fact that the statute as a whole clearly requires departing from the plain wording of section 1311 does not make that wording "ambiguous." It means that section 1311 must be given a meaning different from the meaning it would plainly have standing on its own. In particular, section 1311 must be read to refer to exchanges established by the federal government as well as to exchanges established by states. To state baldly what should be obvious, language that must be given one particular meaning is not "ambiguous," regardless of whether the one meaning the language must be given is its literal meaning or some other meaning. And where there is no ambiguity—no multiplicity of reasonable ways in which legal language could be given force—there is no role for *Chevron* deference.

[21] As noted in the first paragraph of this Response, "textualism" names a family of interpretive approaches rather than a single rule or set of rules. There is of course a sense in which such a decision like *King*, which is based on the overall plan or purpose of a statute, is not less "textual" than a decision that hews closely to particular language in the statute, because both the meaning of the particular words and the sense of a statute overall can reasonably be described as considerations about the text. But as was also noted, see *supra* note 2 and accompanying text, it is the role of close reading, or of "clause-bound" textualism, that is of interest in the present analysis.

much as any area of constitutional law suggests that the formal division between statutory and constitutional cases is not enough to explain the textualism gap.

II
THREE FACTORS

I suspect that more substantive considerations do the work of determining when courts hew closely to enacted clauses and when they are more willing to reason in other ways. Above, I noted three relevant factors: the determinacy of enacted clauses, the presence of precedent, and the potential cost of hewing closely to the wording of enacted language. Consider each now in a bit more depth.

(1) *Indeterminacy*. Serkin and Tebbe note the difference between enacted language that articulates precise rules and enacted language that articulates less determinate standards.[22] Not all texts are equally directive, and a court confronting a less-directive text is more likely to reason in ways that go beyond the words in front of it, if only because it is impossible to decide the case without doing so. But that difference between rule-like and standard-like texts is only the beginning.

(2) *Precedent*. Another factor is the difference between legal questions with thick accumulations of case law on point and legal questions where the case law is thinner. The first case to construe a constitutional clause, like the first case to construe a statutory provision, is more likely to reason closely about the text than the hundredth case decided under the same language, because the hundredth case has ninety-nine precedents shaping its approach. If those precedents are sufficient to dispose of the issue, then the court is unlikely to reason closely about the underlying enacted language at all. It doesn't need to. Indeed, it might go wrong by doing so, because part of a court's responsibility is to decide consistently with precedent. And even if the precedents don't fully dispose of the issue, the question that the court must decide might be one to which no close reading of the underlying text would speak, either because governing doctrine had already traveled a fair distance from enacted text, or, if the doctrine was fairly understood as working within possible meanings of enacted text, because the question presented for decision might concern

22 Serkin & Tebbe, *supra* note 4, at 719.

something that had never been adequately specified by that text.

(3) *Cost*. Some cases have a great deal at stake, whether practically or symbolically or both. Others matter less. Where relatively little is at stake, courts are more likely to be content to go where a text (or any other preexisting authority) points them, regardless of whether that destination seems sensible to them on the merits. But the more that a case matters—or perhaps more precisely, the more that the decisionmakers think that a particular outcome in the case would be awful[23]—the more those decisionmakers are likely to resist authorities that seem to direct undesirable outcomes. It is one thing to lose a dollar because of a poorly worded clause, and it is quite another to lose a kingdom because of one. Reasonable people expend more effort in fighting the latter prospect than they do in fighting the former one. So the tendency to reject a text and the tendency to work hard to find a way to re-read that text both increase as the perceived cost of obeying the conventional reading of the text increases.

III
ASSESSING THE FACTORS

The literature on constitutional interpretation canonically points to the first factor—the indeterminacy of the relevant texts—as a reason why constitutional interpreters frequently reason nontextually.[24] There is something to that observation. I suspect, however, that the second variable—the existence of relevant precedent—explains more of the textualism gap be-

---

23 This refinement is meant to operate along two dimensions. First, the importance of a case for these purposes is measured subjectively, from the decisionmakers' point of view, rather than objectively. What matters for predicting whether decisionmakers will be content to follow a text meekly, even when it seems to point in a bad direction, is the decisionmakers' sense of the stakes rather than anything about what the stakes "really" are. *See infra* pp. 109–10. Second, by saying that the willingness to depart from textual authority rises with the decisionmakers' sense that a particular outcome would be awful, rather than just the sense that a lot is at stake, I mean to point out that decisionmakers often know that a legal question is important but do not have a confident sense of which outcome would be harmful. *See, e.g.*, Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 694 (2011) (suggesting that decisionmakers are often unable to predict whether constitutional decisionmaking procedures will yield outcomes they favor or outcomes they oppose). A decisionmaker in that situation might be delighted to have a rule to follow mechanically, because it relieves him of the responsibility for the decision.

24 *See, e.g.*, ELY, *supra* note 5, at 13 (noting that several constitutional clauses cannot be given determinate legal content unless the interpreter looks beyond the words of the clause).

tween statutory and constitutional interpretation than the first factor does.

Consider equal protection cases. In most cases that we say "arise under the Equal Protection Clause," courts do not reason about the meaning of the words "equal protection," struggle with the indeterminacy of that phrase, and then reason nontextually to decide which possible meaning of those words is most appropriate.[25] They simply consult case law, deciding the issues before them without ever grappling with the possible meanings of the words "equal protection." So it is true that the words "equal protection" do not carry a single, determinate meaning. But the indeterminacy of the clause's meaning is not what prompts courts to engage in the kind of nontextual reasoning in which they do in fact engage. What drives courts to reason as they do is a thick body of case law.

One might be tempted to think that the existence of that thick body of case law is itself a product of the indeterminacy of the underlying text. If that were so, then the indeterminate meaning of the words "equal protection" would still be driving the nontextual decisionmaking we see in equal protection cases, just at one remove. Textual indeterminacy would drive the development of case law as a means of settling questions that could not be resolved on the basis of the text alone, and the fact that judges made decisions based on that case law rather than directly on the basis of the text would then be traceable to that text's indeterminate meaning.

Perhaps such a dynamic does account for a share of constitutional interpretation's tendency to operate less textually than statutory interpretation. But we should not overestimate that share. After all, broadly worded and standard-like constitutional clauses are not the only ones that become the subjects of thickly developed case law. Consider the Eleventh Amendment.[26] No first-semester law student identifies the Eleventh

---

25 In the Supreme Court's recent landmark decision in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), the opinion of the Court used the words "equal protection" four times: once when stating the question presented, *id.* at 2204, once when stating the holding of a lower court, *id.*, once when stating the petitioner's claim, *id.* at 2207, and once when stating the meaning of one of its own precedential cases, *id.* at 2210. At no point did the Court engage questions about the range of meanings that the phrase "equal protection" might bear, nor did it at any point frame its analysis as answering questions about how to particularize the meaning of those words.

26 U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

Amendment as a text that speaks in broad and indeterminate principles. It reads like the statement of a relatively specific rule.[27] But that has not prevented the development of a thick body of case law. When judges decide Eleventh Amendment cases, they do so on the basis of that case law rather than by reading the text closely, and their reason for doing so is not that the text is broad and indeterminate.

What drives interpreters to develop thick case law, and to decide cases nontextually, in contexts like Eleventh Amendment jurisprudence, where the text is not especially broad? A big part of the answer, I suspect, is about the third factor I identified above: the perceived cost of hewing closely to the text. For many constitutional interpreters, state sovereign immunity and the related issues of federalism are enormously important. These interpreters are strongly committed to the idea that the constitutional system requires a certain set of answers to the relevant questions. The text of the Eleventh Amendment, on its face, would not vindicate the answers to which these interpreters are sincerely and powerfully committed. And their commitment is strong enough to prompt them to depart from the enacted language, even though the language is specific rather than general.[28]

I suspect that this third reason for nontextual decisionmaking—the stakes of a case, and the unacceptably high cost of the result that simple forms of textualism would direct—has been underappreciated in the recent literature on legal interpretation. Indeed, I suspect that this third factor is sometimes the most powerful force in prompting nontextual decisionmaking. And it operates in statutory cases as well as constitutional ones.

Consider *King v. Burwell* again. Each of the first two factors discussed above would seem to make *King* a case in which courts would hew closely to the language of the clause at issue. First, the relevant wording—"an Exchange established by the State under section 1311 of the Patient Protection and Afforda-

---

27 *See generally* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665–67 (2004) (characterizing the Eleventh Amendment as "precise"). To be sure, one can argue about whether a text is specific or general. But if the wording of the Eleventh Amendment is nonspecific, then so is most if not all of the wording of the U.S. Code, and that would mean that we could not point to the generality of the Constitution's wording as a factor that distinguished statutory from constitutional interpretation.

28 That is exactly what Manning cogently argues ought not to happen. *Id.* at 1665. And yet it does.

ble Care Act"—did not force judges to reason nontextually by virtue of being broad or general. The clause states a rule, not a standard, and the rule is stated with a fair degree of specificity. Second, the issue was a matter of first impression. No prior Supreme Court decisions had construed the meaning of the language at issue. So the Court's choice to depart from the plain meaning of section 1311 in favor of considerations of statutory purpose and common sense was not driven by either of the first two factors. It was driven instead, I think, by the third factor: the enormous cost of taking the plain meaning of section 1311 as authoritative. Giving the words "established by the State" their ordinary meaning would have made hash of a major statute and wrecked a gargantuan government program. That consideration was strong enough to overcome whatever tendency the first two factors might have had to foster a ruling based on the plain meaning of the words "established by the State."[29]

Something similar is true with respect to affirmative action under Title VII, or at least with respect to the initial cases departing from statutory language in that domain. The reason why courts permit affirmative action in workplaces covered by Title VII is not that 42 U.S.C. § 2000e-2 contains broad or open-ended language on the point. The wording of section 2000e-2 would pretty clearly prohibit employers from practicing affirmative action if it were given its plain meaning. And courts have not pretended that the language itself is indeterminate. They have simply overcome the language, ruling that

---

29 It is worth noting that in the particular case of *King*, the enormous potential consequences of the case were the motivation for the plaintiffs' making the close-reading argument in the first place, as well as the major reason for refusing to accept that argument. The case in *King* arose as a deliberate attempt to wreck the ACA; the architects of the challenge scoured the statute's language for weaknesses that could be used to bring down the system, and they found 26 U.S.C. § 36B(b)–(c). Absent the motivation to destroy the ACA, it is likely that nobody would have given the language "an Exchange established by the State" its plain meaning simply because nobody would have thought about it. As a matter of the common sense of the regulatory plan, 26 U.S.C. § 36B(b)–(c) was obviously supposed to apply to exchanges established by the federal government as well as those established by states, and everyone would have operated the statutory scheme that way without a second thought if nobody had gone looking for problems. But once the linguistic glitch was spotted and made salient, a court would need to overcome the plain meaning of the language in order to deny the plaintiffs' claim. In a case with less at stake, the Supreme Court might well have gone along with the challenge, saying something like, "Look, we know that reading 'State' to mean 'State' might make a mess of how Congress intended its system to work, but hey, this is what they legislated, and it's not our job to clean up after them." But that argument goes down easier when the mess is small. *See* discussion of *Lamie v. United States Trustee infra* p. 116.

affirmative action is sometimes permissible even though the words of section 2000e-2 do not seem to permit it.[30] Today, of course, the reason why courts permit affirmative action despite the wording of section 2000e-2 is that case law directs them to. But when the first cases establishing this line of precedent were decided, it mattered that the permissibility *vel non* of affirmative action was highly important, both as a practical matter and as a symbolic one. The Supreme Court that decided *United Steelworkers v. Weber*[31] in 1979 was not going to let affirmative action in the workplace disappear just because the language of section 2000e-2, read strictly, would prohibit it—not as long as the Court could say, and, I am confident, believe, that the overall purpose of Title VII was consistent with some affirmative action, whether or not affirmative action was consistent with the letter of the statute.[32]

Now consider the constitutional domain. As noted earlier, most cases here are decided by reference to judicial precedent, not by reference to enacted constitutional text. Many bodies of constitutional doctrine are, at least officially, engaged in giving meaning to textual standards that are too indeterminate to dispose of particular cases, such that courts must engage in nontextual reasoning in order to apply the text at all. Think of free speech cases, or takings cases, or cases about cruel and unusual punishments. But as also noted earlier, constitutional decisionmaking frequently proceeds under precedent even when the associated text is specific, and in some contexts the doctrines developed to "apply" those texts cannot reasonably be described as particularizing those texts further. Instead, the doctrines direct decisionmaking that competent speakers of English who did not know the stakes of the cases would

---

30 *See* United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding a private affirmative action plan aimed at addressing the past practices that had blocked African Americans from holding certain positions).

31 *Id.*

32 The resemblance between *Weber* and *King* is obvious, with the distinction that in *King* the Court labored to declare the statutory language "ambiguous," rather than forthrightly acknowledging its choice to do something at variance with the wording of an enacted clause. That difference is likely the product of a changed legal culture. In 2015, judges were much less willing than they were in 1979 to admit, and perhaps even to recognize, that they are doing something other than abiding by an available meaning of particular enacted language. The desire to maintain the pretense that one is not subordinating a statute's wording to other considerations is what drives the Court in *King* to its nonstandard deployment of the word "ambiguous." In current practice, perhaps a clause is "ambiguous" if either (a) its language admits of two different meanings, or (b) the one meaning of which its language admits is so unfortunate that courts will refuse to give that meaning legal force. (Call this the ambiguity of ambiguity).

simply never imagine could be plausible interpretations of the constitutional language. Above, I gave the example of Eleventh Amendment doctrine. Other examples include cases applying the First Amendment against the federal executive branch[33] and cases reading the Tenth Amendment as an affirmative limit on Congress's delegated powers rather than an instruction applicable in cases where Congress has no delegated power to act upon.[34] In these cases, the courts are not choosing among possible plain meanings of the relevant words in constitutional clauses. The First Amendment says that "Congress shall make no law respecting an establishment of religion."[35] There is no theory of plain meaning on which "Congress" might mean "The President." None, anyway, that preserves what a theory of plain meaning is supposed to deliver, because a theory on which "Congress" might mean "The President" is a theory on which language could mean a lot of surprising things, and that is exactly what plain-meaning jurisprudence is supposed to prevent.

So the reason why courts do not hew closely to the wording of enacted texts in these contexts is not that the textual language is imprecise. It is that following the specifications of the language would yield unacceptable results in fields of law too important to be sacrificed to the abstract idea that plain language ought to govern. Courts are unwilling, and properly so, to permit Presidents to censor speech, because doing so would betray a deeply held American value and probably enable the President to become a dangerously threatening figure. Current doctrine reads the Tenth Amendment as affirmatively pushing back against the enumerated powers of Congress on the theory that the essence of American federalism requires such a doctrine, whether the wording of the Constitution captures it or not. In short, mainstream interpretive practice is for courts to depart from enacted language *when they really need to*—that is, when they see a lot to lose from a mechanical application of the idea that enacted language, read plainly, states the law.

---

33 *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (applying the First Amendment against the federal executive despite its being addressed to "Congress").

34 *See, e.g.*, New York v. United States, 505 U.S. 144, 156 (1992) ("[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself[.]"). For further development of this point about the Tenth Amendment, see Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 629–30 (2014).

35 U.S. CONST. amend. I.

A caveat is here in order. The point is not that the areas of law—be they constitutional or statutory—in which courts set aside the plain meaning of enacted texts have systematically higher stakes than those in which courts stay within the limits of enacted phrases. Much of the time, enacted language successfully describes what a court should do in order to prevent things from going badly wrong. As a result, courts (and other officials) can usually keep the government operating smoothly without departing from the directions given in relevant statutes and constitutional clauses. It is not necessary to depart from plain meanings in order to authorize the federal government to maintain the armed forces,[36] or to prohibit states from holding whites-only elections,[37] or to prevent Congress from declaring its members officeholders for life.[38] The situation where courts must set plain meanings aside in order to prevent seriously adverse consequences arises only when something has gone wrong, either because the text was badly written or because something important—maybe a material circumstance, maybe the prevailing set of normative values—has changed since the text was written.

So with respect to each kind of enacted text, two questions arise. First, how often does something go wrong in one of these ways? Second, when something does go wrong in one of these ways, what are the costs of hewing closely to enacted language?

One of the reasons why constitutional law lends itself to "less textual" decisionmaking than statutory law, I suspect, is that a larger proportion of the cases falling within the constitutional domain have high stakes, whether practically or symbolically. So even if the Constitution and the U.S. Code were drafted with equal degrees of skill and equal degrees of specificity, and even if both texts were revised to keep up with a changing world at the same rate (which of course they are not), constitutional litigation would probably involve a higher percentage of cases in which courts would be put to the choice between abiding by the words of enacted clauses and sanctioning terrible results. Assuming that judges are no *less* inclined to avoid terrible results in constitutional litigation than in other kinds of litigation, we should expect judges to depart from enacted language more often in the constitutional context.

---

36 *See* U.S. CONST. art. I, § 8, cls. 13–14.

37 *See* U.S. CONST. amend. XV.

38 *See* U.S. CONST. art. I, § 2, cl. 1 (House of Representatives); U.S. CONST. amend. XVII (Senate).

In suggesting that constitutional law involves a higher proportion of high-stakes cases than statutory law does, I am not claiming that constitutional law is more important overall than statutory law, nor that in each year the number of high-stakes constitutional cases exceeds the number of high-stakes statutory cases, nor that the most important cases are always constitutional. I am not claiming that all constitutional cases are high-stakes cases, nor even that most of them are. It is obviously true that modern America is pervasively structured by statutory law, and a reasonable case could be made for the proposition that the U.S. Code today is, as a practical matter, more important, both in the functioning of American government and in the lives of individual Americans, than the Constitution is.[39]

But the U.S. Code, being orders of magnitude more extensive and prolix than the Constitution, also gives rise to a great many low-stakes cases. A "low-stakes case," in the sense in which I intend the term, is one in which the decisionmakers do not feel deeply invested in the outcome, except in the general sense in which they always think it important to get decisions right. To be sure, many of the cases I am calling "low-stakes" are important to *someone*. The parties to particular cases often have a great deal at stake, even if nothing about the case is unusually salient from the perspective of the decisionmaker. To criminal defendant Smith facing the possibility of prison, *United States v. Smith* is a high-stakes case, and it is a high-stakes case regardless of whether it turns legally on a statutory question (like the meaning of an element in a federal criminal law) or a constitutional one (like whether evidence was gathered in violation of the Fourth Amendment). But most judges regard criminal prosecutions as routine, meaning not that they see the cases as unimportant, but that their importance is of an ordinary sort within the judges' professional lives. Similarly, statutory cases in civil litigation might decide matters of considerable personal and economic importance to a great many people without being especially salient to the judiciary. Consider *Lamie v. United States Trustee*,[40] which Serkin and

39 *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 27 (2010). My only hesitation in agreeing to that proposition outright is that I find it hard to think about either regime in hermetic isolation from the other. But that means only that the idea that statutory law is more important should not be taken too woodenly, not that it lacks an important message about how modern American government really works.

40 540 U.S. 526 (2004).

Tebbe discuss as an example of statutory textualism.[41] It seems plausible that a ruling about the availability of attorneys' fees in bankruptcy cases would have important effects on many people, including those who practice bankruptcy law as well as those who are bankrupt or who are the creditors of bankrupt estates. Congress bothered to pass the relevant statute, after all. But from the perspective of a federal court, the question in *Lamie* might just be one of many going to the intricate and opaque mass of regulation that the law provides for a complex society. Before the briefs in *Lamie* landed on their desks, Article III judges might have had no view on the issue at all, and they might not worry much about the issue once the decision is handed down. The decisions I am calling "high-stakes," in contrast, are the ones whose outcomes are particularly salient to the judges, either because of their expected consequences or their symbolic value or both.

So maybe the textualism gap between constitutional and statutory interpretation is mostly explained by two facts. First, statutory litigation presents more matters of first impression than constitutional litigation does. After all, the U.S. Code is a great deal more extensive than the U.S. Constitution. It contains orders of magnitude more clauses to be litigated, and new ones are produced at a much faster rate than new constitutional clauses are. Given this difference in the number of topics that are litigated, judicial precedent—the chief displacer of enacted textual authority—does its displacing work less frequently in statutory cases than in constitutional ones. Second, constitutional litigation might be more likely than statutory litigation to put judges to the choice between nontextual decisionmaking and unacceptable results. Not because the Constitution is especially poorly drafted, and not because bad decisionmaking in statutory cases is a low-cost affair from society's point of view, but because most of the statutory issues that courts confront as matters of first impression are not issues in which the judges are deeply invested on the merits.

CONCLUSION

Serkin and Tebbe's titular question is whether the Constitution is special. With specific reference to the textualism gap, I think the answer is partly no and partly yes. By proposing that departures from the wording of enacted clauses are driven by the same factors in the statutory and constitutional con-

41 Serkin & Tebbe, *supra* note 4, at 716.

texts, I am pushing back against the claim that prevailing practice treats constitutional text differently *just because it is the text of the Constitution*. More particularly, I do not think that the largest cause of the textualism gap—the relatively larger share of precedential decisionmaking in constitutional law—reflects a way in which the Constitution is "special," at least not in the sense that interests Serkin and Tebbe. It reflects, as noted above, the fact that the Constitution is much shorter than the U.S. Code, or more precisely the fact that there are far fewer substantive issues that get litigated under the Constitution, which means that a larger share of all constitutional litigation arises in areas with prior case law.

But the tendency of constitutional law to present a higher share of cases where judges feel there is something important to lose does reflect a way in which the Constitution is special. It does so for a reason that I have the space here to gesture at but not to argue for at length. In brief: constitutional law does not skew toward highly salient cases because the text of the Constitution happens, by design or accident or both, to address the most salient issues in American law. It skews toward highly salient cases because American lawyers find ways, consciously and unconsciously, to make the issues that are most salient to them into constitutional issues. The Constitution always embodies the deepest values and highest aspirations of the American people—not because the words of the document name a set of values and aspirations that were most salient to the document's authors and which have remained constant over time, but because constitutional interpretation is a practice in which Americans invest the document, in its particular phrases and in general, with meanings that are relevant to their own values and aspirations.[42] *That* is special. As long as American constitutional practice exhibits that dynamic, constitutional cases will contain a relatively high share of the cases where judges see the most to lose from bad decisions—and the most to be gained from avoiding too mechanical a reliance on the language of enacted text.

THE INFERENCE FROM AUTHORITY TO INTERPRETIVE METHOD IN CONSTITUTIONAL AND STATUTORY DOMAINS

Kevin M. Stack†

42 *See infra* Richard Primus, *The Constitutional Constant*.

† Professor of Law, Vanderbilt Law School. I am grateful to Chris Serkin for helpful comments.

Should courts interpret the Constitution as they interpret statutes? This question has been answered in a wide variety of ways. On the one hand, many scholars and jurists understand constitutional and statutory interpretation as largely overlapping, continuous, or converging. For some, this overlap follows directly from the Constitution's status as a form of legislated law.[43] In this way of thinking, because the Constitution, like a statute, was bargained over and formally adopted, it should be interpreted in accordance with general principles applicable to legislated law.[44] Proponents of this view argue that if constitutional interpretation appears distinctive in practice, that is because it involves the application "of usual principles" to "an unusual text," not because special principles apply.[45] For others, the commonality between constitutional and statutory interpretation follows from more general commitments about the character of law. The premise, for instance, that the fundamental imperative for courts is to make decisions—whether constitutional, statutory, or common law—that align with contemporary values renders constitutional, statutory, and common law methodology continuous.[46]

On the other hand, many embrace interpretive and methodological pluralism, including divergence between constitu-

---

43 Legislated law, including statutory law and written constitutions, is expressly and intentionally made to change the law. *See* John Gardner, *Some Types of Law*, *in* COMMON LAW THEORY 51 (Douglas E. Edlin ed., 2007).

44 *See, e.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 92, 80 (1882) ("Our constitutions, being, like statutes, written instruments and laws, are, in the main, similarly interpreted." (internal citations omitted)); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–40 (1997) (explaining that a "common-law way of making law" is "not the way of construing a democratically adopted text," and noting that statutory rule that "a text does not change would apply a fortiori to a constitution"). John Manning also argues that the fact that the Constitution, like a statute, represents a settlement and compromise mitigates against the adoption of constitutional doctrines, such as federalism and separation of powers, which are not readily tied to particular provisions of the Constitution. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2007–10, 2040 (2009); John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943, 1947 (2011).

45 SCALIA, *supra* note 44, at 37 (noting that constitutional interpretation "is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text").

46 *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (contesting firm distinctions among statutory, common law, and constitutional interpretation; and positing that all should be interpreted dynamically); Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1384 (2010) (arguing that the Legal Process School's conception of statutory purpose, incorporating recourse to more fundamental purposes of public law "effectively renders statutory and constitutional [interpretation] continuous").

tional and statutory interpretation. Defenders of interpretive pluralism, of which I am one of many,[47] also come in different types. For some, pluralism follows from views about the authority of different types of law or their distinctive roles in the legal system.[48] For others, practical considerations of institutional competence, not first principles, justify divergence in interpretive method.[49] In this vein, many go a step further and argue that interpretive method also depends on the institutional position and capacities of the official doing the interpreting—that is, that the lower court, the Supreme Court, the President, and the administrative agency do not (or should not) have identical approaches to interpretation.[50]

---

47 *See, e.g.*, Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 2–4 (2004) (arguing that neither originalism nor dynamic approaches to interpretation should be the same when applied to the Constitution and statutes); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 356–65 (2012) (defending an interpretive method for regulatory interpretation based on the distinctive legal character and legal function of regulations); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 873–81 (2015) (arguing that agency statutory interpretation is guided by different norms than judicial statutory interpretation). Many scholars defend a difference in constitutional and statutory (and common law) modes of interpretation; these issues are directly explicated and carefully considered in Kent Greenawalt's books on public law interpretation, as part of his three-volume exploration of legal interpretation. *See* KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION (2013) (comparing statutory and common law interpretation, including contrast between agency and judicial forms of statutory interpretation); KENT GREENAWALT, INTERPRETING THE CONSTITUTION 5 (2015) ("The similarity of statutes and constitutions [as forms of legislated law] does not entail that whatever represents sound statutory interpretation applies to interpreting a constitution. Any such equation would be deeply mistaken."); *see also* Kent Greenawalt, *Constitutional and Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 267, 271 (Jules Coleman & Scott Shapiro eds., 2002) (arguing for difference in constitutional and statutory interpretation); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 212–13 (2006) (arguing that agencies should draw on a wider array of interpretive tools than courts given their different capacities).

48 *See, e.g.*, SCOTT J. SHAPIRO, LEGALITY 357–59 (2011) (arguing that interpretive approach, for each set of officials, follows from their relative place in society's economy of trust); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501–04 (2005) (observing and offering a defense of difference in agency and judicial statutory interpretation).

49 *See generally* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 885–90 (2003) (exploring how institutional capacities shape the way certain institutions interpret certain texts).

50 *See, e.g.*, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327–51 (2005) (arguing that strong horizontal stare decisis in statutory cases should not apply in lower courts); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 439 (2012) (arguing that different norms apply to lower courts and the Supreme Court when interpreting statutes); *see also* Stack, *Purposivism in the Executive Branch*, *supra* note 47, at 873–81 (citing literature on

Christopher Serkin and Nelson Tebbe's article, *Is the Constitution Special?*,[51] is a welcome addition to this long-running debate over the character of our constitutionalism. Their article has two basic elements. First, it carefully and compactly chronicles differences in the interpretive norms (which they call arguments) applied by courts when faced with statutory and constitutional questions. Serkin and Tebbe's thoughtful account of the dimensions of divergence in current law and practice is likely to inspire many forms of engagement.[52] Second, their article argues that these observed differences are not justified, and more generally, they contend that the case for divergence in constitutional and statutory interpretation has not been made.

In this essay, I focus on their second claim that divergence in interpretive approach between the Constitution and statutes is not—or has not yet been—justified. To defend this claim, Serkin and Tebbe's primary strategy is to isolate characteristics of the Constitution and constitutional law, and argue these characteristics do not, individually or collectively, justify the distinctive norms of constitutional interpretation that we observe. They consider a wide collection of attributes of the Constitution, including the generality of many of its terms, the fact that the Constitution includes broad aspirational principles (e.g. equal protection), the Constitution's relative entrenchment from express amendment, its legal supremacy, democratic legitimacy, and its merits and symbolic place in American self-understanding. Acknowledging that this is not a comprehensive set of characteristics or considerations that might differentiate the Constitution and statutes, their article ultimately relies upon a more general skepticism that understandings of the Constitution's authority "translate directly, or even particularly well into interpretive strategies."[53] The Constitution's "[a]uthority," they argue, "has less to do with argument than many suppose," and it "underdetermines

---

arguing that agencies and courts interpret statutes under different norms and defending the view).

51 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

52 See, for a start, Richard Primus, *The Cost of Text*, *supra* (offering an explanation of the observed divergence).

53 Serkin & Tebbe, *supra* note 51, at 768 (endorsing general view skepticism about the connection between constitutional authority and interpretation in context of evaluating perfectionist arguments for the Constitution's authority); *see also id.* at 773–74 (embracing the same skepticism about argument for the Constitution's authority as central to American self-understanding and interpretive method).

interpretation."[54] In the end, Serkin and Tebbe allow that some argument from the Constitution's authority might justify a particular interpretive approach,[55] but they do not think the case has been made.[56]

Serkin and Tebbe's article, in company with prior scholarship,[57] raises a fundamental question about how much constraint conceptions of constitutional authority impose on constitutional interpretation. But to reach their further conclusion that the case for divergence in constitutional and statutory interpretation has not been made requires *a comparison* of the grounds of authority of the Constitution, on the one hand, and statutes, on the other. Even if arguments from authority do not dictate particular interpretive approaches, I argue that comparing the grounds of the authority of the Constitution and statutory law still suggests differences in the methods of constitutional and statutory interpretation.

One note of clarification at the outset: I treat Serkin and Tebbe's positions only in reference to constitutional and statutory interpretation by the Supreme Court; that excludes interpretive practices by other courts and other officials. This limitation is important. There are strong arguments that interpretive practice varies among the Supreme and lower courts, in state courts, as well as among executive officials. Limiting the evaluation to interpretation in the Supreme Court isolates the comparison between constitutional and statutory interpretation without confounding factors relating to the institutional stance of the interpreter.

I

To see how a comparison in the authority of the Constitution and statutes might support an argument for interpretive divergence, consider the following premises:

1. The Constitution (and constitutional law) and statutes (and statutory law) have distinct grounds of authority as well as distinct roles in our legal system.
2. The differences in the grounds of authority and legal roles of the Constitution (and constitutional law) and statutes

---

54 *Id.* at 773.

55 *Id.* at 774.

56 *Id.* at 775.

57 *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 640–69 (2008) (grappling with theories of constitutional authority and their connection to interpretive method).

> (and statutory law) make a difference to how the Court should interpret these two forms of law.

By authority, I mean an account of what explains the respect courts and others accord that form of law, and by role, I mean an account of the functions the form of law paradigmatically serves in the legal system. I address the reasons for the parenthetical inclusion of "constitutional law" and "statutory law" below.[58]

These premises generalize a principle articulated by Joseph Raz. Raz writes, "[a] principle of constitutional theory that commands widespread support says that the principles of constitutional interpretation depend in part on the theory of constitutional authority."[59] The generalization is that norms of interpretation, not only norms of constitutional interpretation, depend in part on the authority of the type of law at issue.[60] Tebbe and Serkin are skeptical about this generalized principle. One way to address that skepticism is to defend the two premises indented above. Those premises, if valid, justify divergence in interpretive approach to the Constitution and statutes—and might, one would hope, also shed light on the precise divergence that Serkin and Tebbe observe in current law.

To defend the first premise requires identifying grounds for the authority of the Constitution and statutes. Notice that not all characteristics or features of the Constitution also make claims to be a ground for the Constitution's authority. For instance, the generality of the Constitution's terms makes the Constitution unusual, though not unique, but generality does not itself provide a ground for why we owe the Constitution respect.[61] Likewise, the fact that the Constitution contains aspirational principles neither distinguishes it from statutes,[62] nor provides a ground for its authority. Among the characteristics of the Constitution isolated in Serkin and Tebbe's analysis,

---

58 *See infra* Part IV.

59 Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 157 (Larry Alexander ed., 1998).

60 *See* Stack, *Divergence*, *supra* note 47, at 56 (defending this generalization of Raz's principle).

61 Though, as Primus argues, on different grounds, generality does make a difference to the constraints that text impose on interpretation. *See* Primus, *The Cost of Text*, *supra* note 52, at 6–7 & n.2; *see also* Serkin & Tebbe, *supra* note 51, at 751–53 (rejecting that the Constitution's often broad and general wording justifies its interpretive exceptionalism because the Constitution displays prolixity at times and certain statutes also display broad and general wording).

62 *See* Serkin & Tebbe, *supra* note 51, at 752.

the two most promising candidates that could be grounds for authority fall under the general mantles of (i) democratic legitimacy, and (ii) stability and continuity.[63] We view the democratic mandate or claim of democratic endorsement of a law as a reason to abide by it; and so too, law's role in creating continuity and stability in society also provides a reason to respect it.[64] Focusing on these two grounds for authority, the question is whether the Constitution and statutes part company in ways that make a difference to their interpretation.

II

First consider claims to democratic authority. As Paul Kahn observes, claims of democratic authority involve claims to represent a popular body.[65] If this is correct, then the democratic authority of the Constitution and statutory law are derivative of their underlying claims of representation.

But the body the Constitution claims to represent cannot be the same as the body represented by statutory law. Statutory law claims to represent and derive its authority from the legislative majority, and through it, the popular majority. The possibility of repeal or amendment of any statute gives existing as well as recently enacted statutory law a claim to represent the legislative majority. To be sure, many features of our system complicate and undermine the extent to which enacting coalitions reflect the popular majority or even the legislative majority. The current campaign financing regime, redistricting practices, veto-gates in the legislature (including super-majority thresholds for bill consideration), in addition to competition for scarce legislative time and resources, etc., make it more difficult to draw direct lines between enacting coalitions, legislative majorities, and the popular majority.

---

63 Tebbe and Serkin note that the Constitution is superior to statutes in the sense of overriding statutes in the case of conflict. The fact that the Constitution is superior to other laws is part of what defines it as a constitution, *see* Raz, *supra* note 59, at 153, but that feature does not provide a ground for its authority. Serkin and Tebbe's interesting arguments about entrenchment I treat as part of my discussion of stability and continuity values. The perfectionist arguments do make claims as grounds for the Constitution's authority. I do not find them the most convincing grounds for constitutional authority, *see* Stack, *Divergence*, *supra* note 47, at 27–28, and so I pass over them here in favor of a focus on democratic legitimacy and stability and continuity.

64 *Cf.* DAVID A. STRAUSS, THE LIVING CONSTITUTION 37–39 (2010) (identifying command theories and common law approaches, rough cognates to my considerations of democracy and stability and continuity, as two traditions for understanding law).

65 PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 198 (1997).

Even allowing that statutory law is imperfectly majoritarian, it is clear that the Constitution's claim to represent a popular body cannot be a claim to represent the legislative majority. A basic element of our constitutional scheme is that the Constitution may check and invalidate the majority as expressed in legislation. The Constitution's democratic authority therefore presupposes that it represents a different democratic body, a different demos, than the legislative majority.

Who, then, does the Constitution claim to represent? Some constitutional theorists argue that the Constitution represents the past supermajorities who enacted and ratified its text, intending to entrench its provisions against change through normal lawmaking processes. As a ground for democratic authority, these views face familiar objections, of the type Serkin and Tebbe discuss, that they necessarily privilege the preferences of prior generations over current majorities (the dead hand problem).[66] In response, other constitutional theorists argue that the body the Constitution represents cannot be reduced to any moments of historical consent, but rather is an intergenerational body that defines "our 'fundamental nature as a people.'"[67] From this perspective, the Constitution claims to represent an abstract body, a body which exists now or existed in the past "under the rule of a particular political-legal order."[68] No doubt there is significant work to be done to explain how such a democratic subject makes a claim of authority over us. Perhaps the hope of a democratic basis for the Constitution's authority is ultimately wistful. But the basic point remains that whether one simply views past supermajorities or an inter-temporal subject as the body represented by the Constitution, statutory law and the Constitution have different sources of democratic authority because they claim to represent different democratic bodies.

Turning to the second premise, what implications do these different claims of democratic authority have for statutory and constitutional interpretation? Adam Samaha, who is a skeptic about the relationship between *constitutional* authority and in-

---

66 *See* Serkin & Tebbe, *supra* note 51, at 766; *see also* Samaha, *supra* note 57, at 616–25 (discussing dead hand arguments).

67 Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 24 (1990) (quoting Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987)); *see* JED RUBENFELD, FREEDOM AND TIME 61, 153–54 (2001); *see also* Stack, *Divergence*, *supra* note 47, at 35–42 (discussing views of the democratic subject of the Constitution).

68 RUBENFELD, *supra* note 67, at 153.

terpretation, is not worried about the authority-interpretation inference in the context of statutory interpretation. Conceptions of the authority of legislation, he writes, "might logically guide statutory interpretation."[69] I agree; statutory authority provides some direction to statutory interpretation. Consider a statute's democratic character: the statute represents the legislative majority and ultimately the popular majority through discrete moments of *authorization.* In an election, the authorization flows from the popular majority to the elected officials, and then in the moment of statutory enactment, from the elected officials to the law. The statute's representative and democratic character is defined by these moments of authorization. This makes a difference to statutory interpretation: it justifies interpreting statutes in a way that attends carefully to the statutory text enacted and to the statute's stated and public aims. Moreover, the courts' (and especially the Supreme Court's) statutory interpretations remain accountable to the current legislative majority; if Congress disagrees with the Court's interpretation, it can make corrections.[70]

In contrast, the body the Constitution represents is not identified with an ongoing federal institution, like the legislature, and judicial interpretations face little practical prospect of override. The Constitution's representation of a popular body thus has a more symbolic character; the Constitution represents its demos whether conceived as past supermajorities or an intergenerational people less through discrete moments of authorization, which an existing body can monitor and call back, than by *standing for* the people it represents.[71] We (the People) are constituted and symbolized by the Constitution; as Serkin and Tebbe observe, the Constitution has a uniqueness as a cultural symbol, in part because our political-legal order is identified with the existence of our Constitution.[72]

---

69 Samaha, *supra* note 57, at 637.

70 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 331–43 (1991) (documenting the congressional practice of overriding Supreme Court statutory interpretation decisions); *cf.* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 860–66 (2012) (documenting how the Supreme Court will reinvigorate precedent that Congress has overridden).

71 *See* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 39–43, 101–03 (1967) (discussing representation as authorization and as symbolic 'standing for'); KAHN, REIGN OF LAW, *supra* note 65, at 199, 218.

72 *See* Primus, *The Cost of Text*, *supra* note 52, at 11 (noting that American lawyers frame issues of significance in constitutional terms).

Serkin and Tebbe view "[r]emarkably little" as following from the Constitution's distinctive status as a symbol.[73] But comparing the symbolic character of the Constitution's representation of its subject with that of statutory law sets constitutional and statutory interpretation on different paths. In the constitutional domain, to claim democratic authority, interpretation must itself play a role in identifying and sustaining a connection with the body that the Constitution claims to represent. It is from this perspective that Robert Post observes, the authority of the Constitution "does not flow from the antecedent nature of the Constitution, but rather from the particular relationship we have forged with the Constitution" through interpretation.[74] The symbolic character of the democratic subject the Constitution claims to represent places a burden on constitutional interpretation of setting forth principles that the people can view as their own.[75] This is not to say that background values play no role in statutory interpretation; they do.[76] In the statutory case, courts may check the prospective interpretation against background principles. But statutory interpretation does not have the same narrative burden of articulating principles in a way that makes sense of, and ultimately constitutes, our collective commitments as a people.

From this perspective, important elements of the divergence Serkin and Tebbe observe in how courts treat these forms of law fall into place. In particular, the greater attention to text in statutory interpretation makes sense given the directness of the claim of democratic authorization of statutory text. Further, the elaboration of the Constitution's requirements through a body of law that remains at a considerable distance from the Constitution's text provides a means of articulating and updating principles that the people can identify as their own. In short, representation through authorization privileges text, whereas symbolic representation privileges persuasion through judicial narrative. Comparison of the grounds of dem-

---

73 Serkin & Tebbe, *supra* note 51, at 773.

74 Post, *supra* note 67, at 29; *see also* Paul W. Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115, 144 (2014) (explaining that "[t]he courts must persuade the people to take the position of authorship [of the Constitution]; they must present the meaning of the text such that the people can hold themselves accountable for this text").

75 *See* Kahn & Brennan-Marquez, *supra* note 74, at 144.

76 *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 9 (tent. ed. 1958) (advocating for background values as a check to statutory interpretation); Kahn & Brennan-Martinez, supra note 74, at 140–44 (illustrating the same in contemporary context).

ocratic authority thus suggests different orientations in constitutional and statutory interpretation.[77] Even if we ultimately conclude that the Constitution's claim to democratic authority is fictive, that conclusion still has implications for interpretation. It means that arguments for attending to text have a democratic grounding in statutory interpretation that they lack in constitutional interpretation.

III

Let us now consider another ground of authority: the role of law in creating continuity and stability in the legal order. To be sure, continuity and stability are not the only virtues of law. We also prize law that fosters innovation or justice, for instance. But stability and continuity remain fundamental virtues of legal arrangements. Perhaps most important for our purposes, creating stability and continuity in a legal order is also a ground for law's authority. That is, other things equal, a reason to comply with a form of law is that it creates stability and continuity.

Statutory law and the Constitution, however, have a different relationship to stability and continuity. Part of the task of a constitution and constitutionalism is to create a "stable framework for the political and legal institutions of the country,"[78] and to "preserve stability and continuity in the legal and political structure."[79] While constitutions are subject to adjustment from time to time, to have a constitution is to recognize a form of higher law that is not subject to the same vicissitudes as ordinary lawmaking forms; constitutions may change, but a constitution is designed to be relatively enduring. This is not to deny, as Serkin and Tebbe importantly reveal, that many other forms of law turn out to be just as enduring;[80] nor is it to deny that there are other forms of lawmaking that intend to constrain future majorities.[81] But it still is the case that constitutional law paradigmatically has the legal and political aim of

---

77 The Constitution might be thought to have a different kind of connection to democracy, in particular by promoting the democratic process. In *Divergence*, I consider process-based conceptions of the Constitution's authority and argue that this role too pushes constitutional and statutory interpretation norms in different directions. *See* Stack, *Divergence*, *supra* note 47, at 29–33.

78 Raz, *supra* note 59, at 153.

79 *Id.*

80 Serkin & Tebbe, *supra* note 51, at 753–59 (considering whether the Constitution's interpretive exceptionalism can be rooted in its entrenching quality).

81 *See generally* Daryl Levinson & Benjamin I. Sacks, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 402–08 (2015) (examining how politicians employ functional entrenchment mechanisms in addition to the formal modes of

constraining future majorities and thus creating stability and continuity to a greater extent than statutory law.

This different connection of constitutional law and statutory law to the values of stability and continuity also has implications for their elaboration. While the Constitution's role in creating continuity does not specify a single interpretive method for the Constitution,[82] it makes a virtue of interpretive approaches that constrain the pace of change from current norms.[83] Interpreting the Constitution to serve stability and continuity recommends modes of elaboration of the Constitution's requirements that give substantial weight to the status quo and require special justification for departures from it, and even then, favor incremental and developmental changes. Fostering stability and continuity thus provides a strong endorsement of our common law style constitutional elaboration: our common law constitutionalism gives a legal presumption in favor of status quo norms and requires special justification for an interpretation that results in a changed reading of what the Constitution requires. From this perspective, it makes sense that we identify our "constitutional law" with the judiciary's precedential elaborations of the Constitution's requirements; doing so is a way of promoting stability and continuity in our constitutionalism.

Statutory law, in contrast, does not labor under the same preservationist norms. When deciding whether to enact a new statute, Congress faces no formal legal presumption in favor of the existing law; so long as Congress acts constitutionally, it need not provide special justification to change the law, much less opt for more incremental as opposed to cross-cutting solutions. So too, no requirement of special justification applies to courts when they enforce new statutory requirements; their job is to implement the statute, even if it involves making significant changes in the law. In this way, the criteria for valid change in statutory law and constitutional law differ. With regard to statutory law, Congress may enact a new statute or statutory amendment that dramatically changes the existing law, and courts routinely enforce those changes without requiring special justification. With regard to constitutional law, outside of the rarity of constitutional amendment, the court's criteria for recognizing and enforcing changed readings of the

---

entrenchment through rules governing elections and the processes for enacting and repealing legislation).

82 Samaha, *supra* note 57, at 666.

83 *Id.*

Constitution creates a presumption in favor of the status quo, and requires special justification for change. In sum, constitutional and statutory law labor under different criteria for valid change: a preservationist norm that requires special justification for change applies to constitutional law but not to statutory law. In this way, stability and continuity ground different norms of change for constitutional and statutory law.

It might be objected that this analysis relies on a false comparison; it compares change in "constitutional law" as articulated by the courts to change in "statutory law," including when Congress enacts a new statute or amends an old one. I think this comparison is defensible. First, consider Serkin and Tebbe's usage. They do not distinguish between constitutional interpretation, constitutional implementation, the Constitution, and constitutional law. For instance, Serkin and Tebbe argue that "the meaning of constitutional provisions is constantly changing" outside of Article V formal constitutional amendments.[84] In other words, they treat changes in the judicial doctrines of constitutional law as changes in the Constitution. Thus the norms or arguments they refer to as "constitutional argument" pertain to the specification or implementation of constitutional law, including, norms of precedent which clearly do not pertain to "interpretation" in a narrower sense. This inclusive, non-formalist stance towards the set of norms that come within the dialogue of constitutional interpretation is widely shared,[85] and reflects the view that constitutional law changes primarily through judicial decisions.

I have no objection to this broad view of what comes within the domain of "constitutional interpretation and argument," but that same non-formalist stance should also apply when considering what counts as statutory interpretation and argument. If constitutional interpretation and argument includes norms that apply to constitutional development and lawmaking, then so too statutory interpretation and argument should include norms that apply to statutory development and lawmaking. Taking this functional stance with regard to *both* constitutional and statutory law reveals that a preservationist constraint has greater hold on our constitutional than statutory law for the simple reason that change in constitutional law

---

84 Serkin & Tebbe, *supra* note 51, at 757.

85 *See, e.g.*, ADRIAN VERMEULE, THE CONSTITUTION OF RISK 5 (2013) (noting that constitutional interpretation often amounts to constitutional rulemaking and declining to make a strict distinction between interpretation and implementation).

is constrained by precedent whereas change in statutory law is not.

Serkin and Tebbe might still object that they observe courts applying a less stringent form of precedent with regard to constitutional decisions than statutory ones, so doesn't that suggest a greater preservationist norm with regard to statutory law? This difference in the strength of precedent does not reveal that constitutional law is less preservationist than statutory law. In all but the rarest occasions, the only way constitutional law changes is through reversals of judicial precedent. Not so for statutory law. Congress regularly amends statutes in ways that change prior statutory text and also overrules prior judicial constructions. So the black letter doctrine that statutory precedent is stronger than constitutional precedent does not negate the underlying point that a greater preservationist norm applies to constitutional law and elaboration.

To summarize, the difference in the roles of constitutional and statutory law in creating stability and continuity justifies divergence in their modes of elaboration. Constitutional law's role justifies granting weight to current norms and requiring special justification for change; that same preservationist norm does not apply to statutory development. Put another way, a legal presumption in favor of the status quo is intrinsic to constitutional elaboration, but not to statutory law. Accordingly, the challenge of accommodating change while preserving continuity and stability makes a distinctive demand on constitutional elaboration.

IV

Serkin and Tebbe ask *Is the Constitution Special?* My response is that to understand the Constitution's distinctiveness requires comparing the grounds for the authority of statutory and constitutional law. Constitutional and statutory law have different claims to democratic authority and different connections to the values of stability and continuity. Even if these particular grounds of authority do not constrain interpretive choice for statutes or the Constitution to a single method, the contrast suggests different orientations and guideposts in constitutional and statutory interpretation. The contrast also suggests justification for some of the divergence which Serkin and Tebbe observe in current practice, including the greater role of statutory text, the greater reliance on judicial decisions as the

means of elaboration of the Constitution, and the different role for precedent.

Suggesting that the interpretation of these two forms of law depends in part on their different sources of authority does not deny that at times it will be very difficult to distinguish constitutional and statutory interpretation. Statutory interpretation may be hard to distinguish from constitutional interpretation when, for instance, a court is construing a very old statute, written in general or aspirational terms, with a significant body of stable precedent elaborating it.[86] More generally, to suggest that some aspects of the authority of constitutional and statutory law diverge is not to deny that these two forms of legislated law may have some overlapping grounds of authority which might, in a given case, be more important than their differences. The basic point remains that the distinct authority and roles of constitutional and statutory law provides a foundation for divergence in their interpretation.

MYTHMAKING IN CONSTITUTIONAL INTERPRETATION: A RESPONSE TO PRIMUS AND STACK

Christopher Serkin† & Nelson Tebbe††

In our recent article, *Is the Constitution Special?*,[87] we demonstrated that lawyers and judges apply special interpretive approaches to the Constitution that they do not apply to other sources of law, whether statutes or the common law.[88] We then asked whether any familiar characteristics of the Constitution justify such interpretive exceptionalism.[89] After ruling out the most obvious candidates, we suggested that there may be a mismatch between the Constitution's characteristics and the shape of constitutional argument.

Richard Primus and Kevin Stack have now written two thoughtful and provocative responses, to which we have been

---

86 *See* Primus, *The Cost of Text*, *supra* note 52, at 2 (arguing that when a domain is rich with case law the decision making typically will proceed on the basis of that case law, whether the matter concerns a statute or the Constitution).

† Associate Dean for Research and Academic Affairs and Professor Law, Vanderbilt Law School.

†† Professor of Law, Cornell Law School.

87 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

88 *See id.* at 708–49.

89 *See id.* at 749–75.

invited to reply.[90] The two responses take on different aspects of our argument. Primus disagrees with our positive claim that the Constitution is actually subject to different—or, in our terms, special—methods of interpretation, and he sets out to show that the differences we identify can be attributed to variations in the context in which constitutional issues arise, and not to distinct interpretive methodologies.[91] Stack takes issue with our normative claim and argues that the Constitution should be interpreted differently, because it has a unique source of democratic authority.[92] In other words, Primus argues that the Constitution is not, in fact, interpreted differently than other sources of law, whereas Stack argues that it should be. Interestingly, then, we find ourselves in a curious triangular standoff where all three of us disagree with one another, but on different grounds.

Looking more closely, however, there emerges a surprising consensus: we all believe that the Constitution's principal distinguishing feature may be the fact that people *think* the constitution is special—that it has a kind of mythological status. Our subtler and more profound disagreement, then, may be whether this constitutional culture marks a real difference, and whether it is actually a sufficient justification for interpretive exceptionalism. We consider those questions below, and in the process we also suggest that both Primus and Stack underappreciate the significance of the unusual role of *stare decisis* in constitutional argument.

Primus focuses first on our claim that the text of the Constitution is interpreted differently from other legal texts, and specifically that it is given less weight. He suggests that the differences we observe come less from intrinsic attributes of the text itself than from extrinsic characteristics of constitutional litigation. He points first to the greater likelihood that issues of statutory interpretation present novel questions for courts. In other words, his intuition is that courts interpreting any

---

90 Richard A. Primus, *The Cost of the Text*, *supra*; Kevin M. Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, *supra*.

91 *See* Primus, *supra* note 90, at 2 ("[T]he textualism gap is mostly a product of . . . the role of precedent and the costs of adhering to the wording of enacted texts.").

92 Stack, *supra* note 90, at 15 ("[D]istinct authority and roles of the Constitution and statutory law provide[ ] a foundation for divergence in how courts interpret these different forms of law.").

sources of law look first to what other courts have said and then to the text itself. Because of the Constitution's relative age and brevity, it is much more likely for there to be a well-developed line of cases interpreting every provision. Courts are able to rely on prior judicial pronouncements and do not need to reinterpret the text anew with each new constitutional case. The same is less likely to be true of statutes, where novel questions implicating never-before parsed language are more common. This is plausible and, indeed, probable, and it may at least partly account for what we characterized as a distinctive lack of focus on text in constitutional argument.

However, it is not just the quantity of potentially applicable precedent that is distinctive in constitutional interpretation, but also its role and its character. Consider first its role. As we argued, constitutional *stare decisis* is unusually weak, and statutory *stare decisis* unusually strong relative to the benchmark of the common law.[93] Even if there are more cases interpreting most constitutional provisions than statutory ones, that still may not explain the relative unimportance of constitutional text if those greater number of cases are less binding on subsequent courts. In other words, Primus's useful observation pushes us to identify an *interaction* between the distinctiveness of constitutional textualism and constitutional precedent.[94] Yet even after considering that interaction, we are not wholly convinced that the relative unimportance of the text in constitutional interpretation can be fully or even largely attributed to the greater number of cases interpreting every provision.

Moreover, the character of the precedent that Primus invokes as an alternative explanation for the seeming distinctiveness of constitutional interpretation reinforces our positive claim that constitutional interpretation is special. Many constitutional decisions are characterized by soaring language, the invocation of democratic first principles, and a focus on justice and fairness.[95] And even where the language of a decision is more technical, the culture of constitutional exceptionalism is

---

93 Serkin & Tebbe, *supra* note 87, at 738–41.

94 Although we did not explore the interactive effects of argument types in our original article, we are happy to have the chance to do so here.

95 *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.").

pervasive in the ways we originally identified, with the unusual treatment of history, structure, and precedent itself.

What if Primus were to respond that the distinctive use of precedent, too, is attributable more to context than to a distinctive interpretive attitude? Perhaps his argument is intended to offer an *example* of a different kind of explanation for constitutional exceptionalism rather than a comprehensive rebuttal. He might then push us to explore whether it would be possible to offer a similar kind of account of each of the special forms of constitutional interpretation we identify. On this view, differences in constitutional interpretation result not from different deployments of text, structure, history, or precedent, but instead from differences of context that cause the same moves to generate divergent interpretive outcomes. This is a provocative idea, but we have trouble imagining whether or how it would work.

Take precedent, for instance. One might expect that the Constitution's age—the attribute Primus emphasizes here—would have an entrenching effect, because the relevant precedent would be tested and reliable. Yet we argued that exactly the opposite is true; constitutional precedents are less binding in practice than cases in other areas. We have similar difficulties imagining how context could account for the differences we see in other types of interpretive argument. We showed, for example, that structural issues can arise in statutory settings, and yet courts deploy pure structural arguments only when interpreting the Constitution. Likewise, we cannot see any reason why differences in litigation context would generate different approaches to history. So, in sum, we doubt that context can account for all the differences we observe in our positive argument. It seems more likely that lawyers are applying different interpretive techniques.

Primus's second argument draws on a different kind of contextual circumstance: he says that text matters less in constitutional interpretation because the cases tend to be more important. As he puts it, rigid adherence to constitutional text is more likely to "yield unacceptable results in fields of law too important to be sacrificed to the abstract idea that plain language ought to govern."[96] Primus makes the claim with nuance and sophistication. Nevertheless, it is difficult to avoid the impression that—for Primus's lawyers and judges—constitutional cases may be especially important *simply because they*

96 Primus, *supra* note 90, at 9.

involve the Constitution. He argues explicitly to the contrary, acknowledging that all constitutional cases are not necessarily important, and that some statutory cases are important in the way he describes. That is undoubtedly correct. But the examples he offers do not always abide by those careful caveats.

For one, he looks to the recent case, *King v. Burwell*,[97] interpreting the Affordable Care Act as allowing a subsidy under both federal and state insurance exchanges, contrary to at least part of the text of the statute. Primus thinks this case demonstrates that courts ignore text in statutory cases too, when the stakes are sufficiently high. But this case is not a perfect example of the principle he is trying to establish. To our eyes, the Court's analysis in *King* looks more like conventional textual analysis than the kind of flouting of text that occurs in many constitutional cases. Admittedly, the narrow sentence at issue appeared squarely to the contrary of the Court's interpretation, but reading the text of the statute as a whole—as the Court ultimately did—revealed a much more equivocal picture that actually supported the Court's holding. The case did not so much involve the Court ignoring text as the Court adopting a broader frame and interpreting the relevant provision in its larger textual setting.[98] Understood that way, the case represents a real attentiveness to text in a way that is rarer in constitutional interpretation.

Similarly, Primus looks to *United Steelworkers v. Weber*,[99] the Title VII case that upheld affirmative action.[100] Primus argues that the Court did not allow the text of Title VII to control because it was a case of intrinsic importance, and the contrary result would have been too harmful. We suspect that

---

97 135 S. Ct. 2480 (2015).

98 *Cf.* Abbe Gluck, *Congress Has a "Plan" and the Court Can Understand It – The Court Rises to the Challenge of Statutory Complexity in* King v. Burwell, SCOTUSBLOG (June 26, 2015, 8:55 AM), http://www.scotusblog.com/2015/06/symposium-congress-has-a-plan-and-the-court-can-understand-it-the-court-rises-to-the-challenge-of-statutory-complexity-in-king-v-burwell/ [https://perma.cc/2FSZ-NZGG] (noting the ways in which the *King* Court departed from rigid, literalist textualism but then noting "[t]his is not to say that *King* is an atextual decision. To the contrary, it turns on a sophisticated, close reading of the ACA's provisions and structure and it does not so much as whisper the phrase 'legislative history.'"); Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 66 (2015) ("Textualism is chock full of rules that emphasize holistic interpretation — rules that sit in some tension with other textualist rules that advance a laser focus. One way to understand *King* is that the Chief Justice chooses the holistic side of textualism, one that has always shared with purposivism the assumption that Congress legislates rationally, with means to an end.").

99 443 U.S. 193 (1979).

100 Primus, *supra* note 90, at 8 & nn.27–29.

sense of importance arises in no small part because the case was constitutionally inflected. While it did formally involve the interpretation of Title VII, and while the opinion formally set aside constitutional considerations, affirmative action must be viewed through the lens of broader concerns. Justice Brennan explained for the majority that Title VII was "a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long."[101] It was part of a larger effort to dismantle Jim Crow, much of which was state sponsored, of course, including through government employment practices. Justice Brennan said it would be "ironic indeed" if a law with this purpose was read to prohibit efforts to combat racial injustice.[102] It is this theme, which has unmistakable overtones sounding in equal protection, that appeared to shape the Court's views.

Fundamentally, we agree with Primus that courts are less likely to be bound by text when the stakes are particularly high. But we suspect that courts often believe the stakes are high when the Constitution is involved. This is not necessarily so. Is carbon regulation under the Clean Air Act any less important than Free Speech, or even Equal Protection? There is no reason in the abstract to think that this is true, although we expect most lawyers will naturally elevate cases implicating the latter precisely because they are constitutional. But at that point, constitutional text is not de-emphasized because the litigated cases are especially important; the text is de-emphasized because the cases are interpreting the Constitution. This is precisely the constitutional exceptionalism that we seek to challenge, or at least to spotlight.

Stack—unlike Primus—at least implicitly accepts our positive claim that the Constitution is interpreted differently than other sources of law,[103] but he disagrees with our normative claim that this is not supported by any of the Constitution's unique attributes or claims to authority. He argues, first, that stability is particularly important in constitutional law, and so courts and commentators should adopt interpretive ap-

---

101 *United Steelworkers*, 443 U.S. at 204 (internal quotation marks omitted).

102 *Id.*

103 Stack, *supra* note 90, at 3 ("[Serkin and Tebbe's] thoughtful account of the dimensions of divergence in current law and practice is likely to inspire many forms of engagement.").

proaches that promote legal constancy. As he puts it, the Constitution should be interpreted differently from other sources of law because it has "a different relation to stability and continuity."[104]

It is no doubt commonplace to think of the Constitution as entrenched. In fact, we characterized it that way ourselves, while still noting—as does Professor Stack—that other sources of law can be equally binding in practice.[105] But Professor Stack is making a more profound claim, not just that the Constitution is difficult to change, but that its role in our legal system is as a kind of stabilizing force, limiting legal change, and that this should inform how it is interpreted.[106] For Stack, this justifies the special modes of constitutional interpretation.

We are unconvinced that the Constitution either does or should play such a role. Descriptively, the distinctive role of precedent in constitutional interpretation again appears to promote change as much as stability. We embrace—as we must—Professor Stack's focus on the heartland of cases rather than outliers. After all, we too are focused on what we called the overall "shape" of constitutional litigation, attempting to characterize it in the main and not on the margins. Even so, the role that Professor Stack identifies for the Constitution sits uncomfortably with the special treatment of constitutional precedent. If the over-arching goal of constitutional law is to create and preserve legal stability—regardless of content—then we would expect precedent to have more force, not less. But that, as we noted above and in the original article, is not how constitutional precedent traditionally operates.[107]

Normatively, too, we are open minded about the fluidity in constitutional meaning that we see in actual practice. Constitutional protections are continuously changing through both subtle adjustments and seismic shifts.[108] Whether the issue is equal protection, substantive due process, free exercise of religion, or even property protection, the only real constant is change itself. Dynamism in constitutional law is the result of interpretation and re-interpretation, and it is this tradition of evolution that keeps it relevant. While we recognize this view is

---

104 *Id.* at 10.

105 Serkin & Tebbe, *supra* note 87, at 753–59.

106 Stack, *supra* note 90, at 11 ("[C]onstitutional law paradigmatically contains the legal and political aim of . . . creating a relative stability and continuity to a greater extent than statutory law does.").

107 *See supra* text accompanying note 93; Serkin & Tebbe, *supra* note 87, at 739–41.

108 Serkin & Tebbe, *supra* note 87, at 753–59.

contested and that not everyone will agree, we are skeptical of Stack's positive claim that the Constitution constrains legal change more than statutes or even the common law, as well as his normative claim that it should.

Professor Stack's second criticism is subtler but even more provocative. He argues that the Constitution has a different claim to democratic authority than does statutory law.[109] Statutes—he says—represent the will of the legislature and therefore the popular majority by representation.[110] Because legislation contains the possibility of repeal or amendment through the legislative process, its democratic legitimacy flows from its passage and, for an existing statute, from the fact that the legislature has not changed or repealed it. The Constitution, on the other hand, is countermajoritarian, and so must—he argues—be representing a different body.[111] The bottom line for Professor Stack is that "statutory law and the Constitution have different sources of democratic authority in part because they represent different democratic bodies."[112] This, in turn, generates different interpretive responsibilities.

Because the persistence of the Constitution does not reflect even a tacit democratic acquiescence to its content among current citizens, its democratic legitimacy must come from some other source. For Professor Stack, that source can be found in the process of interpretation itself. He says succinctly: "[I]nterpretation must itself play a role in identifying and sustaining a connection with the body that the Constitution claims to represent."[113] That consideration is different from the interpretive concerns that guide statutory law, and so it justifies the exceptionalism of constitutional interpretation.

This is fascinating and creative, but ultimately seems to us like another instance of constitutional mythologizing. One of the lessons of constitutional theory of the last two decades is that constitutional meanings are made and unmade using familiar mechanisms, such as social mobilization, media coverage, political party pressure, legislative action, presidential leadership, and so forth. The mechanisms are debatable and debated, but the insights of popular constitutionalism suggest

---

109 Stack, *supra* note 90, at 6–10.

110 *Id.* at 7 ("Statutory law claims to represent and derive its authority from representing the views of the legislative majority, and through it, the popular majority.").

111 *Id.* (noting that "the Constitution's claim to represent a popular body cannot be a claim to represent the legislative majority").

112 *Id.* at 8.

113 *Id.* at 9.

that the Court is rarely out of step with popular majorities for long.[114] Ordinary people continually reclaim the Constitution, not an abstract "We the People." That means there is little need for judges—and Stack's account *is* closely centered on judges—to deploy distinctive interpretive techniques in order to maintain or reflect its democratic authority. In a world of rough consonance between democratic will and constitutional meaning, there is no need for special efforts at democratic legitimation.[115]

Even if it were true that courts must take pains to reestablish democratic legitimacy whenever they interpret the Constitution, at most this would affect how they talk about constitutional meaning, and not the meaning itself. In other words, nothing in Professor Stack's account explains fully how the difference in claims to democratic *authority* affect the substance of constitutional *argument*. The table-setting may be different, but the meal is the same.

Perhaps, however, Stack means something even more subtle. In our original Article, we acknowledged that the Constitution occupies a distinct place in our culture. But we argued that this venerated role may not justify the interpretive exceptionalism we see in practice. Yes, the Constitution is special, but not in a way that necessarily makes the text less important, precedent less binding, structure more relevant, nor history more constrained. In other words, we challenged whether the Constitution's character made sense of the special interpretive moves that we observed in practice.

But what if that has it backward? What if the purpose of all these special interpretive moves is implicitly to establish and reinforce the Constitution's special place in legal culture? Constitutional myth-making does not justify but is instead created—at least in part—by interpretive exceptionalism. In this view, the question is simply whether the modes of constitutional argument help to render the Constitution distinctive. This explanation does not require the kind of tight fit that we demanded between cultural authority and interpretive argu-

---

114 *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009) (arguing that the Supreme Court generally has adhered to the will of the majority, and that the institution of judicial review itself has survived because the people have approved of it).

115 If William Eskridge is right, something similar is true for statutes. And that matters, because some key statutes are ancient and difficult to amend. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).

ment. All that matters is that constitutional interpretation contributes in some way—even if not precisely—to the Constitution's authority.

This is an intriguing possibility, but raises the normative question of whether constitutional mythologizing is an appropriate goal to pursue. We worried in our original piece that invoking the Constitution functions like a political blunderbuss that silences genuine argument. It serves this role precisely because it is so venerated, but we view this as a possible flaw, not a feature, of constitutional discourse. We are more inclined to object to methods of interpretation that increase the height of the pedestal on which the Constitution sits. And we do so in light of the kinds of arguments that Stack articulates to defend constitutional exceptionalism.

To press his point, Stack invokes past supermajorities and inter-temporal subjects as providing the Constitution's democratic force.[116] He refers to the ways in which the Constitution constitutes and symbolizes our political order. His is an elegant and skillful articulation of the deep intuitions at the heart of our constitutional democracy. But it is also an aspect of precisely the sort of constitutional mythologizing that we identify. If justifying the shape of constitutional argument requires invoking some kind of pan-temporal immortal demos, then we think the justification participates in the very phenomenon that causes us concern.

Although Primus and Stack attack different aspects of our Article—they address our descriptive and normative arguments, respectively—they both intersect with our deepest claim, namely that it is the document's mythological status, if anything justifies the constitutional exceptionalism that we see in legal interpretation. We take that common theme as an invitation to attempt to restate our underlying concern with this mythologizing.

One important aspect of the Constitution's special cultural status is that it seems to be shared by lawyers and citizens outside the legal profession. So we see lawyers and judges crafting interpretive arguments that perhaps both reflect but also reinforce—constitute, we might say—the Constitution's unique status in American culture and politics. Whether this interaction between professional and popular politics is a good

116 Stack, *supra* note 90, at 5–6.

thing is something we are interested to explore, perhaps with Primus and Stack if they are inclined to address it in their responses. Our own intuition was, and remains, that constitutional mythologizing may actually *impede* democratic values by insulating certain topics from political discourse because they ostensibly concern higher-order lawmaking, which only constitutional lawyers and judges can and should be able to shape. But perhaps this view is too simple, or too cynical. Regardless, we continue to believe that no other attributes of the Constitution justify the constitutional exceptionalism we observe in practice. Primus and Stack thus helpfully focus us more closely on this central question: does the fact that people view the Constitution as special justify interpreting it differently than other sources of law? We think not, but now—thanks to Primus and Stack—look forward to hearing whether and why others disagree.

THE CONSTITUTIONAL CONSTANT

Richard Primus†

The Constitution embodies the deepest values of the American people. That feature of our political culture is constant. As a result, the meaning of the Constitution changes over time. The content of American values changes from generation to generation, after all. So because the Constitution constantly embodies our deepest values, the meaning of the Constitution also changes. It has to, or else the Constitution would cease to embody the American people's deepest values.

The proposition that the Constitution embodies the deepest values of the American people is as robust and stable a truth as exists in our political culture. It seems to be true all the time, generation after generation, even in the face of tremendous change. American values change; circumstances change; doctrines and institutions and methods of government change. But whatever our deepest values are, and whatever we understand to be our most basic commitments about government, will reliably be reflected in the Constitution. At any moment, there will be a correspondence between our deepest values and the meaning of the Constitution as we understand

† Theodore J. St. Antoine Professor of Law, The University of Michigan Law School.

it. That correspondence is what I am calling the *constitutional constant*.

My claim about the constitutional constant presents a picture of constitutional law different from the one on offer in the civics-book conception of the Constitution as a precommitment strategy.[117] On that familiar view, constitutional law is a system that overcomes pathological decisionmaking at Time 2 by enforcing the decisions made at a more thoughtful Time 1. For the system to work that way, the idea goes, the content of the rules must be constant over time, so that the decision made at Time 1 is in fact what will be enforced at Time 2. On that model, change in the meaning of the Constitution over time would be a fatal flaw.

Constitutional law in practice sometimes works the way that the civics-book precommitment picture imagines.[118] Much of the time it does not. Over the course of history, and particularly where the most value-laden constitutional issues have been concerned, the content of constitutional law has been a variable rather than a constant, and the relevant changes have usually come without formal amendments.[119] The relevant variability is not of the kind where any constitutional rule in existence today might be different tomorrow, or even next year. Most of the time, most things are stable, at least in the short-to-intermediate run. But over the longer run, even many fundamental things change substantially. The scope of federal regulatory power under Article I,[120] the re-

---

117 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); *see generally* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 37–38 (1979) (discussing general examples of precommitment strategies).

118 To this point in history, for example, Americans have reliably enforced the Time 1 decision to hold presidential elections every four years, rather than asking in the face of various political exigencies whether this time we should just skip the next election.

119 *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–59 (2001).

120 *Compare* Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding Congress did not have the power to regulate labor conditions), *with* United States v. Darby, 312 U.S. 100 (1941) (overruling *Dagenhart* in upholding the Fair Labor Standards Act of 1938).

quirements of due process[121] and equal protection,[122] the nature of protected expression under the First Amendment[123] and the limitations on firearms regulation under the Second[124]—all of these have changed over time. In short, and in contrast to what simple forms of precommitment theory imagine, the content of constitutional rules over long stretches of time is regularly not a constant. It is a variable.

What is constant is the correspondence between Americans' deepest values and the meaning they attribute to the Constitution. As Americans came to believe deeply in a cluster of ideas about free speech and racial discrimination, those ideas gave content to constitutional law and meaning to the First and Fourteenth Amendments.[125] To be sure, Americans regularly disagree with one another about important normative issues. We disagree about abortion and affirmative action, to take two easy examples. While those disagreements rage, we also disagree about what the Constitution directs on those subjects—just as we disagreed about what the Constitution directed with regard to racial segregation during the years when Americans were deeply divided on that issue. When one side of such a conflict prevails in the battle for mainstream American values, the prevailing reading of the Constitution comes to track the winning side's conception. That prevailing reading, which is then no longer one side's view of a controversial question but a reflection of the dominant set of American values on the matter in question, is then regarded as the meaning of the Constitution.

---

121 *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia sodomy law), *with* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas sodomy law as contrary to the Due Process Clause of the Fourteenth Amendment).

122 *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding racial segregation in public schools), *with* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (declaring racial segregation in public schools unconstitutional).

123 *Compare* Whitney v. California, 274 U.S. 357 (1927) (upholding a conviction under the California Criminal Syndicate Act based on involvement with an organization of Communists), *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (invalidating, on First Amendment grounds, a conviction under Ohio's criminal syndicalism statute).

124 *Compare* United States v. Miller, 307 U.S. 174 (1939) (allowing a restriction on transporting certain shotguns when their relationship to the preservation of a militia could not be shown), *with* District of Columbia v. Heller, 554 U.S. 570 (2008) (guaranteeing an individual's right to possess a firearm unrelated to serving in a militia).

125 *See, e.g.*, RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 177–233 (1999) (identifying how European totalitarianism during World War II catalyzed an American push towards constitutional rights relating to racial equality, free speech, and open democratic politics).

A few clarifications are in order here. First, when I speak of the values or beliefs of Americans, my focus is on what we might think of as the decision-making class: not a population of hundreds of millions, but the smaller group of officials, activists, and opinion makers who wield power in the world of ideas and who most shape the dominant public discourse, certainly among professionals and probably among a broader public as well. Second, I do not mean to suggest that even that smaller population ever exhibits consensus in the sense of unanimous opinion. When I speak of a prevailing view, or of the deeply held values of Americans, I mean to refer to relatively broad agreement within the decision-making class—a state of affairs in which, within that class of Americans, an opinion is widely held or at least rarely challenged.[126]

Moreover, when I say that the Constitution embodies the deepest values of the American people, I do not mean to say that just *any* values are likely to be read into the Constitution if Americans are sufficiently committed to them (though that might be true). Nor do I mean to suggest that constitutional law traffics only in questions of values (thought that might be true also). Rendered more precisely, my contention is that there are two kinds of propositions that become propositions of constitutional law when the American decision-making class regards them as sufficiently important and sufficiently salient. Building upon and partly adapting the work of Charles Black and Phillip Bobbitt, we can call the two kinds of propositions *structural* and *ethical*. A structural proposition is one that concerns the nature of, or the relationships among, the institutions of American government.[127] An ethical proposition is one about the American people's self-conception as a polity; it concerns who we think we are as Americans, or perhaps who we think we are at our best.[128] Our collective self-conception—our ethos—changes over time, as do our ideas about what governmental structure would best serve us in light of our ethos and

---

126 *See generally* Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1209–10 (2010) (exploring the role of consensus within the decision-making class in shaping constitutional meaning).

127 *See generally* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (explaining and recommending structural analysis in constitutional decisionmaking).

128 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93–119 (1982) (developing the category of "constitutional ethos"); *see also* Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. 79 (2010) (adapting Bobbitt's conception so that "constitutional ethos" means the general idea of the polity's self-conception, rather than just the particular self-conception for which Bobbitt argued).

our circumstances. Controversies about structure and ethos are reflected in controversies about constitutional meaning. And when there is broad agreement within the decision-making class about an important matter of governmental structure or a salient aspect of the American ethos, that agreement is reflected in the content of constitutional law. (The preceding sentence is a more fully specified version of the first sentence of this essay.)

The correspondence between the content of constitutional law and the decision-making class's views on important matters of structure and ethos is what I am calling the constitutional constant. At any given time, constitutional law reflects prevailing views on our most important issues of structure and ethos, and it does so to the extent that there is broad agreement on the relevant question. The content of the decision-making class's commitments on matters of structure and ethos changes over time. But the correspondence between those commitments and the content of constitutional law remains. Whatever an elite American consensus regards as most fundamental to its system of government and its value-laden sense of the national polity will be understood to be required by, and embodied in, the Constitution. Indeed, that is why the content of constitutional law changes over time. Our values change, and what we require of our government changes. So to maintain the constitutional constant—that is, the correspondence between the Constitution and our important commitments—the meaning of the Constitution changes as well.

* * *

Christopher Serkin and Nelson Tebbe argue that lawyers tend to think of constitutional cases as distinctively important.[129] I agree. But as my discussion of the constitutional constant may suggest, my sense of the reason why lawyers think of constitutional cases as distinctively important may differ from Serkin and Tebbe's.

Serkin and Tebbe take the view that constitutional cases are deemed important *because those cases are constitutional*. On that framing, whether a case is a constitutional case is a fact independent of the case's perceived importance. I suspect that most constitutional lawyers would agree. On the most conventional view, a "constitutional case" is one that raises an

129 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

issue about the meaning of a clause in the Constitution, regardless of the importance of that issue. Serkin and Tebbe do not specify whether they have that textual criterion for constitutionality in mind or whether, in their view, there is something else that distinguishes constitutional cases from non-constitutional ones. But whatever it is that makes a case constitutional in their view, it is apparently something independent of the perceived importance of the issues it raises. Constitutionality is the independent variable in their analysis, and the perception of importance the dependent one; the fact of constitutionality makes lawyers think of a case as important.

I suppose things do work that way sometimes. But in my view, the judgment that a case raises a constitutional issue is often not independent of a substantive judgment about the importance of the issue raised. More particularly, the judgment that a case raises constitutional issues is not independent of the profession's sense that the case implicates fundamental questions about structure or ethos.[130] In the year 1890, the state-court prosecution of an unlawyered felony defendant raised no constitutional problem. Today it does.[131] When the legal profession's prevailing intuitions about what is fundamental to our constitutional structure and our constitutional ethos change, so does the profession's sense of which cases raise constitutional issues.

Serkin and Tebbe are accordingly correct, I think, to say that American lawyers intuitively think of constitutional cases as distinctively important. But that happens in part because the cases we intuitively classify as structurally or ethically important get described as "constitutional." The meaning of the Constitution then adapts: we discover ways to read the Constitution's text so that it speaks to the issues we regard as fundamentally important.[132] As a result, the category of "constitutional cases" is continually populated with the cases that strike lawyers as raising the most salient questions of governmental structure and national ethos. So yes, lawyers

---

130 Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1129–35 (2013).

131 *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment, as applied to the states through the Fourteenth, guarantees felony defendants legal representation even if they cannot afford it).

132 *See* Primus, *supra* note 130, at 1095–98 & nn.41–46 (describing constitutional textuality as a continuum along which substantive propositions move as the legal profession's intuitions about the merits of those propositions changes).

think that constitutional cases are distinctively important.[133] But they do so in large part because the distinctively important cases have a way becoming "constitutional."

Note here how Serkin and Tebbe write about *United Steelworkers v. Weber*,[134] the decision in which the Supreme Court upheld affirmative action in workplaces covered by Title VII. In an earlier portion of this conversation, Serkin and Tebbe contended that lawyers and judges pay less attention to text in constitutional cases than statutory ones.[135] In response, I suggested that whether judges hew closely to enacted text may depend more on the stakes of the case than on whether the text at issue is part of the Constitution or part of the U.S. Code.[136] Where there is a lot to lose, I argued, judges are more willing to buck prior authority, including the authority of previously enacted text—and they are willing, when the stakes are high, to buck not just constitutional text but statutory text as well. As one of my examples of a high-stakes statutory case in which the Supreme Court ignored enacted text, I offered *Weber*.[137] Responding to that example, Serkin and Tebbe agree that the *Weber* Court behaved nontextually but deny that *Weber* exemplifies statutory rather than constitutional interpretation. *Weber*, Serkin and Tebbe say, was "constitutionally inflected," because the subject matter of affirmative action sounds in the constitutional category of equal protection.[138] *Weber* should therefore be understood as a quasi-constitutional case, they say, even though it was formally statutory. So in Serkin and Tebbe's view, *Weber*'s disregard for enacted text supports the claim that it is in constitutional contexts that judges are prone to behave nontextually.

I agree that there is a sense in which *Weber* was a constitutional case, or at least a constitutionalish one. The relevant

---

133 I mean this in a general way: it is a statement about lawyerly intuitions toward the big categories of "constitutional cases" and "non-constitutional cases." When one gets down to particulars, it might turn out that the vast majority of formally constitutional cases are not distinctively important, except of course to the people directly affected. *See infra* note 142 (describing suppression motions under the Fourth Amendment as typical constitutional cases). For further discussion of this point, see Primus, *The Cost of the Text*, *supra*, at 9–10.

134 443 U.S. 193 (1979).

135 *See* Serkin & Tebbe, *supra* note 129, at 718–19.

136 *See* Primus, *The Cost of the Text*, *supra* note 133, at 7–11. To be precise, I suggested that it depends partly on the distinction between high-stakes cases and low-stakes cases and partly on the distinction between cases in thickly developed doctrinal areas and cases raising questions of first impression. *See id.* at 10.

137 *Id.* at 8.

138 Christopher Serkin & Nelson Tebbe, *Mythmaking in Constitutional Interpretation: A Response to Primus and Stack*, *supra*, at 4.

sense of "constitutional" is substantive rather than formal. What makes affirmative action under Title VII a "constitutionally inflected" issue, to use Serkin and Tebbe's term, is not merely that affirmative action cases arising under Title VII raise issues that overlap with the issues raised by cases arising under the Fourteenth Amendment. The deeper reason why affirmative action seems "constitutionally inflected" even when the legal issue in a case is formally statutory is that issues of racial equality are important to the American constitutional ethos, and being important to the constitutional ethos is what makes an issue constitutional. In other words, *Weber* is substantively constitutional for the same reason that *Fisher v. Texas*[139] is: because it raises an important ethical issue.[140]

Preserving the idea that judges reason nontextually in constitutional cases more than in statutory ones by classifying formally statutory cases like *Weber* as substantively constitutional is a perfectly defensible move on its own terms. But it requires adopting a view of the relevant difference between constitutional and non-constitutional cases that largely tracks a distinction that I suggested does much of the real work of determining when judges are willing to depart from textual authority: the distinction between ordinary cases and cases where judges feel there is a lot to lose.[141] In other words, the fact that a case raises high-stakes issues of structure and ethos has at least two sets of consequences. Judges are more likely to reason nontextually, and the legal profession is more likely to regard the case as constitutional. But neither of those consequences is caused by the other one. Judges in a case like *Weber* do not first think, "This case is important, so we regard it as constitutional," and then proceed to think, "This case is constitutional, so we might not hew to the text." Instead, it is the fact that the case raises the high-stakes issue it raises that drives both the judges' willingness to depart from enacted text and our intuition that the issue is in some sense constitutional.

I do not mean to suggest that the constitutionality of a case is always just a consequence of some anterior perception of its importance.[142] But the category "constitutional cases" attracts

---

139 136 S. Ct. 2198 (2016).

140 *See* Primus, *supra* note 130, at 1132–35 (describing ethos as a basis for constitutional status).

141 Primus, *The Cost of the Text*, *supra* note 133, at 9 & 11.

142 Indeed, I do not think that it is true that (formally) constitutional cases in general are regarded as particularly important—though of course many are. For every case in which a court orders a state to recognize same-sex marriage, there are thousands of cases in which courts adjudicate suppression motions under the

and assimilates the cases that strike lawyers as raising the most important issues of structure and ethos. Sometimes, as in *Weber*, we continue to regard a case as technically non-constitutional even though we also perceive a sense in which the case is constitutional. At other times, we develop new readings of the Constitution itself in order to make the Constitution bear on our most salient questions.[143] In so doing, we perpetuate one of the intuitions that Serkin and Tebbe identify: that constitutional cases are distinctively important. After all, the questions in which we are most invested somehow turn out to be constitutional questions. As must be true, if the Constitution is always going to embody our most important commitments.[144]

* * *

Serkin and Tebbe's claim that American lawyers think of constitutional cases as having an especially elevated status is consistent with my view that Americans constantly reimagine constitutional law so that it speaks to our most fundamental

---

Fourth Amendment. Suppression motions are often important—particularly to the defendants who raise them. But to the judges who adjudicate them, suppression motions might be important in an ordinary sort of way, rather than in the special way that same-sex marriage cases were important in the last several years. The sense that constitutional cases are distinctively important is thus driven, I think, by the profession's tendency to let the most salient constitutional cases color an impression of the entire category.

143 *See* Primus, *supra* note 130, at 1095–98 & nn.41–46 (discussing this process of textual reconciliation).

144 Serkin and Tebbe respond to my other leading example of a statutory case in which the Court departed from enacted text—*King v. Burwell*, 135 S. Ct. 2480 (2015)—by arguing that the Court in *King* actually did pay much closer attention to the text than it usually does in constitutional cases. And it is true that the Court engaged closely with the enacted statutory wording in *King*, though it did so en route to a decision that refused to give legal force to a key bit of enacted text. I do not think, however, that the Court's close engagement with enacted text in *King* lacks parallels in cases arising under the Constitution. Consider *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Court held that the Second Amendment protects an individual right to possess certain kinds of firearms. The *Heller* Court engaged closely and at great length with the wording of the Second Amendment, and so did Justice Stevens's *Heller* dissent. I would agree that *Heller*'s in-the-weeds engagement with the wording of the Constitution is unusual in modern constitutional law, and I would further agree that such close engagement with enacted text is more common in statutory cases. But as I have previously argued, I think that much of the explanation for that difference lies with the fact that statutory cases present more questions of first impression about the meaning of enacted text than constitutional cases do. *Heller* was a constitutional case of first impression regarding the meaning of a constitutional text, and, presented with that case, the Court engaged with the enacted wording of the Constitution at least as closely as the *King* Court engaged with the enacted wording of the U.S. Code.

concerns. But Serkin and Tebbe have some worries about that dynamic. One worry is that if Americans code their most important issues as constitutional, there will be a tendency for those issues to be taken out of ordinary political discussion and relegated to the domain of professional elites.[145] Another is that the constitutionalization of the polity's most important issues raises the stakes of political conflict and reduces the available space for compromise.[146]

The first worry can be understood either as a concern that courts will decide issues that are better left to the normal political process or as a concern that people who are not constitutional lawyers will shrink from engaging with important issues because those issues seem to require a refined and technical treatment that is beyond the abilities of laypeople. On the first conception, the worry strikes me as reasonable. If prevailing understandings of the Constitution evolve as the norms of American elites change, and if courts understand themselves as authorized to countermand the decisions of other institutions on the basis of their understandings of the Constitution, then courts will probably decide some number of issues that are better decided by other institutions. To be sure, people will differ as to the particulars here, and we would need a robust theory of judicial review to sort out when courts should and should not intervene. Over-judicialization is to be avoided, but so is under-judicialization, and trying to figure out how to avoid both problems is one of the longer-lived preoccupations of American constitutional theory.

If Serkin and Tebbe are also worried about the second version of this problem, however, then I do not think I share their concern. Yes, there is a risk that courts will decide issues that are better resolved in other forms. But I doubt that the American tendency to understand our most salient questions of structure and ethos as constitutional questions has the effect of discouraging people who are not professional constitutional lawyers from engaging vigorously with those questions. As far as I can tell, there is a robust lay discourse about guns, gay marriage, affirmative action, abortion, the Affordable Care Act, and many other issues denominated "constitutional." If there is evidence that ordinary Americans, or members of the decision-making class other than lawyers and judges, regularly decline to express themselves on these matters because they believe the topics require professionally expert resolution, I am

145 Serkin & Tebbe, *Mythmaking*, *supra* note 138, at 8.
146 Serkin & Tebbe, *supra* note 129, at 776.

not aware of it. Indeed, I think it at least as likely that broad public discussion on several of those issues influences the judiciary as it is that the way the issues are discussed by elite lawyers limits the speech, thought, or activism of other interested Americans.

I do suspect, however, that Serkin and Tebbe are correct to worry about the other concern they express. Precisely because Americans intuitively regard the Constitution as embodying their deepest values, disagreement about constitutional law can seem like fundamental disagreement. And where disagreement is fundamental, people often find it hard to recognize the legitimacy of differing views.

In my own view, a polity is generally healthier when the members of its decision-making class are able, across a relatively broad range of issues, to recognize the legitimacy of different ideas. Indeed, I am attracted to the idea that the Constitution works best when it is understood to provide for governance that assumes important disagreement within the polity, rather than when it is understood to resolve all such disagreement. The Constitution, as Holmes remarked, is made for people of fundamentally different views.[147] But it is also true, as I noted earlier, that the meaning of the Constitution adapts over time so as to continually embody the deepest commitments of the American decision-making class. It follows that Americans are unlikely to see the Constitution as neutral on the polity's most salient issues. We have fundamentally differing views, and, much of the time, we each see our views reflected in the Constitution.

So perhaps the key questions are these: Can members of the decision-making class recognize the existence of a gap, at any given time, between their own views on issues of structure and ethos—even their own *fundamental* views on those issues—and the views of the American people, or at least those of the decision-making class, as a whole? Can they recognize, when such a gap exists, that the text of the Constitution might not settle the question one way or the other? Put differently, if two people have different and deeply held views about federal power or affirmative action, must each one regard the other as betraying the Constitution? Or can they think that the content of the Constitution might be indeterminate on the issue that divides them, at least until such time as one of them succeeds in persuading the broader polity to adopt one set of views? The

147 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

latter frame of mind is harder to maintain, especially in the heat of mass politics. But it would surely make for a healthier constitutional culture.

Serkin and Tebbe worry that by treating the Constitution as special, Americans raise the stakes of politics in unhealthy ways. There is a sense in which I think they are right. But perhaps the problem is less that we treat constitutional issues as especially important than it is that we treat too many commitments as not subject to reasonable disagreement. If we were better able to tolerate disagreement, we might be better able to tolerate disagreement about the Constitution. And disagreement about the Constitution is not going away, precisely because of a deep respect in which the Constitution *is* special: even as American values change over time, the Constitution embodies the deepest values of the American people, and when we disagree about what our values should be, we disagree about the meaning of the Constitution. That feature of the Constitution may not be unique; indeed, one could probably say similar things about at least some other sacred texts that, for particular communities, have the status of higher law. But it does seem deserving of the label "special." And to this point in history, it also seems to have been reliably constant.

THE CONSTITUTIONAL RATCHET EFFECT

Kevin M. Stack†

Christopher Serkin and Nelson Tebbe take an inductive and empirical approach to constitutional interpretation and elaboration. They ask whether attributes of the Constitution justify interpretive exceptionalism—that is, interpreting and elaborating the Constitution differently than other forms of law.[148] They conclude that the characteristics of the Constitution they consider do not justify interpretive exceptionalism—at most, the "Constitution's principal distinguishing feature may be the fact that people *think* the Constitution is special—that it has a kind of mythological status."[149] As Serkin and Tebbe see it, the extent to which individuals view the Constitu-

† Professor of Law, Vanderbilt Law School. I am grateful to Chris Serkin for helpful comments.

148 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 703–04, 749–51 (2016).

149 Christopher Serkin & Nelson Tebbe, *Mythmaking in Constitutional Interpretation: A Response to Primus and Stack*, *supra*, at 1.

tion or constitutional law as special is best explained with reference to a broad cultural gloss, a shared ascription of a particular kind of value to the Constitution rather than any particular feature of our existing Constitution or constitutional law.[150] As a result, interpretive exceptionalism appears to be founded on accepting a mythology of the Constitution's and constitutional law's special character.[151] That thought in turn prompts Serkin and Tebbe to worry about the ways in which this cultural identification and valorization of the Constitution poses distinctive risks.[152]

I take up their invitation to consider those risks below, but first notice how different Serkin and Tebbe's approach to constitutional theory and law is from more deductive and top-down theories. Under a more deductive approach, it does not make sense to ask whether observed features of the Constitution (such as the generality of its terms) are able to justify a distinct interpretive approach.[153] Rather, a justification for the Constitution's special treatment follows from arguments about the Constitution's distinctive authority or distinctive legal role—that is, premises of constitutionalism. On this view, the project of constitutional theory is to provide an account of how constitutional law performs a special function in our legal system, and then to develop interpretive theories on the basis of that ascribed function. The arguments for the divergence in constitutional and statutory interpretation that I make in my first response proceed from that perspective.[154]

From Serkin and Tebbe's more empirical viewpoint, they want a showing—some proof—that constitutional law actually performs a distinctive function before they will endorse its distinctive interpretive treatment. For instance, they insightfully argue that constitutional law may not be particularly entrenched in the sense of being less subject to change than other kinds of legal arrangements.[155] So why, they wonder, does it makes sense to continue to think of the Constitution and constitutional laws as distinctively serving a preservationist func-

---

150 Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 771–72; Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 8.

151 Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 7.

152 Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 775–76; Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 7–8.

153 Kevin M. Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, *supra*, at 5–6.

154 See *Stack*, *supra* note 153.

155 Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 753–59.

tion.[156] In this sense and others, they insist that constitutional practices should bear out the premises of any constitutional theory, otherwise claims of constitutional authority or function are perpetuating a mythology. This raises deep questions about the aims of constitutional theory, and the relationship between more ideal theory and a cultural study of the practices we identify as constitutional.[157]

We need not resolve those higher-order questions, however, because even when we take a more empirical approach, grounds for divergence in constitutional and statutory interpretation still emerge. These arguments for interpretive divergence arise as responses to observed pathologies. Consider, for instance, Serkin and Tebbe's concern that the pervasive view of the Constitution as special produces distinctive risks. The constitutional risks they have in mind might be conceived as a constitutional ratchet with three elements.

The first concerns use of the Constitution in politics. If the Constitution is viewed as a repository of our deepest values,[158] politics can take strategic advantage by casting issues in constitutional terms.[159] Framing an issue in constitutional terms, when successful, "insulat[es] certain topics from political discourse because they ostensibly concern higher-order lawmaking."[160] Second, and closely related, that constitutional framing distances consideration of an issue from the normal politics that takes place in elected bodies and administrative agencies. It also augments the role of legal argumentation.[161] In particular, once an issue is decided or framed in constitutional terms, the wide range of policy and evaluative concerns that might otherwise bear on its resolution must be translated into the terms of constitutional argument and accorded the weight that constitutional law grants them. Third, the Constitution's special status in our culture may make it particularly tempting for courts to enlarge the range of issues for which

156 *Id.* at 758–59.

157 *See, e.g.*, PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 37 (1999) (explicating the conditions and aims of a cultural study of law).

158 *See* Richard Primus, *The Constitutional Constant*, *supra*, at 1–2; *cf.* Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 771.

159 Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 775 (commenting on reasons political actors invoke constitutional categories).

160 Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 8.

161 Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 772–73.

constitutional law provides an answer,[162] often in the form of a constitutional right.

When these dynamics operate together, they have a ratchet effect of transforming more and more of our political landscape into constitutional politics. On the one hand, the Constitution's special status as a repository of our deepest values means that what is constitutional not only changes with our values,[163] but changes in a way that expands the scope of issues touched by constitutional law. But once an issue is accorded a constitutional status or right, it alters normal politics about the issue, and to the extent that courts become the privileged forum for resolution of those issues, argument about the merits must move within the constrained model of practical reasoning provided by constitutional argument. As issue after issue is resolved in a form of constitutional law rather than resting primarily under the power of municipal governments, common law courts, state legislatures, Congress, or the federal executive, our already judicialized government becomes subject to the courts in a more profound way.

At an admittedly high level of abstraction, this constitutional ratchet effect may provide a diagnosis of an important dynamic or even pathology within American constitutionalism. It also seems to capture what Serkin and Tebbe worry are the risks or downsides of our view of the Constitution as distinctively important and special in ways that are difficult to tie to its attributes. Let us suppose that this ratchet effect obtains and describes a dynamic in American constitutionalism. Doesn't it, too, have implications for constitutional interpretation and elaboration?

I could imagine several ways in which it would justify principles of constitutional interpretation and elaboration. Here is one way that argument might proceed: lawyers and the public view the Constitution and constitutional law as distinctively important, and the way which they do so ends up producing the ratchet effect just described. Assuming that effect is generally undesirable—whether because it unduly impinges on the scope of issues subject to democratic resolution or for some other reason—an implementing rule could help check the judiciary's tendency to enlarge the scope of issues to which the Constitution provides an answer.

---

162 *Cf. id.* at 776 (asserting that political actors leverage the lofty status of constitutional law in political warfare).

163 Primus, *The Constitutional Constant*, *supra* note 158, at 1–2.

Such implementing rules have deep roots in the American constitutional tradition. One such rule, framed as a "rule of administration," was defended by James B. Thayer in his classic article, *The Origin and Scope of the American Doctrine of Constitutional Law*.[164] Thayer argued that when courts are faced with a question of whether legislation is constitutional, the question they should ask themselves is whether "the violation of the constitution is so manifest as to leave no room for reasonable doubt."[165] As Thayer elaborates this defense of a kind of constitutional minimalism, he argues that "*the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not*."[166] Thayer's rule, developed with regard to the dangers of judicial review of legislation in particular, could be generalized to help address the judicial tendency of finding too many constitutional answers, with courts asking whether the Constitution is clearly violated.

I do not mean to suggest that an approach that mirrors Thayer's is the only inference that could be made from the ratchet effect, or that such a doctrinal standard would always be effective.[167] But if we see the constitutional ratchet effect as a consequence of the way in which judges mythologize the Constitution, that observation can provide a foundation for principles of constitutional interpretation along the lines that Thayer proposed. Notice that this type of argument for interpretive exceptionalism has a different character than more deductive arguments from constitutional authority that Serkin and Tebbe want to avoid. It begins with an account of political risks or pathologies and defends interpretive principles to address those risks. For Serkin and Tebbe, the focus would be on addressing the constitutional ratchet or other implications of our cultural ascription of value to the Constitution. Others, such as Adrian Vermeule, have generalized this inquiry, developing a theory of the Constitution based on an understanding of how well it manages certain political risks.[168] Following this path leads to arguments for interpretive exceptionalism, but based on functional accounts of risk or institutional tendencies. So even if we proceed, with Serkin and Tebbe, by focusing on how we view the Constitution, not theoretical arguments about au-

---

164 7 HARV. L. REV. 129, 139–40 (1893).

165 *Id.* at 140 (quoting Commonwealth v. Smith, 4 Binn. 117 (1811) (Chief Justice Tilghman)).

166 *Id.* at 150.

167 *See, e.g.*, ADRIAN VERMEULE, THE CONSTITUTION OF RISK 54–56 (2014) (examining a critique of "parchment barriers").

168 *See id.*

thority, why don't those differences, and the dynamics they create, also provide grounds to apply different interpretive principles in the constitutional and statutory domains?

JUST LAW

Christopher Serkin & Nelson Tebbe†

INTRODUCTION

What if the Constitution were interpreted as just another source of law? What if it were understood as the product of political compromise—necessarily flawed rather than infallible—and then construed in ordinary ways? In our original Article, we argued that the Constitution is subject to exceptional forms of legal interpretation involving distinctive treatments of history, text, precedent, and structure.[169] We then explored the possible justifications for that practice, and we found them mostly unconvincing.[170] We noticed a gap between interpretive *arguments* directed toward the Constitution and its *attributes* or claims to *authority*.[171] What most convincingly sets the Constitution apart, we suggested, is the very fact that Americans regard it as special—that it occupies an exceptional place in the political culture.[172] And we questioned whether that characteristic could justify the interpretive exceptionalism that we see in everyday lawyering.[173]

In our subsequent exchange with Richard Primus and Kevin Stack, a fair bit of agreement has developed—at least for the sake of the instant argument. If we are reading them correctly, they now concur that lawyers do in fact deploy distinctive interpretive arguments in constitutional cases.[174] Second, they acknowledge, if only implicitly or arguendo, that it is hard

---

† Thanks to Aziz Rana for his help on an earlier version.

169 Christopher Serkin and Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

170 *Id.* at 749–75.

171 *Id.* at 705–06.

172 *Id.* at 771–75.

173 *Id.* at 774–75.

174 Richard A. Primus, *The Constitutional Constant*, *supra*, at 3–4. Primus's agreement on this point depends on his argument that categorizing a case as "constitutional" depends partly on lawyers' perception that it raises important issues. We address this argument in a moment. Kevin M. Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, *supra*, at 3 ("[Serkin and Tebbe's article] carefully and compactly chronicles differences in the interpretive norms (what they call arguments) applied by courts when faced with statutory and constitutional questions. Their thoughtful account of

to justify that practice except by reference to the political and cultural reverence that surrounds the document.[175] Third, they recognize costs associated with constitutional exceptionalism, in particular the danger of excessive judicialization and the way constitutional exceptionalism raises the stakes of disagreement, making political compromise more difficult. They recognize both of these as real dangers.[176] However, Professors Primus and Stack have pushed us to think more deeply about the scope, consequences and inevitability of constitutional mythologizing. Most recently, in their excellent sur-responses, they encourage us to vary our concept of what counts as "constitutional."

I
CONSTITUTIONAL CATEGORIZING

Both Primus and Stack observe, interestingly and independently, that the boundaries of constitutional law shift over time. Primus argues that they change as Americans' fundamental values evolve and get coded as constitutional. What he calls the "constitutional constant" is that the issues dubbed "constitutional" always reflect lawyers' fundamental values regarding government structure and national ethos.[177] Though the values themselves change, the fact of their constitutionalization does not. In a sense, he argues that the category "constitutional" is defined by core values on questions of structure and ethos, whatever they may be at any moment in time.

We initially meant something more straightforward by the term "constitutional"—we meant to invoke lawyers' conventional conceptions of the category. So we argued that *United Steelworkers v. Weber*,[178] the challenge to affirmative action

---

the dimensions of divergence in current law and practice is likely to inspire many forms of engagement.").

175 Primus, *Constitutional Constant*, *supra* note 174, at 8 (describing "a deep respect in which the Constitution *is* special: even as American values change over time, the Constitution embodies the deepest values of the American people, and when we disagree about what our values should be, we disagree about the meaning of the Constitution"); Kevin M. Stack, *The Constitutional Ratchet Effect*, *supra*, at 1 (assuming that the Constitution is regarded as special and arguing that such perception justifies distinctive interpretive practices).

176 Primus, *Constitutional Constant*, *supra* note 174, at 6–7 (sharing the worry that too many disputes will be judicialized, and agreeing that constitutionalization can make compromise more difficult); Stack, *Ratchet Effect*, *supra* note 175, at 2 (building an argument for interpretive distinctiveness based on "[Serkin and Tebbe's] worry that problems or pathologies follow from our viewing the Constitution as special").

177 Primus, *Constitutional Constant*, *supra* note 174, at 3–4.

178 443 U.S. 193 (1979).

under Title VII, was "constitutionally inflected" not because it implicated fundamental values, but simply because its resolution was closely connected to the fate of affirmative action under the Equal Protection Clause.[179] But we think Primus is right to push us to consider the category of constitutional law as a variable, rather than a constant.

Stack also notices that the category can expand, but he focuses on how that can happen for strategic reasons, as lawyers and judges seek to leverage the argumentative advantages of constitutional discourse.[180] In this way, constitutional law can colonize other areas of legal doctrine. Because the incentives push this dynamic mostly in one direction, he calls it a ratchet effect.

According to both Primus and Stack, moreover, attending to the Constitution's shifting boundaries yields reasons for interpretive exceptionalism. Primus seems to believe that the Constitution's distinctive relationship to fundamental values gives lawyers a reason to treat it differently from other legal authorities. He implies that the "constitutional constant" explains why lawyers separate out cases implicating fundamental values.[181] Once you understand that any case implicating basic values counts as constitutional, then you can see that legal professionals deploy distinctive arguments in such cases. Here, Primus subtly recasts our original observation: lawyers do indeed interpret the Constitution distinctively, once the category is understood to include all basic commitments on questions of structure and ethos.

And, he suggests in his latest response, there may be good justifications for their special argumentation. Lawyers and judges may fashion interpretive rules that lower the two most serious costs of constitutionalization, namely over-judicialization and heightening the stakes of disagreement so that com-

---

179 Christopher Serkin & Nelson Tebbe, *Mythmaking in Constitutional Interpretation: A Response to Primus and Stack*, *supra*, at 4.

180 Stack, *Ratchet Effect*, *supra* note 175, at 3.

181 This is a subtle shift from Primus's first argument, which was that the Constitution *isn't* special, at least with regard to textual argument—constitutional law just happens to include really important cases. And their importance presses judges to depart from the text to reach the right result. We responded that these cases might seem important precisely because they involve the Constitution. Serkin & Tebbe, *Mythmaking*, *supra* note 179, at 4. Now Primus responds that at least some cases are not important simply because they concern the Constitution; they are coded as "constitutional" because they implicate basic values. He seems to be suggesting that perhaps constitutional interpretation *is* distinctive, if you define "constitutional" capaciously enough to include all cases concerning fundamental values on questions of structure and ethos.

promise becomes more difficult. Primus himself urges lawyers and judges to better tolerate disagreement about the meaning of the Constitution—not by denying that fundamental values are at stake, but by realizing that there can be reasonable disagreement about those basic values.[182]

For Stack, the ratchet effect increases constitutionalization's dangers. Lawyers and judges might resist those dangers, however, by fashioning interpretive approaches to slow or limit constitutional creep. He offers, for example, Thayerian minimalism—an approach that limits the circumstances under which legal questions are answered by the Constitution. It is possible to avoid the costs we identify by realizing that the Constitution does not provide a clear resolution of every legal dispute—and where its meaning is unclear, courts should decline to use the Constitution as a basis for striking down democratically enacted laws.[183]

We are open to this line of inquiry. As we acknowledged initially, the mythological status of the Constitution may well give lawyers and judges reasons to interpret it differently in some respects (though we expressed doubt that it could justify every interpretive difference we observe in professional practice).[184] And if the category "constitutional" implicates whatever disputes are most important or fundamental, even cases that technically concern statutory law or common law, then there may well be a reason to direct distinctive arguments to those legal authorities. In particular, the costs associated with the tendency of lawyers to constitutionalize cases may warrant distinctive approaches.

Provocative suggestions like those of Primus and Stack naturally raise as many questions as they answer. And we have some questions here. Primus, for one, believes that constitutional inquiry and therefore constitutional interpretation are extended to any legal question implicating lawyers' values on fundamental questions of structure and ethos. It follows—at least implicitly—that special interpretive rules may well be justified by the inherent importance of the issues, if not by any particular characteristics of the Constitution more narrowly defined. While we are open to the suggestion that important or core questions deserve special interpretive rules, it is less clear

---

182 Primus, *Constitutional Constant*, *supra* note 174, at 7–8.

183 Stack, *Ratchet Effect*, *supra* note 175, at 3–4.

184 Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 169, at 773–74 ("Conceivably, the Constitution's central place in American legal mythology could translate into distinctive interpretive moves.").

what those rules should be and whether they correspond in any way to the rules that we actually observe in constitutional practice.

Why, for example, should text and precedent be treated differently because the issue is especially important? While we could imagine a normative justification that text and precedent should matter less, because courts should be less attentive to legal stability than to reaching the "right" result in such important or core cases, we could imagine the opposite, too—that legal stability is especially desirable where the stakes of the case are high. Over-judicialization may be especially dangerous in such cases as well. In short, defining constitutional cases as including all those that raise fundamental commitments, as Primus suggests, may well justify different modes of constitutional argument. However, it is less clear to us what those modes of argument should be, and it seems unlikely that they correspond to the observed practice that we originally identified.

Stack suggests that constitutional exceptionalism may be justified by lawyers who wish to shrink the domain of constitutional argument by engaging in a form of minimalism that allows policy issues to be resolved in the language of ordinary law and policy without invoking a constitutional answer. That would keep some issues out of court altogether, and it would lower the stakes of many other disputes, enabling compromise. Questions that never become constitutional are more likely to be resolved within normal political discourse.

Stack's worry is consistent with our own. But here we wonder about the inevitability of the phenomenon he identifies, and of minimalism as the response. In fact, constitutionalizing may not always have a ratchet effect, and questions can actually be de-constitutionalized. This has happened before, of course. Issues have been taken out of the domain of constitutional adjudication and placed back in the realm of ordinary law and politics. Think of 1937, when the Supreme Court began to treat national economic questions as matters of ordinary policymaking that were within the discretion of legislators and other lawmakers.[185] Or think of 1990, when the Court announced that claims for religious exemptions could no longer be made under the Free Exercise Clause.[186] And today the

---

185 *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

186 *See* Emp't Div. v. Smith, 494 U.S. 872 (1990). Religious exemptions became available only under statutory law, *see* Religious Freedom Restoration Act

Court has been trying to extricate itself from both the Takings Clause and the Establishment Clause by erecting barriers to adjudication.[187] Of course, many conservatives have been trying to de-constitutionalize the right to terminate a pregnancy for decades.

But there is another available response to the ratchet danger. Instead of narrowing the scope of constitutional law, lawyers could diminish the significance of categorizing a dispute as constitutional. We offer this argument tentatively. If constitutional law were regarded as merely another source of law—not necessarily implicating our basic values, but resulting from compromise—then the consequences of constitutionalization could well be reduced. Moreover, there would be less incentive for lawyers and judges to ratchet up the level of authority. And, to circle back to our original point, it would become even harder to justify special interpretive arguments. Of course, demythologizing the Constitution would have downsides that would need to be carefully considered. But reading Primus and Stack makes us think that Americans should have that normative conversation.

II
THE CONSTITUTIONAL CONTINGENT

However constitutional boundaries are drawn, and however fluid they are, we all seem to agree that the Constitution does, in fact, enjoy a kind of mythological status in our legal system. It is not just supreme in the sense that it trumps other law, but is especially revered. The final question Primus and Stack at least implicitly push us to consider is whether this mythologizing is normatively desirable, or whether it comes with particular dangers.

Notably, neither Primus nor Stack actually *defends* the sacred cultural status of the Constitution. Primus simply says that the "constitutional constant"—the reality that the Constitution embodies basic commitments regarding structure and ethos, even as those values shift—is as close to a fixed feature of American political life as exists. And if it were inevitable,

---

(RFRA), 42 U.S.C. §§ 2000bb–2000bb-4 (2006), or state statutory or constitutional law.

187 *See, e.g.*, Hein v. Freedom From Religion Found., 551 U.S. 587 (2007) (rejecting taxpayer standing for a particular type of Establishment Clause challenge); San Remo Hotel, L.P. v. City & County of S.F., 545 U.S. 323 (2005) (holding that issue preclusion prevents federal courts from hearing takings challenges already litigated in state court, even when state court litigation is required to ripen a takings claim).

that would be enough; there would be no reason to consider normative arguments for or against constitutional mythmaking. With Primus, we could simply urge lawyers and judges to tolerate disagreement about the meaning of the Constitution, even though it embodies our most profound commitments about government structure and American ethos.

Yet we have some doubts. Although neither of us is a professional historian, we wonder whether the Constitution really has always been regarded as an embodiment of ultimate values, even just among lawyers and even just on questions of structure and ethos. It seems to us equally possible that for much of the early republic—perhaps through and including Reconstruction—the Constitution was viewed as the product of compromise, at best, and not the object of a consensus on national commitments. It might have been understood as a framework for working together rather than an idealization of American values.[188] Of course, the Constitution trumped other laws in the event of conflict, but perhaps only in the same way that other laws superseded inferior rules.[189]

Universal support for the Constitution might instead be the product of an American nationalism that arose later, in the context of economic integration and global warfare.[190] This is at least a *conceivable* reading. Viewed in historical perspective, in other words, the contemporary consensus is just as likely to appear contingent, not constant.

Even today, we wonder whether the "constitutional constant" is really so constant. Again, most economic questions were de-constitutionalized in the late 1930s. Do economic concerns not present questions that are fundamental to the American ethos?[191] Yet there is agreement (itself contingent) that

---

188 *See* Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335, 382 (2015).

189 *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 17–18 (2008) (suggesting that, at the time of the Founding, judges made constitutional decisions in the same way they made other decisions); *see also* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 129–30 (2013) (arguing that the Framers interpreted the Constitution and statutes with substantially similar methods).

190 Rana, *supra* note 188, at 340 (arguing that "in the late nineteenth and early twentieth centuries, significant popular skepticism actually existed concerning the basic legitimacy of the text, voiced at times even by future presidents and sitting judges" but that against the backdrop of international conflicts during this time period that led to World War I, "a combination of corporate, legal, and military elites initiated a concerted campaign to establish constitutional support as the paramount prerequisite of loyal citizenship").

191 Some have sought to revive the constitutional commitment to economic equality. Their project underscores the fact that economic unfairness is not today

they do not raise constitutional questions, or at least not constitutional questions that are susceptible to adjudication (that said, the fact that some libertarians are trying to revitalize the Privileges and Immunities Clause precisely to enable rights of property and contract provides some support for Primus here).[192]

If our skepticism regarding the "constitutional constant" is justified, or even just plausible, then theorists would do well to start thinking about whether its mythological status is desirable as a matter of American political morality. That project is far beyond the scope of this exploratory essay, although we can imagine in broad strokes some of the likely arguments on both sides.[193]

On the one hand, the concerns that we have identified—and that Primus and Stack seem to share—would be mitigated by demythologizing the Constitution. In particular, arguments from the Bill of Rights or the Commerce Clause would no longer raise the moral stakes, making compromise more difficult. And lawyers *might* be less tempted to constitutionalize their cases, so that they become matters for federal judges who could no longer be overruled by ordinary lawmakers. Judicialization of

---

seen to raise a constitutional issue. *See* GANESH SITARAMAN, THE CRISIS OF THE MIDDLE CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017); Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1288 (2016) ("For prior generations of reformers throughout the nineteenth and early twentieth century, economic circumstances [of extreme inequality] like our own posed not just an economic, social, or political problem, but a *constitutional* one . . . . [T]oday [that discourse], with important but limited exceptions, lies dormant: a discourse of constitutional political economy."); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1466 (2016) ("Without accounting for the influence of economic elites over policymaking, leading constitutional theories in some cases are incomplete, and in other cases, fail to achieve their stated goals.").

192 For example, the lawyer who argued before the Supreme Court that the Second Amendment should be incorporated against the states urged the Court to use the Privileges and Immunities Clause, rather than the traditional mechanism of the Due Process Clause. When Justice Ginsburg asked why he was making that creative argument, the lawyer responded that reviving the Privileges and Immunities Clause could (re)constitutionalize economic rights such as the right to contract and the right to property. Transcript of Oral Argument at 8–9, McDonald v. City of Chi., 561 U.S. 742 (2010) (No. 08-1521).

193 A literature has begun the project of evaluating the Constitution, not merely interpreting it to reach desirable results. *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 27–34 (2006) (contending that many of the Constitution's provisions promote unjust or ineffective government); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 4–26 (2012) (arguing that the Constitution is most defensible as a source of inspiration rather than a source of law).

disputes could be reduced, as could federalization of issues that otherwise might remain questions of state law.

More generally, something like Primus's vision would become more attainable: lawyers could disagree with each other, even about the meaning of the Constitution. But they would do so not, as Primus says, despite the fact that the Constitution implicates their highest values—requiring them to tolerate conflict exactly where their commitments are strongest. Rather, they would disagree without necessarily accusing each other of betraying the nation's highest principles.

On the other hand, there are good reasons for caution. Constitutional law remains one of the few remaining foundations of national unity, at a time when virtually all other institutions of government have been wholly or partially delegitimized through partisan division. It is hard to think of another national government institution that enjoys the same kind of support—perhaps American troops fighting on an active battlefield come close, but few other government projects bring the citizenry together.[194] Even the Supreme Court, viewed as the guardian of constitutional law, has suffered a diminution of public regard. The Constitution is distinctive as a subject and stimulant of national unity.

Another worry might be that constitutional law would become less responsive to democratic mobilizations, not more responsive. We think this concern is probably unfounded—after all, statutes and common law rules can also be influenced by social movements and political dynamics.[195] Still, we realize that some of the distinctive interpretive arguments that lawyers direct toward the Constitution allow its meaning to shift, perhaps also in response to political and institutional dynamics. Think for instance of the relative unimportance of the text, or the unique role of structural argumentation. To the degree that unifying interpretative argumentation reduces democratic responsiveness, legal theorists might have reason to worry.

CONCLUSION

Recognizing that the mythological status of the Constitution is historically and culturally contingent would open up conceptual space for new forms of normative argument regarding that status. Fully engaging in that debate not only would

194 *See* Rana, *supra* note 188, at 340.

195 *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–87 (1987) (showing that the present societal, political, and legal context should and does impact the interpretation of statutes).

take us far beyond the subject matter of our original project—the specialness of constitutional interpretation—but it would also demand a shift in methodology. We could no longer argue only empirically and inductively (words that Stack insightfully uses to describe our method). Instead, or in addition, we would have to argue from principles of American political morality. Must the Constitution be regarded as special in order to vindicate commitments to democratic responsiveness, and to full and equal membership for everyone? That is a question we would be happy to explore in further work. Our object here has been to make it available for debate. If a conversation about these fundamental questions should emerge, we can think of no better interlocutors than Professors Primus and Stack.