

## LET'S CALL THE WHOLE THING OFF?

**THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM.** By Dennis J. Goldford.<sup>1</sup> Cambridge University Press, New York. 2005. Pp. xi, 305. \$75.00 (hard); \$29.99 (paper).

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“The only jurisprudence that has made it into the public sphere is . . . originalism.”<sup>3</sup> Since the 1980s, conservative Presidents and legal intellectuals have very visibly insisted on original meaning as the touchstone of constitutional interpretation. Lawyers in and around the Reagan Administration settled on originalism as the essential core within the general conservative rhetoric lambasting “judicial activism” and exhorting “strict constructionism” and then helped shape this general disposition into a relatively concrete theory of constitutional interpretation and judicial review. The conservative commitment to originalism at least kept it on the political agenda and impressed it into the public consciousness. Originalism fared less well in the scholarly debates over constitutional theory in the 1980s, but it remains one of the contenders as a large-scale theory of constitutional interpretation, and there is little question that historical inquiry into original meaning remains a standard (if not decisive) mode of constitutional argumentation.

It is perhaps a propitious time to return to the originalism debates. The administration of President George W. Bush has not mounted the same sort of public campaign for originalism that the Meese Justice Department did, but that is in part because two decades after the founding of the Federalist Society and the ill-fated nomination of Robert Bork to the Supreme Court, the Bush administration can take originalism for granted

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3. Clyde Spillenger, *quoted in* Jess Bravin, *Change on the Supreme Court*, WALL ST. J., July 5, 2005, at A4.

as part of its intellectual and political background. Confirmation fights over conservative judicial appointments and continuing controversy over the Supreme Court's constitutional jurisprudence give originalism renewed prominence. Although for many the originalism debates remain forever frozen in 1987, a "new originalism" has been developing within the scholarship for many years now and the dance of originalist proponents and critics requires some new moves.<sup>4</sup>

Dennis Goldford's new book revisits the originalism debate with a goal of getting past it. What is interesting about originalism for him is precisely how it illuminates general problems of American constitutional theory. With a clear-eyed picture of the Constitution, he argues, we can get beyond originalism and non-originalism and develop a constitutional theory that transcends that old division. Goldford's proposed alternative, what he calls "a theory of constitutional textuality," shares a great deal with recent constitutional theorizing and is often quite illuminating, of both the Constitution and constitutional theory (p. 10). Somewhat surprisingly, I found myself largely in agreement with the book, despite its being pitched primarily as a critique of originalism. Perhaps this suggests that Goldford has transcended the originalism debate after all, though I do not think so. There is a great deal of theoretical common ground to be found out there, but there are still important points of disagreement. It is worth locating both. In order to do so, Part I of this review summarizes Goldford's argument, Part II raises a problem of constitutional authority that is not adequately answered in this theory of constitutional textuality, and Part III sketches an approach that situates originalism within American constitutionalism, accommodating if not transcending originalism and nonoriginalism.

### I. GOLDFORD'S CRITIQUE OF ORIGINALISM AND THEORY OF CONSTITUTIONAL TEXTUALITY

Much of the book is framed as a review of the originalism debate and as a critique of originalism. For those looking for an accessible introduction to that literature, Goldford is a reliable and fair guide. While he provides critical commentary on the arguments that have been made by others (almost always siding

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4. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

with the critics of originalism), this discussion does not significantly redefine the terms of the debate or significantly advance its margins.

Goldford first introduces the “debate over originalism” as the indirect exchange between Attorney General Edwin Meese and Associate Justice William Brennan in 1985. While Meese and allies such as Robert Bork accused those who would abandon the original meaning of the Constitution when engaging in judicial review as engaging in naked politics, Brennan charged that the originalists merely chose to disguise their politics. Goldford takes this charge quite seriously, and thus spends some time attempting to identify “at least one instance in which originalists acknowledge that a liberal result is generated by originalist interpretation,” and thereby saving “originalism from originalists themselves” (pp. 37, 38). He finds such a savior in Justice Hugo Black, whose argument about the historical meaning of the Fourteenth Amendment’s due process clause proved able to “yield liberal as well as conservative results” (p. 50). With the example of Black before us, we are apparently in a position to take originalism seriously as a theory of constitutional interpretation, partly freed from the taint of its association with conservative advocates.

With those preliminaries out of the way, Goldford divides the debate over originalism into several distinct arguments. In each, originalists and their critics are shown to embrace a series of sharp dichotomies. Those dichotomies are then subverted to show that each side has only a partial grip on the proper understanding of American constitutionalism. Whether in the context of disagreements over a living constitution versus a fixed constitution, interpretation versus noninterpretation, objectivity versus subjectivity, originalists are understood to be driven by the fear of unconstrained judges exercising discretion to make policy from the bench, and consequently the need for a set of fetters by which judges can be tied down. Goldford ranges widely in presenting these debates. He does not limit himself to the most prominent public or scholarly defenders of originalists but freely pulls in historical judges and politicians, relatively obscure law review articles, and those who might not be thought of as originalists at all, such as Harry Jaffa. The criticisms of originalism are generally drawn from the expected sources.

For those seeking an overview of the ins and outs of the debate over originalism in the 1980s, the first several chapters of *The American Constitution and the Debate over Originalism* are

a convenient source. The coverage can be somewhat idiosyncratic, however, and the focus is on the big dividing lines between originalists and their opponents rather than on the contours or development of originalism itself. Gregory Bassham's *Original Intent and the Constitution* remains the essential source for a comprehensive and analytically sharp overview of the originalist theories of the 1980s.<sup>5</sup> Johnathan O'Neill has now done for originalism what Laura Kalman did for "legal liberalism,"<sup>6</sup> providing a serious intellectual history of originalism from the postwar period to the present.<sup>7</sup>

The summary and critique of originalism is ultimately a secondary aim of the book, however. The primary purpose of the extended journey through the originalism debates is to lay bare some basic issues in American constitutionalism and to set up Goldford's own response to those issues. This is a somewhat indirect path to the desired endpoint, encouraging some repetition in the presentation (key arguments are repeated nearly verbatim in several chapters). It also tends to focus attention on the criticism of originalism even though Goldford ultimately wants to reject both originalism and "nonoriginalism," and his departure from nonoriginalism is left less apparent than it might otherwise have been.

Goldford sees the modern originalism debate as more than just an episode in Reagan-era politics. It is rather a manifestation of our recurring struggle with "the very nature of the American constitutional system itself," the commitment to binding politics and the future with a written Constitution (p. 9). Americans are "a people who live textually," but only to the extent that we allow society to be controlled by the "meaning of its fundamental constitutive text" (p. 4). This way of social ordering means that "political conflict over principles basic to and definitive of American society quite naturally finds expression in conflict over interpretation of the fundamental text that formalizes those principles and renders them authoritative" (p. 3). But this political dynamic gives rise to the anxiety that the Constitution will become the plaything of political opponents, its meaning being erased and written over by political actors. We might, as Jefferson feared, "make it a blank paper by construction" (p. 9). Rather than being the master of politics, the Constitution may

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5. GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION* (1992).

6. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1998).

7. JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

become its servant. Originalists may feel this anxiety most strongly, and thus they have pressed particularly forcefully on the need for a method of constitutional interpretation that will limit judicial discretion and maintain constitutional fidelity. Goldford is not persuaded by their response to that anxiety, but he takes their concern seriously and sees it as lying at the heart of the American constitutional project.

Goldford's dissatisfaction with originalism as an answer to what it means to "live textually" is straightforward. It is the commitment to constitutional interpretation—the willingness to argue in constitutional terms and within the boundaries provided by the constitutional text—that creates "textuality," the binding of actual American politics by the constitutional text (p. 10). Although textuality requires that "what binds the future is the constitutional text," originalism requires instead that "what binds the future is the original understanding of the constitutional text" (p. 11). In their hearts, originalists do not trust "the binding capacity of language," and so paradoxically fail to "take the Constitution seriously" despite their stated desire to do just that (p. 12). In their effort to preserve the Constitution, they try to substitute something else for it, an "unwritten constitution" drawn from the historical record (p. 244). They give up on the Constitution itself and subtly abandon the constitutional project of binding politics with a written text.

So what does living textually really mean? Ultimately, Goldford argues, the Constitution achieves "social reality" not through the dictate of the Court or of the founders, but through the social activity of the American people (p. 242).<sup>8</sup> Originalists, according to Goldford, do not believe in "the constitutive character of the Constitution" and so instead assume that the Constitution has to be imposed on the people by judges (though presumably, much the same could be said about most normative theories of constitutional interpretation) (p. 239). "Textuality" operates through three constitutional roles. The Constitution is "definitional" in that political debate employs the Constitution's terms. It is "conserving" in that its existence "as an actual historical document" pulls that debate back to "that particular set of general and specific principles with which the Framers constituted the American polity." It is "revolutionary" in that current

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8. He endorses to this extent Karl Llewellyn's dictum: "there is only one way of knowing whether, and how far, any portion of the Document is still alive; and that is to watch what men are doing and how men feel, in the connection." Karl Llewellyn, *The Constitution as an Institution*, 34 COL. L. REV. 1, 15 (1934), quoted in Goldford (p. 249).

political practices can be measured against those principles and found wanting (p. 236). Goldford gives little attention to these roles, however. Instead he emphasizes that what the founders gave us is a “social text—the social practice of an ongoing constitutional convention” (p. 275). The Constitution can only be simultaneously democratic and binding if we view it as a constitutive document (that makes and is made by current social practice) rather than as a positive document (that imposes an order on social practice). Constitutional interpretation in this constitutive mode gives up the idea that there are right answers to constitutional questions or that constitutional interpretation can be outside of politics. Living in the text only means engaging in legitimate constitutional arguments, making use of the available constitutional grammar. Constitutional interpretation is necessarily political, but it is a politics that must embrace “the legitimacy of multiple argumentative positions” and refuse to accept “the idea of a privileged standpoint” from which to access constitutional meaning (pp. 292, 293). Constitutionalism is all about argument, about “difference and disagreement,” but it is apparently never about outcome (p. 202).

Goldford believes that this constitutional textuality would transcend originalism and nonoriginalism. Both originalists and nonoriginalists are equally guilty of trying to find “the right normative standard governing interpretation,” whether they are trying to impose “the Framers’ position” or “evolving moral standards, John Rawls’ theory of justice, and so on” on the text (p. 194). Rather than trying to lock the language of the Constitution down, constitutional textuality calls on us simply to “participate as active subjects in the activity of constitutional meaning,” to treat the “Constitution” as “a gerund rather than a noun” (p. 198). In doing so, we would necessarily be interpreting the Constitution that the founders left us, and all we can ever say about that text is “this is *our* best reading of the Constitution.” This is, by now, a familiar move, pioneered, among others, by David Couzens Hoy<sup>9</sup> and Stanley Fish.<sup>10</sup> Goldford presses the point in a particularly clear and strong fashion, however, and his final chapters elaborate a sensibility about constitutionalism that is both widespread in contemporary theory and in many ways quite attractive.<sup>11</sup>

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9. David Couzens Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KENTUCKY L. REV. 479 (1988).

10. STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989).

11. This focus on constitutional grammar rather than on constitutional require-

## II. THE PROBLEM OF AUTHORITY

Constitutional textuality is an attractive way to understand constitutionalism. In an important sense, the Constitution is constitutive in the manner that Goldford highlights. If we are to experience the Constitution as something other than an alien imposition, and as a consequence if it is to have authority within our politics, then we must recognize ourselves and our ideals in that text and feel comfortable continuing to speak in its language. A “Constitution” that cannot be reconciled with our political reality is not a constitution at all; it is, at most, a façade. Perhaps, Jon Elster’s metaphor should be reversed: The Constitution is not the lash that binds us to the mast, it is the siren’s call that draws us in to itself (though hopefully not to our doom).<sup>12</sup>

The emphasis of the book on the theoretical significance of the “interpretive turn” is also reasonable. There is a range of argumentative modes available within our accepted, legitimate constitutional discourse. Any time we commit ourselves to interpreting the text of the Constitution, we have, to that extent, committed ourselves to the founders’ Constitution. There is no authority to which we can appeal to settle our theoretical and interpretive debates; “all we have is the open sea of constitutional discourse,” and “all we have is our own persuasive powers” (p. 201).

The question is how far this pure constitutive approach to the Constitution can take us. Goldford would have us not only embrace the constitutive notion of the Constitution but also abjure the positivist notion of the Constitution. Undoubtedly, he would say that we have no choice—the constitutive is all we really have. That perspective, however, leaves us few resources with which to understand some fairly basic features of American constitutionalism. In particular, it leaves us with two unexplained problems of authority.

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ments is central, for example, to PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* (1993); HOWARD SCHWEBER, *THE LANGUAGE OF LIBERAL CONSTITUTIONALISM* (forthcoming). A kind of appeal to textualism can (almost) unite those across the interpretation debate. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); RONALD DWORKIN, *LAW’S EMPIRE* (1986); Jack M. Balkin, *Alive and Kicking: Why No One Believes in a Dead Constitution*, SLATE, August 29, 2005 ([www.slate.com/id/2125226](http://www.slate.com/id/2125226)).

12. Cf. JON ELSTER, *ULYSSES AND THE SIRENS* (1984).

## A. WHY THIS TEXT?

*The American Constitution and the Debate over Originalism* contends that constitutionalism should be understood simply as a text-based social practice. It is the Constitution that “defines who we are as a people not just in a symbolic sense, but, more significantly, in a substantive sense” (p. 3). It is the “common bond of American society” (p. 3). It is this text that we are committed to interpreting, and the legitimate moves of constitutional discourse depend on our ability to make reference to the language of the Constitution. As we are repeatedly told, it is “the Constitution itself” that is authoritative (p. 78).

We are not told *why this* text is authoritative. For the purposes of “textuality,” any text will do, as long as we organize ourselves around it. It could be the Holy Bible, old Star Trek episodes, or “the Constitution” as written by two law professors.<sup>13</sup> Why then is the Constitution in particular authoritative for this community, and why is only the Constitution authoritative in this way? Why not the Gettysburg Address, the “I Have a Dream” speech, or *A Theory of Justice*, in addition to or instead of the Constitution? Why is the Constitution as a whole, as a unified document bounded by its preamble and its last amendment, the relevant authoritative text? Why might we not select out favored bits and pieces of the document to give this authoritative status while ignoring the rest? Why is the language of the founders binding on us, especially when we think that their intentions in employing that language are not and especially if we think that language is not only “definitional” but also communicative of a “particular set of general and specific principles” (p. 236)?

An answer might be purely empirical. It may just happen that the Constitution is our textual center. Those who would analyze constitutions as coordination devices could accept this answer. The Constitution’s role is just a historical accident, the text of 1787 just happens to be a particularly prominent focal point around which we have coordinated our political activities and now it would be costly to coordinate around something else.<sup>14</sup> Of course, it would still be an empirical question as to whether the Constitution actually serves that function, whether in fact we take our cues as to who the legitimate next president is

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13. See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 465 (2000).

14. John Finnis, *Law as Co-ordination*, 2 RATIO JURIS 97 (1989); RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 82–140 (1999).

based on the procedures laid out in Article II and the Twelfth Amendment as opposed to, say, the consensus forecast of the broadcast newscasters. It seems unlikely that Goldford would be content with such an answer, however. He seems to want something less contingent and more normative. He recognizes that the Constitution is authoritative, not merely convenient.

An alternative answer might be purely historicist. It is enough to know that the present community has invested the Constitution with this sort of authoritative meaning. The text to which this community now consents to be governed could have come from anywhere. It could have been found in a bottle on a beach, inscribed on a tablet on a mountaintop, or left by a foreign prince. What would be important is not why the Constitution has such a status, but merely that it does now have such a status. Its authoritativeness is a pretheorized given that has no justification, a foundation on which the theory of textuality can be built. This is not an uncommon position for similar sorts of antifoundationalist theories, but it is a fairly precarious one to be in.<sup>15</sup> If pressed to explain why we are a people defined by the Constitution, however, Goldford's account offers little by way of a response. We simply are the knights who say "Ni," the keepers of the sacred words.<sup>16</sup>

Even if we are willing to accept that, we are still faced with the empirical question of whether the Constitution, the whole Constitution, and nothing but the Constitution in fact serves this political ordering role. To know which, if any, texts serve this constitutive role for American society is fundamentally a sociological question, and there is no reason to assume a priori that the Constitution is the sole, or even primary, text that performs that function.<sup>17</sup> Tracing out the strategies of legitimation within contemporary political discourse would likely give only a small role to the Constitution.

There is a better answer as to why we take the Constitution as a particularly authoritative text, but the answer requires stepping out of the contemporary constitutive framework within

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15. See, e.g., RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH* 175–96 (1990).

16. MONTY PYTHON, *MONTY PYTHON AND THE HOLY GRAIL* (Columbia, 1975).

17. Cf. MARK TUSHNET, *TAKING THE CONSTITUTION SERIOUSLY* (1999) (elevating in his "populist constitutional law" the "thin" constitution of the ideals associated with the Declaration of Independence over the "thick" constitution of structures and rules associated with the Constitution itself); ANNE NORTON, *REPUBLIC OF SIGNS* (1993) (arguing that in the Constitution "Americans become a people of the text" but finding equally relevant a wide variety of sources in popular culture).

which Goldford has confined himself.<sup>18</sup> The Constitution as a unique, coherent text has special authority within our political system because of the historical, positive act of its being ratified by popular convention. This text is constitutive because of the political authority of those who adopted it and, in so doing, (re)founded the United States. To be sure, that project of constitutional founding might have failed. The Constitution of 1787 might have been rejected, replaced, or at some point abandoned. That act of founding has continuing force only because of the actions of subsequent generations in accepting the founders' text as their own. Nonetheless, the foundation of constitutional authority is positivist.<sup>19</sup>

To the extent that we remain tethered to the "actual historical document" and it is *this* that we must interpret, as Goldford says that we must, then it cannot really be true that we are in the position of an "ongoing constitutional convention," as he also claims (pp. 236, 275). Either the founders and their text have a privileged position within our political discourse, or they do not. If we are committed to interpreting *their* text (controlling for amendments), then they have an authority as legislators that we as interpreters do not have. We are called back to their text and their principles as embodied in that text, and we are obliged to take those as particularly authoritative (for certain purposes) over alternative or conflicting texts or principles that we might otherwise prefer and around which we might otherwise order our social and political activities. To account for this, we need to step out of the framework of free-form constitutive discourse and recognize that the Constitution is regulative as well as constitutive.<sup>20</sup> The Constitution is "an object" as well as a "social practice," a noun as well as a gerund (cf. p. 198).

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18. It is, of course, possible to reject the premise that the Constitution is uniquely authoritative. We might argue instead, for example, that the opinions of the Supreme Court or the consistent practice of government officials are equally or more authoritative within our politics. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PENN. L. REV. 1 (1998). But that would be to reject Goldford's constitutional textuality.

19. See also, Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in *LAW AND INTERPRETATION* (Andrei Marmor ed., 1995); Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW* (Robert P. George ed., 1996).

20. See also, Keith E. Whittington, *Once More Unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 *LAW & SOC. INQ.* 601, 630 (2000).

B. WHAT AUTHORIZES JUDGES TO ARBITRATE AMONG  
CONSTITUTIONAL INTERPRETATIONS?

The second problem of authority left unaddressed in *The American Constitution and the Debate over Originalism* is that of judges exercising the power of judicial review. It is a virtue, not a vice, of the book that it revolves around constitutionalism, not around judicial review. Most constitutional theory is driven by a concern with judicial review and judge-made constitutional law, and there is more to constitutionalism than just that. Nonetheless, it is a flaw in the book not to recognize that a great deal of the originalism debate is driven by a particular concern with the work of judges and how best to justify and guide their decisions to lay aside the public policies endorsed by elected representatives. The originalism debate speaks to the nature of constitutional interpretation generally, but it is particularly motivated by and concerned with constitutional interpretation within a very specific institutional context. For both originalists and their critics, competing understandings about constitutional authority underwrite the institutional authority of the judiciary to speak for the text and the particular approaches to constitutional interpretation that the courts might employ.<sup>21</sup> From the perspective of that debate, any effort to transcend the division between originalists and nonoriginalists will have to be evaluated by how well it responds to the concerns that opened and sustain that divide. How well does textuality address the problem of judicial review?

On the authority of judges to stamp the Constitution with their particular interpretations of its meaning, Goldford is largely silent. This is a conscious decision. He notes in his introduction that he thinks the originalism debate has been “erroneously conflated with the . . . debate over judicial activism and judicial restraint” (p. 4). The question of “who in the American political system is authorized to determine that X is contrary to the Constitution” is entirely separate from the question of “how—that is, by what criteria—does the authorized interpreter(s) determine that X is indeed contrary to the Constitution” (p. 5). Goldford offers no real argument for regarding these questions as completely separable, but there is certainly a superficial plausibility to it.<sup>22</sup> Knowing whether or not original-

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21. See also Robert Post, *Theories of Constitution Interpretation*, in *LAW AND THE ORDER OF CULTURE* (Robert Post ed., 1991).

22. Goldford borrows the questions and their separation from Walter Murphy and

ism should guide our interpretations of the Constitution would not by itself tell us whether or not we should have judicial review or how deferential the judiciary should be when exercising the power of constitutional review. An originalist Court might be active or passive, deferential or not.<sup>23</sup> Nonetheless, there might be real connections between the “who” and the “how.” We might well think that differently situated actors might approach the Constitution differently. Certainly we might think twice before authorizing the Court to employ an approach to constitutional interpretation that would explicitly transform the justices into an “ongoing constitutional convention” (p. 275).

It has been decades since such talk of ongoing constitutional conventions has commonly been used without either irony or derision. There is a reason why Goldford can engage in such talk without apparent self-consciousness, and that is again because he minimizes the regulative quality of the Constitution. When he speaks of the first “fundamental” premise of American constitutionalism, that its purpose is “to bind future generations to the vision of its founders,” he understands that to mean something very limited (p. 10).<sup>24</sup> What the founders gave us is merely “argumentation and debate” (p. 275). In contrast to originalism, the very exemplar of “a regulative theory of constitutional interpretation,” Goldford’s constitutional textuality is a purely constitutive theory (p. 11). It does not seek to bind the unwilling. There is no apparent question of these understandings of constitutional requirements being imposed on those who are dubious of them. It does not need to grapple with the countermajoritarian difficulty. Quoting Hanna Pitkin, the “Constitution” in this constitutive sense is just “something we *are*” (p. 240).<sup>25</sup> As a presumptively constitutive text, the Constitution in this sense is almost necessarily both “democratic” (it is what *we are*) and “binding” (how could we be anything other than what we are?). We know the Constitution by its works.

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his co-authors (p. 5, n.13). WALTER F. MURPHY, JAMES E. FLEMING, & WILLIAM F. HARRIS III, *AMERICAN CONSTITUTIONAL INTERPRETATION* (1986). See also, Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 *REV. POL.* 401 (1986).

23. See also, Whittington, *supra* note 4.

24. It is worth noting that Goldford gives more normative weight to intergenerational constitutional binding than seems proper. The intergenerational survival of a piece of constitutional text is purely contingent within American constitutionalism. In the first instance, the goal of a constitutional constraint is not to bind our descendants but to bind our government officials.

25. Quoting Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 *J. LEGAL ED.* 167, 167 (1987).

How far can this constitutive approach carry us in understanding American constitutionalism? Part of the way, but not all of the way, I believe. Perhaps more accurately, it can take us a long way in understanding the nature of constitutionalism as such but not very far in understanding a particular instantiation of it, in this case in the form of the U.S. Constitution. In its particulars, the Constitution attempts to do more than order the political system and establish a grammar of political debate. It also attempts to settle some actual or potential controversies, to establish right answers to some constitutional questions. It makes some substantive commitments. In some cases, those commitments may be fairly specific, leaving little room for debate. In other cases, those commitments may be less specific, leaving more room for debate about how best to construe and apply them. In either case, the Constitution seeks to regulate government action by ruling some options out of bounds, and it calls on faithful constitutional interpreters to recognize those boundaries and enforce them against those who are less meticulous or less faithful. Daniel Webster represents one clear vein in the American constitutional tradition when scolding that a constitution that did not establish limits that are either clear in themselves or subject to authoritative resolution “should not be denominated a constitution. It should be called, rather, a collection of topics, for everlasting controversy; heads of debate for a disputatious people. It would not be a government. It would not be adequate to any practical good, nor fit for any country to live under.”<sup>26</sup> Within the discourse of American constitutionalism, there is a consistent and appropriate demand for a method of constitutional interpretation that promises to get the Constitution right. Both originalist and nonoriginalist theories of constitutional interpretation seek to respond to that demand. Goldford’s theory of constitutional textuality does not.

Constitutional textuality may serve more adequately as an external account of American constitutional discourse than as an internal account that can be consciously deployed by the participants in that discourse. As an outside observer, we may well recognize that all interpretations are contingent, that it is discourse “all the way down,” that there are multiple modes of legitimate constitutional argumentation, and that looking across history the most notable constant is that there will be argument and debate. As an inside participant in the process of constitutional interpre-

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26. 6 REG. DEB. 78 (1830).

tation, however, we may nonetheless be obliged to struggle as best we can to identify what we take to be the right answers. Goldford hints as much when he notes that “The written nature of the American Constitution has contributed to the development of a legalistic, and thus more narrow, notion of constitutionalism centered on courts, but constitutional theory is an intellectual domain whose concern with general issues in constitutionalism identifies it as more a species of social and political theory than of conventional constitutional law” (p. 240). He offers constitutional textuality as a “descriptive and analytical argument about the nature of constitutional interpretation,” as part of the effort “to put constitutions back into the empirical concerns of political science and social theory,” rather than as “some alternative normative theory” (pp. 18, 19). This form of constitutional theory, as “grand theory” or “meta-theory,” can be valuable.<sup>27</sup> But it can go astray when it steps out of the analytical mode and questions whether “we need a normative theory in the first place” (p. 18).<sup>28</sup> When doing that it ceases to be an academic alternative to participating in the originalism debate and instead becomes an alternative within the originalism debate. But as an alternative within that debate—as a suggestion to those who would *do* constitutional interpretation—constitutional textuality provides little normative leverage for substantively or procedurally resolving constitutional controversies.

### III. INTERPRETATION AND CONSTRUCTION

But what should an originalist take away from the critiques of originalism in *The American Constitution and the Debate over Originalism*? I will not attempt to respond to those critiques in detail.<sup>29</sup> I do, however, think that originalists should take Gold-

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27. See also, Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509 (2000).

28. In doing so, it gives in to what Stanley Fish has called “theory hope,” a false expectation that the conclusions of metatheory ought to have consequences for theory. FISH, *supra* note 10, at 324, 342. The fact that we know that individual interpreters operate within interpretive communities that help define what considerations are counted as persuasive within them does not help us determine how any given interpretive community should function.

29. I have presented an extended argument for a version of originalism in KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999). Goldford devotes a chapter to that argument (pp. 208–34). Here, as elsewhere, the central thrust of Goldford’s critique is that either originalism is impossible (we cannot control our interpretation of one text by reference to other texts) or unavoidable (if we are interpreting, then we must be interpreting the author’s text). As I argue in the book, I believe that while we may always be interpreting

ford's central points seriously. His emphasis on the semantic autonomy of the text is widely shared and weighty. His insistence that we recognize the constitutive character of the Constitution is well taken. The book helps direct us to where the real theoretical disagreements between originalists and their critics still are.<sup>30</sup> The originalist arguments of the 1980s were motivated by the desire to restrain judges and were often framed in terms of interpretation versus noninterpretation, but as eventually became clear most scholars were willing to claim the label of "interpretation" and the subjective experience of "constraint" was hardly the issue.

As the questions raised in Part II above suggest, the central issues may well relate to the problem of political authority. Recent theorizing about originalism (which should probably be distinguished from political agitation about originalism) has been motivated less by concerns about judicial discretion than about what the sources of constitutional authority are taken to be and what is required for constitutional fidelity given those understandings. Less evident but related, I think, is disagreement about what the purpose of judicially enforceable constitutional rules are. Arguably, originalists tend to think the purpose of such rules is to prevent political powerholders (whether understood as electoral majorities or particular government officials) from exercising that power in ways that are not constitutionally authorized, whereas their critics tend to think the purpose of such rules is to prevent wrongful or unjust action simply.

Here again I think we need to reintroduce the institutional complexity of our constitutional system, a complexity that Goldford largely ignores. In setting aside the issue of judicial review and the "narrow" constitutionalism of the courts, Goldford

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the author's text, we will do a better job of it if we are clear about who the relevant "author" is. Or, as Larry Alexander has observed, it may be "redundant to speak of that Fred's original determinations," but it does matter who "Fred" is. Larry Alexander, *Originalism, or Who Is Fred?*, 19 HARV. J.L. & PUB. POL'Y. 321, 325 (1996). Goldford observes that "originalism and theories of indeterminacy are locked in an embrace with each other, bound in their shared premise of the importance of authorial intent" to confining the possibilities of textual meaning (p. 219). Of course, in practice we do not experience texts as indeterminate in this way, except when subjected to deconstructionist analysis. But from the fact that we naturally settle on some determinate understanding of the text, it does not follow that we will settle on the correct understanding unless we are guided by the appropriate considerations when interpreting. Originalism and nonoriginalism disagree about what those appropriate considerations are. Goldford's textuality suggests that *any* consideration is appropriate.

30. In applying originalism in any given case, there may well remain real practical questions as to how far available historical materials might take one in resolving the contested meaning of a given text.

speaks instead of an undifferentiated “we as a polity” who interpret and are bound by the Constitution (pp. 240, 285). When he says that “we” simultaneously consent to and are bound by the Constitution in the process of textuality, it is this undifferentiated we that is in play (pp. 10-13). In describing how the Constitution operates as a constitutive rather than a regulative rule, he emphasizes that nothing political exists in a form that “predates” the Constitution, nothing stands outside of it for it to regulate (p. 268). Instead, like a bishop in a chess game, all the “institutions, relations, and procedures” of both the government and “the people” are “constituted by and are ‘logically dependent on’ the Constitution” (p. 269). Unlike a chess piece, however, political actors are autonomous agents with real power at their disposal. The president’s authority may be “logically dependent on” the Constitution (though even this is too formalistic, as political leaders including the president draw authority from a variety of sources including “electoral mandates,” popular approval and personal charisma), but his power is not. We wish to deploy the Constitution not merely to bind “us” or “future generations,” but most importantly to bind current government officials who might exercise their power in ways that are at odds with our own sense of the constitutional requirements. To focus on the constitutive to the exclusion of the regulative can miss the ways in which we not only enact the Constitution through our actions but also struggle over it.

Although originalists might well insist that the proper goal of those interpreting the Constitution is to realize the meaning that was imbued in that text by the founders, they should also recognize that such interpretive efforts will not exhaust what can be done with the text. Originalists qua originalists are only concerned with the bare minimum of how we must live if we are to adhere to the requirements of the Constitution. That bare minimum may be easy or hard to satisfy, but it is what the Constitution was written to demand of government officials. It may or may not be easy to determine what those requirements are, or what their implications are for the case at hand, but the standard for evaluating proffered interpretations of them is whether they realize the requirements established by those with the authority to dictate the fundamental law. For the Court, the appeal to the original meaning of the Constitution provides a ready basis for its own authority to review and set aside the policies of other government officials. Originalism offers a refuge for judges from having to make a direct appeal to controversial value judgments,

challenging other officials to either submit to the judicial interpretation, to offer their own better interpretation of the original Constitution, or to explain why the principles embedded in the constitutional text should be abandoned.

There might well be additional constitutional moves that we can make. We appeal to the Constitution to help us identify how we should live as well as how we must live. In doing so, we construct a Constitution of our own. Such constitutional constructions may take inspiration from the text but they need not make claims that they are the only plausible interpretation of it. Such constructions are not authoritative. Those who offer them cannot draw upon the larger authority of the founders and ask for deference in their name. The construction of the text does rest on its own persuasiveness as to what the Constitution might be.

Unsurprisingly, those who would reconstruct our understanding of the Constitution do not simply rely on the persuasiveness of their proffered understandings. They seek to stack the deck in their favor. They alloy their constitutional arguments with other appeals, and significantly they exploit the tools of political power to construct their preferred constitutional order. In actual practice of American constitutionalism, the word is bound to the polity not just through reasoned discourse but also through political force, including that of judges exercising the constructed and inherited power of judicial review.<sup>31</sup>

The debate over originalism is about one particular feature of American constitutionalism. Originalists and their critics attempt to provide an account of how the Constitution might operate as a legal rule such that it can be used within and justify the practice of judicial review. To the extent that the Constitution provides right answers to political questions, originalists and their critics offer accounts of how best to determine those right answers. That debate is not the sum total of constitutional scholarship. Goldford succeeds less in transcending the originalism debate than in changing the subject. He does not offer a compelling alternative way to justify the practice of judicial review or guide those who would seek to interpret and apply the Constitution, though he does help sharpen our understanding of how the contending sides in the current debate differ. He is more successful in pointing us toward different questions that we might ask,

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31. On the practice of constitutional construction, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

some of which are empirical (How is the constitutional text in fact deployed to legitimate political action? How significant is the Constitution as a source of political legitimacy in contemporary politics? How do we come to have the constitutional understandings and practice that we in fact have?) and some of which are conceptual (How can we understand the notion of a constitutional people that transcends multiple generations? What are the basic purposes of a constitution within a political system?). For those interested in changing the subject from the debates over judicial review, there are plenty of other features of American constitutionalism worth exploring.