Students of American legal history have recently developed a significant interest in popular constitutionalism—the concept that the people themselves rather than judges should determine the substance and meaning of the constitution. Historians have convincingly shown that from the 1760s, when major issues first arose about the power of Parliament to tax and regulate the colonies, to the end of the eighteenth century, the people debated publicly what their constitution meant and resolved differences mainly through popular, sometimes even violent, action. Events such as the Boston Tea Party—indeed, the War of Independence itself—come to mind. Judicial decision making played only a minor role in constitutional debate.¹

According to twenty-first-century law, in contrast, the people have little power over the constitution; judges determine what it means. Since Cooper

William E. Nelson

in 1958,\textsuperscript{2} the Supreme Court of the United States has claimed final, dispositive authority over constitutional interpretation; it has repeatedly asserted “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.”\textsuperscript{3} When and how did this change occur?

The core claim of this chapter is that the change occurred when it became impossible in the mid-nineteenth century to envision the American people as a cohesive political entity. Instead, the nation had become divided into majority and minority factions, which then sought to use the written constitution of 1787, as originally drafted and ratified by the Founding Fathers, in support of their interests and to prohibit emerging majorities from acting contrary to those interests.

Let me begin with the eighteenth century, whose popular constitutionalism rested first and foremost on the fact that the people were interpreting a customary constitution rather than a formally enacted document. The constitution was not a set of written commands issued by an authoritative body informing government officials of the scope and limits of their power. Of course, there were some writings, such as Magna Carta, the Declaration of Rights, and the Act of Settlement, that were part of the constitution, but the reason for their inclusion was not their enactment by the king or Parliament. They were part of the constitution because the people had come to accept them as such.

The eighteenth-century English constitution consisted of those fundamental norms and practices, some in writing but some not, to which the English people as a whole had consented and by which they had come over time to be governed. Of course, perfect agreement did not exist as to the specific content of those norms and practices. Some individuals were always challenging whatever tentative and fleeting consensus most other people had accepted. Thus, the eighteenth-century constitution did not consist of readily identifiable, fixed rules; ultimately, the constitution, in the notable language of John Phillip Reid, was “whatever could be plausibly argued and forcibly maintained.”\textsuperscript{4}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{2} 358 U.S. 1 (1958).
\item \textsuperscript{3} Ibid., p. 18.
\item \textsuperscript{4} John Phillip Reid, “In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution,” \textit{New York University Law Review} 49 (1974):1043, 1087.
\end{itemize}
\end{footnotesize}
The imprecision of the constitution gave it great flexibility over time. The English constitution of 1760 was not the same as the constitution of 1690, let alone that of 1630. It had evolved. Parliamentary legislation had contributed to the evolution, but the evolutionary process did not consist solely of constitutive acts. Indeed, some acts, such as Oliver Cromwell’s Instrument of Government, had come to possess no force at all. What made the constitution evolve was the gradual, sometimes imperceptible changes in the public’s understanding of the norms and practices that composed the foundation on which government rested.

The document drafted in 1787 and ratified in 1788 that we now view as the Constitution of the United States—that is, as the entire American constitution—was not, I urge, so understood by the people of 1787–88. Rather, it was simply part of a still largely customary American constitution. I disagree with Jefferson Powell’s claim that the great “innovation” of the Revolutionary era “was to identify ‘the Constitution’ with a single normative document instead of a historical tradition”—as a written superior law set above the entire government against which all other law and all government action is to be measured.\(^5\)

I do not deny that some Americans in the late 1760s began to argue that “the fundamental Pillars of the Constitution should be comprised in one act or instrument” so that “not a single point may be subject to the least ambiguity.” They urged that it was necessary to limit government “by some certain terms of agreement” that would provide security against “the danger of an indefinite dependence upon an undetermined power.” By 1776, the idea that “all constitutions should be contained in some written Charter” surely was in the air.\(^6\)

But older concepts of a customary constitution and popular constitutionalism also persisted. James Otis Jr. had argued as early as 1761 that “an act against natural equity is void” and that the people and even the courts should “pass such acts into disuse.”\(^7\) Many Americans afterward continued to believe that all law must be consistent with higher law and natural equity and


\(^6\)Quoted in Wood, *Creation of the American Republic*, pp. 267, 268.

William E. Nelson

should be held null, void, and of no effect if it was not. Thus, for John Dickinson, rights were

not annexed to us by parchments and seals. They [were] created in us by the decrees of Providence, which establish the laws of our nature. They [were] born with us; exist with us; and cannot be taken from us by any human power, without taking our lives. In short, they are founded on the immutable maxims of reason and justice.

Philip Livingston was another who, before the Declaration of Independence, agreed that people were entitled to their rights “by the eternal laws of right reason.”

The coming of independence changed nothing. Eleven states drafted written constitutions between 1776 and 1780 to fill in gaps in their customary constitutions created when British authority was expelled from the colonies. But these written constitutions, it was argued, needed to adhere “to the ancient habits and customs of the people . . . in the distribution of the supreme power of the state.” As state legislatures went into operation under their written constitutions, critics continued to assert that even if statutes were consistent with some constitutional text, those that “militate[d] with the fundamental laws, or impugn[ed] the principles of the constitution, [were] to be judicially set aside as void, and of no effect.” It continued to be said that all law “must be restrained within the bounds of reason, justice, and natural equity.”

Clearest of all in criticizing written constitutions was a series of articles by Noah Webster in 1787–88. Webster wrote that “liberty is never secured by such paper declarations; nor lost for want of them.” According to Webster, government

takes its form and structure from the genius and habits of the people; and if on paper a form is not accommodated to those habits, it will assume a new form, in spite of all the formal sanctions of the supreme authority of a State. . . . Unless the advocates for unalterable constitutions of government, can prevent all changes in the wants, the inclinations, the habits and the circumstances of the people, they will find it difficult, even with all their declarations of unalterable rights, to prevent changes in government. A

---

8Quoted in Wood, Creation of the American Republic, pp. 293, 294.
9Quoted in ibid., pp. 431, 456 (emphasis in original).
paper-declaration is a very feeble barrier against the force of national habits, and inclinations.\textsuperscript{10}

The nation’s first decade of experience under the federal constitution in many ways proved Webster right; think, for example, how quickly the actual procedures for electing the president became radically different from what the framers had put down on paper.

Lawyers and judges similarly continued to have recourse to higher law norms outside written constitutions well into the nineteenth century. For instance, in the decade after Webster’s articles, when the Georgia legislature repealed an act under which a vast tract of land in Mississippi had been sold, investors in New England who had bought some of the land sought an opinion from Alexander Hamilton, who was then in private practice, about the legitimacy of the repeal act. Hamilton responded that it was “a contravention of the first principles of natural justice . . . to revoke a grant of property regularly made for valuable consideration, under legislative authority.”\textsuperscript{11} Congressman Robert Goodloe Harper similarly argued that the Georgia land sales were contracts and that it was “an invariable maxim of law, and of natural justice, that one of the parties to a contract, cannot by his own act, exempt himself, from its obligation.” After the Georgia repeal had become a significant national political issue, Jedidiah Morse gave wide publicity to the Hamilton-Harper view in his \textit{American Gazetteer}, where he wrote that “it was generally agreed by the informed part of the community, that . . . the [Georgia] repealing law must be considered as a ‘contravention of the first principles of natural justice . . .’ and void.”\textsuperscript{12}

When the Georgia repeal act came before the Supreme Court in 1810 in \textit{Fletcher v. Peck},\textsuperscript{13} Chief Justice John Marshall relied in part on the written constitution’s contract clause. But he also invalidated the act on the ground of “general principles which are common to our free institutions,” which “prescribe some limits to the legislative power,” among them that “the property of an individual, fairly and honestly acquired,” could not “be seized

\textsuperscript{10}Quoted in ibid., p. 377.


\textsuperscript{12}Quoted in ibid., pp. 20, 23.

\textsuperscript{13}10 U.S. (6 Cranch) 87 (1810).
without compensation.”14 In his concurring opinion, Justice William Johnson relied only on “general principle, on the reason and nature of things, a principle that will impose laws even on the Deity.”15

Other cases similarly invalidated legislation on the basis of general principles of natural justice and equity rather than written constitutional text.16 *McCulloch v. Maryland*,17 in turn, revealed another aspect of popular constitutionalism and the customary constitution. The case, involving the constitutionality of the Second Bank of the United States, was about the power of Congress under the constitution of 1787, not about the application of fundamental, higher law norms antecedent to that written constitution. Nonetheless, Chief Justice Marshall did not resolve the case by turning only to an analysis of the written text or to a discussion of what those who had drafted and ratified the text intended when they used the language they chose. He also examined the meaning that had been given to the constitution since its adoption. He noted that even when Congress first established a bank, the question of its constitutionality was never concealed from “an unsuspecting legislature, and pass[ed] unobserved.” From the outset, the arguments in favor of the bank were “completely understood, and [were] opposed with equal zeal and ability.” After consideration “first in the fair and open field of debate, and afterwards in the executive cabinet,” the bank opened. Although the charter of the First Bank was not renewed, “a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced [even] those who were most prejudiced against the measure of its necessity.” Marshall therefore concluded that such “an exposition of the constitution, deliberately established by legislative acts, on the faith of which” people had advanced “immense property,” could not “be lightly disregarded.”18

As late as the 1860s, even the people themselves did not always consider the document of 1787–88, frozen in time, as the entirety of America’s constitution. They paid heed to other norms and practices beyond the 1787 text. Consider the abolitionists. One leading abolitionist, Lysander Spooner, for

1410 U.S. (6 Cranch) at 135.
1510 U.S. (6 Cranch) at 139, 143 (concurring opinion).
1717 U.S. (4 Wheat.) 316 (1819).
example, adopted a common position that the Declaration of Independence, with its aspirational language about the equality of all men and their entitlement to liberty, was “the constitutional law of this country for certain purposes”; he continued that slavery was “so entirely contrary to natural right; so entirely destitute of authority from natural law; . . . that nothing but express and explicit provision can be recognized, in law, as giving it any authority.”

Some two decades later, a Lincoln supporter named Grosvenor Lowrey called the written constitution “not the cause, but the means of American freedom.” Thus, whenever the constitution was “the subject of consideration,” it was necessary, according to Lowrey, to look beyond and “through the Constitution to that broader charter on which it rests [—] . . . a higher law which shall sustain and be in agreement with it.”

In sum, the customary constitution and popular constitutionalism remained vibrant and effectual into the era of the Civil War. The people, along with judges and political leaders, continued to play a significant role in determining the constitution’s substance and meaning. In doing so, they scrutinized the text of not only the 1787–88 document but also other documents, especially the Declaration of Independence, as well as unwritten doctrines of higher, fundamental law. Finally, the customary constitution—that which could be plausibly argued in a fashion convincing to large numbers—retained enormous capacity for change: both the antislavery constitutionalism around which the Republican Party coalesced in the late 1850s and the secessionist constitutionalism of the South that had scarcely existed thirty years earlier.

Nonetheless, as slavery became an increasingly divisive issue in American life in the years after 1830, change began to occur in how judges and political leaders thought about the constitution. It had made sense into the 1820s, when the United States still possessed a comparatively cohesive political order, to think of the people as an entity and of the constitution as a set of customary practices which that entity collectively could change over time. But once the nation became divided into sections—a majority antislavery section and a minority proslavery section—the constitution’s

---

19 Lysander Spooner, *The Unconstitutionality of Slavery* (Boston, 1845), pp. 39, 43–44.

capacity for collective change vanished; instead, different groups in the slavery debate sought to show how the written constitution of 1787, as originally drafted and ratified by the Founding Fathers, supported their interests. In particular, the South argued and the Supreme Court agreed that the original constitution embraced a binding bargain that protected slavery from antislavery ideas that were developing in the North.

Prigg v. Pennsylvania,\(^\text{21}\) which relied on the Constitution’s fugitive slave clause to invalidate a Pennsylvania anti-kidnapping statute, was an early manifestation of the changing modes of thought. In his opinion for the court, Justice Joseph Story wrote that

it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.\(^\text{22}\)

Note how this originalist analysis by Justice Story differed sharply in its approach from the popular constitutionalist analysis with which Chief Justice Marshall had begun McCulloch v. Maryland.

Similar recourse to originalist analysis occurred again in Chief Justice Roger Taney’s opinion in Scott v. Sandford.\(^\text{23}\) Taney, who, like Story, was concerned with protecting the South from the growing antislavery populism of the North, wrote that the court could not

give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode

---

\(^{21}\)41 U.S. (16 Pet.) 539 (1842).

\(^{22}\)41 U.S. (16 Pet.) at 611.

\(^{23}\)60 U.S. (19 How.) 393 (1857).
prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. . . . [A]s long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court.24

The Civil War, which broke out four years later, saved the Union, but it did not bring an end to sectionalism on issues of race. The idea of a cohesive body politic that could transform the constitution over time remained a mirage. One result was that the constitution increasingly came to be seen as a body of fixed, politically enacted rules rather than an accumulation of flexible, customary, popular norms.

In particular, the Unionists who won the Civil War and controlled Congress in its aftermath, like antebellum Southerners whose views had been reflected in Prigg and Dred Scott, came to understand the constitution as a mechanism for the permanent codification of their values in the event a time should come when a majority of the American people no longer shared them. Those Unionists used the Reconstruction amendments, especially the Fourteenth, for that end. In short, “the Fourteenth Amendment was understood” not as a constitutional provision subject to future popular interpretation but “as a peace treaty to be administered by Congress in order to secure the fruits of the North’s victory in the Civil War.”25 The Union army had suffered 364,511 deaths in the war—more than one out of every fifty men who lived in the North.26 Northerners understood that it would “take a good deal of whitewash to cover the blood that ha[d] been shed.”27 “[T]he loyal sentiment of the Country” demanded that the “brave boys who offered their lives upon the Altar of their country” not be “sacrificed . . . in vain.”28 Thus, the goal of the Reconstruction amendments in general, and of the Fourteenth Amendment in particular, was to establish “a permanent

24 60 U.S. (19 How.) at 426.
26 Ibid., p. 46.
27 John W. Pease to John Sherman, Mar. 14, 1866, in John Sherman Papers, Library of Congress (LC), Washington, D.C.
28 W. Bryce to John Sherman, Jan. 21, 1866, in Sherman Papers, LC.
peace” 29 “to the end that the curse of civil war may never be visited upon us again.” 30 The goal was “to secure in a . . . permanent form the dear bought victories achieved in the mighty conflict,” 31 in the words of a June 1866 resolution of the Union Party of Ohio, “upon such stable foundations that rebellion and secession will never again endanger our National existence.” 32

Such an understanding of the Fourteenth Amendment, not as one of many norms and practices contributing to the nation’s future constitution but as a stable foundation anchoring that constitution, transformed American constitutionalism. Now that Unionists had adopted the antebellum, pro-Southern originalism of Prigg and Dred Scott, no significant interest group viewed the constitution as a body of custom that could evolve over time. Instead, the constitution became a permanent command put in place by wartime victors who demanded security for the fruits of their victory. Determining the meaning of the constitution thus no longer authorized those who would be affected by its meaning to decide what they wanted it to mean. Instead, the meaning of the constitution was set in stone by those who had drafted and ratified it. The people who had to live under the constitution no longer had a role to play in deciding what it meant. The constitution’s meaning instead had to be parsed by experts—lawyers in the role of forensic historians—who could look back into the past to intuit what the drafters and ratifiers had intended. Popular constitutionalism was gone; originalism had replaced it.

Of course, this overstates both the suddenness and the thoroughness of the shift from a customary to an originalist constitution. As just seen above, originalism emerged before the Civil War, and the idea of the constitution as custom has persisted, as exemplified by Justice John Marshall Harlan II’s mid-twentieth-century dissent in Poe v. Ullman, 33 where the justice supported his decision on the ground of “those rights ‘which are . . . fundamental; which belong . . . to the citizens of all free governments’”—rights extracted from a “tradition [that] is a living thing”—that is, from “the traditions from

---

29 Samuel Craig to Thaddeus Stevens, Feb. 5, 1866, in Thaddeus Stevens Papers, Library of Congress, Washington, D.C.
31 “Governor’s Message,” Iowa State Register (Des Moines), Jan. 15, 1868, p. 3, col. 7.
32 Resolutions of June 19, 1866, in Sherman Papers, LC.
which . . . [the nation] developed as well as the traditions from which it broke.”

I am guilty of overstatement, however, for a good reason—to make a central analytical point. If one conceives of constitutional provisions as fundamental but flexible norms and practices by which a cohesive, democratic community governs itself at any given moment in time, then the people of the community at that moment in time possess collective power to determine what those constitutional provisions mean, and a court charged with deciding a case should look to the people of the moment for guidance. If, by contrast, one conceives of constitutional provisions as codifications of past political or military victories designed to assure the victors that even if they lose power and become a minority their victories will be preserved in the future, then experts of some sort are needed to determine exactly what the past codified, and a court charged with deciding a case should look to experts for guidance, not to ordinary people.

The Fourteenth Amendment can be understood both as a flexible, foundational norm and as a permanent guarantee designed to secure in all times the rights even of minorities. The Supreme Court has tended to understand it mainly as the latter. Let me end by offering two reasons why the amendment can be understood in both ways, as well as why I think the court has understood it mainly as a permanent guarantee protecting minorities.

The first reason for the amendment’s flexibility is the language the drafters used in Section 1. The drafters may have wanted the Fourteenth Amendment to serve the future as a stable anchor of the peace they understood the Civil War had won. But they could not agree among themselves on the specific terms of that peace. In particular, they could not agree whether to extend the right to vote to freedmen. So they papered over their disagreement with vague language—privileges and immunities, due process, and equal protection—that the Supreme Court, the institution eventually charged with enforcing the drafters’ anchor of peace, could not possibly enforce with precision. The justices quickly recognized that their task was to “construe” the Fourteenth Amendment “as it was understood at the time of its adoption,” but they could not determine how it was understood when adopted because it had purposely been drafted so that different people

---

34 367 U.S. at 541–42.
could understand it differently: as the Republican state chair of Ohio explained to Chief Justice Salmon P. Chase in 1866, it was necessary in presenting the Fourteenth Amendment to the people “[i]n the Reserve Counties . . . [to] openly advocate impartial suffrage, while in other places . . . not only to repudiate it, but to oppose it.” As a result, although the justices were “in the condition of seeking for truth” in their efforts to construe the amendment, they ultimately had to turn to the differing understandings of the people about the amendment’s meaning.

The second reason why the Fourteenth Amendment can be read either as a flexible norm or as a permanent, inflexible guarantee is that its drafters and ratifiers wrote Section 1 so as to codify the higher law norms of the customary constitution. In my view, they did not codify specific, fixed norms. All that the framers did, on the basis of their understanding that states granted most higher law rights to their most favored citizens, was to insist that the states grant whatever rights they provided to any one citizen equally to all citizens. On this view, states have power to modify the Fourteenth Amendment’s meaning by altering the rights they provide to their most favored citizens.

Other scholars have theorized, however, that the language of privileges and immunities and due process directly incorporates specific norms into the constitution. But even on this theory, there may be flexibility. The framers might have incorporated into the constitution not only specific higher law norms but also the customary constitution’s understanding of the people’s capacity over time to revise those norms. The speech that Thaddeus Stevens, a key drafter of the Fourteenth Amendment and its manager on the floor of the House of Representatives, made when he presented the amendment to the House supports this view. Although Stevens found the amendment an “imperfect . . . proposition,” he argued that it was necessary

---

to “take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions” as the amendment’s meaning developed over time. On the other hand, the framers might have codified in permanent form the specific higher law norms that existed in 1866; the frequently reiterated language about the Fourteenth Amendment’s permanence that I noted earlier supports this interpretation.

Despite occasional references to a “living constitution” and a “living tradition,” the Supreme Court and constitutional scholars since the New Deal nonetheless have largely understood the Fourteenth Amendment to have codified a permanent, unchangeable set of principles. Both the court and scholars have tended to look back to the Reconstruction era to determine the content of those principles. Think, for example, of the debates about the Fourteenth Amendment’s incorporation of the Bill of Rights or about Congress’s power under Section 5 to broaden the amendment’s meaning. Even in Brown v. Board of Education, the court began its analysis by directing counsel to inquire into original intent. The customary constitution and the power of the people to give it meaning are, in large part, dead.

Paradoxically, a concern about the constitution’s democratic pedigree is one reason for popular constitutionalism’s demise. Chief Justice Taney in the Dred Scott case expressed this concern as well as anyone ever has. The constitution itself, he noted, prescribes how the people may amend it; for the court to usurp the power to change it would be “altogether inadmissible” for a “tribunal” of appointed, lifetime judges, who have power only “to interpret it.” But there is also another, deeper reason for popular constitutionalism’s demise. If, as footnote 4 of United States v. Carolene Products Co. maintains, the main duty of the Supreme Court is to protect discrete and insular minorities, it cannot do so by administering a constitution that the people have continuing power to revise. A customary constitution, subject to change at the will of some significant majority, sometimes will enable that majority to trample on the rights of politically powerless minorities.

---

41 Congressional Globe, June 13, 1866, 39th Cong., 1st sess., p. 3148.
One need only remember the internment of Japanese Americans during World War II or the long history of Jim Crow in the post–Civil War South. Minorities need the protection of robust, fixed principles that majorities cannot modify. Although a court charged with enforcing such principles may not always do so effectively, the existence of a constitution composed of fixed principles at least gives the court a chance.

So let me say this in conclusion. One way to think of a constitution—what we now see as the classic British way—is as a body of custom that people governed by the constitution can change over time. Alternatively, a constitution can be understood as a written guarantor of fixed rights. Americans today and often in the past have confusingly thought of their constitution as both. But the Civil War and the Reconstruction amendments brought a major shift in emphasis—from emphasis on a flexible constitution interpreted by the people to emphasis on a fixed guarantor of rights administered by forensic experts in the chambers of the Supreme Court.