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## There Is Only One Texas Constitution

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## ARTICLE

# THERE IS ONLY ONE TEXAS CONSTITUTION

JOSH MORROW\*

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## I. INTRODUCTION

How many constitutions govern Texas if one governs at all? The convention that framed the Texas Constitution of 1876 drafted one set of text, but the delegates to that convention signed and enrolled a second document that contained different text. The secretary of state certified a third document for distribution before the ratification vote, and newspapers circulated (at least) a fourth. The third and fourth documents differed from each other and from the first two, although all were written in English. But the secretary of state also certified copies in Spanish, German, and Czech.

Some commentators have argued that this means there may be no way to know which copy of the constitution governs today,<sup>1</sup> or even that Texas does not have a constitution.<sup>2</sup> These arguments create theoretical problems because they are impossible to square with the convention's actions and with

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1. See Jason Boatright, *No One Knows What the Texas Constitution Is*, 18 TEX. REV. L. & POL'Y 3 (2013) (raising the argument that "Texas . . . might have as many as six constitutions, or no constitution at all, in effect right now"); see also *id.* at 26 ("[C]orrectly interpreting the current constitution might be impossible without first determining what the text is. And determining what the text is might be impossible, too."); David A. Furlow, *Executive Ed.'s Page: Learning from the Constitution*, 4 J. TEX. SUP. CT. HIST. SOC'Y 5 (2015) (noting the "important variations among versions of the Constitution of 1876" identified in Boatright's article); Kelsie Hanson, *Preface* to 18 TEX. REV. L. & POL'Y, at xi (2013) (highlighting "issues that could arise from the lack of a single enrolled, ratified [constitution]").

2. See Andrew Weber, *Looking Back at The Confusion Surrounding The Texas Constitution*, KUT PUB. MEDIA STUDIOS (Mar. 2, 2016), <https://www.kut.org/post/looking-back-confusion-surrounding-texas-constitution> [<https://perma.cc/QB52-T6HP>] (stating that "technically, Texas doesn't have a uniformly-recognized constitution"); Jonathan Baker, *Does Texas Actually Have a Constitution?*, HIGH PLAINS PUB. RADIO (Mar. 9, 2016), <https://www.hppr.org/post/does-texas-actually-have-constitution> [<https://perma.cc/ZZ3R-3WNY>] (reporting that "even after 180 years, Texas still doesn't technically have a constitution in effect").

the popular vote by which the people of Texas, exercising their sovereign power more than a century ago, overwhelmingly voted to ratify a single constitution.<sup>3</sup> The arguments also create practical problems. How are courts and litigants to choose among the multiple conflicting English-language copies? And if the foreign-language<sup>4</sup> copies are authoritative, why have courts neglected them? How should a court respond to the argument that a given act of the legislature is invalid because it did not include the words “Decrétase por la Lejislatura del Estado de Texas”—the enacting clause that the Spanish copy of the constitution requires of “todas las Leyes”?<sup>5</sup>

This Article argues that Texas has only one constitution: the manuscript constitution that the delegates to the convention signed and enrolled.<sup>6</sup> The Article begins with a survey of the state’s prior constitutions. It then discusses the process by which the convention drafted the current constitution and arranged for its printing and distribution to voters. This history sets the stage for the Article’s two main arguments.

First, the convention *framed* the enrolled constitution. In one of their first official acts after assembling, the delegates to the convention adopted rules

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3. See JOHN SAYLES, *THE CONSTITUTIONS OF THE STATE OF TEXAS* 600 (4th ed. 1893) (reprinting an ordinance requiring that the ballots for the ratification vote read either: “For the Constitution” or “Against the Constitution”); S. S. MCKAY, *SEVEN DECADES OF THE TEXAS CONSTITUTION OF 1876*, at 179 (1942) (reporting that the ratification vote favored the new constitution by a ratio of more than two to one—136,606 votes “for” and 56,652 votes “against”).

4. Today, as in the 1870s, many Texans speak Spanish, German, or Czech. Describing these languages as “foreign” to Texas is, in an important sense, simply not correct. On the other hand, these languages *are* presently foreign to the judicial and academic discussion of Texas constitutional law. This Article argues, in part, that the foreign-language copies of the Texas Constitution can play a larger role in that discussion. See *infra* Part V.B. The Article’s contrast between English and “foreign” languages is descriptively accurate but should not be understood to carry a normative connotation.

5. CONSTITUCION Y ORDENAZAS DEL ESTADO DE TEXAS 14, <https://tarltonapps.law.utexas.edu/imgs/constitutions/documents/texas1876spanish/texas1876spanish.pdf> [<https://perma.cc/L9Z2-NKPW>] [hereinafter SPANISH COPY]; see also TEX. CONST. art. III, § 29, <https://www.tsl.texas.gov/treasures/constitution/1875-01.html> [<https://perma.cc/2ANL-6R4J>] [hereinafter ENROLLED CONSTITUTION] (“The enacting clause of all laws shall be: ‘Be it enacted by the Legislature of the State of Texas.’”); *Am. Indem. Co. v. City of Austin*, 246 S.W. 1019, 1023 (Tex. 1922) (holding that the constitution “compel[s]” the Legislature to use the proper enacting clause). Unless otherwise noted, quotations of the Constitution of 1876 (1876 Constitution) rely on the text as it appears in the enrolled copy of the constitution that the delegates to the Convention of 1875 signed.

6. See ENROLLED CONSTITUTION, *supra* note 5, at 40 (listing the delegates who were present and signed).

of order to govern their proceedings.<sup>7</sup> The rules made clear that the enrolled constitution would supersede every prior draft. The convention also adopted “approved” parliamentary practice as a backstop to decide procedural disputes.<sup>8</sup> These rules, too, show that the convention framed only the enrolled constitution. Finally, the “enrolled-bill rule” that Texas courts apply to statutes demonstrates that the enrolled constitution should control even if the convention failed to follow its own rules.<sup>9</sup>

Second, the people *ratified* the enrolled constitution. Several copies were available to voters, but every copy contained express textual evidence indicating that the ratification vote applied only to the enrolled constitution. Because voters would have expected their votes to ratify the enrolled constitution, the principle of popular sovereignty dictates that this copy controls. Furthermore, the arguments in favor of any other copy are all underwhelming. For example, the certified English-language copy was never framed, nor was it even the most widely circulated copy in that language. And while prior constitutions existed in translation, a foreign-language constitution had not been legally binding since the state broke from Mexico. Because popular sovereignty prohibits concluding that Texas altogether lacks a constitution, and because the enrolled constitution is the best candidate, it would control even if the textual evidence alone were less than dispositive.

It follows from this conclusion that courts should rely only on the enrolled constitution, particularly when the difference between copies could affect interpretation. At the same time, courts should be free to use the other copies, including the foreign-language copies, to dispel uncertainties that appear in the enrolled text. The conclusion also suggests that it may be time to reevaluate which copy of the U.S. Constitution is controlling, and why—especially given recent scholarship highlighting that the nation’s founding document was distributed in languages other than English.<sup>10</sup>

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7. See JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS: BEGUN AND HELD AT THE CITY OF AUSTIN, SEPTEMBER 6TH, 1875, at 16–22, <https://babel.hathitrust.org/cgi/pt?id=hvd.li18vn&view=1up&seq=7> [<https://hdl.handle.net/2027/hvd.li18vn>] [hereinafter CONSTITUTIONAL CONVENTION JOURNAL] (reporting the rules that the convention adopted).

8. *Id.* at 22.

9. See, e.g., *Ass’n of Tex. Pro. Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990) (discussing and applying the enrolled-bill rule).

10. See Christina Mulligan et al., *Founding Era Translations of the Constitution*, 31 CONST. COMMENT. 1, 2 (2016) (explaining that German and Dutch translations “can clarify the meaning of

Part II of this Article discusses the state's prior constitutions, the drafting and printing of the current constitution, and the ratification vote. Part III argues that the convention framed the enrolled constitution. Part IV argues that the people ratified the enrolled constitution. Part V discusses a few practical and theoretical implications that follow from the conclusion that the enrolled constitution is controlling, and Part VI concludes.

## II. BACKGROUND

“Texas has had many constitutions, but all of them were born of necessity.”<sup>11</sup> Part I.A surveys the state's superseded constitutions and the events that led the Governor to call a constitutional convention in 1875.<sup>12</sup> Parts I.B and I.C contain the most important introductory material, for they describe how the convention drafted the document that now governs the state. Understanding this document's legal status requires understanding the process by which it was proposed, drafted, signed, printed, and ratified. Part I.D discusses the differences between the several documents that the

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the [U.S.] Constitution's original text”). *See generally* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 (2016) (discussing different theoretical frameworks for analyzing the interpretative effects of the founding-era translations of the U.S. Constitution).

11. JANICE C. MAY, *THE TEXAS STATE CONSTITUTION*, at xxix (1996). “Many” is an apt description, for counts vary. *Compare, e.g.*, D. B. AXTELL, *CONSTITUTION OF THE STATE OF TEXAS, ANNOTATED* vii (1901) (listing eight constitutions), *with* CLARENCE R. WHARTON, *2 TEXAS UNDER MANY FLAGS* 230–32 (1930) (summarizing a different set of eight), SAYLES, *supra* note 3, at 2 (discussing “the various Constitutions of the State and the Republic, six in number”), Kathryn Garrett, *The First Constitution of Texas, April 17, 1813*, 40 SW. HIST. Q. 290, 290 n.5 (1937) (listing a different set of six), *and* ALVAH PENN CAGLE, *AMERICAN CONSTITUTIONAL FUNDAMENTALS: THE TEXAS CONSTITUTION 1* (1954) (“The present Constitution of Texas was ratified in February, 1876, being the fifth constitution for the State.”).

12. For a discussion of these many constitutions, see MAY, *supra* note 11, at 1–35 (summarizing the state's constitutional history). *See also id.* at 415–27 (outlining bibliographic material from the 1830s forward). A book-length treatment that examines the role of these constitutions in the state's political history is WILLIAM J. CHRISS, *SIX CONSTITUTIONS OVER TEXAS* (forthcoming 2022). The Tarlton Law Library at the University of Texas maintains the most accessible online prints of the state's prior constitutions, translations thereof, and records of constitutional conventions. *See* CONSTITUTIONS OF TEXAS 1824–1876, <http://tarlton.law.utexas.edu/constitutions> [<https://perma.cc/Y2MD-9K6Q>]. Likewise, the University of North Texas hosts scanned copies of the ten printed volumes that contain the most commonly cited reprints. *See generally* H. P. N. GAMMEL, *THE LAWS OF TEXAS, 1822–1897* (Austin, Texas, Gammel Book Co. 1898), <https://texashistory.unt.edu/explore/collections/GLT/> [<https://perma.cc/J3LQ-H3HT>]. Finally, the six-volume TEXAS STATE HISTORICAL ASSOCIATION, *NEW HANDBOOK OF TEXAS* (1996) [hereinafter *NEW HANDBOOK*] is an indispensable source of introductory and bibliographic material on the constitutions and the circumstances of their framing and ratification. TEXAS STATE HISTORICAL ASSOCIATION, *HANDBOOK OF TEXAS ONLINE*, <https://tshaonline.org/handbook/online> [<https://perma.cc/4DSU-GRY2>].

process produced, and it gives examples of how the differences could be of practical consequence.

#### A. *Early Texas Constitutions*

The state's constitutional history begins with the inauspicious events of 1813, when Spanish Texas was an interior province that belonged to the Viceroyalty of New Spain.<sup>13</sup> Spain had quelled a nearby rebellion just three years earlier, but support for an independent Mexico was growing, and the “spirit of revolt” was spreading throughout the provinces.<sup>14</sup> This “revolutionary wave” soon reached Texas.<sup>15</sup> In what became known as the Gutierrez-Magee Expedition, a “motley band of Mexican and Tejano rebels” organized in Louisiana and marched to San Antonio.<sup>16</sup> The group “aimed simultaneously to overthrow Spanish rule in Texas and to assist the cause of Mexican independence.”<sup>17</sup> The expedition saw brief but violent success and produced a brief but “far[c]ical” constitution.<sup>18</sup> The first of eighteen short sections declared: “The province of Texas shall henceforth be known only as the State of Texas, forming part of the Mexican Republic, to which it remains inviolably joined.”<sup>19</sup> The new state lasted only about

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13. *See generally* RUPERT N. RICHARDSON, TEXAS: THE LONE STAR STATE 28–46 (2d ed. 1958) (discussing Spanish Texas).

14. LOUIS J. WORTHAM, 1 HISTORY OF TEXAS 41 (1924).

15. HUBERT HOWE BANCROFT, 2 HISTORY OF THE NORTH MEXICAN STATES AND TEXAS 17 (1889).

16. David E. Narrett, *José Bernardo Gutiérrez de Lara: “Caudillo” of the Mexican Republic in Texas*, 106 SW. HIST. Q. 195, 195 (2002).

17. *Id.*

18. Garrett, *supra* note 11, at 291; *see also id.* at 292 (describing this constitution as “false to the principle of liberty”); KATHRYN GARRETT, GREEN FLAG OVER TEXAS: A STORY OF THE LAST YEARS OF SPAIN IN TEXAS 183–85 (1939) (discussing the events of 1813). Garrett’s work is the “best” discussion of this period, especially for its summary of the development of the *Constitution of the State of Texas of 1813* (1813 Constitution). DAVID VIGNESS, THE REVOLUTIONARY DECADES: 1810–1836, at 14 (1965).

19. *See* ERNEST WALLACE & DAVID VIGNESS, DOCUMENTS OF TEXAS HISTORY 40–41 (1963) (reprinting the 1813 Constitution); GARRETT, *supra* note 18, at 305–08 (reprinting the TRANSLATION OF THE FIRST CONSTITUTION OF TEXAS APRIL 17, 1813). Very little is known about how the 1813 Constitution was drafted. *See* Narrett, *supra* note 16, at 217. Whatever the process, the result was a document that protected few individual liberties and concentrated power in the executive branch. *See id.* (“The [1813 C]onstitution gave supreme authority to the governor over the army, foreign relations, and the execution of laws.”); *see also* Garrett, *supra* note 11, at 302 (criticizing the 1813 Constitution for creating an “omnipotent . . . tyrant” who enjoyed “entire jurisdiction”).

four months.<sup>20</sup>

Mexico gained independence seven years later, and in 1827 the Constitution of the State of Coahuila and Texas took effect.<sup>21</sup> While this 1827 Constitution is notable for having been drafted and promulgated “simultaneously” in both English and Spanish,<sup>22</sup> the joinder of Coahuila and Texas into a single state proved “inherently unstable” and “became one of the many burrs under the saddle that led Texas to throw off Mexican rule.”<sup>23</sup> In 1833, a convention of settlers met and appointed Sam Houston to head a committee that drafted a new constitution giving Texas separate statehood.<sup>24</sup> Stephen F. Austin took the draft to the Mexican capitol, but his efforts to earn it federal approval were mooted when General Santa Anna abandoned federalism in favor of a central government.<sup>25</sup> A Texas

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20. See Garrett, *supra* note 11, at 300 (“On April 6, the declaration of Texas independence was proclaimed.”); GARRETT, *supra* note 18, at 305 (describing the Battle of Medina, which “felled” the fledgling state in August).

21. COAHUILA & TEXAS CONSTITUTION of 1827, *reprinted in* 1 GAMMEL, *supra* note 12, at 423–53. Framing this constitution (1827 Constitution) took “[m]ore than two years.” S. S. McKay, *Constitution of Coahuila and Texas*, in 2 NEW HANDBOOK, *supra* note 12, at 287. The journals of the framing body are reproduced in English and Spanish in MANUEL GONZÁLEZ OROPEZA & JESÚS F. DE LA TEJA, PROCEEDINGS OF THE CONSTITUENT CONGRESS OF COAHUILA AND TEXAS 267–1690 (2016). The 1827 Constitution implemented the familiar tripartite system of government and enshrined the “imprescriptible rights of Liberty, Security, Property, and Equality” for “[e]very man who inhabits the territory of the State, though he may be but a traveler.” *Id.* at 228 (providing a facsimile reproduction of Article 11 of the 1827 Constitution); see also *id.* at 45–49 (summarizing the structure and content of the 1827 Constitution).

22. *Id.* at 30.

23. DAVID J. WEBER, THE MEXICAN FRONTIER, 1821–1846: THE AMERICAN SOUTHWEST UNDER MEXICO 25–26 (1982); see also S. S. McKay, *Constitution of Coahuila and Texas*, in 2 NEW HANDBOOK, *supra* note 12, at 287 (noting the “widespread objections to government under this document”); OROPEZA & DE LA TEJA, *supra* note 21, at 57 (characterizing the 1827 Constitution as, “[in] one sense, . . . represent[ing] the cause for the break that took place between Texas and the rest of the Mexican nation”).

24. 2 BANCROFT, *supra* note 15, at 133; see also WALLACE & VIGNESS, *supra* note 19, at 80–85 (reprinting the proposed Constitution for the State of Texas of 1833). The Convention of 1833 was the “successor to” an earlier effort that took place in 1832. Ralph W. Steen, *Convention of 1833*, in 2 NEW HANDBOOK, *supra* note 12, at 297. The 1832 convention recorded its proceedings, see 1 GAMMEL, *supra* note 12, at 474–503, but “[v]ery little is actually known of the Convention of 1833; no journal of the proceedings exists.” John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1112 (1995). “Most of the 1833 Constitution was an amalgamation of the Tennessee, Missouri, and Louisiana constitutions.” *Ex parte Tucci*, 859 S.W.2d 1, 29 n.30 (Tex. 1993) (Phillips, C.J., concurring) (citing Joseph W. McKnight, *Stephen Austin’s Legalistic Concerns*, 89 SW. HIST. Q. 239, 265 (1985)). The result was “thoroughly republican in form,” 2 BANCROFT, *supra* note 15, at 133, and was “typically Anglo-American in every important feature,” RICHARDSON, *supra* note 13, at 77.

25. RICHARDSON, *supra* note 13, at 79–81.



“consultation” assembled during the ensuing revolution and produced a declaration supporting federalism along with a document outlining a provisional state government.<sup>26</sup> A “semblance of government” operated under these documents during the months leading up to the next convention.<sup>27</sup>

The Republic of Texas began with the Convention of 1836, which met at Washington-on-the-Brazos on March 1 and declared independence from Mexico the next day.<sup>28</sup> “Over the entire proceedings there was a sense of urgency that could not be allayed.”<sup>29</sup> The delegates “never knew what day they might be obliged to disband and either seek safety in flight or join the army then being assembled to stop the Mexican advance.”<sup>30</sup> Despite these conditions, the convention produced a new constitution in barely more than two weeks.<sup>31</sup> The draft borrowed heavily from the U.S. Constitution and from the constitutions of other states.<sup>32</sup> The people ratified the new

26. See 2 BANCROFT, *supra* note 15, at 171–74; see also 1 GAMMEL, *supra* note 12, at 538–45 (reproducing “the plan and powers of the provisional government of Texas,” along with a section governing the military, which together formed the “organic law” of the provisional government); 1 GAMMEL, *supra* note 12, at 522 (reproducing the “Declaration of the People of Texas” “in defence of their rights and liberties . . . and in defence of the republican principles of the [F]ederal [C]onstitution of Mexico”); 1 GAMMEL, *supra* note 12, at 522 (reproducing, with the foregoing documents, the proceedings of the “consultation” that wrote them).

27. RICHARDSON, *supra* note 13, at 91; see also Paul D. Lack, *Consultation*, in 2 NEW HANDBOOK, *supra* note 12, at 293 (describing this period as “uncertainty leaning toward anarchy”); Cornyn, *supra* note 24, at 1119 (describing the provisional government as a period during which “confusion reigned”); 2 BANCROFT, *supra* note 15, at 193 (“The proceedings of this provisional government present a page in the history of Texas painful to read.”).

28. 1 GAMMEL, *supra* note 12, at 1063–67; see also Cornyn, *supra* note 24, at 1121 (noting that “the delegates approved the declaration after only one hour of deliberation”); Ralph W. Steen, *Texas Declaration of Independence*, in 6 NEW HANDBOOK, *supra* note 12, at 315 (“The Texas edict, like the United States Declaration of Independence, contains a statement on the nature of government, a list of grievances, and a final declaration of independence.”).

29. VIGNESS, *supra* note 18, at 185.

30. Rupert N. Richardson, *Framing the Constitution of the Republic of Texas*, 31 SW. HIST. Q. 191, 192 (1928).

31. See THE GENERAL CONVENTION AT WASHINGTON, MARCH 1–17, *reprinted in* 1 GAMMEL, *supra* note 12, at 821 (reproducing the journals of the Convention of 1836; these journals cover the period from March 1 through March 17, during which the convention drafted the constitution (1836 Constitution)).

32. Cornyn, *supra* note 24, at 1122 (“The Constitution of the Republic was a composite of the United States Constitution and that of several southern states, although no one single state constitution appears to have been the model.”); see also RICHARDSON, *supra* note 13, at 214 (noting that this method “had its advantages, for in borrowing these terms and expressions from the older constitutions [the

constitution later the same year, and it governed for the next nine.<sup>33</sup>

Annexation, discussed from the Republic's inception,<sup>34</sup> began in earnest after President Tyler, on his last full day in office, sent to Texas a signed congressional resolution offering statehood.<sup>35</sup> The Texas Congress voted to accept the offer,<sup>36</sup> and on July 4, 1845, a convention assembled and did the same.<sup>37</sup> That convention spent the next two months drafting a constitution to govern the new state.<sup>38</sup> The delegates “drew most naturally

drafters] were getting material that they understood and which had been clarified and defined by decades of court interpretation”); David P. Currie, *The Constitution of the Republic of Texas: Part 1 of 2*, 8 GREEN BAG 2D 145, 147–54, [http://www.greenbag.org/v8n2/v8n2\\_articles\\_currie.pdf](http://www.greenbag.org/v8n2/v8n2_articles_currie.pdf) [<https://perma.cc/5KEJ-LV4Q>] (analyzing the text of the 1836 Constitution).

33. 1 WORTHAM, *supra* note 14, at 363 (noting that the ratification vote was “practically unanimous”). The 1836 Constitution was notoriously difficult to amend, requiring “passage of a proposal by two successive legislatures (the second by a two-thirds vote in each house).” Currie, *supra* note 32, at 152. Two attempts were made, but neither succeeded. *Id.* at 154. Notably, the original copy was lost, leaving the fledgling republic no choice but to rely on newspaper reprints. See JOHN J. LINN, REMINISCENCES OF FIFTY YEARS IN TEXAS 55 (1883) (“The [C]onstitution of the Republic of Texas was adopted at a late hour on the night of the 17th of March, but was neither engrossed nor enrolled for the signatures of the members . . . [n]o enrolled copy having been preserved, th[e] printed one was recognized and adopted as authentic.”).

34. See Eugene C. Barker, *The Annexation of Texas*, 50 SW. HIST. Q. 49, 50 (1946) (“The question of annexation of Texas by the United States was for ten years a subject of world importance.”). For a thorough history of annexation, see JUSTIN HARVEY SMITH, THE ANNEXATION OF TEXAS (1911).

35. *Joint Resolution for Annexing Texas to the United States*, H.R.J. Res. 5, 7, 8, 28th Cong., 2d Sess. (1845). The joint resolution passed with a comfortable margin in the House, but by only two votes in the Senate. See SMITH, *supra* note 34, at 345–47 (tallying the votes in each House). The U.S. Supreme Court later confirmed that the method of annexation-by-joint-resolution is legally effective. See *De Lima v. Bidwell*, 182 U.S. 1, 191 (1901) (“On March 1, 1845, Congress adopted a joint resolution consenting to the annexation of Texas upon certain conditions[], but it was not until December 29, 1845, that it was formally admitted as a state.” (citations omitted)). President Tyler’s last full day in office was March 3, 1845, the same day he sent the resolution to Texas. 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854, 448 (1991).

36. SMITH, *supra* note 34, at 456.

37. The convention met in Austin, “[even] though the government had been carried on from Washington-on-the-Brazos since 1842.” Barker, *supra* note 34, at 73. The delegates did not formally assemble until July 4, but “an informal meeting” the previous day had appointed a committee to draft an ordinance approving annexation. Annie Middleton, *The Texas Convention of 1845*, 25 SW. HIST. Q. 26, 29 (1921). By the time annexation was formally discussed on July 4, an ordinance in favor of annexation was put to a vote within “a few minutes.” *Id.* at 32; see also 2 GAMMEL, *supra* note 12, at 1303–04 (reprinting the ordinance). The Texas Congress had voted in favor of annexation a few weeks earlier, but the convention’s vote was also needed. Barker, *supra* note 34, at 73–74.

38. See generally JOURNALS OF THE CONVENTION, ASSEMBLED AT THE CITY OF AUSTIN ON THE FOURTH OF JULY, 1845 (Austin, Miner & Cruger 1845) [hereinafter 1845 JOURNALS] (reporting the convention’s day-to-day business). The delegates’ debates were also recorded. See generally WILLIAM F. WEEKS, DEBATES OF THE TEXAS CONVENTION, <https://tarlton.law.utexas.edu/c.php?g=787754&p=5640115> [<https://perma.cc/V53Y-472P>].

upon their own Constitution of 1836,” but they also looked to other states as “precedents.”<sup>39</sup> They finished their work in August,<sup>40</sup> and two months later voters ratified what has been called “the most popular of all Texas constitutions.”<sup>41</sup> Texas formally joined the United States on December 29, 1845.<sup>42</sup>

The Civil War decade saw three constitutions, one each corresponding to secession, presidential reconstruction, and congressional reconstruction.<sup>43</sup> The delegates to the secession convention of 1861 produced a constitution within a few weeks.<sup>44</sup> They did little more than copy the 1845 Constitution, “simply substituting the words ‘The Confederate States’ for ‘The United States’”<sup>45</sup> Five years later, the 1866 convention “removed all references to the Confederacy” and implemented other post-war changes, again “in the form of amendments to the 1845 charter.”<sup>46</sup> The 1869 Constitution, by contrast, “differed significantly” from those

39. Frederic L. Paxson, *The Constitution of Texas, 1845*, 18 SW. HIST. Q. 386, 388 (1915).

40. See TEX. CONST. of 1845 (stating that the convention adopted the constitution on August 27, 1845). This constitution (1845 Constitution) was translated into Spanish, but only *after* it was adopted. 1845 JOURNALS, *supra* note 38, at 219–20 (reprinting a resolution recommending “translating the Constitution of the future State of Texas, so soon as the same shall have been adopted”); *id.* at 287 (authorizing 500 printed copies of the translation); *id.* at 301 (authorizing translation “into the Spanish language”).

41. McKay, *Constitution of 1845*, in 2 NEW HANDBOOK, *supra* note 12, at 288; see WALLACE & VIGNESS, *supra* note 19, at 149 (reporting that Daniel Webster described the 1845 Constitution as “the best of all American state constitutions”); Barker, *supra* note 34, at 49 (noting that the 1845 Constitution “was ratified by popular vote in October”). Like its predecessor, the 1845 Constitution was quite difficult to amend, and only one amendment ever succeeded. MCKAY, *supra* note 3, at 288.

42. *De Lima v. Bidwell*, 182 U.S. 1, 191 (1901).

43. MAY, *supra* note 11, at 8–13; Carl H. Moneyhon, *Reconstruction*, in 5 NEW HANDBOOK, *supra* note 12, at 474–81.

44. See JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 91 (Ernest W. Winkler, ed., Austin Printing Co., 1912), <https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t3vt1p136&view=1up&seq=7> [<https://hdl.handle.net/2027/uc2.ark:/13960/t3vt1p136>] (reporting that the convention began considering a constitution on March 4, 1861); see also *id.* at 251 (reporting that the convention adjourned on March 25, 1861).

45. ERNEST WALLACE, TEXAS IN TURMOIL: 1846–1875, at 73 (1965); TEX. CONST. OF 1861.

46. MAY, *supra* note 11, at 18. See also generally TEX. CONST. OF 1866; JOURNAL OF THE TEXAS STATE CONVENTION, ASSEMBLED AT AUSTIN, FEB. 7, 1866 (Austin, Texas, Southern Intelligencer Office 1866), <https://tarlton.law.utexas.edu/c.php?g=810765&p=5785188> [<https://perma.cc/9TYD-N7EM>].

previous.<sup>47</sup> “Major exceptions to the past were rights for blacks, more authority for the governor, centralization of state over local authority[,] and the establishment of a state public school system.”<sup>48</sup> Texas was readmitted to the Union in 1870.<sup>49</sup>

Reconstruction ended when a Democratic governor and legislature took office in 1874, and soon there was “an overriding desire to replace the 1869 Constitution.”<sup>50</sup> Governor Coke wanted a constitutional convention.<sup>51</sup> The legislature obliged with a Joint Resolution calling for a convention to assemble that fall in Austin “for the purpose of framing a New Constitution.”<sup>52</sup> The same instrument provided that the convention would be “composed of ninety delegates of the people,” to be chosen in a popular election that would also determine whether the convention would actually occur.<sup>53</sup> A “decisive” majority voted in favor of the convention in the August election,<sup>54</sup> and the people selected “seventy-six Democrats and fourteen Republicans” as delegates.<sup>55</sup>

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47. Carl H. Moneyhon, *Reconstruction*, in 5 NEW HANDBOOK, *supra* note 12, at 477. *See also generally* TEX. CONST. OF 1869; JOURNAL OF THE RECONSTRUCTION CONVENTION, WHICH MET AT AUSTIN, TEXAS JUNE 1, A.D., 1868 (Austin, Texas, Tracy, Siemering & Co. 1870), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112063804428&view=1up&seq=11> [<https://hdl.handle.net/2027/uiug.30112063804428>].

48. MAY, *supra* note 11, at 20.

49. WALLACE, *supra* note 45, at 210.

50. MAY, *supra* note 11, at 14. As with other aspects of Reconstruction, the roots of the desire to replace the reconstruction constitution (1869 Constitution) have been the subject of sustained historical debate. *Compare, e.g.*, WALLACE, *supra* note 45, at 220–21 (“To the Democrats [the 1869 Constitution] was so defective that no argument was needed to justify its replacement.”), *with* John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1616 (1990) (arguing that the 1876 Constitution was part of a national trend “toward restrictive state constitutions” and that Reconstruction was “neither the sole nor even the primary reason” for the trend), *and* Ralph A. Smith, *Grange*, in 3 NEW HANDBOOK, *supra* note 12, at 279 (1996) (“Half of the membership of the Constitutional Convention of 1875 were patrons dedicated to ‘retrenchment’ in government.”). *See also* Edgar P. Sneed, *A Historiography of Reconstruction in Texas: Some Myths and Problems*, 72 SW. HIST. Q. 435 (1969) (discussing historians’ shifting treatment of Reconstruction).

51. WALLACE, *supra* note 45, at 222.

52. 8 GAMMEL, *supra* note 12, at 573.

53. *Id.* at 574.

54. MCKAY, *supra* note 3, at 74. The Governor issued a proclamation formally “calling the convention” later that month. MCKAY, *supra* note 3, at 76; *see also Proclamation by the Governor of the State of Texas*, GALVESTON DAILY NEWS, Aug. 25, 1875, at 2, <https://texashistory.unt.edu/ark:/67531/metaph463454/m1/2/> (printing Governor Coke’s proclamation that called delegates to convene in Austin “for the purpose of framing a new constitution for the State of Texas”).

55. J. E. Ericson, *The Delegates to the Convention of 1875: A Reappraisal*, 67 SW. HIST. Q. 22, 22 (1963).

### B. *Framing the Constitution of 1876*

The delegates to the Constitutional Convention of 1875 met in Austin at noon on September 6.<sup>56</sup> Two days later they adopted rules of order to govern their actions.<sup>57</sup> The rules empowered the president of the convention, E. B. Pickett, to decide points of order “according to parliamentary practice, as laid down by approved modern authors.”<sup>58</sup> The rules also provided for twenty-one standing committees.<sup>59</sup> Among these were the “Committee on Engrossed and Enrolled Ordinances” and the “Committee on Style and Arrangement.”<sup>60</sup> Over the next three months, the delegates worked through these and other committees to draft the new constitution.<sup>61</sup> The work occurred in several steps.

The constitution’s article II, which establishes the principle of separation of powers, is a good example of the drafting process. The process began when a delegate proposed a topic or text for inclusion in the constitution.<sup>62</sup>

56. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 3; *see also* S. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 at 1 (1930) [hereinafter DEBATES]. “The motion to provide for the publication of the convention debates was lost” because the opposition “objected to the expense,” so the foregoing and the *Journal* are the best records of the convention’s proceedings. MCKAY, *supra* note 3, at 78 (“This action of the convention had the effect of obscuring all of its later work. Only a very few [news]papers attempted to make a daily summary of the proceedings, and their accounts were comparatively meager.”).

57. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 16–22; *see also id.* at 242, 501 (amending the process by which the convention would finalize the constitution’s text); *id.* at Index vii (listing the convention’s actions related to the “Rules of order”).

58. *Id.* at 22.

59. *See id.* at 21 (listing each committee). Additional committees were added later. *See, e.g., id.* at 24 (documenting the creation of a committee “to ascertain and report to the Convention the distance to be traveled and the amount of mileage payable to each delegate”); *id.* at 26 (documenting the creation of a committee to consider “postponing the general biennial election”).

60. *Id.* at 21.

61. *See id.* at 821 (adjourning the convention “*sine die*,” i.e., without a date for resumption, on November 24, 1875). The substance of the constitution that the convention’s efforts created (the “1876 [C]onstitution”) is beyond this Article’s scope and has in any case been discussed elsewhere. *See generally* GEORGE R. BRADEN ET AL., *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, TEX. STATE L. LIBR., <https://www.sll.texas.gov/library-resources/collections/bradens-annotated-texas-constitution/bookreader/#page/1/mode/2up> [https://perma.cc/MR8A-2PZS]; MAY, *supra* note 11, at xxix; James E. Anderson, *The Texas Constitution: Formal and Informal*, in THE CONSTITUTIONALISM OF AMERICAN STATES 368–83 (George E. Connor & Christopher W. Hammons eds., 2008); Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990); A. J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907 (1957).

62. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 242. The proposals were made via resolution. *Id.* at 242.

The proposal would then be “referred to the appropriate committee.”<sup>63</sup> About one month into the convention, John H. Reagan, “the best-known and possibly the most powerful figure at the convention,”<sup>64</sup> proposed an article related to the “division of the powers of government.”<sup>65</sup> The convention adopted a resolution referring the proposal to a newly-created committee of the same name.<sup>66</sup>

The committee would then draft the text and propose it to the convention via a “first reading” that was “for information” only.<sup>67</sup> Article II underwent its first reading on November 13.<sup>68</sup> After the first reading, printed copies would be distributed for the delegates to review and evaluate for amendment.<sup>69</sup> The rules required a “second reading,” at least one day later, and at this reading the rules allowed delegates to propose amendments to the text.<sup>70</sup> Article II saw its second reading on November 20, and there were no amendments proposed.<sup>71</sup> The final question after the second reading was whether the text “shall be engrossed and read a third time.”<sup>72</sup> The terms “engross” and “enroll” had approximately the same meaning in 1875 as today: “To *engross* a legal document (as a deed) is to prepare a fair copy ready for execution. To *enroll* it is to enter it into an official record upon execution.”<sup>73</sup>

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63. *Id.* at 18.

64. BEN H. PROCTOR, NOT WITHOUT HONOR: THE LIFE OF JOHN H. REAGAN 210 (1962).

65. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 313.

66. *See id.* (documenting the creation of a committee “to take into consideration and report on an article in relation to the division of the powers of government”).

67. *See id.* at 242 (prohibiting amendments until a resolution or ordinance emerged from committee and underwent a second reading).

68. *Id.* at 661–62.

69. *See id.* at 662 (reporting that the convention ordered 100 copies of article II printed after that article’s first reading); *see also id.* at 19 (“Every report affecting any provision of the constitution, shall, as of course, lie on the table to be printed, and shall not be acted upon by the Convention until printed and in possession of the delegates for at least one day.”).

70. *Id.* at 242.

71. *See id.* at 745–46.

72. *Id.* at 242. Some articles were also printed again after engrossment. *See, e.g., id.* at 450 (reporting that the convention ordered two hundred copies of the engrossed draft of what became article III, the “Legislative Department”).

73. BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 317 (3d ed. 2011). In other words, an “engrossed” document is an official intermediate copy, whereas an “enrolled” document is an official final copy. The term “engross” originates from the historic practice of writing a proposed enactment in “large” letters. *See* NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 144 (1881). The term “enroll” originates from the practice by which formal “records were

The convention ordered article II engrossed after the second reading.<sup>74</sup> Articles were engrossed, together with any amendments, under the supervision of the Committee on Engrossed and Enrolled Ordinances (engrossing committee).<sup>75</sup> Though its title dedicated it only to ordinances, this committee also checked to make sure that each article was correctly engrossed after the second reading.<sup>76</sup> The committee's members did not do the engrossing themselves—that work fell to one of two assistant secretaries.<sup>77</sup> Instead, the committee's job was to make sure that the assistant secretaries correctly engrossed (and later, enrolled) the documents that the convention approved.<sup>78</sup>

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kept in the shape of continuous rolls of parchment.” STEWART RAPALJE & ROBERT L. LAWRENCE, *A DICTIONARY OF AMERICAN AND ENGLISH LAW* 445 (1883).

The English-language dictionaries cited in this paragraph and elsewhere in this Article are included because they are among “the most useful and authoritative for the English language generally and for law” for the period 1851–1900. *See* Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2D 419, 423 (2013), [http://www.greenbag.org/v16n4/v16n4\\_articles\\_scalia\\_and\\_garner.pdf](http://www.greenbag.org/v16n4/v16n4_articles_scalia_and_garner.pdf) [<https://perma.cc/B6H5-LCJN>] (“Dictionaries tend to lag behind linguistic realities—so a term now known to have first occurred in print in 1900 might not have made its way into a dictionary until 1950 or even 2000. If you are seeking to ascertain the meaning of a term in an 1819 statute, it is generally quite permissible to consult an 1828 dictionary.”).

In the context of the convention, “engrossment” referred to the formal process of preparing an article for its third reading. *See, e.g.*, CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 242 (referring article II for engrossment after the second reading). This terminology makes sense in the context of the procedures that the U.S. Congress uses. There, an “engrossed bill” is the official copy which has passed in either the House or the Senate and is sent to the other chamber. 1 U.S.C. § 106 (1947). An “enrolled bill” is the final copy that receives the assent of both houses and travels to the President for signature. *Id.* § 106; *see* BRADEN, *supra* note 61, at 121 (“In parliamentary procedure a bill is engrossed for third and final consideration by one house and enrolled after final passage by that house for transmittal to the other; a bill is also enrolled after final passage by both houses for transmittal to the governor.”).

74. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 746.

75. *See, e.g., id.* at 452 (reporting that the Committee on Engrossed and Enrolled Ordinances had “carefully examined and compared” what became article X: “On Railroads”).

76. *See id.* at 242.

77. The assistant secretaries—A. H. Latimer and J. L. Cunningham—did clerical work and were not delegates to the convention. *See id.* at 10–11 (reporting the election of each secretary). Their responsibilities, “in addition to their other duties,” included performing “the engrossing and enrolling for the Convention.” *Id.* at 10; *cf. id.* at 683 (documenting the adoption of a resolution authorizing the “employ[ment of] such assistance as may be necessary to keep the engrossing and enrolling up with the work of the Convention”).

78. *See id.* at 200 (reporting that the Committee on Engrossed and Enrolled Ordinances had “carefully examined” an engrossed ordinance); *id.* at 452 (noting that the same committee had “carefully examined” an engrossed article); *id.* at 817 (stating that the same committee had examined the enrolled constitution).

The rules then required a “third reading” of the engrossed draft, again at least one day after the second reading.<sup>79</sup> As happened many times during the frantic final weeks of November, the convention suspended this rule and passed article II on a third reading immediately after the second.<sup>80</sup> The vote to pass an article after a third reading did not automatically add the article’s text to the draft constitution. Instead, the rules provided:

Whenever any article of the constitution shall be passed upon its third reading, under the foregoing rules, it shall be, as of course, referred to the Committee on Style and Arrangement. When the whole constitution shall be presented to the Convention by said committee, it shall not be subject to any amendment that will change its meaning or intent, except by a two-thirds vote.<sup>81</sup>

After article II passed on its third reading, the drafting process brought it to the Committee on Style and Arrangement (style committee).<sup>82</sup> This committee’s job was to arrange all the articles, implement any stylistic changes, and then present “the whole constitution” to the convention.<sup>83</sup> The style committee did its job,<sup>84</sup> and a second committee checked its work.<sup>85</sup> The process resulted in slight differences between the text of article II as it appeared in the engrossed drafts and as it appeared in the final, enrolled document that the delegates signed (enrolled constitution or

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79. *Id.* at 242.

80. *See id.* at 746 (reporting that only four members voted against suspending the rules); *see also id.* at 20 (“The rules of the Convention may be changed or suspended at any time, by a vote of two-thirds.”); *id.* at 749 (noting that article II was “correctly engrossed”).

81. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 501.

82. *Id.*

83. *Id.*

84. *See id.* at 816 (“The Committee of the Convention on Style and Arrangement, having carefully examined the entire constitution and all the ordinances of the Convention, as enrolled, find them correctly enrolled and prepared for authentication by the signatures of the President, Secretary and members of the Convention.”).

85. *See id.* at 817 (“[The] Committee on Engrossed and Enrolled Ordinances would respectfully report that they have examined and compared the new constitution, embracing the following articles [I–XVII] and accompanying ordinances . . . [a]nd find the same correctly enrolled.”).



enrolled copy).<sup>86</sup> Similar differences are evident in the other articles, and some of these differences affect the text's meaning.<sup>87</sup>

The delegates followed the same process for each article, and in every instance the enrolled constitution superseded the engrossed drafts. For example, the Bill of Rights (including the preamble) was introduced and read a first time on October 2.<sup>88</sup> It was read a second time, amended, and engrossed on October 14.<sup>89</sup> It passed its third reading on October 21,<sup>90</sup> after which it was deposited with the style committee.<sup>91</sup> That committee's changes are reflected in the enrolled constitution that the style and engrossing committees approved and that the delegates signed.<sup>92</sup>

These steps—proposal by a delegate, referral to a committee, drafting, first reading, printing, second reading, amendment (if any), engrossment, third reading, styling, arranging, and enrollment—are how the convention drafted the constitution. Drafting, though, was not the end of the process. The convention also had to vote on the final product. This they did, approving it by a vote of 53 to 11 on November 24, 1875.<sup>93</sup> “The delegates present then came forward and signed the enrolled copy of the constitution,”<sup>94</sup> and the convention adjourned.<sup>95</sup>

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86. Compare *id.* at 662 (documenting the proposed draft of article II, which the convention voted to engross); ENROLLED CONSTITUTION, *supra* note 5, at 3. The engrossed text of article II, as it appears in the *Journal*, capitalizes the “departments” of government (e.g., “Judicial”), includes a hyphen in the clause “to-wit,” and uses a colon and a semicolon in the list of the departments. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 662. The enrolled text omits the capitals, omits the hyphen, and uses commas throughout. ENROLLED CONSTITUTION, *supra* note 5, at 3.

87. See *infra* Part II.D; see also Boatright, *supra* note 1, at 5 (describing differences in the engrossed and enrolled versions of the preamble's text).

88. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 270.

89. *Id.* at 357. The Bill of Rights was read and amended article-by-article in a three-day process that began on October 12. See *id.* at 337 (reporting that the second reading began on October 12).

90. See *id.* at 434–36 (reporting that the “Bill of Rights” was “taken up and read a third time” and then “finally passed” on October 21, 1875).

91. See *id.* at 501 (documenting a rule requiring all articles that passed a third reading to be “referred to the Committee on Style and Arrangement”).

92. See *id.* at 816–17 (listing the articles that this committee examined).

93. See *id.* at 818. Although the *Journal* reports the number of “Nays” as “11,” it actually lists twelve names as voting against passage. *Id.*

94. *Id.* at 820.

95. *Id.* at 821.

### C. *Ratifying the Constitution*

With the enrolled constitution now signed, the convention had fulfilled its purpose.<sup>96</sup> But the new constitution required ratification, and that required printing. This task fell to the printing committee that the delegates appointed to “supervise the printing of the constitution” and to “see that the work is done in accordance with the enrolled copy.”<sup>97</sup> The delegates, before adjourning, had already mapped out much of this committee’s work. For example, “[t]he convention had made a generous provision for the printing and distribution of the new constitution among citizens of the state.”<sup>98</sup>

The convention ordered “[40,000] copies of the constitution and ordinances” printed in English.<sup>99</sup> The convention also voted to print the constitution in three other languages, because “many citizens of the State [were] unable to read the English language.”<sup>100</sup> There were 5,000 copies ordered in German, with translation and printing performed by C. Von Boeckmann & Son.<sup>101</sup> In Spanish, there were 3,000 copies ordered, with translation and printing “on the best terms” the printing committee could obtain.<sup>102</sup> And in the “Bohemian” (i.e., Czech) language, the convention ordered 1,000 copies.<sup>103</sup>

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96. *See id.* at 5 (reproducing the speech of E. B. Pickett, upon his election to serve as president of the convention: “We ninety delegates have been selected in our respective districts, out of a population of a million and a half . . . people, to come here and perform the difficult work of making a new Constitution for this people and for this young and great and growing [s]tate.”); *see also id.* at 820 (reproducing Pickett’s speech upon adjourning the convention on November 24, 1875: “Our labors are finished. The work we were sent here to do is now ready to be committed to the people for their approval or disapproval.”).

97. The committee had three members, “George Flournoy, W. P. Ballinger and W. H. Stewart.” *Id.* at 780.

98. MCKAY, *supra* note 3, at 147.

99. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800; TEX. CONST., <https://tarltonapps.law.utexas.edu/constitutions/download/texas1876/texas1876.pdf> [<https://perma.cc/4FR7-RXL9>] [hereinafter ENGLISH COPY].

100. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 109.

101. *Id.* at 108–09 (documenting order of 3,000 copies); *id.* at 818 (raising order to 5,000 copies); CONSTITUTION DES STAATES TEXAS, <https://tarltonapps.law.utexas.edu/imgs/constitutions/documents/texas1876german/texas1876german.pdf> [<https://perma.cc/9MUA-T3VL>] [hereinafter GERMAN COPY].

102. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 215; SPANISH COPY, *supra* note 5. Luis de Tejada translated the Spanish copy. *Id.* at 136.

103. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 281; USTAVA STATU TEXAS, <https://tarltonapps.law.utexas.edu/constitutions/files/documents/texas1876czech.pdf> [<https://per>

Printing began as soon as the convention adjourned. The secretary of the convention traveled “at once to Galveston, with the manuscript copies of the journal and constitution,”<sup>104</sup> to “superintend the printing of same” in English.<sup>105</sup> Meanwhile, the secretary of state, now in possession of the enrolled constitution, prepared a “certified copy” of that document so that the printing committee could travel to Galveston to “compare the same with the proof-sheet” that the printer generated from the manuscript copy.<sup>106</sup> In the case of any differences between the manuscript copy and the enrolled constitution, the committee was to ensure that the final printing was “in accordance with the enrolled copy.”<sup>107</sup> Even so, the process again resulted in minor differences—this time between the enrolled constitution and the version that the Galveston printer produced (English copy).<sup>108</sup> And both of these differed from the engrossed drafts of individual articles.<sup>109</sup> Most of the English copies were distributed to voters, but two thousand were “deposited” with the secretary of state.<sup>110</sup>

The process was slightly different for the foreign-language copies.<sup>111</sup> First, unlike the English-language printer in Galveston, there is no indication that the foreign-language printers in Austin ever received a “certified copy” of the enrolled constitution from the secretary of state. Instead, these printers likely produced their copies either from the manuscript copies that were used to generate the Galveston proof-sheet, or from the English copies that eventually arrived from Galveston. Second, there is no indication that the printing committee oversaw the translation or printing of the foreign-

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ma.cc/X26K-UELQ] [hereinafter CZECH COPY]. Bohemian is a “dialect[]” of Czech. Clinton Machann, *Czechs*, in 2 NEW HANDBOOK, *supra* note 12, at 465. The resolution that proposed the Czech printing failed the first time, CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 216, and when it finally passed there was no mention of who would perform the translation or under what terms. *Id.* at 281.

104. None of these manuscript copies are known to have survived.

105. *Id.* at 753.

106. *Id.* at 820.

107. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 780.

108. It is unknown where in the process these differences arose. Did the manuscript copies contain errors? Did the secretary of state introduce the differences via the certified copy? Or did the printer introduce them? Did the committee find them inconsequential, or did the differences go unnoticed? The answers are probably lost.

109. See Boatright, *supra* note 1, at 5 (discussing the differences between the engrossed and enrolled versions of the preamble).

110. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800.

111. *Spanish Copy*, *supra* note 5; *German Copy*, *supra* note 101; *Czech Copy*, *supra* note 103. This Article refers to these collectively as the “foreign-language copies.”

language copies. Third, while “two thousand” English copies were filed with the secretary of state, there is no indication that any of the foreign-language copies ever were.<sup>112</sup> Instead, the foreign-language copies were distributed to “delegates having constituents speaking said languages.”<sup>113</sup>

The English and foreign-language copies were all printed in pamphlet form. Immediately following the names of the delegates who signed the enrolled constitution, each pamphlet contained the secretary of state’s seal and signature certifying that the pamphlet accurately reflected the enrolled constitution’s text.<sup>114</sup> In English, it reads:

I, A. W. DeBerry, Secretary of State for the State of Texas, do hereby certify that the above and foregoing pages contain, and are true and correct copies of all the articles of the proposed Constitution of the State of Texas, as enrolled and now on file with the Department of State.<sup>115</sup>

In addition to the pamphlets, “over a hundred thousand copies” were printed in newspaper form.<sup>116</sup> At least one such broadsheet survives,

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112. *But see* MCKAY, *supra* note 3, at 148 (1942) (stating that “a small number of each kind [of pamphlet copy] were retained and filed in the office of secretary of state”); Boatright, *supra* note 1, at 9 (“Copies of all four versions were filed in the secretary of state’s office.”). McKay cites page 808 of the *Journal*, but this page does not say anything about filing. *See* CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 808. Instead, it refers to an earlier resolution requiring that “there shall be printed forty thousand copies of the constitution and ordinances in English, two thousand of which shall be deposited in the office of the Secretary of State.” *Id.* at 800. Neither page says anything about filing the foreign-language copies. Boatright cites a different page, one which requires the secretary of the convention to “distribute two hundred and twenty copies of the constitution in English, and one copy of the journal, to each member of the Convention, and deposit the remainder with the Secretary of State.” *Id.* at 753. This sentence also says nothing about filing the foreign-language copies. The sentence that follows mentions the foreign-language copies but does not say anything about filing. *Id.* at 753.

113. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 780.

114. ENGLISH COPY, *supra* note 99, at 26; SPANISH COPY, *supra* note 5, at 85; GERMAN COPY, *supra* note 101 at 97; CZECH COPY, *supra* note 102, at 59.

115. ENGLISH COPY, *supra* note 99, at 26. The English copy also documented the convention’s resolution “appoint[ing] a committee to supervise the printing of the [c]onstitution and see that the work is done in accordance with the enrolled copy.” ENGLISH COPY, *supra* note 99. The foreign-language copies included a translated version of this resolution. SPANISH COPY, *supra* note 5, at 120; GERMAN COPY, *supra* note 101, at 138; CZECH COPY, *supra* note 103, at 59. This is the *only* resolution that appears in the pamphlet copies of the constitution.

116. MCKAY, *supra* note 3, at 148. There is some reason to believe that this number might be exaggerated. McKay’s source is a letter to the editor in which a delegate to the convention reports to the people that elected him that he kept his “pledge” to “have the new Constitution printed in large numbers.” *See* John Henry Brown, *Letter to the Editor*, DALLAS DAILY HERALD, Dec. 16, 1875, at 2,

bearing the title “The New Constitution of the State of Texas, Carefully Compared with the Original Copy in the State Department” (newspaper copy).<sup>117</sup> Despite the promise of careful comparison, the newspaper copy does not match the enrolled constitution.<sup>118</sup> Nor does it exactly replicate the text that appears in the engrossed articles<sup>119</sup> or in the English copy.<sup>120</sup>

The people had about three months to examine these copies and consider ratifying the new constitution.<sup>121</sup> The ballot gave each voter two choices: “For the constitution” or “[a]gainst the constitution.”<sup>122</sup> The votes “for” carried the day “by a commanding margin of 2 to 1.”<sup>123</sup> The next month, the governor issued a proclamation announcing that “the Constitution framed by the Convention . . . ha[d] been ratified and adopted by the people

<https://texashistory.unt.edu/ark:/67531/metaph280573/m1/2/> [<https://perma.cc/Y779-GC2V>] [hereinafter *Brown Letter*].

117. The New Constitution of the State of Texas, Carefully Compared with the Original Copy in the State Department, Broadsides Collection, Dolph Briscoe Ctr. for Am. History, The Univ. of Tex. at Austin, Box BCOD1875 [hereinafter *Newspaper Copy*] (photographs on file with author). The newspaper copy appeared about two weeks after the convention adjourned. See WEEKLY DEMOCRATIC STATESMAN, Dec. 2, 1875, at 2, <https://texashistory.unt.edu/ark:/67531/metaph277552/m1/2/> [<https://perma.cc/CDF4-QA33>] [hereinafter *Statesman Copy*] (presenting subscribers with “a complete copy of the new [c]onstitution, which they will receive [e]nclosed with this paper”); see *id.* at 3–7 (printing a copy of the 1876 Constitution); see also ERNEST W. WINKLER & LLERENA FRIEND, CHECK LIST OF TEXAS IMPRINTS, 1861–1876, at 607 (1963) (listing the newspaper copy with other documents printed in 1875).

118. Compare *Newspaper Copy*, *supra* note 117, at 1 (omitting a comma after the word “person” in article II), with ENROLLED CONSTITUTION, *supra* note 5, at 3 (including a comma after the word “person” in article II).

119. Compare *Newspaper Copy*, *supra* note 117, at 1 (omitting a comma after the word “departments” in article II) with CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 662, 745–46 (reprinting a draft, later engrossed, that includes a comma after the word “departments” in article II).

120. Compare *Newspaper Copy*, *supra* note 117, at 1 (omitting a comma after the word “person” in article II), with ENGLISH COPY, *supra* note 99, at 2 (including a comma after the word “person” in article II).

121. See CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 772 (reprinting an ordinance designating the “third Tuesday in February,” i.e., February 15, 1876, as the date for the ratification vote); *id.* at 775 (reporting that the ordinance passed). See generally RICHARDSON, *supra* note 13, at 223 (2d ed. 1958) (stating that the election took place on the “third Tuesday in February”). But see MAY, *supra* note 11, at 17 (1996) (stating that the constitution was ratified on February 25, 1876). May’s date appears to be the result of a typographic error that transposed “25” for “15.”

122. See CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 772; see also MCKAY, *supra* note 3, at 147–81 (recounting the months leading to the ratification vote, including the arguments for and against).

123. MAY, *supra* note 11, at 17.

of Texas.”<sup>124</sup> The Constitution of 1876 has governed ever since.<sup>125</sup>

D. *The Nature and Consequences of the Differences Between Copies*

When the ratification vote occurred on February 15, 1875, at least eight different copies of the proposed constitution were, to varying extents, circulating throughout the state.<sup>126</sup> Before considering which of these copies became law, it is appropriate to discuss a few examples that illustrate the nature and effect of the differences between them. The engrossed drafts as reported in the *Journal* frequently differ from the text that appears in the enrolled constitution. For example, while the enrolled constitution requires the legislature to prohibit both “lotteries” and “evasions involving the lottery principle,”<sup>127</sup> the engrossed drafts would require the legislature to prohibit only the former.<sup>128</sup>

The English copy and the enrolled constitution differ foremost in the capitalization of various nouns, but also—importantly—in punctuation such as commas, semicolons, and hyphens. Many of these differences are stylistic (e.g., italics, capitalization) and do not affect the constitution’s

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124. See, e.g., *Proclamation by the Governor of the State of Texas*, GALVESTON DAILY NEWS, Mar. 28, 1876, at 2, <https://texashistory.unt.edu/ark:/67531/metapth464383/m1/2/> [<https://perma.cc/3VUE-KSVB>].

125. Though ever in effect, the 1876 Constitution has been “subject . . . to constant change by amendment.” MAY, *supra* note 11, at xxvii; see *id.* at 419 (providing a bibliography of sources discussing amendments). Article II, however, has never been amended. *Amendments to the Constitution Since 1876*, TEX. LEGIS. COUNCIL 12, <https://tlc.texas.gov/docs/amendments/constamend1876.pdf> [<https://perma.cc/QR62-2UUP>] [hereinafter *Amendments to the Constitution*].

126. Those copies were: (1) the engrossed drafts of each article’s text, as reflected in the convention’s *Journal*, CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 501; (2) the enrolled constitution, on file with the secretary of state, ENROLLED CONSTITUTION, *supra* note 5; (3) the *Newspaper Copy*, *supra* note 117; (4) the ENGLISH COPY, *supra* note 99; (5) the SPANISH COPY, *supra* note 5, at 136; (6) the *German Copy*, *supra* note 111; (7) the *Czech copy*, *supra* note 103; and (8) the “manuscript copies” that had traveled to Galveston, CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7.

127. ENROLLED CONSTITUTION, *supra* note 5.

128. TEX. CONST. art. III, § 47 (amended 1980) (“The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States.”). See CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 504 (reporting that the convention “adopted” an amendment striking everything after the word “State” in what became article III, section 47); see BRADEN, *supra* note 61, at 191–93 (discussing the variation and concluding that it “may be a mistake in the *Journal*”).

meaning. But it is not so easy to dismiss the punctuation.<sup>129</sup> Just a few years before the convention, the so-called “Semicolon Court”<sup>130</sup> had earned that moniker by issuing *Ex parte Rodriguez*,<sup>131</sup> a decision ruling that the 1873 election was invalid due to a single semicolon that appeared in the 1869 Constitution.<sup>132</sup> The decision was and remains controversial.<sup>133</sup> But the controversy perhaps owes more to the circumstances—some have argued that the case was feigned<sup>134</sup>—and to the practical result, which undid a popular vote, than to the Court’s reliance on “the rules of grammar [and] of good composition.”<sup>135</sup> Regardless, the decision suggests that the delegates to the convention would have been mindful of semicolons and would have placed punctuation marks with care.<sup>136</sup>

The foreign-language copies, of course, use foreign words, and a tour through a few of the state’s familiar constitutional provisions indicates how these differences could be significant. While the English copies of the constitution allow the legislature to regulate “the wearing of arms,”<sup>137</sup> the

129. See, e.g., Boatright, *supra* note 1, at 22–23 (discussing “differences in meaning” between the double jeopardy clause that appears in the enrolled constitution and the one that appears in the English copy, differences which “depend completely on the presence, or absence, of a single semicolon”).

130. See generally George E. Shelley, *The Semicolon Court of Texas*, 48 SW. HIST. Q. 449 (1945) (discussing the Semicolon Court, the decision in *Ex parte Rodriguez*, various other cases from that era, and the court’s legacy).

131. *Ex parte Rodriguez*, 39 Tex. 705 (1873).

132. Carl H. Moneyhon, *Ex parte Rodriguez*, in 2 NEW HANDBOOK, *supra* note 12, at 917 (noting *Rodriguez* held that “the election had not been valid”).

133. Compare JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, at 85–86 (2013) (“Outrage does not begin to describe the popular reaction to the decision . . .”), and Shelley, *supra* note 130, at 468 (“To this day, no court in Texas accepts as authoritative precedents the opinions of the Semicolon Court . . .”), with James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 292 (1959) (“Rather obviously, the court’s reliance on the semicolon . . . cannot justly be regarded as unjudicial or even unusual.”).

134. Shelley, *supra* note 130, at 456.

135. *Ex parte Rodriguez*, 39 Tex. at 776.

136. United States constitutional history gives additional reasons for this conclusion. See, e.g., Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 873 (2015) (“In theory, whether West Virginia is unconstitutional ultimately comes down to whether the Constitution permitted Virginia to be divided in two, which in turn depends on the relevance of a particular semicolon in Article IV.”); see also William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 507 n.104 (2007) (discussing the “use of a semicolon before the start of the General Welfare Clause” in a draft of the U.S. Constitution, which arguably would have rendered the clause a “general grant of power rather than a limitation on the taxing power”).

137. ENROLLED CONSTITUTION, *supra* note 5, at 2.

Spanish copy allows regulations to reach “el uso de armas”<sup>138</sup>—literally the “use”<sup>139</sup> of arms. Next, while government takings require “adequate” compensation according to the English copies,<sup>140</sup> the German copy requires compensation that is “verhältnißmäßig,”<sup>141</sup> which means “proportionate.”<sup>142</sup> And in place of an “efficient”<sup>143</sup> school system, the Czech copy requires a system that is “výdatné”<sup>144</sup>—i.e., “fruitful,”<sup>145</sup> or perhaps “effective; rich, plentiful.”<sup>146</sup> If these words are part of the state’s constitutional firmament, they have been underutilized by courts and litigants.

There are aspects of the foreign-language copies that could be of even greater consequence. Every such copy contains its own version of article III, section 29, which in English requires that “[t]he enacting clause of all laws shall be: ‘Be it enacted by the Legislature of the State of Texas.’”<sup>147</sup> Texas courts have strictly construed this requirement.<sup>148</sup> But the legislature has yet to author an act that begins “Budiž uzavřeno zákonodárstvím státu Texas,” as the Czech copy requires.<sup>149</sup> The foreign-

138. SPANISH COPY, *supra* note 5, at 7.

139. EDWARD R. BENSLEY, A NEW DICTIONARY OF THE SPANISH AND ENGLISH LANGUAGES, SPANISH–ENGLISH 618 (1895). The Spanish word “uso” includes the English sense “wearing,” but it is much broader, for it also includes the senses “use,” “employment,” “service,” and “enjoyment,” among many others. *Id.*

140. TEX. CONST. art. 1, § 17; *see also* ENROLLED CONSTITUTION, *supra* note 5, at 2. Texas courts “look to federal cases for guidance” on the meaning of the Texas constitutional prohibition against takings. *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 56 (Tex. 2006). The German copy arguably renders this position less tenable.

141. GERMAN COPY, *supra* note 101, at 7.

142. IG. EMANUEL WESSELY, THIEME-PREUSSER: A NEW AND COMPLETE CRITICAL DICTIONARY OF THE ENGLISH AND GERMAN LANGUAGES 532 (1886).

143. TEX. CONST. art. 7, § 1; *see also* ENROLLED CONSTITUTION, *supra* note 5, at 20; *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 842 (Tex. 2016) (surveying the “unique body of Texas jurisprudence” on school finance).

144. CZECH COPY, *supra* note 103, at 32.

145. V. A. JUNG, A DICTIONARY OF THE ENGLISH AND BOHEMIAN LANGUAGES 448 (2d ed. 1911).

146. JAN VÁŇA, NEW POCKET-DICTIONARY OF THE ENGLISH AND BOHEMIAN LANGUAGES 415 (1920) (omitting entry for “výdatné,” but defining “vydatný” as quoted).

147. TEX. CONST. art. III, § 29; ENROLLED CONSTITUTION, *supra* note 5, at 6.

148. *See Am. Indem. Co. v. City of Austin*, 246 S.W. 1019, 1023 (Tex. 1922) (“Among the provisions in the Constitution regulating legislative procedure, which the Legislature is compelled to follow . . . [is] section 29 of article 3, prescribing the enacting clause . . . .”); *see also* MAY, *supra* note 11, at 101 (“[C]ourts have indicated that the exact language of the clause must be followed to ensure the law’s validity . . . . One way to kill a bill in the legislature is to win approval for a motion to strike the enacting clause.”).

149. CZECH COPY, *supra* note 103, at 11.



language copies are also more prone to error, perhaps since they were translated and printed without close supervision from the delegates.<sup>150</sup> The German copy, for instance, entirely omits article I, section 18,<sup>151</sup> the section of the constitution that in English guarantees: “No person shall ever be imprisoned for debt.”<sup>152</sup>

Among the several copies, there are doubtless myriad other differences that could give a creative litigant colorable grounds to argue that some law does or does not apply. More worrisome is the argument that the existence of multiple copies means that perhaps *no* copy can rightfully claim authoritative status. A century-and-a-half of legislative, executive, and judicial function at every level of the state's government indicate that this argument cannot be sound. The next two Parts explain why it is not.

### III. THE CONVENTION FRAMED ONLY ONE CONSTITUTION

The delegates adopted rules designed to ensure the orderly drafting of a single document embodying their final product. Part III.A argues that the delegates followed these rules and produced an enrolled constitution that supersedes the text of earlier drafts. Part III.B argues that the convention adopted “parliamentary practice” as the tiebreaker for contested procedural points, and that contemporary authorities all agreed that an enrolled document was controlling. Thus, even if the convention's rules did not give the enrolled constitution authoritative status, its decision to rely on contemporary parliamentary practice means that the enrolled constitution is final. Part III.C argues that even if the convention broke its own rules, courts should look to the enrolled-bill rule to validate the enrolled constitution. Under this rule, courts accept as conclusive a legislative body's affirmation that a given enactment conformed with the body's governing rules. Thus, the enrolled constitution is the only constitution that the convention framed.

#### A. *The Convention's Own Rules*

The rules the convention itself adopted show that the enrolled constitution is authoritative.<sup>153</sup> This is evident in at least four respects. First, of the many votes that the convention held on the drafts, only the final

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150. See *supra* notes 111–13 and accompanying text.

151. GERMAN COPY, *supra* note 101, at 7.

152. TEX. CONST. art. I, § 18; ENROLLED CONSTITUTION, *supra* note 5, at 152.

153. For a discussion of the rules, see *supra* note 57 and accompanying text.

vote could have created a final constitution. Second, the convention vigorously debated the process for overriding any changes that arose between the drafts of individual articles and the final text as it appeared in the enrolled constitution.<sup>154</sup> If the earlier drafts were final, this debate would have been pointless. Third, the convention's rules refer only to the enrolled constitution as the "whole constitution."<sup>155</sup> Fourth, the convention directed that the printed copies be produced "in accordance with the enrolled copy."<sup>156</sup> The delegates would not have voted to print thousands of copies of a document that they believed incomplete.

Until the final vote on the enrolled constitution, all affirmative votes in favor of the constitutional text were cast in anticipation of further changes to the working drafts of each article. These were votes to move the process along, not to give final approval to a still-evolving text.<sup>157</sup> Proposals for articles or for additions to articles did not require a vote and were not subject to debate.<sup>158</sup> Rather, proposals were automatically referred to one of several drafting committees.<sup>159</sup> Each drafting committee consisted of between five and fifteen members and roughly corresponded to what became single articles of the constitution.<sup>160</sup> The Committee on the Judicial Department, for example, drafted what became article V (which governs the "Judicial Department").<sup>161</sup> The committee process culminated in a vote to send a draft article to the convention floor.<sup>162</sup> The committee members knew that the convention would have an opportunity to amend the draft,<sup>163</sup> so the committee votes did not, by their own power, create a final draft of any article.

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154. DEBATES, *supra* note 56, at 322–24.

155. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 501.

156. *Id.* at 780.

157. *See supra* Part II.B.

158. *See id.* at 18 ("Every resolution or proposition in any form affecting any provision of the constitution shall be referred to the appropriate committee, without debate.").

159. *Id.*

160. *Id.* at 21.

161. *Id.* at 95.

162. Records of each committee's proceedings do not exist. *See supra* note 56 and accompanying text. However, when the committees could not reach unanimity, any dissenting member had the option to submit a "minority report." Billy D. Walker, *Intent of the Framers in the Education Provisions of the Texas Constitution of 1876*, 10 REV. LITIG. 625, 645–46 (1991) (discussing the minority reports from the Committee on Education). This procedure indicates that the committees required only a simple majority to send a draft to the full convention.

163. *See, e.g.*, CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 242 (reporting a rule allowing delegates to propose amendments after an article's second reading).

The first reading of a draft on the convention floor did not trigger a vote.<sup>164</sup> A first reading was in order only at certain times, but it always concluded with copies of the draft being printed.<sup>165</sup> These copies were distributed to the delegates so that they could review the draft and evaluate whether to propose any amendments (to be discussed at the second reading).<sup>166</sup> Because these drafts had not yet received a vote, the text they contain is not final.

Amendments to the printed copies of the draft were in order upon an article's second reading.<sup>167</sup> By default, delegates offered amendments—and voted on them—by voice vote.<sup>168</sup> An assistant secretary would likely hand-write any amendment that passed directly onto one of the printed copies.<sup>169</sup> The final question after the second reading was whether the article should “be engrossed and read a third time.”<sup>170</sup> A vote to engross moved the process forward, but it did not create a final draft.<sup>171</sup>

The engrossed draft of an article, once prepared and examined by the engrossing committee, was subject to a third reading and to another vote.<sup>172</sup> But this vote still was not final. Instead, if an article passed its third reading, it was referred to the style committee.<sup>173</sup> The delegates understood that this committee would arrange and number the articles, which prior to that point were known only by their name—e.g., “Judicial Department.”<sup>174</sup> But the delegates *also* understood that the committee would implement stylistic

164. *See id.* at 501.

165. *See, e.g., id.* at 662 (reporting that there were “[o]ne hundred copies ordered printed” after article II’s first reading).

166. *See, e.g., id.* at 19 (“Every report affecting any provision of the constitution, shall, as of course, lie on the table to be printed, and shall not be acted upon by the Convention until printed and in possession of the delegates for at least one day.”).

167. *Id.* at 242.

168. *Id.* at 20 (“All questions shall be distinctly put by the President, and the members shall assent or dissent by answering ‘yea’ or ‘nay.’”).

169. There is no direct evidence for this practice, but in a similar context the rules provided: “Resolutions or ordinances referred to the committee of the whole shall not be defaced or interlined; but all amendments, noting the page and line, shall be duly entered by the Secretary on a separate paper.” *Id.* at 20. A printed copy of an article would have been an appropriate “separate paper” on which to mark minor amendments, whereas longer amendments (including those in the form of a replacement) could have been recorded on their own.

170. *Id.* at 242.

171. *See id.* (reporting a rule that allowed “amendment” at the third reading, but only with “consent of two-thirds of the members present”).

172. *Id.*

173. *Id.* at 501

174. *Id.* at 95.

changes, and that these changes could even prove substantive. Some evidence of this comes from the committee's name, which refers to both intra-article "style" and inter-article "arrangement"<sup>175</sup> Even better evidence is that the convention vigorously debated the process for overruling any changes that arose in the style committee.<sup>176</sup> This debate would have been pointless if the vote after the third reading was final. Thus, the vote after the third reading did not create a final draft of an article. Instead, it allowed the drafting process to continue.

The drafting process culminated in enrollment, which occurred only once.<sup>177</sup> Enrollment began after the style committee edited all the articles. The most natural course would have been for the style committee to edit the engrossed drafts of each article by hand, arrange the edited copies in a preferred order, and then direct the assistant secretaries to produce an enrolled constitution that reflected the edits and the arrangement.<sup>178</sup> No record of the style committee's proceedings exists, and the convention's *Journal* shows the committee taking only a single action:

The Committee of the Convention on Style and Arrangement, having carefully examined the entire constitution and all the ordinances of the Convention, as enrolled, find them correctly enrolled and prepared for authentication by the signatures of the President, Secretary and members of the Convention.<sup>179</sup>

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175. *Id.* at 21.

176. DEBATES, *supra* note 56, at 322–24 (recording a debate about whether to require a simple majority as opposed to a two-thirds vote to overturn the style committee's edits); *see also* JOHN ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS, AND MODES OF PROCEEDING 288 (3rd ed. 1873) ("It is always in the power of such a committee [of style] . . . even without intending it, in the process of manipulating a Constitution . . . to change its language so as materially to alter its legal effect."); William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 119 MICH. L. REV. (forthcoming 2021) (manuscript at 3) (on file with author) (discussing several "consequential" changes that arose from the style committee that arranged the U.S. Constitution).

177. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 242 (referring to a single "enrolled copy" of the constitution).

178. The assistant secretaries—A. H. Latimer and J. L. Cunningham—did clerical work and were not delegates to the Convention. *See id.* at 10–11 (reporting the election of each secretary). Their responsibilities, "in addition to their other duties," included performing "the engrossing and enrolling for the Convention." *Id.* at 10; *cf. id.* at 683 (reporting that the convention adopted a resolution authorizing the "employ[ment of] such assistance as may be necessary to keep the engrossing and enrolling up with the work of the Convention").

179. *Id.* at 816.

The Committee on Engrossed and Enrolled Ordinances also examined the new constitution and found it “correctly enrolled.”<sup>180</sup>

The delegates cast their final votes on the enrolled constitution, which is the only instrument that the convention’s rules refer to as the “whole constitution.”<sup>181</sup> And the convention ordered the enrolled constitution printed and distributed to the people for ratification.<sup>182</sup> The purpose of this elaborate process was to ensure the production of a single, authoritative document. The process worked, and no delegate protested the constitution on procedural grounds; the unnumbered articles drafted in dozens of small committees thus became a “whole constitution” produced by a single convention acting together.<sup>183</sup>

#### B. *Approved “Parliamentary Practice”*

Even if there had erupted a procedural dispute about which text controlled—whether an engrossed article or the enrolled constitution—the convention had already adopted a backstop rule that would solve it: “The President of the [c]onvention shall decide all questions not provided for by the standing rules and orders of the [c]onvention, according to parliamentary practice, as laid down by approved modern authors, subject to the right of appeal, as in other cases.”<sup>184</sup>

This rule designates both a decisionmaker (the president of the convention) and a decisional authority (parliamentary practice). The delegates did not entrust procedural disputes to the president’s discretion. Instead, they adopted the parliamentary practice “laid down by approved modern authors” to govern any disputes that might arise.<sup>185</sup> The authors of the time uniformly agreed, as do authors today, that an enrolled document supersedes earlier drafts, including earlier engrossed drafts.

Thomas Jefferson’s *A Manual of Parliamentary Practice: for the Use of the Senate of the United States (Jefferson’s Manual)* “was the first American manual of parliamentary law” and would have been familiar to the delegates at the

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180. *Id.* at 817.

181. *Id.* at 501.

182. *Id.* at 780.

183. *See id.* at 501, 818–19 (reporting the protest of Mr. Ballinger, not on procedural grounds, but “against the provisions of the constitution regulating the salaries and terms of executive and judicial officers, and against the election of judicial officers”).

184. *Id.* at 22.

185. *Id.*

Texas convention.<sup>186</sup> The manual made clear that, for federal legislation, the President was to sign the enrolled bill and to deposit the same “among the rolls in the office of the [S]ecretary of [S]tate.”<sup>187</sup> Luther Cushing’s *Lex Parliamentaria Americana: Elements of the Law and Practice of the Legislative Assemblies in the United States of America* was the other “outstanding work on legislative rules of procedure” in the 1800s.<sup>188</sup> It gives a good overview of the differences between engrossment and enrollment in the legislative context:

When a bill has passed in both branches, having been previously engrossed on paper merely, and not on parchment, it is then to be enrolled on the latter material, by the clerk of the house in which the same originated, . . . and then delivered . . . [to] the committee on enrolled bills, for examination by them. This is a joint standing committee . . . whose duty it is to compare the enrol[ment] with the engrossed bills, . . . and, after correcting any errors they may discover therein, to report the same . . . . Enrolled bills, after this examination and report, are to be signed in the respective houses . . . . The signing of an enrolled bill by the speaker or president is an official act . . . .<sup>189</sup>

In America, then, the primary authorities of the day both agreed that an enrolled document was final and controlling.<sup>190</sup>

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186. John Waldeck, *Parliamentary Procedure for Non-Profit Organizations*, 13 CLEV.-MARSHALL L. REV. 529, 531 (1964); see also Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 VA. L. REV. 971, 976–77 (1989) (tracing “[t]he evolution of parliamentary law in the United States”).

187. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES 121 (1801). At least one state convention adopted *Jefferson’s Manual* itself to govern the convention’s proceedings. See JAMESON, *supra* note 176, at 275.

188. Waldeck, *supra* note 189, at 532. The distinction between legislative rules of procedure and other types of rules is important. While the 1800s saw a great many books “plainly designed for the expanding market of citizens attending town meetings, volunteer organization functions, and political action sessions,” only a relative few discussed government. Levmore, *supra* note 186, at 977. The well-known ROBERT’S RULES OF ORDER first appeared in 1876 and is an example of a book aimed at citizens rather than legislative bodies (such as a constitutional convention). See generally HENRY M. ROBERT, POCKET MANUAL OF RULES OF ORDER FOR DELIBERATIVE ASSEMBLIES (Milwaukee, Burdick & Amp 1876). It does not discuss engrossment or enrollment and would have therefore been of little value to a convention trying to decide which to prioritize. See generally *id.*

189. LUTHER STEARNS CUSHING, LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF THE LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA 917–18 (1856).

190. The same is true today. See 1 U.S.C. § 106 (2020) (providing that when a bill “passe[s] both Houses, it shall be printed and shall then be called the enrolled bill . . . and shall be . . . sent to the

In England, Sir Thomas Erskine May's "renowned"<sup>191</sup> *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* laid down the same rule.<sup>192</sup> First published in 1844,<sup>193</sup> it became the "standard work" on that country's parliamentary procedure within a decade,<sup>194</sup> and so it remains.<sup>195</sup> The first edition referred to enrolled bills as "ingrossment rolls" and stated that these should be "preserved in the House of Lords" and reviewed "when necessary."<sup>196</sup> By the second edition of May's work, Parliament had "discontinued" this practice and replaced it with a system of "authenticated prints" that served the same purpose.<sup>197</sup> In both cases, the final, signed copy was "deposited" in the records and was used to create "impressions" for printing copies.<sup>198</sup> These copies were then "referred to as evidence in courts of law."<sup>199</sup> Thus, under the rule set forth by the leading parliamentarian in England, the Texas convention enrolled a constitution that superseded earlier drafts.

Law dictionaries from the late 1800s reflect the same rule.<sup>200</sup> According to *Black's*, for example, to "engross" meant "to copy the rude draft of an instrument."<sup>201</sup> But to "enroll" meant "to make a

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President of the United States"). Even so, courts and commentators do not always distinguish between enrollment and engrossment. See NORMAN SINGER & SHAMBIE SINGER, 1 SUTHERLAND STATUTORY CONSTRUCTION § 15:1 (7th ed. 2020) ("Although originally there was a sharp distinction between engrossment and enrollment, legislative practice has obscured the line and on occasion courts have referred to the engrossing process—the process of final authentication in a single house—as enrollment.").

191. Charles J. Zinn, *Book Review*, 6 HARV. J. ON LEGIS. 123, 123 (1968) (reviewing M. N. KAUL & S. L. SHAKDHER, PRACTICE AND PROCEDURE OF PARLIAMENT (1968)).

192. THOMAS ERSKINE MAY, A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 295 (3rd ed. 1855).

193. *Id.*

194. *Parliamentary Law*, 22 LAW MAG. Q.R. JURIS. 58, 58 (1855) (reviewing THOMAS ERSKINE MAY, A PRACTICAL TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (3rd ed. 1855)).

195. *Erskine May*, UK PARLIAMENT, <https://erskinemay.parliament.uk/> [https://perma.cc/CV8H-ULZ2] ("Erskine May, often referred to as 'the Bible of parliamentary procedure' is both an iconic and practical publication. It's the most authoritative and influential work on parliamentary procedure and constitutional conventions affecting Parliament.").

196. MAY, *supra* note 192, at 295.

197. THOMAS ERSKINE MAY, A PRACTICAL TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 362–63, 374 (2d ed. 1851).

198. *Id.* at 363.

199. *Id.* at 374.

200. For an explanation relating to the choice of dictionaries, see *supra* note 73.

201. *Engross*, BLACK'S LAW DICTIONARY (1st ed. 1891); see also JOHN BOUVIER, A LAW DICTIONARY 591 (15th ed. Philadelphia, J. B. Lippincott Co. 1883) (giving a similar definition).

record,”<sup>202</sup> and “enrollment” meant the “[t]he registering . . . of any lawful act.”<sup>203</sup> Another dictionary explained that “engrossing means copying” and that “[l]egislative bills are also ordered to be engrossed at a certain stage of their passage.”<sup>204</sup> By contrast, according to the same dictionary: “To enroll is to enter . . . a document on an official record.”<sup>205</sup> These sources show that in 1875, an enrolled document was authoritative.<sup>206</sup>

The convention adopted these authorities as the decisional rule for disputed procedural points.<sup>207</sup> True, the convention’s president was the designated decisionmaker, but the basis of the decision was not the president’s whim but instead the “approved authorities” themselves.<sup>208</sup> Since the authorities are in agreement, the convention would have viewed the enrolled constitution as the only framed document, even if its rules did not expressly establish that fact.

### C. *The Enrolled-Bill Rule*

Suppose, however, that the convention failed to follow its own rules.<sup>209</sup> For example, suppose one of the secretaries made an engrossing error that went unnoticed,<sup>210</sup> or suppose the convention gave an article only two readings.<sup>211</sup> Would either error render an article invalid? If so, would the invalid article render the convention’s vote on the “whole constitution” fatally defective?<sup>212</sup> And if the final vote was defective, would it not make sense to rely on the engrossed drafts? Indeed, if the final vote was void, are not the engrossed drafts the only drafts that ever received a proper vote

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202. *Enroll*, BLACK’S LAW DICTIONARY, *supra* note 201; *see also* BOUVIER, *supra* note 201, at 592 (giving a similar definition).

203. *Enrollment*, BLACK’S LAW DICTIONARY, *supra* note 201; *see also* BOUVIER, *supra* note 201, at 592 (giving a similar definition).

204. RAPALJE & LAWRENCE, *supra* note 73, at 444.

205. *Id.* at 445.

206. Modern authorities follow the same rule. *See supra* note 73 and accompanying text.

207. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 22.

208. *Id.*

209. For the rules, *see supra* note 57 and accompanying text.

210. *See* CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 9–10 (providing for two assistant secretaries to perform the “engrossing and enrolling for the Convention”).

211. *Id.* at 242 (“Every resolution or ordinance, before it becomes a part of the constitution, shall be read on three several days”).

212. *Id.* at 501.



from the full convention?<sup>213</sup>

The enrolled-bill rule gives a framework for addressing these questions, and it would answer each in the negative. In the statutory context, earlier drafts cannot impeach an enrolled bill, and the bill itself is conclusive evidence that the enactment was procedurally sound. The Texas Supreme Court has recently stated the rule as follows:

The enrolled bill rule provides that the “enrolled statute,” as authenticated by the presiding officers of each house, signed by the governor (or certified passed over gubernatorial veto), and deposited in the secretary of state’s office, is precisely the same as and a “conclusive record” of the statute that was enacted by the legislators. Under the strict enrolled bill rule, the House and Senate Journals are not more reliable records of what occurred than the enrolled bill, and no extrinsic evidence may be considered to contradict the enrolled version of the bill.<sup>214</sup>

The enrolled-bill rule, then, applies to legislative action.<sup>215</sup> One aspect of the rule is that “[n]either . . . the bill as originally introduced, nor the amendments attached to it . . . can be received in order to show that an act . . . did not become a law.”<sup>216</sup> Because earlier sections of this Article have already demonstrated that the enrolled constitution supersedes earlier engrossed drafts under the convention’s own rules,<sup>217</sup> this section focuses on a different aspect of the enrolled-bill rule. Namely, the enrolled-bill rule also prohibits the consideration of “[j]ournals” and other “extrinsic

213. See *id.* (requiring that each individual “article of the constitution shall be passed upon its third reading, under the foregoing rules” before being sent to the style committee). The vote on the third reading was a vote by the whole convention on the engrossed draft of an article. See *id.* (requiring engrossment before the third reading of an article). If the vote on the whole constitution was procedurally void, then there is a plausible argument that the engrossed drafts are what the convention framed.

214. *Ass’n of Tex. Pro. Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990) (citations omitted). The “strict enrolled bill rule” does not apply in every statutory context or in every jurisdiction. *Id.*; see also Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 816 (1987) (describing a “range of approaches” to the enrolled-bill rule); see *infra* notes 237–53 and accompanying text (discussing exceptions to the enrolled-bill rule).

215. See BRADEN, *supra* note 61, at 121 (“Technically, the doctrine should be called ‘the enrolled act doctrine’ because it is an act and not a bill after it becomes law.”).

216. *Usener v. State*, 8 Tex. Ct. App. 177, 181 (1880), *overruled in part on other grounds by* *Hunt v. State*, 3 S.W. 233 (Tex. Ct. App. 1886) (quoting *State v. Swift*, 10 Nev. 176, 178 (1875)); see also *Teem v. State*, 183 S.W. 1144, 1150 (Tex. App. 1916) (reiterating the same rule).

217. See *supra* Sections III.A and III.B.

evidence” in determining whether a bill’s enactment was procedurally sound.<sup>218</sup>

In the statutory context, this aspect of the enrolled-bill rule has at least three justifications.<sup>219</sup> The first justification is structural: the separation-of-powers principle prevents the judicial branch from inquiring whether the legislative and executive branches have actually enacted what they have purported to.<sup>220</sup> Second, as a practical matter, the need for finality forecloses any rule that would require a citizen to dig through the legislature’s journals to determine whether a law is in effect.<sup>221</sup> The final

218. See *Kirby*, 788 S.W.2d at 829 (stating that the “strict enrolled bill rule” prohibits the consideration of journals and extrinsic evidence to contradict the enrolled bill).

219. The justifications are not free from overlap, and there are of course other ways to phrase them. For a discussion focusing on another aspect of the enrolled-bill rule—namely, that an enrolled bill also supersedes post-enactment printed copies—see *infra* Part IV.A.2.

220. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892) (“[J]udicial action based upon [legislative journals] . . . is forbidden by the respect due to a coordinate branch of the government”); *King v. Terrell*, 218 S.W. 42, 44 (Tex. App.—Austin 1920, writ ref’d) (“[T]he power to ascertain and decide whether the constitutional demands have been complied with should be vested in the Legislature itself.”); Kristen L. Fraser, “Original Acts,” “Meager Offspring,” and Titles in a Bill’s Family Tree: A Legislative Drafter’s Perspective on *City of Fircrest v. Jensen*, 31 SEATTLE U. L. REV. 35, 65 (2007) (“[T]he enrolled bill doctrine is a pillar of separation of powers principles . . . .”); Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1278 (2000) (“[C]ourts would show disrespect for legislatures if they questioned the certification that the bill had been properly enacted.”); see also *Pub. Citizen v. U.S. Dist. Ct. for D.C.*, 486 F.3d 1342, 1348 (D.C. Cir. 2007) (noting that “the rule could be viewed as an application of the political question doctrine”). On this view, it is Congress’s job to fix any procedural irregularities that come to light. See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 244 (1957) (“When an objection is raised on a significant point of procedure in the Congress, the presiding officer and the members are obliged to address the point as one of legal principle, and they quite generally do so.”); Hanah Metchis Volokh, *Constitutional Authority Statements in Congress*, 65 FLA. L. REV. 173, 181–82 (2013) (describing “the accuracy of enrolled bills” as an “issue[] over which the courts have no jurisdiction”).

221. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670 (1892) (“[W]e cannot be unmindful of the consequences that must result if this court should . . . declare that an enrolled bill, on which depend public and private interests of vast magnitude . . . was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law.”); *Jackson v. Walker*, 121 Tex. 303, 308, 49 S.W.2d 693, 694 (1932) (reasoning that deviation from the enrolled-bill rule “would certainly prove disastrous and would create a condition in the affairs of our state government that would almost be irreparable”); *Sherman v. Story*, 30 Cal. 253, 275 (1866) (“Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, State and national, should at any and all times be liable to be put in issue and impeached by the [j]ournals, loose papers of the Legislature, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable.”); Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine*, 97 GEO. L.J. 323, 329 (2009) (discussing “the fear that allowing courts to look behind the ‘enrolled bill’ would produce uncertainty and undermine the public’s reliance interests.”); David Sandler, Note, *Forget What You Learned in Civics*

justification is evidentiary: because journals and other extrinsic evidence of what an enacting body did are at least as prone to typographic and other errors as the enactment itself, these sources are no basis for second-guessing a bill's contents.<sup>222</sup>

All three justifications apply with at least equal force to the framing of a constitution. And while there are exceptions to the enrolled-bill rule, they have no application in the constitutional context.<sup>223</sup> The enrolled-bill rule thus provides an additional reason to conclude that the enrolled constitution supersedes earlier drafts, including engrossed drafts of individual articles.<sup>224</sup>

First, structural considerations suggest that a court lacks authority to second-guess the positive statements of the convention whose work established the court's jurisdiction. At least two committees of the convention examined the constitution and found it "correctly enrolled."<sup>225</sup> Enrollment was proper only for an article that had passed "under the foregoing rules" of the convention.<sup>226</sup> By stating that the constitution was correctly enrolled, each committee necessarily affirmed that the constitution conformed to the convention's rules. The delegates accepted this

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*Class: The "Enrolled Bill Rule" and Why It's Time to Overrule* Field v. Clark, 41 COLUM. J.L. & SOC. PROBS. 213, 219 (2007) (discussing the argument that "the cost of allowing collateral attacks on facially-valid laws is less than the danger of invalidly passed bills becoming law.").

222. See, e.g., Williams v. Taylor, 19 S.W. 156, 158 (Tex. 1892) ("The [legislative] journals are the work of the clerks, perhaps hastily performed, and, as the official copies in this state, in some instances at least, will show, their reading is frequently dispensed with by vote. When such is the case, the journals are merely the work of the recording clerk, and even when read there is no assurance that the reading has led to the correction of every error."). Though records are better in the modern era, "[e]arlier cases made a point of the haphazard, careless, inaccurate, and incomplete character of legislative journals." Singer & Singer, *supra* note 190, at § 15:10; see also Nueces County v. King, 350 S.W.2d 385, 387 (Tex. App.—San Antonio 1961, writ ref'd) ("The journals are not more certain and reliable records of what occurred than the enrolled bill."); Weeks v. Smith, 18 A. 325, 327 (Me. 1889) ("Legislative journals are made amid the confusion of a dispatch of business, and are therefore much more likely to contain errors than the certificates of the presiding officers are to be untrue."); Carlton v. Grimes, 23 N.W.2d 883, 902 (Iowa 1946) ("Certainly [the legislators] may err, but aren't they less likely to err than the clerks and stenographers, who in the hurry and distraction of a legislative assembly must note and set down the daily proceedings, and after adjournment compile and condense the record and get it to the printer, so that it may be printed and made available for the next day's session?"). See generally William J. Lloyd, *Judicial Control of Legislative Procedure*, 4 SYRACUSE L. REV. 6 (1952) (discussing the evidentiary argument for the enrolled-bill rule).

223. See *infra* notes 237–53 and accompanying text.

224. For discussion of the engrossed drafts, see CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7 at 22.

225. *Id.* at 816–17.

226. *Id.* at 501.

affirmation when they signed the enrolled constitution.<sup>227</sup> A court that ignores these affirmations violates the “respect due”<sup>228</sup> to the constitutional convention to at least the same degree that a court inquiring into equivalent legislative affirmations commits a similar error.

Second, practical considerations should prevent a court from conditioning a constitution’s validity on drafting events other than the drafters’ final assent.<sup>229</sup> If a court must examine a journal to determine what a constitution means, then so must everyone else. This requirement would reduce certainty,<sup>230</sup> increase litigation expense,<sup>231</sup> and undermine the finality of judgments.<sup>232</sup> These overlapping concerns already protect legislation from attacks based on procedural irregularities.<sup>233</sup> They should

227. *Id.* at 820.

228. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892).

229. This analysis might be different if it were alleged that the printing errors were intentional or malicious. *See* Aaron-Andrew P. Bruhl, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL’Y 349, 358 (2007) (“The courts are generally willing to defer to Congress regarding the details of passage, but they may well choose to intervene when there is manipulation within the Congress.”). There is no indication that the discrepancies discussed in this Article are due to anything other than completely honest mistakes. Intentional changes are more than a theoretical possibility, however. *See* Treanor, *supra* note 176, (manuscript at 3) (on file with author) (discussing “fifteen substantive changes to the text” that were “covertly” made to the text of the U.S. Constitution).

230. *See* *United States v. Munoz-Flores*, 495 U.S. 385, 409 (1990) (Scalia, J., concurring) (describing the enrolled-bill rule as a “salutary principle [that] is also supported by the uncertainty and instability that would result if every person were ‘required to hunt through the journals of a legislature to determine whether a statute, properly certified by the [S]peaker of the [H]ouse and the [P]resident of the [S]enate, and approved by the governor, is a statute or not’”) (internal citations omitted) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 677 (1892)); Bell, *supra* note 220, at 1278 n.94 (“If enrolled bills were subject to the attack that procedural requisites had not been met, citizens would have to inquire extensively into the legislative process before they could rely on the statute.”).

231. *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1175 (2003) (“Absent [the enrolled-bill rule], litigation costs would rise . . . .”); Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 636 (2006) (“Much of the [enrolled-bill] rule’s benefit is enhanced public certainty, but it can also reduce decision costs in litigation.”). *See generally* Singer & Singer, *supra* note 190, at § 15:3 (“Admission of other evidence to impeach the enrolled bill invites attack on the basis of uncertain and often unreliable journals. Until the journals are published, often long after the acts are in effect, there is no practical way to determine an Act’s constitutionality. The amount of litigation encouraged by admission of extrinsic evidence is out of proportion to the number of enactments involving serious constitutional violations.”).

232. *See, e.g., Baker v. Carr*, 369 U.S. 186, 214 (1962) (“[T]he need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities.”).

233. *See, e.g., King v. Terrell*, 218 S.W. 42, 44 (Tex. App.—Austin 1920, writ ref’d) (“We think the true and correct rule is that in passing upon the validity of a legislative act the courts should inspect the completed work and deal with it alone, and, if this is found to meet the constitutional requirements,

apply with even greater weight in favor of a constitution, without which legislation would be impossible. The constitution is the state's foundational instrument. Its validity must depend on the signatures of those who drafted it, not on a court's centuries-later examination of whether the drafting process was perfect in every procedural respect.

Third, the *Journal* is the only evidence of what earlier drafts actually said.<sup>234</sup> It is the work of a "journal clerk"<sup>235</sup> who copied the text of engrossed drafts, which were themselves the work of but two overworked assistant secretaries.<sup>236</sup> The drafts reprinted in the *Journal* are thus copies of copies. There is no reason to think that these copies are better, by any measure, than the enrolled constitution itself. No committee "carefully examined" the *Journal* or "confirmed" that its entries were correct.<sup>237</sup> Nor did the delegates sign the *Journal*.<sup>238</sup> Thus, under the enrolled-bill rule, the courts should reject any invitation to elevate the *Journal*'s text over the text of the enrolled constitution.

Texas courts have stated at least two exceptions to the enrolled-bill rule, but neither should apply in the constitutional context.<sup>239</sup> Similarly, while some scholars have argued that "[r]econsideration of this time-honored doctrine is also appropriate because . . . factual and doctrinal developments

they are not permitted to inquire whether the legislative workmen in the processes of their labors assembled imperfect material, employed defective tools, or worked during forbidden hours.").

234. None of the loose-leaf engrossed drafts are known to have survived. See WINKLER & FRIEND, *supra* note 117, at 606–08 (listing known printed documents produced in 1875 related to the "Texas Constitution").

235. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 101.

236. See *supra* note 77 and accompanying text. For their hard work, the delegates voted "[t]hat the assistant secretaries of the Convention be allowed twenty-five dollars extra pay for services rendered during night sessions." CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 820.

237. Cf. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 816 ("The Committee of the Convention on Style and Arrangement, having carefully examined the entire constitution and all the ordinances of the Convention, as enrolled, find them correctly enrolled and prepared for authentication . . ."); see *id.* at 817 ("[The] Committee on Engrossed and Enrolled Ordinances . . . examined and compared the new constitution . . . and f[ou]nd the same correctly enrolled."). Although the convention did not create any committees to proofread the *Journal*, the delegates did tend to read and adopt the prior day's entries at the beginning of the next. See *id.* at 17 ("When there is a quorum assembled the journal of the preceding day shall be read, and corrected if necessary."). Even so, there is no indication that the delegates reviewed the journal entries with any greater care than they reviewed the enrolled constitution.

238. Cf. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 820 (reporting that the delegates "signed the enrolled copy of the constitution").

239. See *Hunt v. State*, 3 S.W. 233, 236 (Tex. Ct. App. 1886) (describing exceptions to the enrolled-bill rule); *Ass'n of Tex. Pro. Educators v. Kirby*, 788 S.W.2d 827, 829–31 (Tex. 1990) (defining an exception to the enrolled-bill rule).

since *Field* was decided in 1892 significantly erode its soundness,”<sup>240</sup> the doctrine remains sound with respect to a constitution approaching its 150th anniversary.

One exception is the so-called “journal entry” rule. The Texas Court of Appeals (now the Court of Criminal Appeals)<sup>241</sup> stated this exception as follows: “[W]here the [C]onstitution expressly requires . . . that certain facts shall be entered upon the journals, the courts will look behind the statute to the journals, . . . and, if the journals fail to show affirmatively that such entry was made[,] . . . the statute will be held void.”<sup>242</sup> Because there is no higher law that could “expressly require[]” certain journal entries in the creation of a constitution, this exception cannot apply in the constitutional context.<sup>243</sup> Furthermore, the only Texas court to ever recognize the exception no longer does, having since expressly overruled itself.<sup>244</sup>

The Texas Supreme Court has stated a second exception: “[W]hen the official legislative journals, undisputed testimony by the presiding officers of both houses, and stipulations by the attorney general . . . conclusively show the enrolled bill signed by the governor was not the bill passed by the legislature, the law is not constitutionally enacted.”<sup>245</sup> This “exception to

240. Bar-Siman-Tov, *supra* note 221, at 326; *see* Sandler, *supra* note 221, at 219 (highlighting that even the U.S. Supreme Court recognized that the original justifications were not entirely convincing). These arguments have not yet persuaded the courts. *See* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 9 B.U. L. REV. 1915, 1917 n.6 (2011) (“A significant number of recent decisions by lower federal courts ma[k]e clear, however, that the resistance to judicial review of the legislative process, embodied in the ‘enrolled bill’ doctrine, remains in full force today.”).

241. HALEY, *supra* note 133, at 139 (“In 1891 a constitutional amendment was ratified . . . . To clarify the function of the Court of Appeals, it was renamed the Court of Criminal Appeals, and it maintained its appellate jurisdiction over all criminal appeals.”).

242. *Hunt*, 3 S.W. at 237; *see also In re Tipton*, 13 S.W. 610, 611 (Tex. App. 1890) (emphasis added) (“We conclude, therefore, that we are not at liberty to go behind the authenticated statute in this instance. Upon its face, it is a valid law, and it is not claimed that the journals fail to show any fact expressly required to be shown in order to make it valid.”). *See generally* Atchison, Topeka & Santa Fé Ry. Co. v. State, 28 Okla. 94, 113 P. 921 (discussing the exception and collecting cases for and against it); BRADEN, *supra* note 61, at 122 (“If the constitution mandates a particular procedure, this rule provides, there must be an entry in the journal reflecting its performance or the noncomplying statute is void.”).

243. *Cf. Hunt*, 3 S.W. at 237 (relying on the authority of the constitution to enforce the journal entry requirement). Nor does the Texas Constitution itself require specific journal entries related to the events surrounding its drafting.

244. *See Maldonado v. State*, 473 S.W.2d 26, 28 (Tex. Crim. App. 1971) (“We will not look behind the engrossed bill to see if the Governor issued a proclamation including the subject matter of the enacted legislation. All cases holding to the contrary are overruled.”).

245. Ass’n of Tex. Pro. Educators v. Kirby, 788 S.W.2d 827, 830 (Tex. 1990); *see also* Save Our Springs All., Inc. v. Lazy Nine Mun. Util. Dist. 198 S.W.3d 300, 314 (Tex. App.—Texarkana 2006, pet.

the enrolled bill rule must exist to avoid elevating clerical error over constitutional law.”<sup>246</sup> The case that announced this rule involved an error in the enrolling process, the result of which was that the bill the Governor signed “was definitely not the version passed by the Senate.”<sup>247</sup>

There are several reasons that this exception should not apply to the Texas Constitution. For one thing, the exception’s basis is that a law must follow certain procedures to be “constitutionally enacted.”<sup>248</sup> But as just discussed, there is no higher law that could require the same from a constitution. For another, there is no reason to suspect that the differences between the engrossed drafts and enrolled constitution were the result of clerical error rather than intentional editing.<sup>249</sup> Finally, even if the exception could apply, invoking it would require “undisputed testimony” from officers who are no longer alive to give it.<sup>250</sup>

Scholars have criticized the enrolled-bill rule on several grounds, but none are persuasive in the constitutional context.<sup>251</sup> Some critiques argue that the rule undermines the separation of powers, for example, by violating the nondelegation doctrine.<sup>252</sup> But in the constitutional context, the rule does not seize power from another branch. Rather, it merely denies the judiciary power to second-guess the actions of an adjourned convention. These critiques leave intact the structural reasoning that favors the rule.

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denied) (“The Texas Supreme Court [in *Kirby*] only recognized a narrow exception when conclusive evidence shows ‘the enrolled bill signed by the governor was not the bill passed by the legislature,’ but did not otherwise modify the enrolled bill rule.”); Tracy Bateman et al., *Enrolled Bill Rule in Judicial Review of Enactment Procedures in Determining Constitutionality of Statutes and Ordinances—Exception to Application of Rule in Case of Clerical Error*, 12B Tex. Jur. 3d Constitutional Law § 63 (Apr. 2021 update) (discussing the exception).

246. *Kirby*, 788 S.W.2d at 829–30.

247. *Id.* at 828.

248. *Id.* at 830.

249. See *supra* note 227 and accompanying text.

250. *Kirby*, 788 S.W.2d at 830.

251. See generally Bar-Siman-Tov, *supra* note 221, at 323 (highlighting various criticisms of the enrolled-bill rule); Sandler, *supra* note 221, at 213 (arguing against the enrolled-bill rule).

252. See Bar-Siman-Tov, *supra* note 221, at 357 (“[T]he doctrine entails an impermissible delegation of judicial power . . . .”); see *id.* at 375–76 (“In treating lawmaking as a sovereign prerogative and the legislative process as a sphere of unfettered power immune from judicial review, [the enrolled-bill rule] deviates from *Marbury* and from the fundamental and well-settled principles of American constitutionalism.”); David B. Snyder, *The Rise and Fall of the Enrolled Bill Doctrine in Pennsylvania*, 60 TEMP. L.Q. 315, 326 (1987) (“Allegations that improprieties in the enactment process violate the constitution should be deemed justiciable [because] . . . such cases run[] contrary to the concept of ‘checks and balances,’ which is fundamental to our system of government.”).

Other criticisms argue that the rule is no longer practical because it is a negative incentive for Congress.<sup>253</sup> But unlike legislative sessions, constitutional conventions are rare, and there is no reason to think that the prospect of later judicial inquiry would provide any greater check against fraud or error than would contemporaneous attention from delegates. A third set of criticisms attacks the rule's empirical foundation, arguing that the rule is unnecessary because recent "technological developments . . . make it easier to reconstruct what actually happened in the legislative process."<sup>254</sup> But this is not an argument against applying the rule to an era that preceded modern innovations.

These criticisms do not apply to the creation of a constitution that occurred almost 150 years ago, so they should not prevent a court from applying the enrolled-bill rule to the Texas Constitution today. Indeed, both of the state's high courts still apply the enrolled-bill rule to statutes.<sup>255</sup> The reasoning behind these decisions shows that the rule should also apply in the constitutional context. The rule thus provides additional grounds to conclude that the convention framed only the enrolled constitution.

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As between the engrossed drafts of an individual article and the enrolled constitution, the latter must prevail. The secretary of state confirmed the same when he attested that the pamphlets the State distributed to the people ahead of the ratification vote were "true and correct copies of . . . the proposed Constitution of the State of Texas, *as enrolled*."<sup>256</sup> That conclusion would end this Article if the copies were accurate. But they were not.

#### IV. THE PEOPLE RATIFIED THE FRAMED CONSTITUTION

Texas voters never received a perfect reproduction of the enrolled constitution before the ratification vote. Instead, they received printed

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253. See Sandler, *supra* note 221, at 248 ("If the courts do not permit review, the legislature may never become aware of a defect. And where the legislature may be aware of a defect, there are few incentives for making it public. Congress can sweep it under the rug and do nothing about it.")

254. Bar-Siman-Tov, *supra* note 221, at 335; see also Adler & Dorf, *supra* note 231, at 1180 ("[I]f the only basis for [the enrolled-bill rule] is epistemic, then there does not really need to be an [enrolled-bill] doctrine . . ."); Sandler, *supra* note 221, at 242 ("Technological changes since *Field* have completely transformed Congress's recordkeeping.")

255. See generally *Ass'n of Tex. Pro. Educators v. Kirby*, 788 S.W.2d 827 (Tex. 1990) (recognizing the applicability of the enrolled-bill rule and its exceptions); *Maldonado v. State*, 473 S.W.2d 26, 28 (Tex. Crim. App. 1971) (upholding application of the enrolled-bill rule).

256. ENGLISH COPY, *supra* note 99, at 26 (emphasis added).



copies that contained various discrepancies and imperfections.<sup>257</sup> Most differences were harmless, but some were substantive.<sup>258</sup> Some copies were printed in English.<sup>259</sup> Others were printed in foreign languages.<sup>260</sup> Some copies bore a seal certifying conformance with the enrolled constitution. Others did not.<sup>261</sup> The copies that voters received thus differed both from the enrolled constitution and from each other.

Determining which (if any) of these documents is in effect today “requires us to dust off and put to work first principles”—or rather, a single principle: popular sovereignty.<sup>262</sup> This foundational concept holds that a state’s “constitution does not derive its force from the convention which framed [it], but from the people who ratified it.”<sup>263</sup> It was, after all, “the people” of Texas who did “ordain and establish” the state’s constitution.<sup>264</sup> So, in determining which copy of the constitution governs the state today, “the intent to be arrived at is that of the people.”<sup>265</sup>

Applying the principle of popular sovereignty makes for an easy determination: the people ratified the enrolled constitution. Part IV.A begins by showing that the convention intended to offer that copy to the people for a vote. And more importantly, it was the enrolled constitution that the people would have expected—and thus intended—their vote to ratify. Contemporaneous caselaw reinforces this conclusion. Part IV.B continues by offering an additional argument, one of negative implication.

257. See *supra* Part II.D.

258. See *supra* Part II.D.

259. At least two such copies survive, the English copy, see *supra* note 99 and accompanying text, and the newspaper copy, see *supra* note 117 and accompanying text.

260. See *supra* Part II.C.

261. In fact, the vast majority of printed copies were newspaper prints, which did not have an official seal. MCKAY, *supra* note 3, at 179.

262. Akhil R. Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 (1987).

263. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 66 (2d ed. 1871); see also ELLIS PAXSON OBERHOLTZER, THE REFERENDUM IN AMERICA 72 (1912) (“There has never been the slightest doubt in the minds of publicists who have written of our institutions as to where sovereignty resides. It resides with the people. They are the original source of the government’s authority; it is with them as the object of its activities that the state exists.”); Andrew G. I. Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061, 1079 (“The American conception of popular sovereignty completely remapped the representative structure of government.”).

264. TEX CONST. pmb. While there are linguistically significant differences in the various versions of the preamble, these words are the same in every copy. See Boatright, *supra* note 1, at 5–7 (comparing different versions of the preamble).

265. COOLEY, *supra* note 263, at 66.

Popular sovereignty means that Texas must have *some* constitution in effect, and because the other copies all lack a coherent claim to authoritative status, the enrolled constitution must be the constitution that governs today.

A. *The Original Vote Ratified the Framed Constitution*

Seventy percent of ratification votes were in favor of the new constitution.<sup>266</sup> The convention's own records and the explanatory text that accompanied the printed copies make clear that these votes applied to the enrolled constitution that the convention framed. Caselaw from the time shows that this conclusion is correct and that it reflects the outcome the people would have expected, even had the copies lacked any explanatory text. Because the people would have understood that they were voting on the enrolled constitution, their vote ratified that document rather than any of the printed copies.

1. The Convention Proposed the Framed Constitution

The convention assembled only because the people of Texas, in a popular vote, decided that it should and chose its delegates.<sup>267</sup> These actions were an exercise of the people's sovereign power.<sup>268</sup> Indeed, because the 1869 Constitution did not discuss constitutional conventions, the power that resides in the people themselves is the only source that could have authorized the convention at all.<sup>269</sup> The delegates thus spoke for the people rather than for themselves.<sup>270</sup> That is why the convention's ordinances

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266. See MCKAY, *supra* note 3, at 179 (“There were cast for the constitution 136,606 votes; against the constitution 56,652 votes.”).

267. See *supra* notes 53–55 and accompanying text.

268. DEBATES, *supra* note 56, at 141 (reporting John H. Reagan’s argument that “it [i]s the inalienable right of the people to meet in assembly or convention whenever they so desire”); *id.* (reporting that Reagan’s interlocutor, though in opposition on other points, agreed that “[t]he Convention could not have assembled except in obedience to the popular voice”); see also WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 51 (1910) (“The practice of obtaining the popular approval for the calling of a convention may be said to have become almost the settled rule.”).

269. MAY, *supra* note 11, at 404.

270. See *Quinlan v. Hous. & Tex. Cent. Ry. Co.*, 34 S.W. 738, 744 (Tex. 1896) (“[W]hen a convention is called to frame a constitution . . . [t]he delegates to such a convention are but agents of the people, and are restricted to the exercise of the powers conferred upon them by the law which authorizes their election . . . .”); see also *Boatright*, *supra* note 1, at 16 (“[T]he people do not merely ratify the constitution, they also frame it insofar as they elect representatives.”); Kilberg, *supra* note 263, at 1074 (explaining that a constitutional convention is necessary to exercise the people’s sovereign

(directives which, among other things, established the timing and manner of ratification) all begin with the phrase: “*Be it ordained by the People of Texas, in convention assembled.*”<sup>271</sup> To determine the intent of the people, then, it is first necessary to determine the intent of the convention.<sup>272</sup>

The convention intended the enrolled constitution to control not only over *previous* drafts,<sup>273</sup> but also as against *subsequent* printed copies. Most obviously, the convention “appointed a committee to supervise the printing of the constitution, and see that the work [wa]s done in accordance with the enrolled copy.”<sup>274</sup> Similarly, the convention established by ordinance “[t]hat the new Constitution, *framed* by this Convention, shall be submitted to the electors of this State . . . for their ratification or rejection.”<sup>275</sup> The enrolled constitution was the only document that the convention framed,<sup>276</sup> and it was the only copy that the convention intended to submit to the people for a vote.<sup>277</sup>

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power to enact a constitution because “[a]ction undertaken directly by the whole people [i]s impractical; proposal and deliberation of changes in fundamental law [i]s impossible[.]” and “the people [c]an[.]not assemble as a whole to discuss proposals”).

271. ENGLISH COPY, *supra* note 99, at 35.

272. *See* Boatright, *supra* note 1, at 18 (“[T]he notion that the people are the source of all governmental power does not give rise to the inference that ratification is the most important step in the creation of a constitution; it gives rise to the inference that framing and ratification are equally important steps in the process of making a constitution.”).

273. *See supra* Part III.

274. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 780.

275. ENGLISH COPY, *supra* note 99, at 35 (emphasis added).

276. *See supra* Part III.

277. By 1876, the practice of submitting state constitutions to a popular vote was well-established in Texas and in other states. *See* CHARLES SUMNER LOBINGIER, *THE PEOPLE’S LAW* 285 (1909) (“In Texas . . . popular ratification as a part of its public law is older than the state.”); *see also id.* at 285–91 (discussing the history of popular ratification in other states). But it was not always so. *See* DODD, *supra* note 268, at 62 (“[O]f the state constitutions adopted before 1784[,] only those of New Hampshire and Massachusetts were formally submitted to a vote of the people . . . .”); *see also id.* at 67 (discussing departures from this custom in the late nineteenth century). *But see* JAMESON, *supra* note 176, at 439 (arguing that popular ratification is always necessary). The vote that authorized the 1875 convention did not *require* the convention to submit the constitution to the people. *See supra* notes 53–55 and accompanying text. Conceivably, then, the convention could have dispensed with that custom. *See* DODD, *supra* note 268, at 69 (“[T]he only rules positively binding a convention to submit its constitution to the people are those contained in the constitution [that then governs].”). But the convention itself chose otherwise, mooted further discussion along these lines. *See* ENGLISH COPY, *supra* note 99, at 35 (“If . . . a majority of all the votes . . . cast and returned be against ratification, then the new [c]onstitution shall have and be of no effect whatever.”).

## 2. The People Ratified the Framed Constitution

Among the nearly 200,000 Texans who visited the polls on February 15, 1876,<sup>278</sup> there were likely few, if any, who actively contemplated whether their vote would apply to a manuscript enrolled in Austin as opposed to one of the printed copies that circulated throughout the state.<sup>279</sup> That is no cause for concern. The differences in the English copy were relatively minor, and there is no evidence that any were maliciously introduced.<sup>280</sup> And each copy in every language included text indicating that the enrolled constitution was the authoritative document. Thus, any voters who *did* actively consider the subject could have come to but one conclusion about which document their vote would apply to.<sup>281</sup>

First, each copy that the state printed and designated “official”—whether printed in English or otherwise—included a paragraph certifying that the text contained “true and correct copies of all articles of the proposed Constitution of the State of Texas, *as enrolled* and now on file in the Department of State.”<sup>282</sup> This certification followed immediately after the proposed constitutional text, and it affirmatively established that the copies were just that—“copies.”<sup>283</sup> Of greater importance, however, is the fact that the certification appeared at all. If the copy itself were proposed for ratification, then a certification of conformance to some other document would have been entirely unnecessary.<sup>284</sup> Indeed, it would have been

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278. DEBATES, *supra* note 56, at 179.

279. *See supra* Part II.C.

280. *See supra* note 227 and accompanying text. Minor differences in punctuation can, of course, lead to major changes in meaning, as a decision from the Texas Supreme Court had shown just a few years earlier. *See supra* notes 130–36 and accompanying text (discussing *Ex parte Rodriguez*, 39 Tex. 705 (1873)). Minor differences can also be the product of strategic addition. *See, e.g.*, Treanor, *supra* note 176, (manuscript at 5, 15) (on file with author) (discussing “a series of subtle textual changes of great import” introduced via a “dishonest scrivener” who sat on the committee that styled and arranged the U.S. Constitution).

281. A thoughtful voter, of course, also would have considered the convention’s intent. *See supra* Part IV.A.1.

282. ENGLISH COPY, *supra* note 99, at 26 (emphasis added); *see also supra* note 115 and accompanying text.

283. ENGLISH COPY, *supra* note 99, at 26; *see also supra* note 115 and accompanying text.

284. It might be argued, on the contrary, that the certification would be useful to show that the printed copies conformed to the enrolled constitution even if the printed copies would ultimately control. For example, voters might have found it helpful to know that the copies were faithful reproductions of the convention’s handiwork. But this argument would render the certifications at best superfluous. *Of course* the copies reflected the convention’s work—they cannot have come from anywhere else. And if the copies were intended to become binding themselves, then one would expect

downright confusing.<sup>285</sup> The certification was intended to show that the copies matched the enrolled constitution, and in so doing, it also confirmed that the enrolled constitution was the document to be ratified.<sup>286</sup>

The newspaper copy included a similar explanation, printed in English, stating conspicuously at the top of the first column on the first page that the text that followed was “carefully compared with the original copy in the state department.”<sup>287</sup> This “original copy” must have been the enrolled constitution.<sup>288</sup> The description is significant because it shows that the printer—assumedly a private citizen—regarded the enrolled constitution as

to see a different kind of certification, perhaps one attesting that the copies matched *each other* rather than the enrolled constitution.

285. Another view is that the delegates knew that the English copy would become legally effective and included the certification to show that the legally effective copy matched the framed constitution. This argument fails for the reasons discussed *infra* Part IV.B.2.

286. The same arguments follow from the resolution that closed the English copy—which was the *only* resolution that appeared in that copy. ENGLISH COPY, *supra* note 99, at 36 (appointing a committee to ensure that the constitution was printed “in accordance with the enrolled copy”). The foreign-language copies, too, reprinted this resolution but no others. *See supra* note 115 and accompanying text.

287. Newspaper Copy, *supra* note 117 (photographs on file with author). The enrolled constitution was transferred to the secretary of state when the convention adjourned. *See* CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 820 (reporting that the convention asked the secretary of state to prepare a “certified copy” of the constitution, a copy which can have been generated only from the enrolled constitution (since the English copy had not yet been printed)).

288. The description “original copy” is somewhat odd since the words that form it are antonyms. Read literally, this description would mean that the “original copy” was not the enrolled constitution itself but was instead the *first*—i.e., “original”—copy of that instrument. After all, there were two thousand English copies on file with the secretary of state. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800. There are several reasons to reject this argument. First, there is good evidence that the English copy was still being prepared even while the newspaper copy was printed on December 2. For example, the English copy did not arrive in Dallas until December 7. *See Brown Letter*, *supra* note 116, at 2 (reporting that the author, a delegate to the convention, received “on Thursday last [i.e., Dec. 7] four hundred and twenty-two copies” of the English copy). Second, this reading would render the word “original” meaningless. Even after the English copies were printed, there was only one set of copies on file at the state department. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800. Third, the newspaper copy more closely matches the enrolled constitution than it does the English copy. The preamble, for example, exactly matches the enrolled constitution. And where the newspaper copy differs from the enrolled constitution, it *also* differs from the English copy. For example, the newspaper copy’s text of article II differs from both, but it still more closely matches the enrolled constitution. Accordingly, the better reading is that the word “copy” in the description means “version” or “instance” rather than “reproduction.” *See, e.g.*, 2 THE CENTURY DICTIONARY AND CYCLOPEDIA 1257 (1896) (defining “copy” in this sense as: “The thing copied or to be copied; something set for imitation or reproduction; a pattern, exemplar, or model”); *see also* RICHARDSON, *supra* note 13, at 215 (using “original copy” in this sense in reference to the 1836 Constitution, as enrolled).

authoritative, not the English copies.<sup>289</sup> There were many such copies in circulation, and it would have been much easier for the printer to certify that the newspaper copy conformed to one of these “official” copies if they were indeed authoritative. The newspaper copies outnumbered the English copies two-to-one,<sup>290</sup> but a voter reading either would see unmistakable evidence that the enrolled constitution was authoritative—and thus the object of the ratification vote.

Second, and in particular regarding the English copy, voters would have expected that the printed copies—even those designated “official”—might contain typographical errors and would *not* have expected these errors to become binding through ratification. The state’s constitutional history would have been one source of this expectation. For example, the pre-ratification printed copy of the 1869 Constitution was distributed with a supplemental “errata” sheet correcting more than two dozen errors that appeared in the printed copy.<sup>291</sup> Copies of earlier constitutions contained similar inconsistencies, though not always errata sheets.<sup>292</sup> None of these errors became binding law. Instead, minor errors inevitably crept into documents—and even into copies of constitutions—that were printed in an era that relied on human typesetters.

Third, although foreign-language copies of prior Texas constitutions had existed for almost fifty years, only one was positive law in a language other than English.<sup>293</sup> The 1827 Constitution was authoritative in both English

289. The newspaper copy bears no indicia of authorship or origin, though it has been dated to 1875. WINKLER & FRIEND, *supra* note 117, at 607. The newspaper copy also appears to have been included with at least one newspaper in that year. See generally *Statesman Copy*, *supra* note at 117 (showing the newspaper copy printed in a newspaper).

290. See *supra* notes 99, 116 and accompanying text.

291. See ENGLISH COPY, *supra* note 99, at 76. The Spanish copy of the 1876 Constitution included an errata sheet, though no other copy did. SPANISH COPY, *supra* note 5, at 136. The translator for the Spanish copy was Luis de Tejada. *Id.*

292. RICHARDSON, *supra* note 13, at 216 n.73 (noting “considerable difference in punctuation” in copies of the 1836 Constitution); see also Garrett, *supra* note 11, at 308 n.2 (noting “several” inconsistencies in copies of the 1813 Constitution).

293. See GONZÁLEZ OROPEZA & DE LA TEJA, *supra* note 21, at 30 (discussing the 1827 Constitution). The 1836 Constitution was printed only in English. The 1845 Constitution was printed in English and translated into Spanish and German, but only after the English version was ratified. See 1845 JOURNALS, *supra* note 38, at 220. Reports of the decisions of Texas courts began in 1840. Dylan O. Drummond, *Dallam’s Digest and the Unofficial First Reporter of the Supreme Court of Texas*, 2 TEX. SUP. CT. HIST. SOC. J. 8, 11 (2013). From that year through 1875, no reported decision treats a foreign-language translation of any Texas constitution as authoritative law. This strongly suggests that the English copies were the only authoritative instruments in those years, and that voters in 1876 would not have expected the foreign-language copies of the proposed constitution to become binding law.

and Spanish, but only because it was drafted and “read in full” in both original languages and enrolled in “two original copies [that] were signed by all representatives” who were members of the drafting body.<sup>294</sup> What happened at the Convention of 1875 was hardly similar. Rather than drafting in multiple languages simultaneously, the delegates simply voted to print copies in foreign languages, delegating the translation to the printers themselves.<sup>295</sup> These translations were never read at the convention, and the delegates never signed them. The 1827 Constitution is thus the “only instrument of its kind promulgated simultaneously in Spanish and English.”<sup>296</sup>

Fourth, curious voters who turned to contemporary legal sources would have concluded that their votes would apply only to the enrolled constitution. No reported cases, and certainly no Texas cases, address the differences between enrolled and printed copies of a constitution, but there are a number of authorities that discuss similar discrepancies in the statutory context. These authorities deserve persuasive weight in the constitutional context because they are closely analogous. And to the extent that they are contemporaneous, the sources indicate what the people’s expectations must have been before the ratification vote.

In the statutory context, “[w]hen there is a discrepancy between the printed statute and the enrolled act, all the authorities agree that the latter controls.”<sup>297</sup> The Texas Supreme Court announced the same rule in 1870—just six years before the ratification vote.<sup>298</sup> In that case, *Central*

294. GONZÁLEZ OROPEZA & DE LA TEJA, *supra* note 21, at 25.

295. *See supra* notes 101–03 and accompanying text.

296. GONZÁLEZ OROPEZA & DE LA TEJA, *supra* note 21, at 30.

297. 1 J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 123–24 (1904); *see also id.* at n.44 (collecting cases).

298. *Cent. Ry. Co. v. Hearne*, 32 Tex. 546 (1870). Though the year was 1870, the month was only January, so the Texas Supreme Court’s membership did not yet consist of the justices who later that year decided *Ex parte Rodríguez*. *See supra* notes 130–36 and accompanying text; *see also* HALEY, *supra* note 133, at 238 (listing the justices who sat on the Texas Supreme Court in 1870). Instead, the court as it existed in early 1870 is “known as the Military Court.” TEXAS RULES OF FORM: THE GREENBOOK 100 (14th ed. 2018). The Military Court’s decisions “are generally not given precedential weight.” *Id.* *Hearne* appears to be an exception. *See, e.g.,* *Nueces County v. King*, 350 S.W.2d 385, 387 (1961) (citing *Hearne* as the origin of the enrolled-bill rule in Texas); *Atchison, Topeka & Santa Fé Ry. Co. v. Hix*, 291 S.W. 281, 283 (Tex. App.—El Paso Dec. 30, 1926) (citing *Hearne* for the proposition that an “enrolled bill controls”). And even if *Hearne* is not strictly precedential, it would have been among the foremost legal sources to which a voter would turn in 1875, and it would have been an important factor affecting voters’ expectations in that year.

*Railway Co. v. Hearne*,<sup>299</sup> the printed copy of a statute allowed a railroad company to charge a rate not to exceed “fifty cents per hundred pounds[] and twenty-five cents per foot” of freight.<sup>300</sup> But the enrolled statute used the conjunction “or.”<sup>301</sup> The plaintiff argued that the printed copy should control.<sup>302</sup> The district court agreed and refused to admit evidence of the enrolled statute’s text.<sup>303</sup> The Texas Supreme Court reversed, holding that “the enrolled bill [i]s the best evidence of the terms and meaning of the law as it passed the legislature,” and that the district court erred by not admitting it to correct the printed copy.<sup>304</sup>

High courts in other states have reached the same conclusion. For example, in *State v. Marshall*,<sup>305</sup> the Supreme Court of Alabama considered whether an indictment that mirrored the printed copy of a statute in charging a defendant with “attempt” to murder was sufficient when the enrolled statute required the indictment to charge the defendant with “intent.”<sup>306</sup> The court answered, after it had “examined the enrolled bill,”<sup>307</sup> that the indictment was not sufficient and that the defendant should “be discharged by due course of law.”<sup>308</sup> Likewise, the Supreme Court of Kansas in 1874 explained that a bill “filed away by the secretary of

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299. *Cent. Ry. Co. v. Hearne*, 32 Tex. 546 (1870).

300. *Id.* at 562 (emphasis added).

301. *Id.*

302. *Id.* at 561 (emphasis added). The consequence of the difference was not whether the railroad company could assess *both* rates against a single shipment, and it had not attempted to do so. *Id.* Rather, the issue was whether the railroad company had an obligation to impose a charge using only the *lower* of the two rates. For if the railroad’s charge could not exceed a certain rate by the “pound” *and* also could not exceed a certain rate by the “foot,” then the total rate could not exceed whichever rate was lower.

303. *Id.* at 562.

304. *Id.* at 561; see BRADEN, *supra* note 61, at 121 (“The enrolled bill is also the exclusive source of the text of a statute, and in case of conflict between it and the printed text, the enrolled version prevails.”); see, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Hix*, 291 S.W. 281, 283 (Tex. App.—El Paso Dec. 30, 1926) (supp. op. Feb. 24, 1927) (“This court is not advised how it happens that the printed copy differs from the enrolled bill. In any event, the change was unauthorized and the enrolled bill controls.”); *Williams v. Sapieha*, 59 S.W. 947, 949 (Tex. App. 1900, no writ) (“This article was omitted from the Revised Statutes as published, but the omission was a mistake of the printers. The article, in fact, appears in the enrolled bill, and is now in force.”).

305. *State v. Marshall*, 14 Ala. 411 (1848).

306. *Id.* at 414. The same court later upheld a jury verdict that used “attempt” instead of “intent.” *Prince v. State*, 35 Ala. 367, 369 (1860). This decision does not overrule *Marshall*, for it holds merely that “[v]erdicts are not construed strictly, as pleadings are,” and that “it could never be tolerated that a distinction so technical should be applied in construing the verdict of a jury.” *Id.*

307. *Marshall*, 14 Ala. at 414.

308. *Id.* at 415.



state, [i]s the highest evidence of what the law is” and is “the embodiment of the ‘act’—the ‘law.’”<sup>309</sup> Many other state high courts have held the same, and at least as of 1891, none had held otherwise.<sup>310</sup>

Federal courts have stated the same rule, albeit in dicta. For example, in *Pease v. Peck*,<sup>311</sup> the Supreme Court acknowledged, “as a general rule, that the mistake of a transcriber or printer cannot change the law; and that when the statutes published by authority are found to differ from the original on file among the public archives, that the courts will receive the latter as containing the expressed will of the legislature in preference to the former.”<sup>312</sup> And while riding circuit, Justice McLean noted that a court could “receiv[e] the original enrolled bill to correct an error” in a printed copy.<sup>313</sup> The rule that enrolled statutes control over printed copies was thus well-established by 1876, and it would have been among the first to which any court (or citizen) would turn to answer whether an enrolled constitution would receive the same priority.<sup>314</sup>

These observations show that the voters in 1876 would have expected their votes to apply to the enrolled constitution. This does not mean that the voters could not trust the copies that were available for examination. Instead, it reflects the commonsense view that the enrolled constitution would control in any case that turned on the difference between it and the printed copies. Because it is clear that the people would have *expected* their vote to apply to the enrolled constitution, it is equally clear that the people *intended* to ratify that document by voting for it. Respect for popular

309. *Sedgwick Cnty. Comm'rs v. Bailey*, 13 Kan. 600, 608–09 (1874).

310. See SUTHERLAND, *supra* note 297, at 123 (1891) (noting that “all authorities” agree on this point); see also, e.g., *Greer v. State*, 54 Miss. 378, 381 (1877) (“It is hardly worth while to observe that the omission to embody in the printed Code the section quoted from the original bill in the secretary of state’s office does not affect its validity as law. The highest and most conclusive evidence of a statute is the enrolled bill.”); *Bruce v. State*, 48 Neb. 570, 570 (1896) (“Procedure merely makes the printed laws published under authority of the state presumptive evidence of such laws. In case of conflict[,] the original enrolled act . . . is the controlling evidence.”).

311. *Pease v. Peck*, 59 U.S. 595 (1855).

312. *Id.* at 596–97. The statement was dicta because the Court held (over a dissent) that the purported errors in the printed copy had later “received the sanction of the [state] legislature.” *Id.* at 596.

313. *Reed v. Clark*, 20 F. Cas. 433, 433 (C.C.D. Mich. 1844). The statement was dicta because the court refused leave for the defendant to late-file the plea that brought to light the differences between the printed and enrolled copies.

314. With some digging, a court might also have discovered that the enrolled version of the 1836 Constitution had been lost, and that “[n]o enrolled copy having been preserved, th[e] printed one was recognized and adopted as authentic.” LINN, *supra* note 33, at 55. This quote obviously implies that the enrolled version of the 1836 Constitution would have taken priority had it been preserved.

sovereignty requires acknowledging that the people's intent is controlling, and thus that the enrolled constitution is currently in effect.<sup>315</sup>

#### B. *Alternative Theories Rejected*

An additional path leads to the same conclusion, again using the principle of popular sovereignty. Voters in 1876 cannot have intended their votes to mean nothing. And the decades since—which have seen hundreds of popularly-ratified amendments, not to mention constitutional government—rebut any argument that the state altogether lacks a constitution. It would defy popular sovereignty to conclude that procedural defects (if any) in the original ratification render moot all that has come since. So, the 1876 Constitution must be in effect. And if any doubt exists about whether the enrolled constitution is the controlling copy of that instrument, considering the other possibilities removes it. The English copy was neither framed nor ratified, and in any event, it stands on no better ground than the foreign-language copies. Nor is the possibility of a multi-lingual constitution convincing. The delegates drafted in English, with translation little more than an afterthought, and no foreign-language copy was ever enrolled. These observations confirm that the enrolled constitution is controlling.

##### 1. Theory: Texas Has No Constitution

The arguments that Texas does not have a constitution come in several guises, but among them are at least the following.

First is a formal argument along these lines: (a) Texas has a constitution only if a single instrument was framed by the convention and ratified by the people;<sup>316</sup> (b) no single instrument meets these criteria; (c) therefore, Texas does not have a constitution. The preceding parts of this Article have argued that the second premise is incorrect, i.e., that the enrolled constitution *does* meet the criteria.<sup>317</sup> But what if the printing deviations and other missteps are just too many? After all, the convention's own ordinances required that the "framed" constitution "be submitted to the electors of this state" to become valid.<sup>318</sup> And it is true that the English copy that voters saw differed from the enrolled constitution the delegates

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315. COOLEY, *supra* note 263, at 66.

316. *See, e.g.*, Boatright, *supra* note 1, at 4 (discussing a similar argument).

317. *See supra* Parts III, IV.A.

318. ENGLISH COPY, *supra* note 99, at 35.

framed—to say nothing of the foreign-language and newspaper copies. What's more, the secretary of state incorrectly certified that the English copy contained the “true and correct” text of the framed constitution.<sup>319</sup>

This argument fails because it is impossible to square with the principle of popular sovereignty. The people in 1876 voted overwhelmingly “For the [c]onstitution.”<sup>320</sup> The people have since voted to approve more than five hundred amendments to that constitution.<sup>321</sup> Similarly, voters in the 1970s approved an amendment that called for the creation of a commission to revise the constitution.<sup>322</sup> Although voters ultimately rejected the commission's changes, everyone involved agreed that the 1876 Constitution then governed.<sup>323</sup> So, too, has every citizen to ever cast a vote for a candidate running for an office created under the constitution's terms, or to recognize the authority of the laws issuing from those offices. To ignore these manifestations of the people's sovereign will would be to “elevat[e] clerical error over constitutional law.”<sup>324</sup> The Texas Constitution exists.<sup>325</sup>

A second argument might, while affirming the constitution's theoretical existence, point to the imperfections in the printing and ratification process

319. *Id.* The foreign-language copies included a translated certification to the same effect. See *supra* note 114 and accompanying text.

320. ENGLISH COPY, *supra* note 99, at 35.

321. See generally *Amendments to the Constitution*, *supra* note 125 (listing proposed and adopted amendments to the Texas Constitution). Every amendment has assumed that an underlying constitution exists. Importantly, however, a mere amendment cannot ratify the underlying constitution. Not only has no amendment ever purported to do so, but even if one had, the object of implicit ratification would still be indeterminate. That is, there would still be the question of *which* copy the amendment ratified. It is also questionable whether a single amendment could carry the force of law if the underlying charter did not actually exist. Even if it could, many of the most important provisions in the 1876 Constitution have never been amended (e.g., the first ten sections of the Bill of Rights) and would thus be lost if the constitution consisted only of amendments. *Id.*

322. See BRADEN, *supra* note 61, at 827–37 (summarizing the revision commission's creation, work, and impact).

323. The most obvious evidence for this point comes from the fact that the amendment that created the revision commission amended the 1876 Constitution rather than some other instrument. TEX. CONST. art. XVII, § 2 (amended 1999).

324. Ass'n of Tex. Pro. Educators v. Kirby, 788 S.W.2d 827, 830 (Tex. 1990).

325. Had the 1876 Constitution never been ratified, then arguably the 1869 Constitution would govern rather than no constitution at all. But that conclusion fits no better with the principle of popular sovereignty: the whole point of the convention (and of the ratification vote) was to create a new charter to *replace* the 1869 Constitution. Since then, voters have approved amendments only to the 1876 Constitution and have lived only under the system of government that it created. Importing those amendments to the prior charter would be, at best, a theoretical nightmare. And rejecting them would be to reject hundreds of expressions of the people's sovereign will. Reviving the 1869 Constitution is not a serious option.

as reasons for concluding that the constitution's text is fixed, but impossible to pin down. Still, the argument might continue, the various copies are very strong *evidence* of what that text is. On this view, the constitution exists, and with fixed text, but only in an abstract sense. It cannot be pulled from a shelf, but a curious citizen can—by examining the enrolled constitution, the English copy, and the other copies—come close enough to determining what the true constitution actually says. By acknowledging a constitution, this argument squares with popular sovereignty. And by relying on the copies to determine the constitution's meaning, it aligns with the commonsense view that the state cannot be wholly without a governing charter.

The appeal is only superficial. A constitution, especially one in the American tradition, is valuable chiefly because it is written.<sup>326</sup> If the constitution's written text is impossible to determine, then the constitution cannot serve its most important function.<sup>327</sup> Moreover, from the perspective of popular sovereignty, the people did not vote to ratify a constitution that was merely theoretical, nor have they ever agree to be governed by a constitution that contains no determinable governing text.<sup>328</sup>

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326. "Written" is used here in the literal sense, a sense that includes both sides of the "written-unwritten distinction [that] is . . . routinely invoked to contrast the American and British systems of fundamental law." Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 999 (2009); *see id.* at 999 n.38 ("[M]ost of the British Constitution 'is written, somewhere' and . . . what the British lack is a 'codified' constitution—a document 'in which all the principal constitutional rules are written down in a single document named 'The Constitution.'") (quoting ADAM TOMKINS, PUBLIC LAW 7 (2003)). And while a constitution need not be written, American constitutions are. *See* Stephen Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 168 ("[Y]ou can have a bona fide originalism in a society that uses no written instruments at all."); Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1030 (2010) ("Our commitment to the written constitution may mean that we are unlikely to accept an answer that does not accord some role to the constitutional text.").

327. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (discussing "the greatest improvement on political institutions—a written Constitution"); *see also id.* at 176–77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution is written. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently . . . an act of the legislature, repugnant to the [C]onstitution, is void. This theory is essentially attached to a written constitution . . .").

328. In the scholarly debate about whether the United States has an "unwritten constitution," all participants agree that the country also has a constitution that is written. *See generally* AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (2012); David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532 (2013) (book review); *see also* Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1800 (2013) (discussing the "many" possible meanings of the term "unwritten constitution.").

So the second argument is merely a variation of the first, and it fails for the same reasons.

A third argument refines the point even further, and it comes closest to describing the rule that Texas courts appear to use. Broadly, the third argument holds that the constitution exists, and can be put into words, but that its text consists *only* of the words and punctuation that appear in every copy.<sup>329</sup> This view accords with popular sovereignty by acknowledging that the constitution exists and has fixed, determinable text. It also accords with the state's judicial opinions, which have treated multiple English copies as authoritative.<sup>330</sup> No court has said so explicitly, but taken as a whole, the state's judicial opinions reflect a rule something like: "The constitution consists of (and only of) the text that appears in the English-language copies, to the extent that the copies do not conflict." From a practical perspective, the idea of a "collective" constitution has served courts and litigants well—no case has yet presented an issue that explicitly required a court to choose between copies.<sup>331</sup>

There are several reasons to reject this argument, despite its practical draw. To begin, the collective constitution was neither framed nor ratified. Parts of it were, but not the whole thing.<sup>332</sup> Worse, if the only way to arrive at a single, valid constitution is to build it out of several invalid parts, then there is a logical argument that the better course is to instead reject every part. After all, that is how the law treats a bill that passes both houses in

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329. This argument could include as few as two copies (for example, the enrolled constitution and the English Copy) or as many as four (adding the engrossed drafts and the newspaper copy). It could even include the foreign-language copies, but only if there were an official method of comparing their content against the English copies.

330. See *supra* Part IV.A.3.

331. This does not mean that no case has *in fact* turned on the differences between copies. For example, cases discussing article III, section 47's prohibition against "evasions" of the lottery ban would have come out differently if the courts that decided them had relied on the engrossed drafts of the constitution, which contain no such prohibition. See *supra* notes 127–28 and accompanying text; see also, e.g., *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701–02 (Tex. 1936) ("Defendant in error's 'Bank Night' plan was obviously an evasion of the lottery laws . . . . Therefore, defendant in error's 'Bank Night' plan stands condemned by the Constitution of Texas. . . . [I]t follows that in this case the defendant in error in seeking to enjoin the void ordinances in question had no right to be protected."). Instances of more recent vintage exist, but describing them would not further this Article's aims.

332. See *supra* Part II.

different forms.<sup>333</sup> Concluding that every constitution governs is arguably, then, just another way of saying that none does.

Next, the idea of a collective constitution fits uneasily with the traditional inclinations that place a constitution near the center of the state's identity and affairs. A charter with such lofty functions ought best to consist of a single document, and it ought not to depend so heavily on nuance and technicality for its very existence. Finally, the "collective constitution" theory gives no answer to what courts ought to do when a conflict *does* arise between copies. Thus, while perhaps useful as a descriptive account of what Texas courts have done, combining the English copies into a collective constitution merely sidesteps the question of which copy actually controls.

## 2. Theory: The English Copy Controls

The English copy certainly looks official, just as the copy's cover designates it.<sup>334</sup> The secretary of state's seal bookends the designation, certifying that "the above and foregoing pages contain, and are true and correct copies of all the articles of the proposed [c]onstitution."<sup>335</sup> Forty thousand such copies were printed and made available to the people of Texas before the ratification vote.<sup>336</sup> These (and other) observations form a plausible argument that the English copy was both framed and ratified, and therefore controls. The argument fails, however, because it cannot elevate the English copy above the enrolled constitution—nor even above the foreign-language copies.

Did the convention frame the English copy? There are a few reasons to think so. First, the convention appointed a committee to supervise the English copy's printing.<sup>337</sup> Perhaps this committee, like the style committee before it, had independent authority to conform the printed draft to its own liking.<sup>338</sup> And perhaps in exercising this authority, it spoke for the convention as a whole. If so, then the convention might have framed the English copy. Second, unlike the foreign-language copies, the English

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333. See, e.g., TEXAS LEGISLATIVE COUNCIL, THE LEGISLATIVE PROCESS IN TEXAS 6 (2018) ("Failure of the conference committee to reach agreement kills the bill.").

334. ENGLISH COPY, *supra* note 99, at 1.

335. *Id.* at 26.

336. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800. Two thousand of these were "deposited" with the secretary of state, but even these were presumably available to someone. *Id.*

337. *Id.* at 780.

338. See *supra* note 176 and accompanying text (discussing a style committee's theoretical authority to make substantive changes to the drafts of each article of a constitution).

copy was filed with the secretary of state.<sup>339</sup> This filing differentiates the English copy from the foreign-language copies. And once filed, the English copy might have superseded the enrolled constitution that had previously been filed in the same manner.<sup>340</sup> Third, even if these facts are not concrete evidence that the English copy is formally authoritative, they might still show that the convention at least *intended* the English copy to be the final embodiment of its work.<sup>341</sup> And maybe all of these observations are together enough to establish that the convention framed the English copy.

Several further observations critically undermine this line of reasoning. The printing committee did not have the authority to approve changes to the English constitution. Instead, the committee's job was to ensure that the English copy matched the enrolled constitution.<sup>342</sup> And even if the committee did have the power to make minor changes, it cannot have been the convention's power, for the convention had already adjourned.<sup>343</sup> The printing committee had, at most, authority to make changes to the copies of the framed constitution—it did not have authority to frame a new one. Next, the two thousand English copies “deposited” with the secretary of state are hardly evidence of a formal filing.<sup>344</sup> The sheer volume shows that the delegates intended the copies for use as *copies* rather than as the formal record of the convention's work. More importantly, the convention made no provision for any one of the copies to be duly enrolled, signed by “the President of the Convention, [and] countersigned by the Secretary”—which

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339. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800.

340. *Id.* at 820.

341. Foremost, of course, the convention intended the English copy to *match* the enrolled constitution in every respect. But the convention's reliance on parliamentary procedure—and its frequent references to “engrossing,” “enrolling,” and “filing”—show that the delegates also intended to create some final copy that would control even if the match turned out to be less than perfect.

342. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 780; ENGLISH COPY, *supra* note 99, at 36.

343. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 821. The printing committee was not without some authority to amend the printed copies. Scrivener's errors, for example, may appear in a constitution just as they do in other documents. *See, e.g.,* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 348 (2002) (discussing apparent scrivener's errors in the U.S. Constitution). Had the printing committee noticed a scrivener's error in the enrolled constitution, it had the power to correct that error in the English copy. This correction would not have changed the enrolled constitution's legal content, but instead would have merely implemented that content more clearly. Critically, then, even these corrections would not have had any *legal* effect—just as the other changes in the English copy had no legal effect.

344. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800.

was the convention's normal procedure for authenticating final copies of binding instruments and ordinances.<sup>345</sup>

Nor did the convention intend to frame the English copy. True, no delegates supervised the foreign-language printing,<sup>346</sup> and no foreign-language copies were deposited with the secretary of state.<sup>347</sup> But these differences are easy enough to explain. A delegate supervising the foreign-language printing in Austin would have little to do but compare the printed copies to the printer's translation.<sup>348</sup> By contrast, the printing committee in Galveston could compare the English copies to a "certified copy" from the secretary of state.<sup>349</sup> Because the English copies were printed in greater numbers and in the common language,<sup>350</sup> greater supervision makes sense. The increased care also makes sense because the delegates most likely expected that the two thousand English copies deposited with the secretary of state would serve as working copies for the state's new government. Relying on these facts to infer that the convention intended to frame the English copy is also implausible because the words the convention wrote demonstrate a contrary intent. The *Journal* and the English copy state that the English copy should conform to the enrolled constitution. The delegates intended the English copy to *reflect* the enrolled constitution that the convention framed, but not to supersede it.<sup>351</sup>

But framing is not the end of the story. Rather: "All political power is inherent in the people. . . . [T]hey have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think

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345. See, e.g., *id.* at 24 (stating that the convention followed this procedure for an ordinance postponing the election); *id.* at 799 (noting that the convention followed this procedure for the enrolled constitution).

346. See *supra* notes 111–13 and accompanying text.

347. *Id.*

348. See *id.* (explaining that the convention delegated translation to the printers who printed the foreign-language copies).

349. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 820.

350. See *supra* notes 99–103 and accompanying text.

351. See CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 780 ("[T]he printing of the constitution [shall be] done in accordance with the enrolled copy."); ENGLISH COPY, *supra* note 99, at 26 ("[T]he above and foregoing pages contain, and are true and correct copies of all the articles of the proposed Constitution of the State of Texas, as enrolled."); *id.* at 36 ("[M]embers of this [Convention] . . . are hereby appointed [as] a committee to supervise the printing of the Constitution, and [to] see that the work is done in accordance with the enrolled copy.").



expedient.”<sup>352</sup> The people’s sovereign power would allow them to dispense with a convention altogether if they thought it expedient.<sup>353</sup> In other words, it is possible the people ratified a constitution that the convention did not frame.<sup>354</sup>

Did the people ratify the English copy? Again, an affirmative answer is plausible. The people’s sovereign power is surely sufficient to ratify the discrepancies that crept in at the printing office. And the differences are, for the most part, small enough that maybe only a little power is enough to do the trick. Even so, this argument is underwhelming. In particular, the textual evidence all favors the enrolled constitution.<sup>355</sup> On the other hand, the textual evidence is not as robust as it could have been. The convention did not explicitly adopt an ordinance stating anything like “the enrolled constitution is definitive as against any discrepancies that appear in any other copy.” But even ignoring the textual evidence does not lead to the conclusion that the English copy controls. Instead, it creates a new problem: how to decide among the English copy, the foreign-language copies, and the newspaper copy.

It might be tempting to choose the English copy based on volume. When the ratification vote occurred, there existed 40,000 English copies<sup>356</sup> and only one enrolled constitution.<sup>357</sup> But if volume alone were sufficient, then the newspaper copy—of which there were “over a hundred thousand” printed—ought to control.<sup>358</sup> Perhaps, in the alternative, the secretary of

352. TEX. CONST. art. I, § 2; ENROLLED CONSTITUTION, *supra* note 5, at 1; see Amar, *supra* note 262, at 286 (“Once we remember that it was popular ratification that transformed a mere proposal into binding law, we cannot but choose as our supreme legal text the edition that was in fact offered to and endorsed by the People of the United States *ipsisssimis verbis*; namely, the September 28 print [of the U.S. Constitution].”).

353. For example, a popular vote requiring Texas to adopt some other state’s constitution as its own (substituting the word “Texas” for the other state) would surely be binding, if logistically difficult to arrange.

354. Indeed, at least one prominent scholar has argued that this is how the U.S. Constitution came to be. See Amar, *supra* note 262, at 281–84 (arguing the “real Constitution” of the United States is a reprint of a reprint of a print of the engrossed parchment that the framers signed because this is the copy that saw “mass distribution” and that the states relied on in their ratifying conventions). For further discussion of the U.S. Constitution, see *infra* Part V.C.

355. See *supra* Part IV.A.2.

356. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 800.

357. See *id.* at 821 (referring to a single enrolled copy).

358. MCKAY, *supra* note 3, at 148. This number may be an exaggeration. *Id.* at 116. But even if it exaggerates the true number twofold, there were still 50,000 newspaper copies in circulation. It is impossible to know whether the newspaper copies all matched, but it seems unlikely. On the other

state's certification is dispositive.<sup>359</sup> But this route requires acknowledging that the foreign-language copies are also binding law.<sup>360</sup> And any argument that the English copy is binding because it is written in English cannot distinguish between the other copies written in that language.

Volume and the other criteria are thus insufficient if viewed independently, so perhaps combining them would help. Under this view, the English copy is controlling because it is the only copy printed in English, produced in large volumes, and bearing the secretary of state's seal and signature. But this seems like a post hoc justification based on factors that coincidentally overlap rather than reasoned analysis according to the principle of popular sovereignty. A voter could not have known how many copies were printed and certified without reviewing the *Journals*.<sup>361</sup> By contrast, *every* pre-ratification copy of the constitution contains explicit textual evidence recognizing the enrolled constitution's authority.<sup>362</sup>

In sum, the English copy was neither framed nor ratified. It was not framed because the committee that oversaw it had no authority to alter the enrolled constitution. And it was not ratified—foremost because the textual evidence all favors the enrolled constitution, but also because even if the textual evidence is not dispositive, there is no way to choose between the English copy and the others.<sup>363</sup>

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hand, the two known remaining copies do match. Compare Newspaper Copy, *supra* note 117, at 5 (photographs on file with author), with Statesman Copy, *supra* note 117, at 3. The argument here is not that volume *should* control. Instead, the argument is that if mere volume allows the English copy to supersede the enrolled constitution, then mere volume also allows the newspaper copy to supersede the English copy. Among the best arguments against the newspaper copy is that it was not framed (because neither the convention nor any single delegate ever approved it) nor was it ratified (because it clearly states that it is merely a copy of the “[o]riginal” constitution). See *supra* notes 116–20 and accompanying text. Also, the conclusion that a lone printer could determine the text of the state's constitution merely by distributing a large number of copies is, to say the least, not intuitive.

359. See ENGLISH COPY, *supra* note 99, at 26 (showing the secretary of state's seal and signature).

360. This position is also unsatisfactory. See *infra* Part IV.B.3.

361. See *supra* notes 99–103 and accompanying text.

362. See *supra* notes 115, 117.

363. A more sophisticated argument favoring the English copy might posit that the voters both ratified the enrolled constitution and simultaneously approved the English copy as the authoritative version of that instrument. The most obvious response is that there is no way to distinguish *approving* the English copy from *amending* the enrolled constitution, and the ratification vote did not comply with the mode of amendment that the Constitution requires. See *generally* TEX. CONST. art. XVII (requiring the legislature to propose amendments, which if approved, are then subject to a popular vote).

### 3. Theory: Texas Has a Multi-Lingual Constitution

As with the English copy, the textual evidence shows that the foreign-language copies are not authoritative. But suppose the textual evidence were not dispositive. The secretary of state certified pamphlets in four languages and distributed them to citizens as the “official” copies before the ratification vote.<sup>364</sup> This fact suggests the theory that all four certified copies govern together as a single, authoritative constitution expressed in four different languages.<sup>365</sup>

A constitution in more than one language would hardly be novel. In Texas, for example, the 1827 Constitution governed the state in both English and Spanish.<sup>366</sup> Nor would the innovation be the first of its kind among American states. In 1849, California adopted a constitution that remained authoritative in both English and Spanish even after that territory became a state.<sup>367</sup> Bi- and multi-lingual constitutions also exist in the modern era—Ireland<sup>368</sup> and South Africa<sup>369</sup> being two examples.

Canada, too, has a bilingual legal tradition.<sup>370</sup> From these and other sources spring a wealth of interpretative principles explaining how to

364. See *supra* note 115 and accompanying text.

365. For the same reasons that the English copy cannot govern on its own, neither can any one of the other certified copies. See *supra* Part IV.B.2. Analytically, the foreign-language copies are all in the same category. Either all of them govern or none of them do.

366. See GONZÁLEZ OROPEZA & DE LA TEJA, *supra* note 21, at 30 (noting that the 1827 Constitution was enacted “in both languages” and thus “appl[ie]d to all inhabitants without distinction”).

367. BETH J. SINGER, *Human Rights: Some Current Issues*, in ETHICAL ISSUES FOR A NEW MILLENNIUM 1, 20 (John Howie, ed., 2002) (discussing the “bilingual constitution” that governed California from 1849 to 1879, “more than a quarter century after California’s admission to the Union”); see also Cal. Const., <https://www.sos.ca.gov/archives/collections/constitutions/1849/> [<https://perma.cc/QSE3-UJX2>] (hosting “the handwritten parchment copy of the constitution that the delegates signed” in English).

368. CONSTITUTION OF IRELAND 1937 art. 8, <http://www.irishstatutebook.ie/eli/cons/en/html> [<https://perma.cc/UNR9-QYJZ>] (“The Irish language as the national language is the first official language. The English language is recognised as a second official language.”); see also Richard Humphreys, *Our Bilingual Constitution*, 35 IRISH JURIST 375, 376 (2000) (reviewing MICHEÁL Ó CEARÚIL, *BUNREACT NA HÉIREANN: A STUDY OF THE IRISH TEXT* (1999)) (“[T]he Irish text is not a translation but in fact was developed step by step alongside the English text.”).

369. S. AFR. CONST., ch. 1 § 6, <https://www.justice.gov.za/legislation/constitution/index.html> [<https://perma.cc/BL6E-QTZ4>] (“The official languages of the Republic [of South Africa] are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.”).

370. See Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 55 (U.K.) (“A French version of the portions of the Constitution of Canada . . . shall be prepared by the Minister of

harmonize enactments that are authoritative in more than one language.<sup>371</sup> A multi-lingual constitution for Texas, then, would not be unprecedented and would not necessarily create any insurmountable interpretative obstacles.<sup>372</sup> But like the other theories, the idea of a multi-lingual constitution does not survive serious consideration.

The convention did not frame the certified copies.<sup>373</sup> First, the delegates conducted their proceedings entirely in English and signed only the enrolled constitution (in English) rather than multiple copies (in other languages). By contrast, the delegates who framed the state's bilingual 1827 Constitution drafted it in both languages and signed enrolled copies in both languages.<sup>374</sup> Second, neither the *Journals* nor the *Debates* record any discussion about the foreign-language copies other than that they were to be printed.<sup>375</sup> Third, there is no evidence that any delegate to the convention had anything to do with translating or printing the foreign-language copies.<sup>376</sup> Rather, the convention delegated these tasks to printers.<sup>377</sup> Nor did the convention dispatch delegates to supervise the foreign-language printings.<sup>378</sup> If the convention intended the foreign-language copies to become law, the delegates would have shown greater care regarding translation and

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Justice of Canada as expeditiously as possible . . . ."); *see also* Kim Covert, *Making Canada's Constitution Bilingual*, CANADIAN BAR ASS'N NAT'L MAG. (Mar. 29, 2019), <https://www.nationalmagazine.ca/en-ca/articles/cba-influence/insight/2019/making-canada%E2%80%99s-constitution-bilingual> [https://perma.cc/E87P-8GGK] ("Those French versions were completed in 1990, but have never been presented to Parliament.")

371. *See generally* Lawrence M. Solan, *The Interpretation of Multilingual Statutes by the European Court of Justice*, 34 BROOK. J. INT'L L. 277, 277 (2009); Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, 29 BROOK. J. INT'L L. 985, 986 (2004); Pierre-Andre Cote, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, 29 BROOK. J. INT'L L. 1067, 1067 (2004); *see also* Paul Salembier, *Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule*, 35 OTTAWA L.R. 75, 77 (2003) ("A surprisingly large number of legislative jurisdictions enact legislation in more than one language. Ireland enacts legislation in Irish and English, Wales in Welsh and English, Hong Kong in Chinese and English, and Tanzania in Kiswahili and English . . . . Switzerland legislates in three languages, while the European Union uses [twenty] and the United Nations six.")

372. This is not to say that harmonizing multilingual texts is always easy, or that a single methodology or theoretical framework has achieved academic or judicial consensus.

373. The convention did not frame the English copy. *See supra* Part IV.B.2.

374. *See supra* note 22 and accompanying text.

375. *See supra* Part II.

376. *See supra* notes 100–03, 111–13 and accompanying text.

377. *See supra* notes 100–03 and accompanying text.

378. *See supra* notes 111–13.

printing.<sup>379</sup> Fourth, there is no indication that any of the foreign-language copies were ever deposited with the secretary of state.<sup>380</sup> If the foreign-language copies were authoritative, the convention would have retained some to serve as working copies for the new government.<sup>381</sup> These observations show that the delegates did not intend to frame a constitution in any language other than English.

Nor did the people ratify the certified copies.<sup>382</sup> Formally, for the people to ratify the same articles in four different languages, the convention would have needed to distribute pamphlets that contained *every* article in *every* language rather than distributing different pamphlets that contained each article in only one language. By analogy, consider the result had the convention distributed 40,000 copies of article I, 5,000 copies of article II, 3,000 copies of article III, and 1,000 copies of the remaining articles. Now imagine that each copy claimed to contain the entire constitution. Would a popular vote in favor of the constitution then be enough to ratify every article, even though most citizens had seen no more than a fraction of the entire text and had no way to know that the other articles even existed? Surely not.<sup>383</sup> It is the same with the English, German, Spanish, and Czech copies, which were distributed in these exact numbers.<sup>384</sup> Because the certified copies were not *distributed* as a single constitution, voters would not have expected a vote in favor of the constitution to ratify all four copies.

Even voters who knew about each foreign-language copy would have had little reason to expect that the ratification vote would apply to those copies. The 1845 Constitution, for example, had been translated into Spanish,<sup>385</sup> but only after it had already been “adopted” in English.<sup>386</sup> Not since before it broke from Mexico had the state existed under a constitution that governed in a language other than English.<sup>387</sup> It would have required more

379. For example, the convention made careful provision for oversight of the printing of the English copy—the copy which the delegates *did* intend to become law by virtue of intending it to match the enrolled constitution. *See supra* notes 104–10 and accompanying text.

380. *See supra* note 112.

381. *See supra* notes 338–40 (discussing the convention’s decision to deposit 2,000 English copies with the secretary of state).

382. The people also did not ratify the English copy. *See supra* Part IV.B.2.

383. This argument does not contradict the claim that the enrolled constitution supersedes the English copy, because (among other reasons) the English copy contained far more than a mere fraction of the enrolled, authoritative text.

384. *See supra* notes 99–103 and accompanying text.

385. *See supra* note 40 and accompanying text.

386. 1845 JOURNALS, *supra* note 38, at 9–12.

387. *See supra* notes 21–23 and accompanying text.

than mere translation to dislodge voters' expectations that the new state constitution would also govern only in English. But the translations themselves are the only evidence that exists. No certified copy contains any indication that a voter who read it would have read only *one-quarter* of the actual constitution. Indeed, no certified copy even mentions that copies were distributed in other languages. By contrast, every such copy assured that it was a "true and correct" copy of the enrolled constitution.<sup>388</sup> Of course, this assurance was not strictly true. The English copy contained typographical and other errors, and the foreign-language copies were translations rather than copies. The important point, however, is that the certification itself expressly demonstrated that the enrolled constitution was controlling. Any voter who considered the question after reading a certified copy would have concluded the same and would have voted accordingly.

These arguments rebut the theory that Texas has a multi-lingual constitution, and that is important because a constitution in multiple languages would bring with it a host of practical problems. As was the case with recognizing multiple English-language copies as simultaneously authoritative, recognizing a multi-lingual constitution would not solve the underlying interpretative question of what to do when the copies irreconcilably conflict.<sup>389</sup> Many countries that have recently adopted multi-lingual constitutions have solved this problem by including a backstop provision stating that a particular language governs in any case of conflict between two or more authoritative translations.<sup>390</sup> Because the certified copies of the Texas Constitution contain no such provision, courts and litigants would have no way to choose among those copies in instances of conflict. A multi-lingual constitution would also bring into doubt the status of prior judicial decisions interpreting the constitution. If the constitution is authoritative in four languages, then the decisions construing it have so far only used one-quarter of its text. These practical problems are an additional reason to embrace the conclusion that the Texas Constitution

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388. See *supra* note 115 and accompanying text.

389. See *supra* Part IV.B.1.

390. See, e.g., CONSTITUTION OF IRELAND 1937, *supra* note 368, at art. 25 ("In case of conflict between the texts of any copy of this Constitution enrolled under this section, the text in the national language [i.e., Irish] shall prevail."); Humphreys, *supra* note 368, at 377 (discussing the "priority afforded to the Irish text" of the Constitution of Ireland); S. AFR. CONST., 1996, ch. 14 § 240 ("In the event of an inconsistency between different texts of the Constitution, the English text prevails."). *But see* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 57 (U.K.) ("The English and French versions of this Act are equally authoritative.").

exists only in English and that the enrolled constitution is the authoritative version.

\* \* \*

The people did not receive a perfect copy of the constitution that the convention framed, but every copy they did receive contained unmistakable textual evidence that the ratification vote applied only to the enrolled constitution. This evidence shows that the people's majority vote was "[f]or"<sup>391</sup> the *enrolled* constitution. Considering the other options reinforces this conclusion. Popular sovereignty prohibits concluding that the state lacks a constitution, and no other copy has a sound basis for being authoritative. Thus, according to both the textual evidence and the process of elimination, the enrolled constitution now governs the State of Texas and is controlling against discrepancies that appear in any other copy.

#### V. REMARKS

Before closing, it is worth addressing a few points that follow from this Article's conclusion. First, courts should always rely on the enrolled constitution's text and should not quote the engrossed drafts or the English copy as authoritative law. Second, courts can rely on the other copies, including the foreign-language copies, to help clarify uncertainties in the enrolled constitution. Third, given recent scholarship highlighting pre-ratification translations of the U.S. Constitution,<sup>392</sup> it may now be worth reconsidering which version of the U.S. Constitution is controlling. While the discussion below is not comprehensive, and although the points it raises may in some instances deserve further consideration, the conclusions—in particular, those related to the Texas Constitution—are strong enough to merit implementation.

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391. See SAYLES, *supra* note 3, at 600 (“Those electors in favor of ratification shall have written or printed on their ballots, For the Constitution.”).

392. See Mulligan, *supra* note 10, at 1 (“After the United States Constitution was drafted in 1787, the document was translated into German and Dutch . . .”); Balkin, *supra* note 10, at 72–73 (describing Pennsylvania’s German-speakers and New York’s Dutch-speakers as “a significant proportion of the ratifying public”).

A. *Courts Should Use the Enrolled Constitution*

Texas courts have not been consistent in their choice of constitutional text.<sup>393</sup> That inconsistency should end. Because the enrolled constitution is controlling, courts should always use that version when construing constitutional text—especially when considering new or novel constitutional issues. Likewise, courts should not quote the text from any other copies and should be careful not to quote from secondary sources that use those copies.

One way to measure which copy courts tend to quote involves identifying “sample” sections of the constitution and treating decisions that quote them as indicative of which copy courts prefer. An ideal sample section would meet most or all of several criteria. First, a sample section is useful only if the enrolled constitution and English copy differ as to its text, preferably in conspicuous respect.<sup>394</sup> Next, a sample section should also be a new or mostly new inclusion in the 1876 Constitution. This guards against the mistaken conclusions that could arise from relying on a court that merely used an earlier constitution.<sup>395</sup> Finally, a sample section should be one that courts have quoted often and in different time periods. To meet this latter criterion, it helps if the sample section has not been amended (or has been amended only recently).

Several sections meet these criteria. Consider, for example, article III, section 50, which prohibits the state from extending credit.<sup>396</sup> The enrolled

393. See e.g., Boatright, *supra* note 1, at 11 (“Texas courts have cited several different versions of the [constitution’s] preamble.”).

394. These are the primary copies for which a comparison of judicial opinions would be useful. The engrossed drafts were neither framed nor ratified, so they cannot be authoritative. See *supra* Part III. And courts have not used the foreign-language copies. See *supra* note 293.

395. Such an obvious error may seem unthinkable today, but—remember—between 1860 and 1876, five different constitutions governed the state. See *supra* Part II.A. Many sections in the 1876 Constitution had appeared, either verbatim or with only minor differences, in all four prior constitutions. See generally MAY, *supra* note 11, at 14 (“While retaining many of the provisions of previous state constitutions, the 1876 document is better known for the new sections aimed primarily at limiting legislative power.”); see also SAYLES, *supra* note 3, at Preface (“[I]t is still necessary to refer to the provisions of these earlier Constitutions, not only for the purpose of determining rights arising under them, but also to assist in construing the existing Constitution [of 1876].”).

396. See TEX. CONST. art. III, § 50 (“The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, *whether municipal or other*, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.”) (emphasis added); ENROLLED CONSTITUTION, *supra* note 5, at 8. This section was a new addition to the 1876 Constitution, and it has never been amended.



constitution includes a comma,<sup>397</sup> whereas the English copy uses a semicolon,<sup>398</sup> after the phrase “whether municipal or other.” But *every* reported decision that quotes this section uses the comma that appears in the enrolled constitution.<sup>399</sup> In contrast, however, stand the dozens of judicial decisions that quote the final portion of article I, section 17, which for more than a century explicitly prohibited the legislature from granting “special privileges or immunities.”<sup>400</sup> At least ten courts have quoted the text that appears in the enrolled constitution (which uses a comma after the phrase “shall be made”),<sup>401</sup> whereas at least thirty have quoted the text from the English copy (which does not).<sup>402</sup> These examples show that courts do not consistently quote from a single source.<sup>403</sup>

Consistency is a worthy goal because it reinforces that the constitution contains text that is both fixed and determinable. These characteristics are important for the theoretical reasons already discussed,<sup>404</sup> and also because Texas courts “rely heavily on [the] literal text” when they interpret the constitution.<sup>405</sup> A court that relies on the engrossed drafts or on the

See BRADEN, *supra* note 61, at 224 (“This section first appeared in 1876.”); *Amendments to the Constitution*, *supra* note 125, at 35.

397. See ENROLLED CONSTITUTION, *supra* note 5, at 8.

398. See ENGLISH COPY, *supra* note 99, at 5.

399. See *Tex. Nat. Guard Armory Bd. v. McCraw*, 126 S.W.2d 627, 633 (Tex. 1939) (quoting the text of article III, section 50 as it appears in the enrolled constitution); *Cross v. Dallas Cnty. Flood Control Dist. No. 1*, 773 S.W.2d 49, 51 (Tex. App.—Dallas 1989, no writ) (same). The English copy’s semicolon appears in the reports only once, in a concurring opinion quoting the plaintiff’s brief. *Terrell v. Middleton*, 191 S.W. 1138, 1143 (Tex. 1917) (per curiam) (Hawkins, J., concurring).

400. See TEX. CONST. art. I, § 17 (amended 2009) (“[N]o irrevocable or uncontrollable grant of *special privileges or immunities* shall be made; but all privileges and franchises granted by the legislature, or created under its authority shall be subject to the control thereof.”) (emphasis added); see also BRADEN, *supra* note 61, at 63 (explaining that this portion was a “new but not clearly relevant” addition to the prohibition against takings).

401. ENROLLED CONSTITUTION, *supra* note 5, at 2; see, e.g., *City of Houston v. Hous. City St. Ry. Co.*, 19 S.W. 127, 130 (Tex. 1892) (quoting the text of article I, section 17 as it appears in the enrolled constitution); *City of Lubbock v. Phillips Petroleum Co.*, 41 S.W.3d 149, 160 (Tex. App.—Amarillo 2000, no pet.) (same).

402. ENGLISH COPY, *supra* note 99, at 2; see *Ft. Worth Imp. Dist. No. 1 v. City of Ft. Worth*, 158 S.W. 164, 168 (Tex. 1913) (quoting the text of article I, section 17 as it appears in the English copy); *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 n.1 (Tex. App.—Dallas 2006, no pet.) (same).

403. See *Boatright*, *supra* note 1, at 11 (“[T]exas courts have cited several different versions of the preamble.”); *id.* at 12 (“[O]ffices in all three branches of state government have cited more than one version of the preamble to the Texas [C]onstitution.”).

404. See *supra* Part IV.B.1.

405. *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000); see also *Garofolo v. Ocwen Loan Servicing*, 497 S.W.3d 474, 477 (Tex. 2016) (“[W]hen interpreting our state constitution, we rely heavily on its literal text and give effect to its plain language.”).

English copy is not relying on the constitution's literal text. Judicial reliance on those copies undermines the perceived permanency of the constitution's written words. It also undermines the holding that "[t]he meaning of a Constitution is fixed when it is adopted."<sup>406</sup> Permanent meaning cannot emerge from impermanent text. Courts should reinforce, not reduce, the permanency of the constitution's written words.

Courts can achieve consistency by grounding interpretations *only* in the text that appears in the enrolled constitution.<sup>407</sup> Thus, a court confronting a new or novel constitutional issue must always review the enrolled constitution's actual, authoritative text. Courts should neither rely on nor quote any other copies of the constitution. Likewise, courts should be wary of quoting from secondary sources of the constitution's text. Older annotations and reprints frequently include deviations that the twin advances of technology and textualism would no longer tolerate. Even Braden's celebrated annotation, impeccable in other regards, includes stylistic discrepancies that do not appear in *any* pre-ratification copy of the constitution.<sup>408</sup> Litigants should also pay close attention to their choice of text, especially when the differences between the enrolled constitution and the various copies could affect how a court decides a case.<sup>409</sup>

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406. Cox v. Robison, 150 S.W. 1149, 1151 (Tex. 1912).

407. The recommendations in this paragraph apply only to portions of the constitution that are unchanged since 1876. For a list of articles and sections that meet this definition, see *Amendments to the Constitution*, *supra* note 125. Of course, courts should also take care to quote the legally controlling text of each constitutional amendment, but a comprehensive discussion of the text that is constitutional by amendment is beyond this Article's scope.

408. See, e.g., BRADEN, *supra* note 61, at 89 (adding a semicolon after the first instance of "another" in article II). Though eminently sensible as a stylistic matter, the semicolon that Braden adds to article II does not appear in the engrossed drafts, the enrolled constitution, or the English copy.

409. The Texas Legislative Council publishes an internet-accessible copy of the constitution. *Texas Constitution: Includes Amendments Through the November 5, 2019, Constitutional Amendment Election*, TEX. LEGIS. COUNCIL, <https://tlc.texas.gov/docs/legref/TxConst.pdf> [https://perma.cc/9KN2-QEHV] [hereinafter *Council Copy*]. From 2021 onward, this version will be "presumed to be an accurate copy" of the constitution for legal purposes. Uniform Electronic Legal Material Act, 86th R.S., ch. 159 § 1, 2019 Tex. Gen. Laws 1 (codified at TEX. GOV'T CODE § 2051.156). The *Council Copy* relies on the "signed, enrolled version of the 1876 constitution" as authoritative. *Implementation Plan for Publishing the Constitution of the State of Texas in Compliance with the Uniform Electronic Legal Material Act*, TEX. LEGIS. COUNCIL 7 (Sept. 1, 2020) [https://tlc.texas.gov/docs/TLC\\_UELMA.pdf](https://tlc.texas.gov/docs/TLC_UELMA.pdf) [https://perma.cc/H578-W6XZ]. This will make it easier for courts and litigants to rely only on the enrolled constitution.

B. *The Other Copies Can Help Clarify Uncertainties in the Enrolled Constitution*

Texas jurisprudence undoubtedly reflects a strong originalist streak.<sup>410</sup> Some cases emphasize original intent,<sup>411</sup> and others original public meaning,<sup>412</sup> but in each instance the methodology is originalist.<sup>413</sup> Accordingly, Texas courts “strive to give constitutional provisions the effect their makers and adopters intended,” and “rely heavily on [the constitution’s] literal text and give effect to its plain language.”<sup>414</sup> The pre-ratification copies can help clarify the constitution’s original meaning.

In practice, the English-language copies are useful primarily to help correct any scrivener’s errors that appear in the enrolled constitution.<sup>415</sup> For instance, article XI, section 7 contains “a glaring grammatical error”<sup>416</sup> in that it allows coastal counties to collect taxes “for construction of sea

410. Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL’Y 341, 357 (2017) (listing Texas among the states in which “there is a consistent invocation of originalism . . . across time”); *see also id.* at 402–03 (collecting Texas cases that reflect an originalist methodology).

411. *See* *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000) (“We strive to give constitutional provisions the effect their makers and adopters intended.”); *Holley v. State*, 14 Tex. App. 505, 513 (Tex. Ct. App. 1883) (“The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.”).

412. *City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996) (“[B]ecause of the difficulties inherent in determining the intent of voters over a century ago, we rely heavily on the literal text.”); *Cox v. Robison*, 150 S.W. 1149, 1151 (Tex. 1912) (“The meaning of a constitution is fixed when it is adopted; and it is not different at any subsequent time when a court has occasion to pass upon it.”)

413. For a discussion of originalism, including the difference between “original-intent” originalism and “public-meaning” originalism, see ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 16–17 (2017).

414. *Garofolo v. Ocwen Loan Servicing*, 497 S.W.3d 474, 477 (Tex. 2016).

415. Texas courts recognize the scrivener’s-error doctrine in statutory interpretation. *See* *City of Amarillo v. Martin*, 971 S.W.2d 426, 428 n.1 (Tex. 1998) (inserting a word “in brackets to indicate the obvious legislative intent” when “[the] literal reading of the statute [wa]s patently absurd”); *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring) (“[I]n some circumstances, words, no matter how plain, will not be construed to cause a result the Legislature almost certainly could not have intended.”); *State v. Boone*, 05-97-01157-CR, 1998 WL 344931, at \*2 (Tex. App.—Dallas June 30, 1998, no pet.) (mem. op.) (“If application of a statute’s plain language would lead to absurd consequences that the legislature could not have intended, we do not apply the language literally.”). Texas courts also “construe Texas constitutional provisions in the same manner as . . . statutes.” *Tex. Comm’n on Env’tl Quality v. Abbott*, 311 S.W.3d 663, 669 (Tex. App.—Austin 2010, pet. denied) (citing *Harris Cnty. Hosp. Dist. v. Tomball Reg’l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009)) (“In construing the Constitution, as in construing statutes, the fundamental guiding rule is to give effect to the intent of the makers and adopters of the provision in question.”). Thus, the scrivener’s-error doctrine is applicable in constitutional interpretation even though no reported decision has yet required a Texas court to apply it in that context.

416. BRADEN, *supra* note 61, at 692.

walls, breakwaters, or sanitary purposes.”<sup>417</sup> The section ought to say that a county may collect taxes *for* sanitary purposes, but by omitting “for,” it allows a county to collect these taxes only for “constructi[ng] . . . sanitary purposes.”<sup>418</sup> The omission is a classic scrivener’s error.<sup>419</sup> The grossed drafts include the word “for,”<sup>420</sup> and thus help rescue coastal counties from having to determine what it means to “construct a sanitary purpose.”

The foreign-language copies could also have practical value. These copies are evidence of the constitution’s original public meaning—“the meaning of the text as understood by its contemporary translators and as reflected in their interpretive choices.”<sup>421</sup> The copies are of unique value because they are both comprehensive and contextual.<sup>422</sup> That is, they both “exhaustively restate every term and phrase” and “represent those terms and phrases in context.”<sup>423</sup> The foreign-language copies are, in essence, contemporary, full-length commentaries on the constitution’s original public meaning.<sup>424</sup> Courts can use the foreign-language copies to help remove ambiguities that appear in the English text.

The Texas Supreme Court’s decision in *Wentworth v. Meyer* is one example.<sup>425</sup> Jeff Wentworth was a state senatorial candidate.<sup>426</sup> His term as a senator “would overlap, by twenty-one days,” with his previous term of appointment to a different statewide office.<sup>427</sup> But article III, section 19 prohibits a person from serving in the legislature “during the term for which

417. TEX. CONST. art. XI, § 7 (capitalization adjusted); ENROLLED CONSTITUTION, *supra* note 5, at 27. The section has been amended four times, but each amendment carried the error forward. See *Amendments to the Constitution*, *supra* note 125, at 112.

418. TEX. CONST. art. XI, § 7; ENROLLED CONSTITUTION, *supra* note 5, at 27.

419. See Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 357 (2012) (noting that Texas courts will correct an “obvious error such as a typographical one that resulted in the omission of a word”); SCALIA & GARNER, *supra* note 74, at 236 (“What is omitted from statutory text, no less than what is included, can cause it to be absurd.”).

420. CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 7, at 694; see BRADEN, *supra* note 61, at 692 (discussing this error).

421. Mulligan et al., *supra* note 10, at 2.

422. *Id.*

423. *Id.* at 3.

424. See *id.* at 11 (“On this point, there is virtually unanimous consensus among textual scholars and linguists who compose the field of translation studies: no substantive epistemological difference exists between a commentary and a translation.”).

425. *Wentworth v. Meyer*, 839 S.W.2d 766 (Tex. 1992).

426. *Id.* at 766.

427. *Id.*

he is . . . appointed” to another state office.<sup>428</sup> Wentworth had resigned his previous appointment five years before becoming a senatorial candidate, and he argued that his previous “term” had therefore expired. Fred Meyer, the party chairman, disagreed, and he “determined and declared Wentworth ineligible as the Republican nominee.”<sup>429</sup> Wentworth sought mandamus relief in an original proceeding at the Texas Supreme Court.<sup>430</sup>

At issue was whether the word “term” referred to the entirety of Wentworth’s prior appointment, or instead, only to the portion of the appointment that he actually served.<sup>431</sup> Eight justices wrote opinions—one plurality, five concurring, and two dissenting.<sup>432</sup> A majority of justices agreed that the section was ambiguous.<sup>433</sup> The plurality opinion then turned to the section’s “purpose”<sup>434</sup> and to the rule that the constitution “must be strictly construed against ineligibility.”<sup>435</sup> In the end, five justices agreed with Wentworth that the word “term,” as it appears in article III, section 19, refers only to actual time in office rather than potential time in office.<sup>436</sup>

The Spanish and German copies support the plurality’s conclusion.<sup>437</sup> Whereas the section in English uses “term,”<sup>438</sup> the Spanish copy uses

428. See TEX. CONST. art. III, § 19 (“No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.”) (capitalization adjusted); ENROLLED CONSTITUTION, *supra* note 5, at 5.

429. *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992).

430. *Id.* at 766.

431. *Id.* If the former, then Wentworth was eligible for the legislature; if the latter, he was not. The case involved other issues, including stare decisis and equal protection, that are not relevant here.

432. *Id.* at 766. Only Justice Hightower participated without writing an opinion. *Id.* at 772 (Hecht, J., concurring).

433. See *id.* at 767 (plurality opinion) (“[T]he language is susceptible of varied interpretations.”); *id.* at 769 (suggesting that the text is “susceptible of two reasonable interpretations”) (Gonzalez, J., concurring); *id.* at 774 (noting “ambiguity in the text”) (Hecht, J., concurring); *id.* at 778 (arguing that the text “is demonstrably susceptible to two distinctly different meanings”) (Cornyn, J., concurring); *id.* at 781 (noting “ambiguity on the face of [s]ection 19”) (Phillips, C.J., dissenting). But see *id.* at 790 (arguing that the text is “unambiguous”) (Doggett, J., dissenting).

434. *Id.* at 767.

435. *Id.* (citing *Brown v. Meyer*, 787 S.W.2d 42 (Tex. 1990)).

436. See *id.* at 772 (Hecht, J., concurring) (“To summarize the Court’s decision, five Members of the Court . . . hold that article III, section 19 of the Texas Constitution does not prohibit an officeholder who resigns his position from serving in the Legislature during a time when he would otherwise have remained in his former office.”).

437. The Czech copy’s apparent translation of “term” would require more than a dictionary to parse and is thus not addressed here. CZECH COPY, *supra* note 103, at 9.

438. TEX. CONST. art. III, § 19; ENROLLED CONSTITUTION, *supra* note 5, at 5.

“tiempo”<sup>439</sup> (“time”)<sup>440</sup> and the German copy uses “Amtsdauer”<sup>441</sup> (“employment duration”).<sup>442</sup> Importantly, these copies elsewhere use cognates for “term.”<sup>443</sup> Thus, while sections 18 and 19 of article III both use the word “term” in English,<sup>444</sup> these same sections in Spanish and German use cognates for “term” in section 18 (“termino”<sup>445</sup> and “Termins”<sup>446</sup>) but use different words in section 19 (“tiempo”<sup>447</sup> and “Amtsdauer”<sup>448</sup>). These differences indicate that the German and Spanish translators understood sections 18 and 19 to refer to different periods,<sup>449</sup> and thus that the plurality was correct in concluding that Wentworth was eligible for the legislature.<sup>450</sup>

These examples illustrate how the pre-ratification copies of the constitution, including the foreign-language copies, could play an active role in constitutional interpretation. Like other extrinsic sources, these copies are useful only when an uncertainty exists in the English text of the enrolled constitution.<sup>451</sup> The copies of the constitution can be used to help explain an uncertainty, but never to introduce one.

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439. SPANISH COPY, *supra* note 5, at 11.

440. See BENSLEY, *supra* note 139, at 594 (defining “tiempo” as “time”).

441. GERMAN COPY, *supra* note 101, at 13.

442. See WESSELY, *supra* note 142, at 25 (defining “Amt” as “employment”); *id.* at 114 (defining “Dauer” as “duration”).

443. See SPANISH COPY, *supra* note 5, at 11 (translating article III, section 18’s “term” as “termino”); GERMAN COPY, *supra* note 101, at 13 (translating article III, section 18’s “term” as “Termins”).

444. TEX. CONST. art. III, §§ 18–19; ENROLLED CONSTITUTION, *supra* note 5.

445. See BENSLEY, *supra* note 139, at 593 (defining “termino” as “term”).

446. See WESSELY, *supra* note 142, at 25 (defining “Termin” as “term”).

447. SPANISH COPY, *supra* note 5, at 11.

448. GERMAN COPY, *supra* note 101, at 13.

449. Both “tiempo” and “dauer” can also mean “term.” BENSLEY, *supra* note 139, at 594; WESSELY, *supra* note 142, at 25. If the Spanish and German copies had used the same words in article III, section 18 as in article III, section 19, then neither copy could help explain the ambiguity in the English word “term.” But because the Spanish and German copies used a cognate for “actual term” in section 18, and some other word in section 19, it would not make sense to treat either “tiempo” or “Amtsdauer” as meaning “potential term” for purposes of article III, section 19.

450. Wentworth won the primary and the race, and he served in the Texas Senate for the next two decades. Jeff Wentworth, BALLOTPEdia, [https://ballotpedia.org/Jeff\\_Wentworth](https://ballotpedia.org/Jeff_Wentworth) [https://perma.cc/7NPY-X65A].

451. Uncertainty can arise from the ambiguity in certain individual words and phrases, of course, as in *Wentworth*. It might also, due to vagueness or some other indeterminacy, inhere in constitutional substructures, and the foreign-language copies could be useful in those instances as well.

C. *A Note on the U.S. Constitution*

Thirty years ago, Akhil Amar argued that the “handwritten, handsinged” U.S. Constitution “enshrined in the National Archives and reprinted everywhere was never ratified.”<sup>452</sup> Amar reasoned that a different version saw “mass distribution to the polity” and formal adoption in at least some of the state ratifying conventions.<sup>453</sup> But recent scholarship emphasizes that pre-ratification versions of the U.S. Constitution were also distributed in both German and Dutch.<sup>454</sup> And voters, including delegates to the state conventions, had access to far more than a single version in English.<sup>455</sup> So, even accepting Amar’s conclusion that “we cannot but choose as our supreme legal text the edition that was in fact offered to and endorsed by the People,”<sup>456</sup> some question remains as to which edition that is.<sup>457</sup>

Since Amar’s article, increased attention to the U.S. Constitution’s original public meaning has spurred interest in aspects of the text that earlier

452. Amar, *supra* note 262, at 281.

453. *Id.* at 283–84. That reasoning, even if sound, does not transfer to the Texas context, first because the state constitution did not require separate ratifying conventions, and second because no single version was distributed to voters. *See supra* Part II.C.

454. Mulligan, *supra* note 10, at 1; Balkin, *supra* note 10, at 72; Sanford Levinson, *What One Can Learn from the Foreign-Language Translations of the U.S. Constitution*, 31 CONST. COMMENT. 55 (2016); Hans Lind et al., *Translation Approaches in Constitutional Hermeneutics*, 33 INT’L J. FOR SEMIOTICS L. 299 (2020).

455. *See* Philip Huff, *How Different Are the Early Versions of the United States Constitution? An Examination*, 20 GREEN BAG 2D 163, 166 (2017), [http://www.greenbag.org/v20n2/v20n2\\_articles\\_huff.pdf](http://www.greenbag.org/v20n2/v20n2_articles_huff.pdf) [<https://perma.cc/PCE8-WT5L>] (discussing “four early texts of the Constitution with a special claim on our attention”); *id.* at 173 n.35 (2017) (“Even a conservative count identifies about two dozen” pre-ratification newspaper copies, “and this does not include pamphlets.”). *See generally* Leonard Rapport, *Printing the Constitution: The Convention and Newspaper Imprints, August–November 1787*, 2 PROLOGUE: THE JOURNAL OF THE NATIONAL ARCHIVES 69, 89 (1970) (“[T]he [pre-ratification] printings of the [U.S.] Constitution totaled more than one hundred and fifty; and the number may have approached two hundred.”).

456. Amar, *supra* note 262, at 286.

457. *See* WILLIAM BAUDE & JUD CAMPBELL, EARLY AMERICAN CONSTITUTIONAL HISTORY: A SOURCE GUIDE at 4 n.16 (working paper) (Oct. 2018) (describing the signed parchment copy as “the modern ‘official’ version of the [U.S.] Constitution”); David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 710 (2012) (noting that the parchment copy of the U.S. Constitution “is, as a factual matter . . . , the version that is currently reprinted in the United States Code and treated as authoritative today,” and deferring “to the conventional views of the legal community in [focusing] on [that] copy rather than any of the printed copies”); Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667, 696 n.104 (2007) (noting that the “engrossed copy”—i.e., the signed, parchment copy—is the “official” version of the U.S. Constitution).

generations may have dismissed as merely stylistic.<sup>458</sup> This attention, and the academic discovery of the German and Dutch copies, suggest it is time to consider anew which version of the U.S. Constitution formally governs the nation. On one hand, the differences between various copies appear *de minimis*.<sup>459</sup> But on the other, a single “punctuation change” can have “powerful legal significance” in constitutional interpretation.<sup>460</sup>

Renewed consideration of the U.S. Constitution would begin with at least the following questions: Did the federal constitutional convention intend to submit the parchment version of the U.S. Constitution to the states for ratification, or some other version? Did voters in the several states delegate to their respective ratifying conventions the authority to ratify *any* copy of the constitution, or only the copy that the federal constitutional convention framed? Which copy would delegates to the state ratifying conventions have expected their votes to ratify? What role should the various aspects of the enrolled-bill rule play in answering these questions?<sup>461</sup> Does not the multiplicity of printed, newspaper, and pamphlet copies—together numbering at least several dozen—confirm the wisdom of the framers’ decision to enroll a single copy, proving that this copy controls?

Answers grow timelier with each advance of textualism and public-meaning originalism in the academy and the judiciary. This Article’s conclusion suggests that a roughly parallel path may exist toward concluding that the parchment copy of the U.S. Constitution is the controlling copy of that instrument, but more work remains.

## VI. CONCLUSION

One constitution governs Texas: the manuscript constitution that the delegates to the Convention of 1875 signed and enrolled. This conclusion follows foremost from the pre-ratification copies that circulated throughout the state, each of which included express textual evidence that the ratification vote applied only to the enrolled constitution. Popular sovereignty requires treating this evidence as conclusive. And even if the

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458. See generally Treanor, *supra* note 176; Yellin, *supra* note 457; Nardella, *supra* note 457; William W. Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas: A Short Epistolary Report*, 10 GREEN BAG 2D 469, 469–70 (2007), [http://www.greenbag.org/v10n4/v10n4\\_van\\_alstyne.pdf](http://www.greenbag.org/v10n4/v10n4_van_alstyne.pdf) [<https://perma.cc/MLD4-8DGP>].

459. Amar, *supra* note 262, at 281 n.2.

460. Treanor, *supra* note 176, (manuscript at 30) (on file with author).

461. Indeed, the enrolled-bill rule appeared in England more than 250 years before the U.S. Constitution was ratified. *The King v. Arundel*, 80 ER 268, ¶5 (KB 1617).



evidence were not conclusive, the enrolled constitution remains the only version with a sound claim to authoritative status. No longer should any court cite a pre-ratification copy as law, although courts can use those copies to help dispel any ambiguities that appear in the ratified text. Every Texan should—and now can—know exactly what the Texas Constitution is.