

# When to Consider Original Meaning

## Table of Contents

Introduction.....	1
I. A Structure for Constitutional Interpretation.....	4
II. Originalism and Democratic Authority.....	8
III. Originalism and the Rule of Law.....	25
Conclusion.....	39

Richard Primus  
University of Michigan Law School  
[richard.primus@umich.edu](mailto:richard.primus@umich.edu)

Preliminary Draft  
For discussion at the University of Virginia, September 29, 2006

“Originalism” is the surname of a family of interpretive methods in constitutional law. All forms of originalism seek to derive constitutional authority from some condition that obtained at the time when a given constitutional provision was written or adopted.<sup>1</sup> For some forms of originalism, the relevant authority is located in the intentions or understandings of the drafters of constitutional provisions. Others ask how the ratifying public would have understood the provisions it ratified. The question this paper addresses is as follows: *When*, or under what circumstances, should constitutional interpreters deploy an originalist method?

In posing the question this way, I endorse the idea that constitutional interpretation properly draws on several modalities of argument.<sup>2</sup> But I mean to move beyond both the aspiration to identify a generally applicable hierarchy of those modalities<sup>3</sup> and the countervailing tendency to say that the applicability of different kinds of argument is a matter of case-to-case judgment.<sup>4</sup> I do not believe it possible to specify in advance which method of constitutional argument should *prevail* when multiple methods are applicable in the same case and point to different results. I do suggest, however, that it is possible to specify kinds of cases in which given methods of interpretation are or are not applicable. In some kinds of cases, interpretive methods that make sense in other contexts are simply not in point and should not be considered at all.

---

<sup>1</sup> Because not all parts of the written Constitution were adopted at the same time, originalism is concerned with conditions obtaining at various times in . The original meaning of Article I is a matter of conditions existing in the 1780s, but the original meaning of the Seventeenth Amendment is a matter of conditions existing in the 1910s.

<sup>2</sup> See, e.g., Richard Fallon, A Constructivist Coherence Theory of Constitutional Interpretation; Phillip Bobbit, Constitutional Fate

<sup>3</sup> See Fallon

<sup>4</sup> See, e.g., Stephen Breyer, Active Liberty: Intepreting Our Democratic Constitution

The goal of this paper is to take one set of interpretive methods—originalism—and distinguish categories of cases in which it is and is not a sensible mode of interpretation. In principle, the same sort of exercise should also be possible for other modalities of interpretation, such as text, precedent, structure, and so forth.

To figure out when it makes sense to consider original meaning as a factor in constitutional interpretation, I examine what I take to be the two best arguments for originalism. These two arguments are concerned with two different (if sometimes overlapping) ends of constitutional law: democratic authority and the rule of law. According to some constitutional theorists, originalism is the only method through which interpreters can show proper respect for the democratic authority of the constitution.<sup>5</sup> According to an overlapping set of theorists, originalism upholds the rule of law by tying constitutional meaning to something more fixed and objective than the preferences of judges.<sup>6</sup> To know when to be an originalist for the reasons given in each argument, one must know when originalist interpretation would succeed in achieving the aims—respect for democratic authority and fostering the rule of law—that underlie the arguments for originalism in the first place.

In Part I of this paper, I lay out a general approach to constitutional interpretation that amplifies the suggestions of the preceding paragraphs. Central to this approach is the idea that modalities of constitutional interpretation should be thought of as tools for advancing the ends, or values, of constitutional law. If Part I succeeds, readers who make it to the end of that part should have a good sense of how I mean them to understand the

---

<sup>5</sup> See, e.g., Keith Whittington, *Constitutional Interpretation*; Antonin Scalia, *A Matter of Interpretation*

<sup>6</sup> See, e.g., Robert Bork, *The Tempting of America* 1-5, 143-46, 154-55 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849, 854, 862-63 (1989).

claims (and limits) of the arguments advanced in Parts II and III. Those Parts deal with originalism in particular, analyzing respectively the idea that originalism is required by the democratic authority of the Constitution and the idea that originalism serves the rule of law.

In Part II, I conclude that originalist interpretation is a good method for respecting the democratic authority of the Constitution when—but only when—the constitutional provision at issue has been recently enacted. Part II gives reasons why this is so and also explains how the standard of “recency” should be applied. Then, in Part III, I conclude that the test for when originalist interpretation is a good method for fostering the rule of law is largely practical: it asks when different judges attempting in good faith to apply originalist reasoning would in fact converge on a common answer to the question before them. Over the domain of constitutional questions where originalist interpretation would yield decisional consensus—but only over that domain—originalism deserves to be part of the interpretive mix.

If my reasoning is correct, there are relatively few cases in which originalism is a good method of constitutional interpretation. This is a contingent fact about constitutional adjudication in our times: cases presenting the circumstances in which the best reasons to be an originalist have purchase do not arise often. In other words, one concise way to answer the question “When should I be an originalist” is “Rarely,” or more precisely “Rarely, under the prevailing conditions of 2006.” But rarely is not never. Originalism is entitled to no more influence than the best arguments for it justify, but it is also entitled to no less. Moreover, the conditions of 2006 will not always prevail. Under

other foreseeable circumstances, originalism should be used more widely than it should be used today.

## I. A Structure for Constitutional Interpretation

### *A) The Interpretive Toolkit*

Think of the modalities of constitutional interpretation—text, precedent, original meaning, and so on—as tools for achieving the ends of constitutional law. Like any craftsman possessed of multiple tools, a good constitutional interpreter must know when to use which instrument. Sometimes more than one instrument in the toolkit could be used for a particular job. When that happens, there is sometimes no articulable reason why one of those tools is superior to another. On the other hand, some tools are not at all appropriate for some jobs. (Suppose I want to hang a picture on my wall. I could drive a nail into the wall with a hammer and hang the picture from the nail, or I could hang wire from molding hooks and hang the picture from the wire. But I should not try to do the job with a circular saw, nor with a fax machine.) The criteria for choosing tools are pragmatic, which is just to say that the propriety of using a given tool is a matter of its efficacy in attaining the relevant end. On this understanding, the choice of which interpretive method to deploy in a given constitutional case should be a function of which method, or methods, if applied in that case, can advance the ends of constitutional law.

I take the ends of constitutional law to be roughly as follows, and not necessarily in order of importance: civil peace; the rule of law; justice; respect for and facilitation of democratic decisionmaking; the public's identification with, rather than alienation from,

the constitutional regime; social welfare; and the legitimacy of the constitutional system itself.<sup>7</sup> These are not mutually exclusive categories, and often they will be mutually reinforcing. Democratic decisionmaking may enhance the public's identification with the regime, and civil peace may foster social welfare (which may foster civil peace), and the legitimacy of the constitutional system is probably some complex function of several (or even all) of the previous factors. The content of these categories is open to debate: we can argue about what constitutes democracy or the rule of law. That said, we can also speak coherently about these values and the relationships among them. For example, we can say that we are often called upon to balance the value of the rule of law with the value of justice in particular cases—though one might also argue that adherence to the rule of law promotes justice in the aggregate.

One way to understand what it means for the foregoing list to state the goals of constitutional law is as follows: A constitutional decisionmaker should only act in contravention of one of these ends when doing so is necessary in light of the superior demands of other purposes within this set. Similarly, when a constitutional issue could be resolved in more than one way, a resolution that is Pareto-superior with respect to these categories is always to be preferred to one that is Pareto-inferior. Or to say the same thing in another jurisprudential language, “easy cases” in constitutional law are those in which none of these values need be compromised.

No interpretive method is the best way to advance all of these goals in all constitutional cases, just as no single piece of hardware is the best way to do every kind

---

<sup>7</sup> I have not attempted to track the language of the Preamble, but it should be unremarkable that the set of purposes I describe largely overlaps, in substance, with the aims recited there.

of household repair. That is why a good constitutional interpreter should deploy multiple interpretive strategies. Nor do interpretive methods that sometimes serve a particular goal within the set *always* serve that goal. (Hammers are good for driving nails, but some hammers are too big or too small for some nails. Textualism often serves the rule of law, but sometimes it might disserve the rule of law—as when there is a long and settled practice, blessed by a prior judicial decision, to do something other than what the natural reading of the text directs.)

My aim in this paper is to identify those instances in which originalism is a good interpretive method for advancing the ends of constitutional law. According to the structure here offered for thinking about constitutional interpretation, those instances will therefore be appropriate sites for the consideration of original meaning in constitutional interpretation. I therefore must ask two questions. First, which ends of constitutional law is originalism a good tool for advancing? Second, in what categories of cases can originalism actually advance those ends? As noted in the introduction, I take the best two arguments for originalism to be those presenting originalism as serving two different constitutional ends: respecting democratic authority and fostering the rule of law. Parts II and III investigate when originalism can in practice succeed in serving those ends.

## ***B) Two Limits of my Analysis***

(1) It would be a valid objection to say that I have left out another good reason for using originalism in constitutional interpretation. The democratic-authority argument discussed in Part II and the rule-of-law argument discussed in Part III are not the only

arguments that originalists advance in support of originalism.<sup>8</sup> What they are, I think, is the only two arguments that actually support originalist interpretation. Readers who believe that other reasons justify originalist interpretation may therefore protest that I have not covered all the necessary ground. That would be a fair objection, especially if it turned out that the neglected argument for originalism was in fact sufficient to justify originalism as a tool for serving some constitutional value. Note, however, that such an objection would be an objection only to the scope of this paper's argument. It would not be an objection to the overall toolkit-metaphor framework I offer for constitutional interpretation, nor would it contest the merits of my analysis of the arguments for originalism based on democratic authority and the rule of law.

(2) I seek in this paper only to determine when originalism should be a factor in the interpretive mix of a constitutional case. I do not address the subsequent question of whether and when originalism should, in such cases, prevail over other interpretive methods that might also be applicable. Often, cases in which originalism can advance the ends of constitutional law are also cases in which other tools can advance (other) ends of constitutional law, and the different applicable methods might counsel conflicting results. How to resolve such conflicts is beyond the scope of this paper; this paper is restricted to answering the prior question of when original meaning should be one of the (possibly conflicting) factors. That said, part of the value of answering that question is that it can obviate the need, in many cases, for choosing among conflicting interpretive methods. If

---

<sup>8</sup> For example, Randy Barnett advocates originalism on the grounds that originalist interpretation is the best way to secure a governmental order that respects individual rights in the way necessary to make the government legitimate. In his view, originalism serves that end because of the happy coincidence that the Founders of the Republic held a correct substantive view about individual rights. See Barnett, *Restoring the Lost Constitution*.

we can delimit the set of cases in which originalism is a sensible interpretive method, we can identify cases in which originalism should not be brought to bear at all.

## II. Originalism and Democratic Authority

### A) *An Argument for Originalism*

One powerful argument for originalism sounds in respect for the authority of democratic decisionmaking. The argument goes like this: the Constitution has authority because it was democratically adopted by the American people, so the Constitution must mean what the people who adopted it understood themselves to be agreeing to. As with any set of rules that rests on consent, the content of the consent determines the content of the rules; the parties to the agreement are bound to what they consented to be bound by, neither more nor less.<sup>9</sup> The parties are free to alter the rules in the future through consensual processes, which in the case of the Constitution means through democratically enacted amendments. But until the terms of the agreement are democratically revised, enforcing the Constitution means enforcing the bargain that was democratically struck in the past. To do anything else would disrespect democracy by denying the people at any point in time the ability to strike democratic bargains that could be reliably enforced in the future.<sup>10</sup>

This rationale for originalism calls for the use of some versions of originalism rather than others. Specifically, the relevant original meaning of the Constitution must be

---

<sup>9</sup> For one good account of the strengths and weaknesses of the idea that the authority of government derives from the consent of the governed, see Herzog, *Happy Slaves* 182-214, esp. 182-85.

<sup>10</sup> The argument is made in various forms by different theorists. See, e.g., Scalia; Amar; Whittington.

the meaning that the ratifying public understood itself to be agreeing to, rather than what the drafters might have understood themselves to be proposing. The democratic authority of the Constitution's adoption resides in the fact that the people agreed to it, not in the fact that several dozen delegates with a questionable mandate suggested it. If the virtue of originalism is that it makes the Constitution mean what it was democratically agreed to mean, then the relevant original meaning must be the meaning understood by the democratic polity that gave the Constitution force. [I bracket for now questions about how the understandings of a large public can be ascertained and assume, for the moment, that it is intelligible to speak of what the public would reasonably have understood the Constitution to mean.] I will use the shorthand "ORU originalism"—where ORU is short for "original ratifiers' understanding"—to name the kind of originalism that looks to the understandings of the original ratifying public.

## ***B) The Dead Hand Problem and its Limits***

The most important limitation on ORU originalism's capacity to serve the constitutional end of respecting democratic authority is often called the dead-hand problem.<sup>11</sup> Stated simply, the problem is that the people whom the Constitution governs today played no role in its adoption. We weren't alive, so we were not consulted, did not participate, and did not consent. Democratic authority entails the consent of the governed, but here the passage of time means that the governed and the consenting are two mutually

---

<sup>11</sup> See, e.g., Paul Kahn, *Legitimacy and History*. The dead-hand problem is not the only limitation on ORU originalism, but for present purposes it eclipses the others. Consider, for example, the familiar point that the exclusion of many Americans from past ratification processes on the grounds of race and sex may vitiate the Constitution's claim to be democratically enacted. Reasonable people disagree about the extent to which such exclusions impede claims of democratic authority. For present purposes, however, it is not necessary to settle these issues, because the method I propose for handling the dead-hand problem avoids the need to address these other problems separately. See *infra*.

exclusive groups of people.<sup>12</sup> Accordingly, the objection concludes, giving binding force to the understandings of long-dead ratifiers does not serve democracy. If anything, according such understandings a legal status superior to the will of the people today impedes democratic governance.

Assessing the strength of the dead-hand objection requires thinking carefully about two different dimensions of constitutional governance. The first is the difficulty of amending the Constitution. The second is the degree to which a polity at Time 2 can be said to be “the same polity” that enacted a constitutional provision at Time 1, such that enforcing the provision at Time 2 can be an act of self-governance. To varying degrees, the problems to be considered along both dimensions arise in all democratic lawmaking, whether statutory, constitutional, or otherwise. In the American context, however, constitutional law poses each problem in an extreme form, such that the dead-hand problem, though not always fatal, has a good deal of bite.

## **1) The difficulty of amendment**

Suppose the people who make up the American polity had a costless and frictionless mechanism for enacting their constitutional views into constitutional text. There would then be no dead-hand problem, because the people would be perfectly free to replace an inherited constitutional rule with one of their own choosing. The dead-hand

---

<sup>12</sup> Some readers may respond that people today demonstrate their consent to the system of government by living under its jurisdiction. This is the familiar if controversial idea of “implied consent.” Whether or not the implied consent idea succeeds in showing that people today consent to the system of government, however, it does not demonstrate their consent to be governed according to ORU. The implied consent idea seeks to show that people today consent to be governed by the government under which they are actually living. If it were the case that American government today were run according to ORU originalism, then implied consent would be consent to be governed by ORU. In fact, however, American government today is not conducted along strict ORU lines; it is conducted through an uncertain mix of various interpretive methods. Implied consent is consent only to be governed by that uncertain mix.

problem only arises if the people's authentic constitutional views cannot be adopted into the Constitution, such that they are stuck with a contrary constitutional rule inherited from a prior time. Consider the extreme case of an absolutely unamendable constitution. If a polity at Time 1 adopts a set of rules that are immune from any future democratic revision, and if at Time 2 all the people living at Time 1 have died, there is no democratic mechanism for reform. The dead-hand problem would be at its strongest, and the fact that the inherited constitutional rules had been democratically enacted at some time in the past would not lend them continuing democratic authority.

The question then, for present purposes, is where democratic amendment of the United States Constitution falls along the spectrum between frictionless amendment and unamendability. Different people may reach somewhat differing answers to this question. Any reasonable answer, however, would have to concede that the Constitution is extremely difficult to amend, at least by the formal means of amendment stated in Article V. One modern study has pronounced the United States Constitution mathematically more difficult to amend than any other national constitution in the world.<sup>13</sup> Formal amendment requires, among other things, the approval of three-quarters of the state legislatures.<sup>14</sup> Failure to win ratification in just thirteen states can block an amendment, no matter how small a share of the country's total population reside in those thirteen states. Moreover, because forty-nine of the fifty states have bicameral state legislatures in which ratification requires concurrent approval by both houses, an

---

<sup>13</sup> See Donald Lutz in Levinson, *Responding to Imperfection*

<sup>14</sup> Or the approval of conventions in three-quarters of the states—though that alternative amendment track has almost never been pursued.

amendment can be blocked by the inaction of only thirteen of the country's ninety-nine state legislative houses, properly distributed.<sup>15</sup>

As a practical matter, an amendment that failed to win approval in one house of each of the thirteen smallest states would probably fail in at least some other houses and other states as well, because the smallest thirteen states do not form a solid community of interest. Nonetheless, the existing system is a serious obstacle to constitutional amendment even by large supermajority vote. The proposed Equal Rights Amendment, for example, was approved in Congress in 1972 by a vote of 354 to 24 in the House of Representatives and 84 to 8 in the Senate, after which it was ratified by states containing more than 70% of the country's total population. In a collection of other states with 20% of the population, the amendment was approved in one house but not the other. (In the largest such state—Illinois—majorities in both houses voted in favor of the amendment, but local rules required supermajorities for ratification.) States in which neither legislative house approved the amendment accounted for only 10% of the American population. That level of opposition, however, sufficed to defeat the amendment.

The high bar to amendment is a contingent feature of our constitutional system. If formal amendment were more achievable, the dead hand problem would be less important, and ORU originalism would have a stronger claim to being an interpretive method that respects democratic authority. What we need, however, is an originalism for the constitution we actually have. The tremendous obstacles to formal amendment under

---

<sup>15</sup> Because conventions are presumptively unicameral, passage through conventions might be a bit easier than passage through state legislatures.

the United States Constitution undercut most—though not all—of the force of the idea that amendability avoids a dead-hand problem in American constitutional law.

## **2) The passage of time**

The dead-hand problem is an extreme form of a more general problem that the passage of time poses for all democratic decisionmaking. At some level, the passage of time erodes the democratic authority of any decision. Once the composition of a polity changes, the people whose representatives enacted any given decision are no longer identical to the people who are governed. Because the composition of every polity is always changing—people are born and die every die—this problem applies to every polity, all the time. If a decision only enjoyed democratic authority when the adopting polity and the polity bound were completely identical, no decision could have democratic authority over a nation of millions for longer than the instant in which it was adopted. Democratic authority would then cease to be a useful concept for American constitutional theory. Indeed, it would cease to be a useful concept for American law in general, because the underlying problem applies to all forms of democratic decisionmaking, including majoritarian lawmaking by legislatures.

Fortunately, we need not say that any change in the polity eliminates a decision's claim to democratic authority, because democratic authority need not be an all-or-nothing proposition. Think of it instead as a matter of degree: decisions can have more or less democratic authority rather than having perfect democratic authority or none. We can then say that marginal changes in the composition of a polity reduce the democratic authority of a prior decision only marginally. The operational question about a given decision is whether it enjoys enough authority to command obedience, not whether its

authority is complete. Accordingly, a decision that enjoys much of its initial democratic authority might still legitimately require obedience, even if its democratic authority is less than it once was.

Moreover, a decision that enjoys some democratic authority can play a role in directing action even if its democratic authority is not strong enough to command obedience standing alone. Suppose that a state democratically adopts a constitutional provision setting an income tax rate of 10%. In the year when the provision is adopted, respect for democratic decisionmaking is probably a sufficient reason for compliance. Indeed, it is probably a sufficient reason for a form of compliance consistent with what the people who ratified the amendment understood the provision to require—that is, for compliance on the model of ORU originalism. Over time, however, the composition of the polity will change, and the democratic authority of the provision will erode. At some uncertain date in the future, the provision’s claim to democratic authority will no longer be sufficient, standing alone, to require compliance. Respect for democratic authority is not, however, the only end of constitutional law. Another is the set of values and benefits that fall under the rubric of the rule of law: things like stability, predictability, transparency, and impersonal authority. On the day after the future date when the hypothetical income tax provision no longer commands obedience by virtue of its democratic authority alone, the combined strength of its remaining claim to democratic authority and the rule-of-law benefits that come from continued adherence to an existing decision will probably be sufficient to warrant continuing compliance with the 10% tax rate.

At some point, the composition of the polity will have changed so much since the time of enactment that the democratic authority of the income tax provision will approach zero. When that happens, the force of other constitutional considerations (including the rule of law) might still provide sufficient reason for respecting the 10% tax rate set by the amendment. It would not be the case, however, that adhering to the 10% tax rate would then show respect for democratic decisionmaking. It would show dedication to the other constitutional values, like the rule of law, that justify adhering to the 10% tax rate even in the absence of a democratic mandate for doing so.

What kind of interpretive tool should be used when determining the meaning of a constitutional provision when the reason for adhering to that provision is something other than its democratic authority? An interpretive method whose strength is its ability to respect the democratic authority of past decisions would not be appropriate. The constitutional provision in question has no democratic authority to respect. What we want instead is an interpretive method that yields benefits along other axes of constitutional value that are more in point, like the rule of law. Note that this does not necessarily rule out originalism as an appropriate tool. But if originalism would still be an appropriate tool, it would be because originalism also has the virtue of serving some other constitutional value (like the rule of law). Originalism's capacity to respect past democratic decisionmaking would be of no moment: it would be like a feature of a hammer that plays no part in driving the nail, like a corkscrew built in to the handle end. Or, in a good pragmatist image, it would be a wheel that turned no part of the mechanism.

### 3) The Intertemporal People

Probably the most elegant attempts to respond to the dead-hand problem are those that seek to dissolve the difficulty by saying that the subject of democratic assent to the Constitution is not an aggregation of individuals but rather the American People, conceived as a corporate and temporally extended entity. Individuals are born and die, but the People continues, and it is the People who form the relevant polity. Thus, the People consented, and the People are (is?) governed, and democracy as self-government is reconciled with the authority of an inherited Constitution: in submitting to the Constitution, we merely accept what we ourselves agreed to.<sup>16</sup>

This proposal has considerable appeal. Among other things, it offers to create a world of constitutional discourse in which we are connected across time to famous historical figures and their heroic undertakings. The 21st-century American who adopts this perspective can see himself as engaged in a common project with, or indeed standing in the shoes of, the Philadelphia Convention or the Reconstruction Congress, participating in and carrying forward acts of national self-governance. As a selling point to people who are interested in constitutional law, this aspect of the intertemporal-people idea should not be underestimated.

For all its elegance and romantic appeal, however, the idea of an intertemporal People cannot dissolve the dead-hand problem. It is just plain hard to understand in what meaningful sense “we” who are governed “agreed” to the Constitution’s enactment

---

<sup>16</sup> Ackerman, Amar, Rubinfeld

before we were born.<sup>17</sup> This is not to deny the realities of intergenerational continuity. National communities outlive individuals, and what happens in the time of one generation constrains or enables the behavior of those who follow. We inherit many of the problems and institutions that structure our politics, and coming generations will inherit problems and institutions from us: if the federal government today spends trillions of dollars more than its revenues, future Americans may have to repay a large national debt. Moreover, our identities (personal and communal) are shaped by narratives that begin before our birth: most people understand the significance of their own lives and that of their national communities in the context of stories that transcend their individual lifetimes. But we do not explain much about this complicated reality by saying that we chose the world (or the family, or the constitution) that we inherit, just as it would be perverse to say that we have the democratic authority to bind our descendants to pay our debts because the whole American People over time blesses the arrangement.<sup>18</sup>

---

<sup>17</sup> We may agree to, or acquiesce in, its operation today, but that is a different thing that could not support originalism in the same way as our having agreed to it in the past. See *supra*, XX.

<sup>18</sup> One irony about debate over the dead-hand problem is that those theorists (like me) who are inclined to regard the problem as serious are often perceived as having an impoverished understanding of history and its influences. It is easy to see how this perception arises. First, the basic contention of the dead-hand problem sounds in presentist democracy. Second, many proponents of solutions like the idea of an intertemporal people are great lovers of history, including lovers of the worlds of meaning that attention to history can create.

It seems to me, however, that my argument flattens history less than arguments for communal intertemporality do. The idea that the Constitution has democratic authority because the People persists as a corporate body through time attempts to take all of the varied ways in which history might shape good constitutional decisionmaking and reduce them to a form of justificatory reasoning: the idea of democratic choice. That seems to me not only implausible but also thin as an understanding of what might be valuable about engagement with history. In my understanding, history shapes and constrains the constitutional order (and appropriate decisionmaking today) in a great many ways—it's just that after a certain lapse of time, democratic choice is no longer one of them. The richer questions are all about how to cope with the fact that a national community (and its somewhat democratic constitution) are embedded in a history that supplies some of its values, that constrains its choices, and against which it often measures itself—and yet which is not of the choosing of its people. To pretend that we have chosen our constitution democratically evades the need to think about these questions in the rich ways they deserve.

It makes more sense to say that communities, like individuals, often operate under constraints that they did not choose and would not have chosen as an original matter. If future generations choose to honor the debts we bequeath to them, it will not be because the debts come with the imprimatur of democratic authority, or at least not exclusively. It will largely be because other important values, like stability and social welfare, will depend on their doing so. Similarly, our continued adherence to constitutional arrangements that we did not choose (and might not choose as an original matter) does not rely on the democratic authority of those arrangements. It may rely instead on our understanding that some combination of other constitutional values—the rule of law, justice, social welfare, citizen identification with the governing regime—justifies our maintaining existing arrangements despite our not having chosen them.

#### **4) The Constitution Survives the Dead Hand**

One reason why it is crucial to recognize that constitutional law aims at (and is justified by) more values than respect for democratic authority is that it allows us to admit the force of the dead-hand problem without worrying that such an admission would lead to the collapse of the constitutional system as a source of legitimate authority. I suspect, though I cannot prove, that a fair amount of resistance to the dead-hand argument is rooted in that worry. Fortunately, however, the dead-hand problem does not imply the illegitimacy of the Constitution. It would imply that illegitimacy of the Constitution if, but only if, democratic enactment were the *only* source of the Constitution's legitimate authority. If it were, then any threat to the authority rooted in the Constitution's democratic enactment would be a threat to the Constitution's authority as a whole. But democratic enactment is nothing like the only source of constitutional

authority. Just as constitutional government serves multiple (and overlapping) ends, it draws its legitimacy from multiple sources of authority—which is to say that each of the ends the Constitution serves provides a reason to uphold it.<sup>19</sup>

Part of the Constitution’s legitimacy derives from the brute fact that it exists and that no society can rewrite all of its laws every day, so concerns for stability and other rule-of-law values argue for respecting the existing Constitution until and unless it is changed through some (stable, legal) method. Part of the Constitution’s legitimacy derives from its ability to deliver tolerable levels of substantive justice; part from the fact that citizens identify subjectively with our system of constitutional government and claim it as their own; part from the fact that the Constitution leaves a relatively broad field of play for democratic decisionmaking, albeit subject to certain constraints. No formula specifies how much of each factor is required to make a legitimate constitution. But probably not even perfection along one of these dimensions—even the dimension of democratic enactment—would legitimate a constitution that failed utterly along all the other dimensions. (Thus, I do not think people should consider themselves bound to obey an autocratic, unjust regime that people regarded as alien and that presided over a chaotic society, even if that regime or its forerunner had been established by a perfectly democratic process. Nor do I think that the American polity would in fact uphold such a regime for very long.)

The dead-hand objection is irrelevant to most of the sources of constitutional authority. Where the objection is applicable, it nullifies the claim that the Constitution’s democratic enactment is a source of its authority, but it leaves the other sources of

---

<sup>19</sup> Cf. Joseph Raz’s definition of “authority” as a reason for acting. Raz, *The Authority of Law*.

authority untouched. And in the American system as we know it, the other sources of constitutional authority are sufficient to justify our continued allegiance, or, to say the same thing, the Constitution's continued legitimacy. The constitution of a government that provides civil peace, social stability, the rule of law, and tolerable levels of substantive justice, that decides most issues through electoral politics, and that enjoys the loyalty of ordinary citizens is well worth maintaining irrespective of the circumstances by which it was enacted.

Two comparative examples may help make the point. The constitutions of Canada and Japan are legitimate sources of authority in those countries, legitimate even when invoked to block the outputs of majoritarian electoral politics. Neither of those constitutions, however, can claim democratic enactment in the manner of the United States Constitution. The Canadian Constitution, though drafted by Canadians, was officially bestowed by the grant of the British Crown. The Japanese Constitution was drafted and imposed by a hostile army, *i.e.*, that of the United States. There is no credible sense in which its authority can be said to derive from its having been democratically willed by the Japanese people. Nonetheless, a combination of other factors suffices to make that constitution a legitimate source of law, even of law superior to ordinary electoral lawmaking. It's nice to be able to think of one's own ancestors (genetic or culturally adopted) as the authors of one's system of government, but it is not an indispensable condition of constitutional legitimacy.

Given that we ought to uphold the Constitution despite its shortcomings in democratic authority, we need not pretend (or make ourselves believe) that upholding the Constitution shows respect for democratic decisionmaking. This is not to deny that

democratic enactment can be a source of constitutional legitimacy. It can, under circumstances where the people giving consent sufficiently overlap with the people later bound. In that circumstance, it is meaningful to say that respect for democracy entails respecting the bargain that was struck—that is, respecting their own prior democratic decisions. But whatever the reasons for upholding a centuries-old constitution, we do not vindicate democracy by so doing. And if upholding the Constitution is not an exercise in respecting democratic decisionmaking, then it makes little sense to choose a method of constitutional interpretation on the grounds that it is required by the democratic authority of the Constitution.

### ***C) What's Left: Recent Enactment***

The dead-hand problem is real, but it does not mean that originalism can *never* deliver on its promise to interpret the Constitution in a way that properly respects democratic authority. Although the dead-hand problem is serious where it applies, it does not apply to every instance of constitutional interpretation. Specifically, there is no dead-hand problem if the constitutional provision being interpreted is of recent enactment, rather than being inherited from a time long ago.

“Recency” is offered as a standard, and there is no principled way to translate it into a quantitative legal rule (like “within the last twelve years”). The following two examples illustrate both why recency matters and what the rough contours of the standard should be. Begin with a clearly recent enactment. Suppose that a new constitutional amendment—call it the twenty-eighth—was adopted yesterday. If a constitutional interpreter were to apply that amendment today, looking to what the ratifying public

understood the amendment to mean at the time of adoption would show respect for democratic decisionmaking. The ratifying public presumably meant to bind itself by the amendment it adopted, and that public had the democratic authority to make decisions binding on itself. To enforce the amendment in line with the expectations of the public that agreed to it shows respect for the democratic choice that public made. Put another way, it would clearly compromise democracy if an amendment adopted yesterday were today applied to require something different from what the ratifying public understood itself to be requiring.<sup>20</sup> The idea that the public's democratic authority provides a reason to obey today an amendment adopted only yesterday is not only plausible but also compelling.<sup>21</sup> Then, at the other extreme, consider an amendment adopted in 1868. No American alive today was alive then. So an 1868 enactment is not recent enough to command authority over us today by reason of its democratic enactment, even if its enactment had been unimpeachably democratic a hundred and forty years ago.<sup>22</sup>

---

<sup>20</sup> Whether some combination of constitutional values other than respect for democracy could ever justify such a compromise is a separate question, and I do not address it now.

<sup>21</sup> I note in passing that this approach provides a justification for the practice of constitutional originalism in the first years or even decades after 1788. See (scholars stating that originalism was then the prevailing form of interpretation. Kahn? Friedman & Smith? Horwitz?) When all of the Constitution was new, and the people on whose authority it was adopted were still the people it bound, interpreting the Constitution to enforce the bargain agreed to would indeed have shown respect for democratic processes of decisionmaking. But I offer this observation only as an illustration, not as any kind of support for the correctness of the approach I here recommend. From a justificatory point of view, given my general theory, whether Americans of long-ago generations saw the relationship between democracy and constitutional authority in one way or another cannot bear on the democratic legitimacy of the constitution today. Moreover, I make no claim about the extent to which early Americans understood their constitutional originalism to be aimed at respecting democratic decisionmaking in the manner that the modern theory of original understanding claims. Respecting democracy is only one possible reason to be an originalist, see XX, and it is far from clear that anything like a consensus of early Americans understood democracy to be the guiding value in constitutional interpretation. Compare (Horwitz, dem is a 20th c justification) w/ (Amar, democracy all along).

<sup>22</sup> I do not mean by this statement to imply that the Fourteenth Amendment was in fact enacted in a democratically legitimate way. Whether it was is a tricky question of its own, and it need not be resolved for present purposes. See RAP, *The Riddle of Hiram Revels*; Ackerman, WTP.

Sometime between yesterday and 1868, “recent enough” flows into “not recent enough.” Nobody can say exactly when. The ideal measurement of recency might be a unit of time corresponding to a political generation, such that enactments would claim the authority of democratic enactment for the life of their enacting generations—but generations are fluid, because people are born and die every day rather than at twenty- or thirty-year intervals. Any choice about where one generation begins and another ends would be problematic.

This difficulty, however, means only that the recency inquiry is rough; it doesn’t mean that it isn’t the right inquiry. It is the right inquiry. In some cases, it will not yield a unique right answer, which is to say that interpreters will have to exercise judgment. But given the actual conditions of American constitutional interpretation in 2006, the recency standard will usually yield unique answers to the question “Was this enactment recent enough that construing it according to its original understanding would show respect for democratic decisionmaking?” Under present circumstances, the unique answer that this inquiry will yield is “No, it’s not recent enough.”

The reason why is straightforward: almost all constitutional adjudication today construes constitutional provisions adopted more than a hundred years ago. This fact is a contingent consequence of there having been few if any recent amendments to the Constitution.<sup>23</sup> After a burst of amending activity, such as that which occurred in the

---

<sup>23</sup> The case of the Twenty-Seventh Amendment—the most recently adopted as of this writing—helps to flesh out the import of constitutional recency. That Amendment was officially adopted in 1992, but it is questionable whether the decisionmaking process behind the Amendment was “recent” in the relevant sense. The text of the Amendment was adopted by Congress in 1789. Seven states ratified it between 1789 and 1792, and an eighth state ratified in 1873. No other ratifications followed until the 1980s, when a new ratification campaign exhumed the Amendment and brought it before the remaining state legislatures. Thirty states ratified by 1992, whereupon the Amendment was deemed adopted by the ratification of

1910s or the 1860s, originalism has an important role to play. But under the historically specific conditions of 2006, the democratic process argument for originalism has almost no application.

At this point, some readers may fear that I have engaged in a bait and switch. I promised to take the democratic-process argument for originalism seriously and to identify the circumstances in which it warrants the use of originalism as a method of constitutional interpretation, but in the end I revealed that those circumstances almost do not exist, such that the set of cases where the democratic-process argument warrants originalism is nearly empty. I do not think that this fear should count as an objection to the argument. But perhaps more importantly, a suspicion that my argument is a nice way of saying “the democratic-process argument for originalism never makes sense” may betray a weakness in the democratic-process argument for originalism itself.

Here’s why. My approach only implies the near-uselessness of the democratic-authority argument for originalism if the circumstances of 2006, under which little constitutional adjudication looks to recent amendments, will always be the normal circumstances under which constitutional adjudication occurs—in other words, if constitutional amendments are always going to be few and far between. If significant amendment were likely on a regular basis, my theory would direct an important role for

---

Article V’s required three-fourths of all states (i.e., those thirty plus the eight that had ratified more than a hundred years before, for a total of thirty-eight out of fifty). Many legislators whose votes were necessary to make the Twenty-Seventh Amendment part of the Constitution (as well as the people who voted to elect those legislators) were thus long dead by the time of the last ratifications. The Amendment may be valid law despite this oddity in its adoption history, but it is hard to argue that interpreting the Amendment in line with the understandings of its ratifiers would show respect for the authority of democratic decisionmaking, even in the first years after the Amendment was adopted. Such an interpretive enterprise would either have to look exclusively to the understandings of twentieth-century ratifiers, whose authority was (by the rules of Article V) insufficient to adopt the Amendment, or it would have to look also to the understandings of the Amendment’s supporters in previous centuries, who no longer had democratic authority in 1992.

originalist interpretation on a recurrent basis. If my theory means that the democratic-process argument for originalism will have few if any applications, it can only be because amendment will be highly uncommon. I happen to believe, of course, that that is the case: as I noted earlier, it's awfully hard to amend the Constitution. But the democratic-process argument for originalism relies on more than the premise that the Constitution was democratically adopted. It also requires the premise that We The People can alter the Constitution, democratically, whenever we want. As we become less confident that the future holds regular amendments, we should be less drawn to the democratic-process argument in the first place.

That said, I do not doubt that there will occasionally be constitutional amendments in the future. I expect the Constitution to persist for a long time, and over the course of a long time, a lot happens. When new amendments are adopted, the democratic-process argument will justify using ORU originalism as an interpretive method—for a while—in cases where those amendments must be applied.

### **III. Originalism and the Rule of Law**

A second serious argument for originalism is that originalist interpretation supports the rule of law. The nub of this idea is that tethering constitutional meaning to originalist sources stabilizes the content of constitutional law, thus limiting the discretion of decisionmakers. To determine whether and when this argument justifies admitting originalist interpretation into the set of methods that a constitutional interpreter should consider, I briefly discuss the content of the rule of law as a constitutional value and then analyze originalism's effectiveness as a means for attaining the benefits that the rule of

law offers. As was true of the argument from democratic authority, I conclude that the argument from the rule of law succeeds in some cases better than in others. In those cases where it has value, it should be used—provided that other, better tools for attaining the same end are not available. In cases where better tools are available, and in cases where originalism simply does not deliver rule-of-law benefits, it should not be consulted for this purpose.

### **A) *The Rule of Law as a Constitutional Value***

The rule of law is an ideal of government by an impersonal and relatively stable system of authority. This ideal is a cluster concept with several overlapping but distinguishable themes. These themes include the idea that the law is stable and can deliver a certain amount of social stability; that the law governs officials as well as ordinary people; that governmental authority resides in offices rather than in individuals; that both officials and ordinary people actually look to the law to guide their behavior; and that the law is administered impartially, predictably, and with fair procedures.<sup>24</sup> These ideas are mutually reinforcing. For example, it is the confidence that officials will look to the law to guide their behavior, coupled with the confidence that the law contains fair procedures, that creates the expectation that the law will be administered predictably, such that ordinary persons can benefit from ordering their affairs with reference to the expectations the law creates. Thus, the rule of law means something like Weberian rational authority, albeit with connotations more uplifting than the prospect of the iron cage. Moreover, the predictability, stability, and impersonal authority that travel together

---

<sup>24</sup> See generally Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 6-9 (1997).

as the rule of law are vitally important to a well-functioning legal system: as Don Herzog has pithily suggested, people inclined to denigrate these benefits of the rule of law should consider what life is like in societies lacking them.<sup>25</sup>

Excessive discretion vested in government officials charged with administering the law threatens the rule-of-law ideal. To be sure, no sensible legal system eliminates all role for the exercise of judgment. But if officials are not guided by preexisting sources of authority, the rule of law begins to unravel. This is especially so as their decisions become more informed by their subjective preferences or their privately held senses of right and wrong (at least if those senses are controversial and not legally sanctioned). Moreover, official edicts not founded on a stable system of rules might disrupt settled expectations and institutions. Social stability and freedom from arbitrary personal power thus require state authority to be wielded on the basis of an impersonal system, which in turn calls for those who implement state authority to follow some external source of guidance rather than simply acting on their own preferences. In other words, the rule of law calls for a law of rules.<sup>26</sup>

The American constitutional system features many points of contact between the rule of law and respect for democratic authority. An impersonal system of rules must be rooted in *some* authority, and in a democracy, that authority is often some process of electoral decisionmaking. Tethering constitutional meaning to something outside the decisionmakers' own preferences can thus support both the rule of law and democracy at the same time. That said, it is also possible (and important) to distinguish between the

---

<sup>25</sup> See Herzog, *Happy Slaves* 133.

<sup>26</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*

concern with democracy and the concern with the rule of law: a well-functioning judiciary could uphold the rule of law, and valuably so, even in a liberal monarchy that held no democratic elections at all. Indeed, any source of interpretive authority sufficiently robust to confine decisionmaking but not rooted in popular voting could serve the rule of law without vindicating the values of democratic process.

Ideally, a theory of constitutional interpretation would maximize both values, but that cannot always be done. Where either democracy or the rule of law can be served without harming the other (or some third independent constitutional value), it makes sense to do so. Thus, a constitutional theory should strive to maximize the rule of law, at least up to the point where further increases in the rule of law would harm other constitutional values (like democracy), even if gains in the rule of law would not themselves advance the other values (like democracy). All of which is just to say that the rule of law is an independent constitutional value.

## ***B) How Originalism Could Help***

### **1) Originalism and the components of the rule of law**

One virtue of originalism, it is often argued, is that it can confine and regulate constitutional interpretation in ways that serve the rule of law. Unpacking this argument calls for attention to each of the themes in the rule-of-law cluster. Consider first the value of impersonal authority. If decisionmakers interpret and apply the constitution on the basis of original meanings, which are assumed to be independent of the decisionmakers' own views, then the content of constitutional law will be independent of the preferences of particular officials. Next, consider predictability. Assuming that

original meaning is gleaned from publicly available sources, it should be not only external to the preferences of particular officials but also knowable, *ex ante*, to potential litigants and others who will be affected by official constitutional interpretations. To the extent that people can know in advance how law will be, they are freed from the arbitrariness of surprise, just as the impersonality of law frees them from the arbitrariness of being ruled by the subjective preferences of this or that decisionmaker. Finally, consider stability, both legal and social. Assuming that original meaning is a function of conditions obtaining at some fixed moment in the past, it should remain constant over time. Tethering constitutional law to original meanings thus holds the law in place, enhancing social stability by allowing people to retain whatever arrangements have grown up within existing frameworks rather than forcing periodic adaptation to external legal shocks. Sophisticated originalists know, of course, that neither originalism nor any other plausible interpretive method could deliver all of these benefits perfectly in every case. But to whatever extent it can deliver these benefits, originalist interpretation can enhance the rule of law.

Upon reflection, however, the rule-of-law argument for originalism sounds more in the concern for impersonal authority than in the concerns for predictability and stability. Again, consider predictability first. In most cases where judges decontest open legal questions by referring to original constitutional meaning, they do so after surveying a fair amount of historical source material. Let us suppose, generously, that in all such cases the judges have correctly identified the original meaning they seek based on their historical investigation. (This cannot be the case, if only because judges regularly diverge from one another on questions of original meaning. But for the moment, let us

take the possibility of predictability in its best possible light.) It is not realistic to think that people whose behavior will come to be governed by constitutional rulings will pursue such historical inquiries with the doggedness necessary to discern original meanings in advance of such rulings and at a time when knowing the content of the law would help them order their behavior. After a court pronounces a ruling based on its understanding of original meaning, the resulting rule of law may be relatively accessible and of greater assistance in predicting the operation of law in the future. But the force then fostering the predictability of the law is the precedential ruling, not the original meaning in an unmediated form.

Similarly, originalism is often a poor tool for enhancing stability in the law. As many originalists have recognized, originalism may enhance stability if it is applied consistently from the first day a legal system operates, but attempts to impose original meaning on the constitutional law of a system that has changed since the time of its origin will actually produce a great deal of instability.<sup>27</sup> If it were the case that constitutional practice from, say, 1789 to 1890 were constant, then perhaps making decisions in 1891 based on the constitutional understandings of 1789 would help hold the law steady, but if the system in 1890 functions much differently than it did in 1789, an attempt to revert to the rules of 1789 would upset settled practices and expectations. At least in many cases, therefore, adherence to precedent (whether in the form of judicial rulings or a history of practice) promotes stability better than a jurisprudence of original meaning would.

Accordingly, although the rule-of-law argument for originalism may trade complexly on

---

<sup>27</sup> See, e.g., Scalia, *A Matter of Interpretation* (explaining that this phenomenon persuades him that *stare decisis* should often function as an exception to a general theory of originalism).

several different ideas within the rule-of-law cluster, its gravamen and greatest strength lie in the concern with impersonal authority rather than in concerns for predictability and stability in the law.

The rule-of-law concern that interpreters not apply the Constitution on the basis of their privately held views should not be confused, however, with an argument for judicial restraint. “Judicial restraint,” which is sometimes associated with originalism, is a shorthand for a practice whereby judges defer to the decisions of other branches of government. To the extent that this practice prevent judges from deciding cases on the basis of their privately held views, it overlaps with some of the same rule-of-law concerns that motivate some arguments for originalism. Moreover, in a system where judges are not electorally accountable, judicial restraint may show respect for (presentist) democracy by giving elected officials a broad field on which to operate. Respecting democratic decisionmaking, however, is not identical with fostering the rule of law. Indeed, the two are sometimes in tension, as noted earlier. For example, the rule of law could call for judges to enforce the Constitution’s substantive requirements, regardless of whether those requirements are consistent with the wishes of elected officials. If Congress were to pass a law that might or might not be an unconstitutional bill of attainder under Article I, Section 10, a judge practicing judicial restraint might seek a way to deem the law not a bill of attainder, thus enabling him to uphold the law and let the people’s elected representatives have their way. In contrast, the rule-of-law ideal might require the judge to call spades spades and bills of attainder bills of attainder. Thus, the kind of interpretive constraint that would enhance the rule of law would in principle be orthogonal to judicial restraint: it would call on judges to enforce the rules as

they exist, leaning neither toward nor away from legislatures but instead permitting the permitted and prohibiting the prohibited.<sup>28</sup>

## **2) Criteria for success**

In assessing originalism's capacity to serve the rule of law, one must not expect more of originalism than an interpretive method can deliver. Thus, two qualifications should be borne in mind. First, the relevant question about originalism's usefulness as an interpretive tool is about its usefulness in the hands of interpreters trying in good faith to use originalism to enhance the rule of law, not interpreters cynically manipulating the method for other ends. Originalism is susceptible of bad-faith manipulation, but so are all other plausible interpretive theories. The claim that originalism can confine the range of constitutional interpretation is not a claim about originalism's capacity to police bad-faith judging: it is a claim about supplying guidance for judges (and other interpreters) acting in good faith.

Second, originalist interpretation can have rule-of-law value even though original meanings are often indeterminate. As many scholars have shown, factors like the multiplicity of originalist sources and the difficulty of applying ideas articulated in one century to unforeseen situations arising in another regularly prevent historical evidence from yielding determinate meanings.<sup>29</sup> If an interpretive method needed to identify uniquely correct results in all or even most cases in order to promote the rule of law, originalism would not serve. But no plausible interpretive method supplies unique results

---

<sup>28</sup> See Keith Whittington in *Constitutional Interpretation*, who makes this point elegantly.

<sup>29</sup> See, e.g., Michael Klarman, Suzanna Sherry

in every case, so any interpretive method's ability to enhance the rule of law is a matter of degree. Therefore, if originalism can *sometimes* confine interpretive discretion, it has some value as a tool for promoting the rule of law. And it can, sometimes.

Indeed, sometimes originalism can confine interpretive discretion in ways that promote the rule of law even when the relevant original meaning cannot be determinately known. This is so for two reasons. First, the rule-of-law benefits that flow from constraining interpretive discretion do not always require convergence in judges' understandings of constitutional *meaning*. Some rule-of-law benefits accrue whenever interpretive convergence is sufficient to bring judges to agreement about how to dispose of actual cases, even if they lack agreement as to the deep reasons for those dispositions.<sup>30</sup> Second, originalism would have some rule-of-law value whenever it can reduce the menu of possible outcomes, even if it cannot bring judges to converge on a single result.<sup>31</sup>

---

<sup>30</sup> Suppose it is an established rule that courts will not review the validity of senate impeachment trials. See *Nixon v. United States*, 506 U.S. 224 (1993). Different judges may have different accounts of the rule at the level of constitutional meaning. Some may believe that the rule is required by the text of Article I, Section 3, while others believe that the rule is not textually required but instead inheres in a broader constitutional principle about the system of checks and balances. (Compare the view of the majority opinion in *Nixon* with that of Justice White's concurrence.) So long as all of the judges apply the rule the same way in cases that come before them, it makes little difference for rule-of-law purposes that the judges differ on an issue of underlying constitutional meaning. To be sure, convergence at the level of constitutional meaning is likely to correlate with broader convergence at the level of decisional outputs. (Other cases will arise, and shallowly theorized consensus may break down.) But what matters for rule-of-law purposes is convergence as to outcomes, and convergence at the level of meaning is a proxy or way-station toward that goal. Accordingly, originalism can serve the rule of law by constraining judicial discretion even if it fails to yield uniform judicial understandings at the level of meaning.

<sup>31</sup> Imagine a contested issue about which a judge might reach resolution X, Y, or Z in the absence of an accepted method for (further) confining interpretive discretion. An ideal method for confining discretion would identify one possible resolution—say, X—as correct. But the cause of reducing discretion would also be advanced, albeit more moderately, by a method that would eliminate one option—say, Z—and leave the other two—X and Y—as possible resolutions. We can distinguish between these two situations with the terms “outcome determinative” and “outcome limiting.” Given a case in which interpreters differ as to the correct result, an interpretive method is *outcome-determinative* if all or almost all interpreters agree that applying that method to the existing disagreement would direct a unique result. Similarly, an

## **C) The Problem of Interpretive Divergence**

### **1) At the level of results**

I here offer a simple and admittedly incomplete test for whether an interpretive method produces any of the kinds of convergence among interpreters that promote the rule of law by reducing the degree to which constitutional meanings (or the results of cases) depend on the identity of the decisionmaker. The test asks the following question: How frequently would the application of that method reduce the range of available interpretations (or results) relative to the available range in the presence of other common methods of constitutional interpretation? Imagine, in other words, the range of tools available to the constitutional interpreter: text, precedent, original meaning, historical practice, structural argument, normative argument, and so forth. Imagine next some constitutional question that a group of judges or other decisionmakers must confront. How effective would each method be at bringing all or almost all members of the group to the same decision? And in cases where the method seems effective, is it operating distinctively, or is the interpretive consensus actually produced, or produced more easily, by one of the other methods?

No plausible interpretive method will pass this test all the time. Every one of the methods listed above will fail in a great many cases, as would any other method that a reasonable judge might adopt. Some of the methods, however, would also succeed in a

---

interpretive method is *outcome-limiting* if all or almost all interpreters agree that applying that method to the existing disagreement would exclude one or more otherwise acceptable results. Other things being equal, and assuming that reducing interpretive discretion enhances the rule of law, outcome-determinative tools for reducing discretion are better than outcome-limiting tools. But outcome-limiting tools are better than nothing. Accordingly, to sustain the claim that originalism can serve the rule of law by constraining interpretive discretion, it is not necessary to demonstrate that originalism is outcome-determinative. It is only necessary to show that it is sometimes outcome-limiting.

nontrivial number of instances. Consider the example of text. Many constitutional texts are open to broad ranges of meaning. Good-faith effort to apply the text of the Equal Protection Clause, for example, would probably not (in isolation from other sources of authority like precedent) produce consensus among interpreters asked to decide whether the Constitution permits the state of Michigan to impose a progressive income tax (or a regressive one). But good-faith effort to apply the constitutional text probably would produce consensus among interpreters asked to decide who has the power to fill a senate vacancy when a sitting senator dies.

I suspect that good-faith attempts to be guided by original meaning would produce interpretive convergence among decisionmakers in few cases. Judges facing questions not clearly decided by text and precedent have regularly divided as to the original meanings of virtually every frequently litigated aspect of the Constitution, as well as a great many infrequently litigated ones. It is hard to identify many counterexamples, *i.e.*, cases in which different judges have reached consensus on otherwise open questions by the application of original meaning. (I will be grateful to readers who bring examples to my attention.)

Moreover, I suspect that in a fair number of the cases where originalism does seem to produce convergence, what really produces the convergence is the intervention of some other interpretive tool—frequently precedent—that decontests the world of original meaning, establishing a particular rule as the proposition for which originalism can be invoked. Thus, various judges deciding state sovereign immunity cases in recent years have delved into early American historical sources to construe the Tenth and Eleventh Amendments. But when a judge today undertakes such a discussion, he or she

usually does so through the lens of cases like *Alden v. Maine* and *Seminole Tribe v. Florida*. What the Tenth and Eleventh Amendments meant in the 1790s is still the subject of serious contest, but what *Alden* and *Seminole* say they meant is more determinate.

For rule-of-law purposes, it does not matter whether the failure of judges to converge when deploying originalist methods reflects an irreducible plurality of possible meanings in the historical materials or simply the error of many interpreters. What matters is the fact of disagreement and, secondarily, the absence of evidence that the existing scope of disagreement is smaller than would be the case without originalism. The attempt to use originalism to constrain constitutional interpretation is a practical undertaking, and it can be measured by its practical results. If in practice different judges reach different conclusions about what originalism dictates, then originalism does not achieve this set of aims. And where it does not, it is of no value to the cause of the rule of law.<sup>32</sup> In such cases, originalist interpretation should have no weight—unless, of course, it is useful for the promotion of some constitutional value other than the rule of law.

## **2) At the level of method: Which originalism?**

One often neglected reason why originalism performs poorly as a tool for fostering the rule of law through interpretive convergence is that the aspiration to the rule

---

<sup>32</sup> All right—maybe not *no* value. Perhaps articulating criteria that in principle might constrain contributes to an overall legal culture in which reason-giving is valued, thus fostering the rule of law in a more diffuse way. I suspect, however, that the benefits here are sufficiently attenuated as to be vanishingly small, especially when weighed in the balance against possible consequences in the other direction. (Suppose, for example, the routine recitation of reasons that audiences do not really believe constrain the decisions fosters the view that reason-giving is in general a smokescreen for willful subjective decisionmaking.)

of law fails to identify which kind of originalism interpreters should deploy. As noted earlier, “originalism” is the surname of a family of interpretive approaches, not the name of a single method. Different purposes for which originalism might be used call for different forms of originalism: as discussed earlier, for example, the democratic-authority rationale must look to original ratifier understandings (ORU). The rule-of-law rationale for originalism, however, does not imply that ORU is the best form of originalism, nor does it imply any other specific kind of originalism instead. It simply underdetermines which kind of originalism interpreters should use. Interpretive convergence is a coordination game, but the failure to specify a particular kind of originalism for all players to use decreases the chance that all (or even most) interpreters will be constrained in the same way.

Theorists have had a tendency to overlook this problem. One recent tendency, I think, has been to settle on ORU originalism as the most appropriate form for democratic-authority reasons and then to regard ORU as the best form of originalism in general. Under the theory of this paper, however, originalism is (contingently, in 2006) rarely a good way to respect democratic authority. Originalism may still be useful for rule-of-law purposes: just because the tool doesn’t serve one constitutional value doesn’t mean that it can’t serve others. But if the reason for originalism is to foster the rule of law, then the best kind of originalism to use might not be the one designed to serve a different purpose—the democratic authority purpose—that is not in fact being served. Accordingly, one should question whether ORU is the best kind of originalism for advancing the rule-of-law rationale. And once the question is asked, it should quickly be doubtful that ORU is the most sensible kind of originalism for serving rule-of-law values.

ORU originalism requires the construction of legal meaning from a large set of sources; constitutional interpretations might be more predictable, and less likely to vary from judge to judge, if based on fewer sources rather than more.<sup>33</sup> Accordingly, the same aspiration to make sense of a large and complex historical record that recommends ORU in the democratic-authority context diminishes ORU's usefulness as a tool for fostering the rule of law.

It is not clear, however, what kind of originalism should be used instead. Any attempt to impart greater determinacy to originalist interpretation by confining the universe of source materials would require choices about which materials to exclude, and the judgment calls entailed in those choices would compromise an interpretive method's ability to deliver rule-of-law benefits.<sup>34</sup> For originalism to serve the rule of law, interpreters must settle *ex ante* on a single kind of originalism, or else predictability and interpretive constraint would be undermined by variability in the method itself.

Ironically, the imperative that interpreters all use the same kind of originalism may argue for using ORU after all. It is not well-designed for the purpose, but if it is relatively widely used, it may be a natural focal point on which interpreters can converge.

---

<sup>33</sup> This generalization will not be true in all cases: some "small" sources are capable of generating much interpretive controversy. But other things being equal, it is reasonable to suspect that the project of reconstructing the ideas of an entire polity will call for at least as much discretionary interpretive judgment as the project of reconstruction the ideas of one person or a small set of people.

<sup>34</sup> Assume, for example, that interpreters engaging in good-faith originalism regarding the Equal Protection Clause would achieve greater convergence by looking only to the views of a single drafter than by looking to the understanding of the whole ratifying polity. Someone would still have to choose which of several possible drafters to use for the purpose. In the worst case, judges might (consciously or subconsciously) manipulate the choice of drafter so as to affect the result of the interpretive endeavor. That would deprive originalist interpretation of some of its ability to make constitutional meaning independent of the identity and preferences of the adjudicator. And even if the choice of drafter were entirely free of any intention to manipulate results, *ex ante* uncertainty about whose original understanding would be consulted could reduce rule-of-law benefits like the settled predictability of the law.

It might be preferable to converge on some form of originalism that looked to a more confined set of sources, but a suboptimal equilibrium is here preferable to no equilibrium at all. For without methodological convergence among interpreters, originalism (or any other interpretive strategy) cannot deliver the rule-of-law benefits at which it aims.<sup>35</sup>

#### ***D) Summary on the rule of law***

In practice, originalism is not a reliable tool for produce interpretive convergence in constitutional cases. Indeed, it is not even a particularly useful tool for producing convergence at the level of case outcomes. Where originalism does not in fact increase interpretive convergence, it fails to foster the rule of law. Accordingly, in such cases, the rule-of-law rationale for originalism does not justify affording any weight to considerations of original meaning. That said, when cases arise in which originalism does constrain interpretation, it is reasonable to admit original meaning into the interpretive mix in the name of fostering the rule of law. The set of such cases is probably small, but it may not be empty.

## **Conclusion**

The best justification for originalist interpretation, as for any method of constitutional interpretation, is that it is instrumentally useful in serving the ends of constitutional law. The constitutional ends (or values) most plausibly served by

---

<sup>35</sup> To be sure, a system in which judges used varying kinds of originalism to confine their interpretive discretion might have some rule-of-law advantage over a system that used no confining criteria at all: any reduction in discretion helps to depersonalize legal authority. But the rule of law aims at a depersonalized authority that is predictable, not one that is arbitrary.

originalist interpretation are respecting democratic authority and fostering the rule of law. There are relatively few circumstances, at least under the contingent circumstances of 2006, when originalist interpretation would in practice serve those ends. Accordingly, decisionmakers should rarely look to original meaning for constitutional authority.

The actual reasons why many constitutional interpreters are drawn to originalism are not limited to the two arguments explored in this paper. Indeed, I suspect that originalism has many bases of popularity that this paper does not touch at all. Here are several examples. Originalism valorizes the Founders and thus reassures us that our government is wisely designed; engaging with famous historical predecessors creates a satisfying sense of connection across time to a community of ancestors, whether genetic or culturally adopted; a discursive practice that encourages people today to identify with the founders of the constitutional regime can defuse threats to its legitimacy.<sup>36</sup> I suspect that some combination of factors like these underwrites a fair amount of originalism's actual popularity. A study of these other functions of originalism in the community of constitutional interpreters would be valuable in its own right. The concern of the present paper, however, is with a justificatory account for originalism, and I do not think that any of the appeals of originalism listed in this paragraph is a justificatory reason for using original meaning as authority in constitutional law.<sup>37</sup>

Just as I have not attempted here to explore all of the functions of originalism in constitutional thought, I have not attempted an exhaustive survey of the ways in which history, including enactment-era history, might be used in constitutional interpretation.

---

<sup>36</sup> See Primus, *Judicial Power and Mobilizable History*

<sup>37</sup> I similarly assume that many people *oppose* originalism for an uncertain mix of reasons, some justificatory and some not, some conscious and some not.

Other possible uses of history could be discussed in other places. For example, nothing is said here about the usefulness of consulting historical experience when trying to decide whether given constitutional arrangements would be practically efficacious, nor is anything said about possible uses of history as data for testing our normative intuitions about how constitutional issues should be resolved. The present analysis is limited to the question of when a specific kind of historical source material—original meaning—should be consulted as a source of constitutional authority.

In another way, however, this paper is a template for a more comprehensive exploration of how to conduct constitutional interpretation. Something like the analysis of this paper could be performed for each interpretive method in the toolkit. For each method—text, precedent, structure, non-originalist history, and so forth—one could ask which constitutional values are served by such an approach to interpretation and in what kinds of cases the approach can actual serve those values. Bit by bit, a sequence of such investigations could build a general theory of when each interpretive method is in point.