2008

When Should Original Meanings Matter?

Richard A. Primus

*University of Michigan Law School, raprimus@umich.edu*

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Constitutional Law Commons, Judges Commons, Public Law and Legal Theory Commons, Rule of Law Commons, and the Supreme Court of the United States Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
WHEN SHOULD ORIGINAL MEANINGS MATTER?

Richard A. Primus*

Constitutional theory lacks an account of when each of the familiar sources of authority—text, original meaning, precedent, and so on—should be given weight. The dominant tendency is to regard all sources as potentially applicable in every case. In contrast, this Article proposes that each source of authority is pertinent in some categories of cases but not in others, much as a physical tool is appropriate for some but not all kinds of household tasks. The Article then applies this approach to identify the categories of cases in which original meaning is, or is not, a valid factor in constitutional decisionmaking.

TABLE OF CONTENTS

INTRODUCTION ...................................................................................... 166

I. A FRAMEWORK FOR CONSTITUTIONAL DECISIONMAKING.............. 172
   A. Methods and Values ................................................................. 172
   B. The Toolkit ............................................................................. 175
   C. Objections ............................................................................. 176
      1. The Nature of Written Constitutions ..................................... 177
      2. The Nature of Interpretation ................................................. 180
      3. Forms of Argument as Sources of Legitimacy ..................... 183
      4. Avoiding Fundamental Questions ........................................... 184
   D. Summary .................................................................................. 186

II. ORIGINAL MEANING AND DEMOCRATIC AUTHORITY ............... 186
   A. Only the Command Theory Fits ............................................... 187
   B. Democratic Enactment and the Dead-Hand Problem ............. 192
      1. Declining Democratic-Enactment Authority over Time .......... 193

* Professor of Law, The University of Michigan Law School. For especially generous comments and suggestions on drafts of this Article I thank Jack Balkin and Don Herzog. I also thank Bruce Ackerman, Danielle Barbour, Andrew Coan, Michael Dorf, Michael Farbierz, Eliot Fishman, David Franklin, Daniel Halberstam, Scott Hershovitz, Rick Hills, Nien-he Hsieh, Doug Laycock, Anna-Rose Mathieson, Gil Seinfeld, Scott Shapiro, Marc Spindelman, Kevin Stack, Nelson Tebbe, Mark Tushnet, and participants at faculty workshops at the University of Pennsylvania Law School and the University of Virginia Law School. Michael McGovern, Kerry Monroe, and Eric Schmale provided valuable research assistance. Research for this Article was funded in part by the Cook Endowment. I also offer special thanks to the student members of the University of Michigan Law School chapters of the American Constitution Society and the Federalist Society. Their critical engagement with the ideas in this Article has been both a stimulus to improvement and a pleasure in itself.

INTRODUCTION

Constitutional scholarship features three attitudes toward originalism. One small but significant group of theorists believes that original meanings should be all but conclusive. An even smaller group rejects originalist decisionmaking as unworkable, undesirable, or both. By far the dominant position is to regard original meaning as always relevant to constitutional interpretation, albeit only as a factor to be considered alongside other factors. None of these approaches is satisfying. The first two fail to


5. See, e.g., Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 GEO. L.J. 1765, 1766 (1997) ("[V]irtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation."); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189 (1987) (identifying original meanings as one of several sources that judges should strive to reconcile); Larry Kramer, Fidelity to History—and Through It, 65 FORDHAM L. REV. 1627, 1627 (1997) ("Most of those who engage seriously with problems of constitutional interpretation . . . treat the Founding as special and privileged in some sense without making it fully determinative or conclusive."); David A. Strauss, Common Law, Common Ground, and Jefferson’s Principle, 112 YALE L.J. 1717, 1718 (2003) ("[O]riginal understandings [must] play some role in constitutional interpretation—as essentially everyone agrees . . . ."). Even some theorists who are usually numbered among the harshest critics of originalism actually argue only that the role of original meanings must be limited, not that constitutional law should do without original meanings completely. See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 205 (1980) ("[M]oderate originalism is coherent and workable."); id. at 237 ("The nonoriginalist treats the text and original history as presumptively
When Should Original Meanings Matter?

When Should Original Meanings Matter? acknowledge, respectively, the weaknesses and the strengths of the best arguments for originalist reasoning. The third is not very useful, because it has no account of whether original meaning should be important in any particular case. Constitutional theory should do better than this. In this Article, I recommend a different approach, one that avoids the oversimplifications of the first two while providing more guidance than the third.

I suggest that deciding issues based on original meanings makes sense in some kinds of cases but not in others. For more than a generation, the leading arguments for originalism have been grounded in two fundamental constitutional values, namely democratic authority and the rule of law.\footnote{See, e.g., \textsc{Antonin Scalia}, \textit{A Matter of Interpretation: Federal Courts and the Law} (Amy Gutmann ed., 1997); Brest, supra note 5, at 204 (identifying these as the two major arguments for originalism); Keith E. Whittington, \textit{The New Originalism}, 2 GEO. J.L. & PUB. POL’Y 599 (2004) (describing the prominence of these two arguments in recent decades). I do not mean to imply that these two arguments for originalist reasoning are the only possible arguments. Several theorists have offered others. See, e.g., \textsc{Barnett}, supra note 1, at 53-86 (arguing that originalist interpretation is valuable because the Constitution as originally understood happens to vindicate a desirable set of individual rights); John O. McGinnis & Michael B. Rappaport, \textit{A Pragmatic Defense of Originalism}, 101 NW. U. L. REV. 383 (2007) (arguing that the Constitution is well designed to produce good laws if implemented in line with its original understandings); see also infra Section I.C (describing noninstrumental arguments for originalism). If other reasons justify attention to original meanings in other categories of cases, then decisionmakers should consult original meanings in those cases as well. But the analysis should still be about the applicability of the justification to particular kinds of cases rather than for constitutional law as a whole.)

Carefully considered, arguments based on those two values succeed in a subset of constitutional cases. What follows is that constitutional decisionmakers should consult original meanings \textit{in those cases}. But in cases where no good argument for attention to originalist reasoning applies, considerations of original meaning should not be a factor in the content of constitutional decisions.

The point goes beyond originalism. Indeed, it could be used to structure a general approach to constitutional decisionmaking. Many important theorists\footnote{See, e.g., \textsc{Fallon}, supra note 5.} and practitioners\footnote{See, e.g., \textsc{Stephen Breyer}, \textit{Active Liberty} 7-8 (2005).} regard text, precedent, structure, original meaning, nonoriginalist history, and other sources of constitutional authority as all in play at the same time, leaving the question of which methods should actually decide an issue to the realm of inarticulate judgment. Some such exercises of judgment are unavoidable or even positively beneficial, and no reasonable jurisprudence would eliminate them.\footnote{See \textsc{Jerome Frank}, \textit{Law and the Modern Mind} 7 (1930) ("Much of the uncertainty of law is not an unfortunate accident: it is of immense social value." (emphasis in original)).} That said, my approach would offer an additional measure of clarity to the decisionmaking process by classifying individual sources of authority as germane or not germane in specific categories of cases. Different methods of decisionmaking have different virtues, and decisionmakers should always ask whether the virtues of binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking.

6. See, e.g., \textsc{Antonin Scalia}, \textit{A Matter of Interpretation: Federal Courts and the Law} (Amy Gutmann ed., 1997); Brest, supra note 5, at 204 (identifying these as the two major arguments for originalism); Keith E. Whittington, \textit{The New Originalism}, 2 GEO. J.L. & PUB. POL’Y 599 (2004) (describing the prominence of these two arguments in recent decades). I do not mean to imply that these two arguments for originalist reasoning are the only possible arguments. Several theorists have offered others. See, e.g., \textsc{Barnett}, supra note 1, at 53-86 (arguing that originalist interpretation is valuable because the Constitution as originally understood happens to vindicate a desirable set of individual rights); John O. McGinnis & Michael B. Rappaport, \textit{A Pragmatic Defense of Originalism}, 101 NW. U. L. REV. 383 (2007) (arguing that the Constitution is well designed to produce good laws if implemented in line with its original understandings); see also infra Section I.C (describing noninstrumental arguments for originalism). If other reasons justify attention to original meanings in other categories of cases, then decisionmakers should consult original meanings in those cases as well. But the analysis should still be about the applicability of the justification to particular kinds of cases rather than for constitutional law as a whole.)
a given technique have purchase in the particular case to be decided. The applicability of a method will sometimes be contestable, but in many cases methods can be classified as clearly pertinent or clearly not. In cases where a particular method’s virtues are not in point, the method should not be used.

In this Article, I illustrate this approach by identifying categories of cases in which judges (and perhaps other constitutional decisionmakers) should consult original meanings. Part I lays out a framework for choosing among methods of constitutional decisionmaking. It analogizes the choice of methods to a choice among physical tools, each of which has multiple uses but none of which is good for everything. The metaphor is not perfect, but it captures the idea that some methods should play no role in some decisions, just as some tools have no value for some jobs. Then, with the general theory in view, Parts II and III take up the specific case of original meaning and examine when originalist reasoning can be a useful tool for promoting democratic authority and the rule of law respectively.

In Part II, I address the idea that originalist interpretation respects the authority of the Constitution’s democratic enactment. Briefly, the contention is that the Constitution is binding because it embodies the popular will as expressed through a democratic process, such that its content must be what the people who enacted it understood themselves to be agreeing to. Assessing this argument’s applicability to federal constitutional law requires careful attention to the dead-hand problem. Equally briefly, that problem is that a constitution inherited from a previous era binds a population that did not agree to it. Acknowledging the dead-hand problem does not mean, as too many people have thought, that an inherited constitution is illegitimate. That would follow only if democratic enactment were the sole basis of constitutional legitimacy, which is not the case. The dead-hand problem does mean, however, that the authority of inherited constitutional provisions is not democratic in the sense that would support originalist interpretation.


11. See, e.g., Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1072–73 (1988). The major reason why the present argument applies to constitutional but not statutory decisionmaking is that statutes are easier to amend or repeal. See infra Section II.B.2. This is also one reason why the present argument leaves much more room for originalist reasoning in state constitutional law than in federal constitutional law: most state constitutions are more easily revised than the United States Constitution is. See infra Section I.D.

12. See, e.g., Michael W. McConnell, Textualism and the Dead Hand of the Past, 66 GEO. WASH. L. REV. 1127, 1127 (1998) ("[T]he dead hand argument, if accepted, is fatal to any form of constitutionalism.").

13. See Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 HARV. L. REV. 1787 (2005) (arguing that the Constitution has multiple bases of legitimacy). Note that some countries, like Japan, have legitimate constitutions that were not democratically adopted at all. See infra Section II.B.4.
That said, the democratic-authority analysis does support originalist decisionmaking in some cases. Paying attention to original meanings makes sense in cases construing provisions that were adopted recently enough that the dead-hand problem does not arise. Original meanings have declining democratic authority over time: the original meaning of a given constitutional provision is very weighty just after the provision is enacted and gradually becomes less important until the provision's democratic authority expires completely.

No quantitative formula can fix the lifespan of originalist authority. It is probably longer than a day and shorter than a hundred years. Accordingly, if constitutional litigation regularly engaged provisions enacted at many different times within the last several decades, the approach I present would have little clarifying power. Given the actual conditions of American constitutional law, however, this approach makes most real cases arising under the United States Constitution easy. Constitutional litigation today overwhelmingly concerns provisions adopted more than a century ago. Under present circumstances, therefore, the aspiration to respect the democratic authority of the Constitution of the United States is rarely a good reason for consulting original meanings. But the democratic argument for originalism has a future. When the Constitution is amended again, there will be a period of time when the democratic authority of the new enactments requires originalist decisionmaking.

In Part III, I consider the argument that originalism fosters the rule of law. A generation ago, the crux of this argument was that originalism constrains decisionmakers who would otherwise decide cases in accordance with their subjective preferences. The central concern here was with decisionmaking by judges: the fear was that people who should not be legislating at all would trump the democratic process on the basis of their personal views, and the hope was that tethering constitutional content to original meanings would confine judicial discretion. Within the last generation, however, sophisticated originalists have recognized three serious flaws with using originalism to constrain judicial decisionmaking. First, original meanings are in principle as likely to direct judges to take issues away from the political process as they are to counsel judicial deference to

14. There is a wrinkle here for theorists who believe the Constitution to have been informally amended during the twentieth century. See infra notes 111, 158.

15. The present argument applies to federal constitutional law. Where state constitutional law is concerned, matters are substantially different. Many state constitutional issues arise under provisions that have been recently enacted. Theorists of originalism tend to be more concerned with the United States Constitution than with, say, the Georgia Constitution of 1983 or the 2004 amendments to the Constitution of Ohio. But because many state constitutional enactments are recent, the democratic-authority rationale for attention to original meanings routinely makes sense as applied to the constitutional law of states. I thank Marc Spindelman for emphasizing this point.

16. See Whittington, supra note 6 (explaining that this form of the argument has waned in recent years).

17. See, e.g., Scalia, supra note 1; Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1166–67 (1993) (explaining that the chief proffered virtue of adhering to original meanings is the limitation of discretionary judicial decisionmaking).
elected officials. Second, almost any interpretive theory constrains interpretation if honestly applied, and there is little reason to think that originalist judging would in practice be more constrained than judging according to any of several other theories. Third and most fundamentally, constraint by itself may not deliver the real promise of the rule of law. What the rule-of-law vision of originalism really hopes for is that judges will apply the correct substantive content of the Constitution, not merely that they will be constrained. For many contemporary originalists, therefore, the rule-of-law argument for original meanings is less about constraining judges as such than it is about fidelity to the authoritative content of the Constitution.

When a constitutional provision first comes into being, the fidelity argument says, its content is of course its original meaning. Thereafter, the rule of law requires that judges remain consistently faithful to that authoritative meaning. To do otherwise is to fail to treat the Constitution as law. This argument can make sense even after a provision's democratic-enactment authority has faded: the content of the law does not change merely because time passes. But considered more precisely, this argument for originalism makes sense only in cases where a provision's original meaning is also its operative meaning, where "operative meaning" is the meaning that a provision has to its contemporary audience. As long as a provision's operative meaning includes or is the same as its original meaning, adhering to that original meaning can help secure the stability, transparency, and reliability that are the hallmark benefits of the rule of law. But if some portion of an original meaning has been forgotten or abandoned over time, rule-of-law considerations may not support reimposing that meaning. If a contrary meaning has taken hold in fact, then displacing that operative meaning in favor of the original meaning might undermine the very rule-of-law values that originalist reasoning is supposed to support.

Before proceeding to the body of my argument, it is important to acknowledge a possible weakness with the idea that officials should use different interpretive methods in different cases. Put simply, choosing the

18. See infra Section III.A.
19. E.g., Whittington, supra note 1, at 39.
20. See, e.g., id. at 4; Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427 (2007); Thomas W. Merrill, Originalism, Stare Decisis and the Promotion of Judicial Restraint, 22 Const. Comment. 271 (2005) (arguing that decisionmaking based on precedent conduces to judicial restraint and promotes the rule of law much more than decisionmaking based on original meaning could).
21. Whittington, supra note 6, at 609. For an example of this position, see Steven G. Calabresi & Saikrishna B. Prakash, The President's Power To Execute the Laws, 104 Yale L.J. 541, 551-52 (1994).
22. See, e.g., Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291 (2007); Randy E. Barnett, Trampling Precedent With Original Meaning: Not As Radical As It Sounds, 22 Const. Comment. 257, 258-59 (2005); Calabresi & Prakash, supra note 21, at 551-52 (exemplifying the position); see also infra Section III.B.
right methods in each case is a demanding task. Judges might make mistakes about which tools are applicable when. Even if they do not make mistakes, figuring out which tools are applicable might consume a lot of effort. Perhaps a general rule of the form "We always use this method" or "We always use this combination of methods" would yield better decision-making in the aggregate, even if it were less finely calibrated in particular cases.

My view, which I defend in Part I, is that judges should in fact adjust their tools from case to case. But if I am wrong about that point, the implication for originalism is dire. If in fact judges should deploy interpretive tools wholesale, then they should pay much less attention to original meanings than if they considered the propriety of originalist reasoning from case to case. After all, the choice to simplify decisionmaking by deploying the same set of methods in every case is as compatible with never paying attention to original meanings as it is with always paying attention to original meanings. And in choosing between always and never, the sensible rule to choose is the one that better approximates the ideal usage of original meaning: a rule of thumb should be right or at least close to right most of the time. As Parts II and III show, the democratic-authority and rule-of-law reasons for originalist decisionmaking apply in very few constitutional cases. Accordingly, if the choice is between originalist reasoning always and originalist reasoning never, "never" is the better simplifying rule. It follows that the democratic-authority and rule-of-law arguments for originalism can only justify originalist reasoning at all if different decisionmaking tools should be used in relevantly different cases. In this light, my approach does not come to bury originalism. It comes to explain why original meanings should sometimes matter, even though the leading justifications for originalist reasoning have no traction in most cases that constitutional decisionmakers confront.

Original meanings are entitled to no more authority than sound reasons for such authority can justify. But they are also entitled to no less. By evaluating those reasons in terms of their applicability to specific categories of cases, we can clarify when original meanings should matter in constitutional decisionmaking. More broadly, by evaluating the reasons for consulting other sources of authority in the same segmented way, we can clarify which kinds of arguments are appropriate in different kinds of constitutional cases.

Two final notes are in order before proceeding to the body of the Article. First, my argument is about decisionmaking, not rhetoric or civic discourse. No one doubts that lawyers are often well advised to make plausible-sounding originalist arguments as part of trying to win cases, even if neither they nor the judges have a clear idea of why original meanings should matter. Some theorists might even recommend that judges publicly defend their decisions in terms of original meanings even if those decisions were in fact reached on other grounds. The question this Article addresses, though, is whether—and more specifically, when—judges and other officials should
regard considerations of original meaning as reasons for deciding a contested issue one way or the other. Second, at its broadest level, the general framework for decisionmaking described in Part I holds for all officials who decide constitutional questions, whether or not they are members of the judiciary. Applying the framework, however, often requires attention to the institutional roles of different kinds of officials. I will often focus on decisionmaking by judges, but I do not mean to imply that theirs is the only or even the most important kind of constitutional decisionmaking.

I. A FRAMEWORK FOR CONSTITUTIONAL DECISIONMAKING

A. Methods and Values

Constitutional reasoning features a familiar set of methods, including the analysis of text, precedent, structure, original meaning, and nonoriginalist history as well as others.\(^2\) Normative constitutional theory features conflicts among a set of values, including democracy, the rule of law, liberal individualism, justice, and social welfare, also among others. The validity of the methods in the first set as aids to constitutional decisionmaking is a function of their relationship to the values in the second set. More completely, it is a function of their relationship to the values in the second set as refracted through the institutional roles of the decisionmakers.

The point is not usually stated as directly as I have just put it. In fact, I expect this formulation to be controversial. In an inchoate way, however, most constitutional scholars understand it to be true. It is why the normal way of defending a given method of constitutional reasoning is to argue that it respects, or better yet promotes, values like democracy or the rule of law.

As a matter of history, the methods of reasoning did not originate as means intended to serve the particular values of American constitutionalism. On the contrary, some of the most prominent methods—the close reading of text, the application of precedent, the search for original meaning—are inherited from legal systems whose underlying values were importantly different.\(^2\) Lawyers in premodern England, the medieval Church, and other legal cultures that are forerunners of our own did not believe that the legitimacy of their law was a function of, say, its protection of liberal rights or its respect for democracy. They accordingly did not justify their hermeneutics by reference to those values. Today, we do think of democracy as an important ground of our law, and decisionmaking methods in constitutional law can be sound or unsound based on whether they respect that value. We use old tools for new purposes.\(^2\)

---

25. See Fallon, supra note 5, at 1189–90.


But although the general methods are often inherited, they are not entirely static. Instead, the process of using old tools for new purposes blends with a process of adapting those tools to better serve the purposes for which they are now needed. Despite their frequently having entered legal practice for other reasons, decisionmaking methods in constitutional law are defensible today, I submit, only to the extent that they cohere with the values of modern American constitutionalism. This is decidedly not to say that the forms of constitutional reasoning that now exist are in fact only those that are justified by reference to our best understanding of American constitutional values. Practices are sticky once established, and an accustomed practice can persist for a long time even as the apologia for it become harder and harder to sustain. But as a prescriptive matter, whether a decisionmaking method is justified today depends on its relationship to the values that now animate the constitutional system. Accordingly, the attempt to improve constitutional decisionmaking should be, in substantial part, an effort to better align our decisionmaking tools with our constitutional values.

The modifier "in substantial part" in the preceding sentence is necessary because the quest for a better theory of constitutional decisionmaking is also a matter of contesting the constitutional values themselves. That contest occurs at two levels. First, the content of particular values is controversial. Different people have different conceptions of democracy, the rule of law, and the rest. Second, the list of values in the set is controversial. Probably all players in contemporary American constitutional law agree that democracy and the rule of law—on their preferred understandings of those concepts—are constitutional values. They are part of the metric against which constitutional legitimacy is assessed, and they furnish criteria that should guide constitutional decisionmaking. But trying to give a complete list of values in the set would provoke serious controversy. There is no authoritative list of constitutional values, and if there were something that seemed like such a list, we would need to know why it was authoritative—thus pointing to the need to discover values prior to the list itself. Identifying constitutional values involves normative judgments, and the question of

28. One example taken from material to be discussed in Part II is the development of originalist interpretation based on original understandings or original public meanings, rather than original intentions, when some originalists realized that their overall democratic-authority theory required reference to the meanings understood by (or at least available to) the Constitution's ratifiers rather than its drafters. See Whittington, supra note 6.


30. Above, I included liberal individualism, justice, and social welfare. One might also argue for federalism, fidelity, or public identification with the regime. Some values are clearly out: nobody thinks that it would be appropriate to construe constitutional law so as to promote the public embrace of Buddhism, or filial piety, or rule by members of the Democratic Party. But there is room for considerable disagreement within the world of plausible candidates.

31. Thus, the Preamble to the Constitution states several aspirations that could be basic constitutional values, but we cannot read the text of the Preamble as setting forth the relevant list unless we have already decided on a theory of interpretation under which the Preamble should have that authority.
which values are the right ones is inescapably part of what is contested in controversies about the proper methods of constitutional decisionmaking. As a discursive matter, the normative controversy over constitutional values and the more analytic project of aligning those values with appropriate decisionmaking tools are usually both in play at the same time. Suppose, for example, that two theorists disagree about whether judges serve the rule of law (a constitutional value) by adhering to precedent (a decisionmaking method). Assuming that the two theorists mean the same thing by “adhering to precedent,” their disagreement could concern the instrumental capacity of that method to serve the rule of law, but it might also concern the proper understanding of the rule of law. Indeed, a proponent of precedent-based decisionmaking faced with a strong argument that adhering to precedent does not in practice serve the rule of law might alter or clarify his account of the rule of law in order to bring the value and the method back into alignment. The slipperiness of the values makes analysis of the instrumental fit between the values and the interpretive methods insufficient for formulating rules for constitutional interpretation.

That said, assessing instrumental fit is a necessary part of the argument for a decisionmaking method. Unless the use of a given method is a matter of inherent value—a possibility that I consider and criticize below—no account of constitutional values justifies any decisionmaking method until it is joined with an account of the mechanism by which the method advances one or more such values. Moreover, the fact that constitutional values are controversial does not mean that they are infinitely flexible. Nobody believes that promoting the cult of Apollo is an American constitutional value, and nobody believes that “democracy” in the American constitutional context means rule by the front line of the Detroit Red Wings. To whatever extent people share a sense of which values count, we can show decision-making methods to be sound or unsound on the basis of their capacity to respect or promote those values. Again, assessing the fit between methods and values is only part of assessing an approach to constitutional law. But it is a necessary part, and constitutional decisionmaking can be improved by paying careful attention to it.

33. We could call the two theorists “Calabresi” and “Merrill.” Compare Steven G. Calabresi, Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311 (2005) (arguing that judicial decisionmaking based on precedent is highly prone to manipulation), with Merrill, supra note 20 (arguing that decisionmaking based on precedent conduces to judicial restraint and promotes the rule of law).
34. Dewey had this dynamic in mind when he observed that means and ends have a “thoroughly reciprocal character” in matters of practical judgment. DEWEY, supra note 27, at 189. “[O]nly by a judgment of means,” he wrote, “is the end determinately made out.” Id.
35. See infra Section I.C.1.
When Should Original Meanings Matter?

B. The Toolkit

Assessing the fit between decisionmaking methods and constitutional values is in some respects like assessing the fit between tangible tools and the tasks for which the tools might be used. A method might serve more than one value, just as a tool can be used for more than one job. Similarly, some values can be promoted by more than one decisionmaking method, just as some jobs can be accomplished with more than one kind of tool. Crucially, however, there are some tools that will not work for some jobs. Suppose, for example, that 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.

Methods of constitutional reasoning, I suggest, have analogous limitations. To keep with the example used earlier, it may well be the case that adhering to precedent promotes the rule of law. But it is not the only method that does so. Moreover, it would be odd to think that attention to precedent promotes every constitutional value, and it would be even odder to think that it was the best way to promote all of them. The skilled constitutional decisionmaker, like any craftsman with multiple tools, must know when to use which instrument. When more than one tool could work, the choice among them will sometimes be a matter of judgment, and sometimes it will be normative. Sometimes, though, there are clear reasons of fit dictating that one tool is better than others. And in some cases, certain tools are not useful at all.

As the last sentence implies, I believe that judges and other officials should assess the fit between decisionmaking methods and constitutional values not for constitutional law as an undifferentiated whole but with attention to differences between different categories of cases. I offer this point as a corrective to the prevailing tendency in constitutional theory to argue about the merits of originalism, textualism, or other methods across the practice of constitutional law in general. Rarely do theorists argue that each of those techniques has virtues in some cases that it does not have in others, much less that we can identify which cases are which. But often we can, and where we can, we should.

The analogy to physical tools may help make the point. Speaking generally, we might say that hammers are good for driving nails. But actual carpentry requires the matching of particular hammers to particular nails, and some hammers are too big or too small for some nails. Similarly, a theorist thinking at a certain level of abstraction might say that a textual approach to constitutional interpretation serves the rule of law because it

36. I think it does. See infra Section III.A.

37. Cf. Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1, 23 (1994) ("Our legal system need not embrace a monolithic theory of law . . . . Indeed, the activity of legal reasoning ought to depend on the particular purposes of one's activity.").
yields decisionmaking in line with a stable, knowable source of authority outside the whim of the decisionmaker.\footnote{38} And so it does—sometimes. Sometimes, though, textualist decisionmaking would disserve the rule of law. If there is a long-settled practice of doing something other than what a natural reading of a text directs, and if that practice is blessed by judicial decisions such that people order their affairs around their expectation that the practice will continue, then altering the practice to conform to a text would compromise important rule-of-law values. In such a case, attention to text could still make sense if text-based reasoning in that case would serve some constitutional value other than the rule of law. But the general idea that textualism advances the rule of law does not mean that officials should decide constitutional issues on the basis of textual interpretation in cases where such a course of action would not advance the rule of law any more than the general idea that screwdrivers are good for driving screws means that I can use a Phillips-head screwdriver to drive a flathead screw. It won’t get the job done.\footnote{39}

\section*{C. Objections}

Parts II and III of this Article use this toolkit approach to show when original meanings should be part of constitutional decisionmaking. Before embarking on that application, however, I will discuss four possible objections to the toolkit approach. The first maintains that written constitutionalism necessarily requires judges to act on the basis of original meanings rather than choosing among multiple decisionmaking tools.\footnote{40} The second holds open the possibility of multiple decisionmaking approaches but insists that the core of constitutional decisionmaking is interpretation, and it further argues that only a subset of decisionmaking techniques, notably those that seek original meanings, can be called "constitutional interpretation."\footnote{41} The third sees constitutional law as a social practice, or a form of life,\footnote{42} in which the use of certain methods is itself a source of legitimacy, rather than a way of serving some set of values prior to or deeper

\begin{footnotesize}
\begin{itemize}
\item\footnote{38}{\textit{See}, e.g., Strauss, supra note 5, at 1732.}
\item\footnote{39}{One might argue that rigorous insistence on textualism in all cases would eventually serve the rule of law in the aggregate, even if it did considerable damage to rule-of-law values like stability and reliance in the short term. For that argument to succeed, however, it must be the case that some practically feasible form of textualism would, if applied in all cases, eventually deliver more stable, predictable, and impersonal adjudication than either the present system or a system in which the rule-of-law valence of particular interpretive methods were decided from case to case. I am skeptical that such a form of textualism exists, though I am quite confident that textual interpretation applied in appropriate cases does help support the rule of law.}
\item\footnote{40}{\textit{See}, e.g., Barnett, supra note 1, at 100–03; Barnett, supra note 22, at 258.}
\item\footnote{41}{\textit{See}, e.g., Whittington, supra note 6, at 612–13.}
\item\footnote{42}{\textit{See}, e.g., Richard Rorty, Contingency, Irony, and Solidarity 3–22 (1989); Richard Rorty, Philosophy and the Mirror of Nature 170–73, 270–73 (2d prtg. 1980).}
\item\footnote{43}{\textit{See} Ludwig Wittgenstein, Philosophical Investigations 226–27 (G.E.M. Anscombe trans., 2d ed. 1958).}
\end{itemize}
\end{footnotesize}
than the practice.44 The fourth cautions against decisionmaking approaches that require judges to delve too deeply, or too often, into contested value choices.45 I argue that the first two objections should largely be dismissed. The third and the fourth have more substance, but they do not defeat the toolkit approach.

1. The Nature of Written Constitutions

One objection to my approach can be found in the work of Steven Calabresi and Saikrishna Prakash and sometimes also in the work of Randy Barnett. It maintains that constitutional law cannot permit judges to worry about underlying values and instrumental fit as a precondition for deciding cases on the basis of the Constitution as it was originally understood. The reason why goes to the fundamental nature of written constitutionalism. The written Constitution, the objection runs, is a law that binds us in its own terms. Those terms are the words of the document as understood by the authority that enacted them. That is simply what the Constitution is, and any decisionmaking process that does not proceed from that starting point is not really engaged in constitutional law at all.46 This objection has a certain rhetorical cache, but upon consideration it turns out to be either a metaphysical assertion or an oversimplification of American constitutional practice.

One serious problem for this objection is that it implies that the practice of American constitutional law as engaged in by its thousands of practitioners is in the grips of a fundamental mistake. In practice, originalist decisionmaking is rare.47 Most constitutional cases are decided on the basis of judicial precedent, with no attention to original meanings at all.48 Many doctrines that are central to modern constitutional law are not reconcilable with original constitutional meanings.49 If the only form of decisionmaking that qualifies as constitutional law under a written constitution is decisionmaking in light of original meanings, many practices and doctrines that American lawyers think of as constitutional law are, in fact, not constitutional law.50

44. See Philip Bobbitt, Constitutional Fate (1982).
46. See Barnett, supra note 1, at 111 (stating that a rejection of originalism is tantamount to a rejection of the Constitution); Calabresi & Prakash, supra note 21, at 551–52.
47. This is a point wisely conceded by some of originalism’s most prominent defenders. See, e.g., Scalia, supra note 1, at 852.
48. See Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 106 (1997); Merrill, supra note 20, at 272.
It is one thing to argue that a practice is slightly askew, such that getting it right requires certain reforms. But it is quite another to argue that an entire community of practitioners is radically mistaken about the nature of its enterprise. If long-standing American constitutional practice differs from a particular theory of constitutional law, then we should ask whether something is wrong with the theory. One cannot settle the issue by pointing again to the theory’s definition of constitutional law, of course, because the question is why anyone should accept that definition rather than dismissing it as idiosyncratic.

A sympathetic reconstruction of the argument that written constitutionalism requires decisionmaking on the basis of meanings locked into the Constitution from the beginning might proceed as follows: The nature of constitutionalism is a matter of consensus. Everyone accepts that the reason to have a written constitution is to engage in binding commitments that limit government action. Fulfilling that purpose requires enforcing the commitments as they were understood at the time they were made. Unfortunately, many practitioners engage in practices that undermine that purpose. Some of those practitioners may be bad actors; others may have misunderstood the relationship between their practices and the purpose of having a written constitution in the first place. Accordingly, it is important to point out that only a limited set of interpretive practices—notably, originalism—are compatible with what everyone agrees to be the purpose of constitutionalism.

Understood this way, the claim that written constitutions require originalist decisionmaking is a reminder of a shared premise. It does not take much investigation, however, to realize that the premise has never been fully shared. Yes, the idea that the Constitution is a device for limiting the future actions of government has deep roots in American law. But so do other ideas, including some contrary ones. Many people have rejected or qualified the vision of written constitutions as social contracts or precommitment devices. In addition to laying down fixed rules for governmental behavior, a written constitution can articulate nonenforceable principles.


53. See, e.g., McCulloch v. Maryland, 17 U.S. 316 (1819) (describing the flexibility and adaptability of government over time, in unforeseen and changing circumstances, as the essence of constitutionalism).

54. See, e.g., Jeremy Waldron, Law and Disagreement (1999) (criticizing the precommitment model); Eisgruber, supra note 3, at 1613 ("[T]he central and most damaging fallacy of modern constitutional theory . . . holds that the purpose of the Constitution is to subordinate present-day politics to the will of past super-majorities."); Kramer, supra note 5, at 1634 (disputing the view that a constitutional system is necessarily about a framework of rules fixed at a given time and foregrounding instead a model of evolving restraints over time).

contribute to the development of customary law,\textsuperscript{56} frame political aspirations,\textsuperscript{57} cultivate a population’s sense of itself as a single community,\textsuperscript{58} organize debate,\textsuperscript{59} supply focal points to help coordinate official behavior,\textsuperscript{60} or settle divisive issues in the short term in the hopes that stable organic structures will develop in the longer term.\textsuperscript{61} A given constitution might do any of these or several of them in combination. Moreover, the purposes that initially motivate the adoption of a written constitution might not be the same purposes for which later generations find that same constitution valid or useful.

In short, constitutionalism has many possible purposes, and the purposes of the United States Constitution are a subject of disagreement among participants in the practice of constitutional interpretation. The fact that prevailing American constitutional practices are not exclusively originalist accordingly suggests that our constitutional culture is not a failed attempt to implement a vision of the Constitution as a precommitment device but instead the working out of a different aspiration or, more likely, a mixed set of aspirations.\textsuperscript{62} And not all of those aspirations require originalist decision-making.

To be sure, a fair amount of originalist decisionmaking may be appropriate even if the purposes of constitutionalism are understood in this more complex way. Several of the possible purposes of constitutionalism other than the classic precommitment idea might be advanced by attention to


\textsuperscript{58} See Balkin, supra note 20.

\textsuperscript{59} See K.N. Llewellyn, \textit{The Constitution as an Institution}, 34 \textit{Colum. L. Rev.} 1, 4 (1934) (noting that the written Constitution’s various clauses provide lawyers and judges with “a filing cabinet for the classification of constitutional questions,” even if the document does little to settle those questions).

\textsuperscript{60} See Strauss, supra note 5, at 1733–35.


\textsuperscript{62} There is also another possibility, one which permits us to recognize that dominant American constitutional practice does not conform to the originalism-only vision while simultaneously permitting a group of theorists to maintain, cogently, that governance under a written constitution requires the originalist mode of decisionmaking. It is to recognize that the American regime is not properly characterized as governance under a written constitution, or at least not under a written constitution alone. Instead, American government is conducted on the basis of a complex web of documents, institutions, arrangements, and norms—that is, a “constitution” in the generic sense—one component of which is a written document somewhat misleadingly titled “the Constitution,” as if it were the entire constitution. This view is probably the best one available. But it is also controversial, and I do not claim to establish it here. For present purposes, we need not choose between denying that the American constitutional regime is fully grounded in a written constitution and accepting a vision of governance under a written constitution flexible enough to include the way that American constitutional practice actually functions. Either way, it is clear that a claim about the inherent entailments of written constitutions cannot establish that prevailing practices are fundamentally misguided, nor can it install itself as the best understanding of constitutionalism in the absence of a normative argument.
original meanings. But originalist reasoning is not necessary for pursuing many of constitutionalism's possible purposes. Moreover, if the constitutional system actually pursues a complex set of purposes, then something like the toolkit approach might make a great deal of sense: different methods might be good for advancing different purposes within the set, and originalist reasoning could be just one of those methods.

Theorists who believe that written constitutionalism is incompatible with decisionmaking that looks to values other than those sanctioned by the original meaning of the document are free to argue that we would be better off adopting their vision, rather than muddling through with the bundle of constitutional practices that now prevails. That argument, however, would not be a purely conceptual claim about the nature of written constitutions. It is based on a normative judgment, and a contestable one. It claims that the community of practitioners should do something other than what it presently does. So: Why would it be better to approach the Constitution as these originalists recommend than to approach it in some other way? Any answer to this question must contain an account of the values that should justify and animate constitutional law. If such an account is supplied, we are on the terrain of arguing about the ends, purposes, and values of the constitutional regime. And if no such account is forthcoming, then the community of practitioners has been given no reason to change its practices.

2. The Nature of Interpretation

There is also another form of the claim that a written constitution can only be interpreted by reference to original meanings. Rather than contending that written constitutionalism necessarily entails originalism, this form of the argument maintains that no alternative to originalism should be called constitutional interpretation. The idea here, which has analogues in literary theory, is that the activity of "interpretation" is inherently about discerning the meaning that some original actor sought to communicate. Some constitutional theorists accordingly hold that even if constitutional decisionmaking is possible without reference to original meanings, that decisionmaking does not "interpret" the Constitution. Keith Whittington, for example, distinguishes between "constitutional interpretation," which in his view must be originalist, and "constitutional construction," which encompasses other legitimate (but

---

63. Part of the rhetorical power of arguing that the Constitution just is its original meaning is its apparent disavowal of any normative stance. This approach is not what I prefer, the proponent says, but simply a necessary entailment of having a written constitution.

64. E.g., Stanley Fish, Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law, 29 Cardozo L. Rev. 1109, 1127 (2008) ("Interpretation is the act of trying to figure out what the author, not the dictionary, meant by his or her (or their) words."); id. at 1122 ("An interpreter cannot disregard [the author's] intention and still be said to be interpreting . . . .").

65. See, e.g., Whittington, supra note 1, at 109 ("The appropriateness of interpretive tools must be measured by their ability to advance the goal of understanding the intentions of the author.").
inferior) forms of decisionmaking.\textsuperscript{66} For Whittington, therefore, the claim that constitutional interpretation must be originalist is not a claim about \textit{constitutions}. It is a claim about \textit{interpretation}. To deny that interpretation is a matter of finding original meanings, Whittington says, is simply to misunderstand what interpretation is.

The question, then, is why it matters whether we call the activity of constitutional decisionmakers “interpretation.” There is some temptation here to write the question off as purely nominal. “Interpretation” is not a category, let alone a term, that exists in nature. If the point were merely about the definition of “interpretation,” it would be an adequate response to say that we could all agree to call nonoriginalist decisionmaking “shmerpretation” and then not to care whether judges do “interpretation” or “shmerpretation.” Assuming that the content of the decisionmaking process is the same no matter what label we put on it, the fact that we say “interpretation” as opposed to “shmerpretation” will have no impact on constitutional decisions. But the temptation to answer this way should be resisted. Whittington and some others who argue about the meaning of “interpretation” are sophisticated thinkers, and we should presume that their concern is with something more substantive than labels.

So why might the meaning of “interpretation” matter? One possibility is that our constitutional culture’s use of that word provides a clue about its underlying values. American lawyers regularly use the phrase “constitutional interpretation” to refer to the activity of making decisions in constitutional law. Other expressions like “constitutional construction” and “constitutional decisionmaking” are also in use, but “constitutional interpretation” is the dominant term. So if “interpreting” means trying to capture the meaning that some authorial actor intended to communicate, perhaps the fact that we speak of “constitutional interpretation” indicates that our constitutional culture sets a high value on original meanings.

Here, Whittington and others have a point. We do use the term “constitutional interpretation,” and at least to many people, “interpretation” implies trying to discern the meaning that some original actor communicated. But the point should not be overstated. If we use a term that seems to imply originalism, we are probably warranted in thinking carefully about whether we are in fact committed to originalism. That said, our use of the term does not prove such a commitment. The term might be a misnomer. Alternatively, “constitutional interpretation” might be a locution inherited from a time when our predecessors were committed to a kind of constitutionalism that differs from the kind we have today. We are all familiar with terms that stay the same even when the world changes, such that the terms would mislead if taken literally. Think, for example, of our

\textsuperscript{66} \textit{Id.} at 5–7; Whittington, \textit{supra} note 6, at 612. In Whittington’s view, “construction” is a valid form of decisionmaking when “interpretation” is not possible, but “interpretation” should prevail when interpretations and constructions conflict. Or, to say the same thing, nonoriginalist decisionmaking can be valid on questions that original meanings do not resolve, but questions that can be decided by reference to original meanings must be decided that way. \textit{See} WHITTINGTON, \textit{supra} note 1, at 11–13, 79.
use of the name "Big Ten" to refer to an association of universities that has eleven members.67 Finally, the claim that "interpretation" necessarily refers to the process of discerning an original actor's communication might simply be overbroad: perhaps "interpretation" sometimes bears that sense and sometimes does not, depending on the context. Soothsayers interpret dreams, and statisticians interpret scatterplots.68 Thus, even if "interpretation" in certain contexts is about the recovery of original meanings, the fact that people speak of "constitutional interpretation" might not indicate a commitment to original meanings in constitutional law.

Given that actual constitutional practice involves many nonoriginalist techniques as well as some originalist ones, perhaps the term "constitutional interpretation" encompasses things that go beyond the search for original meanings. Alternatively, if the term "interpretation" carries misleading implications about our constitutional decisionmaking practices, then perhaps we should become more comfortable using other terms. In this Article, I use the language of "constitutional decisionmaking." Ultimately, however, what we call our processes of constitutional decisionmaking is not the important thing. If we want, we can reserve the name "interpretation" for decisionmaking based on original meaning and accept that there are more ways than interpretation to make constitutional decisions. If we prefer, we can use "interpretation" to refer to elements of decisionmaking that do not look to original meanings as well as those that do. Either way, nothing follows about the real issue, which is how constitutional questions should be decided.


68. See Timothy A.O. Edicott, Putting Interpretation in its Place, 13 LAW & PHIL. 451, 457 (1994) ("An account of . . . interpretation should admit interpretations of dreams, novels, census data, seismograph records, constitutions and the entrails of a chicken, without dismissing any as non-standard uses of the word."); Scott Hershovitz, Judging Interpretations 11 (2001) (unpublished D. Phil. dissertation, University of Oxford) (on file with the Michigan Law Review) ("[M]any objects of interpretation (e.g. paintings, compositions, data sets) are not the types of things that bear linguistic meaning.").

69. Whittington's use of "constitutional construction" to describe nonoriginalist decision-making is in some ways similar. Given the actual dynamics of debate, however, there is a danger in a classificatory scheme like Whittington's, in which "interpretation" refers to one kind of constitutional decisionmaking and other terms are used for other kinds. The danger arises because "interpretation" is an appraisive term in constitutional theory. To say "I am doing constitutional interpretation, and you are not" is not generally understood as a neutral characterization of two different approaches to legitimate decisionmaking. See generally Quentin Skinner, Language and Political Change, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE 6 (Terence Ball et al. eds., 1989) (arguing that disputes over appraisive terms in political debates are normative, rather than merely semantic). At least implicitly, it communicates the message that I am doing something more valid than you are. Not coincidentally, Whittington believes that "interpretation" as he defines it is superior to "construction" because he believes original meanings to be the supreme source of constitutional authority. See WHITTINGTON, supra note 1, at 11–13, 79. To his credit, Whittington supplies substantive arguments for his originalism, rather than simply resting on the claim that only originalism deserves to be called "interpretation." But if we are going to reserve the term "interpretation" for a subset of constitutional decisionmaking techniques, we will have to remain vigilant to ensure that the terminological choice does not prejudice substantive decisions about what kind of decisionmaking is appropriate.
3. Forms of Argument as Sources of Legitimacy

Consider also another alternative to understanding forms of constitutional reasoning as justified by reference to underlying values. Perhaps certain forms of argument simply constitute the activity of constitutional reasoning as sanctioned and accepted by the relevant community. We might argue constitutional questions on the basis of the text of the written Constitution, for example, not because that method respects democracy or enhances the rule of law but because using the text in that way is an aspect of the culture of American constitutional law. To do otherwise would depart from American constitutionalism as its practitioners recognize it. What is fundamental are the practices themselves—interpretation of text, invocation of original meaning, and so on—rather than any purported account of their value.

Philip Bobbitt's book *Constitutional Fate* may still be the leading treatment of this idea. According to Bobbitt, the traditional forms of argument simply make up the grammar of constitutional reasoning. Competent speakers of English know how to conjugate, and constitutional lawyers internalize the standard forms of argument. To the extent that values from political theory seem to correspond to the traditional forms of argument, it is the forms of argument that supply legitimacy to the values and not the other way around: rather than social-contract theory legitimating textualist argument, for example, Bobbitt suggests that constitutional lawyers' deep confidence in the propriety of textualist argument is what makes social-contract argument resonant in constitutional theory.

Such a practice-based approach captures a great deal about how American constitutional argument actually functions. Few judges set out from an explicit view of underlying constitutional values and then choose among methods of decisionmaking accordingly. Instead, they largely muddle through at the level of practice, deploying standard methods without worrying much about why. When the conversation does shift to the propriety of different decisionmaking strategies, participants in the culture of constitutional law often generate multiple explanations for a particular method and shift from one to another as each one comes under close scrutiny, suggesting that what has staying power is the practice itself rather than any particular set of criteria against which the propriety of the practice would be measured.

That said, nothing about the fact that lawyers and judges identify legitimacy with certain traditional forms of argument means that constitutional decisionmaking could not be improved by thinking critically about which

70. BOBBITT, supra note 44.
71. Id. at 6.
72. Id.
73. Id. at 5.
74. Here again, Dewey has a helpful observation, namely that a person's choice to do something is generally not made by comparing each possible thing against abstract criteria. Instead, one looks at the various options at hand, compares them, and acts. DEWEY, supra note 27, at 190.
forms of argument are applicable in which cases. Constitutional theory might properly take a reformist posture toward our practices, albeit one that simultaneously takes existing practice seriously.\(^7\) For example, prescriptive theory could aspire to making different aspects of our practices cohere with one another, rather than simply accepting everything as it finds it. Constitutional lawyers do identify legitimacy with certain traditional forms of reasoning, but they also engage in normative arguments about the propriety of those forms, and they also argue about the relationships between appropriate constitutional outcomes and political values like democracy and the rule of law. Perhaps, then, a prescriptive theory of constitutional decision-making should try to align the familiar forms of argument with those values to the greatest extent possible.

4. Avoiding Fundamental Questions

To be sure, there are risks involved in urging decisionmakers (and especially judges) to think critically about the values that lie beyond the conventional methods of argument. An approach to decisionmaking that requires officials to make frequent reference to underlying values might be both destabilizing and difficult to implement.\(^6\) Where the officials in question are judges, there are also normative arguments against directing decisionmakers to think about underlying constitutional values in every case. In a basically democratic system, the weighing of competing values might be better left, as much as possible, to the legislature. Thus, even if I am right that the conventional methods of constitutional reasoning must be rooted in underlying values, perhaps we should trust the values to do their work silently, through the methods, rather than encouraging judges to think directly about the underlying values in each case that comes before them.

It is therefore important to realize that in most cases the toolkit approach would not counsel judges to expound underlying constitutional values any more than they do under the conventional practices that now prevail in judicial decisionmaking. In most constitutional cases that arise for judicial decision, precedent is enough to resolve the issue and no constitutional

---

75. Bobbitt himself counsels significant revaluations in what constitutional lawyers recognize as good and bad forms of argument, even as he describes the powerful role that the traditional forms of argument play in legitimating the system. Indeed, Constitutional Fate can be read in part as a meditation on a constitutional culture in which the traditionally favored and therefore legitimating styles of argument are, from the author’s point of view, not the best ways to decide many hard questions. See BOBBITT, supra note 44, at 24 (suggesting that much originalist argument is more effective as rhetoric, either to make a moral point or to legitimate the practice of judicial review, than as a criterion for decisionmaking); id. at 52, 55 (identifying shortcomings of doctrinal argument as a method for resolving constitutional questions); id. at 75, 85 (suggesting that structural argument, a relatively disfavored form, is often a substantively better form of constitutional reasoning than textual argument, a traditional and legitimating form); id. at 95–106 (arguing that constitutional lawyers should embrace arguments based on what Bobbitt calls “ethos”); id. at 181 (distinguishing generally between the forms of argument that legitimate judicial review and the functions that justify it).

When Should Original Meanings Matter?

value is so disserved by the adherence to precedent as to warrant the application of other tools.\textsuperscript{77} In other words, constitutional values like the rule of law and the preference for legislative policymaking prevail in such cases over whatever other values might pull in other directions: we are content in such cases to go with the settled rule. Judges accordingly use the decisional tools that are good for that job, like applying conventional doctrine and respecting the principle of stare decisis. Most of the time, therefore, judges deploying the toolkit approach would function at the level of doctrine. Clearly, doctrinal decisionmaking sometimes involves discretionary decisions about underlying values. Doctrine does not apply itself.\textsuperscript{78} But in most cases, judges engaged in doctrinal analysis need not expound underlying values under the toolkit theory any more than they must do so under any other theory that directs judges to decide cases on the basis of settled doctrine.

In cases that settled doctrine cannot adequately resolve, the toolkit approach does call for judges to think actively about underlying constitutional values.\textsuperscript{79} But in those cases, attention to underlying values is appropriate. Such cases, after all, are occasions when the existing rules cannot perform their usual task of sparing decisionmakers the need to consult deeper principles, either because the existing rules do not dictate particular results or because the results they do dictate are sufficiently troubling as to force a rethinking of the rules.\textsuperscript{80}

Even if we prefer that judges usually avoid reference to underlying values, we cannot avoid their looking to something controversial and beyond the normal rules when those rules cannot decide a question.\textsuperscript{81} To be sure, asking decisionmakers to consult underlying values comes with risks even if real choices must only be made on the occasions we call "hard cases." Sometimes decisionmakers will choose poorly. But if decisionmakers must look beyond the normal rules, it is appropriate for them to look to the values that justify those rules in the first place. The toolkit approach cannot guarantee that decisionmakers will reach the right conclusions in hard cases, but it would at least have them ask the right questions.

\textsuperscript{77} Fallon, supra note 48, at 106–07 (differentiating between "ordinary" and "extraordinary" constitutional interpretation).

\textsuperscript{78} David A. Strauss, Originalism, Precedent, and Candor, 22 CONST. COMMENT. 299, 300 (2005) ("Maybe Christopher Columbus Langdell thought that precedents constitute a closed axiomatic system from which legal outcomes could be deduced on every occasion, but no one else thinks that.").

\textsuperscript{79} This is not an argument against judicial minimalism (or for it). Cf. Sunstein, supra note 45 (explaining and defending the idea of judicial minimalism). Nothing here means that judges should resolve conflicts between constitutional values by awarding victory to one and putting the others to flight.

\textsuperscript{80} Cf. infra note 190 and accompanying text.

\textsuperscript{81} A judge's choice to defer in such a case to the output of a democratic electoral process is an example of a choice that must be justified in terms of underlying constitutional values, not an escape from the need to choose what those values are. See Dworkin, supra note 32.
D. Summary

Techniques of constitutional decisionmaking must be justified by their capacity to advance underlying constitutional values. Clearly, this approach raises hard questions. It requires us to ask what the underlying values are. Because there are many such values, it also requires us to ask what to do when different constitutional values conflict with one another. But these questions, controversial as they are, are the ones that must be answered. If my theory begs the questions, it at least begs the right questions.

There are alternatives to my approach. Constitutional decisionmakers could deploy a hodgepodge of arguments that may or may not shape their decisions, or they could pretend that all the normative questions are already authoritatively settled. In either case, they would still make decisions about conflicting constitutional values, albeit without doing so explicitly (or perhaps even consciously). But I doubt that the decisions they would make would be better than the decisions they would make by knowingly confronting the real questions and letting the larger constitutional community critique the answers they give.

In the remainder of this paper, I aim to identify instances in which making decisions by reference to original meaning is a good method for serving the values of constitutional law. I therefore must ask two questions. First, which constitutional values are well advanced by originalist reasoning? Second, in what categories of cases can consulting original meanings actually serve those values? As noted in the Introduction, I take the leading two arguments for attention to original meanings to be those focusing on two different constitutional values, namely democratic authority and the rule of law. Part II investigates when looking to original meanings can in practice succeed in serving the former value; Part III investigates the latter.

Note that I seek here only to determine when original meaning should be a factor in deciding a constitutional question. Often, cases in which original meaning can advance 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 we can delimit the set of cases in which originalist reasoning is useful, we can identify cases in which original meaning should not be a factor at all.

II. ORIGINAL MEANING AND DEMOCRATIC AUTHORITY

Originalism is a family of ideas and practices that locate the authoritative content of legal provisions in meanings that prevailed, actually or
constructively, at the time when the provisions were enacted. The ultimate concern with the time of enactment differentiates originalism from textualism, though the two approaches are regularly intertwined: a pure textualist can interpret and apply a legal provision without knowing when it was adopted or anything else about the circumstances of its enactment, but a pure originalist cannot. Different forms of originalist reasoning look to the intentions, subjective understandings, or hypothesized reasonable understandings of different populations, including drafters, ratifiers, and the public at large. Originalist reasoning figures in nonconstitutional as well as constitutional law, but my focus in this Article is on originalist decisionmaking in the constitutional realm.

Many originalists have argued that originalism is necessary if constitutional decisionmaking is to respect democratic authority. This contention is partly right and partly wrong. More precisely, it is overbroad: sometimes originalism shows respect for democratic authority, and sometimes it does not. In this Part, I argue that originalist reasoning makes sense as a tool for respecting democratic decisionmaking only in cases construing recently enacted provisions. How recent is recent enough is a hard question that I do not purport to be able to answer cleanly. But unless one accepts the idea of informal amendments, it is almost always clear under the actual conditions of contemporary constitutional litigation that the provisions being construed are not recent enough, because almost all contemporary constitutional litigation construes clauses that were enacted more than a hundred years ago.

A. Only the Command Theory Fits

Understanding when democracy calls for originalist decisionmaking requires thinking carefully about the different ways in which constitutional decisions might promote or vindicate democratic values. In this Section, I canvass several different ways in which constitutional decisionmaking might respect or promote democracy. I do not argue that any of these ways captures the best understanding of democracy, nor do I argue that any of them best describes the relationship between democracy and constitutionalism. Instead, and in keeping with the toolkit model of interpretation, I call attention to a matter of instrumental fit. It is this: only one view of the relationship between democracy and constitutionalism—a view sometimes

82. Whittington offers, as "a fairly basic definition of originalism," the following: "Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present." Whittington, supra note 6, at 599.

83. Cf. BOBBITT, supra note 44, at 7, 26 (commenting on the common tendency to confuse textual and originalist argument but explaining that they are actually separate forms of reasoning); Lawrence Lessig, The Limits of Lieber, 16 CARDOZO L. REV. 2249 (1995) (identifying situations in which textual interpretation is possible even though originalist interpretation is not).

84. See, e.g., Whittington, supra note 6 (canvassing forms of originalism).

85. See infra notes 111, 158 and accompanying text.
called the command theory—would make originalism an appropriate decisionmaking tool.

The command theory maintains that the Constitution has authority because it was democratically enacted by the American people. Therefore, it continues, 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. The parties can alter the rules through consensual processes, which in the case of the Constitution means through democratically enacted amendments. But until the terms of the agreement are so 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.

On the command-theory rationale for attention to original meanings, the relevant original meaning of the Constitution must be the meaning that the ratifying public understood itself to be agreeing to, not what the drafters 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 originalist decisionmaking 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. To be sure, it is frequently impossible to identify a particular meaning as the one understood by a large public audience, so decisionmaking based on original ratifier understandings is often impossible in practice. But to consider the command-theory argument in its most favorable light, I assume that it is at least sometimes intelligible to speak of the dominant public understanding of a constitutional provision.

The command theory envisions a straightforward relationship between democracy and constitutional law, but it is not the only such relationship.

86. See, e.g., Strauss, supra note 5, at 1740.

87. Clearly, there are many problems, from a twenty-first century perspective, with regarding the process by which the Constitution was ratified as acceptably democratic. For present purposes, however, it is not necessary to decide how damaging those problems are to the claim that the Constitution was democratically adopted, because the argument presented here will stand equally well whether the Constitution's initial adoption was adequately democratic or not.

88. The argument is made in various forms by different theorists. See, e.g., SCALIA, supra note 6; WHITTINGTON, supra note 1, at 111; Amar, supra note 11, at 1072–73; Monaghan, supra note 10, at 724–26.

89. See, e.g., SCALIA, supra note 6, at 38; Caleb Nelson, Originalism and Interpretive Conventions, 70 U. CHI. L. REV. 519, 554 (2003).

90. To be sure, it is possible that the polity enacting a constitutional provision understood it to delegate to future decisionmakers the responsibility for construing that provision. But this wrinkle does not affect the basic argument. On the contention here described, the reason for letting later decisionmakers construe constitutional meaning is that the enacting polity understood itself to be agreeing to that arrangement.
that can be imagined. Different arguments for originalism could follow from different understandings of democracy, or if emphasis were placed on different aspects of the cluster of ideas that the term “democracy” can name. Here are some examples. Rather than locating the democratic basis of constitutionalism in the historical adoption of the Constitution, one could argue that the Constitution is democratically legitimate because people implicitly consent to being governed by it today. Alternatively, one could argue that the Constitution promotes democracy by stimulating democratic activity today, and in two ways. First, the Constitution commits the resolution of most issues to democratic politics. Second, by creating an institutional structure that can only be altered through the mass democratic action required in the amendment process, the Constitution encourages popular mobilization as the method for changing the system of governance. The toolkit approach proposed in this Article does not require us to adjudicate among these conceptions of democracy. Instead, in the spirit of examining the instrumental fit between constitutional values and decisionmaking methods, it points out that only the command theory calls for a jurisprudence of original meanings.

Consider first the mismatch between originalist decisionmaking and the implied-consent approach to democratic legitimacy. Let us assume for the moment that the implied consent of present-day Americans supplies a kind of democratic legitimacy to the constitutional regime. It would not follow that constitutional decisionmakers should care about original meanings. The reason why not is that consent to the present regime is not the same as consent to what the Constitution meant a long time ago.

Implied consent is consent to a government as it actually operates: if one implicitly consents to the government’s authority, one does so by living under its existing rules. Accordingly, implied consent to the present constitutional regime could only establish the propriety of governance based on original constitutional meanings if the existing rules of American governance corresponded to such original meanings. In fact, however, the present regime features nearly plenary congressional regulatory authority under the Commerce Clause, a sprawling administrative state, greenback currency, a prohibition on separate public schools for children of different races, restrictions on sex discrimination, and many other things that depart from original meanings. (Randy Barnett’s constitution is “lost,” and what

91. See, e.g., Amar, supra note 11, at 1074.
93. See Whittington, supra note 1, at 79 (“The constitutional text authorizes judicial review but also inspires political action.”); Amar, supra note 11, at 1101 (arguing that the public’s capacity for constitutional exertion wanes when institutions of government can change the constitutional rules and waxes when the framework is considered resistant to such attempts at change).
94. Whether this assumption is warranted on the merits is a complex and contestable question, and I do not mean to endorse any position on that question here. I mean only to show how little follows if the assumption is sound.
95. See, e.g., Fallon, supra note 49, at 15–17; Dam, supra note 49, at 389 (making the point that the original meaning of the Constitution would have precluded the use of paper money);
he wants is restoration.96) If it is sensible to say that a mass public can implicitly consent to a system of government, the consent on offer in the United States today is consent to the practices that actually prevail, not to a counterfactual system of government by original meanings.

The intuition that the public's implied consent supports not just the legitimacy of the Constitution but also originalism as a method of decisionmaking arises, I suspect, from the following flawed thought process: "People implicitly consent to be governed by our system of government. Our system of government is the Constitution. The Constitution, rightly understood, means what it meant originally. Therefore, implied consent to our system of government means implied consent to a jurisprudence of original meanings." The flaw in this argument is that it jumps from the actual to the idealized. Even if it were true that the Constitution rightly understood means what it meant originally, it would not follow that people implicitly consent to such an understanding of the Constitution. Indeed, given that implied consent arises from living under a given system of government, it is hard to see how such consent could go to any set of constitutional arrangements other than what the public presently experiences. If implied consent is given at all, it is given to what is, not to what ought to be. So where original meanings and present arrangements diverge, implied present consent cannot be an endorsement of original meanings.97

---

96. Thus the title of his book. See Barnett, supra note 1.

97. One aspect of our present constitutional arrangements is that constitutional decisionmakers sometimes engage in originalist reasoning. It might therefore be argued that the public's present implied consent does permit a certain amount of originalism, because originalism is part of the system now on offer. But playing out this line of argument highlights the implausibility of implied consent's having the resolving power necessary to endorse a particular form of constitutional reasoning, even if implied consent were sufficient to legitimate a system of substantive law. The contention that the public can implicitly consent to the substantive rules by which it is governed rests on the idea that people would somehow signal their discontent, perhaps by emigrating or revolting, if they found those rules wanting. For a host of reasons well known to political theorists, that idea has weaknesses even as applied to a government's substantive rules. See, e.g., Don Herzog, Happy Slaves: A Critique of Consent Theory 182-214 (1989). But if the public's implicit consent is supposed to legitimate not a set of substantive rules but rather a form of reasoning, we must indulge the significantly more adventurous idea that people who are content with a government's substantive law would emigrate or revolt because they disagreed with something about the terms in which that law was officially justified. Failure to emigrate or revolt is not a terribly precise form of communication, and it is unwise to infer from it more than minimal acceptance of the status quo. At most, the public's present tolerance of a constitutional discourse in which originalism plays some role signals that respect for present public preferences is not an affirmative reason to banish originalism from constitutional law. But because it is unwise to infer more than acceptance on a theory of implied consent, it would make little sense to think that the public's non-objection to the present mix of originalism in constitutional law comprised an affirmative demand that originalist reasoning be used. Any suggestion that the public's acceptance of the present state of discourse constituted such an affirmative demand would immediately descend into the absurd position that the public demands that constitutional reasoning be conducted exactly as it is in the present, even if it is today conducted slightly differently than it was a hundred years ago, when presumably the public, through its acceptance, also demanded that it continue exactly as it was. The
Consider next the idea that democracy calls for originalism because originalist jurisprudence leaves most issues to the realm of electoral politics rather than making them the subjects of judicial decisionmaking. This is essentially an argument for judicial restraint. In the 1970s and 80s, many originalists praised originalism in these terms: they believed that originalist jurisprudence would restrain the judges and let democracy operate.  

As modern originalists have grown more sophisticated, however, they have realized that originalism is orthogonal to judicial restraint.  

Sometimes original meanings assign issues to the political process rather than to judges, but sometimes original meanings take issues away from the political process.  

Leaving things to the political process, after all, means not limiting the power of Congress by reference to the original meaning of the Commerce Clause or the Tenth Amendment but instead letting the elected officials work it out themselves. Originalism, in contrast, calls for shutting down the political process whenever original meanings so direct.  

Finally, consider the idea that originalism serves democracy by fostering the mobilization of contemporary political movements. The idea here is that by eliminating the courts as an agent of political change, originalism will force people to advance their agendas through electoral politics and formal constitutional amendments.  

Again, originalist decisionmaking is a poor tool for the job. If the point is to eliminate the hope that the government will be restructured through constitutional litigation, then originalism—which would seriously restructure American governance if adopted—cannot be the right method. As with the implied-consent idea, some originalists may be tempted by the mobilization position because they momentarily forget that we are not living under originalism at present, or because they are imagining an ideal circumstance in which originalism had been attained, such that originalist jurisprudence would produce stability rather than change. Under our actual present circumstances, however, a better choice for forcing the impetus for change into the channels of mass democratic action would be a jurisprudence that refused to order changes to our existing constitutional arrangements, even when those arrangements depart from original constitutional meanings.  

The point here is not that the command theory states the best understanding of the relationship between democracy and the Constitution. Instead, the point is that of the various conceptions of that relationship that are invoked to support originalism, only the command theory fits. This is an

98. See Whittington, supra note 6, at 602.

99. See id. at 604–05; see also infra Section III.B.

100. See Whittington, supra note 6, at 609.


example of how attention to instrumental fit can improve our theory of constitutional decisionmaking even in areas where we cannot settle, or at least have not settled, a contestable question of value.

I will use the term "democratic-enactment authority" to refer to the command theory's kind of democratic authority. It is not the only kind of democratic authority that might be relevant in constitutional law. But given the present circumstances of American constitutionalism, it is the only kind that calls for originalist decisionmaking.

B. Democratic Enactment and the Dead-Hand Problem

The most important limitation on originalism's capacity to serve the constitutional end of respecting democratic-enactment authority is often called the dead-hand problem. Simply put, the problem is that the people whom the Constitution governs today played no role in its adoption. We were not alive. We were not consulted, did not participate, and did not consent. Democratic-enactment authority arises from people's right to bind and govern themselves, and here the passage of time means that the enactors and the governed are two mutually exclusive groups of people. Accordingly, governing the population of the United States today according to the constitutional understandings of people long since dead should not be understood as showing respect for democratic-enactment authority. If anything, it might be antidemocratic to accord such understandings a legal status superior to the will of the people today.

In Section II.B.1, I explore the decline of democratic-enactment authority over time. That decline is gradual: democratic-enactment authority is a matter of degree. But after enough time passes, the democratic enactment of a constitutional provision ceases to make that provision authoritative. It need not follow that the provision ceases to have legal authority, because democratic enactment is not the only possible source of valid law. That said, it may no longer make sense to apply the provision by reference to its original meaning. If the source of a law's authority is something other than its democratic enactment, the command-theory justification for originalist reasoning no longer applies. The dead-hand problem thus imposes a temporal limit on that justification for originalist decisionmaking.

In Sections II.B.2 and II.B.3, I address two leading attempts to dissolve the dead-hand problem. The first holds that the Constitution's democratic

104. See, e.g., Amar, supra note 11, at 1072; Strauss, supra note 5, at 1717–19. The dead-hand problem is not the only limitation on this use of 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 Section II.D.

105. See, e.g., ELY, supra note 92, at 11.

106. See, e.g., PAUL W. KAHN, LEGITIMACY AND HISTORY 8 (1992) (arguing that democratic self-government is not possible in any state that maintains its government over time).
authority does not diminish over time because the people can amend the Constitution. In Section II.B.2, I point out that even if this argument saves the Constitution from being democratically illegitimate, it completely fails to support originalism as a decisionmaking tool. The democratic authority it claims for the Constitution is the authority of implied consent (which, as already explained, does not make originalism a sensible decisionmaking strategy), not the authority of democratic enactment (which does). Only by confusing those two kinds of authority could the revisability argument appear to restore the command-theory basis for originalism. Then, in Section II.B.3, I address a second response to the dead-hand problem, this one based on the idea that democratic-enactment authority does not fade when the enactors die because the true enactor of the Constitution is not a specific aggregation of individuals but rather the American people collectively, conceived as a corporate body that persists through time. This response taps into powerful facets of intergenerational community, but its bid to restore the command theory’s argument for originalism stretches the idea of democratic authority beyond reasonable limits. It does so, I suggest, because of an unnecessary and untenable wish to ground constitutional legitimacy in democratic enactment alone.

Section II.B.4 accordingly expands on the point that democratic enactment is only one possible source of constitutional legitimacy. I distinguish between two versions of the dead-hand problem, one which I call “totalizing” and one which I call “targeted.” The totalizing form of the dead-hand argument maintains that inherited constraints on popular will are simply illegitimate once democratic-enactment authority has expired. That totalizing idea misfires, because democratic-enactment authority is not the sole source of constitutional legitimacy. In contrast, the targeted form of the dead-hand argument maintains only that a law cannot claim its democratic provenance as its source of authority once too much time has passed since its enactment. That targeted form of dead-hand idea—"targeted" because it takes aim at one possible basis for a law’s authority rather than at the law’s authority across the board—is entirely cogent.

The dead-hand problem in its targeted form should be less frightening to constitutional theorists than the totalizing form, because a targeted dead-hand problem is consistent with maintaining a legitimate constitutional government from generation to generation. But it is fatal to originalism’s claim to vindicate democratic authority after the enacting generation has passed. Once democratic-enactment authority expires, a decisionmaking tool’s capacity to respect that kind of authority is no longer germane.

1. Declining Democratic-Enactment Authority over Time

The dead-hand problem in constitutional law arises from a conundrum that the passage of time poses for all democratic decisionmaking. Once the composition of a polity changes, the people whose representatives made 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 day—this problem applies to every polity, all the time. If a decision only enjoyed democratic-enactment authority when the adopting polity and the polity bound were completely identical, no decision could have democratic-enactment authority over a nation of millions for longer than the instant in which it was adopted. Democratic-enactment 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-enactment authority, because we need not think of such authority as an all-or-nothing proposition. Think of it instead as a matter of degree: decisions can have more or less democratic-enactment authority rather than having perfect democratic-enactment authority or none. On that understanding, marginal changes in the composition of a polity reduce the democratic-enactment authority of a prior decision only marginally. The operational question about a given enactment is whether it enjoys enough authority to command obedience, not whether its authority is complete. Accordingly, an enactment that enjoys much of its initial democratic-enactment authority might still legitimately require obedience, even if its democratic-enactment authority is less than it once was. Moreover, a law whose democratic-enactment authority standing alone was not sufficient to command obedience could legitimately require obedience if it enjoyed some authority on the basis of its democratic enactment and some authority on other grounds.

Suppose, for example, that a polity democratically adopts a constitutional provision colloquially known as the Twenty Percent Clause and which reads “All income shall be taxed at the rate of twenty percent.” In the year when the clause 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 the original public meaning of the clause. Over time, however, the composition of the polity will change, and the democratic-enactment authority of the provision will erode. At some uncertain date in the future, the Twenty Percent Clause’s claim to that kind of authority will no longer be sufficient, standing alone, to require compliance. But respect for the authority of democratic enactments is not the only relevant value. There are also others, some of which sound in other forms of democratic authority and some of which sound in values other than democracy. For example, there are the values of stability, predictability, transparency, and impersonal authority that we associate with the rule of law. On the day after the future date when the Twenty Percent Clause no longer commands obedience by virtue of its democratic enactment 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 rule will probably be enough to warrant continuing compliance with the twenty percent tax rate.
At some point, the composition of the polity will have changed so much since the time the income tax provision was adopted that the democratic-enactment authority of that provision will approach zero. When that happens, the force of other constitutional values (including the rule of law) might still provide sufficient reason for adhering to the terms of the provision. But doing so would not then show respect for democratic decisionmaking. It would show dedication to other values, like the rule of law, that justify maintaining the twenty percent income tax even in the absence of a democratic-enactment mandate for doing so.

If the reason for obeying a constitutional provision is something other than its democratic enactment—in this example, the rule of law—then it does not make sense to implement that provision with a tool whose virtue is its ability to respect the democratic-enactment authority of past decisions. The constitutional provision in question has no democratic-enactment authority to respect. Instead, we should use a decisionmaking method that can promote the constitutional end or ends that actually make the provision worth obeying. Judges would still have a valid reason to consult original meanings if originalist reasoning would promote some constitutional value other than democratic decisionmaking, of course. But originalism's capacity to respect past democratic decisionmaking would in that scenario be like a feature of a hammer that played 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.

2. The Irrelevance of Revisability

One common response to the dead-hand objection in the context of American constitutional law is that the Constitution is revisable.107 If the people do not like the law they inherit, they can change it democratically. The intuition underlying this response is easy to understand. If the people are free to replace inherited constitutional rules with rules of their own choosing, the idea runs, then there is no dead-hand problem to worry about. The dead-hand problem arises only if the people's authentic views cannot be adopted into the Constitution, such that they are stuck with a contrary rule inherited from a prior time. That would be the case if the Constitution were unamendable. But the actual United States Constitution can be democratically amended. The fact that the people accept inherited rules rather than changing them, the argument concludes, signals present democratic acceptance of the Constitution. And if the Constitution presently enjoys popular acceptance, there is no dead-hand problem.

There is a well-known rejoinder to the revisability argument. It is that the United States Constitution is highly resistant to amendment.108 If popular

107. See, e.g., Whittington, supra note 1, at 201; Amar, supra note 11, at 1072–73 (arguing that only the amendability of the Constitution rescues it from the dead-hand problem).

108. See, e.g., Brest, supra note 5, at 236 ("[T]he formal process of amendment is too cumbersome to bear sole responsibility for constitutional change."); Donald S. Lutz, Toward a Theory of
supermajorities can be thwarted when they try to alter the Constitution—and they can\textsuperscript{109}—then perhaps the process of amendment is too arduous to warrant confidence that the people can in fact change the Constitution when they wish to do so.

Whether the Constitution is revisable enough to let the people express their authentic constitutional views through amendments depends on judgments about what decision rules would properly map the will of something called "the people,"\textsuperscript{110} as well as on the contested question of what the rules for amending the Constitution actually are.\textsuperscript{111} For present purposes, however, we need not engage the debate over whether the Constitution is too hard to amend. Instead, I want to make a point that prior scholarship has missed but that the toolkit approach to constitutional decisionmaking helps make clear. It is this: Even if the Constitution were readily revisable, that revisability would not make originalism an appropriate tool for deciding cases arising under inherited constitutional provisions.

The reason why not goes to the difference between democratic-enactment authority and the authority of implied consent. The revisability argument tries to establish that implied popular consent supplies the Constitution with democratic legitimacy. "The people could change the Constitution if they wanted to, so if they don’t, their inaction is tantamount Constitutional Amendment, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment 237 (Sanford Levinson ed., 1995); Henry Paul Monaghan, Doing Originalism, 104 Colum. L. Rev. 32, 35 (2004) (describing the Constitution as "practically unmendable").

\textsuperscript{109}. 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, 117 Cong. Rec. 35813, 35815 (1971), and 84 to 8 in the Senate, 118 Cong. Rec. 9544, 9598 (1972), after which it was ratified by states containing more than seventy percent of the country’s total population. See Rex E. Lee, A Lawyer Looks at the Equal Rights Amendment 37 (1980); U.S. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1971, at 12–14 (1971) [hereinafter 1970 Census] (listing population statistics for 1970). In a collection of other states comprising just under twenty percent of the population, the amendment was approved in one house but not the other. See The Impact of the Equal Rights Amendment: Hearings Before the S. Subcomm. on the Constitution of the Comm. on the Judiciary, 98th Cong. 92–93 (1984) (ratification history of the Equal Rights Amendment); 1970 Census, supra. (In the largest such state—Illinois—majorities in both houses voted in favor of the amendment, but local rules required supermajorities for ratification. See Gilbert Y. Steiner, Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment 99 (1985)). States in which neither legislative house approved the amendment accounted for only ten percent of the American population. See Lee, supra; 1970 Census, supra. That level of opposition, however, sufficed to defeat the amendment.

\textsuperscript{110}. The answer need not be simple majority, but it is also clear that not just any supermajority rule will do. Suppose that the Constitution could be amended but only by a unanimous vote of all living Americans. No such vote could ever be secured in practice, so the formal possibility of amendment would not signal popular approval of the present system. The same would be true if the Constitution could be amended by only by a ninety-nine percent vote of all living Americans. The question, then, is whether the actual supermajoritarian hurdles to changing the United States Constitution are too high to let the people’s failure to change the Constitution stand for their implicit endorsement of the Constitution as it is. Different people may reach differing answers to this question, but any reasonable answer would concede that the Constitution is extremely difficult to revise.

\textsuperscript{111}. Several theorists have argued that the Constitution can be amended by processes other than those identified in Article V. See, e.g., I Ackerman, supra note 10; Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1737 (2007); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457 (1994).
to endorsing the Constitution as it is.” But as explained in Section II.A, implied consent to the Constitution as it is does not justify originalist decisionmaking in a world where the existing constitutional arrangements do not reliably correspond to the Constitution’s original meanings. Recall here that the command-theory view of the relationship between democracy and constitutional legitimacy is different from the implied-consent view, and recall also that, of the two, only the command-theory view supports originalism. If the Constitution’s authority derives from the fact that it was democratically enacted in the past, then it makes sense to treat original meanings as authoritative when deciding constitutional cases. That is the command theory. But if the Constitution’s authority derives from its present popular acceptance, no such conclusion follows. What follows instead, if anything, is that the people have given their implicit democratic consent to the constitutional arrangements that presently exist, whether or not those arrangements are consistent with original constitutional meanings. Implied present popular acceptance can endorse, at most, the arrangements that are actually on offer in the present. It cannot endorse an alternative set of arrangements under which we are not now living.

The existing debate over revisability and the dead hand has missed this important point, proceeding as if implied present consent could legitimate not just the constitutional system as it is but also a jurisprudence of original meanings. As noted before, that mistake might arise from conflating (1) the existing set of constitutional arrangements with (2) “The Constitution,” which is in turn conflated with (3) the original meaning of the Constitution. The mistake might also arise from conflating two different kinds of democratic authority, namely the authority of democratic enactments and the authority of implicit democratic acceptance. The intuition that might lead one astray goes like this: “The dead-hand problem threatens the democratic authority of the Constitution. The revisability of the Constitution guarantees that the Constitution enjoys democratic authority. Therefore, revisability undoes the dead-hand problem and reestablishes the propriety of originalism.” But this line of reasoning fails to notice that the democratic authority that revisability confers—the democratic authority of present implied consent—is a different kind of democratic authority from the authority of a democratic enactment.

The authority of democratic enactment and the authority of implied consent are both reasonably described as democratic. When present, both kinds can help legitimate a system of government. But for the reasons described in Section II.A, not every kind of democratic authority supplies a reason for originalist decisionmaking. Originalist reasoning is a fitting tool for vindicating the authority of democratic enactments, but it is not a fitting tool for vindicating the authority of implied democratic consent—or at least not when the existing arrangements to which the people are implicitly consenting do not conform to a constitution’s original meaning.

112. See supra Section II.A.
Another set of attempts to dissolve the dead-hand problem contends 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 continue, and it is the People who form the relevant polity. Thus, the People consented, and the People are 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.\(^3\)

This proposal has considerable appeal. Unlike the revisability theory, it does purport to restore the command theory, and with it the democratic-enactment rationale for originalism. We are The People, and we made the Constitution; we are commanding ourselves. Among its other attractions, this idea offers to create a world of constitutional discourse in which we moderns are connected across time to famous historical figures and their heroic undertakings. The twenty-first-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.\(^3\) As a selling point to people who are interested in constitutional law, this aspect of the intertemporal-people idea should not be underestimated.\(^5\)

For all its 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 before we were born.\(^1\) 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 are shaped by narratives that begin before our birth: most people understand the significance of their own lives

\(^{113}\) Ackerman, supra note 10; Jed Rubenfeld, Freedom and Time 173–77 (2001); Whittington, supra note 1, at 1 (“T]he judiciary . . . merely interprets our own previously established commitments . . . .”); Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 28–29 (2000) (“The . . . aim of [constitutional interpretation] is to understand what the American People meant and did when We ratified and amended the document.”).

\(^{114}\) See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992) (“Our Constitution is a covenant running from the first generation of Americans to us and then to future generations.”); Balkin, supra note 20.


\(^{116}\) Again, we may acquiesce in the constitutional system’s operation today, but our modern assent is at most to the Constitution as it is now implemented, not as it was understood in the distant past. See supra Section II.A.
and that of their national communities in the context of stories that transcend their individual lifetimes. But we do not explain much about these complicated realities by saying that we chose the world (or the family, or the constitution) that we inherit, and it would be perverse to say that we have the authority to bind our descendants to pay our debts because the whole American People over time blesses the arrangement.

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

4. Totalizing and Targeted Dead Hands

One reason why it is crucial to recognize that constitutional law does not rest on the authority of democratic enactment alone 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. Too many theorists have been haunted by that thought. Michael McConnell, for example, articulates a broadly shared anxiety when he says that "the dead hand argument, if accepted, is fatal to any form of constitutionalism." I suspect that a fair amount of resistance to the dead-hand argument is rooted in that worry.

Because the dead-hand problem is real, it is fortunate that McConnell's worry is misplaced. Considered carefully, the dead-hand problem does not imply the illegitimacy of the Constitution. Or perhaps more precisely, the dead-hand problem can be understood in two different ways, one of which implies the illegitimacy of the Constitution and one of which does not.

We can think of the two versions of the dead-hand problem as "totalizing" and "targeted." In its totalizing form, the dead-hand problem is based on an uncompromising insistence on presentist democracy. It objects to all inherited authority that constrains democratic decisionmaking in the present. One thinks here of Thomas Jefferson's dictum that the earth belongs to the living and his recommendation that the Constitution expire every nineteen years, lest the living be limited by the purported authority of their ancestors. Perhaps because such presentism has been part of American

117. See McConnell, supra note 12.

constitutional discourse since Jefferson, or perhaps because many modern theorists share Jefferson’s desire to derive all governmental authority from the consent of the governed, many people have assumed that the dead-hand problem must take this totalizing form.

I suggest, however, that it is possible and preferable to understand the dead-hand problem as having a more targeted scope. Specifically, the dead-hand problem could be an objection only to the idea that democratic enactment is what makes inherited constraints authoritative. I call this understanding of the dead-hand problem “targeted” because it takes aim at one particular justification for inherited constitutional authority, not at inherited constitutional authority across the board. On the targeted understanding, past democratic enactment cannot justify constraints that we the living did not agree to, but democratic enactment is not the only possible justification for constitutional constraints.

The totalizing form of the problem is valuable as a thought experiment about the limits of democracy, but it does not state a practical objection to constitutionalism, because it cannot be solved in any real system of government. No society can operate on the basis of fully presentist democracy alone. No government can refund its institutions every time a new member is born into its jurisdiction, and every human decisionmaking process is constrained by prior decisions that structure the process itself, including decisions about who can vote and who can set the agenda. So if it is intended as a serious objection to inherited constitutional authority, the totalizing version of the dead-hand problem—which amounts to uncompromising insistence on presentist democracy—is immature and self-defeating.

The targeted version is more cogent. It recognizes that although the consent of the governed is much to be prized, democratic enactment cannot be the only source of legitimacy in any actual government. Instead, constitutional government serves multiple values and draws its legitimacy from multiple sources. Part of the United States Constitution’s legitimacy derives from the brute fact that it exists and that we cannot rewrite all of our 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

119. See, e.g., Amar, supra note 11, at 1074 (explaining that his theory of informal amendment is designed to make it possible to rest constitutional law on the consent of the governed alone); Jed Rubenfeld, The Paradigm-Case Method, 115 YALE L.J. 1977, 1990 (2006) (insisting that constitutional law is neither a check on democracy, a protector of democracy, nor a vehicle of democracy, but actually democracy itself).

120. See, e.g., Jed Rubenfeld, Revolution by Judiciary 139 (2005) (contending that only a commitment to presentist democracy can intelligibly animate the dead-hand argument).


from its ability to deliver tolerable levels of substantive justice; part from the fact that citizens identify subjectively with the 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.\footnote{See Fallon, supra note 13, at 1792–93.} 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—including 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 regime that they 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 Americans would in fact uphold such a regime for very long.

In its targeted form, the dead-hand objection is irrelevant to most sources of constitutional authority. Where the objection is applicable—that is, where enough time has passed—it nullifies the claim that a constitution's democratic enactment is a source of its authority. But it leaves other sources of authority untouched. In the American system as we know it, other sources of constitutional authority are sufficient to justify our continued allegiance, or, to say the same thing, the Constitution's continued legitimacy.\footnote{See David A. Strauss, Reply: Legitimacy and Obedience, 118 HARV. L. REV. 1854, 1854–55 (2005) (arguing that a government is "legitimate" if defiance of it is not justified).} 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.

Some comparative examples may help make the point. The constitutions of Canada, Japan, and Kosovo are legitimate sources of authority in those countries. None of those constitutions, however, can claim democratic enactment in the manner of the United States Constitution. The Canadian Constitution was drafted by Canadians but officially bestowed by the grant of the British Crown.\footnote{See James Ross Hurley, Amending Canada's Constitution 10, 12, 25 (1996).} The Japanese Constitution was drafted and imposed by a hostile military force, namely that of the United States.\footnote{See Kyoko Inoue, MacArthur's Japanese Constitution 6–36 (1991).} Similarly, the Council of Europe drew up a constitution for Kosovo without the participation of any Kosovars, as Jed Rubenfeld has described.\footnote{Jed Rubenfeld, The Two World Orders, WILSON Q., Autumn 2003, at 22, 26–27.} Rubenfeld sees democratic enactment as essential to American constitutionalism,\footnote{Id. at 29.} but his account of the Kosovar Constitution admirably demonstrates how people with views different from his believed that a constitution could be legitimate so long as it would "recognize human rights, protect minorities, establish the rule of
law, and set up stable, democratic political institutions," even without having been written or ratified by the people it was to govern.\textsuperscript{129} In all three of these countries, a combination of such factors makes the constitution a legitimate source of law, indeed a source of law superior to ordinary electoral lawmaking, even without the authority of democratic enactment.

Admitting the force of the dead-hand problem can thus be entirely consistent with upholding an inherited constitution. As Section II.C describes, it is nice to regard one's community as having democratically created its own system of government. But as examples from other legal systems demonstrate, it is not an indispensable condition. In the American case, we ought to uphold the Constitution despite its shortcomings in democratic-enactment authority, because it has sufficient virtues along other dimensions. We need not pretend (or make ourselves believe) that upholding inherited constitutional rules shows respect for democratic decisionmaking.

This is not to deny that democratic enactment can be a source of constitutional legitimacy. It can, when the people giving consent sufficiently overlap with the people bound. In that circumstance, it is meaningful to say that respect for democracy entails respecting the bargain that was struck—that is, for people to respect their own prior democratic decisions. But the reasons for upholding a centuries-old constitution do not include showing respect for democratic decisionmaking. And if upholding the Constitution is not an exercise in respecting democratic decisionmaking, then it makes little sense to choose a method of constitutional decisionmaking on the grounds that the authority of the Constitution's democratic enactment requires it.

C. What's Left of Democratic Enactment: Subjective Identification

To many American constitutional lawyers, the idea that constitutional legitimacy does not require democratic enactment will be jarring. It is worth emphasizing, therefore, that nothing I have argued means that democratic enactment is \textit{irrelevant} to a constitution's legitimacy. I am arguing that democratic enactment is not \textit{necessary} for constitutional legitimacy and, separately, that a democratic enactment in Century One would not of its own force contribute to a constitution's legitimacy in Century Four. But the qualifier "of its own force" in the previous sentence is important, because there is one respect in which a constitution's having been democratically enacted can enhance its legitimacy even after many generations pass. If the people whom a constitution governs value democratic decisionmaking in their own affairs, then their ability to regard their inherited constitution as democratically enacted can foster their subjective sense of identification with that constitution and the people who made it.

\begin{footnotesize}
\begin{footnote}{129.} \textit{Id.} at 27.\end{footnote}
\end{footnotesize}
When Should Original Meanings Matter?

1. Subjective Identification and Constitutional Legitimacy

As noted above, constitutional legitimacy rests on several factors. One of those factors is the tendency of citizens to identify with the governing regime rather than regarding it as alien. One way in which a political culture fosters identification with the regime is by presenting the regime as the product of people who are somehow akin to the people who are governed. If we think of the Founders as having been like us, we are more likely to experience the Constitution as our own.

Most modern Americans value democratic decisionmaking. We are therefore more likely to identify with the Founders, and with the Constitution, if we believe that the Founders proceeded democratically. That is what we think we would have done, after all. Our image of the Founders as democrats like us does not have a claim on our obedience: the dead-hand problem is still in effect, and in any event we are here describing only our image of the Founders, not what was historically true of them. But if we imagine that they were like us, we will be more comfortable being governed by the constitution they made.

Understood this way, our image of the Founders as democrats is analogous to our image of them as English speakers. Neither supports a claim of political authority. Their democratic authority has long since expired, so it does not bind today. Similarly, the fact that they conducted business in English as opposed to some other language cannot possibly be relevant to their right to govern the future. That said, if the Founders had spoken Portuguese or Hungarian—or Arabic, or Chinese—many Americans today might find them more alien. The English language is a point of commonality between us and the Founders, and so is some kind of democratic politics.

To the extent that our sense of commonality with the Founders enhances our subjective identification with the constitutional regime, each aspect of our image of the Founders that enables our sense of communion also contributes to constitutional legitimacy. Accordingly, a sense that an inherited constitution was enacted democratically can be relevant to its legitimacy today, even admitting the dead-hand problem. Note, however, that what enhances constitutional legitimacy on this account is not the fact of democratic enactment in the past but the present perception (accurate or otherwise) of past democracy. What matters is not what happened at the Founding but how we now feel about the Founding. And the normative significance of that feeling should not be understood as democratic-enactment authority any more than our feeling of commonality with the Founders based on the fact that they spoke English should be. Both are about subjective identification with the regime, which is a different constitutional value.

---

130. See Strauss, supra note 5, at 1739 ("It is not reasonable to expect people to continue to adhere to political institutions without having, or developing, affective ties to those institutions.").

131. If the word "communion" has a religious resonance in the previous sentence, it suggests an appropriate analogy. One function of the Catholic Mass is to foster a sense of identification with heroic events that happened too long ago for anyone participating to have experienced directly. See Paul Connerton, How Societies Remember 4, 102–04 (1989).
One question that now follows is whether constitutional decisionmaking should be influenced by the role that the public’s subjective identification with long-dead Founders can play in supporting constitutional legitimacy. If so, there may be implications for originalism. I have previously suggested that arguing constitutional questions in terms of original meanings contributes to a sense of identification with the Constitution’s framers. When we argue modern issues as if the ideas of James Madison or John Bingham were pertinent, we create a discourse that seems to collapse the distance between us and them. The more we make that distance seem to disappear, the more we can dissipate anxieties that might otherwise attend a democratic society’s having to work within the constraints of a constitution that it did not choose. Just as I suspect that worries about constitutional illegitimacy underwrite much resistance to the dead-hand objection, I suspect that some of the popularity of originalism stems from the fact that many interpreters enjoy the feeling of communion with famous constitution-making heroes. Thus, the popular but flawed argument that the United States Constitution is binding by virtue of its democratic enactment can be understood partly as a reaction to the fear of the dead hand and partly as a conceptual misstep that results when theorists try to rationalize their romantic impulse for connection to the Founders within the framework of legal liberalism.

My claim that trafficking in original meanings can make people feel connected to the Founders was meant to diagnose the phenomenon, not to recommend the use of originalist jurisprudence for this purpose. When I first suggested that diagnosis, no self-described originalist had yet affirmatively claimed this function of originalist discourse as a reason for practicing originalism. But that was then. In two articles published in 2007, Jack Balkin broke new ground by embracing originalism at least in part for its discursive ability to enhance modern Americans’ identification with the inherited Constitution.

For constitutionalism to succeed, Balkin argues, Americans must believe two things. First, they must believe that the Constitution is their own, despite having had no share in its creation. Second, they must believe that the Constitution contains sufficient resources to vindicate their own visions of justice, even if constitutional law today does not validate those visions. To ensure these conditions, Balkin says, people should ground their consti-

132. See Primus, supra note 115.
133. See id. at 179–80.
134. See supra note 117 and accompanying text.
135. See Balkin, supra note 20; Balkin, supra note 22.
137. Id. at 427–28, 532.
When Should Original Meanings Matter?

In doing so, they will demonstrate their own identification with the earlier generations that made and improved the Constitution. The repeated foregrounding of originalist arguments will create a sense of commonality across time: if we argue today's issues in terms of principles that we identify with our predecessors, we will see our project as the continuation of theirs and their achievements as our own. Moreover, by grounding our arguments in a common history despite our conflicting agendas, we modern Americans will make ourselves one constitutional community. We will often differ, surely, about what the original meanings are and about how to apply them to the problems before us. But we all share the connection to a common constitutional past. By identifying with that past rather than rejecting it, Balkin explains, we can reaffirm both our collective identification with the Constitution and our faith that the Constitution—our Constitution—is a worthy one.

One important difference between Balkin's argument and most other arguments for originalism is that most other arguments, including those based on respecting democratic authority and fostering the rule of law, are centrally concerned with decisionmaking. They claim that officials should consult original meanings in order to determine which way contested constitutional issues should be resolved. In contrast, the idea that arguing from original meanings can increase identification with the Constitution is an idea about discourse. It is less concerned with identifying the proper answers to constitutional questions than with the rhetoric in which people frame their answers. This does not mean that its concerns are trivial. Rhetoric can have important consequences, including for a community's self-understanding. But an originalism whose virtue is its capacity to allow people with many different agendas to articulate their positions in ways that will make them feel connected to the Constitution brings with it an important limitation: it offers relatively little help to decisionmakers who must resolve contested issues.

The more indifferent Balkin's originalism is to outcomes in contested cases, the more successful it will be in making originalist discourse an activity that can foster Americans' subjective identification with the inherited Constitution. Unlike other rationales for originalism, the subjective-identification rationale affirmatively benefits when original meanings are indeterminate enough that people on each side of a divisive issue can make originalist arguments. If original meanings could support the strongly held views of some modern Americans but not the strongly held views of their

---

139. Id. at 438–39, 465.
140. Id. at 440–41.
141. Id. at 439.
142. See id. at 507–08 (acknowledging and defending the choice to be concerned with rhetoric).
143. See id. at 504–11; see also Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. PA. L. REV. 297, 322–23 (2001).
antagonists, then a discourse of original meanings would be less able to bind us all into a single community with a common faith in the Constitution's justice.

Appropriately, therefore, Balkin promotes a permissive form of originalism, one that he calls the method of text and principle.144 On his account, constitutional meaning must be faithful to the text and, where the text states a principle rather than a concrete rule, to the principles that underlie the text.145 But a principle can "underlie" a text, Balkin holds, even if no enactor specifically intended that principle.146 Interpreters should consider historical context so as to understand what the enactment of a text was meant to achieve, but the principles are not limited by the applications that the enactors thought would follow from their enactments.147 This is a highly flexible approach to original meanings. As common lawyers and critical legal scholars know, there are lots of principles to choose from, and most principles can be made to do many different kinds of work if not confined by regulating applications.148 As a result, many conflicting principles could qualify as the "original meaning" of a constitutional provision.

It is not a coincidence that Balkin's first application of this theory seeks to establish a right to abortion under the original meaning of the Fourteenth Amendment.149 As Balkin states in explaining his approach, the idea that there is a constitutional right to abortion has often been thought flatly inconsistent with original meanings.150 The value of Balkin's originalism is that it permits more Americans—here, those who are pro-choice—to embrace the world of original meanings. The crucial point about Balkin's approach, however, is not that it permits pro-choice lawyers to be originalists without sacrificing their substantive policy preferences. It is that it permits any significant American interest group to do so. Within the permissive groundrules for what counts as an original principle, good pro-life lawyers will find ways to argue that the original meaning of the Fourteenth Amendment prohibits abortions. Given the aim, which is to enable Americans to feel connected to past enactors, such indeterminacy is a feature rather than a bug of originalism on Balkin's model. Many Americans are pro-choice, and many are pro-life. But if we all can make originalist arguments, then all of us, despite our conflicts, can feel rooted in the inherited Constitution.

This does not mean that text-and-principle originalism makes it possible for absolutely any position to be presented as grounded in the Constitution's original meaning. I doubt, for example, that anyone applying Balkin's

144. See Balkin, supra note 22, at 293.
145. Id. at 293, 295, 304–05.
146. Balkin, supra note 20, at 487.
149. Balkin, supra note 22.
150. Id. at 291–92.
groundrules could plausibly argue that Congress must have four houses or that Senators must be the lineal descendants of Revolutionary War veterans. But nobody within American constitutional discourse holds either of those positions. Within the compass of actually contested issues that an official might have to decide, Balkin’s version of originalist reasoning could probably support either side of a question. Again, this is a virtue of the method, given its aims. To be sure, the people on one side might not find the originalist arguments on the other side as compelling as those on their own side: just because my hypothetical pro-life lawyers can use Balkin’s style of originalism to make pro-life arguments does not mean that Balkin will find those arguments as strong as his own pro-choice arguments. But to whatever extent the arguments on one side of a contested issue are actually stronger than the arguments on the other side, Balkin’s originalism will fall short in its distinctive ambition of enabling Americans on every side of contested questions to identify with the Constitution.

As all parties to a dispute become more able to ground good arguments in original meaning, attention to original meaning can do less and less to adjudicate the issue. To Balkin’s credit, this is less of a problem for him than it would be for most other constitutional theorists, because Balkin is not so interested in theories of constitutional interpretation as tools for decision-making by officials. Instead, he regards the articulation of constitutional claims by citizens as the core case of constitutional interpretation. The gravamen of his recommendation, he says, is that citizens should use original meanings as a framework in which to articulate their views on constitutional issues. To some extent, therefore, the complaint that text-and-principle originalism is not very useful as a decisional tool might be beside the point. Citizens are not usually charged with adjudication in the way that officials are.

That said, even citizens need a way to figure out which side of a constitutional issue they ought to take. No less than officials, citizens who engage constitutional questions need to distinguish better from worse answers. A theory of constitutional argument that makes a broad range of answers acceptable will rarely do the job. To be sure, many people who apply an originalism like Balkin’s may authentically experience themselves as arriving at their conclusions based on their sense of the Constitution’s original meaning, despite the fact that many other and perhaps equally plausible accounts of original meaning are available. But if other and comparably plausible accounts are available, it is probably the case that which originalist arguments a person finds most credible is in substantial part a function of things outside the materials of originalist argument—such as, for example, one’s view of the relative justice of the pro-life and pro-choice positions.

151. See Balkin, supra note 20, at 514–16.
D. What's Left of the Command Theory: Recent Enactment

The value of subjective identification does not yield a form of originalism that is particularly useful as a decisionmaking tool, and the value of respecting democratic authority does not authorize the use of originalism when construing constitutional provisions inherited from previous centuries. Nonetheless, originalist reasoning still sometimes succeeds in vindicating democratic authority. The dead-hand problem is serious where it applies, but it does not apply to every instance of constitutional decisionmaking. Specifically, there is no dead-hand problem if the constitutional provision being applied is of recent enactment, rather than one inherited from a time long ago. "Recency" is a standard, and there is no principled way to translate it into a quantitative 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. In a case arising under that amendment today, looking to what the ratifying public understood the amendment to mean at the time of its 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 govern itself. To enforce the amendment in line with the expectations of the public that agreed to it respects the democratic choice that public made. Put another way, it would compromise democracy if an amendment adopted yesterday were today applied to require something different from what the ratifying public understood itself to be requiring. Then, at the other extreme, consider an amendment adopted in 1868. No American alive today was alive then. An 1868 enactment is clearly not recent enough to command authority over us today by reason of its democratic

---

154. See Brest, supra note 5, at 229 n.94 (writing that the strength of the democratic ideal in constitutional law is such that it is hard to imagine the courts ignoring the mandate of a contemporary amendment); Dorf, supra note 5, at 1816–22; cf. William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 HARV. L. REV. 26, 56–75 (1994) (arguing, in the context of statutory interpretation, that similar reasons make original understanding highly pertinent soon after a statute is enacted and then less pertinent as time goes on). The recency approach provides a justification for the practice of constitutional originalism in the first years or even decades after 1788. See, e.g., Howard Gillman, The Collapse of Constitutional Originalism and the Rise of the "Living Constitution" in the Course of American State-Building, 11 STUD. AM. POL. DEV. 191, 204–05 (1997). 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. To be clear, 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, 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 command theory claims. See Horwitz, supra note 26, at 57–58 (arguing that democracy was not considered a significant source of American constitutional authority until the middle of the twentieth century).
When Should Original Meanings Matter?

enactment, even if its enactment had been unimpeachably democratic 140 years ago.155

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.156 But any choice about where one generation begins and another ends would be problematic, because people are born and die every day rather than at twenty- or thirty-year intervals. Nonetheless, the difficulty with translating the recency standard into a quantified rule means only that the recency inquiry is rough. It is still the right inquiry. It happens to be a limitation of that inquiry that in some cases, it will not yield a unique right answer, which is to say that decisionmakers will have to exercise judgment.

On closer examination, however, it turns out that such judgment calls would rarely be necessary in cases now arising under the United States Constitution. Indeed, under the actual conditions of 2008, answering the recency question will almost always be easy. Nearly all constitutional adjudication today construes provisions adopted more than a hundred years ago. To the question “Was this enactment recent enough that construing it according to its original meaning would show respect for democratic decisionmaking?”, a judge today would be able to answer with an easy “no” in almost every case. This fact is a contingent consequence of there having been few recent amendments to the Constitution.157 After a burst of amending activity, such

155. I do not mean 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 Richard A. Primus, The Riddle of Hiram Revels, 119 HARV. L. REV. 1680, 1687 (2006).

156. Cf. GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 2-3 (2007). Jefferson’s quip that the Constitution should expire every nineteen years was based on his rough-and-ready calculation that that was the best measure of a generation. Letter from Thomas Jefferson to James Madison, supra note 118.

157. 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. Six states ratified the Amendment between 1789 and 1791, and an seventh state (Ohio) ratified in 1873. No other ratifications followed for more than a hundred years, after which a new campaign exhumed the Amendment and brought it before the remaining state legislatures. Beginning with Wyoming in 1978 and ending with Michigan in 1992, another thirty-one states then ratified, and the Amendment was deemed adopted by the ratification of Article V’s required three-fourths of all states (i.e., those thirty-one plus the seven that had ratified more than a hundred years before, for a total of thirty-eight out of fifty). See Richard B. Bernstein, The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment, 61 FORDHAM L. REV. 497, 498, 532, 534, 537–38 (1992). Many legislators whose votes were necessary to make the Twenty-Seventh Amendment part of the Constitution under Article V (as well as the people who voted to elect those legislators) were long dead by the time of the last ratifications. One oddity of the Twenty-Seventh Amendment, therefore, is that a portion of the ratifiers whose assent made the Amendment valid under Article V lacked democratic authority at the time of the Amendment’s adoption. Accordingly, an interpreter implementing the Amendment would either have to reject Article V as the basis for the Amendment’s validity or else abandon the idea that the Amendment had full democratic authority even at the moment when it came into force.
as that which occurred in the 1910s or the 1860s, originalist decisionmaking has an important role to play. But under the historically specific conditions of 2008, the democratic-enactment argument for originalism has almost no application.\(^\text{158}\)

Some readers who are drawn to the democratic-enactment argument for originalism will find this conclusion dissatisfying. After all, I have concluded that there are almost no cases in which that argument presently warrants originalist decisionmaking under the United States Constitution.\(^\text{159}\)

That said, people who sincerely subscribe to the democratic-enactment rationale for originalism are, I think, bound to believe that my analysis holds out the prospect that originalist decisionmaking will yet play a prominent role in American constitutional law. The reason why goes to the command theory’s view of constitutional amendment. After all, my approach only makes the democratic-enactment argument for originalism marginal if the circumstances of 2008, under which little constitutional law looks to recent amendments, are fated to be the normal circumstances of constitutional adjudication—in other words, if new constitutional amendment is always a remote possibility. If the Constitution were amended regularly, my theory would direct an important ongoing role for originalist decisionmaking. So if my theory means that the democratic-enactment argument for attention to original meanings will have few applications, it can only be because amendment will be highly uncommon.

The spirit of the democratic-enactment argument for originalism, however, embraces the idea that We The People can alter the Constitution, democratically, whenever we want. Few originalists concede that the Constitution is nearly unrevisable. On the contrary, the dominant position among

---

\(^{158}\) This clean solution becomes a bit messier if one takes the view that the Constitution has been amended informally on several occasions. See Ackerman, *supra* note 111. If the people have democratically issued a constitutional instruction, the arguments for originalism as a means of respecting democratic authority are essentially the same regardless of whether the instruction is issued through the Article V process or in some other way. On Ackerman’s reading of constitutional history, much modern constitutional litigation should actually be understood as construing the “enactments” of the New Deal or the Civil Rights era, even if the constitutional clauses nominally being construed were formally adopted in previous centuries. If Ackerman is right, then originalism cannot be ruled out in such litigation just because the formal enactments at issue are more than a hundred years old; the actual authority is more recent. One could dodge this complexity by arguing that the Civil Rights and New Deal moments, having occurred forty to seventy years ago, fall on the far side of the recency line. But that judgment may be contestable. Of course, the process of construing an informal amendment might be different from the process of construing a formal amendment. On Ackerman’s theory, informal amendments can be embodied in federal statutes and Supreme Court opinions. Figuring out what was enacted in a federal statute or a Supreme Court opinion might require different techniques from those used to figure out what was enacted in a text that is submitted to state legislature for ratification. But this seems like a problem of execution rather than a problem of authority, and it may or may not be more insoluble than the problem of identifying the original meaning of a formal amendment.

\(^{159}\) My argument leaves a good deal more room for originalist decisionmaking in state constitutional law, because many state constitutional provisions are of recent origin. That said, I do not expect many originalists to be comforted by my noting that the democratic-authority argument for originalist decisionmaking often makes sense in the state constitutional context. Most originalists care a great deal about the United States Constitution and relatively little about the twentieth- and twenty-first century constitutional law of particular states. See *supra* note 15.
theorists who argue for originalism on democratic-authority grounds is that proper respect for democracy requires adhering to the bargains that were democratically struck in the past and that revisions to the terms of that bargain should come in the form of democratically adopted amendments.\footnote{160} Indeed, it is sometimes argued that we must respect the democratically struck bargains of the past precisely so that we can secure the possibility that the democratic bargains we strike today will be respected in the future.\footnote{161} If one takes seriously the idea that democratic amendment is a practically available avenue of constitutional change, then one must see my approach as holding out the prospect of a significant role for originalist decisionmaking in the future, albeit not today.

My own inclination is to regard the possibility of formal constitutional amendment as generally remote. It is awfully hard, I think, to amend the Constitution.\footnote{162} 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 attention to original meanings—for a while—in cases where those amendments are applied.

III. ORIGINAL MEANING AND THE RULE OF LAW

The rule of law is a fundamental constitutional value, and many theorists have argued that the rule of law requires originalism.\footnote{163} Untangling the relationship between originalism and the rule of law, however, requires recognizing that the rule of law is a cluster concept with several overlapping themes.\footnote{164} They include the aspiration for the law to be stable, and to be capable of delivering a certain amount of social stability; for the law to govern officials as well as ordinary people; for both officials and ordinary people to look to the law to guide their behavior; for governmental authority to be impersonal, residing in offices rather than in individuals; and for the law to be administered impartially, predictably, and with fair procedures.\footnote{165} The rule of law is not a sufficient condition for a just or desirable regime, because it has little to say about the substance or source of the law that is administered.\footnote{166} Just as clearly, however, the rule of law is necessary for a well-functioning constitutional system. As Don Herzog has pithily suggested, people inclined to denigrate the predictability, stability, and

\footnotesize{\begin{itemize}
\item \footnote{160} See, e.g., Scalia, supra note 6; Whittington, supra note 1, at 153–56, 201, 216.
\item \footnote{161} See, e.g., Whittington, supra note 1, at 156.
\item \footnote{162} See supra Section II.B.2.
\item \footnote{163} See, e.g., Balkin, supra note 20, at 429; Barnett, supra note 22, at 259 ("Most originalists place a high value on the rule of law, which is one reason they care so much about preserving the original meaning of a written constitution."); Calabresi & Prakash, supra note 21, at 551–52.
\item \footnote{164} See generally Fallon, supra note 23.
\item \footnote{165} See Raz, supra note 23, at 212–18; Fallon, supra note 23, at 6–9.
\item \footnote{166} See, e.g., Raz, supra note 23, at 210–11.
\end{itemize}}
impersonal authority that travel together as the rule of law should consider what life is like in societies without them.167

For a time, originalists commonly argued that attention to original meanings would promote the rule of law by cabining discretionary judicial decisionmaking.168 One still hears this argument.169 But in recent years, sophisticated originalists have recognized that any theory offers constraints170 and that recommending attention to original meanings is not a particularly good strategy for constraining judges in practice.171 Accordingly, leading theorists who argue that originalism promotes the rule of law are now less likely to emphasize constraint as such and more likely to focus on the claim that the original meaning of a constitutional provision is the legitimate legal content of that provision.172 This version of the argument is sometimes described in terms of fidelity.173 Fidelity to the Constitution, the argument runs, requires fidelity to original meanings not merely because a jurisprudence of originalism would constrain what judges do—many styles of reasoning would do that—but because original meanings accurately capture the substance of constitutional law. Or to put the point in terms of the cluster of values that make up the rule of law, the aspiration is for official behavior to be guided by law, not merely that it be nondiscretionary.

Without more, however, the contention that the authoritative or accurate content of a constitutional provision is its original meaning might simply restate the metaphysical claim for original meanings that I discussed and criticized in Part I.174 To see the fidelity argument in a better light, we should understand it as contending that treating original meanings as authoritative would secure the benefits that make the rule of law worth having. Under a jurisprudence of original meanings, the idea runs, officials would be guided by the proper substantive authority. The law would be relatively stable, impersonal, and predictable, and people could plan around a relatively

167. HERZOG, supra note 97, at 133.

168. See, e.g., SCALIA, supra note 6, at 44–47 (arguing that the problem with nonoriginalist constitutional interpretation is that it lets interpreters go off in various different directions); Lessig, supra note 17, at 1166 (explaining that the chief proffered virtue of adhering to original meanings is the limitation of discretionary judicial lawmaking); Whittington, supra note 6, at 609 (characterizing theorists who have adopted this view).


170. E.g., WHITTINGTON, supra note 1, at 39.

171. E.g., id. at 4; Balkin, supra note 20.

172. See Calabresi & Prakash, supra note 21, at 551–52; Whittington, supra note 6 (differentiating the originalism of the 1970s and 1980s, which emphasized constraining judicial interpretation, from more recent originalism, which emphasizes fidelity to the law’s substantively authoritative content).

173. See, e.g., Balkin, supra note 20, at 436; Lessig, supra note 17; Whittington, supra note 6, at 609.

174. See supra Section 1.C.
transparent understanding of what the law required. The reason why original meanings should be the ones that officials look to in order to secure these benefits, of course, is that those meanings were the ones authoritatively poured into constitutional provisions by the people who had the authority to do so. Once those meanings were in place, rule-of-law benefits would flow from continued adherence to them.

As it happens, however, insisting on original meanings would in fact undermine rule-of-law benefits in many cases. If original meanings have been forgotten or abandoned over time, and if the legal system has covered the relevant ground with a different practice that people have come to regard as the law, then original meanings might be a relatively nontransparent source of law, and reimposing an original meaning might destabilize the existing legal system. This possibility arises from the fact that presently operative legal meanings are not always the same as original meanings. In the same way that implied present consent cannot authorize a legal regime that does not currently operate, locating legal authority in original meanings does not reliably promote rule-of-law values if many operative practices that people rely upon as law differ from original meanings.

A. Beyond Constraining the Judges

Many theorists have argued that originalism promotes the rule of law by reducing the discretion of decisionmakers, and in particular judges, because it ties the content of constitutional law to something more objective than the decisionmakers' own preferences. To be sure, no sensible legal system eliminates discretion entirely. But if official action depends too much on the preferences or identities of the decisionmakers rather than on impersonal sources of authority, the rule of law begins to unravel. One rule-of-law argument for originalist interpretation accordingly offers original meanings as a source of determinate content for constitutional law. If judges decide cases on the basis of original meanings, the argument runs, the content of constitutional law will be independent of their private preferences.

As sophisticated originalists have come to realize, however, the argument that judges should consult original meanings so as to keep their discretion constrained has serious shortcomings. For one thing, any

175. Cf. Scott J. Shapiro, Law, Plans, and Practical Reason, 8 Legal Theory 387 (2002) (arguing that the essence of the rule of law is that it enables planning).

176. See, e.g., Scalia, supra note 6, at 44–47 (arguing that the problem with nonoriginalist constitutional interpretation is that it lets interpreters go off in various different directions); Lessig, supra note 17, at 1166 (explaining that the chief proffered virtue of adhering to original meanings is the limitation of discretionary judicial lawmaking); Whittington, supra note 6, at 609 (characterizing theorists who have adopted this view).

177. See Frank, supra note 9, at 7 ("Much of the uncertainty of law is not an unfortunate accident: it is of immense social value." (emphasis in original)).

178. More precisely, having decisions informed by officials' subjective normative views is a threat to the rule of law if those normative views are controversial and not legally sanctioned.

179. See, e.g., Strauss, supra note 78, at 299–300 (characterizing this view).
decisionmaking theory creates constraints. The claim that judges should use originalism as their tool for self-constraint thus calls for an explanation of why attention to original meanings yields better constraints than other methods would.

The answer is surely not that originalism is the most constraining method in some quantitative sense. Original meanings are not always radically indeterminate, but it would be extravagant to claim that attention to original meanings alone would yield less discretionary decisionmaking than, say, a jurisprudence that looked only at judicial precedents. This is not to say that doctrinal analysis based on judicial precedent always yields determinate answers: clearly that is not the case. But precedent grows and develops precisely to reach and settle new questions. Moreover, precedent is hierarchically organized, and in constitutional law judges can look to one court above all others to state doctrine authoritatively. Originalist source material is static, and it was not composed with our precise questions in mind. Moreover, it is regularly vast and internally diverse, and when it speaks in many voices, there is no way to settle the question of whether a view expressed in the Pennsylvania ratifying convention is more or less authoritative than a view expressed in the newspapers of Massachusetts.

This is not to say that there are no clear original meanings. But tellingly, many of the original meanings that operate as clear authority in constitutional law have actually achieved that clarity less because the underlying originalist source material was clear than because the United States Supreme Court issued a decision adopting a particular reading of that source material as authoritative. In such cases, what does the work of making something a clear and constraining authority is not the content of originalist


181. A great deal has been written on the question of how determinate original meanings can be. *See*, e.g., Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995) (describing the difficulty of determining the original meaning of the Fourteenth Amendment); Kramer, supra note 56; William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va. L. Rev. 1237 (1986); Jack N. Rakove, *Fidelity Through History (Or to it)*, 65 Fordham L. Rev. 1587 (1997); Scalia, supra note 1; Strauss, supra note 78.

182. On the relative merits of originalism and attention to judicial precedent as tools for confining judicial discretion, see, for example, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 Minn. L. Rev. 1173 (2006); Fallon, supra note 48, at 106 (describing as "ordinary constitutional adjudication" the large majority of cases that are resolved by reference to the existing doctrinal rules laid down by precedential cases); Merrill, supra note 20; David Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

183. *See* Strauss, supra note 78, at 300 ("Maybe Christopher Columbus Langdell thought that precedents constitute a closed axiomatic system from which legal outcomes could be deduced on every occasion, but no one else thinks that.").

184. *See*, e.g., United States v. Butler, 297 U.S. 1 (1936) (holding on originalist grounds that the Taxing Clause states a power independent of the other provisions of Article I, Section 8); Hans v. Louisiana, 134 U.S. 1 (1890) (holding on originalist grounds that a citizen may not sue his own state in federal court absent an abrogation of sovereign immunity); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding on originalist grounds that the Fifth Amendment does not apply against state governments); Nelson, supra note 89, at 581–84 (describing the process by which judicial decisions shaped an authoritative original meaning of the Ex Post Facto Clause).
source material but the power of judicial precedent. Finally, it is worth noting that one way to assess the degree to which a decisionmaking method can constrain official behavior is to measure the propensity of multiple decisionmakers to concur with one another when using that method to resolve a case, that most constitutional questions litigated in front of three-judge panels in the federal courts are resolved on the basis of precedent alone, and that most such decisions are unanimous. It is hard to imagine a similar degree of unanimity among judges asked to decide each case they faced solely by reference to original meanings.

Nor is it clear that a jurisprudence that used originalist reasoning as one method among several—say, alongside text and precedent—would always yield less discretionary decisionmaking than a jurisprudence that consulted text and precedent but not original meanings. Having multiple indicators of the correct result often promotes determinacy, as when the indicators point to areas of overlap and each can narrow the set of possibilities or substantiate the findings of other indicators. But increasing the number of indicators could also increase net discretion, because different indicators might sometimes point to wholly different results. In that circumstance, and assuming that there is no strict hierarchy among the indicators, a decisionmaker must exercise discretion in choosing which indicator to follow, and the total amount of discretion has been increased.

More fundamentally, however, the idea that originalist reasoning is useful because it reduces judicial discretion is problematic—or at least severely incomplete—because every originalist who has promoted originalism as a tool for respecting the rule of law is at least implicitly aiming at something more than increasing the determinacy of legal outcomes. Yes, the rule of law is served by constraining judges, thus rendering their authority impersonal. It makes a great deal of difference, however, whether the constraining methods that judges apply foster decisionmaking that conforms to a substantively correct understanding of the law. The rule “Always award judgment to the defendant” is highly constraining, but following it is not a good way to reach substantively valid rulings. Appropriate tools for reducing judicial discretion.

185. See Merrill, supra note 20, at 286.

186. Any volume of F.3d will attest to this proposition.

187. Imagine a case in which judicial precedents eliminate options A through D but do not resolve the question of whether E, F, or G is the correct answer. If original meanings preclude E but are consistent with F and G, then attention to original meanings would further the aim of constraining the decisionmaker.

188. Once again, imagine a case in which judicial precedents eliminate options A through D and leave open options E, F, and G. If original meanings are inconsistent with E, F, and G but permit options A and B, the decisionmaker cannot follow both precedent and original meaning. If the choice of which tool to use is itself discretionary, she now has more discretion than if her set of tools had been smaller.

189. Cf. Fallon, supra note 5 (proposing that interpreters follow a hierarchy of methods in cases where they are unable to identify a coherence among the various indicators).
discretion must have some claim to capturing the content of constitutional law accurately, independent of their capacity to constrain.\textsuperscript{190}

Without more, the idea that the value of originalist reasoning lies in its capacity to foster interpretive constraint and impersonal authority is largely indifferent to considerations of substantive legal accuracy. In fact, it is largely indifferent to the accuracy of the historical accounts that would shape originalist decisions. For purposes of constraining judicial discretion, the difference between a correct reading of historical sources and a botched one is not relevant, so long as both readings make the law equally determinate. What is important is that the judges feel authentically constrained. If judges acting in good faith believe themselves to be acting on the basis of original meanings, and if those meanings make the law more determinate, then their originalism has constraining value whether or not it is historically accurate.\textsuperscript{191}

Few originalists would tolerate the idea that a false but constraining view of history is as good as a correct view of history. It must therefore be the case that originalists who invoke original meanings in the name of the rule of law are not concerned with constraint for the sake of constraint alone.\textsuperscript{192} For most originalists, the real aim is not arbitrary limits on judicial discretion but judicial decisionmaking that applies a correct substantive understanding of the Constitution.

B. Fidelity

To put the point in terms of the various strands of the ideal of the rule of law, the hope is that a jurisprudence of originalism would do more than secure impersonal judicial authority. It is also that judicial behavior would be

\textsuperscript{190} The need for discretion-constraining tools to yield substantively accurate results is practical as well as conceptual. As a practical matter, a proposed rule of decision that departed too far from what the judges regarded as substantively acceptable would probably fail to constrain judges even if it were entirely clear, because many judges would refuse to follow such a rule. Brown v. Board of Education, 347 U.S. 483 (1954), is an archetypical example. Its companion case Bolling v. Sharpe, 347 U.S. 497 (1954), is probably an even better one. See Richard A. Primus, Bolling Alone, 104 COLUM. L. REV. 975, 976-77 (2004). To put the point in terms of the plural values that underlie the toolkit metaphor, a constitutional case in which a clear rule points to a substantively repulsive result is likely to be a case in which the interests in legal determinacy and constrained judicial discretion are overcome by other constitutional values. To be sure, decisionmaking principles whose sole virtue is that they can settle the question sometimes have a role to play. But they are only likely to play that role effectively in cases where there are no powerful substantive arguments for any particular resolution, or else in cases where the decisionmakers are choosing among options that are all supported by roughly equally persuasive substantive arguments. See Strauss, supra note 5, at 1743.

\textsuperscript{191} Indeed, given the complexity and indeterminacy of historical sources, rendering the source materials of originalism into a useable form for constraining interpretive discretion in modern constitutional cases often calls for simplifying distortions of history rather than for faithfully rendering the past in its full complexity and on its own terms. See Rakove, supra note 181 (describing the conflict between the project of using originalism to foster constitutional fidelity and the project of being faithful to the discipline of history).

\textsuperscript{192} See, e.g., Whittington, supra note 6, at 608 (noting that contemporary originalists are less interested in constraining judicial discretion than originalists of previous generations generally were).
guided by the content of the law, rightly understood.\textsuperscript{193} In the language of contemporary constitutional theory, the aspiration is not just to constraint but also to fidelity.\textsuperscript{194} And it is fidelity in this sense that is now the leading rationale among theorists who argue that the rule of law requires treating original meanings as authoritative.\textsuperscript{195}

The fidelity argument for originalism as a means of upholding the rule of law runs like this: The Constitution is law. To uphold the law means to be faithful to its authoritative content. And if a legal system is to deliver the benefits of the rule of law, the authoritative content of legal provisions should not vary over time.\textsuperscript{196} Again, the best understanding of why the content of legal provisions cannot vary over time is not the bald metaphysical claim that the law just is its original meaning. A more sympathetic construction of the claim is that maintaining the law's original meaning as its consistent meaning through time yields the benefits of the rule of law. After all, if the content of legal provisions could change over time, the law would not foster order and stability. It follows that the original meaning of a legal provision, including a constitutional provision, should remain its consistent authoritative meaning. Keeping faith with original meanings would then ensure both that judges are guided by the proper authoritative content of the Constitution and that constitutional decisionmaking delivers a stable legal framework.

The foregoing argument might make sense if it were consistently applied from the very beginning of a legal system, such that all original meanings were always preserved. But in our actual constitutional system, many original meanings have receded.\textsuperscript{197} Indeed, every litigant who urges a court to alter doctrine on the basis of an original meaning—assuming his account of original meanings to be correct—reminds us of that point. And in cases where the law in operation has settled on a set of meanings and practices that differ from original meanings, giving a constitutional provision its original meaning would not promote rule-of-law benefits like stability and predictability. On the contrary, it might well undermine them. In such cases, the rule-of-law argument for original meanings disintegrates, unless there is some other reason why the content of the relevant provision must be its original meaning. It is no answer, of course, to repeat the metaphysical

\textsuperscript{193} For some contemporary originalists, the aspiration to get the law substantively right may be the highest value within the rule-of-law cluster. The idea that original meanings should prevail over stare decisis, for example, is a choice to value getting the law substantively right more highly than keeping the law stable and predictable. Compare Randy E. Barnett, Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism, 75 U. CIN. L. REV. 7 (2006) (preferring original meaning to stare decisis), with SCALIA, supra note 6, at 140 (describing stare decisis as an exception to the general rule that constitutional interpretation should be originalist).

\textsuperscript{194} See, e.g., Whittington, supra note 6, at 609; Balkin, supra note 20.

\textsuperscript{195} See Whittington, supra note 6, at 609.

\textsuperscript{196} See Balkin, supra note 20, at 429–31. A provision that states a general principle may properly be applied differently in different contexts, but the argument here described requires that the principle's underlying content remain the same.

\textsuperscript{197} See supra Section II.B.2.
claim that a constitutional provision's content simply is its original meaning. The democratic-enactment argument would suffice, of course, but it has only limited application. In the absence of some source of authority that requires identifying a provision's content with its original meaning, it makes little sense to think that originalist decisionmaking promotes the rule of law even in cases where it would be a source of legal instability.

By way of illustration, let us return to an example from Part II about how the rule of law can call for continued adherence to a constitutional provision that is too old to command obedience on the basis of its having been democratically enacted. Imagine once again the democratically enacted Twenty Percent Clause, which states that "All income shall be taxed at the rate of twenty percent." For some period of time, the fact of democratic enactment is sufficient reason for obeying the provision. Indeed, it is sufficient reason for obeying the provision as it was originally understood. Suppose, for example, that when the Twenty Percent Clause was enacted, people generally understood pension benefits to be a form of income. It would be appropriate for the provision to be initially implemented in accordance with its original meaning: all income would be taxed at the rate of twenty percent, and the tax would apply to pension benefits, because the category of "income" would include those benefits.

At least initially, the propriety of implementing the Twenty Percent Clause in accordance with its original meaning could also be understood in terms of upholding the rule of law. As long as the clause's democratic-enactment authority remained strong, officials would be guided by an appropriate understanding of the authoritative content of the clause if they gave it its original meaning. Moreover, consistent administration of the clause in those terms would help secure rule-of-law benefits. Assume that the clause was in fact initially implemented in accordance with its original meaning. Once the income tax was in place, a consistent understanding of the clause would promote stability, transparency, and predictability. Official authority would be impersonal rather than discretionary, because it would be guided by a recognized rule. People subject to the demands of the Twenty Percent Clause could rely on the law's content and plan accordingly.

As described in Part II, the strength of the Twenty Percent Clause's democratic-enactment authority would decline over time. At some point, that authority would no longer suffice to command obedience. But on that date, other constitutional values would probably support continued adherence to the clause's terms. Those other values prominently include the cluster of considerations that travel together as the rule of law. After all, at the relevant time, the twenty percent income tax would exist as part of the going legal system. Maintaining the tax in its extant terms would keep the law stable and predictable, and judges who continued to decide cases under the same understanding of the Twenty Percent Clause as before would be guided by a known and recognized rule. Government officials could continue to make

198. See supra Section II.B.1.
199. See supra Section II.B.1.
When Should Original Meanings Matter?

policy plans, and ordinary citizens could continue to organize their financial affairs, with a certain understanding of how income would be taxed. Assuming no powerful countervailing arguments based on other constitutional values, these rule-of-law concerns would be sufficient reason for maintaining the system of taxation even after the Twenty Percent Clause’s democratic-enactment authority expired.

Here, however, it is important to recognize a crucial limitation on the role of original meanings in the current example. If the rule-of-law value of continued adherence to the Twenty Percent Clause is a matter of the benefits that come when officials reliably follow a known existing rule, judges who gave the clause its original meaning would promote rule-of-law values only to the extent that the original meaning of the clause was also the accepted operative meaning of the clause. If the dominant understanding of the Twenty Percent Clause had changed over time, then recurring to original meanings might undermine the rule-of-law values that help legitimate the tax after democratic authority fades. What keeps the law stable and predictable, after all, is not that a judge decides a case in conformity with a long-forgotten principle of which he has recently learned. It is that he decides the case in conformity with the same principle that he would have used yesterday, or that another judge would use today, or that the affected community trusts him to consult. A judge who departs from those expectations makes the law less stable and diminishes people’s ability to plan around its requirements. In short, such a judge’s decision diserves the program of the rule of law.

Suppose, for example, that the general understanding that “income” includes pension benefits, which prevailed when the Twenty Percent Clause was enacted, began to fade as the generation that adopted the clause passed into history. At some later date, people might begin to wonder whether the clause should be read to tax pension benefits or not. Suppose that the Internal Revenue Service considered the question and issued a public ruling stating that in its view, pension benefits were exempt from the twenty percent income tax. Perhaps a few lower courts would agree with that position. For many years thereafter, all concerned parties might proceed on the understanding that the Twenty Percent Clause did not reach pension benefits.

Against this background, imagine an appellate court’s holding, on originalist grounds, that the Twenty Percent Clause directed the taxation of pension benefits. Such a holding would conform to the original meaning of the clause, but it would disserve the cluster of interests that make the rule of law valuable. A court that chose to enforce the original meaning of the clause would be acting on the basis of a different rule from the one that people had come to rely on and plan around, and in doing so it might destabilize both the law and the social behaviors that rely upon it.

To be sure, rulings that promote the rule of law by maintaining operative legal understandings often give constitutional provisions their original meanings. Many original meanings persist through time, such that an original meaning is also a currently operative meaning at a later date. Often, the persistence of an original meaning is achieved through a text that has the
same clear and commonsense meaning at different points in time: modern Americans who read the words "thirty-five years" in Article II, Section 1 understand those words to convey the same meaning that the people who adopted Article I in the 1780s understood the words to have.200 (I presume that the words "twenty percent" in the Twenty Percent Clause would be likely to have a similarly stable meaning, even if the term "income" did not.) In other cases, original meanings remain present among operative constitutional meanings because they are clearly articulated by judicial constructions that later decisionmakers regard as authoritative. For example, Barron v. Baltimore201 has made a certain original meaning of the Fifth Amendment operative for subsequent generations, even though the text of the Fifth Amendment does not make that meaning clear. In principle, an original meaning might be part of the operative constitutional understanding of a later generation even in the absence of such textual or judicial vehicles for the conveyance of that meaning. And whatever the vehicle of transmission, an original meaning that is coextensive with a presently operative constitutional meaning is a meaning that a judge could enforce in the name of the rule of law. The fact that the meaning in question is an original meaning, however, is not what makes that meaning authoritative, nor is it why decisionmaking in light of that meaning would enhance legal stability. From the rule-of-law perspective, it is an incidental feature.

In short, by recurring to the original meaning of "income" in the Twenty Percent Clause after the clause's democratic-enactment authority had expired and after the original meaning of "income" had ceased to structure operative law, a court might act contrary to the concerns that made the clause legitimately binding in the first place. After all, the reason why the Twenty Percent Clause would be valid law at that date would not be a function of the circumstances of its enactment. It would be some combination of other constitutional values, probably including rule-of-law concerns like stability and reliance. If those concerns are what make the clause authoritative, then originalist reasoning is a poor decisional tool when it undermines those concerns.

Concerns for stability and reliance are sometimes worth overcoming, all things considered. If excluding pension benefits from the income tax were somehow enormously unjust or inherently antidemocratic or otherwise in flagrant contravention of other constitutional values, then there might be good arguments for a court's jettisoning the operative rule. But where settled practice under a constitutional provision contradicts the provision's original meaning, reimposing the original meaning does not advance the interests that make the rule of law a proper guiding value for constitutional decision-making. Just as implied present consent to a constitutional provision does not justify giving that provision its original meaning when that original meaning differs from the operative content to which implied consent is

200. See U.S. CONST. art. II, § 1, cl. 5 ("No person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . . ").

201. 32 U.S. (7 Pet.) 243 (1833).
given in the present, concern for the rule of law does not justify giving a constitutional provision its original meaning if doing so entails upsetting a clear understanding of the law that participants in the legal system have come to regard as authoritative in practice. To maintain otherwise is to prefer a metaphysical understanding of law’s authoritative content to the payoffs that make the rule of law worth having.

CONCLUSION

Constitutional decisionmakers should evaluate the propriety of decisionmaking methods with attention to the differences between different kinds of cases, not for the enterprise of constitutional law as a whole. A method is appropriate in a given case if its application there would promote constitutional decisionmaking in accordance with the animating values of constitutional law. Those values are contested, so the inquiry this Article recommends is partly instrumental and partly normative. I have said little here about the normative part. Based on the instrumental part of the analysis, however, I have shown that under the circumstances of modern constitutional adjudication the two leading arguments for originalism rarely justify deciding cases on the basis of original meanings. Indeed, appropriate cases for originalist decisionmaking seem rare enough that only an approach on which different tools are good for different kinds of cases could justify looking to original meanings at all. If we had to choose our tools wholesale, it is hard to understand why we would choose one that is so rarely useful.

It would be a fair objection to say that this Article has neglected other good reasons for using originalist reasoning in constitutional decisionmaking. Such an objection, however, would go only to the scope of this paper’s argument. It would not be an objection to the overall structure I have offered for assessing the value of decisionmaking methods in constitutional law, nor would it contest the merits of my analysis of the arguments for originalism based on democratic authority and the rule of law.

The actual reasons why many people are drawn to originalism go beyond those two arguments explored in this paper. Here are a few examples of originalism’s other bases of popularity. Some people believe that a jurisprudence of original meanings would decide contested cases in ways congenial to their own normative preferences. Originalism valorizes the Founders and thus reassures us that our government is wisely designed. Originalism promises to gratify the human yearnings for certainty and

202. See, e.g., Barnett, supra note 1, at 4 (arguing that we should be originalists in part because of the happy coincidence that the Founders enacted a libertarian constitution that properly protects people’s rights). For a survey of a related if less honest tendency, see Robert Post & Reva Siegel, Originalism as a Political Practice: The Right’s Living Constitution, 73 Fordham L. Rev. 545 (2006). For an apt critique of Barnett’s approach, see Trevor W. Morrison, Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution, 90 Cornell L. Rev. 839 (2005).

203. See Dorf, supra note 5, at 1803–05 (describing the phenomenon of “heroic originalism”); cf. McGinnis & Rappaport, supra note 6, at 385 (arguing that the United States Constitution is well designed to produce good laws if implemented in line with original understandings).
parental authority, rather than leaving us to do the best we can on our own.204 Finally, for the large contingent of history buffs in the constitutional law world, doing originalism is just plain fun.205 I suspect that some combination of factors like these underwrites a fair amount of originalism's popularity. I also assume that many people oppose originalist decisionmaking for an uncertain mix of reasons, some conscious and some not, some valid and some not. A study of these matters would be valuable in its own right. The concern of the present Article, however, is with a justificatory account for originalist decisionmaking, and I do not think that any of the appeals of originalism listed in this paragraph is a justificatory reason for using original meanings as decisional authorities in constitutional law.

Just as I have not here explored all of the attractions of originalism, I have not surveyed all the ways in which history, including enactment-era history, might be used in constitutional law. 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 Article is a template for a more comprehensive exploration of constitutional decisionmaking. Something like the analysis of this Article could be performed for each method in the toolkit. For each potential source of authority—text, precedent, structure, nonoriginalist history, and so forth—one could ask which constitutional values are served by reasoning from that source and in what kinds of cases reasoning from that source would actually serve those values. Bit by bit, a sequence of such investigations could build a general theory of when each decisionmaking method is appropriate.

204. See Frank, supra note 9, at 13–21 (interpreting lawyers' unease with legal uncertainty as a form of longing for clear instruction from an absent father).