


2016

Is Theocracy Our Politics? Thoughts on William Baude's 'Is Originalism Our Law?'

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](#), [Religion Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Primus, Richard A. "Is Theocracy Our Politics? Thoughts on William Baude's 'Is Originalism Our Law?'" *Colum. L. Rev. Sidebar* 116 (2016): 44-60.

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.

IS THEOCRACY OUR POLITICS?

*Richard Primus**

Response to: William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349 (2015).

INTRODUCTION

In *Is Originalism Our Law?*, William Baude has made a good kind of argument in favor of originalism. Rather than contending that originalism is the only coherent theory for interpreting a constitution, he makes the more modest claim that it happens to be the way that American judges interpret our Constitution.¹ If he is right—if originalism is our law—then judges deciding constitutional cases ought to be originalists.

But what exactly would the content of that obligation be? Calling some interpretive method “our law” might suggest that judges have an obligation to decide cases by reference to that method. But the account of judicial behavior that Baude takes to show that originalism is our law may say less about the norms of judicial decisionmaking than it says about the norms of judicial discourse. Baude’s essay highlights something significant about the way judges *talk*, but it is not clear that this way of talking constrains, or ought to constrain, the substance of what judges decide.

Consider, by (partial) analogy to the way that judges talk about the Founders, the way that politicians talk about God. Invoking God is a matter of traditional and broadly accepted practice among senior American political figures. Many politicians probably feel that their role requires them to participate in that practice. But it is not clear that these invocations of God by political leaders reveal a widely held theory of political authority. The fact that senior officeholders speak about God has little bearing on the substance of policymaking, and fortunately so, because there are excellent reasons why the government should not set policy on the basis of theological ideas. To be sure, one learns something about American politics by noticing how politicians speak about God, just as one learns something about American constitutionalism by noticing how judges speak about the Founders. But it might exaggerate matters to describe our politics as theocratic, and it might exaggerate matters to describe our law as originalist.

* Theodore J. St. Antoine Collegiate Professor, University of Michigan Law School. Thanks to William Baude and Don Herzog.

1. William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2353 (2015).

In Part I of this Essay, I describe Baude's vision of "inclusive originalism." In Part II, I ask how well inclusive originalism describes prevailing judicial practice. In Part III, I develop the comparison between the practice of respectful engagement with original meanings in the judicial sphere and the practice of respectful invocations of God by elected officials. The two practices are not entirely the same, of course. But it is worth noting their similarities.

I. INCLUSIVE ORIGINALISM

Relative to some other arguments for originalism, Baude's has considerable virtues. It does not rely on hard-to-defend claims about the inherent nature of law, or of constitutions, or of interpretation. It avoids the dead-hand problem because it grounds the authority of original meanings not in actions that occurred long ago but in the practices of the living.² Moreover, and by the same token, Baude's argument for originalism does not rely on the claim that the practices of American constitutional decisionmakers have *always* been originalist. It requires only that originalism be the way that we do things now.³ This is a mature way to argue that some set of practices is our law: Look and see what our legal officials actually do.

To succeed, though, Baude needs to be able to survey what our legal officials actually do and describe what he sees as originalism. A different observer might find that task daunting. After all, if you look to see what judges do most of the time in constitutional cases, you will find them applying doctrine.⁴ Only rarely does a case turn on the text of the Constitution or an account of original meanings.

To his credit, Baude does not pretend otherwise. He does not claim, that is, that judges actually spend more time plumbing original meanings than observers have previously realized. Instead, he offers a version of originalism in which the fact that judges rarely traffic in arguments about original meanings is compatible with the claim that originalism is our law. He calls this model "inclusive originalism."⁵ Under inclusive originalism, modes of decisionmaking that the Founders would have recognized as legitimate are legitimate.⁶ Living as they did in a common-law world, Baude says, the Founders surely accepted the application of judicial prec-

2. *Id.* at 2408 (explaining view that originalism is our law because we choose to accept it).

3. *Id.* at 2389–90 (explaining if originalism is our law now because our current practices accept it, then it is true originalism is our law now whether or not our practices have consistently accepted originalism in past).

4. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 883–84 (1996) [hereinafter Strauss, *Common Law*] (describing dominant role of doctrine in judicial decisions).

5. Baude, *supra* note 1, at 2354–63.

6. *Id.* at 2358.

edent as a valid mode of legal decisionmaking.⁷ So that form of decision-making is in—not on its own bottom but because the Founders accepted it. The same goes for interpretation that tracks the evolving meaning of constitutional language, for the same reason, and for any other modality of argument that the Founders would have considered legitimate.⁸

This is a capacious conception of originalism. Consider, by analogy, what it would mean to describe as “textualist” a theory of constitutional decisionmaking on which judges confronting individual-rights questions should reason about what rights people have without reference to the words of particular constitutional provisions. Given the Ninth Amendment, one can perfectly well argue that the text of the Constitution directs constitutional decisionmakers to reason about rights in nontextual ways.⁹ So it could make sense to describe nontextual reasoning as justified on the basis of the text, just as it could make sense to describe a largely common-law process of constitutional interpretation as justified on the basis of a Founding understanding. But someone who described judges making moral arguments about unenumerated rights as practicing “textualism” would not be using the term in a way that captures what textualism usually means in American constitutional discourse.¹⁰

The point here is not that Baude is wrong to call his approach a version of originalism. Nobody owns the term, and Baude tells his readers clearly what he does and does not mean, and his idea shares something important with the broader family of originalist theories: It maintains that facts from the time of the Constitution’s enactment supply legitimacy criteria for constitutional interpretation today.¹¹ To be sure, Baude’s version of that legitimacy claim is importantly different from the legitimacy claims on offer in some versions of originalism.¹² For Baude, originalism

7. *Id.* at 2358–60.

8. See *id.* at 2352 (explaining inclusive originalism “allows for precedent and evolving interpretations only to the extent that the original meaning itself permits them” (emphasis omitted)).

9. The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend. IX. The Ninth Amendment is thus a constitutional text that states a rule for interpreting the Constitution, and the rule it states is that the rights of the people are not limited to those specified in the text. In other words, the Ninth Amendment recognizes the existence of rights beyond the constitutional text and directs constitutional interpreters not to limit themselves to the text when asking what rights people have.

10. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 38 (1980) (describing conflict between kind of reasoning that language of Ninth Amendment directs and “interpretivism”—that is, textualism—of Justice Black); Richard Primus, *Limits of Interpretivism*, 32 *Harv. J.L. & Pub. Pol’y* 159, 161–64, 167 (2008) [hereinafter Primus, *Limits of Interpretivism*] (describing normal commitments of constitutional textualism).

11. Baude, *supra* note 1, at 2369.

12. Consider, for example, Justice Scalia’s account, on which the legitimacy of originalist interpretation was a matter of the authority of the democratic enactment of the Constitution. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in A*

is authoritative only because we accept it as a matter of practice.¹³ But my use of the word “only” is meant to contrast Baude’s theory with some other forms of originalism, not to suggest that a legal culture’s acceptance in practice of a theory of interpretation is not a good reason to deem that theory authoritative within that legal culture. If Baude can show that the American legal system operates on the basis of something he describes as “inclusive originalism,” he will not have demonstrated that stronger forms of originalism are “our law,” but he will have made a good case for the thing that he claims to be demonstrating.

Why, then, does Baude think that inclusive originalism describes how American constitutional interpretation actually works? Baude points principally to two features of judicial practice.¹⁴ First, judges regularly speak about the Founders as if their ideas were authoritative.¹⁵ Second, although it is true that courts reason about constitutional questions in many ways besides inquiring into original constitutional meanings, the Supreme Court never awards victory to some other modality of argument in a conflict between that modality and the modality of original meanings.¹⁶ In a conflict between an original meaning and something else, Baude says, the original meaning wins.¹⁷

II. DO AMERICAN JUDGES PRACTICE INCLUSIVE ORIGINALISM?

Below, I will examine the limits of those two claims. But first, it is worth noting a way in which those claims, even if accurate, would fall short of establishing that existing judicial practice proceeds on the basis of inclusive originalism.

Suppose it is true that judges speak about the Founders as authoritative figures and even genuinely regard them that way, and suppose it is also true that judges only decide cases on the basis of nonoriginalist reasoning when doing so does not contravene the authority of original meanings. It need not follow that the reason why judges use those other forms of rea-

Matter of Interpretation: Federal Courts and the Law 3 (Amy Gutmann ed., 1997). It is also worth noting that some leading originalists share Baude’s view that the reasons why constitutional decisionmakers should be originalists are rooted in the present rather than being imposed on us from the past. See, e.g., Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 4, 88 (2004) (arguing originalism is necessary because it follows from our present-day commitment to a written Constitution). But see Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. Pa. L. Rev. 1025, 1028–29 (2010) (explaining why written constitutionalism does not require originalism).

13. Baude, *supra* note 1, at 2351–52 (explaining his argument for originalism is contingent in this respect).

14. *Id.* at 2365–86.

15. *Id.* at 2365–70 (noting judicial displays of respect for the ideas of the people who wrote and ratified the Constitution).

16. *Id.* at 2370–86.

17. *Id.* at 2371 (“[I]n cases where the Court acknowledges a conflict between original meaning or textual meaning and another source of constitutional meaning, the text and original meaning prevail.”).

soning—precedent, structure, nonoriginalist textual readings, nonoriginalist history, considerations of fairness, national ethos—is that the Founders agreed to let them do so. If judges happen to decide cases with methods accepted by the Founders but not because the Founders accepted them, then the judges might not be acting as inclusive originalists after all, even if an inclusive originalist would find their choice of methods acceptable. To establish that judicial practices implement inclusive originalism rather than merely coincide with it, we would need evidence that judges from an internal point of view understood their interpretive practices to be governed by Founding-era choices, even when original meanings were not directly at issue. In the absence of such evidence, it seems reasonable to suspect that judges consider their pervasive use of nonoriginalist reasoning legitimate quite without reference to ideas about the Founders. Few judges have gone through the exercise of labeling the different kinds of interpretive moves they make and then seeking sanction for each kind in the attitudes of the 1780s. Nor, on Baude’s ultimate account of interpretive legitimacy, should there be anything troubling about the possibility that judges deem their nonoriginalist modalities legitimate without reference to the Founders. After all, Baude maintains that original meanings are authoritative only because we treat them as such. The final ground of legitimacy is current acceptance. So if judges accept nonoriginalist reasoning in most cases, their acceptance of those methods is just as legitimating regardless of whether it runs through an understanding about what the Founders thought.

Baude does not supply evidence that judges understand their use of nonoriginalist methods in most of the cases they decide as legitimate on the particular grounds suggested by inclusive originalism.¹⁸ But if judges are not really inclusive originalists over this domain, the damage to Baude’s theory is only partial. He could still maintain that originalism is our law in the crucial sense that original meanings are treated as authoritative, and as not defeasible on nonoriginalist grounds, in those cases in which dispositive original meanings are available. That would be a point worth demonstrating, and I take it to be the point that Baude’s two observations about judicial practice are actually meant to establish.¹⁹

18. Nor would a correspondence between the methods judges use and the methods that the Founders would have considered appropriate be particularly strong evidence that judges today consider those methods appropriate because the Founders did so, even if judges today are not conscious of the causal relationship. It is at least as plausible that such a correspondence exists—if it does exist—because the relevant methods seem sensible to people trained in the traditions of English-speaking law. In other words, people today might consider precedential authority sensible for reasons much like the reasons that the Founders thought precedential authority sensible, rather than because the Founders in particular thought it sensible. English-speaking judges in both 1700 and 1900 considered precedential authority sensible, too; there may be nothing special about the Founding moment where attitudes about appropriate interpretive methods are concerned.

19. In the remainder of these thoughts, I will use the term “inclusive originalism” to mean the part of Baude’s theory that sees the Founders as authoritative and original mean-

The first of Baude's two observations seems true as far as it goes. Judges and other actors do frequently speak about the Founders and about original meanings as if they were authoritative in constitutional law.²⁰ That feature of our practices is not sufficient to establish the conclusion that original meanings are "our law," but Baude is right to think that it helps. And to his credit, Baude does not claim that this practice is sufficient, standing alone, to establish his conclusion.

The second observation is meant to bear more weight. When the Supreme Court decides cases, Baude says, it never adjudicates a conflict between an original meaning and some other potential source of authority by deciding against the original meaning.²¹ Yes, the Court often decides without reference to original meanings, and sometimes the Court struggles with an original-meaning question and finds no conclusive answer before disposing of a case on other grounds. But when the Court decides a case on nonoriginalist grounds, it never says, "What we decide today contradicts the original meaning of the Constitution." Instead, the Justices either say that the original meaning yields no clear answer to the question or else say nothing at all about original meanings—perhaps because no answer could be derived that way.²² By refusing to contradict original meanings affirmatively, Baude maintains, the Court signals that original meaning is the master modality.²³ Other modalities will do when original meaning is unavailable, but none of those other modalities can withstand the trumping form of constitutional authority: the original meaning.

The obvious challenge that Baude faces at this stage of his argument is that most experts think that the Court has frequently decided cases in

ings as trumping other kinds of constitutional reasons, without respect to the further claim that those other kinds of reasons are admissible only because the Founders would have accepted them.

20. For example, Baude quotes Justice Kagan as making the following statement at her confirmation hearings: "[S]ometimes [the Framers] laid down very specific rules, sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do." See Baude, *supra* note 1, at 2352 (alteration in original); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.) (invoking image of Framers as "practical statesmen" rather than "metaphysical philosophers" to support argument that Commerce Clause recognizes distinction between activity and inactivity). That the distinction between activity and inactivity is itself metaphysical is beside the point; it goes only to the cogency of the Chief Justice's use of the Framers rather than to the fact of his invoking them as authoritative.

21. Baude, *supra* note 1, at 2371.

22. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (explaining Court had devoted considerable energy to question of original meaning of Fourteenth Amendment and had reached view that inquiry was "inconclusive"); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring) (describing relevant sources bearing on original meanings as "enigmatic" and "largely cancel[ing] each other" rather than directing any particular resolution to question at issue).

23. See Baude, *supra* note 1, at 2371, 2375 (noting "Court's periodic rejection of precedent in favor of original meaning suggests that precedent is not the ultimate source of law" and that "original meaning may be one of the most powerful bases for overturning precedent" (emphasis omitted)).

ways that contradict original meanings. Indeed, this understanding is common ground between nonoriginalists like Strauss (who argue that the Court's nonoriginalist behavior demonstrates that originalism is not really our law)²⁴ and many confirmed originalists (who argue that the Court has behaved poorly).²⁵ Modern originalism arose largely as a critique of landmark twentieth-century decisions, from *Brown* to *Reynolds* to *Miranda* to *Roe*, all of which were said to betray original meanings.²⁶ Obviously, the idea that a Court faithful to original meanings would not have produced those decisions is in tension with Baude's claim that the Court's practice is actually originalist.

So Baude gamely sets out to do exactly what he needs to do to make his point plausible: He reads the putatively anti-originalist cases closely and argues that in none of them did the Court reject the authority of original meanings.²⁷ What the Court has really done, he contends, is "fight[] the original-meaning question to a draw"²⁸ and then decide on other grounds. In *Brown*, for example, the Court declared the original meaning of the Equal Protection Clause "inconclusive," rather than saying that the original meaning permitted segregation but was now to be set aside.²⁹ *Blaisdell*, *Miranda*, *Gideon*, *Roe*, the sex-equality cases, *Lawrence*, and even *Obergefell* are all consistent with a judicial commitment to originalism, Baude argues, despite the fact that many people have thought otherwise.³⁰ In all of those cases the Court claimed that original meanings are ambiguous or even argued that the people who framed the applicable provisions delegated the relevant questions to the future, rather than announcing itself as superseding originalist authority.

To be sure, Baude acknowledges, the Court may not always have gotten the original-meaning questions *right*.³¹ Maybe the Court erred by thinking that it could forbid school segregation or require same-sex marriage with-

24. See David A. Strauss, *The Living Constitution* 35–36 (2010) (arguing dominant interpretive method of American constitutional law is common-law interpretation rather than textualism or originalism).

25. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (describing half century of Court's Commerce Clause decisions as unfortunate departure from original meanings).

26. For descriptions of the rise of originalism, see, e.g., Barry Friedman, *The Will of the People* 306–13 (2009); Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol'y* 599, 599–612 (2004).

27. See Baude, *supra* note 1, at 2376–86 (arguing claims that Court has "expressly rejected originalism" are "mistaken" (quoting Erwin Chemerinsky, *The Elusive Quest for Value Neutral Judging: A Response to Redish and Arnould*, 64 *Fla. L. Rev.* 1539, 1541 (2012))).

28. *Id.* at 2380.

29. *Id.* at 2380–81.

30. See *id.* at 2376–86 (reviewing cases "that have been argued to show that originalism is not the law, or not the ultimate account of our legal practice").

31. See *id.* at 2377 ("It may well be that the outcome of *Blaisdell* was wrong as a matter of original meaning . . .").

out distorting the Fourteenth Amendment's original meaning. But, Baude continues, the quality of the Court's execution is not the question.³² The question is whether the Court exhibits a sense of obligation to be bound by original meanings. Based on the way the Court discusses original meanings, Baude thinks the answer to that question is yes.³³

Baude is on to something important here. Even in the cases canonically adduced as anti-originalist decisions, the Court refrains from saying that some other source of authority trumps original meanings.³⁴ That feature of our practices is sufficiently robust that it probably does mean *something*. But what exactly does it mean? Baude says it means that originalism is "our law."³⁵ But if so, "our law" might have to refer to something that exercises little or no constraining force with respect to the decisions that the Court makes. If a Court exhibiting an obligation to be bound by original meanings can produce *Blaisdell* and *Brown* and *Gideon* and *Roe* and *Heller* and *Obergefell*, then a Court exhibiting that obligation might be able to reach pretty much the same range of outcomes that a Court not exhibiting that obligation might reach. If so, it would follow that "our law" is not something that much constrains decisionmakers in their disposition of cases. And that people who are interested in how courts decide cases should not much care whether our law is originalism as opposed to something else.

An inclusive originalist might be tempted to offer the following response: The Court's sense of its obligation to respect original meanings has in practice done little work as a constraint on the Court's decision-making, but that is because the Court's understanding of original meanings has been sloppy. If American lawyers recognize that originalism is our law and commit to doing the hard work of identifying original meanings correctly, then the profession's sense of original meanings will sharpen and original meanings will constrain future Courts more than they have constrained the Court in the past.³⁶ That response, however, cannot simply emerge from pointing to our present practices because it is a response that calls for those practices to change. The argument on offer identifies inclusive originalism as our law by submitting that inclusive originalism is what the Court has already been doing. It is *what the*

32. See *id.* at 2371 ("The point of looking at these cases is not to ask whether the Supreme Court's decisions are correct as a matter of original meaning.").

33. See *id.* ("[T]he point is to look to how the Supreme Court *justifies* its rulings, as evidence of what counts as a legally sufficient justification in our current system of constitutional law.").

34. See *id.* at 2373 ("Rather, the majority *first* concludes that the text is 'ambiguous,' looking to the text and structure of the Constitution and evidence of its original meaning.").

35. *Id.* at 2352.

36. See *id.* at 2358 (stating that resolving questions about what interpretive moves inclusive originalism is properly understood to permit "will require doing the historical and interpretive work").

Court has been doing that is our law, and a big part of what the Court has been doing is deciding cases like *Blaisdell* and *Brown* and *Gideon* and *Roe* and *Heller* and *Obergefell*. If the fact that the Court articulates fidelity to the Founders is data about what our law is, then so, perhaps, is the fact that the Court frequently decides cases in ways that are not consistent with original meanings.

To be sure, an argument that looks to existing practice is not per se disabled from arguing that the best understanding of the practice would recommend certain reforms. If we are confident that we understand how a practice works and the functions it is supposed to serve, we might also be in a position to point out ways in which its operation can be improved. It is in that spirit, I suspect, that Baude wants to privilege the discursive part of this practice over the decisional part. “Our law,” in his view, is more reflected in what judges say about their obligations than in how they execute those obligations. If the execution fails to show the respect for original meanings that the discourse seems to acknowledge, the execution is wanting.

But that idea rests on two uncertain propositions. The first is that if indeed we should do a better job of aligning constitutional discourse with constitutional decisionmaking, it is our discourse that should be regarded as more authoritative. That proposition cannot emerge from the record of practice alone, and it is not clear that we would choose that resolution if the question were squarely put. Maybe the discursive practice of speaking respectfully about original meanings persists in part because it exercises little constraint on decisionmaking. If we had to choose one or the other, perhaps we would (and should) choose to abandon the discursive pretense of originalism.

The second proposition is that the practice is in need of reform at all—that is, that the tension between the judiciary’s spoken respect for the Founders and its willingness to reach results inconsistent with original meanings is a problem in need of resolution. Maybe it is. But Baude’s argument asks us to take existing practices as authoritative, and judicial practice on these points seems robust and relatively stable. So before we conclude that the disjuncture between the way that judges speak about original meanings and the ways that courts decide cases is a glitch to be repaired, we should ask whether the system’s current operation has a logic of its own.

Here is one possibility for such a logic. Perhaps judicial professions of respect for original meanings serve important functions in constitutional culture even if historical realities about the original meanings of constitutional provisions do not much constrain, and in principle should not much constrain, the resolution of contested constitutional issues. Perhaps the relevant discourse sounds more in national identity than in

concrete decisionmaking.³⁷ And to see how judicial discourse about the Founders might be understood that way, it is helpful to investigate a question parallel to the one that Baude asks and to do so with a similar sort of positive inquiry. The question is this: Is theocracy our politics?

III. IS THEOCRACY OUR POLITICS?

The positive inquiry begins by looking at the behavior of our senior political officials. On a regular basis, they make reference to God.³⁸ When they do so, it is always respectfully, even reverentially. They speak of the need to keep faith with God, to act as God would have us act, and so forth.³⁹ They do not always, nor even most of the time, adduce the Divine Will as the proximate reason for particular policy decisions. And maybe politicians are often wrong about what God wants, as indeed some of them must be, given how often different people represent God as taking different sides of an issue. Never, though, will you hear a senior American politician say that she has canvassed several possible reasons for action, one of which is God's will, and concluded that God's will should be overcome. That's out.

Should we conclude, on the basis of this evidence, that divine authority is the master modality of American political reasoning? I suppose we could. But what would it mean to say so? Perhaps that speaking respectfully about God is a deeply engrained feature of American political discourse, one that reflects certain values and self-conceptions common among the decisionmaking classes and the constituents to whom they respond. It might not follow, though, that theological inquiry would tell us much about how political issues will be or ought to be decided. In-

37. See Richard Primus, *The Functions of Ethical Originalism*, 88 *Tex. L. Rev.* See Also 79, 80 (2010) (“[T]he deeper power of originalist argument sounds in the romance of national identity.”).

38. See, e.g., President George W. Bush, *State of the Union Address* (Jan. 29, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html> (on file with the *Columbia Law Review*) (closing speech by invoking God's blessing); President William Clinton, *State of the Union Address* (Jan. 20, 1999), <http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou99.htm> [<http://perma.cc/Y9CN-RK26>] (same); President Barack Obama, *State of the Union Address* (Jan. 13, 2016), <http://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address> [<http://perma.cc/FZ8H-7F8T>] (same); see also Scott Neuman, *Divine Rhetoric: God in the Inaugural Address*, NPR (Jan. 22, 2013), <http://www.npr.org/sections/itsallpolitics/2013/01/22/169998659/divine-rhetoric-god-in-the-inaugural-address> [<http://perma.cc/BD88-BZ2A>] (tracking emergence and now prevalence of references to God in inaugural speeches).

39. See, e.g., Samuel Smith, *Hillary Clinton on Her Christian Faith: Judgment Left to God; Be Open, Tolerant, Respectful*, *Christian Post* (Jan. 26, 2016), <http://www.christianpost.com/news/hillary-clinton-christian-faith-judgment-god-open-tolerant-respectful-155964/> [<http://perma.cc/66WF-GUCC>] (quoting Senator Hillary Clinton at Iowa campaign event saying, “[T]he most important commandment is to love the Lord with all your might and to love your neighbor as yourself, and that is what I think we are commanded by Christ to do”).

deed, it is not clear that our observation about how politicians discuss God tells much at all about the commitments of American politics beyond the particular commitment to speak this way, or to speak this way at certain times and for certain audiences—audiences that might or might not include the speakers themselves.

The prevailing practice of invoking God probably means different things to different politicians, and different politicians probably use it in different ways. Some politicians may be deeply invested in the idea that they are responsible to see God's will done on earth. Others might see the theological language mostly as a matter of "ceremonial deism"—roughly speaking, as a traditional way of solemnizing an occasion or a role, but not as a statement about the kinds of reasons that should count in politics.⁴⁰ Others invoke God because they think some audience expects it of them. Probably some politicians rarely think about politics or policy in theological terms—indeed, maybe they have principled reasons for thinking that policy decisions should not try to track theological imperatives—but are well enough socialized into the practices of American politics that they speak this way on certain occasions. And a great many may have no well-theorized view about why they do it but either move among self-understandings from occasion to occasion or else engage in the practice with little reflection at all.

The practice of invoking God in politics might serve several functions, including legitimacy functions, but it is not clear that it reveals a thick theory of political authority, nor that it directs official decisionmaking. Most decisions are made on other grounds. And when a politician does adduce God's preferences as a reason, you can be sure that God's preferences, as described, will cohere with what the speaker thinks is a good idea. Senior politicians never award victory over God to some other source of authority, but then again we never hear them saying, "Most of the reasons bearing on this very important issue direct resolution X, but God directs not-X. So, unfortunate as this is, not-X is the decision we must make."

Something similar may be true of originalism. Most American judges have a general sense of reverence for the Founders. Some are committed originalists, in a sense stricter than Baude's.⁴¹ Most others probably think

40. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) ("[S]uch practices as the references to God contained in the Pledge of Allegiance can best be understood . . . as a form [of] 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.").

41. Justice Thomas is a leading example. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 806–58 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing that substance of Second Amendment should apply to states not through Fourteenth Amendment's Due Process Clause, as longstanding incorporation doctrine would suggest, but through Privileges and Immunities Clause, on basis of proper understanding of original meaning of Fourteenth Amendment).

that the ideas and understandings of the Founders matter in some way but without any clearly worked out idea about exactly how and how much.⁴² They speak about the Founders as objects of fidelity.⁴³ Most of the time, however, actual judicial decisionmaking seems to rest on other considerations, chief among which is precedential case law.⁴⁴ And even on those occasions when courts purport to be deciding questions based on original meanings, it is not clear that the decisions judges reach are genuinely constrained by historical reality. Sometimes, perhaps. But most of the time, what judges say the original meaning of a constitutional provision requires in a given case either reflects what prior courts have said about the original meaning (in which case the authority on offer is precedential) or, in matters of first impression and cases in which judges depart from precedent, lines up uncannily well with what those judges think should be done in the case at hand on other grounds.⁴⁵ In short, to the extent that originalism is “our law,” it might reside mostly in that part of our law that sets norms for how to argue about constitutional issues, rather than in that part of our law that sets norms governing the substantive resolution of those issues.

Baude’s description of the Supreme Court’s conduct in cases commonly thought to depart from originalism contains a helpful image for recognizing the possibility that judicial discussions of original meanings sound more in our law’s discursive register than in its decisional one. In *Brown*, the Court did not say, “We rule in a way that is contrary to the original meaning of the Fourteenth Amendment.” Instead, Baude says, the Court invested effort in “fighting the original-meaning question to a draw.”⁴⁶ That seems right.

But why would a court invest effort in fighting original meanings to a draw if that court really thought that original meanings supplied the master legitimating criteria for judicial decisionmaking? To fight original meanings to a draw is to resist the direction in which original meanings are trying to take you. It is not the same as working hard to make sure

42. Few law professors do either, even among those who write about constitutional theory. It seems extravagant to expect more from judges, who must spend most of their time worrying about other things.

43. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.) (rejecting any conception of commerce power that would authorize government to compel private action on grounds that such conception would make United States “not the country the Framers of our Constitution envisioned”); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 901 (1992) (plurality opinion) (“Our Constitution is a covenant running from the first generation of Americans to us . . .”).

44. See Strauss, *Common Law*, supra note 4, at 899–900 (describing predominance of case law in judicial reasoning).

45. For one list of cases in which the Justices divided on questions of original meaning in a pattern that suggests that their conceptions of original meaning largely map their conceptions of the merits of the cases on other grounds, see Primus, *Limits of Interpretivism*, supra note 10, at 170–71.

46. Baude, supra note 1, at 2380.

that one has gotten the original meaning *right* in a discipline-of-history sense. If we thought that the Court in *Brown* had worked hard to get original meanings right, happened to conclude after that inquiry that original meanings were inconclusive, and therefore decided the case on the basis of a different kind of reasoning, then it would make sense to read *Brown* as consistent with the idea that the Court behaves as if original meanings supplied the best reasons for constitutional decisions. But if we think that the Court affirmatively strove to characterize the original meaning of the Fourteenth Amendment in a way that would permit the Court to rule against segregation, then a different possibility emerges. Maybe the Court feels an obligation to show fidelity to original meanings—or at least to avoid showing *infidelity* to them—but not an obligation passively to follow original meanings wherever they might lead. Maybe “our law,” as displayed in prevailing practices, is that the Court should avoid rejecting original meanings *overtly*. Maybe the Court’s treatment of original meanings reflects the sense that our discursive norms require judges to describe themselves as faithful to the makers of the Constitution even when judicial decisions are not meaningfully constrained by Founding ones.

Baude tries to meet this counterargument. Some people, he says, think that judicial professions of fidelity to original meanings are just talk—talk that does not drive decisionmaking.⁴⁷ But if that account of judicial behavior were accurate, Baude continues, it would reveal the judges as duplicitous, and the secret motives animating their duplicity cannot have the status of law.⁴⁸ Whether or not judicial reason-giving is authentic, judicial opinions tell us what sorts of reasons judges think will legitimate their decisions publicly. If the judges are really acting for other reasons that they conceal, then the fact that they feel the need to hide their real reasons indicates that the judges consider those reasons to lack legitimacy. Indeed, to the extent that the judges’ secret reasons are directing results contrary to the results that would be directed by a proper application of the sources of authority that the judges are comfortable adducing in public, Baude claims, the judges are subverting the law.⁴⁹

The trouble with Baude’s response here is that it treats the hypothesis that judges’ discussions of original meanings do not tell us the real reasons for judicial action as if it were a hypothesis about bad-faith behavior. (The relevant section of Baude’s essay is called “judicial insincerity,” and his characteristically colorful argument against treating secret reasons as legitimate analogizes the judiciary to an Illuminati conspiracy.⁵⁰) But the best form of the hypothesis does not propose that the judges are

47. See *id.* at 2386–87 (stating many scholars suggest judges’ articulated reasoning might not provide best account of what drives judicial decisionmaking).

48. See *id.* at 2388 (arguing judges subvert law if they rule for reasons they do not reveal rather than for publicly justifiable reasons).

49. *Id.* at 2396–97.

50. *Id.* at 2386–89.

acting in bad faith. My own guess is that originalist argumentation suffers from motivated reasoning more than it suffers from purposeful duplicity. That is, judges and other constitutional interpreters are liable to misread originalist source material in ways congenial to their own preferred dispositions of cases, even if they are not consciously trying to distort the sources. When they do misread, they may sincerely believe that their actions accord with original meanings. But it is still not the case that original meanings drive the decision. Instead, creating an interpretation of original meanings that reconciles those meanings with the desired outcome becomes a step in the decisionmaking process. The reconciliation might or might not satisfy a panel of disinterested historians, but that is not the point. The question is whether the judge, who is under pressure both to decide the case well and to avoid infidelity to the Founders, can produce a reconciliation good enough to live with. And as Professor Karl Llewellyn warned, “What satisfies the conscience lulls the mind.”⁵¹

The indeterminacy of original meanings helps judges immensely as they pursue this project. Originalist source material is regularly messy, unbounded, and multivocal.⁵² Unlike case law, it is not hierarchically organized, and again unlike case law, it does not adapt over time in ways that settle newly presented questions. On the contrary, as originalist source material recedes farther into the past, it cleanly answers fewer and fewer of the questions that modern judges need to decide.⁵³ What happens when judges approach this indeterminate source material? In general, the judges conclude that original meanings justify some course of action that the judges probably thought was the right course of action anyway.

This is true both when the right course of action is a matter of consensus and when it is a matter of disagreement. On the first score, it is not an accident that the Court became willing to credit *Brown’s* reading of the original meaning of the Equal Protection Clause at the same point in history when American elites more generally came to oppose overtly racist government policies. On the second, only Captain Renault could have been shocked to find,⁵⁴ upon reading the Court’s decision in *Heller*, that Justices Scalia and Breyer had different views about what originalist source material revealed about Founding-era attitudes toward firearms

51. Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Colum. L. Rev.* 1, 10 (1934).

52. See, e.g., Richard A. Primus, *When Should Original Meanings Matter?*, 107 *Mich. L. Rev.* 165, 214 (2008) (“[W]hen [originalist material] 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.”).

53. Adam M. Samaha, *Originalism’s Expiration Date*, 30 *Cardozo L. Rev.* 1295, 1344 (2008) (discussing expiring justifications for originalism).

54. See *Casablanca* (Metro-Goldwyn-Mayer 1942) (“I’m shocked—shocked—to find that gambling is going on in here.”).

regulation.⁵⁵ Or that those same two Justices had different views about what originalist source material revealed about Article II's Appointments Clause in *NLRB v. Noel Canning*.⁵⁶ Everyone could have predicted, in each case, which interpretation would appeal to Justice Breyer and which one to Justice Scalia—and not because the two Justices had different methodological commitments about how to read historical sources.

It would be a big mistake, however, to conclude that these predictable patterns in interpretation come about because judges deliberately manipulate the sources to reach their desired ends. Maybe that does happen, sometimes. But most of the time, there is a different reason why judges' interpretations of originalist source material tend to track their intuitions about sensible results. It is that judges are usually responsible people who want to make good decisions, and they have intuitions about what good decisions would be, and they have the further intuition that the Founders, too, were responsible people who had good values and who made good decisions. If one thinks well of the Founders, then one will more naturally read their indeterminate writings as supporting a sensible idea than as supporting a foolish one—and all the more so if the exercise is not the academic one of establishing the historicity of an idea but the legal one of deploying the power of the state to enforce some result in the social world.

When judges strive to avoid dissonance between their decisions and their understandings of original meanings, therefore, they are not as a general matter trying to fool the public. Maybe they are fooling themselves, and maybe their role pressures them to do so. Or maybe they are playing an important and noncynical role in a system that values its sense of identification with the Founders: Perhaps what our practices require is for judges to endorse a new conception of original meanings when it is time for the law to change because the alternative is to leave the Founders behind, and we like the Founders too much to do that. If so, then our practices do suggest that original meanings are an important modality of argument—but one whose content adapts to the direction of judicial decisionmaking at least as much as it constrains that direction.

Baude might say that even if all of this is true, the fact that judges are unwilling simply to contradict original meanings shows that our practices

55. Compare *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (Scalia, J.) (“From our review of founding-era sources, we conclude that this natural meaning was also the meaning that ‘bear arms’ had in the 18th century. In numerous instances, ‘bear arms’ was unambiguously used to refer to the carrying of weapons outside of an organized militia.”), with *id.* at 672 (Breyer, J., dissenting) (arguing founding-era sources “confirmed the way those in the founding generation viewed firearm ownership: as a duty linked to military service”).

56. Compare 134 S. Ct. 2550, 2561 (2014) (Breyer, J.) (“The Founders themselves used the word [‘recess’] to refer to intra-session, as well as to inter-session, breaks.”), with *id.* at 2595–96 (Scalia, J., concurring in the judgment) (“In the Founding era, the terms ‘recess’ and ‘session’ had well-understood meanings in the marking out of legislative time The period *between* two sessions was known as ‘the recess.’”).

embody the idea that original meanings are authoritative.⁵⁷ But whether that contention is sound depends on what it means to regard original meanings as authoritative. If it means that we resist letting the law develop in ways that we find ourselves unable to reconcile with what we believe about the Founders, then it is probably right. But we seem pretty proficient at believing new things about the Founders when doing so is necessary for letting the law develop—including, when it provides the easiest reconciliation, that the Founders did not speak to an issue, such that we are free to decide it on other grounds.⁵⁸ And if the claim that we regard original meanings as authoritative means that we are committed to obeying some static understanding of original constitutional meanings, or to obeying original constitutional meanings as a team of skilled and dispassionate historians would understand them, then it is probably wrong. At any rate, our practices cannot support those versions of the claim, because our practices do not furnish any robust evidence of the Court's unwillingness to budge from concededly unfortunate rules simply because original meanings require them. When the shoe pinches, the Court tends to find a better shoe.

CONCLUSION

Baude's argument asks us to take existing practices as authoritative. But it reads better as a proposal for reform than as a statement that everything is just fine as it is. Baude wants us to recognize that we already accept inclusive originalism and, based on that realization, to be better originalists than we have been heretofore.

Recall that Baude's theory requires him to say that the Court in *Brown* (and *Blaisdell*, and *Reynolds*, and *Miranda*, and *Gideon*, and *Roe*, and *Lawrence*, and *Heller*, and . . .) may have been doing originalism *badly*. In a way, that concession is a strength. It prevents Baude from suffering the quizzical reactions he might get if he tried to argue that all of those cases, or even most of them, were rightly decided as a matter of original meaning. More broadly, it recognizes both the general reality that courts err and the particular reality that courts are not so good at the kind of histor-

57. Baude, *supra* note 1, at 2371.

58. The changing views within the legal profession regarding the original meaning of the Second Amendment in the twenty years before *Heller* illustrate the scenario in which a new view of original meanings is used to *direct* a change in the law. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *Harv. L. Rev.* 191, 193–94 (2008) (describing process by which lawyers, judges, and law professors came to adopt new view of original meaning of Second Amendment). The Court's treatment of the original meaning of the Equal Protection Clause in *Brown* illustrates the scenario in which a changing view of original meanings is used to *permit* such a change. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 63–65 (1955) (describing process by which *Brown* Court arrived at view that it could order school desegregation despite earlier prevailing sense that Fourteenth Amendment was compatible with segregation).

ical inquiry that originalism officially requires. For present purposes, though, what matters is this: When Baude says that some of the Court's decisions might be wrongly decided as a matter of original meaning, he is saying, I think, that some of those decisions are blemishes on the Court's record—occasions when the Court failed to live up to what it knew it was supposed to do, which is to respect original meanings. Once we recognize that we are committed to originalism, the thought would run, we should commit ourselves to doing originalism *better*, and then we will make fewer mistakes.

An argument that locates our commitments in our practices cannot so easily make that move. The only form of originalism that our practices clearly embody is a form riddled with “errors” of this kind. If the Court were more constant and scrupulous with its assessments of history, our practices would be different. And it is far from clear that our practice of avoiding overt admissions of conflict between original meanings and judicial decisions would survive if it meant that we could not have *Brown*, or *Reynolds*, or *Lawrence*. On the contrary, the pliability of originalist argument might be a precondition for the longevity of our practice of (sincerely) declaring fidelity with original meanings.

So perhaps the Court's periodic-to-regular decisions that strike dispassionate historians as departing from original meanings are not actually errors, measured by the commitments of our practices, properly understood. Maybe the ability to adapt and engineer the Constitution's “original meaning” is a feature of the system rather than a bug, in part because it allows us to continue expressing something that the system values: connection with and respect for the Founders. And if not—if it is unacceptable to present our constitutional law as consistent with original meanings if such a presentation requires taking liberties with history, whether knowingly or otherwise—then the choice between a more constraining originalism and a more open rejection of originalism cannot be made simply by treating our present practices as authoritative. It would require other kinds of arguments—arguments about the institutional capabilities and limits of courts and arguments about the functions and values of constitutional law.

Baude is right that it matters how judges talk.⁵⁹ It tells us something about either their own commitments or their perceptions of the commitments and expectations of some part of their audience. If judges profess respect for the Founders and refuse to contradict original meanings, then those practices are part of our legal culture. But those practices are part of our legal culture in the way that they actually are practiced, not in some more refined way. And if we think that the practice is in need of some reform, the best reform might involve less originalism rather than more. To know, we would need a different kind of argument.

59. Baude, *supra* note 1, at 2386–88.