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Must we be Faithful to Original Meaning?

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I am grateful to the editors of the *Jerusalem Review of Legal Studies* for arranging this symposium on *Living Originalism* and to the contributors to this symposium for their fine essays. *Living Originalism* is about many things: the role of constitutional faith, the possibility of constitutional redemption, the production of democratic legitimacy through the work of political and social movements, and the processes of constitutional change. It advocates both a form of originalism and a form of living constitutionalism, and it argues that the two theories are actually two sides of the same coin. The essays in this symposium, however, focus primarily on the originalist aspects of the book; they discuss what original meaning is and why constitutional interpreters need to be faithful to it. Therefore I have organized this reply as an essay on original meaning, moving back and forth between the views of the various contributors, which respond to each other as much as they do to me.

Original meaning and popular sovereignty

Re'em Segev's essay[1] asks the most basic question: why we should interpret the Constitution according to its original meaning? Segev considers and rejects a number of possible reasons; for example, he points out that if the justification is democracy, then it is not clear that interpretation according to original meaning promotes democracy today.[2] Moreover, we might want to trade off democracy for other important values.[3]

In *Living Originalism*, I do not argue that we must follow original meaning because doing so furthers democracy. Adhering to original meaning might further democracy or it might not. Rather, I argue that we should interpret the Constitution according to its original meaning (i) because of the way that the

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[1] Re'em Segev, *The Argument for (Living) Originalism: Comments on Jack Balkin's Theory of Constitutional Interpretation*, 7 Jerusalem Rev. Legal Stud. 35 (2013).

[2] *Id.* at 40–1.

[3] *Id.* at 41–2.

Constitution became law and (ii) because of the reasons why it continues as law today.

The Constitution became law because of a series of acts of popular sovereignty. A proposal was circulated among the various states to abandon the existing Articles of Confederation and to adopt a proposed Constitution. States elected delegates to ratification conventions to vote on the proposal, and enough states eventually ratified the Constitution to create a working government according to its terms. (Article VII provides that, upon ratification of nine states, the Constitution is established as basic law among the ratifying states.)

In *Living Originalism*, I assume that this act of popular sovereignty was adequate to abandon the Articles of Confederation and to make the proposed Constitution law. One might argue that the ratification did not make the Constitution law. After all, Article XIII of the Articles of Confederation stated that the Articles could not be changed except by unanimous agreement of all states; moreover, it claimed that the union created by the Articles was perpetual and could not be dissolved—except, presumably, by the agreement of all the states.[4] The Constitution was ratified by the ninth state, New Hampshire, in June 1788, and the new government began functioning in 1789. When the Constitution was ratified, several states had not yet agreed, and it was certainly possible that some might never agree. So from the standpoint of the Articles, the new Constitution was illegal.

Yet if the Constitution nevertheless became law in 1788, and the Articles were successfully abandoned, the best explanation is that the public, acting through their representatives, invoked their constitutive power to change the form of government. They simply did so outside of the existing legal process provided for in the Articles of Confederation. Therefore the reason why the Constitution *became* law is popular sovereignty.

To be sure, the process of ratification was hardly democratic by our contemporary standards. Most adults could not vote; women were excluded, and most blacks were held in slavery. Nevertheless, as Akhil Amar points out, for its time the process was remarkably democratic, as great an advance toward popular sovereignty as one could have expected in an age in which most of Europe—indeed most of the world—was still governed by kings and princes.[5]

The fact that the Constitution became law through an act of popular sovereignty, however, does not mean that the Constitution promotes democracy *today*. Parts of it might be undemocratic judged by contemporary standards.

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[4] Articles of Confederation, Article XIII ("And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.")

[5] See Akhil Reed Amar, America's Constitution: A Biography 7, 17–18 (2005) (noting the remarkably democratic features—for its time—of the Constitution's ratification process).

For the same reason, it also does not follow that interpreting the Constitution according to its original meaning is justified because doing so promotes democracy today. In fact, it is possible that interpreting the Constitution according to original meaning exacerbates some of the undemocratic and unjust aspects of the Constitution, at least judged by contemporary standards.[6] (One familiar example is the malapportionment of the Senate.) The point of the argument from popular sovereignty, rather, is to explain how the Constitution became law and how it displaced the previous constitution, the Articles of Confederation.

In addition, the reason why the Constitution *became* law is not necessarily the reason why it *continues* as law today. The Constitution *continues* as law today largely for rule-of-law reasons; or more correctly, because of the way that American legal culture understands and implements the rule of law. In a continuously existing political system like the America's, laws, even ancient laws, continue in force (i) until they are modified or repealed or (ii) until they expire, if the laws contain sunset provisions for their automatic expiration, or if there is a generally recognized legal sunset norm that applies to laws generally, or to laws of a certain kind.

No such sunset norm applies in the American legal system. Moreover, the American people have not engaged in a subsequent act of repudiation of the Constitution as they did with the Articles. The Constitution has been amended many times, but it has never been abandoned in the way that the Articles of Confederation were abandoned in the period between 1787 and 1788. The public has not exercised its constituent power to replace the 1787 Constitution with a new one.[7]

As I discuss later in this essay, the constituent power of the people continues to operate in the realm of constitutional construction. But the exercise of popular sovereignty through constitutional construction builds on the basic framework; it does not reject it.

Thus, the best explanation of why the Constitution continues as law today is the American legal culture's conception of the rule of law: the text of the Constitution is law and the law continues in force until it is repealed or changed. The text can be changed in several ways. We the People can act either through existing legal processes—for example, through a new convention called

[6] For a discussion of the undemocratic features of the American Constitution, see Sanford Levinson, Framed!: America's Fifty-One Constitutions and the Crisis of Governance (2012); Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (2006).

[7] Bruce Ackerman has argued that, although most Americans do not realize it, the USA has actually had three different Republics, in which significant parts of the Constitution were altered in ways that were technically illegal under Article V's amendment rules. 1 Bruce A. Ackerman, We The People: Foundations (1991); 2 Bruce A. Ackerman, We The People: Transformations (1988). Ackerman's brilliant and provocative theory, however, is not the generally accepted understanding of American constitutional history.

under the authority of Article V—or through a new act of constituent power that may or may not be consistent with the terms of the existing Constitution.

The last point is worth emphasizing. Throughout *Living Originalism*, I assume that the American people are not being disingenuous when they say that they are committed to the Constitution and that they want to be faithful to it.[8] I then ask what fidelity requires if people want to commit to this particular plan for politics. I argue that fidelity requires, at a minimum, fidelity to original semantic meaning and to the Constitution's choice of rules, standards, and principles. But this is a hypothetical imperative, not a categorical one. Americans do not have to continue to accept their Constitution. As the Declaration of Independence insists, "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government."[9]

Americans could refuse to be bound by their existing Constitution and start over again. The American people can, as they did in 1788, reject their old Constitution and adopt a new one. And, as in 1788, they do not have to abide by the terms of the existing Constitution in order to do so. The current Constitution is very hard to amend, but that does not mean that, in order to abolish it, we must continue to follow its very difficult rules. That would probably not happen in the case of a political revolution, for example; and Americans did not follow the Articles of Confederation's rules in adopting the 1787 Constitution.

To be sure, for the new constitution to be an act of constituent power, Americans must come up with some procedure for ratifying a new constitution that will widely be regarded as legitimate, even if not fully consistent with Article V. What that procedure would be is beyond the scope of this essay.[10] I simply note that, just as in 1788, at least some procedures that go beyond the terms of the existing Constitution would probably be both sufficient and broadly acceptable.

To sum up: the Constitution of 1787 became law because of an act of popular sovereignty; it continues as law because of rule of law values, because Americans continue to accept it as their basic law, and because no later exercise of constituent power has displaced it.

Original meaning, the rule of law, and plans for politics

The same rule of law values that maintain the Constitution as law over time also set basic requirements for constitutional interpretation. Interpreters must give the words in ancient laws the same semantic meanings that the words had

[8] Jack M. Balkin, Living Originalism 38, 50 (2011).
[9] Declaration of Independence (1776).
[10] For one suggestion, see Akhil Reed Amar, P*hiladelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988) (arguing that a nationwide referendum is sufficient to amend the Constitution).

when they were first adopted—to the extent that these meanings can be determined.[11] In most cases, the contemporary semantic meanings of the words in the Constitution are the same as they were at the time of their adoption. But in a few cases they will differ, because language changes over time. When this happens, interpreters should want to avoid puns and plays on words when they become aware of them. They should choose the original semantic meaning and not the contemporary semantic meaning. This approach to interpretation is the most consistent with the rule of law idea that a duly enacted statute continues in force as law until it is amended or repealed.

For this reason, the term "magazine" in Article I, section 8, refers to places for storing ammunition, and not to printed material; the term "domestic violence" in Article IV, section 4, refers to riots and insurrections, and not to interspousal battery; and the guarantee of "a Republican Form of Government" in the same clause refers to a government that is majoritarian, representative, and nonmonarchical, but not to a government run by the Republican Party, which was founded in 1854. In the context of American legal culture—and many other legal cultures too, I assume—these are not fair or appropriate readings of the text.

The same reasoning applies when the Constitution uses a generally recognized term of art. Such words should continue to be understood as a term of art, even if they have taken on a different meaning in contemporary language. Nevertheless, some terms of art in the Constitution might be taken from the common law and intended to incorporate common law reasoning. If so, then these terms of art should be subject to continuous evolution, just as the common law is.[12]

I argue for adhering to original meaning not only because of rule of law values, but also because of my theory of what constitutions are and what they are for.[13] Even if my views about the purpose of constitutions do not apply to all historical examples, I argue that they apply to the US Constitution.

I argue that the Constitution creates a plan for politics that must be built out over time by successive generations.[14] Therefore interpretive fidelity to the Constitution requires, at a minimum, continuing to apply the same plan over time until it is amended or abandoned. In order to ensure that we remain faithful to the same plan over time, we should interpret the Constitution according to the semantic meaning of its terms at the time of adoption (to the extent that this content differs from contemporary usage), including any generally recognized terms of art and including any inferences from context

[11] Although I emphasize "semantic meanings" in this formulation, the basic framework must include some pragmatic elements: these are inferences about meaning that readers glean from context, as I describe *infra* at pp. 18–21.

[12] See Bernadette Meyler, *Towards a Common Law Originalism*, 59 Stan. L. Rev. 551, 558 (2006).

[13] See Balkin, *supra* note 8, at 4, 35–6.

[14] See Scott Shapiro, Legality (2011) (comparing legal systems to social plans).

necessary to understand the original meaning. If we substitute contemporary usage, or neglect to take into account generally recognized terms of art, the results might be more just or less just, but they will not be the same constitutional plan. Put another way, the fact that we commit to follow a plan means that some possible interpretive moves are not available to us.

Here is an example. Because of technological and cultural changes, the spelling, pronunciation, and vocabulary of English are rapidly changing. It is therefore not at all unlikely that someday the language of the 1787 Constitution might seem as archaic as Geoffrey Chaucer's *Canterbury Tales* appears to English speakers today. Article II, section 1 states that "The . . . President of the United States of America. . . . shall hold office during the term of four years." Suppose that, over time, the word "four" comes to mean "forever," or "an unlimited amount," and that the number [4] is normally signified by the word "foor." Now imagine that the President argues that, according to the contemporary meaning of the text, he is entitled to serve for life. (Under the 22nd Amendment, "No person shall be elected to the office of the President more than twice," but because a single term of "four years" lasts forever, this imposes no effective limits.) The President acknowledges that the word "four" once meant [4], but he argues that contemporary meaning should trump original meaning where the two differ, because contemporary meaning has greater democratic legitimacy.

I argue that this is not a permissible interpretation of the Constitution, even if the 1787 Constitution's use of the word "four" to mean the number [4] has become archaic and is never used in contemporary English. The President's use of contemporary meaning is not faithful to the basic plan for politics and the plan has not been legitimately amended. In my view, the President is using a play on words to accomplish an end-run around a hard-wired structural provision designed to constrain the exercise of political power.

In this case, the linguistic change might be obvious—and everyone except the President's staunchest defenders would understand that applying contemporary meaning was not consistent with rule of law values or with political fair play. There may be other changes in language, however, that few people might notice until an important dispute arose. Yet the argument applies to these cases as well.

Michael Dorf offers an example. Article I, section 8, clause 11 gives Congress the power to "make rules concerning captures on land and water." Suppose that it was clearly established that the term "captures" was a generally recognized term of art in 1787 that referred only to the seizure of ships and property, but not to the capture of persons.[15] A group of peace activists

[15] Several commentators have argued that this limitation is the best reading. See, eg, Ingrid Wuerth, *The Captures Clause*, 76 U. Chi. L. Rev. 1683, 1683, 1722–33 (2009). Nevertheless, as one might expect, the evidence of past usage is complicated. See *id*. at 1723 (explaining that while there is "some support for the claim" that the Captures Clause reaches regulation of prisoners, "there is [also more] countervailing evidence.")

opposed to the harsh treatment of detainees at Guantanamo Bay, Cuba argues that "[e]nemy combatants captured abroad" are "entitled by this language to be treated in accordance with the rules laid down by Congress."[16] (Note that Congress might be able to regulate the treatment of detainees under several other enumerated powers, but Dorf's question is whether Congress can do so under the Captures Clause).[17] The activists are unaware that the original meaning of the Captures Clause differs from and is more limited than their contemporary understanding. Dorf argues that "the peace activists have an attractive account of this reading that ties it to congressional checks on the President's power to make war. Who is Balkin to deny them their reading?"[18]

Far be it from me to prevent social movements from offering any constitutional theories they want in the public sphere. A basic claim of *Living Originalism* is that social and political mobilizations are the engines of constitutional construction and help ensure the legitimacy of the constitutional system over long periods of time. But the fact that people are free to offer their own readings of the Constitution and persuade others to agree with them does not mean that their readings are automatically either permissible constructions or faithful to the Constitution.[19]

Dorf objects that the peace activists' argument cannot be deemed an impermissible construction because "the peace activists in [the] hypothetical example believe they are keeping faith with the Constitution. Reading the Constitution as an intergenerational document, they attribute to its words their contemporary meaning."[20] Note that Dorf does not argue that contemporary meaning should always prevail over original semantic meaning; his point is merely "that contemporary meaning can be a candidate for the best interpretation of a constitutional provision" when it differs from original semantic meaning.[21]

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[16] Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2040 (2012).

[17] For example, Congress has the power "[t]o define and punish . . . offences against the law of nations," Article I, section 8, clause 10; "[t]o make rules for the government and regulation of the land and naval forces," *id.* at clause 14; "[t]o provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," *id.* at clause 16; and "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof," *id.* at clause 18.

[18] *Id.* at 2041.

[19] As I explain in *Living Originalism*, the processes of constitutional change involve a division of labor between laypersons and legal professionals. Balkin, *supra* note 8, at 88, 332–4. Lawyers and judges translate the constitutional claims of popular mobilizations into terms that make sense given professional norms; in particular, they must articulate popular arguments in terms that are consistent with the constitutional framework. In this case, if the Captures Clause were not available, lawyers could easily translate the peace activists' arguments in terms of Congress's other enumerated powers. But the possibility always remains that lawyers could not reasonably translate social movement claims into a theory that is consistent with the framework. Then the only available remedy would be an amendment to the Constitution, or a new Constitution. Dorf appears to regard this as a defect of a theory of constitutional interpretation. Dorf, *supra* note 16, at 2041, 2043. I regard it as a feature. If a constitution is a plan for politics then it cannot be consistent with *every* possible claim that a social movement might someday make.

[20] Dorf, *supra* note 16, at 2041.

[21] *Id.* at 2044.

Dorf is confident that "[a]ny competent reader of modern English" will be able to discard any unreasonable uses of contemporary meaning that might result. "We do not need semantic originalism to constrain contemporary readers from adopting wacky interpretations of the text. Attention to context and common sense will do just fine."[22] As long as people sincerely believe that contemporary semantic meaning is the best reading, the reading is a permissible construction.

I disagree. Sincerity is not the same thing as either faithful interpretation or freedom from mistake. In my previous example, the President and his supporters—who might also be activists—are also free to argue in the public sphere that the President can serve forever. They might also sincerely believe that this interpretation not only keeps faith with the Constitution, but also redeems it and makes it, in Ronald Dworkin's words, "the best it can be."[23] And they might, through effective persuasion, move people's judgements about their position from being "wacky" or, as I would put it, "off-the-wall," to being widely accepted and even common-sense. Stranger things have happened in the history of American constitutional law.

Common sense, after all, is not static; a central argument in *Constitutional Redemption* is that what people regard as reasonable in law and politics is shaped through political and social mobilization.[24] But the sincerity of the activists' beliefs does not make their interpretation either faithful to the plan or correct. Indeed, it must be possible that at least *some* interpretations that people might sincerely believe to be faithful are not in fact faithful; otherwise the Constitution cannot function as a plan for politics because it forbids nothing and requires nothing.

Legal culture and interpretation

When we interpret the American Constitution, we should begin with the original meanings of the words of the ancient text, as best we can determine them. For similar reasons, we should not adopt constructions that are inconsistent with the original semantic meaning of the text. Randy Barnett's symposium essay emphasizes this point.[25] Inconsistency is more than a question of propositional logic. Whether a construction is consistent or inconsistent with the original meaning of an ancient text must be understood relative to the permissible forms of statutory interpretation and construction available in a

[22] *Id.*

[23] See Ronald M. Dworkin, Law's Empire 53, 62, 77, 233, 248, 255, 257, 348, 379, 423 (1987).

[24] Jack M. Balkin, Constitutional Redemption: Political Faith in an Unjust World 12–14, 61–72, 178–83 (2011).

[25] Randy E. Barnett, *Welcome to the New Originalism: A Comment on Jack Balkin's* Living Originalism, 7 Jerusalem Rev. Legal Stud. 42, 47 (2013).

given legal culture.[26] For example, Gematria—the calculation of numbers associated with the letters in a given word or phrase in scripture—is a permissible tool of interpretation in some elements of Jewish law. But calculating the numbers associated with the letters in the text of the First Amendment and comparing them to the numbers associated with other texts would not be a permissible move in American legal culture. In American constitutional culture, using Gematria to develop constructions of the text of the American Constitution would be *inconsistent* with a commitment to original meaning. That is because of differences in legal culture, and differences in background assumptions about legal texts and the permissible moves that interpreters may make in understanding them. For example, in Jewish law, Gematria is permissible because members of the relevant culture believe that it reveals divine meanings that God has placed in the text. The numbers associated with words are thus a kind of original meaning, although esoteric. American legal culture does not assume that such hidden meanings have been embedded in legal texts, or that they are part of the enforceable legal meaning of the text.

Barnett also argues that if we build constructions of the text based on the fact that the text states a principle, we must make sure that we can always explain our constructions as plausible readings of the text. Even if the text contains a principle, we cannot abandon the text and only pay attention to the principle.[27] Barnett's example is the 14th Amendment's guarantee of "equal protection of the laws." Barnett points out that this text is not simply a general principle of equality; it is a guarantee of equal *protection*, and it is not a guarantee of any sort of equal protection, but a guarantee of equal protection *of the laws*.[28]

The distinction is important because some originalists argue for a particularly narrow reading of these words. They maintain that the clause was designed only to secure equal treatment by the executive in enforcing laws, but that it does not constrain the legislature.[29] It would follow that much of modern equal protection jurisprudence is inconsistent with original meaning, although some of it might be justified under the Privileges or Immunities Clause. In *Living Originalism*, I argue that this view of the 14th Amendment is mistaken and that the equal protection clause applies to all branches of the government.[30] Nevertheless, Barnett's point is that depending on how

[26] See Balkin, *supra* note 8, at 352–3, n 16. Akhil Amar has offered a masterful demonstration of the multiple ways that American legal culture uses the constitutional text to generate meaning. Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By (2012).

[27] *Id.*

[28] *Id.*

[29] See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre- Enactment History*, 19 Geo. Mason U. Civ. Rts. L. J. 1 (2008); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385, 1390, 1396, 1435–8 (1992); David Currie, The Constitution in the Supreme Court: The First Hundred Years 349 (1985).

[30] Balkin, *supra* note 8, at 220–1.

we decide this question, we must be bound by the consequences in constructions.

The original framework and democratic legitimacy

Barak Medina argues that a constitution cannot specify how it should be interpreted. Therefore, we do not have to accept the adopters' choice to organize constitutional language in terms of rules, principles, and standards.[31] "[T]here is no good reason," Medina argues, "to recognize . . . the power of the framers and adopters of the Constitution, to determine the method of interpretation regardless of moral and sociological considerations."[32]

I agree with Medina that we are not required to adopt the framers' theory of how to interpret their words. But if we accept the Constitution as our plan and if we commit to follow the plan over time, we must have a sense of what the plan is. We must understand what our theories of interpretation and construction are working on; we must know what it is that we are being faithful to. I believe that a Constitution's choice of norms—hard wired rules versus abstract principles or flexible standards—is not merely a question of interpretive convention that is external to a plan. Rather, it is part of the economy of delegation and constraint that is built into the plan.[33] When we interpret the Constitution, we must ascribe to the adopters, through their choice of words, the purpose of foreclosing some things through hard-wired rules while leaving other things open for future construction.

If one sees things in this way, then one will give the text what Medina calls "lexical priority:" we cannot adopt constructions that are inconsistent with the text.[34] The reason is not that text establishes its own authority; it is because of the hypothetical imperative I mentioned earlier. *If* we want to accept the Constitution as our plan for politics, the binding nature of the text is a consequence of that choice.

Medina finds it entirely too convenient—perhaps too good to be true—that under my reading the American constitution has many open-ended provisions, which leave plenty of room for—and indeed require—subsequent construction.[35] The possibility of constitutional construction, in turn, helps ensure (but does not guarantee) the democratic legitimacy of the Constitution-in-practice over time.

But the reason that the Constitution contains lots of room for construction is that the people who wrote it were neither omniscient nor fools. Many of them

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[31] Barak Medina, *"Foundational" Originalism?: On Jack Balkin's* Living Originalism, 7 JERUSALEM REV. LEGAL STUD. 1, 6 (2013).

[32] *Id.* at 8.

[33] Balkin, *supra* note 8, at 47–9; see also Shapiro, *supra* note 14 (arguing that law, as a form of social planning, involves an economy of trust and distrust).

[34] Medina, *supra* note 31, at 8.

[35] *Id.* at 7–8.

had experience in drafting state constitutions and in studying the confederations of other countries before they drafted the American Constitution. They understood that a constitution cannot settle everything in advance, and that many aspects of a constitution—including bills of rights—must be expressed in terms of fairly open-ended language. Their assumptions are confirmed by the experience of constitution-making in other countries in the past two centuries. So what looks like a happy accident is not really so. If Medina and I were to write a constitution together, we would soon experience the same kinds of limitations in our ability to control the future through mere words. We would therefore choose a collection of rules, standards, principles, and silences that necessarily left a great deal open for future development.

But what if the American Constitution was not written this way, Medina asks? Suppose the adopters seriously miscalculated how to write a constitution for the future. Would I still insist that we interpret it according to the adopters' economy of delegation and constraint? Even if the Constitution was adopted by procedurally legitimate methods, there is no guarantee that the adopters' choice of language will be democratically or morally legitimate as time goes on. Imagine, for example, a constitutional text that contained mostly rules, with few opportunities for construction, that these rules were unjust, and that they only got more unjust with time. Or suppose that the American Constitution had contained a general interpretive clause that said: "This Constitution shall be interpreted and applied according to the expectations of people living at the time of the adoption of each of its provisions."[36]

If the Constitution contained such a text it would be very difficult for Americans today to accept the text as our framework for politics, because the Constitution would lack political and moral legitimacy. And if we could not accept it as our Constitution, it would not be binding on us.

To be sure, such a Constitution might have produced a very different political history. It might well have been eventually amended or abandoned, in whole or in part. Americans might have created a new set of political conventions for employing the text. For example, they might have jettisoned Article V and treated the Constitution as amendable like a statute. They might have treated the text as a purely political document like the Declaration of Independence, or as a defeasible set of norms; or they might have simply ignored certain parts that they found politically inconvenient. The Constitution might have become more like Magna Carta—of largely symbolic significance—or it might have been treated like an ancient statute embedded in and therefore modifiable by a larger set of common-law conventions. (This is,

[36] Medina argues that the framers of a constitution cannot prescribe the rules by which it should be interpreted. Medina, *supra* note 31, at 6. But in this hypothetical we imagine that later generations have agreed to be bound by the Constitution's text, and the text contains a clause further specifying the meaning of the text's use of standards and principles.

in fact, similar to David Strauss's view of how the Constitution actually operates.)[37]

If Americans moved to one of these solutions, the new interpretive conventions would probably have been achieved only through considerable political struggle (or even violence) until they were widely accepted. Then that would be the basic law accepted by the American people, rather than the original constitutional framework. Perhaps this is how some countries have worked around their constitutions; they have simply agreed to abandon the old plan, partially or completely. But *Living Originalism* argues that this is not the best account of the American experience. Americans do not understand themselves as having abandoned their constitution, either in whole or in part. Therefore I have offered an account of constitutional interpretation that makes the best sense of that basic assumption of American politics.

Now it happens to be the case that the US Constitution does not contain such a "original expected applications" clause. On the other hand, as Medina points out, it does contain various rules that cannot be changed without Article V amendment. For example, the Senate is malapportioned by population; candidates can become president even if they do not win the popular vote if they win a majority of the electoral college; and there is a significant gap between the time of election and when a new president takes office.

Medina points out that these features of the Constitution do not allow for "on-going public participation" through constitutional construction because they are hard-wired rules. "It is not clear how," he says, "these parts of the Constitution establish their democratic legitimacy."[38] I do not believe that these hard-wired parts of the Constitution establish their democratic legitimacy in isolation. Rather, they are deemed legitimate only as part of a larger framework, and the question is whether the American people accept that framework as their plan for politics.

I should note that some, but not all, of these hard-wired features allow for legislative workarounds that are forms of constitutional construction.[39] For example, Americans could move to popular election of the president if Congress ratified a state compact (permitted under the Compact Clause). Under this compact, states would agree to pledge their electoral votes to whoever wins the national popular vote. If enough states join the compact, the electoral college majority will always go to the candidate who receives the most votes.[40]

This example demonstrates that when we look at the Constitution as a whole, many parts of the Constitution that appear to be fixed are actually

[37] David A. Strauss, The Living Constitution (2010).
[38] Medina, *supra* note 31, at 8.
[39] See Mark Tushnet, *Constitutional Workarounds*, 87 Tex. L. Rev. 1499 (2009).
[40] For one such proposal, see National Popular Vote, http://www.nationalpopularvote.com/. This solution is not perfect because the winning candidate may receive only a plurality of the popular vote, and not an absolute majority. It would take more work to organize an "instant runoff" ballot that would always produce a majority.

default rules that can be changed through ordinary legislation. However, not all hard-wired features can successfully be altered in this way; and in some cases, even if the changes were technically feasible they would be politically impossible in practice.[41] Therefore the democratic legitimacy of the Constitution-in-practice depends on whether Americans are willing to accept the entire package—including those features that can be changed through construction and those that can be changed only through Article V amendment or a new constitutional convention.

But need it be an all-or-nothing choice? Couldn't a country simply abandon parts of its constitution without abandoning the whole? Surely this has happened many times before. My point, however, is that abandonment is not interpretation or construction. To the extent that the change is democratically legitimate, it is a new exercise of constituent power. This exercise of constituent power may not fit within the constitution's amendment process, but that does not mean that it therefore must be an interpretation or a construction of the Constitution. It might be an extra-constitutional change that has been ratified by the public.[42]

Imagine that a country's constitution has fixed term limits for the presidency; the president keeps running for new terms in defiance of the rules, and the populace keeps electing him or her. I do not doubt that this sequence of events may have altered the country's basic law and made the term limits provision a dead letter, but I would not say that this event was merely an interpretation or construction of the constitution. That is so even if we stipulate that the result is democratically legitimate. Just as interpretive fidelity does not guarantee democratic legitimacy, democratic legitimacy does not guarantee interpretive fidelity. And, of course, some forms of partial abandonment may not even be democratically legitimate. Imagine a military coup in which the generals keep most of the constitution in place but simply ignore the rules for elections.

Medina also argues that framework originalism may "fail[] to satisfy a 'thick' norm of procedural legitimacy" because it delegates too much to later generations.[43] Although Medina agrees that "the framers and adopters of the Constitution may delegate powers to others,"[44] he believes that merely stating a set of basic constitutional principles in a Bill of Rights "is insufficient to gain [a constitution] procedural legitimacy," because "[s]uch a constitution does not reflect substantial moral choices of the People."[45]

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[41] For example, Mark Tushnet has pointed out to me that one could effectively do an end-run around the Senate's malapportionment if the Senate were to adopt an internal rule under Article I, section 5, clause 2, that it approved all legislation passed by the House. But it is unlikely that Senators would ever agree to a rule that rendered them politically powerless.

[42] This is Bruce Ackerman's account of both the 14th Amendment and the New Deal. See *supra* note 7.

[43] Medina, *supra* note 31, at 9.

[44] *Id.* at 10.

[45] *Id.*

I do not see why this is so. When a constitution provides that speech, press, petition, and assembly are protected, it reflects a substantial moral choice; after all, the constitution is protecting speech, and not golf, cooking, or stamp collecting. Perhaps more importantly, Medina's argument seems to prove too much. Constitutions around the world include vague and abstract guarantees of rights that inevitably delegate application to the future. Surely it cannot be the case that all of these constitutions and constitutional provisions lack procedural legitimacy. I believe that Medina's real point, which I agree with, is that a constitution like America's has democratic legitimacy today not merely because its initial adoption satisfied some basic test of procedural legitimacy, but because its provisions are embedded in a constitutional system that possesses sufficient sociological and moral legitimacy.[46]

Original meaning and contemporary construction

Living Originalism's theory of original meaning is "thin." It includes the original semantic meaning of the Constitution's words (including any generally recognized terms of art) and the adopters' choice of rules, standards, or principles. But it does not include the adopters' original expected applications—how the adopters would have applied the text to specific questions, or how the adopters would have formulated the relevant principles of decision. Interpreters may look to this evidence as a resource when they construct present-day doctrines and practices that implement the Constitution, but they are not required to accept it.

Why are original expected applications not part of original meaning? Re'em Segev argues that because "the meaning that a person attributes to a text is a descriptive phenomenon,"[47] "the law, and particularly the original meaning of the constitutional text, is [also] a descriptive phenomenon," not a normative one, and therefore "should be determined in light of an empirical investigation."[48] The fact that parts of the text are stated in abstract or vague terms, Segev maintains, does not mean that the adopters intended to delegate the meaning of those terms to future generations.[49] If we want to know what "equal protection of the laws" meant to the adopters in 1868, the best evidence is what people thought the text would do in practice.

It is possible, Segev concedes, that with respect to some of the provisions in the Constitution, the adopters did not think that their expectations and assumptions were controlling, but instead meant to delegate constitutional construction to future generations. But "it does not seem plausible that the common meaning of *all* the constitutional standards and principles in the

[46] *Id.*
[47] *Id.* at 4.
[48] Segev, *supra* note 1, at 38.
[49] *Id.* at 4–5.

United States Constitution include only a very thin normative idea without any additional, more specific content."[50] Therefore, Segev argues, unless there is strong evidence to the contrary, the original meaning of the text should include the specific content intended by the adopters—the kinds of cases and situations to which they believed the text would apply or not apply, and their expectations about what the text would accomplish in practice.

I disagree. The Constitution becomes law because of an act of popular sovereignty; therefore the proper inquiry is the legal effect of this act. The legal meaning of an act of popular sovereignty is not meaning per se but *meaning for a particular purpose*—the purpose of creating a constitution. Only some elements of meaning become part of binding law; others do not. Legal meaning is only a subset of communicative meaning.

The concept of "meaning" itself has many meanings. It might refer to the semantic content of the words in a sentence, or "meaning" might refer to the purposes, intentions, expectations, or cultural associations held by a person who utters a sentence or who understands a sentence. When a constitutional provision is adopted, the enacted text becomes law, but all of the hopes, intentions, expectations, and cultural associations of the adopters do not become law, even if they were part of the original speakers' meaning.[51] (Note that it is commonplace to *ascribe* purposes to a statute or to a text, but this is not the same thing as saying that the psychological states of adopters are part of the law.) To be sure, these various elements of meaning may be important as aids for present-day constitutional construction, but they are not part of the framework and we do not have to employ them.

So even if Segev is correct that what a speaker meant is a descriptive question and subject to empirical investigation, it does not follow that all aspects of that meaning are part of the law. The aspects of meaning that become law depend on the nature of the practice in which we are engaged, and on the purposes of a constitution.[52] Thus, my thin account of original meaning follows not simply from the nature of language or communication but from my view that a constitution is a certain kind of plan for politics that contains a particular economy of delegation and constraint.

The psychological beliefs and expectations of the adopters are not part of the plan, although they could have been written into the plan. For example, the Eighth Amendment could have said: "Cruel and unusual punishments as understood at the time of this Constitution shall not be inflicted." But the text does not say this, and reading the text as if it does say this actually alters the plan by changing its interpretive economy. It attempts to turn

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[50] *Id.*

[51] See also Barnett, *supra* note 25, at 45–7.

[52] Andrei Marmor has made a similar point. Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, __ Fordham L. Rev. __ (forthcoming 2013).

standards and principles into something more like rules in order to avoid responsibility for present-day judgements.

Segev might still object: the semantic meaning of "equal protection of the laws" might be far narrower than it appears to us today. We cannot assume that just because the text looks abstract and general to us that it looked that way to ordinary speakers of the English language in 1868, when the 14th Amendment was adopted. This aspect of original meaning is a matter of social fact, and it is subject to empirical investigation. The commonly understood semantic meaning of the phrase "equal protection of the laws" in 1868 might have referred only to racial equality, or equality based on race or sex, but not equality with respect to any other issue. Or, as mentioned above, the text might refer only to denials of equal treatment by the executive branch, but not by the legislative or judicial branches.

If this is Segev's objection, it has a great deal of merit. Some parts of the Constitution are terms of art; they might look abstract or general to laymen today but the original meaning may be different. In the same way, some of the Constitution's seemingly abstract principles and vague standards might turn out to have had a generally accepted semantic meaning far narrower than we would assume today; we cannot know this for certain until we do some investigation. Moreover, evidence of how people used the words and how they expected these words would apply to particular situations might be helpful in deciding this question, even given the distinction between original meaning and original expected applications.

My point, however, is that most of the Constitution does not consist of generally recognized terms of art or of words with narrow meanings that would seem unusual to us today. With very few exceptions the words that constitute its abstract principles and vague standards mean today what they meant at the time of their adoption. This is an historical, not a philosophical claim, and with respect to any particular clause it can be proven wrong given sufficient evidence to the contrary. But for most of the clauses that American constitutional lawyers argue about most of the time, the ordinary (and contemporary) meaning is also the original meaning. For example, as I argue in *Living Originalism*, in 1868 "equal protection of the laws" was not a term of art specifically limited to race—the choice of general language was deliberate. In addition, in 1868 "equal protection of the laws" was not a generally recognized term of art that referred only to executive action but not to legislation.[53]

Yet, Segev, might ask, why *would* a constitution use abstract or general principles or standards that delegate their implementation and construction to future generations? Constitutional norms, like legal norms generally, Segev

[53] See Balkin, *supra* note 8, at 25–6, 220–1.

argues, are "descriptive," not "normative"; the view that constitutional norms are "essentially normative rather than descriptive . . . seems odd in general and it is incompatible with Balkin's assumption that the (constitutional) law is determined in light of its original meaning."[54]

I am not quite sure what Segev means by the claim that legal norms are not normative, but I assume he means merely that the content of the law is a social fact and therefore subject to empirical investigation. In any case, that claim is not a problem for my argument. There is no jurisprudential difficulty in legal norms delegating implementation and construction to others. It happens all the time through the adopters' choice of language. Moreover, that is how most constitutions are written. There is nothing odd about a constitution that delegates the implementation of legal norms to future generations, unless one thinks that virtually all constitutions are odd.

In a constitutional plan, adopters can use language in two different ways. The language of a constitution can create institutions and it can create norms. Most constitutions do both. The American Constitution, for example, creates different branches of government that are put in competition with each other; it also contains legal norms.

Generally speaking, most constitutions have a combination of rules, standards, and principles. They can be specific or general; and they can be abstract or concrete, clear or vague. Rules require comparatively little practical reasoning to apply and therefore tend to delegate little to future generations. Standards and principles, on the other hand, normally require considerable practical reasoning to apply, and therefore tend to delegate a great deal of application to future generations. The more abstract or vague the standard or the principle, the more delegation is required.

These aspects of constitutional language are neither unusual nor accidental. They are familiar features of a basic law that has to get politics up and running, help keep politics stable, and allow the political system to last for an indefinite length of time, structuring the political decisions of people who will be born into very different circumstances in the future. Because adopters are not all-knowing, they must leave something to be worked out by future generations. Therefore they must choose an economy of delegation and constraint. They do this through their choice of constitutional language: the kinds of institutions they create, and their choice of legal norms.

For this reason, I argue that a commitment to the text's original meaning also includes a commitment to the adopters' choice of rules, standards, and principles. In this limited respect, we care about what the adopters intended. But that is because we want to understand the interpretive economy they created through their choice of language.

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[54] Segev, *supra* note 1, at 39.

Barak Medina's essay elaborates on this point. He distinguishes between the kinds of sources we should use to "identify[] the Constitution's original framework" and the kinds of "sources that are relevant for interpreting the Constitution" once we understand the framework.[55] To understand the framework, we might need to know what kinds of legal norms the adopters put in the plan: whether they sought to delegate certain decisions to future generations, or instead sought to impose hard-wired solutions that would be difficult to get around. On the other hand, once we know what the basic framework is, constitutional construction may use historical sources quite differently. We might look to the intentions and expectations of the framers as resources that justify our present-day constructions.[56]

Original meaning and linguistic context

Lawrence Solum's paper points out that even a thin conception of original meaning like mine must include more than purely semantic content; it must also take into account pragmatic elements of language. When we communicate with others, we rely not only on the generally accepted semantic meanings of our works, but also on the context of our utterance. Thus, much of what we mean when we speak to other people is not directly stated in the words we use; rather, the audience infers our meaning from background context.

How does background context affect our judgements of what is in the constitutional framework and what is a matter of constitutional construction? Consider the following examples. In Article I, section 1 the Constitution says that the "Congress of the United States . . . shall consist of a Senate and House of Representatives." Later on in the document it refers to the "Senate" without specifying that it is part of Congress. Does fidelity to original meaning require that the later appearances of the word in the text refer to the same US Senate, or could they refer to any Senate—for example, the Roman Senate? The Constitution uses numbers. Does fidelity to the original meaning require that these numbers be in base 10 or could we permissibly interpret them to be in base 12? The Constitution refers to dates, months, and years. For purposes

[55] Medina, *supra* note 31, at 12. I make a similar distinction in *Living Originalism*. Balkin, *supra* note 8, at 46–9.

[56] Medina argues that the constitutional framework should also include certain structural elements: his examples are an "override clause," which allows the legislature to override court decisions, and a "limitation clause," which "authorizes the legislature to infringe liberties under a certain set of conditions." Medina, supra note 31, at 10. If, as in some constitutions, these features are actually part of the constitutional text, there should be no doubt that they are part of the framework. In any case, nothing in my argument is committed to what John Hart Ely once called a "clause-bound interpretivism." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 11, 12–13, 88 & n.* (1980). Quite the contrary, I assume that interpreters should try to understand how the different parts of a constitution work together. More interesting examples are structural principles that are not explicitly stated in the text but that are presumed by the interaction of the Constitution's different parts, like the separation of powers and federalism. Structural principles are technically constitutional constructions that we infer from the text. But some of them are so essential to the operation of the framework that we would seriously misunderstand the Constitution if we neglected them.

of original meaning, is the relevant calendar the Gregorian calendar, or can the Constitution be fairly interpreted to refer to the Jewish lunar calendar, or to any other calendar?

Most people, I suspect, would argue that later references to the Senate refer to the US Senate, that the numbers in the Constitution are in base 10, and that calendar dates refer to the Gregorian calendar. They would infer these understandings from background context and consider them to be part of the original meaning.

But the adopters also probably had unspoken beliefs about how the words of the text would be applied in concrete situations. Solum calls these application beliefs. For example, most people in 1791, if asked, might have assumed that hanging was not cruel or unusual punishment, and most people in 1868 would probably have assumed that the new Equal Protection Clause did not protect homosexuals from discrimination.

As noted above, I deny that widely held beliefs at the time of adoption about how the text should be applied are part of the framework, because I distinguish between original expected applications and original meaning. But couldn't those beliefs about application also be part of the background context in which the Constitution's text was communicated to the public? And if they are not, then does this mean that the calendar and the number system are not part of original meaning either?

Not necessarily. We must infer *some* content that is not directly stated from background context in order for the Constitution to function properly as a plan or framework. But not all inferences from background context are either necessary or appropriate for this purpose.

How do we decide what inferences from background context are needed for the plan to work? Solum mentions Ryan Williams' test: "whether a reasonable member of the ratifying public at the time of enactment would have recognized the implied content as following obviously and noncontroversially from the choice of the particular language used in the provision and the relevant background context."[57]

That is a good start, but obviousness and lack of controversy by themselves are not sufficient. Some applications of an abstract text might be obvious and noncontroversial at the time of adoption, but it does not follow that these applications are part of the framework. For example, a person in 1791 might have thought it obvious and uncontroversial that the first amendment did not protect negligently false statements that defame public officials, sexually explicit materials, public swearing, or some kinds of commercial advertisements. A person in 1868 might have thought it obvious and uncontroversial that the new equal protection clause did not make unconstitutional common-law coverture rules that denied married women almost all of their common-law

[57] Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 Colum. L. Rev. 498, 544 (2011).

rights. The distinction between original meaning and original expected applications presupposes that some applications of a principle that are unthinkable or "off-the-wall" at one point in history might later become plausible or "on-the-wall" at another.[58] When adopters use standards and principles, they are leaving judgements about how to apply the text to later generations *even though* they believe that some applications are obvious and noncontroversial, and that others are "off-the-wall."[59]

In addition, the test cannot be what a member of the adopting public actually believed or assumed, or what they would believe or assume if we could magically whisk them to the present and ask them. When we infer meaning from context, what we infer may not consciously have been in the speaker's mind. Thus, when we use background context to infer original meaning, we *ascribe* certain beliefs and intentions to the adopters regardless of their actual understandings and their actual psychological states. In many cases the adopters might never have thought of a particular question that we raise today. For example, none of the adopters might have ever heard of base-12 arithmetic, and if we posed the question to them, they might not understand what we were talking about.

A better approach is to start with the premises of framework originalism. A constitution is a plan for politics that employs a combination of constraints and delegations to future generations. This plan is the constitution, not the beliefs of its adopters. To be faithful to the plan we must try to understand the plan's particular economy of delegation and constraint. Background context may be necessary to make inferences about this economy, even when it is not fully or explicitly stated in the text.

What kinds of content should we infer? We should ask whether it makes sense for us to ascribe to the adopters the purpose of delegating a particular issue to be worked out in the future, *even though* the adopters might have had application beliefs about the issue in question. If it does not make sense to ascribe a purpose to delegate a question to the future, then we should infer that this content is part of the framework.

Is it reasonable for us to think that the base system for interpreting numbers listed in the Constitution would have to be worked out later on? Is it

[58] On the concepts of "off-the-wall" and "on-the-wall, see Balkin, *supra* note 24, at 177–82.

[59] Jed Rubenfeld argues that the paradigmatic cases involving individual rights or national powers in which the adopters expected the text would apply are binding on later generations because they are part of our constitutional commitments. JED RUBENFELD, REVOLUTION BY JUDICIARY 15 (Harvard University Press 2005). In contrast, situations in which the adopters did not expect that a right or power would extend are by definition not commitments and are therefore not binding. I regard paradigmatic cases as particularly persuasive constructions but do not treat them as part of the framework. In Rubenfeld's approach, the scope of federal rights and powers can only increase from original expected applications. This approach explains much of current constitutional practice as a descriptive matter, but that is largely because of the way the American Constitution has developed since the New Deal and the creation of the National Security State. Rubenfeld's theory does not explain how the framers could ever have committed themselves to limited federal or presidential powers. See Balkin, *supra* note 8, at 346 n. 23.

reasonable for us to believe that what the word "Senate" referred to was to be left to the judgement of later interpreters? In neither case would this be a plausible assumption. Therefore we should infer the relevant content from background context and treat it as part of the original meaning. In contrast, it is entirely plausible that adopters might delegate to later generations how to apply abstract phrases like "equal protection" or "freedom of speech" even if they thought that some questions of application were obvious and noncontroversial in their own day.[60]

This approach to background context solves some problems, but I am quite sure that it does not solve all of them. I expect that there is much more thinking to be done about what kinds of inferences from background context should form part of the basic framework in a theory of framework originalism. Moreover, once we decide that a particular background context is part of original meaning, applying it to new circumstances may sometimes create unexpected difficulties. For example, someday the USA might move to a different calendar than the Gregorian calendar. If that were to happen, interpreters would have to figure out how to translate references to dates and times in the Constitution—for example, when the president's term starts and ends—in terms of the new calendar. There might be multiple ways of performing the translation, based on what we understand the point of the text to be. That would make the translation a question of constitutional construction.

In sum, framework originalism employs background context to infer aspects of original meaning that are not explicitly stated by the text, but it limits these inferences to those necessary to make sense of the basic framework and its economy of delegation and constraint. Therefore its account of original meaning is "sparse" or "thin."[61]

Solum argues that a constitutional theory's choice of whether to have a thick or thin account of original meaning is also a choice about how much to leave to constitutional construction. That choice, in turn, depends on "the underlying justifications for originalism" and "institutional concerns" about decision-making capacities.[62] Consider the theory of *Living Originalism* in terms of

[60] Conversely, we may sometimes discover gaps and inconsistencies in the text that the adopters do not appear to have foreseen. Here background context is important for a different reason. It helps us recognize that there has been a partial failure of communication. In these cases, we should treat the plan as incomplete and we should engage in construction to make the best sense of the plan. Akhil Amar offers an example. Article I, section 3 of the Constitution provides (i) that trials of government officials following impeachment by the House of Representatives are conducted before the Senate; (ii) that the Vice-President presides over the Senate; and (iii) that the Chief Justice shall preside in case of impeachment of the President. Suppose the Vice-President is impeached. Can Vice-Presidents preside over their own trials? Background context should lead us to conclude that the text is incomplete or has misfired. We may therefore engage in constitutional construction to fill in the gaps without concluding that we are contradicting the text. Given the long-standing common-law principle that no person may be a judge in his or her own case, the Senate may provide in its internal rules that the President Pro Tempore (a Senator), and not the Vice-President, presides at the latter's trial. See Amar, *supra* note 24, at 5–7.

[61] Solum, *Construction and Constraint: Discussion of* Living Originalism, 7 Jerusalem Rev. Legal Stud. 17, 31 (2013).

[62] *Id.* at 32.

these two criteria: (i) the theory's underlying justifications for framework originalism and (ii) how the theory understands the institutional capacities of various actors in the constitutional system.

I claim that the adopters chose a particular interpretive economy through the text's choice of rules, standards, principles, and silences. But we cannot know precisely what the adopters thought; therefore, as Barak Medina correctly points out, this is really an ascription of purpose to the adopters rather than a description of their psychology.[63] I justify this ascription of purpose on three grounds. First, it is the best account of why the text reads the way it does. Second, it best coheres with the basic problem faced by adopters with limited knowledge of the future who want to write a constitution designed to last for an indefinite period of time. Third, it is consistent with common features of constitution writing that we see at different times and places around the world, including not only the constitutions of other nations but also the 50 American state constitutions.

There is also a fourth and equally important reason for ascribing these purposes to the adopters. Solum argues that whether a theory of original meaning is thick or thin depends on what he calls "the underlying justifications" for originalism. My theory of constitutional interpretation seeks to explain not only what it means to be faithful to an ancient Constitution, but how the processes of constitutional change can promote the democratic legitimacy of the political system over time. That is, my theory justifies originalism and living constitutionalism together; each is crucial to the justification of the other.

Why is this so? The Constitution may continue as law over time because of rule of law values, but that does not mean that it retains the same degree of democratic legitimacy over time. Although the initial adoption of the Constitution and subsequent amendments may be legitimate as an act of popular sovereignty, their democratic warrant fades over time as the adopting generation passes away and is replaced by generations who had no say in the creation or adoption of the constitutional text. The text may be no less law as time passes, but it may become less democratically legitimate law.[64]

"We the People of the United States" today are not the same human beings as the "We the People" who adopted most of the Constitution's text. In fact, most of the present generation may not even be related to the adopting generation. This feature of a long-lived constitution creates a democratic deficit, because the people who live under the Constitution cannot say that they or their elected representatives created it as law. The democratic deficit increases over time, attenuating the Constitution's democratic legitimacy.

The best response to this problem is to view We the People of the United States as a trans-generational subject, consisting of the successive groups of

[63] See Medina, *supra* note 31, at 7.
[64] Barak Medina makes a similar point. Medina, *supra* note 31, at 8.

individuals who inhabit the same nation, and to treat the Constitution as a trans-generational project, in which each generation contributes its part. But if this answer is to be more than a convenient fiction, each generation must have a hand in building out the Constitution they live under. The Constitution-in-practice must be produced over time by many different people living at different times; it must become the work of many generations, not merely the adopting generation. This means that the constituent or constitution-making power of the people must be exercised not only at the comparatively rare moments of initial adoption and amendment, but continually in constitutional development. If the Constitution is to retain its democratic legitimacy, the initial act of popular sovereignty and the rule of law are not sufficient. Democratic legitimacy must flow from a source that is continually refreshed. That source is constitutional construction, which, in the long run, is responsive to democratic processes, as described in Chapters 13 and 14 of *Living Originalism*.

Solum also argues that the choice of a thick or a thin theory of original meaning depends on institutional concerns about who is best equipped to make decisions about constitutional meaning and application. In his essay, Solum focuses primarily on the institutional capacity of judges. I focus instead on the institutional capacity of generations.

The adopting generation cannot foresee everything that will happen in political life; it cannot predict how technology, foreign affairs, demographics, and social change will drastically alter the world it imagines and wreak havoc on its best-laid plans. Because human capacities for knowing the future are limited, the adopting generation must rely on the work of subsequent generations in order to make the constitutional project a success over time. And because it lacks the institutional capacity to create a complete constitution on its own, the adopting generation needs the assistance of many people devoted to the project who are strewn throughout time.

The adopting generation cannot create a complete constitution—that is the hope and the folly of what I call "skyscraper originalism."[65] What the adopting generation can do, however, is to structure and channel the political choices of later generations in the hope that these people will become attached to the project and work to make it succeed. A trans-generational project, in short, must make the most of each generation's limited capacities to understand the challenges of the future, and it must rely on the contributions of each succeeding generation. Later generations may fail us; that is why legitimacy also depends on constitutional faith.

If the constitutional constructions of successive generations give the Constitution its continuing democratic legitimacy, and if the efforts of

[65] Balkin, *supra* note 8, at 21–2 (defining skyscraper originalism as the view that at the time of initial adoption the Constitution is "more or less a finished project, albeit always subject to Article V amendment.")

successive generations are necessary to compensate for the limited institutional capacity of any single generation, then the best account of original meaning is a thin theory. The US Constitution is not only among the most long-lived in history, it is also among the most difficult to amend in the world. A theory of original meaning that is too thick will exacerbate the democratic deficit of a long-lived constitution, and it will undermine democratic legitimacy as time goes on. A thick account of original meaning will also fail to economize on the collective wisdom of successive generations; it will make far less use of the institutional capacities of later generations to adapt government to technological, social, and economic change, and to new crises and unexpected needs.

The problems created by the increasing democratic deficit of originalism over time and by the limited institutional capacity of adopters are best solved by a thin theory of original meaning, which leaves ample room for constitutional construction. Constitutional construction, in turn, occurs through the processes of living constitutionalism. That is why I argue that framework originalism and living constitutionalism are not opposed but mutually dependent; they are two sides of the same coin.

Living Originalism and halakhic development

I close with a few remarks about Gideon Sapir's remarkable tour de force in which he compares the argument of *Living Originalism* with different positions about interpretation in the halakhic tradition.[66] I shall work in the opposite direction, trying to find analogies between the different positions that Sapir describes and positions taken by American constitutional scholars about how to interpret the US Constitution.

At the outset, however, I should emphasize that however interesting these comparisons can be, there is an important difference between the Torah and the Constitution. According to Jewish tradition, the author of the Torah is God. Moses merely conveyed God's message, and the judges, prophets, and sages who followed attempted to represent God's will. The authors of the American Constitution, in contrast, are human beings representing the American people at a particular point in time. They are flawed, imperfect, and creatures of a particular moment. To be sure, Americans, in a fit of patriotic excess, sometimes ascribe god-like powers to the framers, and a few conservative Christians have even suggested that the Constitution, like the Bible, is divinely inspired. But this is not the majority view; most Americans realize that even if most of the founders were enlightened individuals, they were still human beings with moral failings and limited vision. Some of the founders owned slaves, many of them did not believe in the equality of women, and so on.

[66] Gideon Sapir, Living Originalism – *The Jewish Version*, 7 Jerusalem Rev. Legal Stud. 49 (2013).

This distinction between the Torah and the Constitution is important when we criticize the law as it has been handed down to us. If a particular halakhic interpretation is unjust or illogical, it may be because later interpreters have erred in some way, but it cannot be because God erred. If the Constitution is unjust or illogical, it may be because subsequent interpretations are mistakes. But it may also be because the original plan was defective, or came to be so over time.

Sapir frames the question of interpretive theory in a particularly interesting way. Relying on the fact that God is perfect and infallible, he asks how it is possible that there could ever be a dispute about the Torah, given that the entire law, both written and oral, was given by God to Moses on Mount Sinai and passed down by Moses to generations of sages.[67] Within the halakhic tradition, several explanations have been offered for how disagreement could be possible. Each has parallels in American debates about the proper interpretation of the Constitution. While the Talmudists asked how *disagreement* was possible, Americans have asked how *interpretive change* is possible and to what extent this change can be legitimate. The two ideas are related. If there can be genuine disagreement about the law, then presumably more than one position might be adopted reasonably and in good faith. And if more than one position may be adopted, this creates the possibility of legitimate change in the accepted interpretation, either of the Torah or of the Constitution.

The first position, which Sapir ascribes to Maimonides, regards disagreement as a sign of past errors or failings, which, unfortunately, are now quite difficult to correct. Disagreement about proper halakhic interpretation comes from "moral failure—Torah sages . . . did not serve their teachers sufficiently, and are therefore unable to effectively use the tools of interpretation to uncover the correct explanation."[68] This approach is closest to the first generation of originalists, such as Raoul Berger, Robert Bork, and Antonin Scalia. They argued that contemporary constitutional scholars had forgotten the original intentions or the original meaning of the framers and had therefore strayed from the correct path. Bork even called his book on originalism *The Tempting of America: The Political Seduction of the Law.*[69] Such failings led to illegitimate judicial decisions; hence Berger's book on the 14th Amendment was entitled *Government by Judiciary.*[70] In a famous law review article, Scalia described originalism as "the lesser evil,"[71] and explained that even if judges were not perfect historians, they had a duty to try their best to ascertain original meaning. Sometimes, Scalia argued, because judges in the past have strayed so far

[67] *Id.* at 4. See also Yaakov Elman, *R. Zadok Hakohen on the History Of Halakha*, 21 Tradition 1–26 (1985) (tracing the history of the problem).
[68] Sapir, *supra* note 66, at 5
[69] Robert H. Bork, The Tempting Of America: The Political Seduction Of The Law (1990).
[70] Raoul Berger: Government By Judiciary: The Transformation of the Fourteenth Amendment (1977).
[71] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

from original meaning, we will be stuck with nonoriginalist interpretations because people have come to rely on them. But a true originalist should refuse to go any further down the path of error. We should acknowledge that these decisions are mistakes and not make them worse than they already are.

The second position, ascribed to R. Yannai, explains interpretive disagreement, and therefore interpretive change, quite differently. R. Yannai argued that God created an abundance of possible meanings for the Torah when he gave it to Moses on Mount Sinai, so that later generations are free to choose among them. Thus, Sapir explains, "[t]he interpreter is not required to ascertain the intent hidden in the text because even at the time it was given the text did not have a single intent. The lawmaker's intent does not dictate the truth of the interpretation because no clear intent ever existed."[72] This is the view of many nonoriginalists today. It is similar to the position of Paul Brest, the critic of the philosophy of original understanding who first coined the term "originalism."[73] Among Brest's many criticisms of originalism was that the people who framed and ratified the Constitution would likely have many different intentions, or no position on some issues, so that there was not a single controlling intention. Therefore, Brest argued, the search for original intention is "misconceived."[74] There is, however, a difference between the two positions: R. Yannai assumes that later interpreters may pick from among the many possible meanings that God in his infinite wisdom has provided;[75] nonoriginalists like Brest, in contrast, argue that they are free to choose constructions that none of the adopters would have found acceptable.

The third position, which Sapir finds offered by various Talmudic authorities, is that, with respect to certain (but not all) questions, "God merely established principles and left us the authority to determine the details . . . . The phrase used in all these passages, which helps identify them, is 'Scripture handed it over to the Sages.'"[76] This approach is perhaps closest to the position of some originalists about presidential power; as with the Talmudic theory, it applies only to some questions of constitutional interpretation. According to this view, the scope of executive power and its relationship to the power of Congress evolves through practice, which, in turn establishes certain precedents that should guide later political actors.[77]

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[72] Sapir, *supra* note 66, at 6.

[73] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 212–13, 220–1 (1980); see also Dworkin, *supra* note 23, at 315–22.

[74] *Id.*, at 204.

[75] Cf. Babylonian Talmud Eruvin 13b, in which a heavenly voice declares that the views of the schools of Hillel and Shammai are both acknowledged to be "the words of the living God," but Hillel's position becomes the law.

[76] Sapir, *supra* note 66, at 7.

[77] See, eg, Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and Separation of Powers*, 126 Harv. L. Rev. 411 (2012) (canvassing current theories of historical practice and offering a new theory of when and how past precedents should affect the separation of powers).

The fourth approach, which Sapir identifies with the famous story of the Oven of Akhnai, is that even if God intends that the law be applied in one way, the authority to interpret and expound the law has been given to the Sages once it leaves God's hands. Therefore the Sages may choose a different position that binds them and all future generations.[78] This position obviously has affinities to nonoriginalist views which do not consider the adopters' views as binding on later generations, but may regard precedents as binding. However, a more interesting analogy—although not precisely identical—is to the views of James Madison and other founders. They argued that with respect to certain disputed constitutional questions, the meaning of the text could be "liquidated" by subsequent practice, which would thereafter settle the issue.[79]

A good example of how original meaning might be liquidated according to Madison's views is Congress's power to charter a national bank by creating a corporation. In the 1790s Madison—who can lay as great a claim as any to being a primary drafter of the US Constitution—took the position that such a bank was unconstitutional. However, despite his objections, Congress passed a bill creating the First Bank of the United States, which was signed by George Washington. Authorization for the First Bank expired, and during the War of 1812, the federal government was greatly hampered by having to rely on state banks for loans to finance the war.[80] In 1815, during Madison's second term as president, he continued to oppose the creation of a second bank on policy grounds, but he now argued that it was settled that Congress had the constitutional power to create such a bank. And a year later, in 1816, he signed a bill authorizing a second bank.[81] According to Madison's theory of interpretation, the original meaning of the Constitution had been liquidated by practice.[82] The Supreme Court subsequently upheld the constitutionality of the bank in the famous case of *McCulloch* v. *Maryland*.[83] Note that under Madison's theory, later generations are also bound by the liquidated meaning. But this

[78] Sapir, *supra* note 66, at 8. See Babylonian Talmud Bava Metzia 59b.

[79] See The Federalist 37 (Madison) ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); see also Letter from James Madison to Judge Spencer Roane (September 2, 1819), reprinted in 3 Letters And Other Writings Of James Madison 143, 145 (1865) ("It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter; more especially those which divide legislation between the general and local governments; and that it might require a regular course of practice to liquidate and settle the meaning of some of them.").

[80] See Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and Materials 37 (5th ed. 2006); Bray Hammond, Banks and Politics in America from the Revolution to the Civil War 227–33 (1957).

[81] See Brest et al., *supra* note 80, at 37; Hammond, *supra* note 80, at 233.

[82] See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 U. Va. L. Rev. 1, 11–14, n. 33 (2001). Madison seems to have believed that liquidation could only allow subsequent interpreters to choose from among a set of plausible constructions; it did not allow them to repeal or alter the existing law. *Id.* at 13.

[83] 17 U.S. 316 (1819) Chief Justice John Marshall's opinion also argued that the constitutionality of the bank had been settled by practice. *Id.* at 401–2.

seems not to have occurred. The Jacksonian Democrats who dominated politics in the antebellum period disagreed with Madison's acquiescence and rejected the decision in *McCulloch*. President Andrew Jackson vetoed a bill renewing the second bank on constitutional grounds, and eventually shut the bank down.[84]

The fifth and final position, which Sapir identifies with the Orthodox Rabbi Moshe Shmuel Glasner (also known as the Dor Revi'i, after his most famous book). Glasner's view is that the Oral Torah (*Torah she-be'al peh*) has a different function than the Written Torah (*Torah she-bichtav*). The Oral Law was designed to be transmitted by word of mouth from generation to generation. It was not to be written down so as "not to tie the hands of the sages of every generation from interpreting Scripture according to their understanding."[85] The Torah and its authority as God's law remain eternal precisely because of an oral tradition's inherent possibilities for transformation over time, "for the changes in the generations and their opinions, situation and material and moral condition require[] changes in their laws, decrees and improvements."[86]

Sapir identifies Glasner's position with the argument in *Living Originalism*. I think that he is correct to do so. What is distinctive about this position is that it treats the Written Torah differently from the Oral Torah, and views the two as performing complementary functions. The Written Torah does not change, but its interpretation and application may change, and an important site of this change is the evolution of the views that constitute the Oral Torah.

As the Talmud itself (ironically) explains, the oral law was not supposed to be written down.[87] Nevertheless, for reasons of historical urgency, and in order to secure the survival of the Jewish people in the Diaspora, the Oral Torah had to be recorded. This process of compilation began a period of intense intellectual creativity and disputation that eventually produced the Talmud. But once the Talmud was completed, later commentators—who were also persons of great intelligence—felt bound to accept the opinions of the Talmudic sages as correct representations of the Oral tradition. That which was supposed always to be in flux became increasingly fixed and hardened.

To be sure, the abbreviated, dialectical, and sometimes obscure discussion of legal points in the Talmud still left plenty for later commentators to argue about. Perhaps for this reason we should even be grateful that the Talmud is

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[84] See Brest et al., *supra* note 80, at 74–9.

[85] Sapir, *supra* note 66, at 11. See Yaakov Elman, *Rabbi Moses Samuel Glasner: The Oral Torah*, 25 TRADITION 63–9 (1991), available at <http://www.math.psu.edu/glasner/Dor4/elman.html>.

[86] Sapir, *supra* note 66, at 11.

[87] Babylonian Talmud Temurah 14b; see also Babylonian Talmud Gittin 60b. Given the actual history of Talmudic development, one must take these prohibitions with a grain of salt. See H. L. STRACK AND GÜNTER STEMBERGER, INTRODUCTION TO THE TALMUD AND MIDRASH 31–4 (Markus Bockmuehl, trans., 2d. ed. 1996) ("the doctrine of the oral Torah in rabbinic times did not result in a prohibition of writing.").

sometimes complicated, multivocal, gnomic, and even enigmatic. For the same reason, perhaps we should also be grateful that there is both a Babylonian and a Jerusalem Talmud! If a distinctly oral tradition is to be consolidated into writing, then perhaps it is best that the writing have gaps, ambiguities, inconsistencies and multiple positions for later thinkers to work with.

Nevertheless, the attempt to codify the Oral Torah through writing necessarily marked a diminution in the potential creativity of the Oral Law.[88] The Oral Law's original function—to serve as a wellspring of change through a tradition of reasoned argument about how to apply timeless principles to changing circumstances—was inevitably circumscribed.[89]

Even so, the best exemplars of the Jewish tradition, I would argue, have perpetually sought to recapture the spirit of the original division of labor between the Written and Oral Torah. They have done so through their creative use of the halakhic tradition.

Ideally, then, we should seek to treat the writings of the Sages as we would an oral tradition—one that can evolve through reasoned disputation, even if parts of it have been committed to writing. That means, among other things, that we should honor the Sages but not take them as the final word. The Jewish tradition contains many suggestions to this effect, but this is not, however, the standard view of Orthodox Judaism today. In general the older the opinion or commentary, the more authoritative it is.[90] That is why Sapir must search far and wide in the Orthodox world to find a position like Glasner's. He notes, however, that this approach has found a home in some elements of Conservative Judaism.[91]

According to tradition, Rabbi Judah Ha-Nasi and his successors began to compile the Oral Law because they feared that the Jewish people in the Disaspora would forget the law unless it was written down. Now one might seek to compile the oral tradition for two reasons. The first is to preserve the wisdom and the resources of the past so that they could be used by future generations; the second is to provide a univocal account of the divine law. The second reason is inconsistent with Glasner's position, but the first is not. A living tradition needs memory and resources to work with, even if it changes over time.

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[88] As Sapir explains, this is also Glasner's view. Sapir, *supra* note 66, at 11, n. 28; Elman, *supra* note 85. In contrast, Jacques Derrida's has famously argued that many of the strengths and weaknesses commonly associated with oral communication are also true of writing, and vice versa. Jacques Derrida, Of Grammatology (1976). Thus, Derrida might suggest that a system of continuous writing and interpretation can also provide ample opportunity for creativity.

[89] Elman, *supra* note 85.

[90] See Sapir, *supra* note 66, at 9–11. This has become so in practice despite the principle of *hilkheta ke-vatra'ei* (the law is according to the later scholars).

[91] Sapir, *supra* note 66, at 10–11. One might also point to Rabbi David Hartman's liberal Orthodox Judaism. See David Hartman, A Heart of Many Rooms: Celebrating the Many Voices Within Judaism 50 (1999); David Hartman, A Living Covenant: The Innovative Spirit in Traditional Judaism 36 (1995).

Which reason best explains why the oral tradition was committed to writing? If the Sages sought to produce a single voice expounding the law, they failed miserably. The Talmud is embedded in and encourages a culture of dialectic and disputation. Whether the Talmud is the cause of this culture, or whether this culture has shaped the way the Talmud has been received, it is impossible to say. In any case, it is better to understand the task of the Sages not as setting forth a single true answer for all generations, but as preserving memory and bestowing a set of resources on the future. The Sages sought to safeguard the intellectual tools with which later generations might create their own version of the Oral Law.

Such an interpretation of their purposes properly views the law as a living thing. A living tradition survives not because it is fixed, but because it is adaptable. Thus, if the Torah survives as a living tradition, it survives not merely because the Oral Law has been written down at a particular moment in time, but because the Oral Law can never be fully written down and is therefore never fully and finally completed. No amount of writing by the Sages or by later commentators can perfectly describe it or complete it. In fact, the very attempt to write down the law at a particular point in time leads to still more commentary, and still more writing. The attempt to codify the Oral Law must always fail, and the full understanding of the law must always be projected into the future. But that is the secret of the law's endurance. Under this view, the Torah as a whole—including both its written and its oral aspects—lives because it moves *with time*, rather than being fixed *against time*. It lasts because it is always becoming; it endures because it is never finished.

The Torah differs from the Constitution because the former by tradition is the word of God and the latter is the product of limited, fallible, and mortal human beings. Nevertheless, these ideas about the complementary relationship between the Written Torah and the Oral Torah have obvious analogies to theories about the interpretation of an ancient and venerated Constitution. Like Jewish law, the Constitution is an institution that spans many generations. To survive as an institution its content must not be completely fixed. It must possess a combination of elements—some which change, and some which do not change. And to each generation must be given the tasks of redeeming the law's promises in its own time, and of making the law its own.