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Grégoire C N Webber

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Law Department

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What is an Original Constitution?

Grégoire C N Webber^{*}

Abstract: This essay seeks to explore originalism as something other than a theory of interpretation. This might strike one as odd. After all, if originalism is a theory of interpretation, how else might one seek to understand it? Yet, conceiving originalism as something other than a theory of interpretation may reveal insights that otherwise would remain beyond one's immediate grasp. Recognising this potential, I reflect on how originalism can be understood, not as a theory of interpretation, but rather as a constitution. In short, the query explored is: What is an original constitution? What model of a constitution does originalism contemplate? Now, attempting to design an original constitution may suffer from the same contests facing any account of originalism. Different originalists make different commitments, and any attempt to select among them will be vulnerable to criticism. Despite differences between originalists, three commands and commitments can fairly be attributed to originalism without raising too much contest: the original constitution is written at the founding and changed only by the amendment procedure it sets out, is law insofar as it provides rule-like prescriptions, and occupies a delimited domain, leaving the rest to democratic activity. The model of an original constitution here elaborated seeks to provide a model of a fictional constitution that satisfies, perhaps to a fault, the key commitments and commands of originalism. It seeks to bring to light the commands and commitments originalism would have of us, and of constitutions.

^{*} Law Department, London School of Economics and Political Science. Email: G.Webber@lse.ac.uk. This paper was first prepared for the *Originalism Colloquium* hosted by Grant Huscroft and Bradley Miller at the University of Western Ontario in October 2008. I wish to thank colloquium participants Larry Alexander, James Allan, Randy Barnett, Mitch Berman, Brian Bix, Stanley Fish, Jeffrey Goldsworthy, Mattias Kumm, Margaret Martin, Steve Smith, Larry Solum, and Keith Whittington for excellent discussions. Thanks are also due to Graham Gee, Vicki Jackson, Robert Leckey, and Stéphanie Vig for their comments.

INTRODUCTION

What is originalism? Given the breadth and depth of scholarship on the matter, the question may suffer from an embarrassment of different answers. One might appeal to the ‘old originalism’ with its focus on the intentions of the founders or the ‘new originalism’ with its focus on the public meaning at the founding; in turn, one might review the range of *originalisms* that have animated constitutional scholarship since the turn to new originalism.¹ Proceeding in this way would reveal that the answer to our question is not obvious or, rather more accurately, that any answer purporting to identify a single account of originalism would likely be contestable. The contest would be raised not only within the family of originalists, but also over who may be admitted therein, as not all self-proclaimed originalists are recognised by others to be members of the same set.² But proceeding with this genre of answer would already assume a prior answer to our question. For before one seeks to identify the commands and commitments of originalism, one must situate originalism within the world of constitutional theory—namely, as a *theory of interpretation*.

Originalism, of course, is usually situated alongside other theories of constitutional interpretation. In the United States, it is contrasted with living constitutionalism or, in rather less descriptive and more encompassing terms, with ‘non-originalism’.³ At other times or in other jurisdictions, competing theories of interpretation may include textualism or intratextualism,⁴ purposive or progressive interpretation,⁵ moral principles,⁶ representation-reinforcing interpretation,⁷ structural or unwritten constitutional principles,⁸ and living tree constitutionalism,⁹ to name but a few. Much of the debate surrounding originalism has focused on its

¹ An excellent overview of the old and new originalism is provided in K.E. Whittington, ‘The New Originalism’ (2004) 2 *Georgetown Journal of Law and Public Policy* 599. A catalogue of different originalisms is offered in M.N. Berman, ‘Originalism is Bunk’ (2009) 84 *New York University Law Review* 1 and T.B. Colby and P.J. Smith, ‘Living Originalism’ (GWU Legal Studies Research Paper No. 393, 2008) at ssrn.com/abstract=1090282 (last visited 24 September 2009).

² See E. Leib, ‘The Perpetual Anxiety of Living Constitutionalism’ (2007) 24 *Constitutional Commentary* 353, 355: ‘many originalists will read Balkin to be a living constitutionalist in disguise—and may not let him into their club’.

³ See R.E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004), 92 and ‘An Originalism for Nonoriginalists’ (1999) 45 *Loyola Law Review* 611, 617: ‘It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative.’

⁴ See A.R. Amar, ‘Intratextualism’ (1999) 112 *Harvard Law Review* 747.

⁵ For Canada, see P.W. Hogg, ‘Canada: From Privy Council to Supreme Court’ in J. Goldworthy (ed), *Interpreting Constitutions: A Comparative Study* (New York: Oxford University Press, 2006).

⁶ See R. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996).

⁷ See J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Massachusetts: Harvard University Press, 1980).

⁸ See D. Dyzenhaus, ‘The Incoherence of Constitutional Positivism’ and M.D. Walters, ‘Written Constitutions and Unwritten Constitutionalism’ both in G. Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008).

⁹ See W. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2007).

inherent and comparative merits as a theory of interpretation. Reasons supporting originalism have been *first-order* (inherent to originalism) and *second-order* (instrumental and comparative) as well as directed to what the task of interpretation *must* of necessity be and what it *should* be.¹⁰ These debates have contributed to our understanding of originalism. But just as the focus on originalism as a theory of interpretation has assisted in focusing attention on specific commitments and commands of originalism, it has also privileged one vantage point over others, perhaps keeping from view other related commitments and commands. How might originalism's commands and commitments be brought to light? How might one articulate what originalism assumes about a constitution?

In this essay, I wish to explore originalism as something other than a theory of interpretation. This might strike one as odd. After all, if originalism is a theory of interpretation, how else might one seek to understand it? Yet, this would not be the first time that originalism is conceived as something other than a theory of interpretation. For example, believing that '[n]o approach to constitutional interpretation makes sense in every possible world', Sunstein invites one to view originalism (as well as Thayer's rule of the clear mistake,¹¹ minimalism, and perfectionism) as a *place* or *site*.¹² In Sunstein's world of originalism, the 'original public meaning is quite excellent', 'the democratic process is also very fair and good', and judges, 'unleashed from the original public meaning, would do a great deal of harm, unsettling well-functioning institutions and recognising, as rights, interests that do not deserve that recognition'.¹³ While one may question Sunstein's characterisation of originalism's assumptions, his thought experiment makes explicit the fact that originalism proceeds on certain unstated background assumptions, not all of which are brought into full focus when examining originalism as a theory of interpretation in a situated context. The insight that Sunstein offers is less in his articulation of what the various background commands or commitments of originalism might be, but more in how the exercise of imagining a theory of interpretation other than as a theory of interpretation might reveal what would otherwise remain beyond our immediate grasp.

Recognising this potential, I wish to reflect on how originalism can be understood, not as a theory of interpretation or as a place or site, but rather *as a constitution*. In short, the query I wish to explore is: *What is an original constitution?*

On its face, the question seems ill-posed. After all, if originalism is a theory of interpretation, it cannot provide for the very subject matter that is the object of interpretation. Just as a theory of purposive interpretation cannot provide for the

¹⁰ See L. Solum 'Semantic Originalism' (Illinois Public Law Research Paper No. 07-24, 2008) at ssrn.com/abstract=1120244 (last visited 24 September 2009). See also A. Kavanagh, 'Original Intention, Enacted Text, and Constitutional Interpretation' (2002) 47 *American Journal of Jurisprudence* 255, 294.

¹¹ See J.B. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 144.

¹² C.R. Sunstein, 'Second-Order Perfectionism' (University of Chicago Law & Economics, Olin Working Paper No. 319, 2006) at ssrn.com/abstract=948788 (last visited 24 September 2009).

¹³ *ibid.*, 2-3.

purpose that it seeks to expound, originalism cannot, it would seem, provide an account of an original constitution. Theories of interpretation are dependent on something to interpret; they cannot provide that matter in and of themselves. Yet, this mode of reasoning can be turned on itself: we can ask whether we ever fully know what *it is* that we are interpreting without already engaging, however tentatively, in the exercise of interpretation. If we accept that we cannot fully grasp ‘the constitution’ without a theory of interpretation in hand, then it becomes possible to say that the subject matter of interpretation cannot be divorced so easily from an interpretive approach.¹⁴ If true, ‘the constitution’ may be a different statement depending upon who is speaking and to what theory of constitutional interpretation they are appealing.

There is, of course, a practical activity that we identify as constitutional interpretation, which (we assume) refers to the same ‘constitution’ in undertaking the task of interpretation. Yet, upon examination, we realise that some seek to interpret the intent of the framers, others look to the words in their historical context, and others still look to principles or judicial precedent. While students of constitutional interpretation all consider their activity to be one of interpreting ‘the constitution’, ‘some people use the phrase to refer to one sort of object while others use it to refer to another sort of object’.¹⁵ In this way, we see how theories of constitutional interpretation interact with the subject matter of interpretation. While one should avoid exaggerating the point, ‘the constitution’ seems to play the role of a ‘facilitative modern equivocation’—a sort of *placeholder* that interpreters substitute with the founders’ intention, the original public meaning, or moral principles, among the alternatives.¹⁶ In the case of real world constitutions, theories of interpretation all begin with the written instrument, although few end there.¹⁷ The final destination depends on one’s interpretative approach.

On this basis, our query—What is an original constitution?—may seem somewhat less ill-posed. How does originalism understand ‘the constitution’? What does it substitute for that placeholder? How does it determine the equivocation? What model of a constitution does originalism contemplate? Now, attempting to design an original constitution may suffer from the same contests facing any account of originalism. Different originalists make different commitments, and any attempt to select among them will be vulnerable to criticism. Despite the differences between originalists, I believe that three commands and commitments can fairly be attributed to originalism without raising

¹⁴ This intellectual exercise could be carried further, with the question: What makes the object of interpretation (the constitution) politically legitimate? This question is familiar to originalist debate, where scholars argue in favour of the original intention of the framers (or ratifiers) or the original public meaning of the text based (in part) on reasons of political legitimacy.

¹⁵ S.D. Smith, ‘What Does Constitutional Interpretation Interpret?’ in G. Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008), 38.

¹⁶ *ibid.*, 36.

¹⁷ In the case of the largely unwritten British constitution, we could say that interpretation begins with legal and political practice, not text. The focus of this essay, as befits the theory of originalism, is on a written constitution.

too much contest. I will argue that the original constitution is written at the founding and changed only by the amendment procedure it sets out, is law insofar as it provides rule-like prescriptions, and occupies a delimited domain, leaving the rest to democracy.¹⁸

This account of the original constitution may be too obvious or thin for some, or mistaken in orientation or underinclusive for others, but I hope that it will be sufficient for present purposes. I hope to show that when one moves from the world of the original constitution to real world constitutions in all their diversity, originalism cannot hope to occupy the entire field of constitutional meaning. The choice is not, as it were, between making a real world constitution fit the model of an original constitution or a non-original constitution; *that choice* is a false choice. Real world constitutions lend themselves to originalism in some, perhaps many, but not all respects. I aim to show that this is neither a fault of real world constitutions nor of originalism; rather, it is merely a consequence of interpretation's delimited domain within constitutional meaning.

The following account of an original constitution provides a model of a fictional constitution that satisfies, perhaps to a fault, the key commitments and commands of originalism. It seeks to bring to light the commands and commitments originalism would have of us, and of constitutions. The exercise of divorcing real world constitutions from the model of an original constitution is important, for too much scholarship on originalism conflates the circumstances of real world constitutions—and the US Constitution in particular—as delimiting the circumstances of originalism. This proximity of theory to practice—while illuminating in many respects—at times obscures both, as when the theorist makes the theory fit the facts (consider the criticism that some originalists doctor the evidence to prevent slavery or the death penalty from being sanctioned by the US Constitution) or when the lawyer moulds the facts to satisfy the theory (consider the attempt by some to make the US Constitution rule-like through appeals to original expected application). As a consequence, theory and its application seem impossible to divorce. While this anchor has helped to fashion a markedly practical perspective, it has also at times skewed the debate surrounding originalism. The following account of *the original constitution* cuts loose the anchor.

¹⁸ I will use throughout the expression 'the original constitution' for the purposes of simplifying the text. My aim here is not to provide an account that identifies more closely with any of the competing and compelling available *originalisms*. I readily acknowledge that (despite my simplifying usage), my account will be of '*an* original constitution' (that is, one possible model among others) rather than an account of '*the* original constitution' (that is, the only possible model).

THE ORIGINAL CONSTITUTION AND THE FOUNDING MOMENT

The original constitution is established at its founding, which serves as the definitive reference point for situating the constitution. Events preceding the founding may explain the impetus for and the content of the original constitution, but—like the events that follow the founding—they are irrelevant for identifying the original constitution.¹⁹ Rather, the authoritative discoverable meaning of the original constitution is settled at the founding, being ‘the time its language is enacted’ such that its ‘fixed meaning should remain the same until it is properly changed’.²⁰

The written instrument is the product of a moment, an event; it is not a story. The only story (if it can be so considered) that the original constitution allows for is the story it itself prescribes: constitutional amendments. The original constitution is an end-state, a completed project, a story the narrative of which began only to end. It achieves permanence, stability, and continuity—all of which, in turn, can be referenced back to the original constitution’s founding moment.

THE CONSTITUTION’S WRITTENNESS

The idea of a constitutional founding as a single event rather than as a story draws on the original constitution’s *writtenness*.²¹ The text of the original constitution provides a constant reference: it was written at a specific historical moment. The written character of the original constitution differs from what is often taken to be Britain’s distinctively political constitution, which, despite being in many respects written in Acts of Parliament,²² is in many other respects a constitution of tradition. Tradition, like the constitutional conventions that are a part of it, knows no founding moment. It may know of a defining moment or a paradigm case, but the tradition itself cannot be so reduced. In many ways, the defining moment is only so identified after the fact as it is incorporated into the evolving tradition. The original constitution, by contrast, is authoritatively identified at the moment it is founded.

To translate tradition into writing is to change tradition, to settle it at a point in its evolution, to select a moment in history as the end of evolution. The

¹⁹ This should not be taken to dismiss the original intentions of the framers or ratifiers. For the purposes of this essay, I remain agnostic as between the ‘original intent’ and ‘original public meaning’ camps within the originalist family, and my account of the original constitution seeks to satisfy both.

²⁰ R.E. Barnett, ‘The Misconceived Assumption about Constitutional Assumptions’ (2009) 103 *Northwestern University Law Review* 615 and Barnett, n 3 above, 103-109. See also Whittington, n 1 above, 599.

²¹ For a discussion of the writtenness of a constitution and its relationship to commitments that are carried out over time, see J. Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001), especially ch 3.

²² Note that the more important fact of the British constitution’s writtenness may be the codes of conduct and other non-statutory instruments published (but not enacted) by Parliament and the Government. I am indebted to Graham Gee for this point.

original constitution is not tradition—it does not evolve. The written text of the constitution provides a fixed reference, against which actions may be measured.²³ This is not to deny that a tradition may build up (indeed, may *need* to build up) around the original constitution, sustaining its authority. After all, because any act of founding may fail, the original constitution has ‘continuing force only because of the actions of subsequent generations in according the founders’ text as their own’.²⁴ But that is not the same thing as identifying the original constitution as a tradition. Unlike tradition, a historical snapshot of the original constitution will always be accurate, whereas a historical snapshot of tradition (insofar as the exercise is even possible) will become, with time, dated and misrepresentative of the tradition.

The fixed reference—the founding—discloses an authoritative choice as to what the constitution shall be. Being committed to writing,²⁵ the original constitution is evidence of what was determined at the founding. It led those with the authority to adopt it to deliberate and to caution the merits of the original constitution’s clauses and to channel their actions towards or against enactment.²⁶ The text was the focus of their ultimate agreement, as they proceeded through disagreements on meaning, amendments, substitutions, additions, and other changes to the text. The decision to select a written instrument over an evolutionary tradition secured the meaning of the original constitution. To ascribe to it a meaning that it did not bear at its founding is to undermine and to undo its writtenness and the decision to commit matters to writing. In this way, the meaning of the original constitution is fixed by its writtenness.

To express fidelity to the text that is the original constitution is to understand that its meaning is discoverable as a “social fact”, determined by social conventions, including conventions which make certain kinds of evidence of the speaker’s intentions relevant [if at all], as well as others which fix dictionary meanings and rules of grammar’.²⁷ Interpretation, in this way, is akin to a ‘science’.²⁸ Constitutional meaning exists *before* the interpretive exercise is undertaken; it is contained, somehow, within the original constitution, not within the mind of the interpreter. To be faithful to the original constitution is to

²³ Lawrence B. Solum has identified the ‘fixation thesis’ (‘the semantic content of each constitutional provision is fixed at the time the provision is framed and ratified: subsequent changes in linguistic practice cannot change the semantic content of an utterance’) as one of originalism’s four theses: ‘Semantic Originalism’ (n 10 above).

²⁴ K.E. Whittington, ‘Let’s Call the Whole Thing Off?’ (2005) 22 *Constitutional Commentary* 365, 374. See also P. Brest, ‘The Misconceived Quest for the Original Understanding’ (1980) 60 *Boston University Law Review* 204, 225.

²⁵ The following is based on L.L. Fuller, ‘Consideration and Form’ (1941) 41 *Columbia Law Review* 799, 900-901, reviewed in Barnett, n 3 above, 101 and n 3 above, 630-631.

²⁶ See J. Waldron ‘Legislating with Integrity’ (2003) 72 *Fordham Law Review* 373 and J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), ch 4, 6.

²⁷ J. Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1, 8.

²⁸ A. Scalia, ‘Common-Law Courts in a Civil-Law System’ in A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 3, 14-15. Contrast K.E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1999), 175.

discover *its* meaning and to abide by it. To change the meaning of the original constitution is to change the original constitution and, in so doing, to challenge its authority as a written instrument adopted at a given moment. That challenge is two-fold: it is both directed to the founding moment that created the original constitution and subversive of the original constitution's prescribed method of change—the amendment formula.

By challenging the authority of the original constitution, one denies the authority of the founding moment. One renders the founding moment temporary and turns the constitution into a story, with a fixed beginning but no definite end. The merits of doing so may well depend on whether one views the original constitution as a 'covenant with death and an agreement with Hell',²⁹ but in seeking to improve the constitution, one is no longer being faithful to its status as written text. The aim of faithful interpretation must be to discover the original constitution's meaning at the founding, not the 'commitments that one or another philosopher thinks . . . should have [been] made' or should now be made.³⁰ Interpretation is a preserving act, drawing on the commitment that 'that law continues in force over time until it is amended or repealed' with the consequence that '[i]f the law states a directive, rule or norm that continues in force over time, we must preserve the meaning to preserve the directive, rule or norm that the law states'.³¹

The original constitution's founding marks an authoritative beginning. It is of no consequence that the original constitution may have been inconsistent with prior constitutional requirements;³² the original constitution is a new overriding moment: it erases that which comes before, and premises all that follows. It is, in short, a revolutionary instrument. It contains 'the constitution' in exclusive whole; one need not refer to other instruments or to tradition. The original constitution understands post-founding constitutional development as a tradition of constitutional *compliance*, not constitutional *change*.

Understood this way, the original constitution is an expression of self-government—of living out a people's commitments over time.³³ The constitution's commitments remain their commitments, until *they* choose to change them by the mode *they* prescribe in the constitution. The people speak at the moment of the founding only to retreat from the stage. They exercise their power to create the original constitution only once, and thereafter resign

²⁹ The expression is William Lloyd Garrison's.

³⁰ B. Ackerman, 'The Living Constitution' (2007) 120 *Harvard Law Review* 1737, 1754; see also J.M. Balkin, 'Original Meaning and Constitutional Redemption' (2007) 24 *Constitutional Commentary* 427, 438.

³¹ Balkin, *ibid*, 429-430.

³² In the case of the US Constitution, the Framers decided that nine states—not the thirteen prescribed by the Articles of Confederation—would suffice to establish the founding moment.

³³ The idea of a constitution as living out commitments over time is explored in Rubinfeld, n 21 above. For the difficulties of this narrative in former British colonies and the debate as to who (the former colony or the British Parliament) framed the constitution, see I. Binnie, 'Constitutional Interpretation and Original Intent' in G. Huscroft and I. Brodie (eds), *Constitutionalism in the Charter Era* (Markham, Ontario: LexisNexis Butterworths, 2004), 375 (Canada) and Goldsworthy, n 27 above, 25 (Australia). For a general critique of the 'fiction' of 'We the People', see Barnett, n 3 above, ch 1.

themselves to their constitutional forms: the legislature, the executive, the administration, the court, the citizen. It is only through these constitutional forms that the people now speak. In this way, the original constitution can be understood as both a performative act (by the people) and a declarative act (of who the people are).

The assumption that it is the people who authored the original constitution rests on national myth ('it was We the People who adopted this, our, original constitution') or declared truth ('we few assembled here speak for We the People'). This assumption is important to resist claims that the original constitution represents 'the dead hand of the past'. There is no doubt that in many instances, the reality of historical progression (including emancipation) reveals that the people then were at best only a subset of the people now. But that need not be determinative. After all, we today quite simply are not them then. Yet, should the people now continue to understand themselves as the people then, then the original constitution provides them with a constant reference to their founding moment. This intertemporal association is largely beyond the control of the original constitution and rests on commitments to political community that the original constitution cannot prescribe, even if its continuing validity rests on such commitments. Yet, if it is the case that the founding moment was *both* performative *and* declarative, then there is some malleability and fluidity in the constitutional forms of the people, with the consequence that the existing constitutionally-prescribed forms are 'provisional'. Other forms can be imagined and, if actualised, will challenge the original constitution's ongoing performative and declarative claims.³⁴

But whatever be the call to revisit the constitutional forms prescribed, the original constitution maintains that all changes must be effected through the exclusive mode of constitutional change: the amendment formula.

THE EXCLUSIVE MODE OF CONSTITUTIONAL CHANGE

The amendment formula of the original constitution plays two related roles. First, it confirms for greater certainty what would obtain even in its absence: the original constitution means what it meant at the moment it was adopted. Why else would the original constitution prescribe a mode for change but for the fact that the meaning of the constitution is fixed?³⁵ Second, the amendment formula provides not only a mode of constitutional change, but more fundamentally it provides for the *exclusive* mode of constitutional change. For if it is the case that one must be a 'faint-hearted originalist' not to follow the original constitution or if one must

³⁴ M. Loughlin and N. Walker, 'Introduction' in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 1-2. See also Ackerman, n 30 above, for an account of how the American people no longer see themselves in a state-based conception, thus challenging the logic of state-based constitutional amendment provided for in the US Constitution.

³⁵ See generally Goldworthy, n 27 above.

adulterate the original constitution in order to follow *stare decisis*,³⁶ then it follows that the true original constitution cannot be changed in these ways. It is fixed, stable, and constant, subject only to the amendment procedures it prescribes; and if the original constitution did not prescribe any such procedures, it quite simply could not be changed.³⁷

In keeping with the relationship between writtenness and stability, fixity, and continuity, there is a sense in which amendments to the original constitution should not be lightly undertaken. This may be reflected in the amendment formula itself, which may prescribe a more cumbersome mode of constitutional change than was appealed to when adopting the constitution at the moment of the founding. But quite irrespective of the conditions precedent for achieving a constitutional amendment, an amendment should not be approached lightly; it should be out of the ordinary and altogether exceptional. To do otherwise would be to lessen the importance of the founding and, with it, the authority of the original constitution.³⁸ For even if an amendment changes the original constitution, it does not (because it cannot) recreate the founding moment. Because the entire process is channelled through the constitutional forms established by the original constitution, any amendment may only *change*, not *found* a constitution, quite irrespective of the degree of change that is being pursued. The people then spoke directly;³⁹ the people now speak only through their constitutionally prescribed forms. A constitutional amendment provides no new beginning; rather, there is merely a new chapter in (what now becomes) the story of the original constitution. Moreover, where amendments are targeted rather than encompassing, they differ from the founding moment in another important sense: whereas the original constitution was adopted as a whole, amendments are adopted clause-by-clause. In this way, while amendments may recreate perfectly the original constitution's writtenness, they cannot recreate its 'wholeness'.⁴⁰

Understood thus, the amendment formula *both* provides access to the founding of the original constitution by allowing for change to what was originally determined *and*, by only allowing change according to the original constitution's

³⁶ A. Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 849, 864, 861. Indeed, Scalia correctly states that '*stare decisis* is not *part* of [his] originalist philosophy; it is a pragmatic *exception* to it': A. Scalia, 'Response' in Scalia, n 28 above, 140. See also R.E. Barnett, 'Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism' (2006) 75 *University of Cincinnati Law Review* 7.

³⁷ Some constitutions have 'eternity clauses' (see the Basic Law for the Federal Republic of Germany, art 79(3)) which render 'inadmissible' certain amendments. This is quite different from judicially-proclaimed basic structures that are beyond amendment, as the Indian Supreme Court has declared.

³⁸ The US Constitution and its amendments provide a particularly powerful statement of the immutability of the founding: all adopted amendments are positioned at the end of the document and do not change the original wording of the Constitution. Contrast this with the *mélange* of constitutional documents comprising the Constitution of Canada, non-exhaustively catalogued at Constitution Act, 1982, s 52(2) ('The Constitution of Canada includes...').

³⁹ This, too, is part of national myth or declared truth insofar as the people cannot ever speak without institutions, processes, and rules to constitute their voice. There is, it would seem, no alternative to constitutional forms to let the People speak, making the founding anything but an act of the People (though they may, of course, ratify the founding after-the-fact).

⁴⁰ This point is discussed in Amar, n 4 above, 795-796 and A.R. Amar, 'America's Constitution and the Yale School of Constitutional Interpretation' (2006) 115 *Yale Law Journal* 1997, 2004.

own channels, confirms the qualitative difference between the founding and all that follows. Hence, while the original constitution does not prevent change, it necessarily conditions it.

No doubt, extra-constitutional evolution occurs, and legislatures, executives, courts, and citizens may act in places where the original constitution does not venture. So long as there is no contradiction with constitutional prescriptions, the original constitution bears no direct relationship with this extra-constitutional development. Yet for this very reason, no amount of extra-constitutional change can affect the original constitution's meaning. The story of the original constitution begins with the founding and continues only if there are amendments; there is no other constitutional story to be told.⁴¹

To argue that existing constitutional arrangements are unjust and that the amendment process is too cumbersome to correct them is simply another way of saying that a proposal for constitutional change is not yet ripe for amendment. The original constitution is fixed and proponents of amendments should be hesitant; the narrative of societies is not only one of progression, but also of decline.⁴² What is unjust from your political perspective may be perfect justice from mine. A core purpose of the original constitution is to prevent change, to settle select matters, and to remove them from political debate and 'ordinary politics'. The importance of the founding and the difficulty of achieving amendments testify to the importance of what the original constitution speaks to. Should change be sought, it must rise to a similar level of importance before warranting a place on the stage of the original constitution. One cannot consistently argue for the importance of a difficult amendment procedure so as to maintain stability and immutability, while arguing for the necessity of changing the original constitution's meaning by other, simpler means.⁴³ In the end, 'either we believe in the need for a cumbersome amendment process or we do not',⁴⁴ and the original constitution does.

THE ORIGINAL CONSTITUTION IS LAW

Today, when students of the constitution speak of *constitutional law*, they may, without embarrassment, enumerate a panoply of matters without including the constitution itself. They may, of course, refer to the written constitution, but likely

⁴¹ cf Ackerman, n 30 above, 1750: 'every American intuitively recognizes that the modern amendments tell a very, very small part of the big constitutional story of the twentieth century'.

⁴² See A. Scalia, 'Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Scalia, n 28 above, 40-41. See also Balkin, n 30 above, 457-458.

⁴³ This point is forcefully made in G. Huscroft, 'Constitutional "Work in Progress"? The Charter and the Limits of Progressive Interpretation' (2004) 23 *Supreme Court Law Review* (2d) 413.

⁴⁴ J. Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 42.

only in secondary importance to precedent, general doctrines, judicially-prescribed tests or factors, and the like. With time, and no doubt in the minds of many students of the constitution, the accumulation of judicial precedent will come ‘to assume more importance than the original text’.⁴⁵ Not so with the original constitution.

The original constitution is written and it is law. This may be too obvious to state; after all, most constitutions contain a supremacy clause, which states that the constitution is the ‘supreme *law* of the land’. Yet, for the original constitution, much is contained in the idea of law. The only constitutional law prescribed by the original constitution is *the law of the original constitution*. To achieve this, the original constitution is best understood as a set of constitutional rules and any provision that is not law in this specific sense is akin to an inkblot—it is without meaning.

CONSTITUTIONAL RULES

Some scholars provide accounts of a ‘thin constitution’ constituting only of declarations of grand principles and preambles announcing high aspirations,⁴⁶ leaving the constitution to be no more than a reference in political debate—perhaps a source of neutral language disclosing or directing an overlapping consensus for public reason. A constitution might also, as did many communist constitutions, provide a vision of a perfect future society.⁴⁷ It might, in turn, announce declarative principles.⁴⁸ Alternatively, some scholars look to a constitution as ‘the stage for a kind of common-law jurisprudence’⁴⁹ or as a symbolic public statement about the society’s commitment to rights.⁵⁰

The original constitution is altogether different. In keeping with the importance of the founding and the associated commitments to stability and fixity, the original constitution is law in the sense that it cannot be changed except through the amendment procedure it itself prescribes. It is a prescriptive and authoritative ‘act of communication ... conveying meaning from an author to a reader’.⁵¹ It provides propositions for action and compliance, not for debate. The original constitution is, in short, an exclusive reason for action or non-action, not a

⁴⁵ Hogg, n 5 above, 90. See also H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: University of Chicago Press, 2002), 2 and Goldsworthy, n 27 above, 29.

⁴⁶ See M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999), where the thin constitution is identified as the US Declaration of Independence and the US Constitution’s preamble.

⁴⁷ See A. Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999), 1.

⁴⁸ See the ‘Directive Principles of State Policy’ in the Constitution of India, Part IV and the Constitution of Ireland, s 45.

⁴⁹ See W. Waluchow, ‘Constitutions as Living Trees: An Idiot Defends’ (2005) 18 *Canadian Journal of Law and Jurisprudence* 207, 230 and T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003).

⁵⁰ See J. Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346, 1365; Waluchow, *ibid*, 234-235.

⁵¹ Whittington, n 1 above, 613.

premise in evaluating the merits of acting or not. To achieve this adequately, the original constitution provides in writing what much contemporary constitutional law provides in precedent and practice. The original constitution is law specific enough to eliminate the need for elaboration. The original constitution is law specific enough to be determinate. The original constitution is law specific enough for its meaning to be discovered exclusively through interpretation. In short, the original constitution is a set of *rules*.

The idea of an original constitution as a set of constitutional rules is familiar to much originalism. The pursuit of ‘fixed meaning ascertainable through the usual devices familiar to those learned in the law’⁵² seeks to satisfy the original constitution’s grounding in a founding moment. Much of the confusion surrounding the relationship between the founder’s expected applications—‘how would the constitution have been applied at the founding’—and the original meaning of the constitution can be understood as the pursuit of a constitution of rules. Now, there is no doubt that the framers responsible for the original constitution ‘should be held to what they said rather than what they meant’ even if ‘they fail[ed] to say what they mean[t]’.⁵³ But one can understand how easily those who adhere to either the ‘old originalism’ of original intention or the ‘new originalism’ of original public meaning might be tempted by the framers’ expected application of the constitution: all expected applications are specific and determinate.⁵⁴ They have the determinacy of rules; they provide a ‘constitution of *detail*’.⁵⁵ And a constitution is most fixed, determinate, and unchanging when it is a set of rules.⁵⁶

The force of rules for the original constitution is disclosed by the fact that all—originalists and non-originalists alike—acknowledge that where the constitution is sufficiently rule-like, its original meaning is controlling. All agree that ‘if the Constitution supplies a rule, that rule prevails’⁵⁷ and that ‘if a constitutional provision is clear and unambiguous, it is simply applied according to its terms’.⁵⁸ The examples that are often cited relate to numerical precision, as when the number of members of a legislative assembly is specified or when the duration of a mandate is identified. Matters are altogether otherwise for open-

⁵² Scalia, n 36 above, 854.

⁵³ Kavanagh, n 10 above, 294.

⁵⁴ For a criticism of how Scalia claims to adhere to original public meaning, but practices original expected application, see J.M. Balkin, ‘Abortion and Original Meaning’ (2007) 24 *Constitutional Commentary* 291, 296; Kavanagh, *ibid*, 281; R Dworkin, ‘Comment’ in Scalia, n 28 above.

⁵⁵ R. Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), 119.

⁵⁶ It bears mentioning that while the pursuit of original expected application seeks to confirm the constitution’s determinacy, it subverts that pursuit in part by requiring one to go behind the writtenness of the constitution. See the discussion of the ‘unexpressed intent thesis’ in Kavanagh, n 10 above.

⁵⁷ M.S. Paulsen, ‘How to Interpret the Constitution (and How Not To)’ (2006) 115 *Yale Law Journal* 2037, 2057. See also R.H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), 170 and Balkin, n 30 above, 432-433 on how the debate centres especially on the constitution’s open-ended rights provisions.

⁵⁸ I. Binnie, ‘Interpreting the Constitution: The Living Tree vs. Original Meaning’ (October 2007) *Policy Options* 104, 108.

ended provisions, which stipulate only abstract constitutional commands. For this reason, the original constitution's emphasis on stability and fixity calls on rule-like provisions.

The original constitution's rule-like prescriptions satisfy the idea of *inconsistency* that grounds constitutional supremacy and provides the basis for judicial review.⁵⁹ Legislative prescriptions and constitutional rules can be inconsistent; executive orders and constitutional rules can be inconsistent. But neither legislation nor executive orders can be obviously inconsistent with a constitutional standard or principle. The standard and the principle must be made more determinate before the idea of consistency can obtain—each must be specified to a rule before legislation or executive orders can be evaluated for consistency.

But the original constitution need never be made more determinate; to do so would suggest that the founding moment was incomplete. The original constitution is neither indeterminate nor underdeterminate. Its provisions are specific and depend for their application only on facts. A rule-like prescription possesses the necessary 'specificity in order to connect it to a given situation'; it is, in this way, a 'governing rule' that 'serve[s] as law'.⁶⁰ In all cases, the original constitution itself, aided only by tools of interpretation that discover (not create) meaning, allows for the following constitutional syllogism: the constitution provides the major premise; the facts (legislation, executive order) are the minor premise; with the conclusion following as a matter of deductive logic. This process, for some, is akin to a civil law system where rules are specified in advance, and not to the common law's creation of rules to fit the facts being disputed.⁶¹ For the original constitution, the judicial task is to apply rules to the facts, not to invent rules to fit the facts.

This understanding of an original constitution confirms its authority as a set of legal rules that deliberately and authoritatively settle the matters to which the constitution is addressed. It might be said that for a constitution 'to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, [it] would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind'.⁶² Yet, the alternative is not to understand the nature of a constitution as requiring 'that only its great outlines should be marked, its important objects designated'.⁶³ That is a false alternative. For if the constitution does not itself provide the determinacy needed for its application, that determinacy must come from elsewhere. Outlines and objects do not decide cases; a legal code must be established. What the original constitution proposes is to contain, within itself, the

⁵⁹ This idea is explored and challenged in G.C.N. Webber, 'The Unfulfilled Potential of the Court and Legislature Dialogue' (2009) 42 *Canadian Journal of Political Science* 443.

⁶⁰ Whittington, n 28 above, 6. See also A Scalia, 'Response' in Scalia, n 28 above, 134.

⁶¹ See Scalia 'Common-Law Courts in a Civil-Law System' and MA Glendon, 'Comment' both in Scalia, n 28 above. See also A. Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175; D.P. Kommers 'Germany: Balancing Rights and Duties' in Goldsworthy (ed), n 5 above.

⁶² *McCulloch v Maryland* 4 US 316, 407 (1819).

⁶³ *ibid* at [407].

determinacy required for its application. It is, in this sense, to be understood as public law's civil code where interpretation begins and ends with the text.

OF INKBLOTS AND OTHER NON-SENSE

If the original constitution wishes to settle the question of abortion, it will create a rule;⁶⁴ it will not provide an open-ended provision on liberty or life that might resolve the question one way or the other. If the original constitution wishes to settle the question of affirmative action, it will create a rule;⁶⁵ it will not provide an open-ended provision on equality that might resolve the question one way or the other. Where the original constitution speaks, it speaks determinatively and where the tools of interpretation fail to resolve a question, the original constitution does not speak. If it is the case that further constitutional specification is required, then the original constitution is effectively silent; it is the *author of the further specification*—for example, the court—and not the constitution that then speaks. In undertaking the task of further specification, the author is called upon to make choices that are not the choices of the constitution. The constitution provides only the first step in the inquiry, and cannot direct its further direction. In these circumstances, the constitution cannot be *interpreted*; there is nothing determinate to discover. It cannot satisfy the original constitution's claims to determinacy, fixity, and stability. The determinacy is provided elsewhere, after the fact of the founding and without any of the original constitution's stability and fixity. The result is not of the constitution's authority.

Underdeterminate provisions like preambles, standards, and principles are—as far as the original constitution is concerned—akin to inkblots: they are without sense or meaning. For the original constitution, provisions must have sufficient meaning to be constitutional prescriptions. Where one cannot 'make out the meaning of a provision', one is in 'exactly the same circumstance as a judge who has *no Constitution* to work with'.⁶⁶ For example:

[I]f you had an amendment that says 'Congress shall make no' and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the inkblot if you cannot read it.⁶⁷

For the original constitution, the same reasoning holds for underdeterminate provisions. One should not attempt to 'find' meaning where none exists. In

⁶⁴ See Constitution of Ireland, s 40(3)(3) (guaranteeing the right to life of the unborn).

⁶⁵ See Canadian Charter of Rights and Freedoms, s 15(2) (specifying that affirmative action programs are not inconsistent with the right to equality).

⁶⁶ Bork, n 57 above, 166 (emphasis added); Whittington, n 28 above, 89.

⁶⁷ Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 100th Congress 224 (1987) (statement of Judge Robert H. Bork) cited in K.T. Lash, 'Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment' (2008) 31 *Harvard Journal of Law and Public Policy* 467, 469.

failing to determine a constitutional prescription, the founders failed to act. Where the reader cannot, relying on tools of interpretation, discover meaning to resolve a question, the framers simply failed to address it. Where there is underdeterminacy, there is indeterminacy. Where there is mystery of meaning, there is only a dead letter.

The original constitution is committed to the idea that the provisions of the constitution seek to achieve something. Where the provisions cannot do so without relying on another actor to complete their meaning, the constitution has failed. Relying on a distinction between *interpretation* and *construction* that will be explored below, one might say that for the original constitution, constitutional interpretation (discovery of meaning) never runs out and the time for constitutional construction (supplementing meaning) never obtains. What the original constitution covers, it covers without gaps, without inconsistency, and without indeterminacy or underdeterminacy. In short, the original constitution is all interpretation. The original constitution is a *zero-construction* constitution.

THE ORIGINAL CONSTITUTION AND DEMOCRATIC ACTIVITY

The original constitution is law, understood as a set of determinate rules which settle that which they address. The task of the interpreter is solely one of discovering the meaning of the original constitution—no specification of meaning is required before a constitutional rule is applied. In this way, the original constitution is fixed, stable, and determinate. The task of judicial review is one of holding the authorities constituted *by* the original constitution *to* the original constitution. Constraining the discretion of judges is often identified as one of the indirect (or instrumental) arguments favouring originalism—the ‘lesser evil’ in the world of judicial review.⁶⁸ Whatever the merits of this second-order reason, the original constitution prescribes a role for the judicial function as discovering, not inventing meaning. This relates to another second-order reason that is said to favour originalism: providing greater freedom for democratic activity. Yet, we will see that this is a contingent question which depends on what the original constitution prescribes and the progress of the society it regulates. The worlds of the constitution and of democratic activity are separate such that democratic activity either complies with or violates or proceeds beyond the reach of the original constitution.

⁶⁸ See Kavanagh, n 10 above, 259-260; Scalia, n 36 above.

THE JUDICIAL FUNCTION

‘It is emphatically the province and duty of the judicial department to say what the law *is*’, famously declared Chief Justice Marshall in *Marbury v Madison*.⁶⁹ Much has been written about the significance of the word ‘is’ rather than ‘ought to be’, the central idea being that the constitution’s meaning obtains irrespective of what the judicial branch would like it to say.⁷⁰ The only mode of constitutional change is the amendment formula; no judicial rewriting masquerading as interpretation is consistent with the judicial oath to *uphold* the original constitution. For a judge to take the oath and do otherwise is akin to ‘crossing one’s fingers when making a promise’.⁷¹ After all, the judicial function is not to do justice *simpliciter*, but rather to do justice *according to law*—that is, according to the law of the constitution.

In this way, Chief Justice Marshall’s statement is somewhat misleading for it suggests that the judicial department is necessarily part of the equation of law’s meaning. Yet, for the original constitution, it is neither the province nor the duty of the judicial department to say what the law is; it is rather the province and duty of the *original constitution* to say what the law is. The judicial function is merely to apply the major premise (the constitutional rule) to the minor premise (a legislative or executive act) and to state the conclusion as unconstitutional or constitutional. The constitutional syllogism, which depends on the determinacy of constitutional provisions, is what ‘legitimizes judicial review of constitutionality’.⁷²

It is often said that the old originalism was ‘a reactive theory motivated by substantive disagreement’ with instances of ‘judicial activism’.⁷³ While it is true that all that ‘conserves’ the past is in some simple sense conservative, the old originalism was associated with a political movement more conservative than then prevailing judicial attitudes, which it accused of making the constitution say what they (the judges) wanted it to say. As a remedy, it was argued that the judicial function should be to defer to the other branches. Otherwise, acting under the cover of exercising the judicial function, courts will act ‘as legislators and substitut[e] their own substantive political preferences and values for those of the people and their elected representatives’.⁷⁴ The overriding command of old originalism for the judicial department was one of restraint, exemplified by the refusal to declare acts of the legislature unconstitutional. Irrespective of the major and minor premises of the constitutional syllogism, the conclusion should always be the same: legislation is constitutional. In this way, the old originalism empowered the democratic process and removed the court (and the constitution) from intervening.

⁶⁹ *Marbury v Madison* 5 US (1 Cranch) 137 at [177] (1803) (emphasis added).

⁷⁰ See J. Goldsworthy, ‘Raz on Constitutional Interpretation’ (2003) 22 *Law and Philosophy* 167, 170-171.

⁷¹ Barnett, n 36 above, 18.

⁷² Scalia, n 36 above, 854. See also Bork, n 57 above, 162-163.

⁷³ Whittington, n 1 above, 601.

⁷⁴ *ibid*, 602.

The original constitution is better understood from the perspective of new originalism, which does not depend on the contingent composition of the judicial and legislative departments. It is ‘grounded more clearly and firmly in an argument about what judges are supposed to be interpreting and what that implies, rather than an argument about how best to limit judicial discretion’.⁷⁵ It properly recognises that originalism is politically conservative (or not) only as a contingent matter, depending both on what the original constitution prescribes and on the evolution of the society in which it is authoritative. Under the original constitution, the task of the judge is to uphold the constitution by being faithful to the constitution and by striking down acts that are inconsistent therewith. In this way, the judicial function is understood as being two-fold: to do no *more* than interpret the meaning discoverable in the original constitution itself and to do no *less* than uphold that meaning against all affronts, no matter how democratic they are held out to be. Depending on the actions of the constituted authorities, more legislative and executive actions could be found unconstitutional under this understanding of the judicial function than under an approach favouring judicial discretion so feared by old originalists. But this is how it must be for the original constitution, which requires obedience to its prescriptions from those authorities it constitutes. The ‘primary virtue’ of the judicial function under the original constitution is ‘constitutional fidelity’, not ‘judicial restraint’.⁷⁶ Under the original constitution, judges must stand tall in the face of unconstitutional action; they must also, however, stand back where the constitution does not determine the issue before the court.

According to the original constitution, the judicial function is a delimited one. It involves no discretion in determining meaning, for all underdeterminate meaning is meaningless so far as the judge is concerned.⁷⁷ The personal views of the judge have no place in constitutional adjudication. Judges will, at least on occasion, ‘vote to uphold laws they deeply disagree with, or to strike down laws they would favor, because the basis for constitutional judging ... is independent of their own preferences’.⁷⁸ The original constitution firmly resists any suggestion that it is ‘a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please’.⁷⁹ That approach would deny the original constitution its fixity, determinacy, and stability, in addition to the exclusivity of its amendment procedure.

⁷⁵ *ibid.*, 609.

⁷⁶ *ibid.*, 609.

⁷⁷ cf Goldsworthy, n 70 above, 172, who believes that it is consistent with originalism to have judges ‘resolve gaps and indeterminacies in the constitution, thereby supplementing it, if necessary by resorting to their own notions of good government’.

⁷⁸ M.W. McConnell, ‘Active Liberty: A Progressive Alternative to Textualism and Originalism?’ (2006) 119 *Harvard Law Review* 2387, 2415.

⁷⁹ T. Jefferson, ‘Thomas Jefferson to Spencer Roane, 6 September 1819’ in P.L. Ford (ed), *The Works of Thomas Jefferson* (New York and London: G. P. Putnam's Sons, 1904-1905), vol 3, art 1, s 8, cl 18, doc 16 at press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html (last visited 24 September 2009).

The authority for judicial review rests on the authority of the original constitution. When a judicial declaration of unconstitutionality is issued, one may not speak of judicial activism; one may not blame the judges. Rather, while the declaration is channelled through the court, it is in truth issued by the original constitution. For this reason, one may not speak of a counter-majoritarian difficulty either,⁸⁰ for this suggests that the judicial function involves more than interpreting the original constitution's discoverable meaning. For the original constitution, any difficulty is *intertemporal*, not counter-majoritarian: it relies on past commitments, enshrined in the constitution, which continue to bind.⁸¹ When a court applies the original constitution, 'it appeals to legal enactments that *were* approved' at the founding moment.⁸² To the extent that the people now seek to overcome the intertemporal difficulty, the original constitution provides them with an exclusive form of constitutional change. But, save a constitutional amendment, the people now must comply with the original constitution adopted by the people then.

THE SEPARATE WORLDS OF DEMOCRACY AND THE ORIGINAL CONSTITUTION

Where the original constitution specifies constitutional rules, democratic activity may not proceed in contradiction. Where the original constitution is silent, democratic activity may proceed freely. Under the original constitution, there is a sharp divide between the constitutional politics of the founding and the normal politics that follow.⁸³ The two worlds are separate, which is not to deny that democratic activity is constituted by the constitutional forms (including the design of the legislature and the electoral system) provided for in the original constitution. Yet, beyond these forms, in those areas where no constitutional prescriptions are pertinent, there is no subordination of legislation to the original constitution.

The founding moment represents a choice by the framers as to what should be *removed* from democratic activity. A matter that is regulated by the original constitution is removed from democratic activity; '[t]hat is, after all, the whole purpose of constitutional prohibitions' and prescriptions.⁸⁴ The original constitution represents the closure of normal politics with respect to those issues. But, perhaps as importantly, the founding moment also discloses a choice as to what should *remain* within democratic activity. That choice is disclosed *impliedly* in the sense that all that is not prescribed by the original constitution remains free to

⁸⁰ A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 2nd ed, 1986).

⁸¹ See B.A. Ackerman, 'Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013, 1045-1049.

⁸² *ibid*, 1046; Whittington, n 28 above, 43.

⁸³ The dualist distinction is employed by Bruce Ackerman, but his understanding of constitutional politics extends beyond the founding and formal amendments to what he terms 'constitutional moments'. See B. Ackerman, *We the People: Foundations* (Cambridge, Massachusetts: Harvard University Press, 1991).

⁸⁴ A. Scalia, 'Romancing the Constitution: Interpretation as Invention' in G. Huscroft and I. Brodie (eds), *Constitutionalism in the Charter Era* (Markham, Ontario: LexisNexis Butterworths, 2004), 340-341.

be regulated as the legislature sees fit. But the choice is also *obliquely* referenced in the original constitution itself. In providing for the constitutional form of the legislature and for the citizens' associated rights of political participation in democratic activity, the original constitution contemplates that there be democratic activity. Of course, it does not direct such activity, which it is not to say that it is wholly silent as to how it is exercised. It may be silent about this activity in the sense of not resolving questions which are not subject to determinate constitutional rules, but it nevertheless impliedly shapes the exercise of democratic activity through the constitutionally-prescribed forms of 'citizen' and 'legislator'. In this way, the conduct and character of 'normal politics' will be, in part, and perhaps in large part, shaped by the original constitution. We might say that democratic activity occurs in the shadow of the original constitution.

Any move to remove *additional* matters from democratic activity without having recourse to the amendment procedure (for example, by way of judicial creation parading as interpretation) injures the division between the separate worlds of democracy and the original constitution prescribed by the original constitution and concomitantly lessens the rights of democratic participation guaranteed in the original constitution. If judges rely on 'customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments' or any other source of unwritten constitutional principles,⁸⁵ they are undoing the divide between democracy and the original constitution stipulated at the founding. After all, the reference to *unwritten* principles is 'a frank acknowledgement that the "principles" are not to be found in the written constitutional text, and cannot be derived from the text by normal processes of interpretation'.⁸⁶ For the original constitution, everything that is added by the court to the constitution in the pursuit of grand principles is 'nothing more than an attempt to block self-government by the representatives of living men and women'.⁸⁷ In this sense, all non-formal amendments to the original constitution 'contract' the rights of democratic participation, even if they simultaneously 'expand' others, a point often neglected by proponents of 'evolving standards'.⁸⁸

While it is sometimes assumed that originalism leaves more room for democratic activity than do rival theories of interpretation,⁸⁹ this is also a contingent question. It is rather more accurate to say that the original constitution allows for democratic activity in those areas that it does not regulate. The scope of those areas depends on the prescriptions outlined in the original constitution.

⁸⁵ See B. McLachlin, Chief Justice of Canada, 'Unwritten Constitutional Principles: What is Going On?' (Lord Cooke Lecture, Wellington, New Zealand, 2005), 18.

⁸⁶ Hogg, n 5 above, 90. Rubenfeld's commitmentarian model deems understandings of what the proper scope of a constitutional right or power *did not* include as not conclusive, thereby allowing for change between the frontiers of constitutional and democratic authority: J. Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* (Cambridge, Massachusetts: Harvard University Press, 2005).

⁸⁷ Bork, n 57 above, 171.

⁸⁸ See Scalia, n 36 above, 855-856 and n 28 above, 42.

⁸⁹ See eg Bork, n 57 above, 153.

Now, democratic activity unconstrained by constitutional prescriptions is not, of course, unconstrained from all prescriptions. No democratic legislature entitled to do anything does anything. However, should the legislature transgress the moral limits that apply to it, judicial review would be without authority to offer relief if the measure did not contradict a constitutional rule. Where the original constitution is silent, we are, quite deliberately and by design, ‘at the mercy of legislative majorities’.⁹⁰

THE ORIGINAL CONSTITUTION AND THE DELIMITED DOMAIN OF INTERPRETATION

It might be said that the foregoing account of an original constitution provides no more than a caricature, a distortion of reality, a model no real world constitution can (or should aspire to) match. It might be said that this approach discredits originalism more than it assists in understanding it. I hope this is not so. For it is a commonplace that distorting reality sometimes assists one in seeing what *is* somewhat more clearly. In particular, I hope to show that the idea of an original constitution assists one in concluding that difficulties in realising originalism may not lie with this theory of interpretation at all; they may rather lie with real world constitutions. It may be fairer to say that real world constitutions are best understood as being both part original constitution and part non-original constitution, in part because originalism’s delimited place within real world constitutions maps onto the delimited domain of *interpretation* within constitutional meaning.

REAL WORLD CONSTITUTIONS

While constitutional scholarship is unaccustomed to references to an *original constitution*, it often makes reference to its primary antagonist: a ‘living constitution’.⁹¹ Now, because ‘what we call “non-originalism” depends on what we think originalism entails’,⁹² we cannot hope to exhaust the meaning of non-originalism – or ‘a living constitution’ – by exploring how that term is used in scholarship. However, by drawing on the preceding account of the original constitution as written at the time of the founding, composed of rule-like prescriptions, and in a world separated from democratic activity, we may contemplate tentative answers to the following questions: What is a non-original constitution? Is it unwritten, not law, and never divorced from democracy?

⁹⁰ *Lochner v New York* 198 US 45, 59 (1905) (Peckham J) discussed in R.H. Bork, ‘Neutral Principles and Some First Amendment Problems’ (1971) 47 *Indiana Law Journal* 1, 10-11.

⁹¹ See both proponents (Ackerman, n 30 above) and opponents (W.H. Rehnquist, ‘The Notion of a Living Constitution’ (1976) 54 *Texas Law Review* 693).

⁹² Balkin, n 30 above, 428 (footnote omitted).

Yet, the precise answers to these questions need not be our focus. For in exploring the idea of an original constitution and concluding that no real world constitution matches in all respects the model outlined, we may conclude, in turn, that no real world constitution would match in all respects the model of a non-original constitution. If it is true that ‘no answer is what the wrong question begets’,⁹³ then the search for a real world constitution satisfying the commands and commitments of an original or a non-original constitution will be in vain. What, then, is a real world constitution? In a world infatuated with metaphors of balance and proportionality, it might be tempting to appeal to the comfort of some middle ground—as though all real world constitutions were situated along some *just milieu* between the models of an original and non-original constitution. Yet, such presumptive appeals should be resisted, for another answer seems truer: a real world constitution is *both* an original constitution *and* non-original constitution; that is, a real world constitution exemplifies some of the commands and commitments of each model of a constitution.

Real world constitutions have *both* rule-like prescriptions established at the founding *and* preamble-like clauses that do not prescribe anything determinate. All real world constitutions also suffer in at least some respects from the common vices of language, including unforeseen indeterminacy, vagueness, ambiguity, gaps, and inconsistencies.⁹⁴ The real world constitutions with which we are most familiar appear to be, *at one and the same time*, albeit in different ways and through different sections, provisions, and clauses, both original and non-original constitutions.

While there have been repeated claims in scholarship that the choice between originalism and non-originalism is a ‘false choice’,⁹⁵ that is true *only* in the context of real world constitutions. The choice between an original constitution and a non-original constitution as an abstract matter is not a false choice: two different accounts of a constitution are in play. A constitution-drafter, consciously driven to fulfil the ideal of an original or non-original constitution, is not presented with a false choice—the task of articulating a real world constitution can be guided, even if not wholly determined, by these opposing choices. But in the context of real world constitutions, it seems that where the idea of the original constitution resonates with a real world constitution, it obtains; and where it does not, it cannot. There may, then, in practice be no *choice*—false or otherwise.

Consider the following: Is one faced with a choice when a real world constitution prescribes a legislative mandate of no more than five years or prescribes no less than x and no more than y legislators (where x and y are real numbers)? Are these provisions not determinate, fixed, and stable legal prescriptions? Would it not be false to suggest that these provisions are otherwise and that their meaning is somehow liable to change with time? Consider, in turn,

⁹³ Bickel, n 80 above, 103.

⁹⁴ See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed, 1994), ch VII.

⁹⁵ Most recently, see Balkin, n 54 above and n 30 above.

how answers to the same questions seem less obvious where a real world constitution prescribes ‘freedom of expression’ for all individuals, the ‘right to vote’ for all citizens, and the right against ‘cruel and unusual punishment’ for all convicted persons. Assuming no further particulars, these provisions are far from the determinacy, fixity, and stability of the previous examples. Is there here a choice? Can one read them as determinate, fixed, and stable legal prescriptions?

In either example, to question whether there is a choice is to ask the question of the real world constitution *itself*. The distinction between which provisions are drafted in the image of an original constitution and which are drafted in the image of a non-original constitution is the real world constitution’s *itself*. It is a distinction discoverable through interpretation.

ORIGINALISM AND INTERPRETATION

The idea of ‘interpretation’ has become all too present in constitutional practice. It now serves as a placeholder for *discovering* meaning, *supplementing* meaning, and *changing* meaning and encompasses the entire activity from the first premise that is the constitutional text to the end of the reasoning process in all cases. Determining whether pornography fulfils the purpose of ‘freedom of expression’ is said to be a question of interpretation not different in kind from determining whether ‘arms’ refers to the human body or to artificial weapons in the guarantee ‘the right to bear arms’. On this view, everything is a matter of interpretation; interpretation *never runs out*, it occupies the entire field.

In addition to occupying the entire field from first premise to conclusion irrespective of the underdeterminacy of the constitution, interpretation has also become the vehicle for changing the constitution. It is sometimes maintained that interpretation involves:

a combination of reasons for respecting the constitution as it exists and reasons for remaining open to the possibility that it is in need of reform, adjustment, or development in order to remove shortcomings it always had or shortcomings that emerged as the government or the society that it governs changed over time.⁹⁶

On this understanding, *interpretation* exists in ‘a dialectical tension’ and ‘lives in spaces where fidelity to an original and openness to novelty mix’.⁹⁷ There is no doubt that this understanding of interpretation—which is said to ‘romance’ the meaning of a constitution and to parade ‘innovation as interpretation’⁹⁸—resonates with many scholarly and judicial pronouncements. Yet, this quite simply cannot be right. Interpretation differs from innovation: the first discovers

⁹⁶ J. Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L. Alexander (ed), *Constitutionalism: Philosophical Foundations* (New York: Cambridge University Press, 1998), 177.

⁹⁷ *ibid*, 180.

⁹⁸ Scalia, n 84 above.

meaning, the second creates it; the first assumes what is, the second determines what should be; the first is oriented towards conserving the constitution, the second towards changing it. To interpret a constitution is to ‘work on the assumption that the persons who had the authority to make the constitutional text were trying to achieve something in choosing some words over others’, such that the ‘goal of interpretation is to try to find out what that achievement is’.⁹⁹ Interpretation turns on ‘the *techné* of rationality of laying down and following a set of positive norms identifiable as far as possible simply by their “sources” ... and applied so far as possible according to their publicly stipulated meaning’.¹⁰⁰ Interpretation looks to law as ‘fact’, as what ‘is’, not as ‘what it ought to be’.¹⁰¹

Now, this view of law does not always obtain, for constitutional language can be such that there is no ‘is’ or ‘fact’ to be discovered by interpretation, or at least no ‘is’ or ‘fact’ determinate enough to be applied without further specification. In these circumstances, the task of interpretation becomes exhausted before the process of applying constitution text to factual circumstances is concluded. The major premise of the constitutional syllogism lacks specificity. While the original constitution analogised these instances of underdeterminacy to meaningless inkblots, real world constitutions do not. They view lack of specificity as calling for greater specificity, not for the abandonment of constitutional meaning.

This call for greater specificity is satisfied by what may be called *constitutional construction*.¹⁰² Construction is ‘a necessary feature of constitutionalism’ and a ‘supplementary theory’ of constitutional meaning where interpretation proves insufficient.¹⁰³ Although the model of the original constitution strives to be an exclusively interpretable constitution and, correspondingly, a zero construction constitution, real world constitutions are neither. Their meaning is determined in part by interpretation, in part by construction. Interpretation always comes first: it determines the need, if any, for construction. The degree of specificity or determinacy of a real world constitution is itself revealed by the interpretive undertaking; it resides in the constitution and its meaning.¹⁰⁴ But in those cases where a real world constitution provides no meaning (or insufficient meaning) to be interpreted, the meaning must be supplemented with construction. Constitutional construction elaborates constitutional meaning where constitutional interpretation cannot; it ‘supplements other methods of determining constitutional meaning’ by providing ‘[s]omething external to the text’ to allow ‘the text to have a

⁹⁹ Balkin, n 30 above, 491.

¹⁰⁰ J. Finnis, ‘Natural Law and Legal Reasoning’ in R.P. George (ed), *Natural Law Theory: Contemporary Essays* (New York: Clarendon Press, 1992), 150.

¹⁰¹ Goldsworthy, n 70 above, 190.

¹⁰² The distinction between *interpretation* and *construction* is employed by Whittington, n 28 above and *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Massachusetts: Harvard University Press, 2001) and Barnett, n 3 above.

¹⁰³ Whittington, n 1 above, 612; Barnett, n 3 above, 118.

¹⁰⁴ I do not here suggest that that context is irrelevant to the interpretive task. See Kavanagh, n 10 above, 286; Balkin, n 30 above, 494.

determinate and controlling meaning within a given governing context'.¹⁰⁵ Much of constitutional law—the precedents, general doctrines, judicially-prescribed tests or factors—is *constructed* insofar as it supplements the text of the constitution in order to provide it with determinacy where such determinacy cannot be provided by interpretation.

A real world constitution does not prohibit such constructions; indeed, the underdeterminacy known to many constitutions 'is one of the prices we (or the framers) pay for a writing that uses abstract principles in place of specific rules', although 'it is also one of the well-known virtues of this particular writing'.¹⁰⁶ Where open-ended formulations are used, the constitution provides no settlement and leaves the resolution of disputes to be *guided*—not determined—by the constitution. The task of completing the constitutional project is left to later generations. Constructions are completions of the constitutional project without being part of the founding. They pertain to the constitution without being the constitution; they are part of what constitutes without being the product of constitution-making. In short, they are part of the activity that completes the architecture and, as activity, may be revisited and re-constructed.

Despite their necessary role, constructions are not 'analogous to textual amendments',¹⁰⁷ both in the sense that they do not change the interpretable meaning of the constitution and in the sense that they do not achieve the same status as constitutional amendments. In this way, the constitution remains that which was established at the founding no matter how 'crystallized' particular constructions become. A statute constructing constitutional meaning may acquire the status of 'superstatute' just as a judicial precedent constructing constitutional meaning may acquire the status of 'superprecedent', but they remain constructions and not part of the original constitution.¹⁰⁸

For some, the task of constructing constitutional meaning—of completing the unfinished task of providing for constitutional determinacy—is a task for political institutions,¹⁰⁹ for others it is a judicial undertaking;¹¹⁰ for some, constructions should be justifiable by appeal to a theory of justice,¹¹¹ whereas for others, the contingent development of constructions rest on 'political principle, social interest, or partisan consideration'¹¹² or on the principles somehow contained within the text of the constitution.¹¹³ Stated otherwise, constitutional construction may appeal to the full range of theories that originalists label 'non-originalist'. But whatever their individual merits, these different approaches all converge on one point: they make no appeal to originalism for *construction*.

¹⁰⁵ Whittington, n 102 above, 3, 6.

¹⁰⁶ Barnett, n 3 above, 120 and n 3 above, 645. See also Rehnquist, n 91 above, 694; Binnie, n 33 above, 346-347.

¹⁰⁷ Whittington, n 102 above, 218; Barnett, n 3 above, 646.

¹⁰⁸ See contra Ackerman, n 30 above.

¹⁰⁹ See eg Whittington, n 120 above.

¹¹⁰ See eg Goldsworthy, n 70 above, 177 and n 27 above, 20-21.

¹¹¹ Barnett, n 3 above.

¹¹² Whittington, n 102 above, 6, 209.

¹¹³ See Balkin's method of text-and-principle: n 54 above and n 30 above.

Construction is non-original because the original constitution does not obtain. Construction calls on discretion and judgment and, because the major premise in the constitutional syllogism must be determined further, constitutional construction calls for *adjudication* (in the sense of deciding).¹¹⁴ It is, by necessity, not a task oriented to discovering what is already there.

Now, the distinction cannot be carried so far as to suggest that construction bears no relationship to the constitutional text. For in ‘penetrat[ing] beneath the surface of the text’ in order to construct constitutional meaning, one must in turn ‘reemerge through the text’.¹¹⁵ Construction is possible where interpretation is exhausted; yet, to remain a task of fulfilling and supplanting constitutional meaning, the ultimate measure of a constitutional construction must be its consistency with that which is interpreted. No contradiction between construction and interpretation is permissible. Even if interpretation ceases when confronted with underdeterminacy, it continues to guide and to control construction.

* * *

The idea of constitutional construction confirms that it is no fault of originalism that it can go no further than interpretation itself. Because the ideal of an original constitution is never fully actualised in a real world constitution, other modes of expounding constitutional meaning must be appealed to. But this does not result in a ‘tension between the theory of originalism, which holds that the Constitution has fixed meaning that courts are bound to respect, and the reality of the framing, which produced a document rife with indeterminacy’.¹¹⁶ This tension obtains only if one attempts to realise the idea of the original constitution fully in a real world constitution irrespective of how that real world constitution is written. But when it is realised that real world constitutions only partially adhere to the model of the original constitution and that *neither* the theory of originalism *nor* the real world constitutions are the worse for it, then originalism can be situated in its proper place.¹¹⁷ There, originalism is controlling where interpretation is possible; elsewhere, originalism exercises no authority in determining constitutional meaning.

¹¹⁴ It is perhaps telling that Brest, n 24 above, 228, n 90 refers ‘to nonoriginalist strategies of constitutional decisionmaking collectively as *adjudication*’ (emphasis added).

¹¹⁵ R.E. Barnett, ‘Underlying Principles’ (2007) 24 *Constitutional Commentary* 405, 414. Barnett makes this point in relation to Balkin’s text-and-principle account of originalism, but the idea can be generalized.

¹¹⁶ P.J. Smith, ‘The Marshall Court and the Originalist’s Dilemma’ (2006) 90 *Minnesota Law Review* 612, 623.

¹¹⁷ See Barnett, n 20 above, 18; Whittington, n 1 above, 611.

CONCLUSION

The battle for as well as the battle against originalism both attempt to win by selecting the key words of the debate. The key words animating originalist scholarship include *fidelity* to the constitution, suggesting that alternative approaches preach adultery. In turn, living tree constitutionalist scholarship argues that it is *breathing life* into a constitution that can only *grow* stronger, suggesting the alternative is a dead constitution of frozen rights.¹¹⁸ These attempts to win through definition are not uncommon in scholarship or in political movements more generally, but they are unfortunate for the scholar's undertaking, which should be devoted to a grappling of ideas with others without sophistry or sleights of hand.¹¹⁹ Of course all prefer 'progressive interpretation to regressive; forward thinking to backward' and good to bad,¹²⁰ but this is not the choice one is confronted with in constitutional scholarship.

The real world constitutions with which we are familiar do not instantiate the theorist's model of a perfect original or a perfect non-original constitution. No doubt, they all resemble these models in some, perhaps many, but never all respects. The search, it would seem, is not for a single, overarching, exclusive method for expounding constitutional meaning; rather, the search is for an account of which method obtains when. In turn, this draws on the distinction between constitutional *interpretation* and *construction*, which envisages different methods for expounding constitutional meaning depending on the task at hand. Originalism speaks only to interpretation which is devoted to discovering meaning latent in the constitution. Where that meaning cannot be determined or exhausted, interpretation ceases and construction begins. Now, discriminating between the end of interpretation and the beginning of construction will not always admit of precision and will depend on the ability to discriminate between 'determinacy and indeterminacy, purpose used to clarify meaning and purpose used to change it, genuine implications and spurious ones, evidence of intentions that illuminates original meanings and that which does not, changes in the application of a provision and changes in its meaning, and so on'.¹²¹ Yet, despite this and despite the fact that the world of originalism is a delimited one, within this world, it is controlling.

I conclude with a thought on the significance of the model of the original constitution for a real world constitution *over time*. Originalism—as exemplified by the model of an original constitution—seeks to render the constitution accessible to the citizen as fixed, stable, and continuous. Where a constitution provides determinate prescriptions, the citizen has a compass in hand and is able to read the

¹¹⁸ See Binnie, n 33 above, 347; Rehnquist, n 91 above, 693.

¹¹⁹ See G.C.N. Webber, 'Expounding Constitutional Scholarship' (2009) 25 *Constitutional Commentary* 171.

¹²⁰ G. Huscroft, 'The Trouble With Living Tree Interpretation' (2006) 25 *University of Queensland Law Journal* 3, 5.

¹²¹ J. Goldsworthy, 'Conclusions' in J. Goldsworthy (ed), n 5 above, 324-325; Whittington, n 28 above, 10-11.

instrument without calling upon the scholar or lawyer. Yet, this accessibility, which obtains (when it does) especially at the founding, may wane with the passing of time as the constitution's determinate prescriptions fail to abide to the changing semantic conventions of language.

Take two examples from the US Constitution: the word 'commerce' at the founding may have been the equivalent to the modern day expression 'intercourse' and not to the narrower concern with trade in goods and services; in turn, 'domestic violence' may have signified 'civil war' at the founding, whereas it now addresses an altogether different concern. These simple illustrations highlight the possibility that even if the model of the original constitution were fully realised in a real world constitution at the time of its founding, that real world constitution may fail to continue to be realised as an original constitution with the passing of time. The virtues of stability and fixity for the original constitution may weaken over time, as the citizen becomes less familiar with the linguistic conventions that obtained in the past. Worse still, the citizen may fail to be aware of the decreasing familiarity with the constitution's meaning, assuming modern day linguistic conventions apply to dated usage. In this way, originalism, perhaps more than any other theory of constitutional interpretation, constantly struggles over the past.¹²²

While citizens today are 'linked to the origins of the Constitution', they are 'linked by a tradition' that citizens at the founding could not have.¹²³ Because citizens can never fully 'understand the Constitution in the same way that the framers and ratifiers understood it', they will always, in understanding the constitution, understand it differently.¹²⁴ The difference may be minor and inconsequential, or not. But if it is true when it is true, then even the perfect original constitution cannot forever remain perfectly original.

¹²² See R.W. Gordon, 'The Struggle Over the Past' (1996) 44 *Cleveland State Law Review* 123; Whittington, n 28 above, 210.

¹²³ L.B. Solum, 'Originalism as Transformative Politics' (1989) 63 *Tulane Law Review* 1599, 1610, 1606.

¹²⁴ *ibid*, 1610.