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DEAD HAND ARGUMENTS AND CONSTITUTIONAL INTERPRETATION

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DEAD HAND ARGUMENTS AND CONSTITUTIONAL INTERPRETATION

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This Article attempts to reset the relationship between theories of constitutional authority and methods of constitutional interpretation. Several scholars assert that our reasons for respecting the United States Constitution as law—despite its imperfection and dead authors—strongly influence the proper method of interpretation for that text. The “why” of authority supposedly drives the “how” of interpretation. But this relationship can be better understood. To the extent an authority theory can be distinguished from interpretive method, it is true that the former will identify what counts as law to be interpreted. Beyond that, the asserted relationship fades. First, some authority theories actually depend on a given interpretive method rather than the reverse, and an overarching normative framework can independently suggest interpretive choices. Second, and oddly, the correlation between a constitutional authority theory’s persuasiveness and its logical implications for interpretation seems negative. Perhaps the more persuasive, the less influential. This is so even putting aside institutional considerations, which already have been used to soften the influence of high theory on interpretation. Yet authority theories and interpretation may be connected in a different way. The link involves multiple sources of law, instead of the interpretive method for one text. An authority theory can gauge the relative strength of competing sources of law bearing on the same decision, helping to resolve conflicts among them. Even the Constitution is subject to an evaluation of its strength.

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For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration. ¹

We can determine the method to interpret the Constitution only if we are first clear about why the Constitution is authoritative. ²

INTRODUCTION

Not long ago, the National Archives Building was refurbished at a cost of over one hundred million dollars. ³ Part of this investment went to preserve the “Charters of Freedom”: original parchment versions of the United States Constitution, the Bill of Rights, and the Declaration of Independence. Those documents were not always well-kept. The Declaration spent thirty-five years hanging on a wall of the Patent Office, bathed with direct sunlight. ⁴ By 1952, however, the parchments were placed in ultraviolet-filtered encasements with helium and a little water vapor. Conservators in the 1990s detected deterioration of interior glass panes and possible helium leaks. So engineers developed new encasements with gold-plated titanium frames, a humidified argon gas filling, plus a system for imaging the documents and measuring their atmosphere. The Charters now rest in these encasements. Every morning telescoping robotic arms slide the parchments into the rotunda of the Archives for public viewing, and every evening the documents are returned to bomb-proof vaults for safe keeping.⁵

This might seem extravagant. But the maintenance of cultural icons is a logical preoccupation of government. Icons may perpetuate a sense of common mission that can be useful in maintaining order and implementing policy.⁶ True, our understanding of iconography is not always adequate to explain why any one bit of cultural material becomes salient. Why not encase the Reconstruction Amendments, or Roosevelt’s Four Freedoms, or Reagan’s Executive Order on cost/benefit analysis? In any event, the practice of national symbolism is everywhere and persistent, extending to flags, colors, statuary, pledges, anthems, oaths, and occasionally human remains.⁷ That the Constitution has become an honored relic is not particularly strange.⁸

Somewhat more mysterious is the Constitution’s status as enforceable law. It is not even the most popular document in the rotunda. This distinction belongs to the

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⁷ See Pauline Maier, American Scripture: Making the Declaration of Independence xiii (1997) (comparing the Charters to Lenin’s embalmed corpse displayed in a Moscow mausoleum).
⁸ Cf. Max Lerner, Constitution and Court as Symbols, 46 Yale L.J. 1290, 1294, 1298 (1937) (noting the role of symbol in “cementing internal order”).
Declaration, which mainstream lawyers today consider rhetoric outside the scope of positive law. In fact, the careful treatment of the Constitution at the National Archives is a reminder about texts. Words, including positive law, do nothing without our assistance. Declaring that “the Constitution requires” something of us is shorthand, false modesty, or misdirection. Nor is it completely obvious, to many academics anyway, why we choose to perpetuate the federal constitutional text as law.9

The question of the Constitution’s authority across generations rests within a division of constitutional theory.10 The challenge is to answer the complaint that following an ancient constitution amounts to dead generations governing the living. This dead hand complaint can be broken into three claims: that it is feasible for the living to depart from arrangements indicated by the Constitution; that our generation participated in little of the process responsible for the text; and that the Constitution is otherwise imperfect for our time.11 Of course similar complaints can be lodged against all sorts of arrangements that persist beyond one generation of decisionmakers, including dated statutes, regulations, judicial precedent, wills, and perpetual trusts. It is hard to believe that all of them are illegitimate. But perhaps the Constitution is distinctive. Key provisions are exceptionally old, the text’s formal amendment process is difficult to complete successfully under present conditions, and the text describes a government system with nationwide and international impact. No other source of law shares this combination of features, not even state or foreign constitutions.

However intriguing, dead hand arguments about the Constitution might be purely academic. Our legal culture now firmly accepts the constitutional text as law without indication of softening in the future. Government officials risk heavy reputational hits if not job loss for publicly suggesting the text should be ignored—although predicting the response to such suggestions is tricky because no one ever makes them. The best course might be to recognize an impressive overlapping consensus, accept the Constitution’s

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authority as axiomatic, and move on.\textsuperscript{12}

Against this possibility, several scholars have indicated a practical need to know the rationale for the text’s status as enforceable law. They assert that theories of authority are logically connected to methods of interpretation, and in a particular way: the former drive the latter. One cannot decide whether to use some form of originalism or moral inquiry or common-law reasoning or any other method of interpretation, the argument goes, without knowing why the subject of interpretation counts as law. Thus Michael McConnell asserts that “our answer to the ‘why’ question has implications for the ‘how’ question. We can determine the method to interpret the Constitution only if we are first clear about why the Constitution is authoritative.”\textsuperscript{13} There are different versions of this view but the basic idea is that an interpretive method ought to flow from a sound theory of authority for the Constitution. If so, it is imperative to evaluate competing authority theories despite any rock-solid overlapping consensus that the text must be law. Constitutional interpretation is an ongoing necessity.

This authority/interpretation relationship has been asserted for both statutes and constitutions, and there is something to it. Authority theories identify what counts as law and so they generate targets for interpretation by decisionmakers. Furthermore, if an official should respect a text just because a higher power issued it, then the official might sensibly decide to resolve ambiguities consistent with the higher power’s ascertainable intent, expectation, understanding, or interest. Consider James Madison’s logic. In 1824, he preferred to consult the ratifying generation: “the guide in expounding the Constitution” ought to be “the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution.”\textsuperscript{14} But this type of social contractarianism is not the only authority theory that has been connected to an interpretive method. Scholars who believe our Constitution’s authority turns on its adequately good content, or its coordination of human behavior, or even its potential to destabilize political victories have asserted that these theories should strongly influence interpretive method.\textsuperscript{15}

In this Article, I test the assertion that authority drives interpretation. My claim is that the relationship between authority theories and interpretive method has not been adequately understood. General assertions that a theory of the Constitution’s authority drives its interpretation are partly backward and importantly wrong.\textsuperscript{16} Crucially, I make this claim while attempting to bracket issues of institutional choice and design, which

\textsuperscript{12} See Laurence H. Tribe, American Constitutional Law 23 (3d ed. 2000) [hereinafter Tribe, Constitutional Law] (doing so after framing arguments); Monaghan, Perfect Constitution, supra note 1, at 383–84 (similar).

\textsuperscript{13} McConnell, supra note 2, at 1128.


\textsuperscript{15} See infra Part II.C (collecting sources).

\textsuperscript{16} I use “the Constitution” to refer only to text ratified per Articles VII and V. The relationship to precedent is considered in Part II. I use “authority theory” as an umbrella for many arguments about legal status, including but not limited to practical or theoretical authority as defined in philosophy. If a text qualifies as a practical or theoretical authority, there might well be implications for interpretative method. On philosophy’s use of these concepts, as well as “legitimacy” and “obligation,” see infra Part II.A.
already have been used to question the usefulness of high theory.17 These issues are vital, and I return to them in the closing pages. But my core argument will not depend on theorists becoming empiricists, or the possibility that data or uncertainty about the consequences of various interpretive choices will produce a peaceful overlapping consensus. My argument tests the asserted relationship between authority and interpretation on its own terms, setting aside orthogonal attacks based on institutional and empirical factors.

The asserted relationship turns out to be problematic in two allied ways. First, the supposed unidirectional influence of authority theories on interpretive method does not always hold. Certain authority theories depend on an interpretive method rather than the reverse. If a theorist wants to favorably assess a norm’s content before calling it “law,” then she must approach a text containing the norm with some interpretive presuppositions, however minimal. Moreover, an overarching normative framework can independently influence both interpretive method and authority theory. If so, any analytical sequence from authority to interpretation begins to fade.

Second and with respect to the Constitution, it is difficult to find any authority theory that is both persuasive and logically connected to interpretive method. Indeed there might be a negative correlation between a constitutional authority theory’s persuasiveness and its practical implications for interpretation. This observation is based on controversial assessments, but it can be illustrated with prominent theories. For example, contractarian authority theories based on ratification might well point in an originalist direction, if only these theories were now tenable for an ancient text. In contrast, coordination theories provide plausible reasons to refer to the text today without strongly influencing interpretive choices.

The implications are several. First, the best interpretive method likely varies over time. Contractarian theories might suggest originalism at first and then lose force. Second, other factors influencing interpretation have more power when authority theories drop out. Still to be considered are decision costs and error costs, defined by a normative theory and with regard to particular institutions. A third insight pushes in another direction, however, toward the usefulness of legal theory: Authority theories might be relevant to decisionmaking without instructing a decisionmaker how to interpret any particular text. Decisionmakers might use authority theories to gauge the relative strength of competing sources of law. If the Constitution is only weakly authoritative, we might recognize other sources of supreme law—or instead level down all sources of law toward what we now call “ordinary.” Regardless, the connection between authority theories, interpretive methods, and sound decisionmaking ought to be reconsidered.

Part I explains the dead hand complaint in federal constitutional law, to which theories of authority respond. It can be parsed into a descriptive claim about the ongoing

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social construction of law and different types of normative objections. The discussion includes an analysis of Article V as a potentially optimal outlet for constitutional change. Part II elaborates the concept of an authority theory, tries to distinguish it from interpretive method, and introduces the assertion that the former drives the latter. Part III tests the connection between interpretation and various authority theories: (1) brute fact theories that look to positivist dictates of legal culture; (2) good content theories that rely on the excellence of the text or the Condorcet Jury Theorem; (3) contractarian theories involving precommitment models and ex ante political incentives; (4) stability theories relating to coordination, self-enforcement, and Burkean tradition; and (5) postmodern unsettlement theory. Part IV collects lessons and speculates about why the asserted relationship achieved a foothold in constitutional theory. Finally, a revised picture of sound decisionmaking is suggested. It stresses additional factors: overarching normative frameworks, pragmatic institutional considerations, and the relative strength of competing sources of law.

In what follows, I assume that texts can be given meaning substantially bounded by an interpretive method. Radical versions of the indeterminacy thesis are set aside, positions that are hard to defend in any event. I also assume that a deductive relationship from theory to method is possible. Perhaps these theories and methods must be the product of induction or reflective equilibrium, but my argument will not depend on this claim. Finally, I offer a caveat. An unbending commitment held by some will prevent a decisive resolution of certain normative questions. Heroic national origin stories are important to some audiences, for instance, and they are linked to authority theories involving deference to the judgment of historical figures. My sense is that many of these narratives are mostly myth, even if useful myth. But if others cannot agree, there is a persisting need for the rest of us to know whether the asserted relationship to interpretive method holds true for other authority theories. In any strong form, it does not.

I. DEAD HAND ARGUMENTS

Skeptics might conclude that constitutional theory is a game you win by not playing. The concern is that the theoretical arguments are often empty—designed to produce favored outcomes in particular cases yet promoted as ecumenical solutions to constitutional problems. This portrayal is probably too harsh; many scholars are working in good faith, and attention to the concrete decisions of specific institutions is a perfectly sensible preoccupation. But this Part suggests the reality is, in a sense, worse than the cynical view. Constitutional debate may escalate from particular controversies, to interpretive method, and then to theories of authority without speaking to live questions. The problem is not that dead hand complaints against the Constitution’s authority are too partisan or incoherent; a plausible dead hand complaint is restated below. The problem is that the Constitution’s status as law might be, for the time being, beyond our control.

A. FROM INTERPRETATION TO AUTHORITY

A familiar disagreement proceeds along these lines:

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The Supreme Court decides a case such as *Roe v. Wade*¹⁹ and observers are divided. One camp of scholars is elated with the intervention, believing it comports with a sound moral vision that is at least permitted by constitutional text. Ronald Dworkin’s defense of abortion rights is illustrative. Affixing his position to the Constitution, Dworkin contends that the document is not merely “a list of concrete, detailed remedies drawn up by parsimonious draftsmen but a commitment to an abstract ideal of just government.”²⁰ Here he is not openly advocating judicial inquiry into justice unalloyed. He is making a claim about the drafters’ semantic intentions. For certain constitutional provisions, Dworkin argues that a proper interpretation of what the text means requires readers to work out abstract moral principle as best we now can, and without regard to the particular conceptions or expectations of the drafters’ generation.²¹ The text might incorporate an abstract moral principle and, correctly understood, that principle might yield an abortion right.

A second camp is distraught. They see the Court’s decision as a manipulation of text and democracy-defeating—the exercise of excessive power by unelected judges who have imposed their policy preferences on the nation. In this spirit Robert Bork declared that “*Roe*, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned.”²² Bork denies that constitutional adjudication ought to be an exercise in moral reasoning and demands that courts abide by a version of originalism.²³ This interpretive method, it is hoped, will constrain judicial policy discretion while bolstering adherence to the Constitution as written and ratified. Against the first camp’s commitment to moral outcomes, the second camp might advertise a form of democracy with less judicial policy making and more fidelity to constitutional text.

In response, some reject the idea that constitutional law ought to focus on promoting “democratic” outcomes, at least when enforced by courts.²⁴ They might think private ordering is often too valuable to be sacrificed. But regardless, the originalist camp is vulnerable to perceived contradiction: A commitment to democratic choice may

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²² Bork, supra note 11, at 116.
²³ See id. at 144 (“All that counts is how the words used in the Constitution would have been understood at the time.”); see also Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 92 (2004) (dividing original public meaning from original intent); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 34–37 (1999) (looking for evidence of ratifiers’ specific, clause-by-clause intent).
clash with their brand of textual fidelity. That is, the originalist camp often justifies an institutional choice away from the judiciary with a principle of democracy, yet their best interpretation of constitutional text cannot invariably yield judicial abstinence. Sometimes it will dictate aggressive judicial intervention against modern-day legislation and executive preferences. This becomes apparent when attention moves from arguably ahistorical abortion rights or gay rights and toward purportedly historical restraints on, for example, Commerce Clause regulation or gun control. One fresh target is *Parker v. District of Columbia.* There the D.C. Circuit used the Second Amendment’s text and a founding era history of muskets and militias to tell the District it may not ban home possession of functioning handguns in 2007.

No consensus exists on which current practices are inconsistent with originalism. But likely departures include much of the modern federal administrative state, most federal criminal law, all public school desegregation mandates, and all federal constitutional limits on sex discrimination by the state beyond voting rights. Originalists cannot take contemporary democratic will as their polestar insofar as every version of originalism chains outcomes to the decisions of past generations—whether “we” like it or not. “Everyone who voted for the Constitution is long dead,” Richard Posner observes, “and to be ruled by the dead hand of the past is not self-government in any clear sense.”

Yet the dead hand is a complication for both camps. Nonoriginalists also try to show respect for an ancient constitutional text. If honest, this respect will be constraining; interpretive flexibility is not endless. The theorist who wants moral debate to take place during litigation must accept constraints on that debate according to the provisions of a morally imperfect Constitution. Originalists are no better off. They must defend a version of democracy less presentist than advertised. Each camp may thus tweak the other for its fealty to an aged constitutional text, and the alleged countermajoritarian difficulty for the judiciary becomes an intertemporal difficulty for everyone. The remarkable part is when either side suggests they have achieved an advantage by asserting a dead hand problem.

The issue persists beyond moral readings and originalism. No reputable

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26 478 F.3d 370 (D.C. Cir.), cert. granted sub nom. District of Columbia v. Heller, ___ S.Ct. ___ (No. 07-290). The case is pending before the Supreme Court as of this writing.
27 See id. at 384–95. The legislation itself was thirty years old. On the difficult interpretive questions, see Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 643–57 (1989).
28 Richard Posner, The Problems of Jurisprudence 137–38 (1990); see also William J. Brennan, Jr., Education and the Bill of Rights, 113 U. Pa. L. Rev. 219, 224 (1964) (noting that “[T]he genius of our Constitution resides not in any static meaning it may have had in a world that is dead and gone, but in its applicability and adaptability to current needs and problems.”).
29 See Ackerman, Discovering, supra note 10, at 1045–46.
30 See Bork, supra note 11, at 170–71 (awkwardly endorsing a form of judicial originalism while claiming that nonoriginalists with dead hand complaints want rule by judges rather than electorate); John O. McGinnis & Michael B. Rappaport, A Pragmatic Defense of Originalism, 101 Nw. U. L. Rev. 383, 392 (2007) (indicating dead hand is not problem for originalists because it is problem for text-bound nonoriginalists). Ackerman’s rendition of constitutional politics, see 1 Bruce Ackerman, We the People: Foundations 6–7, 81–99, 263–69, 316–19 (1991), is actually similar; he counsels respect for non-Article V higher lawmaking of the dead.
interpretive method avoids the dead hand issue because no reputable method disregards constitutional text. For example, thematic readings of the Constitution attempt to discern a central message from the document as a whole. Stephen Breyer's *Active Liberty* is a recent effort, but the tradition was vibrant by the 1980s with scholars pushing themes such as deliberative democracy and individual liberty. Similar remarks apply to Thayerian judicial deference to legislative judgment. Like thematic readings, which must presuppose some interpretive tools to find a theme, deference is not a complete interpretive method. Strategies are needed to ascertain when the Constitution is clear enough for the judiciary to intervene and how other institutions are supposed to resolve constitutional disputes. These questions remain related to an ancient text. Larry Kramer’s version of popular constitutionalism, which promotes departmentalism for constitutional issues and relies on founding era history, is not very different on this score. A dead hand complaint can be softened to the extent that contemporary understandings of the text are accorded weight and not cabined by inflexible interpretive requirements. But the complaint cannot be ignored unless the text is no constraint on popular meaning. A remaining interpretive school is more difficult to assess. Common law constitutionalism is an evolutionary method focused on precedent and tradition. It might be an alternative to text. But insofar as it incorporates respect for the Constitution, the remarks above apply.

B. Dead Hand Complaints

In earlier ages, dead hand complaints could be taken more seriously than debater’s points. American revolutionaries once spoke as if they could “begin the world over again,” objecting to the perpetuation of bad practices or warning against attempts to lock in one path for the future. They indicated a liberal democratic premise that living human beings are the proper subject of moral concern. It was also suggested that there was no choice but choice—that the dead could not possibly govern the living with positive law. In fact the dead hand complaint in constitutional law is attributable to positivism and democratic values. If the only possible authority were God’s will, or immortal natural law, or the King’s fancy, or the everlasting German Nation, then law could not be critiqued as a cross-generational artifact. But law and institutions are human-made, the argument went, and they can be unmade once we see fit to reform in

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33 See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 136, 144 (1893); accord Vermeule, Judging Under Uncertainty, supra note 17, at 254–55 (summarizing Thayer’s approach and present-day variations on it).
35 See infra Parts II.B & III.B.4.
light of new facts and values.

Thus Noah Webster lauded popular sovereignty and defended the absence of a Bill of Rights in the 1787 Constitution. He argued that the “attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.” Webster conceded that many laws might “always be good and conformable to the sense of a nation,” but held that “most institutions in society, by reason of an unceasing change of circumstances, either become altogether improper or require amendment.” By 1789, Thomas Jefferson was equally emphatic. He argued to Madison that, “by the law of nature, one generation is to another as one independent nation to another.” Hence “no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.” The same sentiment was expressed by Thomas Paine in his defense of the French Revolution. Paine argued that past generations “have neither the right nor the power” to control their posterity. He derided Edmund Burke for “referring to musty records and mouldy parchments to prove that the rights of the living are lost” as “[t]he circumstances of the world are continually changing, and the opinions of men change also; and as Government is for the living, and not for the dead, it is the living only that has any right in it.”

1. The Article V Outlet. — Still, there was no consensus on the proper balance between stability and innovation during the founding period. Webster, Jefferson, and Paine supported ratification of the 1787 Constitution with its Article V amendment process, so a degree of formal entrenchment was acceptable to them on that occasion. Furthermore, if the practice surrounding Article V amounts to the optimal method for changing supreme constitutional law, then the dead hand complaint is eviscerated. Any objection to this existing law would be appropriately handled through that process.

Article V’s optimality is, however, open to serious doubt. At a minimum we have good reason to be uncertain about the matter, considering the difficult value choices and empirical questions involved. Pressure to respect the Article V process is subject to at least four rational objections: (1) it makes constitutional change too easy, (2) it makes constitutional change too difficult, (3) it generates demand for covert or otherwise troubling substitute methods of legal change, and (4) it skews the distribution of amendment power in the wrong way.

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37 Noah Webster, On Bills of Rights, 1 Am. Mag. 13, 14 (1787) (emphasis omitted).
38 Id. Webster later lost his commitment to popular will in favor of a Christian social order. See Richard M. Rollins, Words as Social Control: Noah Webster and the Creation of the American Dictionary, 28 Am. Q. 415, 416–19 (1976).
40 Id.; accord Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 The Works of Thomas Jefferson 3, 11–14 (asserting that “the dead have no rights”) [hereinafter Jefferson to Kercheval].
43 There is also the issue of precisely what Article V should be read to require and permit. On judicial treatment and past practice concerning Article V, see Tribe, Constitutional Law, supra note 12, § 1-19.
The first concern might seem inconsistent with dead hand complaints about entrenchment. But perhaps a past generation created an amendment process too lax for present exigencies, one that bends to the excitement of reformers too easily, even if the number of Article V victories seems small at first glance. Stability in formal constitutional law has comforting benefits. An analogue to this concern is the suggestion that today’s population ought to be shy about attempting Article V lawmaking. And some foreign constitutions altogether exclude swaths of text from the formal amendment process. Yet because the federal amendment rate is relatively low, Article V laxity is almost certainly not the leading worry.

The next two concerns are about stringency. The Article I, Section 7, process for legislation is arguably elaborate but the formal amendment process is almost comically complex. Article V requires supermajority votes in multiple institutions, and insulates equal state suffrage in the Senate absent the consent of each affected state. Facing such hurdles, advocates of legal change may seek substitute methods. They need not give up on supreme constitutional law, either. Past generations accomplished serious change without formally amending, expressly disavowing, or obviously following the text of the Constitution. Thus Article V’s stringency is a potential explanation for creative judicial “interpretation” of the text in a pinch, and an impetus for theories that validate sources of supreme law not reflected in an Article V victory. This dynamic makes the formal endurance of constitutional text less important—even misleading—for those who wish to understand legal change and the actual character of our constitutional system. Of course, equating a purported interpretation with a constitutional amendment requires a contested choice for what qualifies as interpretation. And some observers might be pleased with judicial power. The simple thought remains that our mixture of informal and formal


45 See, e.g., Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) art. 79(3) (Bundestag trans., 2000) (exempting federalism and basic rights clauses from amendment).


47 See 2 Bruce Ackerman, We the People: Transformations 20–25 (1998) (describing non-Article V constitutional moments); David A. Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1458–64 (2001) (arguing that amendment has not been sufficient for change, either).


50 Cf. John Ferejohn & Lawrence Sager, Commitment and Constitutionalism, 81 Tex. L. Rev. 1929, 1958–60, 1968 (2003) (valuing judicial independence); Henry Paul Monaghan, We the People[s], Original
The fourth concern works somewhat independently. It raises questions about the distribution of power to amend. Even if the rate of federal constitutional amendment is perfectly acceptable, there is the charge that Article V is problematically skewed toward states as entities. Small population states are likely to have more power in the Article V amendment process compared to, say, a national plebiscite or ordinary federal statute making. Some believe that Article V has become discordant with a nationalizing culture and that the Constitution will not include key contemporary values. The most entrenched textual norm is equal representation in the Senate for every state, but no one appears to believe this provision is the most central moral value in our law. A related critique involves congressional power and self-dealing. One might think that members of Congress, rather than the states, possess too much leverage over institutional reform that affects them. Perhaps some type of citizen initiative process, for all the hazards, would be an improvement.

There always have been alternative models for constitutional change. Jefferson himself vetted several: a flat sunset provision for any law after its nineteenth birthday, putting an expiring constitution to a majority popular vote, or constitutional conventions whenever two of three branches of government by two-thirds votes support textual alterations. And Paine intimated that constitutions might be no more entrenched than statutes. He acknowledged that a law may properly extend across generations if the current generation retains power to repeal, and for him “the non-repealing passes for consent.”

Indeed, history reveals little or no support for Article V as a model. The voting rules for amendment of written constitutions in our states and in foreign nations tend to be less demanding than Article V. In addition, the frequency of amendment in these jurisdictions seems higher, even though such victories are less resilient and thus arguably less valuable. More dramatically, fourteen states have implemented one of Jefferson’s


See Ackerman, Living Constitution, supra note 9, at 1749–50.


See, e.g., Cal. Const. art. 18, § 3; Or. Const. art. IV, § 2.

See Jefferson to Madison, supra note 39, at 6; cf. U.S. Const. art. I, § 9, cl. 1 (setting localized sunset); id. art. V (same); id. art. I, § 2, cl. 3 (addressing initial state representation in the House); id. art. I, § 3, cl. 2 (addressing initial classification of senators).

See Jefferson to Kercheval, supra note 40, at 12–14.


ideas for systematic instability. In these places the question whether to hold a new state constitutional convention must be on the ballot periodically, such as every twenty years.59 Between 1970 and 2000, this question was posed twenty-six times and on four occasions enough voters answered in the affirmative.60 Lenient amendment procedures are not disastrous, although surely some jurisdictions would be better off with greater formal legal stability.

There are more imaginative alternatives as well. The Constitution might have sunnsetted Article V and converted the remainder to an ordinary statute after twenty years. Or it might have established, in lieu of voting rules, a standard for departing from the text’s meaning. We might have asked whether fidelity to the text would be seriously contrary to our present sense of public policy (which is basically how wills and perpetual trusts are checked61), or whether directives in the text are now unworkable and the subject of little reliance (as courts may do under the doctrine of stare decisis62). In fact these standards might roughly track the reality of informal change to our nominally supreme constitutional text.

None of this demonstrates intolerable flaws in the current system. The issue is clouded with normative and empirical disputes. For example, relatively high textual amendment rates might be appropriate for the states yet riskier at the national level; or an often-amended text might be associated with more numerous and dangerous full-scale revisions.63 As well, credible commitments to particular legal forms have liberating upsides, which I return to below, while the hoped-for clarity of amendment voting rules might beat amendment standards. Or it could be that formal rules for amendment are much less important for amendment rates than the degree of partisan competition.64 Plus different people have different tolerance levels for judicial updating, to the extent it acts as a substitute for the formal amendment process. But to say there is controversy and uncertainty is not to endorse today’s settlement, either.


59 See, e.g., Ill. Const. art. 14, § 1(b); May, Developments, supra note 58, at 4.


61 See Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 211–17 (Mo. Ct. App. 1975) (refusing to enforce testator’s wish that her mansion be destroyed, considering neighbors’ property values); Restatement (Third) of Property: Wills & Other Donative Transfers § 10.1 cmt. c (1999) (presenting nonexhaustive list of invalid conditions in wills); Restatement (Third) of Trusts § 29(c) & cmts. f & i (2006) (calling for balancing trusts’ benefits with “the effects of deadhand control”).


63 See Lutz, supra note 58, at 247–52.

64 See Daniel Berkowitz & Karen Clay, American Civil Law Origins: Implications for State Constitutions, 7 Am. L. & Econ. Rev. 62, 64, 74–75 (2005) (downplaying the role of formal amendment rules after accounting for influence of partisan political competition, and claiming that civil law origins are related to higher state constitutional amendment rates); see also Lutz, supra note 58, at 247 (suggesting that high amendment rates are partly a product of longer constitutional documents covering more territory). On some of the methodological choices involved in studying the relationship between formal amendment rules and amendment rates, see Astrid Lorenz, How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives, 17 J. Theoretical Politics 339 (2005).
2. Content of the Complaint. — If thoughts of Article V optimality can be defeated with serious doubts or uncertainty, then a dead hand complaint has life. We can aggregate such complaints into a generic restatement that combines descriptive and normative claims: (1) the arrangement in question is socially constructed such that today’s decisionmakers may choose a new arrangement and (2) a new arrangement is justified because (a) today’s decisionmakers have not adequately participated in establishing or validating the existing arrangement and/or (b) the arrangement is otherwise imperfect according to some other normative theory and in view of today’s facts, values, or judgment. This combination matches the elements of commonplace normative argument: feasibility of change, process defects behind the status quo, and substantive superiority of a new arrangement.

The social construction claim is an assertion of present-day freedom to choose. The dead cannot literally govern our choices, the complaint suggests, and so the living bear responsibility for continuing or discarding old arrangements. This was Paine’s position.65 And the claim is importantly true. Positive law is by definition socially constructed in a modest sense. Without conceding that legal texts are boundlessly manipulable in accord with the reader’s preferences, it should be a point of consensus that living human beings are responsible for creating and perpetuating positive law and legal institutions. Anthony Kronman made this point eloquently by connecting culture with law: Both are perishable.66 Although one can reject his further argument that the living generation is obligated to follow through on projects started in the past,67 he is correct that some portion of law is defunct without affirmative effort from the living to abide and transmit it to newcomers. In this policy space we may, but need not, choose to follow the directives of a statute or a will or a trust or a constitution or any other document left over from the past.

Recognizing the mutability of legal norms does essentially nothing on the normative side, however. Social construction observations may reveal options but the motive for change must come from norms.68 Two categories of normative objection to the status quo might be distinguished. The first is a process objection that those affected by an arrangement should have the opportunity to participate in its creation or perpetuation. This might call for individualized consent, or majoritarian democracy, or some other group decision rule; it could be animated by a deontological respect for autonomy, or a communitarian demand for responsibility, or a consequentialist determination that the most accurate judgments will be made by affected parties. These possibilities suggest different remedies. Jefferson’s emphasis on prompting every generation to reconsider legal arrangements may indicate a communitarian vision, while Paine’s toleration of unrepealed law connects the participation objection to actual shifts in popular preferences.69 In any case, the concern is with repetition of past practices without

65 Paine, Rights of Man, supra note , at 12.
67 See id. at 1067—68 (making the argument); Rebecca L. Brown, Tradition and Insight, 103 Yale L.J. 177, 212–13 (1993) [hereinafter Brown, Tradition and Insight] (critiquing the argument).
69 See supra text accompanying notes 39–42.
contemporary validation. And nobody alive today participated in enacting any federal constitutional text prior to the Sixteenth Amendment’s ratification in 1913.

Dead hand critics usually have normative objections beyond participation. After all, the social construction claim threatens to explode the participation objection. The former asserts current power over legal arrangements while the latter complains about a lack of present-day influence. Reconciling these positions demands a controversial theory of participation. As well, if a multigenerational arrangement is otherwise perfect (or unanimously thought so), then the dead hand argument is virtually over.

Charging the current order with imperfection may require another easily contested normative standard but serious complaints do exist. Perhaps the Constitution does not adequately reflect the need for executive power in a setting where the United States government is a global actor and rapid technological change makes legislation and judicial adjudication less reliable. Consider as well the fret that we lack a sensible plan for governing in the wake of a catastrophic terrorist strike on the Capitol. Less ideologically charged critiques are also available. Regardless, dead hand complaints usually will incorporate an attack on the content of legal arrangements designed for, not just by, an earlier time. And the Constitution might present a unique mark for dead hand criticism. Most of the text is exceptionally old, the formal amendment process is uncommonly demanding, and the government it frames importantly influences domestic society and the international order.

But perhaps a multigenerational arrangement is not categorically special. Maybe a new generation of decisionmakers—if we can agree on what that means—is unnecessary for the general complaint to apply. Consider a colonial regime in which one nation dominates another territory for commercial gain. From the perspective of the colonial rulers, this arrangement is contingent on their ongoing choices; from the perspective of the governed population, the arrangement may be unjustifiable because of insufficient popular validation or other moral principle regarding subordination. It is hardly apparent that the situation is less troubling than one generation creating legal norms that are (taken as) binding on the next. Dead hand arguments are a species of all arguments over appropriate decisionmakers. In fact dead hand complaints are less distressing to the extent they assume the feasibility of change by affected parties. Truly subordinated populations have no such choice.

Yet the attraction of dead hand complaints in the cross-generational context could be just this message of freedom to depart. The complaint is designed to achieve an

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73 See infra text accompanying notes 165–173.
energizing sense that there is no spirit world dictating the continuation of ancient imperfection, that the maintenance of law and institutions is contingent on the complicity of living decisionmakers, that these decisionmakers ought to justify the status quo without assuming it is natural or necessary, and that the present might well decide to respect new facts, values, and judgments. When the arrangement in question has lasted for multiple generations, moreover, the sense of opportunity may interact with a concern that past judgments cannot possibly be optimal today. For some observers, this is true of the Constitution. The original text was ratified for a population that was comparatively tiny, crowded against the eastern seaboard, economically backward, isolated by crude transportation and communications technology, tolerant of one human being owning others, wedded to narrow gender roles, religiously parochial, and little more than a bit player on the world stage.\textsuperscript{74} Formal amendments followed but they have not addressed every plausible objection. The Article V procedure will almost certainly remain difficult, while the instances and magnitude of regretful fidelity will either remain stable or increase. The normative side of the dead hand complaint therefore has a disconcerting, and possibly increasing, attraction.\textsuperscript{75}

C. An Invincible Constitutional Text?

But our legal reality is not so fluid. In fact the dead hand complaint against the Constitution is at least partly moot. Not because the normative arguments are nonstarters. The problem is with the social construction claim. As a technical matter, we are responsible for perpetuating older legal norms; as a practical matter, however, the opportunity for departure is restricted.

Stickiness in positive law arises from multiple sources, some of which academics are only beginning to model with any confidence. A well-recognized if not well-understood mechanism of friction is legal and popular culture. Whether or not earlier generations hoped the document would become invincible,\textsuperscript{76} the Constitution is an icon and widely touted as enforceable law. Officials are still sworn to support “the Constitution” and these officers and private parties refer to the text in countless disputes, with some effect on arguments. Granted, popular knowledge of the document’s content is limited and much of the text has an open-ended appearance. Furthermore, flat cultural explanations for ongoing phenomena are thin renderings of the dynamics that create patterned values and behavior. But we need not be more clever if the goal is to know the document’s stature in popular and legal culture. It seems secure for now, and surely

\textsuperscript{74} Cf. Klarman, supra note 11, at 381–87 (rejecting fidelity to the founders); Thurgood Marshall, Commentary, Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1, 5 (1987) (“‘We the People’ no longer enslave, but the credit does not belong to the framers.”).

\textsuperscript{75} Some suggest the dead hand complaint against the Constitution ought to be rejected because it proves too much, jeopardizing dated statutes, judicial precedent, and so on. See Lillian R. BeVier, The Moment and the Millennium: A Question of Time, or Law?, 66 Geo. Wash. L. Rev. 1112, 1115 (1998). Strong reasons exist for treating this material as valid law, but pervasive applicability of the complaint is not an effective answer to it. Maybe we have a systematic problem of slavish respect for antique law.

\textsuperscript{76} See Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 1 Letters and Other Writings of James Madison, supra note 14, at 503, 503–04 (arguing the virtues of stability and the propriety of intergenerational respect); Philip A. Hamburger, The Constitution’s Accommodation of Social Change, 88 Mich. L. Rev. 239, 275–81 (1989) (indicating that many at the founding hoped for an indefinite Constitution); see also The Federalist No. 49, at 314–16 (James Madison) (Clinton Rossiter ed., 1961) (objecting to frequent conventions).
more culturally entrenched than the pre-Civil War era. To the extent constitutional text is now encoded in culture, possibly nobody has a meaningful short-run choice to repudiate it.

Second, multidisciplinary work on path dependence and process sequencing is inching toward a sophisticated understanding of lasting institutions. Roughly speaking, this work investigates the influence of prior conditions and the order of events on subsequent outcomes, especially where those past conditions and sequences were in some sense arbitrary or suboptimal. Path dependence observations became popular in economic development studies some time ago, and political scientists are applying those lessons to government institutions. Paul Pierson, for example, investigates positive feedback mechanisms in politics that may perpetuate institutional rules, mobilization patterns, and thinking about politics. Among the reasons for perpetuation are setup costs for an alternative system, learning effects from familiarity with the current system, network effects from mass participation, and expectation adaptation as institutional patterns appear stable.

There is nothing irrational about these reasons for stability. Transition costs are real costs. True, path dependence is often used to unsettle assumptions that competition and learning yield efficiency; this accounts for vigorous debate over whether and what kind of path dependence is illustrated by the QWERTY keyboard arrangement. But we are considering the stickiness of textual respect, not its desirability. And while path dependence is relatively easy to identify when it comes to the gene pool for the human

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80 See Pierson, supra note 79, at 24 (following Arthur, supra note 78, at 112).


82 This is now the standard letter arrangement for personal computer keyboards in the U.S., although text messaging from cellular telephones illustrates a crack in QWERTY dominance. Compare, e.g., Paul A. David, Clio and the Economics of QWERTY, 75 Am. Econ. Rev. 332, 333–36 (1985) (attributing its success for typewriters to path dependence, and noting that arrangement allowed salesmen to type “typewriter” quickly during demonstrations), with, e.g., S.J. Liebowitz & Stephen E. Margolis, Path Dependence, Lock-In, and History, 11 J.L. Econ. & Org. 205, 206–08 (1995) (distinguishing claims that the decision was suboptimal over some time frame based on whether better choice was feasibly recognizable at t1).
species or the location of the U.S. Capitol Building, it is a mistake to believe that culture, positive law, and institutions are more ephemeral as a rule. The Constitution is not only reflected in living institutions. Its status as a source of law involves an ongoing practice that might be self-reinforcing. Many have learned the Constitution’s terms and the practice of referring to text during debate (or at least avoiding clearly contradicting conventional readings of the text), many expect this pattern of behavior to continue, and many may fear the risks and costs of attempting to transition and recoordinate in a new equilibrium. The Constitution might be law’s version of a QWERTY keyboard.

Textual reference has become sufficiently patterned that it is worth considering how much of the constitutional text would change if Article V were eliminated and the document were amendable like an ordinary statute. Quite possibly nothing, although unpopular Supreme Court interpretations of the text would be in jeopardy. This prediction is most intuitive for matters of government structure. Around the world, shifts between parliamentary and presidential systems are rare. Not one has occurred in the U.S. at the state level, even though their formal amendment processes seem less demanding than Article V. Equally striking are the data on bicameralism. After the Court denied states the ability to apportion legislative districts in ways substantially departing from equal population, the rationale for state senates weakened. Yet not a single state shifted to unicameralism in response. Only four states have tried that structure in our history and only one still has it today. True, persistent structures might signify a locked-in political class. But the point is that Article V-like procedures are not the only sources of constitutional stability. Far from it.

So in some ways the status of the Constitution as law is a topic of no importance. Culture and path dependence resolve the issue for now. Debating the text’s rightful authority might then be a theoretical parlor game, with no obvious answer and no significance other than to provide a gauge of how badly we should regret the past. Along these lines, Henry Monaghan once concluded that the Constitution’s authority is neither a necessary nor a proper legal question:

The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle for theorizing about American constitutional law. . . . For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration. It is our master rule of recognition . . . .

II. AUTHORITY AND INTERPRETATION

There are at least two practical reasons for continuing dead hand arguments about the Constitution, even if there is no doubt about its status as law. The first is a set of long-term concerns which I will ignore. Scraping the document might become realistic

86 Monaghan, Perfect Constitution, supra note 1, at 383–84 (footnotes omitted).
in the future—the Articles of Confederation did not last forever, while written constitutions in other nations regularly disappear within a generation—and an ongoing inquiry into the text’s value can make that future judgment better informed. It could also combat a risky status quo bias. Dead hand debate might produce the right mix of comfort and discomfort with the existing order.

A second reason is more immediate. A group of theorists over the last twenty years has asserted that a defensible method of textual interpretation cannot be constructed without knowing why the text in question is law. Interpretation is an ongoing necessity. No thoughtful observer believes that uncertainty about the Constitution’s meaning will be eliminated in the near term, or ever. Insofar as a persuasive theory of authority drives a justifiable method of interpretation, we are in need of the former regardless of how certain we are that the Constitution counts as law. This Part introduces the conceptual components of this thought.

A. Theories of Authority

In accord with relevant scholarship, theories of authority should be understood with a particular goal in mind. An authority theory is a test designed to ascertain what counts as enforceable or respect-worthy law. It is an if/then proposition: If some test is satisfied, then the subject tested counts as valid law or law worthy of someone’s respect.

This testing function is not a commitment to find law in a given context, much less to create good law. These theories are supposed to be less encumbered than that. An authority theory need not suggest what quantity of material should pass its test; an authority theorist might well prefer less law to more, and her theory will function regardless of how much law it finds. In addition, authority theories ought to be separated from general directives to “do good.” Such directives might influence interpretation but they cannot be issued by an authority theory alone. If authority theories become too bound up with normative commitments, they jeopardize one of their asserted goals—guiding the interpretation of law without descending to ground-level moral debates over abortion policy, gun control, and the like. They need to be theories of the law rather than simply theories of the good. And if they were the latter, any special role for legal authority would be unclear. In this sense, advocates of the authority/interpretation relationship are trying to do more with less.

This restriction still leaves an array of options for authority theories. The questions of law’s definition and respect-worthiness have a massive history of intricate logic and lasting disagreement within Western jurisprudence alone. Fortunately, present purposes call for only general knowledge of the field, in part because constitutional theory has its own set of standard arguments that imperfectly overlap with the teachings


88 See infra Part II.C.

89 For their part, legal positivists might believe that normative evaluation of law will be easier if we refuse to pass moral judgment on candidates for law at the validity stage. See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 597–98, 615–21 (1958) (applying this argument to Nazi law).
of jurisprudence.

To be elementary, what we call law tends to include behavioral norms in the form of commands backed by threat of force or softer encouragements, in addition to protocols for building institutions and fostering human collaboration. The issue for an authority theory is law’s source or grounding. H.L.A. Hart’s rule of recognition and Hans Kelsen’s Grundnorm famously rely on official practice rather than normative justification to identify valid law. Hart’s ultimate rule of recognition sets the test of legal validity for all downstream rules, and it is identified by acceptance of the regime’s officials and reflection in their practices. If officials accept and refer to the Constitution as a font of valid law, that is the end of the analytical line on the text’s legal validity.

There are competing views, of course. One might instead demand that, before any norm can rightly qualify for the label of law, its content must satisfy a basic normative test. A dispute over this requirement divides modern natural law theorists from legal positivists. Perhaps truly evil norms will gain respect if they are called law by theorists and others, or maybe norms flunking a minimal test of goodness are too unstable to warrant the label. Whatever the case, philosophy has subdivided the normative questions into law’s legitimacy, law’s authority, and the obligation to obey law. Legitimacy is the question whether a given law or legal system is justifiably enforced—a question aimed most directly at those who administer the law. Authority is the question whether the status of law can add a good moral reason to believe (theoretical authority) or behave (practical authority) in accord with law. Obligation is the affiliated question whether a person subject to a behavioral norm has a moral reason to obey just because of the norm’s status as law.

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92 See Hart, Concept of Law, supra note 90, at 94–117 (describing necessary and sufficient characteristics of a legal system).


94 See, e.g., Sotirios A. Barber, On What the Constitution Means 57 (1984); cf. Lon L. Fuller, The Morality of Law 38–41 (rev. ed. 1969) (listing eight failures—such as incomprehensible, contradictory, or retroactive rules—that “result[] in something not properly called a legal system at all,” while refraining from issuing more specific moral requirements for law’s content); id. at 205–06 (stressing law’s ability to facilitate moral objectives). One might also believe there can be no description of law without evaluation.


The focus on moral reasons shows an interest in motives for respecting law other than the self-interested fear of sanction. A state trooper might decide to enforce a speeding law, and a driver might decide to travel more slowly because of that law, only because doing otherwise jeopardizes the bank accounts of each. But many theorists want to distinguish rightful authority or ethical action for social good from the effective exercise of power or action in one’s narrow self-interest. Unsurprisingly, inquiries into legitimacy, authority, and obligation demand something more than fear as a test for respect-worthy law. Although these questions can be answered in subtly distinct ways, the technical differences are not very important here. The concepts are certainly related, and I include them all under the rubric of “authority theory.”

Perhaps more useful is legal theory’s notion of a content-independent reason. These are reasons that do not depend on a favorable judgment of law’s content. If such reasons exist, they can be effective in a diverse society that ought to be held together. Persuasive even when a law’s substance is not, content-independent reasons may discourage exit, secession, and civil disobedience. Several have been suggested. One such reason is consent to the legal system by which the law was promulgated. Consent might be given normative weight apart from the law’s content, and the consent theme is part of an ideologically diverse history of social contractarian theorizing. Somewhat similarly, appropriate hierarchical relationships can justify following the wishes of a superior. Valid legal texts, such as statutes, are sometimes analogized to the command of a principal to subordinates including courts. In addition, a person might offer epistemic deference to law. Following a law might produce morally desirable outcomes more often than fallible individual evaluation. Furthermore, widespread acceptance of law can have coordination benefits that allow large numbers of people to achieve mutual gains. Coordination justifications might work even if the outcome is not ideal from each individual’s perspective. One might even have a duty to comply with an unjust law to help prop up an otherwise acceptable legal system.

Each of these ideas has a role in constitutional theory. Normative constitutional theorists explore the desirability of constitutionalism in various forms and across time.

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99 For example, it seems clear there is no independent moral obligation to comply with an illegitimate system. A residual question is whether there is a moral obligation to comply with a law that is legitimately enforced. See Leslie Green, The Authority of the State 234–40 (1988) [hereinafter Green, Authority of the State]; Kent Greenawalt, Conflicts of Law and Morality 48–50 (1987).
100 Philosophy’s subdivisions do indicate a helpful point, however: what counts as law depends on who wants to know. See Part III.A.1.
102 See Bix, supra note 95, ch. 16.
along with effective strategies for enforcement. The desirability issue leads to a proliferation of theories that matches the variety of moral perspectives—utilitarian, egalitarian, libertarian, cosmopolitan, and so on. Furthermore, each moral framework might apply differently in different contexts. Constitutionalism in the United States might have to differ from constitutionalism in the United Arab Emirates or the United Nations. And like legal theory more generally, constitutional theory encompasses content-dependent and content-independent reasons for adherence to imperfect law. To keep the analysis manageable, the more prominent constitutional authority theories are canvassed in Part III. Here I want to emphasize the multiplicity of targets for these theories.

A constitutional text is only one type of constitutional law, even within the category of supreme law. A single document can be useful for initiating a new regime but constitutionalism may rely on other sources. Great Britain has a constrained constitutional system without a document labeled “supreme law.” Analogously, some might believe that certain traditions ought to qualify as supreme constitutional law in the United States, regardless of their reflection in a document entitled “The Constitution.” Judicial precedent is another possibility. Perhaps Supreme Court decisions declaring constitutional law are themselves supreme law. Functionally they are often treated as such, in that many nonjudicial actors appear to accept the Court’s claim that it is the final arbiter of the text’s meaning, and the Court is often interested in its own constitutional doctrine and precedent. Finally, social movements might generate constitutional law without Article V. Depending on the operative theory of authority, more than one source might qualify as supreme constitutional law, or the Constitution might not qualify


109 See, e.g., Fallon, supra note 96, at 1824 (relying on courts’ embrace of precedent and public’s acceptance of such decisions); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 706–10 (1975) (accepting judicial exposition of certain national ideals that are “not expressed as a matter of positive law in the written Constitution”).


while another source does, or perhaps nothing should qualify as categorically supreme.

For now, however, the goal is to understand the relationship between theories of the Constitution’s authority and the methods for interpreting that one text. These theories might be descriptive or normative, content-dependent or content-independent. But to make the authority/interpretation assessment manageable, it is best to begin with the Constitution alone.

B. Methods of Interpretation

Interpretive methods must be distinct from authority theories for the latter to drive the former. And yet on one account, they are not: The function of both is to identify law. Authority theories tell us what counts as law while interpretation yields law’s meaning. It could also be true that authority theories are impossible to apply without an interpretive method. For instance, if the operative authority theory is Hartian legal positivism, can one ascertain the practice and acceptance of officials without a method for interpreting information regarding official behavior? But to animate the asserted relationship, there is an intuitive distinction. One might suppose interpretation is a method by which textual meaning is specified, while authority theories identify which texts are targets for legal interpretation. This distinction is unstable in places but it might be workable.

Even so, explaining which practices qualify as interpretation is challenging. A group of literary theorists and their compatriots in law maintain that interpretation is by definition an inquiry into authorial intent. If a reader is not interested in this intent, he is not “interpreting”; perhaps he cannot even confirm disagreements over textual meaning. Others persistently disagree. They contend that an honest interpretive effort can reflect other considerations—such as concern for fair warning by attention to ordinary word meaning, or adherence to precedent about meaning, or sensitivity to just outcomes under new circumstances. They claim that readers can, do, and at least sometimes should resolve meaning in this fashion.

If this were solely a fight over a definition, the controversy would be trivial—and puzzling in its intensity. But more might be at stake, depending on what function interpretation will serve. Indeed the dispute over proper interpretive method seems unresolvable without a given objective and institutional setting, which will reveal the interpreter’s unique capacities and dynamic relationships with others. Excellent

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112 See, e.g., Steven Knapp & Walter Benn Michaels, Intention, Identity, and the Constitution: A Response to David Hoy, in Legal Hermeneutics, supra note 68, at 187, 193–97 (stating, however, that their definition of interpretation does not yield any insight into how intent should be ascertained).
“interpretation” will not look the same for a vacationer reading a poem for pleasure, a
sergeant reading a superior officer’s orders, and an Article III judge reading the
Constitution during adjudication. When literary theorists and lawyers dispute the
acceptable reach of interpretation, they might have different assumptions about the
ramifications of their debate. \(^{115}\) In any case, a core concern will be what officials and
others do with legal texts within concrete decision processes.

This last point has two implications for testing the authority/interpretation
relationship. First, we ought to remember that institutional and empirical factors could
overrun any logical influence of an authority theory on interpretive method. The
institutional location might be far more important to interpretation and sound
decisionmaking than any convincing authority theory. For instance, perhaps subjective
drafter intent or the moral truth of the matter is not feasible for a Supreme Court justice to
ascertain competently, even if the best theory of textual authority points in one of those
directions. But these institutional factors may be disputed and would leave the asserted
authority/interpretation relationship uncontested on its own terms. Instead the assertion
can be challenged directly, to the extent possible holding aside institutional and related
empirical factors.

Second, this generosity in bracketing institutional objections should not be
canceled out by a narrow definition of interpretive method. Limiting interpretation to a
hunt for authorial intent constricts the set of practices that authority theories might
influence. A broader understanding of interpretation increases the range of potential
implications, without taking a position on the best definition. A conveniently broad
definition of interpretation is then a process by which meaning is derived from a text in
order to help resolve a dispute, especially when there is disagreement over the meaning
of that text. \(^{116}\)

This notion can be filled out by reference to familiar choices commonly
associated with legal interpretation. As an initial matter, the interpreter must have a sense
of the appropriate linguistic rules. The Constitution is thought to be written in English at
various points in that language’s development, rather than in code resembling English,
and so presumably readers do well to follow corresponding rules of syntax. A second
interpretive strategy adds sources for understanding the text and specifies the relationship
among them. \(^{117}\) Examples include ratification era history, tradition thereafter, purposes
associated with the text, plus—to the extent used to construe existing text—moral theory

\(^{115}\) See Philip Bobbitt, Constitutional Law and Interpretation, in Companion to Philosophy of Law, supra
note 97, at 126, 126 (relating interpretation to application and dispute resolution); Paul Brest, Constitutional
Interpretation, in 2 Encyclopedia of the American Constitution 626, 626 (Leonard W. Levy & Kenneth L.

\(^{116}\) Cf. Kent Greenawalt, Constitutional and Statutory Interpretation, in Oxford Handbook of Jurisprudence,
supra note 97, at 268, 268–70 (including text, original meaning, underlying rationale or basic values,
application to particular cases, and stare decisis); Martin Stone, Focusing the Law: What Legal
“everyday notion” according to which interpretation is called for only in cases of ambiguity).

\(^{117}\) See generally Philip Bobbitt, Constitutional Interpretation 11–22 (1991) (identifying six modalities of
constitutional argument).
with attention to consequences. Some or all might be admissible. Third, interpretive methods also might incorporate canons or presumptions of various strengths. For constitutions, an interpreter might presume that no violation occurs unless the transgression is “clear.” Thematic readings fit here as well. If the document is otherwise best read to achieve some value (its relatively clear provisions so suggest), then the interpreter might create a presumption that ambiguities should be resolved so as to further this value. Finally, stare decisis often is considered part of interpretive method. Interpreters might take a prior interpretation as conclusive, informative, or something in between.

There is a complication with including stare decisis within the practice of interpretation, however. It is the brittle distinction between sources of information used to interpret text, as opposed to new sources of law that are authoritative independent of that text. This distinction is required by the asserted relationship between authority and interpretation. For a theory of authority to influence interpretive method for the Constitution, we must be able to determine when the Constitution as a text is being “interpreted” and when distinct sources of constitutional law are being created. A strong version of stare decisis, one that makes past decisions conclusive and unalterable without textual amendment, strains the distinction. To make sense of the asserted authority/interpretation relationship, attention must be confined to the use of precedent and other sources of information for the purpose of interpreting the Constitution as a text.

C. An Asserted Relationship

The relationship to be tested is unidirectional: Authority theories are supposed to influence interpretive method. A weak version of this assertion would be that certain authority theories are sometimes relevant to interpretive method. But often the assertion is stronger, maintaining that a theory of authority is necessary for constructing an appropriate interpretive method. Perhaps some scholars believe that authority theories can be sufficient for this purpose, but the necessity claim is prominent.

In one respect, the necessity claim is obviously false. A reader can interpret a text while ignorant of the text’s status as law or even confident that the text is not law. The Articles of Confederation are not law today and yet anyone can read a copy and deploy interpretive techniques to gain information from that text. Similarly, a reader is free to retain doubts about the legal validity of our purported Twenty-Seventh Amendment while

119 See Thayer, supra note 33, at 144.
120 See supra notes 31–32 (collecting sources).
121 See, e.g., William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1362–63 (1988) (describing different levels of deference Supreme Court gives to common law, constitutional, and statutory precedents).
123 See supra note 10, at 157 (warning against analogies to nonconstitutional law); Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 82–84 (2000) (indicating an authority theory is only one influence on interpretation and stressing empirical questions).
comfortably interpreting its words. And it is possible to ignore the undoubted legal status of a document, such as the Constitution, while thinking through its ambiguities. Better pleasure reading exists but this does not foreclose a review of the Constitution for the sole purpose of leisure and without regard to how the text ought to be used in any other setting.

Thus the asserted relationship will make sense only within certain interpretive situations. These situations are connected to the production of law. More specifically, the asserted relationship can be taken as advice to a legal decisionmaker, such as a judge or legislator or executive official, regarding the normatively appropriate interpretive method for valid law. These officials use interpretation to generate (or clarify) valid law which they are obligated to follow and which presumably influences others in the community. Once this situation is specified, a relationship between authority and interpretation gains plausibility. In fact, some sort of relationship becomes undeniable. By identifying what counts as law, authority theories create subject matter for interpretation by legal decisionmakers. One might say that authority theories isolate law’s raw material, while interpretive method processes these sources into more useful data for decisionmaking. Given the right setting, then, authority theories have at least this targeting relationship to interpretation. And to this extent, the asserted relationship cannot be fully separated from an institutional context.

The live question is whether an authority theory has any more specific influence on interpretive method for legal decisionmakers. This kind of claim has been vetted in the field of statutory interpretation to help resolve disagreement over which sources of information beyond the text should be consulted.124 Faced with the question whether to consult legislative history, the interpreter might decide to do so based on a particular account of the statute’s authority. If the statute is authoritative because the legislature is likely to arrive at normatively correct decisions, then it might be appropriate to recover more information about legislator judgments. There are other possible conclusions and important considerations, but the simple idea is that authority might logically guide statutory interpretation.125

The asserted relationship seems most tight for orders within hierarchies. Suppose your employer asks you to perform a task and her order is not clear to you. You know that she communicated in English but you cannot execute the order without more information. Perhaps your reason for caring about the order will help you interpret it: You might consider your employer the principal for whom you are an agent acting in her interest, and arguably you should interpret her command in a way that comports with her needs or desires, as best as you can discern them. Granted, other considerations may inform your decision. Principal/agent relationships have slack and you might inject your own best judgment; indeed you might believe that your superior’s rank and trustworthiness recommend leaving her at her word and acting in light of only the

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124 See, e.g., Heidi M. Hurd, Sovereignty in Silence, 99 Yale L.J. 945, 1009–10, 1027–28 (1990) (arguing for a “non-communicative” model of legislation under which legislatures are conceptualized as theoretical authorities, and recommending that courts therefore “interpret statutes in light of the purposes that they may best be made to serve”).

125 See Heidi M. Hurd, Interpreting Authorities, in Law and Interpretation, supra note 116, at 406, 432 [hereinafter Hurd, Interpreting Authorities] (“[T]he authority we assign to law determines, in large part, the method by which we must interpret legal texts.”).
unsupplemented order. Or realizing your limited ability to accurately infer unspoken wishes and the optimal course for the organization, you might avoid guessing and do the least work consistent with the text of her command. Or you might simply return to her for clarification. Even so, the connection between authority and interpretation is probably intuitive here and its character might offer some boundaries on interpretive decisions.

Can the same be said for interpretation of the Constitution? Some believe the answer is yes. Prominent advocates of the unidirectional authority/interpretation relationship have been originalists or textualists, including Michael McConnell and Frank Easterbrook. “For the textualist,” Easterbrook says, “a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation.” But the list is longer. Jed Rubenfeld endorses the central importance of an authority theory for constitutional interpretation, and uses it to conclude that his paradigm cases should be the guide. “[L]egitimation precedes interpretation,” he writes. As well, certain proponents of a moral reading of the Constitution argue that this interpretive directive is connected to their reasons for treating the text as law. Joseph Raz denies that aged constitutions are legitimate because of the authority of their makers, but he accepts that proper interpretation partly turns on an account of constitutional authority. Similarly, David Strauss maintains that unsurprising conventional readings are normally required by Burkean conservatism and a coordination theory of authority for the written Constitution. Critical theorists also might relate authority to interpretation. Mike Seidman contends that, once we answer whether the Constitution ought to and can be obeyed, questions about what the Constitution

126 Easterbrook, supra note 11, at 1119; see also Bork, supra note 11, at 143–44 (equating law and original intent); Larry Alexander, Takings of Property and Constitutional Serendipity, 41 U. Miami L. Rev. 223, 226 (1986) (“[A] method of constitutional interpretation must reflect why the Constitution is considered authoritative . . . .”); McConnell, supra note 2, at 1128; cf. Adrian Vermeule & Ernest A. Young, Commentary, Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113 Harv. L. Rev. 730, 744 (2000) (“[A]n account of constitutional obligation . . . is a necessary component of theories of interpretation because it specifies which interpretations are to count as erroneous and which as correct.”).

127 Jed Rubenfeld, Legitimacy and Interpretation, in Constitutionalism, supra note 10, at 194, 198 [hereinafter Rubenfeld, Legitimacy and Interpretation].

128 See Larry G. Simon, The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?, 73 Cal. L. Rev. 1482, 1486–89 (1985); see also Christopher L. Eisgruber, Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence, 43 Duke L.J. 1, 2, 54 (1993) (tracing constitutional authority to substantive goodness, asserting that adherence to constitutional norms is a strategic way to build popular support for just policy, and recommending figurative readings of the text); Michael S. Moore, Justifying the Natural Law Theory of Constitutional Interpretation, 69 Fordham L. Rev. 2087, 2098, 2100–01, 2115 (2001) (“The connection [between constitutional authority and interpretation] is almost as straightforward as the injunction that if you want to hit something, it is best to aim right at it.”).

129 See Raz, Authority and Interpretation, supra note 10, at 157, 173–78 (arguing that continuity is good moral reason for perpetuating multigenerational constitution, and that judges should carry over that insight when making judgments about how much innovation should be allowed during adjudication).

130 See Strauss, Common Law, supra note 11, at 911–13 (asserting that conventionalist account of text “gives relatively specific guidance about how to interpret the text”); see also Strauss, Jefferson’s Principle, supra note 11, at 1732, 1744 (“[T]he objective, in interpreting the text, is to make sure that the text can continue to serve as common ground.”).
commands “more or less answer themselves.”

Figure 1 is a graphic representation of the asserted relationship in three steps. In Step 1, an authority theory filters potential sources of law, including supreme law. Candidate sources are endless: God’s will; natural law; ratified constitutional text; tradition; precedent; revered federal statutes; international law; popular sentiment; everything called ordinary law. After these sources are weeded and prioritized by an appropriate theory, a measure of vagueness will persist. In Step 2, an interpretive method is chosen to yield additional meaning at Step 3, which might include legal doctrine to guide future decisions. Authority theories are supposed to influence proper interpretive method, and some theories that have been linked to particular methods are connected with dotted lines: contractarian theories with originalism, good content theories with moral readings, and stability theories with conventionalism or common law method. Brute fact theories, which are descriptive positivist accounts of valid law, have not been prominently associated with a particular method of constitutional interpretation; nor do thematic readings have an apparent companion authority theory, though good content theories might match. But the graphic’s basic message is an analytic sequence running from authority to interpretation to meaning.

131 Seidman, supra note 106, at 18 (referring as well to questions of how Constitution should be enforced); see id. at 12 (defining key questions); id. at 59–60.
III. THEORIES OF CONSTITUTIONAL AUTHORITY

We are now in a position to grapple with influential theories of constitutional authority and their connection to interpretive method. The former are grouped into (1) brute fact theories, which are descriptive, (2) good content theories, which are normative, (3) contractarian theories and (4) stability theories, which are both normative but (largely) content-independent, and (5) a brief treatment of postmodern unsettlement. 132 I will argue that brute fact theories have essentially no relationship to interpretive method; that good content theories are influenced by interpretive method as much as the reverse; that contractarian theories would influence interpretation if only they were persuasive accounts of our Constitution as law; and that the other theories have weak logical connections to interpretation on the order of mild side constraints. 133 But three preliminary questions about authority theories should be addressed first.

A. Authority Questions

1. Authority as to whom? — Addressees of authority theories matter. To consider intelligently whether a person ought to obey or enforce law is to have a particular person in mind. In addition to its jurisdictional boundaries, much law is designed for a subset of the political community. Consider all the provisions in the Constitution authorizing government institutions and offices and indicating the ambit of their lawful authority. Their immediate addressees are officials. Obviously it would be silly to deny the significance of the text for the entire political community, yet the relevance of authority theories does differ across classes of persons. 134 For instance, officials and naturalized citizens take an oath to support the Constitution while most others do not. As with sound interpretive method, the question whether a law is authoritative partly depends on who needs to know the answer. 135 For convenience, the discussion below often assumes the pertinent question is the Constitution’s authority with respect to officials. This simplifies the analysis, follows the text’s most common addressees, and leaves room for a variety of theories. There will be places in the analysis where the general population is relevant, however, and these will be noted.

2. Authority of what strength? — An affiliated question is the strength of law’s

132 Compare Frank Michelman’s division of existential, rational, and decisional bases for treating a constitution as binding, which match my first three categories. See Frank I. Michelman, Constitutional Authorship, in Constitutionalism, supra note 10, at 64, 65–66 [hereinafter Michelman, Constitutional Authorship]. I separate stability from good content theories because their connections to interpretive method are different.

133 A popular justification for respecting the Constitution combines a finding that the text’s content is passably good with a conclusion that departure would entail serious instability costs. See, e.g., Fallon, supra note 96, at 1792; Raz, Authority and Interpretation, supra note 10, at 173; Strauss, Common Law, supra note 11, at 898; Ernest A. Young, Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments, 46 Wm. & Mary L. Rev. 1733, 1771–75 (2005). This combination is powerful and is referred to below.


135 See supra note 100 and accompanying text.
authority. It can vary. An authority theory for a law might be relevant to a class of people yet differentially persuasive among them; and a theory’s persuasiveness might change over time. Beyond prudential reasons for respecting law, there is a set of conventional approaches in legal theory for measuring the strength of an obligation to law. Law might be only one moral consideration, a suggestive bit of information about good behavior; or it might warrant a prima facie duty overcome by convincing reasons of the same order; or it might provide an exclusionary reason for behavior that knocks out competing moral considerations, at least in the absence of extraordinary circumstances.136 Nothing restricts the question of authority to a binary yes-or-no choice. For the most part, however, the strength dimension will be irrelevant to the analysis in this Part. It tests the relationship between various authority theories and interpretive methods for the Constitution as a text. Authority theories that are unpersuasive drop out, while viable authority theories might be connected or disconnected from interpretive method regardless of their strength. The relevance of the strength dimension to multiple sources of law is postponed until Part IV.

3. Authority in what unit? — It is sometimes intimated that the Constitution should be judged as an undifferentiated unit, and that we must or ought to respect all of the text or none of it.137 This could be called “the Sinatra problem” for the Constitution’s authority.138 It could be the result of several dynamics. First, incomplete authority might be infeasible. Any remaining respect for the document could unravel once a piece of it is overtly shorn from the domain of enforceable law. Second, it might be too costly to devise and implement a test for which parts of the Constitution should continue in force. Furthermore, partial authority is in tension with public pronouncements and popular understanding, to the extent it exists. No official declares that the Constitution is our nation’s fundamental legal charter—except for Article IV. Maybe these assurances count for something.

The necessity of a unitary judgment is, however, open to question. Whatever the popular impression, the true significance of many textual provisions has shifted over time. The Privileges or Immunities Clause had almost no real-world influence until recently,139 while the Contracts Clause received some early attention but today is almost a dead letter.140 Much of this is the product of changing fashions in judicial intervention, and we should not forget that constitutional norms are followed for other reasons. But the changes have been significant. Indeed, episodes of innovation in the modern administrative state might amount to departures from the Article V process for updating

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136 See, e.g., Green, Authority of the State, supra note 99, at 36–39 & n.31 (distinguishing advice from exclusionary reasons); Raz, Morality of Freedom, supra note 101, at 46–47, 53, 57–59 (explaining variable strength of even preemptive reasons that attach to practical authority).

137 See Whittington, supra note 23, at 84 (“Ultimately, a system of governance must be accepted or rejected as a whole.”); Ernest A. Young, The Conservative Case for Federalism, 74 Geo. Wash. L. Rev. 874, 878 (2006) (“If modern politicians and judges can pick and choose which aspects of the Constitution to respect . . . , then entrenchment is a fiction . . . .”).

138 Cf. Frank Sinatra, All or Nothing at All, on Reprise: The Very Good Years (Reprise Records 1991).


Moreover, constructing a method for partial textual fidelity is not beyond human ability. The doctrine of stare decisis could be adapted and applied to constitutional text; perhaps that is roughly current practice. And evaluating the authority of the entire Constitution presents its own set of challenges.

The more crucial point is that the relationship between authority theories and constitutional interpretation can be tested regardless of whether the document is viewed as an undifferentiated whole. There is no apparent reason for the influence on interpretation to vary with the severity of a Sinatra problem. As for contractarian theories, they are designed to justify the entire Constitution based on ratification processes. These theories ought to be assessed on that basis. For the other theory categories, we only need to know whether they are plausible justifications for at least some of the Constitution and then investigate the possible influence on interpretive method. The logical connection to interpretation, if any, ought to show up regardless of the amount of text that can be justified by the theory.

The caveat is that an authority theory might be more persuasive if the Constitution must be judged as a whole. Consider good content theories, which may be criticized for independently judging law’s substance without respect for law’s authority as law. A Sinatra problem might soften the criticism. Good content theories would be judging the entire Constitution without the luxury of selecting preferable clauses and freely discarding others. Or consider stability theories. If the Constitution is still law because of its coordinating function, then the risks of departure and recordination are higher if respect for the text is an all-or-nothing choice. Presumably continued coordination around the entire text would become more attractive as a theory for why the Constitution counts as law, compared to a situation in which the stakes are lower and it is easy to pick and choose which provisions suit us today.

This does bear on my claim that the persuasiveness of an authority theory seems negatively correlated with its implications for interpretation. That claim depends on a satisfactory measurement of each authority theory’s persuasiveness, which in turn might be affected by the presence or absence of a Sinatra problem. Still, the complication seems mild. The negative correlation claim is untouched unless a Sinatra problem changes the relative persuasiveness of the various authority theories. It could be that a Sinatra problem has roughly uniform effects across theories, although there is room for argument. Either way, the rest of the analysis is unaltered by any Sinatra problem. For ease of exposition, the discussion will proceed as if the Constitution must be judged as a whole.

B. Candidate Theories

A prior generation’s \( t_{-1} \) decision cannot bind the current generation at \( t_0 \) simply because the first generation said so. The \( t_{-1} \) declaration is not a justification for preferring one generation’s judgment to another, and likewise the Constitution is not

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\footnote{141}{See supra note 111 and accompanying text.}
\footnote{142}{See supra text accompanying note 62.}
\footnote{143}{See Michelman, Ida’s Way, supra note 134, at 347–51 (raising questions about unitary judgment).}
\footnote{144}{An initial time period is often denoted “\( t_0 \).” But considering the importance of distinguishing past from present and future, “\( t_0 \)” will represent the present moment, “\( t_{-1} \)” an earlier time, and “\( t_{+1} \)” a future time.}
authoritative for us because it announces its status as supreme law. The following authority theories try to do better.

1. Brute fact and Hart’s positivism. — The least ambitious authority theories attempt to define law according to conventional practices and without normatively evaluating those practices. The best example is Hart’s positivism, which is aggressively descriptive. He meant his theory to be “morally neutral” in that “it does not seek to justify or commend on moral or other grounds the forms and structures which appear in [his] general account of law.”

If official acceptance and practice is the test for law, then the Constitution seems to satisfy it. The document plainly qualifies as valid and enforceable law in the minds and actions of judges and other government officials, to at least some extent. They repeatedly refer to it and claim to act in accord with its meaning. The same conclusion can be drawn from the more general legal or popular culture. These forces help explain why oaths are still administered to incoming government officials, who swear or affirm their dedication to support “the Constitution” as a condition of employment. In this and other public ways, officials advertise their willingness to adhere to the federal constitutional text and warn others about departures. The Charters of Freedom exhibit could be part of the advertising. One might even regard these ongoing practices as a kind of mass official consent at every $t_0$. This position is not fixed. It does not imply a lasting official obligation to treat the text as law or to administer oaths in the future. Assuming “the people” are divisible across generations, at some $t_{+1}$, individuals would have to be free to stop consenting. In any case, there is widespread convergence on the written Constitution’s status as law today, enough to satisfy a descriptive authority theory.

The question is whether this brute fact has any serious implication for interpretive method. The answer is no. The extraction of meaning from a document can take place through any number of interpretive methods without gaining guidance from the conceded sociological status of the text as law. This is the pattern of various interpretive schools, anyway. They all claim to respect the text. Originalism is supposed to excavate textual meaning; moral readings are readings of the text to include references to normative inquiries; thematic readings are allegedly drawn from the text plus perhaps context, and used to iron out ambiguities in it; common law constitutional interpretation can be a process for elaborating textual meaning with reference to past judgments in combination with right reason; popular constitutionalists may refer to mass judgments on the text’s correct meaning; and Thayerians attempt to locate decisionmaking authority in a sensible

145 See Schauer, supra note 91, at 152–53.
146 Hart, Concept of Law, supra note 90, at 240.
147 See, e.g., U.S. Const. art. II, § 1, cl. 8 (requiring oath by President); id. art. VI (requiring oath for federal and state legislators, judges, and executive officers); 4 U.S.C. § 101 (2000) (requiring oath for state officers); 5 U.S.C. § 3331 (2000) (requiring oath for federal officers); Green, Authority of the State, supra note 99, at 228 (acknowledging that officials’ oaths may obligate them to obey law); see also 8 U.S.C. § 1448(a) (2000) (requiring an oath for naturalization).
148 Cf. Barnett, supra note 23, at 16 (“[F]or consent to have any meaning, it must be possible to say, ‘I do not consent . . . .’”)
149 See generally Schauer, supra note 91, at 147–61. A complication is determining what counts as “the Constitution.” Even if we concentrate on the text of the document entitled the Constitution of the United States, there might be disagreement over whether certain alleged amendments were properly ratified.
way without repudiating the obligation to abide by the document’s meaning. True, critics
do not always take proponents at their word. One can dispute whether “interpretation” is
really taking place under these methods and challenge particular readings as departures
from the text. But those challenges gain no strength by reminding the reader that the
Constitution is law. The reader rarely denies that fact.\(^{150}\)

Nor are brute fact authority theories justifications for the status quo. They cannot
recommend boundaries on interpretive practice that will sustain the Constitution’s status
as valid law. Descriptive authority theories in particular must be agnostic on this issue.\(^{151}\)
Of course the social fact that the Constitution counts as law might impose feasibility
constraints on possible interpretations of the text. Certain interpretations might be so
thoroughly unacceptable to the public or people in power as to be repudiated, or, if
accepted as correct interpretations, occasions for amendment or rejection of the
document. But brute fact theories cannot take a normative position on these possibilities.

This suggests another route by which the brute facts of culture affect
constitutional law. Practical political or cultural pressures might directly constrain the
behavior of constitutional interpreters. Surely many officials who use the text are
sensitive to such forces. But this will not reconnect any authority theory to interpretive
method. First, we are envisioning a direct path from culture to interpretation. It is not
clear that an intervening authority theory for the Constitution as a document does any
work in this scenario.

Furthermore, today’s political and cultural constraints on interpretive method are
at least arguably modest. Official oaths and affirmations are no help. They refer to “the
Constitution,” whatever that means, and apparently not “as interpreted by method \(x\).”\(^{152}\)
Nor does any one interpretive method dominate the public or official mind, to the extent
there is any awareness of the options (there is not even great awareness of the plain
text\(^{153}\)). Although it would be controversial for the Supreme Court to openly commit to
reading the text in accord with Lutheran doctrine, feasibility constraints will not select
among the prominent interpretive methods described above. Yet moral readings,
originalism, and the others significantly differ in their sources, presumptions, and
attention to precedent. Perhaps the most that can be argued is that some degree of
diversity in interpretive method among public officials is presently sustainable, and might
be a fairly stable equilibrium.\(^{154}\) If true, however, the equilibrium does not recommend
particular interpretive methods. At most it would suggest a system that maintained

\(^{150}\) Cf. Sanford Levinson, Constitutional Faith 36 (1988) (“[R]ecourse to ‘the Constitution’ as a source of
guidance within our own polity simply begs the question of what counts as ‘the Constitution,’ not to
mention what interpretive guidelines must be followed.”).

\(^{151}\) See supra notes 88–93 (discussing Hart and Kelsen).

\(^{152}\) A conclusion that unfortunately depends on the correct method for interpreting the oath. For one
variation on the debate, see Proposed Civil Rights Act of 1967:  Hearings Before the Subcomm. on
Constitutional Rights of the Sen. Comm. on the Judiciary, 84th Cong. 298 (1967) (statements of Sen. Sam
Ervin and attorney Joseph Rauh) (disagreeing over whether Article VI oath should be interpreted to mean
support for the Constitution as interpreted by the Supreme Court).

\(^{153}\) See supra note 77.

\(^{154}\) See infra Part III.B.5.
interpretive diversity in the political class. 155

A brute fact authority theory presents a test for law that the Constitution satisfies at least in part. The theory checks reality for a sociology that makes full-scale departure infeasible. This seems to be our situation. But the persuasiveness of brute fact theories provides no guidance on the kind of interpretive choices that we now face.

2. Good content and Condorcet. — A second theory category is unapologetically normative and dependent on the goodness of law’s content. The first version of the theory involves a direct evaluation of content, while the second version applies the Condorcet Jury Theorem.

a. Authority from goodness. — An early contributor to this school was David Hume, who denied that the modern state was grounded in a social contract. At one point Hume indicated that a modern government’s authority could be traced to its societal benefits, a sense of obligation follows from reflection on “the necessities of human society, and the impossibility of supporting it, if these duties were neglected.” 156 Whether or not law’s goodness can be the exclusive test of its authority—and it sounds nonsensical to assert that everything good is law and every law is good—many believe such normative evaluations should be a component of the inquiry. 157 Good content theories are certainly compelling at the extremes. Morally optimal law is an outcome to be thankful for, while a law with catastrophically bad effects should not be and likely will not be respected for long.

This is not to deny serious problems with content-dependent authority theories. First, there are as many differences over how law’s content ought to be tested as there are differences over normative theory in general. Even if a single normative goal is stipulated, disagreement is bound to occur over the application of a given normative test to a particular law or legal system. 158 Perhaps the strongest (or widest) possible positive evaluation of the Constitution’s content is an overlapping consensus of various normative frameworks. 159 This is the thrust of Frank Michelman’s recent work on constitutional legitimacy from a Rawlsian perspective. 160 Second, good content theories can be unambitious and incomplete. Content-dependent theories need not give any weight to law on account of its enactment; they might make irrelevant the source or process for creating the legal norm. This may cede important territory to a law’s opponents, making its authority contingent on subjective evaluations of content.

Nor are unadorned good content theories reliable normative tests for whether to respect the Constitution. Assuming a Sinatra problem, one must evaluate whether the

155 The analysis might be different close to the time of ratification. A form of originalism is more likely dictated by politics and culture—and thankfully more feasible to perform.
157 See supra note 133.
158 See Waldron, Law and Disagreement, supra note 10, at 274–81 (highlighting such reasonable disagreement).
159 See Rawls, Political Liberalism, supra note 103, at 133–50, 158–68 (discussing the notion of overlapping consensus on allegiance to constitutional arrangements).
160 See Michelman, Ida’s Way, supra note 134, at 364–65 (moving away from political contractarian notions, however, that suggest relatively specified terms with agreed upon meaning).
document is sufficiently flawed to warrant its total discard. Imagine that the Constitution as a unit could be graded on a unidimensional scale of zero to ten, with ten meaning perfect and zero meaning atrocious. Suppose further that the only relevant observer marks the text with a seven. The question whether to respect the text as law has not been sensibly resolved. Answering wisely depends on setting a minimum level of acceptability in light of feasible alternatives.\textsuperscript{161} Content-dependent theories, to be useful, should test law against its absence and what might be put in its place. Perhaps a grade seven constitution should be repudiated because a grade nine constitution can be obtained with low decision and transition costs; perhaps a grade three constitution should be respected because transitioning to anything better is infeasible. These issues involve the comparative virtues of fidelity and innovation, which are the domain of stability theories.

Difficulties would recede if the Constitution were a perfect ten. It would not really matter who was responsible for the document because there would be no motive to make changes and no reason to regret the absence of motive. Risks and costs of transition would be irrelevant. Some Americans have promoted such contentment. A trace of constitutional perfection might be detected in the patriotism of Felix Frankfurter\textsuperscript{162} and more in the assertion of George Sutherland that the Constitution is “a divinely inspired instrument.”\textsuperscript{163} Intense admiration for the document has been expressed more recently by Akhil Amar, whose impressive scholarship is occasionally romantic. His latest book is entitled \textit{America’s Constitution: A Biography} and its opening words are “America’s Constitution beckons . . . .”\textsuperscript{164}

Perfection is not our situation. The written Constitution is imperfect for our time according to any plausible normative framework. Deep and controversial objections were noted in Part I, such as that the text establishes a suboptimal form of democracy, but shallower criticism is probably more devastating to the perfection notion. To note a dozen troubling details:

- the text uses male pronouns to refer to the president, vice president, and members of Congress, and voting rights do not clearly make women eligible for these offices;\textsuperscript{165}

\textsuperscript{161} Cf. Fallon, supra note 96, at 1798 (discussing minimal theories of moral legitimacy).

\textsuperscript{162} See Justice Felix Frankfurter, On Being an American, Address for “I Am an American” Day, Washington, D.C. (May 21, 1944), in \textit{Survey Graphic}, July 1944, at 5 (“Love of country like romantic love is too intimate an emotion to be expressed publicly except in poetry.”). Frankfurter was not simply worshiping American heritage, however. See id. at 7 (quoting Lincoln: “The dogmas of the quiet past are inadequate to the stormy present.”).

\textsuperscript{163} Joel F. Paschal, Mr. Justice Sutherland: A Man Against the State 8 (1951).

\textsuperscript{164} Akhil Reed Amar, America’s Constitution: A Biography xi (2005); see also id. at 5 (comparing Preamble to wedding vows); Catherine Drinker Bowen, \textit{Miracle at Philadelphia} x–xii (1966) (lauding drafters’ judgment). Amar is capable of criticizing the Constitution. See Akhil Reed Amar, A Constitutional Accident Waiting to Happen, in \textit{Constitutional Stupidities, Constitutional Tragedies} 15, 15 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (arguing that the text’s system for selecting the president “makes no sense today”).

\textsuperscript{165} See U.S. Const. art. I, § 2, cl. 2 (referring to representatives); id. art. I, § 3, cl. 3 (senators); id. art. I, § 6, cl. 2 (members of Congress); id. art. I, § 3, cl. 5 (Vice President); id. art. I, § 7, cl. 2 (discussing presidential vetoes); id. art. II, § 1, cl. 1, 6–8 (discussing President); id. art. II, §§ 2 & 3 (same); id. amend. XXV, §§ 1, 3–4 (addressing presidential succession and disability); cf. id. amend. XIX (protecting “[t]he right . . . to vote” of citizens from denial or abridgment on account of sex).
the text mentions an army, a navy, and militias, but not an air force;\textsuperscript{166}

the president must be “a natural born Citizen,” and one reading of the text excludes everyone alive today from eligibility by requiring citizenship “at the time of the Adoption of this Constitution”;\textsuperscript{167}

Congress may and has set a congressional election day long before members’ terms expire and they regularly legislate as lame ducks;\textsuperscript{168}

the vice president has a plausible textual argument that he may preside at his own impeachment trial;\textsuperscript{169}

it is not apparent that the President may fire any federal officer subject to Senate confirmation, especially in light of the impeachment alternative;\textsuperscript{170}

Article II, Section 2, Clause 2 describes how treaties are made but not how, or whether, the country may withdraw from them;

the First Amendment mentions only the federal legislature and not executive or judicial conduct, let alone state and local government action;

the Eleventh Amendment’s text shields states from Article III jurisdiction with respect to suits filed by out-of-state, but not in-state, plaintiffs;\textsuperscript{171}

Section 2 of the Twenty-First Amendment appears to make importation of alcohol into a state in violation of state law a violation of the Constitution as well;\textsuperscript{172}

under the Twenty-Third Amendment, residents of the District of Columbia receive electoral votes but not voting representatives in Congress;

Article V places no explicit limits on the time within which states must ratify proposed amendments, so we might have a Twenty-Seventh Amendment that was proposed by the First Congress in 1789 but not even arguably ratified by three

\textsuperscript{166} See, e.g., id. art. I, § 8, cls. 12–16; art. II, § 2, cl. 1.

\textsuperscript{167} Id. art. II, § 1, cl. 5. It depends on how one deals with the commas. See Jordan Steiker, Sanford Levinson & J. M. Balkin, Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility, 74 Tex. L. Rev. 237, 243–47 (1995).

\textsuperscript{168} See U.S. Const. art. I, § 4 (giving Congress power to set time of elections); id. amend. XX, § 1 (setting January 3 as final day of congressional terms); 2 U.S.C. § 7 (2000) (setting November election day).


\textsuperscript{170} See U.S. Const. art. II, § 4 (providing that “all Civil Officers of the United States, shall be removed from Office” upon impeachment and conviction for certain misconduct); The Federalist No. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The consent of [the Senate] would be necessary to displace as well as to appoint.”). But see Myers v. United States, 272 U.S. 52, 106, 176 (1926) (invalidating statute restricting President’s power to remove certain officers appointed with advice and consent of Senate).

\textsuperscript{171} Contrast the judicial doctrine of state sovereign immunity, which is detached from the Eleventh Amendment’s text. See Allison Marston Danner & Adam Marcus Samaha, Judicial Oversight in Two Dimensions: Charting Area and Intensity in the Decisions of Justice Stevens, 74 Fordham L. Rev. 2051, 2064–66 (2006).

Accepting any of these criticisms defeats the perfection claim, and many of them trade on thin ideological commitments. The flaws, moreover, could easily worsen. If anything, the pace of change has quickened in the last few centuries and there is cause to expect that norms suggested by the text will experience more friction with reality.

This leads to the fundamental message about content-dependent theories of authority: They will not drive interpretive method, even if only one normative framework is selected. In fact, the logical relationship is in the opposite direction.

Consider the shallow criticisms of the text just listed. Readers will have wondered whether there are convincing understandings of the Constitution that defeat the asserted defects. For example, the facial maleness of the document’s pronouns might be ignored; this was a linguistic practice in the United States for a period of time. As well, the Constitution could be read in light of a continuing practice of accepting women members of Congress, a contemporary morality that demands this result, a similar spirit in the Nineteenths Amendment, and insufficient indication that the founding generation considered the question, whatever their hypothetical expectations. Regardless, a method of interpretation produces information about the Constitution’s meaning, which enhances one’s ability to make content-dependent judgments. To that extent, interpretation is driving authority. Indeed there might not be any such thing as pre-interpreted constitutional content.

It is true that the Constitution’s content may be normatively evaluated without a full-blown interpretive method. One might stipulate that the text is written in English and refrain from more divisive choices. This leaves a spectrum of possible constitutional meanings to judge together—probably a large range, but not an infinite range. Thus the Constitution would be judged with certainty that the president must be at least thirty-five-Earth-years old, with less confidence that a woman is eligible for the office, perhaps even

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175 The first women to serve in the House and Senate took their posts between 1917 and 1922, respectively, and the Nineteenth Amendment was ratified in between. See Office of History and Preservation, U.S. House of Representatives, Women in Congress: 1917–2006, H.R. Doc. No. 108-223, at 37, 54–55 (2006) (noting that Senator Rebecca Felton served for one day). The only judicial treatment I have seen is Bickett v. Knight, 85 S.E. 418, 432 (N.C. 1915) (Clark, C.J., dissenting) (“Under the Constitution of the United States no one is debarred from holding any office from President down because of sex.”).

176 For similar observations regarding the ability to evaluate the Constitution’s content for purposes of legitimacy, see Andrei Marmor, Interpretation and Legal Authority 148–49 (2005); Fallon, supra note 96, at 1810 (discussing minimal moral legitimacy); Frank I. Michelman, The Problem of Constitutional Interpretive Disagreement, in Habermas and Pragmatism 113, 117–18 (Mitchell Aboulafia et al. eds., 2002) (challenging Rawlsian constitutional contractarianism with pragmatic claims that “norms are not cleanly separable from their applications”); David A. Strauss, Legitimacy and Obedience, 118 Harv. L. Rev. 1854, 1864–65 (2005) (arguing that legitimacy of Constitution cannot be evaluated without reference to background understandings about how it is to be interpreted).
less confidence that we have a Twenty-Seventh Amendment, and so on. But while our good content theory has become less dependent on information from a stipulated interpretive method, the price is a less attractive authority theory. Greater uncertainty about how the Constitution will be interpreted means a less concrete normative assessment of its content. Resisting informative assumptions about interpretation, moreover, only prevents the arrow of influence from running strongly from interpretation to authority theory. It does not establish that a good content theory can drive interpretation.

Is there any sense in which content-dependent authority theories influence the proper method of interpretation? The strongest possibility seems to involve moral readings of the Constitution. Consider a moral theorist—egalitarian, libertarian, utilitarian, cosmopolitan, or whatever—who adopts two commitments: (1) respect a norm as law only if its content adequately comports with the relevant moral theory and (2) interpret legal texts to adequately comport with that moral theory. Thus respect for the Constitution would be conditioned on its moral goodness, and interpretation would be consciously employed to satisfy this same normative criterion. Randy Barnett and Joseph Raz take positions close to this combination.

Yet even here authority is not driving interpretation in a sequential way. The stumbling block is the role of overarching normative frameworks. If such a commitment is dictating both an authority theory and an interpretive method, it is not productive to assert that the theory is influencing interpretation—or, more boldly, that one must first identify an authority theory before turning to interpretive method. The sequencing portrayed by the asserted authority/interpretation relationship is absent. Indeed, the logically prior issue is the clean moral one: the normative standard for desirable conduct.

Where else would a commitment to preserve the Constitution’s moral acceptability come from? Not from an authority theory. An authority theory is an if/then proposition that tests for the existence or respect-worthiness of law. Alone it cannot indicate that interpreters should rig their readings to preserve the Constitution’s authority. Authority theories lack the equipment to impose that directive. Most likely, the combination of a content-dependent authority theory with a moral reading includes yet other considerations: the practical necessity of treating the text as enforceable law, the risks of instability, and the desire for good outcomes.

But now we are essentially following a general directive to do good things, or a slightly more specific directive to produce good law. Authority theories are unnecessary for and incapable of such advice. They are designed for a narrower function of defining and assessing law—even if, like much other conduct, their construction is animated by a prior and overarching normative commitment. If theories of authority take on more

177 See supra notes 19–21 and accompanying text.
178 See Barnett, supra note 23, at 49–52, 128–30, 268–69; Raz, Authority and Interpretation, supra note 10, at 173 (observing that constitutions are validated by practice “as long as they remain within the boundaries set by moral principles”); see also Dworkin, Law’s Empire, supra note 103, at 52–53 (giving constructive account of creative interpretation); cf. Fuller, supra note 94, at 82, 91 (intimating that judges should interpret statutes in an institutionally appropriate fashion—“appropriate to their position in the whole legal order”—but also to “insure the success” of the legal system).
179 See supra Part II.A.
responsibility, they forfeit their distinctive character, lose any unique leverage on interpretive method, and begin to descend from the analytical heights to the bare questions of sound policy.

We cannot hope for textual perfection by any rational measure, and deeper normative evaluation of the Constitution takes into account how the document is interpreted. A good content theory does not itself present a method of textual interpretation, although a moral reading is not a surprising companion once an additional reason is given for valuing the Constitution’s retention. None of this supposes an analytical sequence by which the question of authority is first answered and only then may attention turn to interpretive method.

b. Condorcet and the Constitution. — Some will resist freeform normative evaluation of the Constitution and yet desire a content-related test for its authority. It has been suggested that past generations of constitutional decisionmakers were exceptionally adept as well as public spirited, particularly the founding generation, and that we should trust their judgment. If so, these *t*$_1$ decisionmakers could qualify as practical authorities on good behavior, whose decisions about constitutional law should be respected and not disrupted by creative interpretation in *t*$_0$.

On these conditions, the Condorcet Jury Theorem (CJT) becomes attractive. It is the mathematical companion to recent interest in the reliability of mass judgments.\(^{180}\) Condorcet and his followers demonstrate that the majority judgment of large groups may be vastly more accurate than smaller groups. Assume that a yes-or-no proposition with a correct answer is at issue and that the average voter has a 60% chance of judging the proposition correctly. With a few additional assumptions, the probability that the majority of these voters are correct increases as the number of voters increases. Thus the majority of three such voters is nearly 65% likely to be correct and for forty-one voters the likelihood is over 90%.\(^{181}\)

Application of CJT to the Constitution is fairly straightforward.\(^{182}\) The question under a content-dependent authority theory is whether the document’s substance is good enough to respect. Part of the founding generation decided whether the Philadelphia draft was superior to the Articles of Confederation, and subsequent decisionmakers judged whether proposed amendments were superior to the document as it then stood. At least some of the participants were attempting to judge what would be best for their posterity


\(^{181}\) See Waldron, Law and Disagreement, supra note 10, at 135 & n.43. Increases also can be achieved by enhancing the accuracy of voters; and the Theorem can hold if the mean accuracy of the voters is over 50% even if some fall below that level. See also Christian List & Robert E. Goodin, Epistemic Democracy: Generalizing the Condorcet Jury Theorem, 9 J. Pol. Phil. 277, 283–87 (2001) (applying dynamic to more than two options, where mean voter is more likely to select correct option than any other option).

\(^{182}\) A recent related argument is that the original Constitution is entitled to respect because it was ratified by supermajority voting rules. See McGinnis & Rappaport, supra note 30. A critical response is Ethan J. Lieb, Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originialists, 101 Nw. U. L. Rev. Colloquy 113, 116–22 (2007) (relying in part on time lapses and circumstance changes).
as well as themselves. One application of CJT is to respect these past judgments, which could have significant logical implications for interpretive method. If the Constitution is authoritative for us because we trust the judgment of past drafters and ratifiers, an interpreter might parlay that trust into some sort of quest for how those past generations understood the text they were making. Again, institutional and empirical considerations might intervene to soften or foreclose originalism, but hold those objections aside.

Unfortunately the premises for Condorcetian confidence are lacking. This is true even if CJT applies to normative and not only fact questions, we ignore voting rights limitations, and we refrain from interpreting the decisions of many or most eligible voters not to participate in the election of delegates for state ratifying conventions. The Theorem demands that (1) each voter answer the same question and hence does not answer questions such as “is the Constitution good?” according to individualized personal preferences, (2) the mean accuracy of all voters is better than random—for instance, greater than 50% for binary choices, (3) voters make judgments independent of the votes of others, such that strategic voting and cascades do not become problems.

The first hindrance is that past generations answered questions different from the one before us. The founding generation chose the original version of the text over the status quo, which might have been perfectly correct and might have attempted to take the well-being of future generations into account. But the current generation might applaud the founding generation’s choice as of \(t_{1}\) without deciding to ignore the new setting at \(t_{0}\). We understand the text’s imperfections better today than the original drafters and ratifiers. Adding subsequent generations who successfully amended the text via Article V does not solve the problem. Each of those decisions that amendment constituted improvement could be normatively correct without answering whether departure or fidelity at \(t_{0}\) is best. At best, past generations asked whether the text was good enough for their generation in addition to ours. That is not the practical question we face.

These concerns are linked to the second CJT condition, involving mean voter accuracy. Even if adequate numbers of \(t_{1}\) drafters and ratifiers were voting on our well-being and even if we can sensibly pose this question without a concrete alternative to the current Constitution, it is not clear that their accuracy on that question is better than a

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185 For exceptions involving small groups, see Bernard Grofman, Guillermo Owen & Scott L. Feld, Thirteen Theorems in Search of the Truth, 15 Theory & Decision 261, 271 (1983) (indicating that mean-voter and majority-vote accuracy are not always both above or both below 50%).
186 See Sunstein, Infotopia, supra note 180, at 88–92 (discussing informational and reputational cascades in deliberation); Grofman et al., supra note 185, at 273–74 (calculating opinion-leader problems). Nonindependent votes just should not be tallied; they do not destroy the value of independent votes. Nor does “independent” forbid deliberation; the problem is simply following others.
random guess. Most of the text is over two hundred years old. The founding generation achieved a remarkable political compromise but they were not omniscient. Their leaders did not fully foresee the development and consequences of national political parties, for example, an event that took place within their own lifetimes.\textsuperscript{187} And if they were systematically biased or their normative values are no longer held (consider the mix of views on slavery, women’s rights, and state power), their mean accuracy on our well-being is less than 50%. If so, CJT magnifies the inaccuracy of their aggregated votes.\textsuperscript{188}

A different use of CJT takes much more recent conduct for its “votes.” One could look to the current generation for indications of support for the Constitution. This gets closer to the relevant question today, it takes advantage of contemporary knowledge, and perhaps we can trust (some subset of) today’s population to make a judgment better than random. But this option is obstructed. It runs into the third condition for Condorcetian confidence in the majority because contemporary expressions of support are not always independent in the way the Theorem demands. This is a ramification of cultural constraints on change.\textsuperscript{189} The more the $t_0$ population worships and defers to the judgment of past generations, the less likely the independent-judgment condition is satisfied.\textsuperscript{190}

Most important, the presentist application of CJT has the weakest of implications for interpretive method. Even if every condition of the Theorem is satisfied, one can only be confident that the Constitution as now written is appropriately respected as enforceable law in our time. If this suggests interpreters of the Constitution should ask these contemporary “voters” exactly what they believe they were validating, we are basically asking ourselves what we think the document means. This is not a guide for interpretation. It is a license to choose—and independently at that.

3. \textit{Contractarianism and incentives}. — Yet another line of theory turns away from law’s content and looks to the potential moral significance of past commitments. These social contract or precommitment theories instead might be animated by ex ante justifications, which are also addressed below.

\textbf{a. Social contracts and precommitment models.} — In contrast to Hume’s arguments from good consequences, theorists such as John Locke sought to justify the authority of law on consent of the governed, bounded by natural right and justice.\textsuperscript{191} Consent can be a potent content-independent theory. One might believe consent enhances the accuracy of authority determinations or rightly respects human autonomy.

\textsuperscript{187} See Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy 5–6 (2005). It might be that $t_1$ decisionmaker ignorance or forecasting errors put them behind the veil such that their judgment is not biased in the way that ours now is. But this reduces their presumed average accuracy, as well, and the implication of the trade-off is unclear. Should we prefer our degree of bias or their degree of incompetence?

\textsuperscript{188} The Article V version of supermajority voting would appear to reduce false positives (erroneous judgments that the text should be amended) and increase false negatives (erroneous judgments that the text should not be amended). A CJT proponent would want an argument for why this tilt makes sense.

\textsuperscript{189} See supra Part I.C.

\textsuperscript{190} See Adrian Vermeule, Common-Law Constitutionalism and the Limits of Reason, 107 Colum. L. Rev. 1482, 1498 (2007) (identifying this “Burkean paradox”). Vermeule suggests the written Constitution’s ratifiers may compare favorably to the judgment of contemporary judges, but he does not appear to vouch for the reliability of either. See id. at 1503–06.

And social contractarian theory has a history of application to the Constitution. Elements of it are present in *Federalist 78* and *Marbury v. Madison*, which were written relatively close in time to the original ratification. Arguing for the supremacy of the document over ordinary statutes, John Marshall referred to the “original right” of “the people” to establish principles for their future government, and Alexander Hamilton invoked the will of “the people, declared in the Constitution.”

Of course not every member of the political community expressly, let alone “voluntarily,” has consented to support the document as enforceable law. A contractarian authority theory requires renovation if it is to survive. But, if persuasive, it could have serious implications for interpretive method. It might well suggest reliance on the ratifying generation’s views about the text’s meaning, or at least their preferred method for ascertaining meaning. A modern cousin of contractarian theories is the notion of precommitment or self-binding, and federal constitutional law is regularly gilded with it.

Precommitment is almost invariably illustrated with the story of Ulysses (Odysseus) and the Sirens. Ulysses clogged the ears of his crew with wax so they would not respond to songs of the deadly Sirens, but ordered himself bound to the mast so he could enjoy them without physical power to stray from his predetermined course. Assuming his initial $t_0$ preference ought to have been satisfied, Ulysses’ preselected constraint on his $t_0$ freedom would achieve a superior outcome in $t_1$. Scholars have since identified several justifications and devices for self-binding. Ulysses’ rational self eliminated options to combat his passionate urges, akin to an addict avoiding social settings that cue dangerous behavior. Another motivation is preventing effectuation of preference shifts due to hyperbolic discounting, as when a penalty for early withdrawal helps the depositor save for a big-ticket item at the end of the year. A third motivation is strategic. Promises and threats can be made more credible to third parties with a reliable precommitment, as when contracts are enforceable in court.

Each of these ideas probably resembles a piece of federal constitutional law but the precommitment model is unsalvageable here. Key flaws have been identified by a leading investigator of precommitment, Jon Elster. One snag he identifies is the character of particular constitutional provisions: Some are best viewed as a majority

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194 I do not take a position on the best rendering of interpretive method at the various times when the text was ratified. On interpretation at the founding, compare the connection to common law reasoning in H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 889, 894–902 (1985), with the assertion of some anticipated invariant meaning and settlement by practice in Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 523–39 (2003).
preference entrenched against minority opposition, perhaps with anticipation that the minority would become a sustained majority in the future. Elster indicates that the Philadelphia Convention’s compromises over slavery amounted to this kind of distributional choice and political haggle. Such events fit poorly with the idea of a rational actor constraining her choices against short-term passion or interest.

Jeremy Waldron presents a related objection. Constitutional provisions often incorporate contestable moral questions. Everyone in the country might justifiably agree that searches should not be “unreasonable” and bearing arms should be a “right,” yet disagree over the specific content of those commitments. Equally important, time changes norms, circumstances, and available information. When the time comes to apply constitutional commitments, often there will be reasonable disagreement over the proper outcome, even with unanimous agreement on a general principle. Prioritizing a past majority’s $t_{-1}$ judgment and then calling it precommitment against irrational urges can unfairly insult the current majority operating in $t_0$. They might be acting rationally with the most generous of public spirit, and better information. Nor is it obvious that constitutional drafting happens in situations where highbrow rationality dominates the forces of passion and narrow self-interest. New constitutions usually mark serious regime change and often in revolutionary ages. Peter drunk—and now dead—might be issuing commands to Peter sober.

This leads to the most fundamental problems: identifying any plausible “self” whose plans are “binding” over time, especially across generations. As for bindingness, the social construction claim in dead hand complaints challenges the ability of $t_{-1}$ to truly govern $t_0$. If the persistence of an arrangement established in $t_{-1}$ depends only on discretion in $t_0$, then the precommitment model is inapposite. The model involves practical impact on choices. This is what made the concept intriguing. Applauding the victory of past preferences over current desires deepened our understanding and evaluation of human freedom. Uninterrupted freedom to choose from unbounded sets can be injurious. Removing the binding destroys the concept. Insofar as “there is nothing external to society,” Elster observes, constitutions are unlike situations in which “the individual can . . . entrust his will to external institutions or forces, outside his control, that literally make it impossible for him to change his mind.”

There actually are mechanisms for a nation to effectively constrain future policy choices. We have already reviewed the possibility of path dependence in politics. And

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197 See Elster, Don’t Burn Your Bridge, supra note 196, at 1757–61.
198 See id. at 1761.
199 See Waldron, Law and Disagreement, supra note 10, at 268–75. The problem of commitment to contestable moral answers might be self-correcting. Intergenerational commitments that chafe might undercut a future generation’s willingness to define their political community to include the past, or might encourage selective use of history in ways that mock precommitment. In any case, it should be understood that Waldron is not demanding unmitigated presentism. His preference for majoritarian democracy requires selection of a community both geographic and temporal. See id. (warning against intergenerational commitment, nevertheless).
201 Elster, Don’t Burn Your Bridge, supra note 196, at 1759–60 (emphasis omitted) (asserting that device of increasing costs is not available to collectives; noting that strategies of deleting options and delaying choices operate differently with respect to individuals and groups).
one nation might make assurances to others via its constitution. We can regard Article VI’s declared commitment to treaty obligations as an instrument of foreign relations, or clauses restricting expropriation of property as tools for attracting foreign investment. Governments that offer such external assurances may later face pressure from other nations or nongovernmental organizations when a departure is contemplated.

But even if national decisions at \( t_1 \) can have binding force at \( t_0 \), the problem of “self” seems intractable. The people responsible for the bulk of the constitutional text are dead. If they found a way to bind themselves to these arrangements, the question today regards constraints on a completely new population. Whether we should be thankful and treat it as “our” precommitment is another question; many people do better when others choose for them, if for no other reason than the savings in decision costs, and continuing to treat the Constitution as law might close off troubling strategic behavior. But these are separate defenses of cross-generational arrangements that do not fit the precommitment analogy. Another way of testing the analogy is to ask whether it makes a difference to the text’s authority that someone can or cannot trace their family heritage to members of a generation during which a ratification took place. Does such a genealogical connection to ratification make the constitutional text more “yours”? It is hard to see why it should. Any confidence that the Constitution ought to be enforceable law does not depend on one’s heritage as a recent immigrant or a Daughter of the American Revolution.

Of course the intergenerational objection can be defused by erasing distinctions among generations. This is not far from Rubenfeld’s position. He maintains that “self-government” must be seen as a multigenerational project to understand and perpetuate the system. Although part of the argument rests on a critique of persons behaving like impetuous consumers with no sense of past and too few long-term commitments, the theoretical assertion is that the Constitution’s authority follows from the present generation’s obligation to collaborate with people from \( t_1 \). “If the Constitution legitimately binds us today, it does so insofar as we are members of the same people that gave itself this law.” Rubenfeld defines “a people” for this purpose abstractly as a set of persons who now exist or existed in the past “under the rule of a particular political-

\[ \text{References omitted for brevity.} \]

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legal order." Without doubt, certain people feel better and behave in socially beneficial ways when they think of themselves as connected to a group or national history, and as contributing to its improvement. Whether or not this attitude is popular with academics, it is felt deeply by many.

True as that may be, generational collapse is neither universally experienced nor indisputably good. Certainly it is not necessary for today’s population to mesh their identity with the achievements and mistakes of the past, any more than it is necessary for adults to root for the same sports team as their great-grandparents. This is fortunate. Too much respect for ancient arrangements hinders our ability to separate good efforts from bad, and Rubenfeld himself is open to considering the entire sweep of constitutional development over time. The living ought to be discriminating in their look back. They may achieve excellent results for \( t_0 \) and \( t_{+1} \) by not following every trajectory mapped out in \( t_{-1} \). And so the conceptual possibility of a multigenerational people is no argument for adopting the thought.

Nor will a conceptual collapse of generations resurrect the precommitment model for constitutional law. Insofar as the argument recommends that we adopt an attitude of respect for tradition and past effort as a way of achieving socially desirable outcomes, it is not a surrender to self-binding but rather a presentist justification for respecting the past. Such a recommendation avoids the puzzles of how to treat newcomers to the United States; and whether a centuries-old “People” of contested membership, character, and duration can be fused with today’s population, at least without serious discretion in the present. But it is not precommitment. It is an exhortation to feel bound in \( t_0 \) so as to achieve a healthy balance of freedom and constraint over the long run. If this recommendation is attractive, moreover, it is difficult to find practical guidance for interpretation. The commitments of the past would be watered down by the norms and circumstances of the present. Rubenfeld’s vision of constitutional adjudication indicates as much. It operates on contemporary judgments about paradigm cases, selected out from \( t_{-1} \) by people in \( t_0 \).

This skeptical assessment of contractarian authority theories should be open to revision. Part of the critique’s force derives from an assumption, sometimes hidden, that jurisdictional exit is difficult. When exit is impractical or a morally problematic imposition, there may be a compensating desire to enhance the voice of people within a political community. Confining them with dated constitutional bargains might seem intolerable. But the costs and opportunities for international migration are not static.

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209 Rubenfeld, Freedom and Time, supra note 207, at 153–54. Rubenfeld distinguishes his idea of a people from uniformity of thought and homogenizing nationalism, see id. at 145–52, 154, and he accepts that there may be more than one “people” within a single national territory, see id. at 155, 158 (discussing slavery).
210 See id. at 190 (discussing post-enactment paradigm cases).
211 See id. at 156–58 (fixating on conceptual possibilities and analogy to single persons over time); cf. id. at 159 (alluding briefly to benefits of identifying with perpetrators of past injustice).
212 See Michelman, Constitutional Authorship, supra note 132, at 76–82 (suggesting necessarily content-dependent normative component in defining multigenerational “people”).
213 Rubenfeld distances himself from precommitment. See Rubenfeld, Freedom and Time, supra note 207, at 125–29 (looking for independent right reasons for action); Rubenfeld, Legitimacy and Interpretation, supra note 127, at 216–17.
Transportation technology has been driving down the price of relocation for many decades; communications technology is making geographic proximity less crucial for thick human relationships; and globalizing forces could partly homogenize cultures without eviscerating differences in legal systems. Of course cultural divides and location-specific human capital often restrict nation-hopping to economic and other necessity. Still, these frictions are not stable. Consent to national law would be even easier to accept if members were well-informed about alternatives; perhaps a subsidized international Rumspringa is in order. Today’s option set is quite different, however, and contractarian theories of constitutional authority are vulnerable for the time being.

b. Forward-looking incentives. — A final thought involves incentives for political mobilization. This is not a well-developed theory of authority for our Constitution, but the argument would be that treating the existing text as law respects the ratification victories of the past. And respecting those victories in our time might create desirable incentives for present-day actors to achieve similar victories. Article V victories become special in that they are bundled with longevity. Those who successfully navigate the arduous process of formal amendment retain that achievement unless an equally powerful political force survives the same process. In this way proponents of textual fidelity can offer a fully presentist justification for the text’s authority, one that suggests an originalist interpretive method as strongly as any other theory.

Such incentive-based reasoning is standard in law and economics and it has been employed to fend off other dead hand complaints. For example, a degree of respect for the dead authors of wills and trusts can be defended on the basis of forward-looking incentives, rather than an emotional attachment to the deceased or the awkward belief that the dead themselves have rights against the living. Respecting testamentary documents signals their efficacy to the living and adds value to property. There may be objections but the dynamic is understandable. And constitutional text tends to have a safeguard that wills lack: the drafters and ratifiers presumably live under the text before passing away.

Although an incentives approach might be stronger than other contractarian efforts, it suffers from serious weaknesses. The first is that one must adore the actual Article V process to make the theory persuasive. The incentives such fidelity creates are hitched to the quirks of Article V. Its brand of supermajority lawmaking slants toward small population states, both in Congress’s role and in the role of state legislatures or conventions. Privileging states as states might be good or bad, but the slant is at least

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215 Rumspringa is a practice in which Amish youth may, without penalty, leave the community and experience alternative lifestyles before deciding whether to return for the long term. For a skeptical view of the value of exit options in illiberal communities, see Steven V. Mazie, Consenting Adults? Amish Rumspringa and the Quandary of Exit in Liberalism, 3 Perspectives on Politics 745, 753–55 (2005). For an inquiry into international mobility among elite workers and the possible sorting effect on rights regimes, see David S. Law, Globalization and the Future of Constitutional Rights, 102 Nw. U. L. Rev. (forthcoming 2008) (unpublished manuscript at 63–78, on file with the Columbia Law Review), available at http://ssrn.com/abstract=975914. I am indebted to Adam Cox for helpful discussions on this thought.

216 Cf. Whittington, supra note 23, at 111–13 (seeing originalism as potentially pro-democracy).

debatable and in tension with modern nationalist trends. One can sensibly prefer, say, a national plebiscite or two for formal amendment. True, the best answer for any one jurisdiction is partly clouded by empirical uncertainty and contested value choices, as discussed above.218 But here, uncertainty is insufficient. The incentives argument requires dedication to a program that affirmatively promotes Article V lawmaking.

The second weakness is equally problematic. There is no apparent theory for the optimal duration of Article V victories, partly because there is no consensus account of the value of such political mobilization. Even if that value can be stipulated, how powerful should the incentives be? Did Article V somehow obtain the right balance? What if supreme constitutional norms formally expired after fifty years? One hundred? The issue resembles an economist’s struggle to determine an optimal patent term.219 Entrenchment creates trade-offs. Only a particular (perhaps peculiar) theory of democracy confirms Article V as a process for legal change that ought to be encouraged and that provides the appropriate amount of encouragement.

4. Stability as coordination and tradition. — A final group of theories is perhaps less optimistic about the uses of a constitution. These theories demand consideration of stability’s virtues and innovation’s vices. But unlike brute fact theories, stability theories offer a normative justification for the persistence of multigenerational arrangements. Burke is commonly used as the avatar of regime stability,220 but others including Hume221 and even Jefferson noted its value. “[M]oderate imperfections had better be borne with,” Jefferson once wrote, “because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects.”222

There is no need to rely on a mystical respect for the work of past generations. In fact, the age of an arrangement is not necessarily relevant. Modern argument for constitutions as solutions to a pure coordination game223 or a (badly named) battle of the sexes224 does not turn on the text’s age. In the former, participants are indifferent to the outcome within a set of options but they do prefer to coordinate on the same option. The perennial example is driving on the left or right side of the road. In battle of the sexes games, participants have different preferences but none stronger than the desire to agree on the same option. In either game, a salient focal point might resolve the matter without a claim to optimality in any other sense. Thomas Schelling’s memorable example was a decision about where and when to meet in New York City. Because the participants could not communicate and had one shot to select a location and time of day, and because

218 See supra Part I.B.
221 See Hume, supra note 156, at 157 (emphasizing stability over “violent innovations”).
222 Jefferson to Kercheval, supra note 40, at 11–12 (denying support for “frequent and untried changes in laws and constitutions”).
223 See David Lewis, Convention: A Philosophical Study 35–36 (1969) (explaining that individuals are capable of coordination even without communication); Thomas C. Schelling, The Strategy of Conflict 54–58 (1963) (identifying hypotheticals that illustrate tacit coordination among parties with common interests).
224 See Douglas G. Baird, Robert H. Gertner & Randal C. Picker, Game Theory and the Law 41–42 (1994) (describing hypothetical version of game in which man and woman have differing, and perhaps stereotypical, preferences for their leisure time).
the set of possible choices was so large, a meeting might seem hopeless. But an outright
majority of Schelling’s New Haven respondents chose Grand Central Station and another
large majority chose noon.\textsuperscript{225} However arbitrary, salient choices prevailed when the goal
was a given.

A force that moves people into these congenial game theoretic models—which
work poorly for issues like abortion policy—is uncertainty. The inability to predict the
consequences of different options pushes decisionmaking toward reasonably
ascertainable variables. Often enough, predictable decision costs and transition costs will
outrun less-certain net benefits from one option over another.\textsuperscript{226} The option selected
becomes less important than ending the decisionmaking process expeditiously.

In addition, stability theories help complete good content theories of authority.
They point to the dangers of transition. Of course stability is not always possible or
better than change; we need a normative framework to help judge the trade-offs. But
decision costs, transition costs, and the risks of failing to recoordinate on a better
arrangement should be recognized in $t_0$ regardless of when or how the current
arrangement got started. Indeed there may be justice in maintaining coordination around
a basically good legal system. Refusals to comply with a generally just system can be a
form of free riding, may encourage others to stop coordinating within the system, and
could result in the system unraveling.\textsuperscript{227} As well, stability theories have the potential
advantage of relative content-independence. They speak to audiences unconvinced of the
value of law’s content standing alone. And unlike contractarian theories, David Strauss
has observed, stability theories age well.\textsuperscript{228} They are everlasting presentist arguments for
respecting certain legal arrangements that survive into $t_0$.

Stability theories seem like fitting justifications for treating the Constitution as
enforceable law. Indeed, recent empirical work in political science and economics
suggests that many constitutional design choices do not significantly affect measurable
aspects of human well-being.\textsuperscript{229} It has been difficult, for instance, to demonstrate an
advantage for either democracy or dictatorship in producing economic growth.\textsuperscript{230}
Tinkering within the democratic category is probably less likely to change per capita
GDP.\textsuperscript{231} In fact, a host of constitutional design choices are subject to serious uncertainty

\textsuperscript{225} See Schelling, supra note 223, at 55 n.1, 56.
\textsuperscript{226} See Samaha, Undue Process, supra note 18, at 614–25.
\textsuperscript{227} See, e.g., Klosko, supra note 105, at 37–39 (discussing problem of free riders); William S. Boardman,
Coordination and the Moral Obligation to Obey the Law, 97 Ethics 546, 549–50 (1987) (arguing that law
functions to solve coordination problems); John Rawls, Legal Obligation and the Duty of Fair Play, in Law
and Philosophy: A Symposium 3, 5–11 (Sidney Hook ed., 1964) (applying duty of fair play to law-
following, as obligation to fellow citizens in just system).
\textsuperscript{228} See Strauss, Jefferson’s Principle, supra note 11, at 1720.
\textsuperscript{229} Studies are reviewed with cautionary notes in Samaha, Undue Process, supra note 18, at 624–29.
\textsuperscript{230} See Adam Przeworski et al., Democracy and Development: Political Institutions and Well-Being in the
\textsuperscript{231} See, e.g., Jan-Erik Lane, Constitutions and Political Theory 208–09 (1996) (asserting that none of his
three democratic types “result[ ] in excellent economic outcomes such as a high rate of economic growth,
low inflation and little unemployment”); Stephen Knack & Philip Keefer, Institutions and Economic
Performance: Cross-Country Tests Using Alternative Institutional Measures, 7 Econ. & Pol. 207, 215,

Forthcoming in 108 Columbia Law Review
Draft of 12/30/2007
regarding their influence on any number of outcomes. To take just one additional example, it is extremely difficult to ascertain the policy or power-related consequences of invalidating one House legislative vetoes—let alone whether any consequence was an improvement over the status quo ante.

This is not to suggest that our Constitution is irrelevant or that conceivable changes would not produce better results. Amartya Sen has claimed that no famine has occurred in a multiparty democracy with elections and a free media. People might live longer or healthier lives in democracies, and perhaps respecting a written constitutional text with basic democratic features is conducive to that outcome. Protecting property rights, contracts, and other market elements has been associated with economic well-being, and constitutional judicial review might help. Moreover, certain rights provisions or democratic forms might have intrinsic value. But there is much constitutional territory in which the effect of fidelity or departure is not safely predictable. Furthermore, if there is a Sinatra problem, we cannot separate textual provisions worthy of respect from those that are not. The entire text would have to be respected to at least a degree. Hence the text’s greatest virtue may be its ability to initiate basic institutions and reduce decision costs on choices that do not matter much.

The critical issue for present purposes is the relationship between stability theories and interpretive method. It has been suggested that coordination and affiliated theories confine textual interpretation by recommending conventional readings. By doing so, an interpreter acts consistently with the benefits of coordination. Furthermore, a shocking interpretation of any part of the text might have far-reaching impact. Observers could become uncertain about the meaning of the entire document as soon as surprising results become salient. This uncertainty might even jeopardize the Constitution’s enforceability. Some claim that popular support is the ultimate test for constitutional longevity and that a constitutional text can be self-enforcing: A GDP from more centralized democratic arrangements). For an attempt to link self-reported life-satisfaction scores to direct democracy in Swiss cantons, see Bruno S. Frey & Alois Stutzer, Happiness and Economics 136–50 (2002).

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sufficiently precise text can make transgressions relatively easy to identify, and the
document can become a focal point for coordinating popular support of textual
constraints. This possibility begins to disappear as the variance in plausible
interpretations increases.

This is all true but the relationship to interpretation is actually attenuated. The
first complication was discussed in relation to good content theories. Strictly speaking,
an authority theory is supposed to test for the presence of (respect-worthy) law without
taking a more controversial position on how much law there ought to be. If the
Constitution is adequately serving a coordination function, then a stability theory will see
a respectable law. It takes an additional normative commitment to want the document to
continue that function, and thus to impose conventionalist restraints on interpretation. At
this point, however, it seems that a more general norm is influencing both authority and
interpretation. A global stability value need not operate through an authority theory that
filters sources of law, and only then apply to interpretive method. The analytic sequence
would be unnecessary. In fact it is quite possible that a constitutional stability theorist
will accept a degree of respect for the Constitution as a side constraint, rather than a
polestar, for interpretation.

Even if this concern gives too little credit to authority theories, the implications
for interpretive method are still limited. Most important, many stable methods of
interpretation should deliver coordination-related benefits. The described threat to
coordination around the Constitution is variance in predicted interpretive outcomes. But
variance can be reduced in a number of ways. Uncertainty about the Constitution’s
meaning can be reduced by assurance that an originalist inquiry will take place, or that a
moral reading will be conducted, or that judicial precedent will be taken as given, or that
ambiguous provisions will be read in light of a theme such as deliberative democracy. To
be sure, sufficiently outrageous interpretive outcomes threaten the coordination function.
Declaring that fidelity to the Constitution requires severe wealth redistribution or
secularization of civil society would jeopardize coordination around the text in 2007.
This practical truth exerts a degree of constraint on interpretation for those who are
already committed to promoting stability, and it suggests that stability theories are not
wholly content-independent in operation. Nevertheless, the debate over appropriate
interpretive method today retains many choices within the range of reasonable
disagreement. Coordination theories are not very useful in selecting among these
candidate methods.

To put it another way, stability is a value involving the pace of change and not
necessarily its direction. Interpretive method can slowly migrate in many possible
directions without undermining the Constitution’s focal status. Creeping originalism or
creeping moralism would be equally acceptable. This conclusion is reinforced when
legal advice is widely available and the anticipated conduct of a single institution, namely
the Supreme Court, is also a focal point for coordination on textual meaning. Expert
advice and Court supremacy facilitate the quick settlement of constitutional disputes.
These resolutions might be normatively suboptimal, but that is not the concern of stability

239 See supra text accompanying notes 177–179.
Theories. They are designed for just such occasions by providing reasons to accept imperfection. As long as a stability theory is able to accommodate some change, the direction of that change is not determined by the theory. Changes in interpretive method would be slowed without being guided.

Furthermore, once an interpreter is committed to stability as a general norm, the Constitution becomes only one source to respect. It is at most one point in a constellation of provisional social settlements. Interpreters of this particular text presumably would not want to dislodge arrangements that have built up alongside—and perhaps contrary to—the best rendering of the text’s meaning. Take Barry Weingast’s scholarship on self-enforcing constitutions.240 His claim is that written constitutions can provide a focal point for citizens to make judgments about government transgressions. Competing forces in society may enter into pacts for mutual advantage, and these pacts might be self-enforcing if reflected in a text.241 Setting aside normative objections to these equilibria, Weingast’s examples from U.S. history are revealing. He points to various compromises over slavery and conflicting sectional interests that stitched together an operative federal government from the founding until the Civil War.242 But these compromises were only partly reflected in constitutional text; they were also instantiated through statute and less formal conventions. This is a reminder that the Constitution is a small part of the status quo, and that valuing stability may justify that document’s continuing status as law without saying much specific about its interpretation. Any societal equilibrium is likely to be multi-sourced.

The importance of sources beyond the Constitution leads to a closing remark. There is another facet to the common law method, one that claims wisdom deeper than simple conservatism. The notion is that the process of reviewing, respecting, yet sometimes revising precedent through contemporary reason will accumulate knowledge across generations without locking in features of law that can no longer be defended.243 Here the avatar is Hayek as much as Burke: the argument is optimistic and progressive. Even if we cannot fully understand the rationale for a tradition embodied in an institution, “the evolutionary view is based on the insight that the result of the experimentation of many generations may embody more experience than any one man possesses.”244

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242 See id. at __.


244 Friedrich A. Hayek, The Constitution of Liberty 62 (1960); see also Burke, supra note 220, at 74 ("We are afraid to put men to live and trade each on his own stock of private reason . . . ."); Cass R. Sunstein, Due Process Traditionalism 3–4 (2007) (unpublished manuscript) (comparing and contrasting Hayek’s evolutionary optimism with Burke’s indication that traditions aggregate information). Burke also suggested reduced decision costs, see Burke, supra note 220, at 74 (recommending “prejudice” for its “ready application in the emergency”), and intergenerational identity and obligation, see id. at 81.
more willing to interrogate tradition or precedent with contemporary reason may still reward longevity with some respect.\textsuperscript{245} This argument is, like coordination theories, content independent but it does depend on a long-standing arrangement.

However persuasive,\textsuperscript{246} this assessment of common law reasoning is at most tangentially related to the authority of the Constitution. The advocated method has no strong reason to prefer the written Constitution to certain contemporary statutes, or even the views of expert executive officials. The Constitution is at best one source of wisdom and any guidance on how to read that source is not obvious. As Strauss puts it, “our written constitution has, by now, become \textit{part of} an evolutionary common law system.”\textsuperscript{247} Here the appropriate relationship among multiple sources of law is rising to the surface, and a unidirectional relationship between authority and interpretation of respective sources is fading.

5. \textit{Postmodern unsettlement}. — There is, finally, a postmodern perspective on authority and interpretation. Mike Seidman ingeniously explores the possibility that respect for the Constitution might be justified by unsettlement rather than certainty.\textsuperscript{248} The idea is that the text is open to differing, even diametrically opposed, readings and has been used to validate very different goals over time. This openness preserves the possibility of unsettling any constitutional order, however resilient current arrangements might seem. Hope for the vanquished comes from the possibility of the worm turning. “Political community is maintained precisely because there is no permanent settlement and, indeed, no exclusive, agreed-upon method for amending temporary settlements.”\textsuperscript{249} Unsettlement theory has attributes of stability arguments but is fueled by indeterminacy.

Some of the unsettlement argument seems true as a descriptive matter. Often in American history constitutional text remained stable while its interpretation and the structure of our government did not. And the Constitution obviously is a revered cultural icon appropriated by many different ideological movements. But even assuming positive unifying effects from the situation, no one should blinker the decision costs associated with interpretive openness combined with supremacy. The opportunity for altering supreme law through shifting interpretation makes constitutional argument all the more attractive. At least some and perhaps most of the territory covered by the written Constitution is not worth fighting over, beyond short-term distributive consequences.

\textsuperscript{245} See Brown, Tradition and Insight, supra note 67, at 180 (rejecting as too extreme attempts to ignore lessons that might be drawn from history); Strauss, Common Law, supra note 11, at 891–97 (explaining that rational common law adjudication avoids blind obedience to past yet proceeds with humility).

\textsuperscript{246} Cf. supra Part III.B.2 (skeptically reviewing application of Condorcet Jury Theorem to Constitution). A concern with deference to tradition is the ex ante incentive to attack novel practices as soon as possible, before much information about the consequences of the practice can be obtained. Knowing that a practice may become entrenched at \(t_1\) can encourage \(t_0\) challenges.

\textsuperscript{247} Strauss, Common Law, supra note 11, at 885 (emphasis added); cf. Harry H. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication 81, 86 (1990) (linking court-identified principles to text but stating such principles “have a life of their own”).


\textsuperscript{249} Seidman, supra note 106, at 55. Seidman assumes a background of relative political indifference, economic wealth, and cultural solidarity. And he is battling some sort of entrenched settlement via constitutionalism rather than ordinary law. See id. at 54–58, 62.
More important, the actual interpretive advice from an unsettlement theory is challenging to operationalize. What should an individual interpreter do when faced with a constitutional argument? In the unsettlement model, rights claims are supposed to be indeterminate.250 Should there be an institutional mechanism for assuring a plurality of interpretive perspectives at any given point in time, or perhaps shifting methods from time to time? Such a mechanism seems to qualify as a constitutional settlement forbidden by the theory, as Seidman wonders.251 Possibly unsettlement theories are less recommendations than observations about the dynamics of constitutional law.252 Whatever insight is delivered, however, offers little advice on interpretive method.

IV. THE INTERPRETATION CONNECTION REVISITED

The logical relationship between authority theories and interpretive method is not as reliable as the assertion with which we began, at least not for the Constitution. Combinations of multiple authority theories only make the relationship to interpretation more complex. There is no good reason to exhaust the possibilities here; we have not even enumerated every conceivable theory or possible component of a robust interpretive method. Instead this Part collects lessons from the analysis, offers an explanation for the emergence of the asserted relationship that has been critiqued, and briefly reconstructs the connection between interpretation and authority in a broader frame—emphasizing norms, decisionmaking, and institutional factors. In fact the greatest significance of authority theories for interpretive practice might be in modulating the strength of competing sources of law. In this way, authority theorizing might be redeemed.

A. Lessons

Dead hand complaints remind us that positive law needs our complicity to survive and they demand a defense of the status quo. Authority theories offer responses and they influence interpretation in an undeniable way: They select targets for a decisionmaker’s interpretation by identifying what counts as law. To the extent an authority theory highlights benefits from respecting some source of law—and not every theory has this purpose—decisionmakers might prefer to avoid warring against those benefits. But this suggests an additional normative commitment and, regardless, the logical relationship between authority theories and interpretive method is vacillating and contingent. Assertions and conclusions about this relationship are summarized in Table 1 and reiterated below.

250 See id. at 59, 75, 93, 105 (suggesting attitude of judicial humility).
251 See id. at 210–11.
252 See id. at 59, 212, 214.


**Table 1**

**The Authority/Interpretation Relationship for the United States Constitution**

<table>
<thead>
<tr>
<th>Authority Theory</th>
<th>Asserted Relationship</th>
<th>Actual Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>brute fact, oaths</td>
<td>unspecified</td>
<td>none</td>
</tr>
<tr>
<td>good content</td>
<td>suggests moral reading</td>
<td>opposite relationship; no method suggested</td>
</tr>
<tr>
<td>practical authority, CJT</td>
<td>suggests originalism</td>
<td>none applied to ( t_0 ) decision; weak theory for ( t_1 ) decision</td>
</tr>
<tr>
<td>precommitment, incentives</td>
<td>suggests originalism</td>
<td>weak theory</td>
</tr>
<tr>
<td>coordination</td>
<td>suggests conventionalism</td>
<td>perhaps, but little constraint</td>
</tr>
<tr>
<td>tradition</td>
<td>suggests common law</td>
<td>none, if another law source</td>
</tr>
<tr>
<td>unsettlement</td>
<td>indeterminacy guarantee</td>
<td>perhaps, but little constraint</td>
</tr>
</tbody>
</table>

First, positivist efforts to describe law without normative evaluation have no apparent connection to any method of interpretation. Such brute fact theories cannot recommend the maintenance of what they define as law, let alone how it ought to be interpreted. These are, after all, content-independent explanations of what law is and they should not be expected to provide much guidance on the subtleties of interpretation.

Good content theories do aim for an assessment of the moral quality of law’s content and they can provide reasons for respecting it. When the law’s content is worse than perfect and better than awful, however, the advice is not clear. Equally important, an informed assessment of the Constitution demands some kind of interpretive presupposition. And this means interpretation is driving authority, not the reverse. The situation might be different if a prior generation qualified as a practical authority or if the Condorcet Jury Theorem applied to their judgments. The problem is that these theories fit poorly with the dated text-making procedures that generated the Constitution.

For similar reasons, contractarian and incentive-based theories could influence interpretive method if they worked with an ancient constitutional text. But application to the Constitution is at least controversial. Precommitment requires individuals to conceptualize themselves as part of a single generation of nation builders. Some will understandably resist this idea, which bears the risk of undue deference to past mistakes and has trouble identifying an effective constraint that the same “self” imposes and obeys.

Content-independent stability theories do present sound reasons for continued if qualified respect for the status quo. Their conservative message complements good
content theories by openly analyzing the foreseeable risks of departure. On the other hand, the implications of stability theories for interpretive method are limited. Even if they could advise conventional readings of the Constitution, they do not provide a direction for interpretation. An array of interpretive choices may reduce variance in meaning without disrupting continued reliance of the document. Adhering to the asserted authority/interpretation relationship is even more awkward when stability and good content theories are combined, as they often are.253 The former provides little guidance for interpretive method, while the latter depends on the method selected on a still-unspecified basis.

A broader lesson recognizes the impact of normative frameworks. Their role in decisionmaking undercuts the sequential rigidity of any general assertion that authority drives interpretation. For the assertion to be convincing, values reflected in an interpretive method and attributed to the dictates of a companion authority theory should not be, in fact, the result of a third force. But at least for good content and stability theories, there does seem to be a third force operating. Their possible affiliation with moral and conventional readings of the Constitution is usefully accounted for with an overarching normative framework. Certainly one can begin with a generic commitment such as egalitarianism, utilitarianism, libertarianism, or some other way of conducting normative evaluation, and then apply that commitment to authority theories as well as interpretive method.254 At some point the larger normative questions are inescapable.

So it would not be surprising if theorists typically deploy a relatively general normative framework both when they attempt to justify respect for the Constitution and when they recommend interpretations of the document. This account fits well with a commitment to interpret the written Constitution so that it is sufficiently good to deserve respect,255 or to ordinarily read the text in a conventional fashion so as to preserve its socially beneficial status as a focal point.256 It is far less apparent what value there is in charting an analytic sequence in which an authority theory is specified at step one and then squeezed for interpretive guidance at step two.

Finally, the relationship of authority to interpretation is likely to change over time. Newly ratified constitutions, newly enacted statutes, newly promulgated regulations, and newly issued orders from superior officers benefit from a different collection of authority theories. Dead hand complaints weaken in the absence of substantial population shifts while social contractarian theories become more plausible. Near the time of enactment or issuance, the basis for a text’s authority might recommend some kind of originalist investigation to resolve uncertainty in meaning.257 There are, as I have emphasized, other

253 See supra note 133 (collecting sources).
254 I am referring to normative authority theories, not brute fact theories. The latter are neither overtly normative nor do they have implications for interpretive method.
255 See supra Part III.B.2.
256 See supra Part III.B.4.
257 Accord Brest, supra note 11, at 205 (referring to a form of nonoriginalism in which the presumptive force of text and history is “defeasible over time in the light of changing experiences and perceptions”); Micheal C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 Geo. L.J. 1765, 1820 (1997) (similar); Richard Primus, When To Be an Originalist 35 (2007) (unpublished manuscript) (similar); Strauss, Jefferson’s Principle, supra note 11, at 1752–54 (arguing that it may be appropriate to start with originalist interpretation but to employ other methods as time passes);
considerations in designing a sound interpretive method—considerations of feasibility and institutional role. But the bare logical implication of an authority theory for recent additions to positive law arguably favors a version of originalism that will respect the political resolution achieved. Perhaps our Twenty-Sixth Amendment should be interpreted differently from our First. And perhaps nations with young written constitutions ought to be originalists, while countries with more constitutional history should rely less on these texts.

All else equal, recent regime change argues for respecting the resulting political settlement with a minimum of creativity. Assuming the new regime should not be divided into separate political communities, attempting to honor original understandings faithfully can be a technique for building trust and long-term cooperation—and it should come at a time when originalist interpretation is most feasible. Such fidelity might well amount to a brute fact of political reality. Of course it may be too difficult to locate a point at which the logical force of contractarian theories expire, or the proper rate at which their force diminishes. The basic implication is, however, clear enough.

B. Explanations

But if the authority/interpretation relationship is variable and complex, one might wonder why simpler and more ambitious assertions about the relationship are heard in constitutional theory. Three possibilities are worth considering.

First, some theorists actually make limited claims. Raz, who suggests the combination of good content and stability theories for respecting the Constitution, is an example. He warns that an authority theory is only one factor in interpretive method and concludes that, once the competing considerations of stability and innovation are accounted for, there is little constructive advice for constitutional interpretation “other than ‘reason well’ or ‘interpret reasonably.’”258 Now, there is a strong case for adding interpretive rules to these vague directives.259 The more important observation is that authority scholarship can be nuanced on the interpretation question and the nuance might be lost to the attraction of plain and bold statements. This might be especially so for theories of constitutional authority, which are intriguing in their own right.

A second explanation is the readily available analogue of statutory interpretation. The logical influence of plausible statutory authority theories on methods of statutory interpretation could be significant.260 Taking the typical situation of a court attempting to resolve ambiguity in statutory meaning, it is not irrational to recommend that the court play agent to the legislature’s principal. This might suggest a brand of originalist statutory interpretation rather than moral or other readings, and this conclusion is reinforced if the legislature ought to be treated as a practical authority. Again, this advice for statutory interpretation is contested. One might decide to respect the legislature by sticking to the statutory language and its supposedly public meaning, for example, rather than investigating other legislative history; it depends on what kind of respect is most

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258 Raz, Authority and Interpretation, supra note 10, at 180.
259 See Samaha, Undue Process, supra note 18, at 614–20 (discussing decision costs and error costs).
260 See supra Part II.C.
appealing. Furthermore, Heidi Hurd reconsidered her authority theory for statutes after concluding that the intent-oriented interpretive method it suggested was inappropriate or impossible.261 Of more immediate concern is the problem of direct importation into federal constitutional law. For many observers it has become difficult to equate ancient constitutional text with statutes that are younger or at least easier to amend, or to view past generations like superior officers who issued commands in t,1 that are entitled to respect at t0.

This second explanation for the asserted authority/interpretation relationship seems incomplete, however, and not only because many Americans do identify with a unified national heritage. Moral readers, common-law constitutionalists, and others have connected interpretive method to an authority theory without accepting a command model of constitutional law or the collapse of generations into “the American People.” More is at work than a contested analogy between statutory and constitutional law.

A third explanation returns to concrete controversies: abortion policy, gun control, and the rest.262 With the Supreme Court situated as an important expositor of constitutional meaning, critics and admirers sought new leverage in their debates. Legal scholars were not willing to follow Monaghan and concede the issue of the Constitution’s legal status to political theorists.263 At some point moral readers and originalists perceived a connection between the interpretive results to which they were committed and an authority theory which they could accept. The former could question the advantages and coherence of dead hand control while advocating the possibility of a morally satisfying Constitution—if only it were supplemented by an interpretive practice sensitive to our best rendering of the good. The latter could draw on popular affection for the founding generation, even if these feelings were not so potent among intellectuals—and follow this respect from the foundation for the Constitution as law to the interpretation of that same text. Common law constitutionalists who accepted the text as worthy of some degree of respect developed their own response to the authority question. They could solve the dead hand problem without automatic respect for founding era decisions by tolerating the text as a focal point and one source of wisdom—which gives the written Constitution a role in our law while confronting the originalists’ asserted authority/interpretation relationship on its own terms.

Originalists and others might have thought that shifting the conversation to a more general theoretical plane would help resolve urgent questions in adjudication. If, for example, nonoriginalists would just admit that the written Constitution must be law and that the reason for its status must drive interpretive method away from the innovations of Roe v. Wade, more people might consult the good work of ratification and its surrounding history. But the debates persisted, replicated at every level from theory to method to meaning.

It is tempting to end on this note, suggesting that the theoretical assent to authority was a not particularly fruitful strategic effort to resolve more ideologically charged controversies. Tempting because partly true. But not all theoretical efforts have

261 See Hurd, Interpreting Authorities, supra note 125, at 405–06, 418–24 (promoting theoretical authority for statutes, as in heuristic advice on moral conduct, and separating it from intentionalist interpretation).
262 See supra Part I.A.
263 See supra text accompanying note 86.
this character. And it will be more constructive to close with thoughts, however provisional, on how the connection between authority theories and interpretive methods can be reconsidered within a broader frame.

C. Reconfiguration

Neither McConnell’s nor Monaghan’s message is quite correct. Those who see authority theories as a separate exercise and the key to interpretive method are overclaiming. Authority theories do identify law and suggest overarching normative values, but an interpreter may take those values into account regardless and the rest of the authority/interpretation connection is complicated. Yet those who jettison the authority inquiry from the proper domain of legal scholarship are losing something. Most important, authority theories are well placed to gauge the relative strength of competing sources of law. This can have serious implications for the practice of constitutional interpretation and decisionmaking. Retaining for convenience the asserted relationship’s deductive character (recall Figure 1), we can reconfigure a defensible connection between authority theories, interpretive methods, and other considerations left out by the assertion (Figure 2).264

264 For those who stress induction or reflective equilibrium, think of Figure 2 turned upside down or repeatedly flipped. On influence diagrams, of which Figure 2 is a simplified version, see Ross D. Shachter,
The first analytical advance follows what is becoming conventional wisdom in the academy: the relevance to interpretation of overarching normative frameworks and institutional factors. The former provide goals for conduct and the latter are reminders that the particular occasion for interpretation matters. Goals are inevitable, whether high-minded or self-centered. Awareness of institutional setting performs complementary functions. Knowing that the relevant activity is, for instance, judicial adjudication or agency rulemaking refines the interpreter’s goals. Each institution possesses comparative advantage on certain tasks but not others. The institutional location shapes appropriate objectives for interpretation and fixes the relationship of the interpreter to other actors in a dynamic way. Further, the institutional setting comes with feasibility constraints. Along with more general limits on what decisionmakers can achieve, the institutional location grounds methodological choices in reality. Only certain information, resources, and effects will be imaginable and obtainable.

This interaction of norms with institutions and their associated feasibility constraints leads to another revision. It is to change the end result from “meaning” to “decision.” The ultimate objective of the asserted relationship between authority theories and interpretive method is to yield meaning from sources of law. Of course generating meaning from law is valuable, but the healthy injection of normative goals and institutional factors is a signal that this form of interpretation is rarely done for its own sake. Legal interpretation produces information for a decision process with consequences. The process affects participants and its output is an alteration of the status quo, even if only to confirm widespread expectations. Textual meaning is only one component of decisions, which are essential to institutions whether they regulate, legislate, adjudicate, or enforce law.

With this decision-oriented perspective, authority theories and interpretation can be reconnected. We already understand they may interact with respect to a single text. For example, choosing an interpretive method facilitates a normative evaluation of the Constitution’s content. But placing the activity of interpretation within an institution’s process for decision exposes another connection—the relative influence of multiple information sources.

Every decision process selects from an infinite number of information sources those that seem required or useful. And every decision process develops some protocol for aggregating or reconciling relevant sources, even if that protocol is implicit. In

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Model Building with Belief Networks and Influence Diagrams, in Advances in Decision Analysis: From Foundations to Applications 177 (Ward Edwards et al. eds., 2007).

See, e.g., Komesar, supra note 17, at 4–5 (stressing institutional choice as necessary for translating social goals into policy choices); supra notes 17, 113–114 (collecting sources).

See supra notes 112–114 (discussing literary theorist’s concentration on interpretation as search for authorial intent and lawyer’s struggle to keep the term more flexible); cf. Gary Lawson, On Reading Recipes . . . and Constitutions, 85 Geo. L.J. 1823, 1823–24 (1997) (seeking to segregate the concept of interpretation and the practice of adjudication).

working with multiple sources perceived as discrete, decisionmakers assign relative strengths to these sources during the process of reconciliation. These relative values move the decisionmaking process forward. The processes we call adjudication, legislation, regulation, and enforcement are no different in this respect. Actors within those institutions have goals and agendas that are resolved by collecting information which often points toward conflicting outcomes. This data includes case-specific facts and more general information, historical inquiry and prediction of consequences. Another piece of information is existing positive law, conventionally divided between supreme federal constitutional law and lower orders of authority. This distinction is pedestrian. After all, the written Constitution declares itself “the supreme Law of the Land” in Article VI, and it has been persistently accepted that the document trumps other sources in the case of conflict.268

The reality of decisionmaking processes is more complicated, however, or at least open to a different approach. No document is supreme on its say-so, as the dead hand complaint reminds us. Asking why the written Constitution is allowed to have force today can lead to a conclusion short of wholehearted endorsement yet more respectful than complete rejection.269 The Constitution’s authority, its legitimacy, and anyone’s obligation to respect it can be variables with multiple gradations. A time can be imagined when the brute forces of social acceptance wane without disappearing. Contractarian and Condorcetian theories have already weakened with time, the goodness of the text varies with one’s normative framework in addition to interpretive method, and stability arguments are only one consideration in the decision to abide. Concluding that the written Constitution is weakly authoritative, in the sense that there should be serious doubt about the propriety of enforcing it to the hilt, is entirely plausible depending on one’s normative values. If the document’s authority may be judged with a scale instead of a switch, then its justifiable strength as a source of law need not match the bravado of Article VI.

Assigning the written Constitution something less than its declared strength might have extremely troubling consequences, at least if done transparently, and doing so less publicly is fraught with other moral risks. But before the thought is rejected, we should understand that softening the Constitution’s potency as a source of law can have at least two effects.

The first effect might be to multiply the sources of supreme constitutional law. Many academics believe such additional sources already exist—for example, judicial

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268 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
269 Richard Fallon helpfully identifies gradations in sociological legitimacy and accepts this possibility for moral legitimacy, but he questions the value of moral legitimacy theories intermediate between minimal and ideal. See Fallon, supra note 96, at 1796, 1798–99 & n.36. He also concludes that it would conflate empirical and normative matters to combine his notions of legal, sociological, and moral legitimacy. See id. at 1851.
decisions denominated constitutional and arrived at through common law reasoning.270 Others have made sustained efforts to expand our operative canon of constitutional law—for example, Bruce Ackerman’s constitutional moments.271 There is also an analogy to theories that soften the distinction between the Constitution and favored statutes.272 It is likewise possible to view recent discussion about the proper role of foreign law in U.S. Constitutional adjudication as an extension of the effort to add sources. Although the argument for foreign sources may be couched as a supplement to interpretation of domestic constitutional text,273 these sources might be used as evidence of a universal normative truth. And, as I have indicated, the line between a new source of constitutional law and a resource for interpretation is easy to cross anyway.274

Each of these candidates for supreme or fundamental law might be unacceptable or frightening, especially if arbitrated through supreme judicial review. But these fears might be grounds to maintain the supreme strength of the written Constitution rather than to deny the possible consequences of moderating that strength. The consequences are perhaps the best reasons for matching the Constitution’s cultural status with a supreme legal status, even if no concrete interpretive method for the document will follow.

The second possible effect is quite different. It involves the relative strength of supposedly lower order domestic law. Strength can matter even if the Constitution is the sole candidate for supreme law. If that text is weakly authoritative, then admittedly nonsupreme sources of law could receive correspondingly greater influence in decisionmaking. The occasions on which interpreted constitutional text trumps other sources of law would be reduced or eliminated. Contrast the first effect of moderating the Constitution’s strength, which raises qualms about too many sources of constitutional law overriding the work of present-day officials. Here the entire notion of a supreme law is eroding. Other sources of supposedly ordinary legal authority—federal statutes, regulations, executive decisions—presumably rise in relative importance.

The result is akin to Thayer’s hope for judicial deference to the judgments of

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272 See Ackerman, Living Constitution, supra note 9, at 1781–82, 1806–07 (reviewing race-based civil rights legislation and emphasizing role of lawyers in defending these past victories); William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216, 1275–76 (2001) (discussing statutes that “over time . . . ‘stick’ in the public culture such that . . . the super-statute and its institutional or normative principles have a broad effect on the law”); Peter M. Shane, Voting Rights and the “Statutory Constitution”, Law & Contemp. Probs., Autumn 1993, at 243, 244 & n.3, 252, 269 (1993) (exploring statutes such as Voting Rights Act of 1965 that “may lay claim to expressing our fundamental law in a way that entitles them to be included within the range of material relevant to constitutional interpretation”); cf. Adam M. Samaha, Government Secrets, Constitutional Law, and Platforms for Judicial Intervention, 53 UCLA L. Rev. 909, 913–16, 956–76 (2006) (using nonjudicial platforms to enable information access claims, but conditioned on freestanding constitutional norm that is otherwise difficult to implement).
273 See, e.g., Tushnet, Comparative Constitutional Law, supra note 118, at 1228 (offering “a more systematic approach to . . . learning from constitutional experience elsewhere” in a way that might “contribute to interpreting the U.S. Constitution”).
274 See supra Parts II.A–B.
other decisionmakers when constitutional concerns arise. But it is conceptually more radical. Diminished in strength, the Constitution would have less legitimate hold on nonjudicial actors who otherwise would have retained an obligation to make their own inquiry into constitutional meaning. Constitutional judicial review would subside in overt form, but so would review by any other institution.

The net practical effect need not be severe, however. A combination of authority theories might nudge the written Constitution above some other sources in strength. And even if that result cannot be achieved, path dependence, the inertia of legal culture, and contemporary judgments in the face of uncertainty might leave the document and even judicial influence fairly secure. Recall the history of vacillation between bicameral and unicameral legislative forms in places where formal constitutional amendment is easier: there is none.

No doubt these potential effects are unacceptable to many, and I am not endorsing either. Adding the dimension of strength to the authority question is meant to establish a practical connection between authority theories and constitutional interpretation within a decision context, a connection more revealing than the asserted unidirectional relationship from authority to interpretation for particular sources. In some ways the connection is unfortunate. It brings with it the possibility of inserting the deep question of the written Constitution’s authoritative strength into the workaday job of interpretation. The issue, moreover, is not one for which the conventional lawyer enjoys a clear advantage in knowledge or judgment. But it appears that a sound analytical picture of interpretation and decision is incomplete without this relationship to the authority inquiry. Who ought to conduct the inquiry is another question.

CONCLUSION

For us and for now, the written Constitution is an invincible icon and enforceable law. But the relationship between theories for its authority and methods of its interpretation is not yet understood. Many scholars have asserted that the former importantly influences the latter, in the sense that particular authority theories are logically linked to particular interpretive methods. The truth is complicated. In some instances the arrow of influence runs from interpretive method back to an authority theory. In others there is no strong influence in any direction. In still others an authority theory ought to influence interpretive method but the theory itself is implausible or at least controversial.

A more useful picture of the authority/interpretation connection makes decision the central concern, and it understands the interpretation of law as simply one source of information. “Meaning” is not the ultimate goal. From this perspective, the practice of interpretation can be reconnected to authority theories. Authority theories identify targets for interpretation for legal decisionmakers, they may reflect overarching normative values that independently influence interpretation, and they can graduate the strength of competing sources of law in a way that affects decisions in institutions. This last influence might be problematic for conventional lawyers and judges. But for a rigorous

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275 See Thayer, supra note 33, at 144 (claiming that courts had traditionally demanded a clear constitutional violation before contradicting the judgment of a coordinate branch of government).
276 See supra notes 84–85 and accompanying text.
analysis of constitutional interpretation and decision, a contested question of authority seems unavoidable: To what extent should people restrict their judgment about law in accord with the imperfect decisions of the past, when the past no longer governs?

Readers with comments may address them to:

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