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Originalism's Expiration Date

Adam M. Samaha

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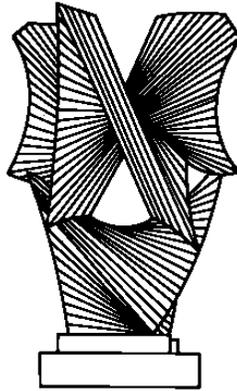
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ORIGINALISM'S EXPIRATION DATE

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ORIGINALISM'S EXPIRATION DATE

*Adam M. Samaha**

The Constitution of the United States declares itself supreme law, but even the amended document is ancient. By 2008, the predicted age of a randomly selected word in this text reached 178 years. The judiciary, for its part, might not interpret the text until decades after ratification. For Article V amendments, the average lag between ratification and Supreme Court interpretation has been about 40 years. The question is how these features of our supreme law might influence the choice of interpretive method and, ultimately, constitutional decision-making. In particular, some scholars indicate that originalism may be a strong force in adjudication when constitutional text is still fresh, but should then fade with time.

This Article is a reassessment of time's influence on constitutional adjudication. It begins by investigating the character and suggesting the causes of time lags in the interpretation of supreme law. It also identifies the Supreme Court's initial encounters with Article V amendments and charts some interpretive trends over time. The Article then turns to the normative arguments for an expiring originalism. First, it resists the claim that strong judicial originalism is always desirable in the wake of ratification. Second, it pushes back in the other direction and explores justifications for a timeless originalism. An example is the possibility that judicial originalism generates ex ante incentives for Article V effort. Although unacceptable to some on principle, for others this justification will be persuasive on certain empirical assumptions. Finally, an unorthodox analogy is explored. Within a limited domain, a version of originalism can function as a culturally acceptable substitute for randomization. It turns out that a corner of supreme law is likely best determined at random, even if judges will never actually roll dice.

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He confessed that he trembled at the idea of altering it, though he was attached to that part of it which gave the right of altering it.[†]

Let the die be cast.^{††}

INTRODUCTION

Among the more bizarre provisions in the Constitution of the United States is the procedure for its formal amendment.¹ Article V describes a series of supermajority votes before new text becomes supreme law under Article VI. Ordinary constitutions — whether

[†] 11 ANNALS OF CONG. 1286 (1802) (reporting remarks of Rep. Benjamin Huger) (discussing the Constitution during the debate on whether to add a Twelfth Amendment).

^{††} 5 PLUTARCH'S LIVES 273 (Bernadotte Perrin trans., 1914) (attributed to Julius Caesar). There is more than one version of this quotation. See *infra* notes 157–159.

¹ I mean the document ratified in 1789 and amended via Article V, not more functional definitions of supreme or constitutional law. I often refer to it as “the document.”

national, state, or local — do not imitate this design. Article V is an outlier. And little used during the 219 years since the first version of the document was ratified. By 2008, the predicted age of a randomly selected word in this text reached 178 years.² A long temporal distance between ratification and interpretation of such text is therefore the norm. This is the *interpretation lag*, and it is a persistent feature of our constitutional system.

There is a second time lag worth understanding. It involves adjudication. Decades can pass before the Supreme Court first interprets constitutional text. While other commentators have indicated that the judiciary's influence on all policy is seriously limited,³ the Court is not the leading voice on the Constitution's meaning, either. This would be less important if courts interpreted constitutional text either early or never.⁴ But courts may try to interpret late. Between 1791 and 2008, the average lag between an amendment's ratification and its first interpretation by the Court was approximately 40 years.⁵ This is the *adjudication lag*, and it varies tremendously across amendments.

The interpretation and adjudication lags are realities. The question is whether they ought to influence how we treat constitutional text today. For instance, when the Supreme Court adjudicated rights to possess handguns⁶ and petition for habeas corpus⁷ last Term, should it have mattered that relevant constitutional text was more than 200 years old? Should the Court have been adjudicating First Amendment claims differently?⁸ Was a different approach to these texts required in 1791? What is the appropriate relationship between the passage of time and the rendering of supreme law?

² See *infra* Part I.A & fig.2.

³ See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 123, 251 (1994) (noting that courts can address only a small fraction of significant policy disputes); cf. Frederick Schauer, *Foreword: The Court's Agenda — and the Nation's*, 120 HARV. L. REV. 4, 9, 49 (2006) (arguing that most Supreme Court adjudication deals with non-salient, even if sometimes influential, policies).

⁴ Cf. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 400–07 (1985) (observing that many clauses are rarely or never litigated, and pointing to relative clarity as a reason).

⁵ See *infra* Part I.B & fig.3. The test for Supreme Court “interpretation” used in this calculation is lax. See *infra* notes 34–35 and accompanying text.

⁶ See *Dist. of Columbia v. Heller*, 554 U.S. ___, ___, 128 S. Ct. 2783, 2788–2812, 2816–18, 2821–22 (2008) (recognizing a limited right to handgun possession in the home under the Second Amendment, and relying on eighteenth- and nineteenth-century history).

⁷ See *Boumediene v. Bush*, 554 U.S. ___, ___, 128 S. Ct. 2229, 2245–51 (2008) (exploring English and United States history forerunning the Habeas Clause, albeit without finding specific guidance).

⁸ See, e.g., *Davis v. Fed. Elec. Comm'n*, 554 U.S. ___, ___, 128 S. Ct. 2759, 2770–74 (2008) (invalidating a rollback of campaign contribution limits, with reference to case law and not originalist history).

There are several possible answers. One option is to disregard the document. Perhaps a sufficiently long lapse after ratification destroys any justification for abiding by the Constitution. No official would openly advocate this position today, but certain practices might only be understood as departures from the document's meaning to serve felt needs. At the other extreme is the option of ignoring time lags. Perhaps the document should have the same legal force today as it did in 1789 and be interpreted in precisely the same way. Strong forms of originalism suggest this result. They counsel the preservation of textual meaning using the same interpretive method across generations.⁹ Alternatively, it is possible to take an intermediate position on the proper effect of time lags. A decision-maker might treat the document as less influential or subject to different interpretive techniques as time passes, and yet still deserving of some consideration even after two centuries. There is no shortage of options.

Debate over judicial originalism is, to a degree, already shaped by the brute facts of interpretation and adjudication lags. Skeptics of history's use in adjudication might concede that originalism is justifiable when ratification is a recent memory, but hold that originalism has an expiration date.¹⁰ Originalists are sensitive to

⁹ See *infra* Part III.A (noting versions of originalism). Some theorists claim that "interpretation" of a legal text for the purpose of understanding its meaning simply is the discovery of authorial intent or of public meaning at the time of adoption. See *infra* notes 114, 183–184. I use a looser definition of interpretation that captures a wider range of contemporary usage. See *infra* text accompanying notes 113–114. This is not to take sides in a conceptual or definitional debate, however. The Article speaks to those with narrow definitions of interpretation as well: At some point, theorists must deal with the potential influence of time on constitutional decision-making, whether that point is "interpretation" or not. My general concern is sound decision-making, not interpretation per se. See *infra* Part III.A; see also Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 633–34, 675–77 (2008) (discussing interpretation, information, and decision).

¹⁰ See Richard Primus, *When Should Original Meanings Matter?*, 109 MICH. L. REV. (forthcoming 2008) (manuscript at 44–47) (arguing that originalism can satisfy a democratic objective only shortly after enactment); *infra* note 155 (discussing Primus). For earlier work reaching similar conclusions, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205, 229 & n.94 (1980) (referring to a form of non-originalism in which the presumptive force of text and history is "defeasible over time in the light of changing experiences and perceptions"); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1815–20 (1997) (arguing that, even when a court faces a paradigm case that inspired an amendment, "the strength of originalist arguments diminishes over time"); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 512 (1996) (recommending contemporary conventional meaning over original meaning when they diverge over time); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1752–54 (2003) (arguing that it may be appropriate to start with originalist interpretation but to employ other methods as time passes); cf. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 (1981) ("[I]t would be an intuitive, widely shared premise that the supreme court in 1800 *should* have accorded interpretive primacy to

these arguments. Their preferred method continues to evolve in its specific protocol and in its justifications. But neither the criticism nor the defense of originalism is fully organized around temporal issues. Time is the central focus of this Article's investigation into supreme law. It offers two contributions.

First, the Article presents measures and explanations for interpretation and adjudication lags in supreme law. Clearly the Constitution is aging and often the Court is an interpretation-laggard. But we do not always know why. Recognizing this uncertainty is pertinent to the normative choices surrounding interpretation and adjudication.¹¹ Past practice, moreover, can illuminate feasible options. The Article therefore identifies the Supreme Court's initial attempts to understand constitutional amendments and then characterizes some doctrinal trends thereafter. The basic finding is variety. Sometimes the Court uses non-originalist arguments to justify case outcomes shortly after ratification, and sometimes it emphasizes originalist history long after ratification. There is no obvious pattern, and no easily discerned feasibility constraint on judicial methodology.

Second, the Article renovates arguments over strong forms of originalism to concentrate on time lags. Of the methodological alternatives, originalism might be the most sensitive to time lags, and it quickly becomes apparent that most criticism of originalism depends on substantial distance from ratification. Consider the objection that following ancient judgments defeats today's democratic will or that historical investigation becomes more difficult as time passes. True, certain objections to making decisions on originalist grounds can be pushed still further, and I will suggest that originalist decision-making is sometimes inappropriate even in the wake of ratification. Regardless, originalist decision-making would be most powerfully defended on justifications that are insensitive to time lags. But often no such defense is possible. Several popular arguments for originalism do run headlong into time-related objections or, if they do not, they are problematic for other reasons.

The closing sections of the Article experiment with other justifications for a strong judicial originalism that lasts. I spotlight two. One argument is comfortably logical, albeit largely overlooked, while the other is unorthodox. The first justification involves ex ante incentives. The supposition is that future law reformers might

original intent."); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1063 (1980) ("The original meaning of the document is not abandoned at a single moment, but gradually.").

¹¹ See *infra* Part IV.D.1 (discussing possible incentives for Article V lawmaking).

favor the politics of amendment-making over litigation if the judiciary starts holding to a strong form of originalism. This justification is hobbled by empirical uncertainties, but it should be attractive in principle to some. The alternative justification involves randomization. Within a limited domain of issues, perhaps a version of originalism can be defended as a culturally acceptable substitute for settling disputes by random selection. If refashioned into a quick take on history, originalism can amount to throwing dice on supreme law. Applying history to contemporary disputes can be somewhat arbitrary, yet a kind of arbitrariness is perfectly rational in some decision situations. This revision of originalism has a limited scope and major weaknesses. But my goal is to explore the possibilities for originalist inquiry in constitutional adjudication, whether or not the arguments track the commitments of today's originalist movement.

Part I of the Article is a diagnosis. It introduces the interpretation and adjudication lags, along with thoughts on their dynamics. Included is a weighted average age for the Constitution and a measure of the adjudication lag for Article V amendments. Part II is analytical. It charts possible and plausible trajectories for originalism's strength in constitutional decision-making over time. It then identifies the Court's first encounters with Article V amendments, characterizes the variety of reasoning on display, and briefly reviews trends thereafter in several doctrinal fields. Parts III and IV are normative. They discuss time-oriented critiques of originalism, defend historiography against the threats of age, and then develop pro-history arguments least likely to degrade with time. I close by exploring justifications founded on incentives and randomization, as well as the premises on which they depend.

I. TIME LAGS IN SUPREME LAW

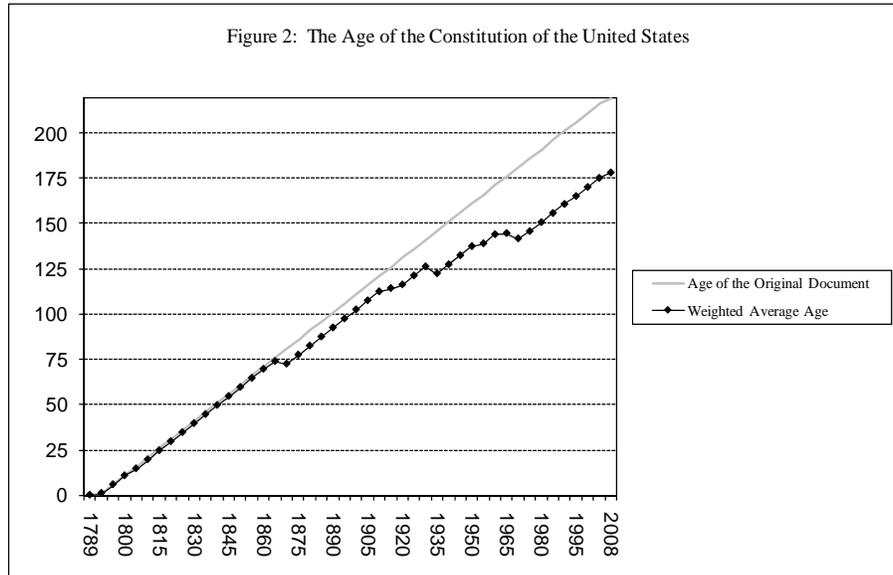
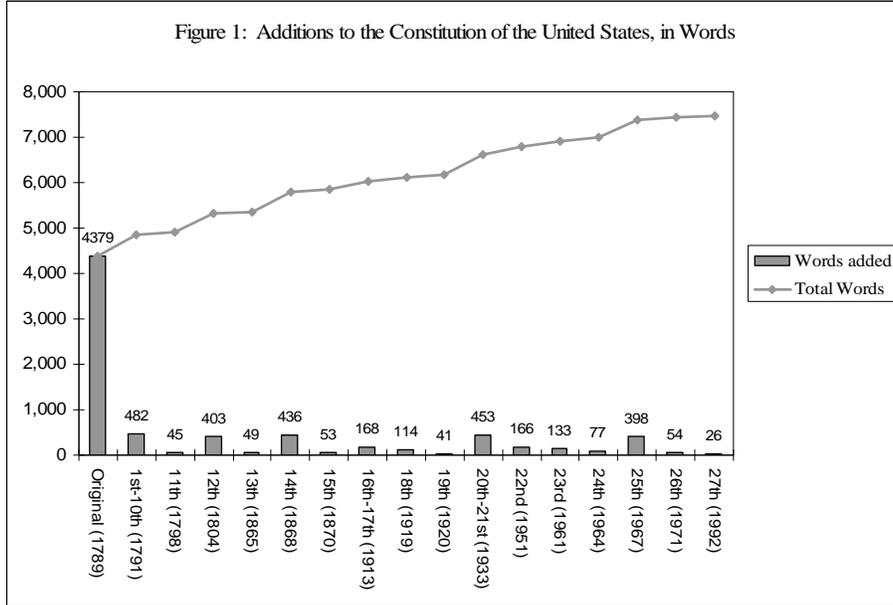
Insofar as one wants to enforce the Constitution of the United States, time lags become hardwired into supreme law. This is true in two senses. First, there always will be a growing temporal gap between ratification of a particular word string and its interpretation. Interpretation lags are unavoidable and affect all interpreters, but the underlying reasons for the length of these gaps are not so clear. Second, there often will be a substantial temporal gap between ratification and a judge's first attempt to understand ratified text. Different decision-makers enter the interpretive scene at different moments. For the Supreme Court, the timing of its entrance has varied greatly across different bits of constitutional

text, but a multi-decade delay is typical. I explain the basis for these observations in this Part.

A. *The Interpretation Lag and Its Dynamics*

The Constitution's words are aging. Instead of a continuous process of textual updating, Article V amendments are often relatively narrow interventions and they usually arrive with significant delays between them (Figure 1). There have been only six recognized Article V amendments since Franklin Roosevelt's first term as President. Although 40% of the document's words were added after 1789, not much more than 25% of those additions occurred after 1933. The words ratified in 1789 were 219 years old in 2008, which is not dramatically higher than the predicted age of a randomly selected word in the amended document: 178 years old. At times, enough text has been added to seriously alter the rate of increase. But the document's weighted average age has been increasing fairly steadily since 1789 (Figure 2).¹²

¹² The weighted average age of the document is the sum of the ages of each part of the text, adjusted according to the fraction of the total text that each part represents in a given year. For example, the weighted average age of the document in 1795 was (6 years of age for the original Constitution * (4,379 words in the original Constitution / 4,861 total words in 1795)) + (4 years of age for the Bill of Rights * (482 words in the Bill of Rights / 4,861 total words in 1795)) = 5.8 years. A longer note on methodology is available from the author on request.



The upshot is that anyone interpreting the document is most likely adverting to text enacted generations earlier. This point is generally understood, but the reasons for an aging constitutional text are not settled. The immediate causes are, of course, retention of the document as law coupled with a low Article V amendment rate and the absence of large-scale revision through that process. The debatable question is why, exactly, the use of Article V has been rare and modest. A growing empirical literature attempts to answer such causation questions.¹³ But the answers are not conclusive and the simplest explanations are not plainly best.

One might begin by supposing that the Article V amendment rate is a function of (1) status quo satisfaction levels, (2) the formal rules for amendment and (3) the alternatives for achieving the same or similar outcomes, including new understandings of existing text. With high satisfaction levels, extremely demanding amendment rules, and functional alternatives to address any remaining complaints with the legal status quo, one should expect few or no formal amendments. At the opposite extremes, one might predict repeated or extensive amendments revising nearly every element of supreme law. Other combinations suggest additional possibilities: low satisfaction levels along with demanding amendment rules and no functional alternatives might lead people to simply disregard the document. But the pattern under consideration here is the limited use of Article V despite continued public respect for the document.

Genuine popular satisfaction is not a complete explanation for the Article V amendment rate. We can expect satisfaction to fluctuate, and there is no guarantee that low satisfaction yields amendments. Periods of rather intense demand for law reform have not always been reflected in amendments: the political victories of Jacksonian Democracy, the New Deal, the Civil Rights Movement, and the Nixon and Reagan coalitions are possible illustrations.¹⁴ Further, the document has become a national icon,¹⁵

¹³ The seminal work is Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 254–62 (Sanford Levinson ed., 1995) (finding that shorter constitutions and higher estimated difficulty of the amendment process are correlated with falling amendment rates); see also John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *LAW & SOC. INQUIRY* 501, 523 (1997) (concluding that the key variable in amendment rates is special legislative voting requirements, not public referenda or state-level ratification); Bjørn E. Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* 319, 333–35 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) (studying OECD countries and concluding, in contrast, that “multiple decisions with voter involvement” tend to decrease amendment rates rather than special legislative majorities).

¹⁴ See generally Bruce Ackerman, 2006 *Oliver Wendell Holmes Lectures: The Living*

which can strangely dampen the use of its own Article V process. We can find at least one likely case of Article V allergy. As congressional debate over a twelfth amendment began in 1802, Federalist Representative Benjamin Huger reportedly “trembled at the idea of altering [the Constitution], though he was attached to that part of it which gave the right of altering it.”¹⁶ This kind of reverence might signify elements of path dependence as well. Maintaining an institution can be judged superior to the risks and costs of transformation, even if the institution is suboptimal in retrospect.¹⁷ Still, the existence of formal amendments suggests textual changes are not anathema.

As to formal amendment rules, the veto gates described in Article V are indeed extraordinary. On its face, the Article V process is more difficult than the legislative process described in Article I, Section 7, and it might seem as or more demanding than any constitution in the world.¹⁸ The required supermajorities indicate especially high decision costs to achieve enactment, with the possibility of a few members of Congress or state legislators holding out for handsome payoffs.

Additional factors must be considered, however. A procedure might appear onerous without resulting in a low amendment rate or serious holdout problems. An amendment might be considered more durable and worth more effort than ordinary legislation. This could increase amendment attempts as the formal rules become more taxing. But of course this depends on the time horizon for law reform efforts. Participants might not care enough about the distant future for durable Article V victories to be prized. In

Constitution, 120 HARV. L. REV. 1737, 1749–50 (2007) (arguing that the document does not reflect modern nationalistic values).

¹⁵ See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 3 (1986); cf. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294, 1298 (1937) (going so far as to associate certain cultural use of the Constitution with totem, fetish, and cult).

¹⁶ 11 ANNALS OF CONG. 1286 (1802); cf. THE FEDERALIST NO. 49, at 313, 314 (James Madison) (Clinton Rossiter ed., 1961) (hoping for veneration of government through stability).

¹⁷ See PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 10–24 (2004); S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 206–08 (1995) (categorizing claims that an initial decision was suboptimal based on whether or not a better choice was feasibly recognizable).

¹⁸ See generally Lutz, *supra* note 13, at 256–61 & tbl. 11 (comparing 30 national constitutions and finding the U.S. Constitution second-most difficult to amend, based on an index of indicators assembled from U.S. state experience); Janice C. May, *State Constitutional Developments in 2003*, in 36 THE BOOK OF THE STATES 3, 6 tbl.B (2004) (explaining the processes for amending U.S. state constitutions). Perhaps the addition of state legislatures and members of Congress over time has made Article V more difficult to use in 2008 compared to 1789. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 112 (1962) (theorizing a rise in per capita bargaining costs under the same voting rule as decision-makers increase).

addition, there is empirical work indicating that the length of a constitution or the surrounding political climate, such as one-party dominance, are more important factors in the amendment rate than the formalities of process.¹⁹ The United States has rarely experienced partisan political dominance across national and state institutions, and the Constitution is a relatively concise document with significant generalities.

Another possible factor is the availability of alternatives. Other avenues for change might be roughly as good as, and easier to accomplish than, Article V lawmaking under present circumstances. It is worth emphasizing that alternatives can reduce the demand for formal amendments whether or not Article V lawmaking is highly valued. Perhaps altering constitutional text does achieve the deepest available victory; the document's advertisement of "supreme" law in Article VI suggests as much. Yet we know enough about written constitutions to understand that new paper does not necessarily mean new practices or lasting social change. The decades after Reconstruction are evidence of this. There must be living human will to make legal texts relevant, and those who want change for the long run will not necessarily prefer Article V amendments to so-called ordinary law joined with a political coalition to keep it stable. Thus alternatives to formal constitutional amendment might be attractive because they achieve adequately significant change, or because Article V cannot be depended upon to do so.²⁰

But uncertainty surrounds the magnitude of this influence as well. There is reason to deny that Article V has been effectively duplicated. Different routes to change have different features and they present different opportunities for reversal. Supreme Court interpretations of the Constitution are styled as final renderings of supreme law reversible by Article V amendment, but they also can be reversed by a subsequent Court decision.²¹ They are thus vulnerable to personnel changes, if nothing else.²² The text of the

¹⁹ See Daniel Berkowitz & Karen Clay, *American Civil Law Origins: Implications for State Constitutions*, 7 AM. L. & ECON. REV. 62, 64, 74–75 (2005) (downplaying formal amendment rules after accounting for partisan political competition, then stressing a statistically significant link from a state's civil law tradition to a relatively high amendment rate); Lutz, *supra* note 13, at 247 (correlating document length with amendment rate); see also Ferejohn, *supra* note 13, at 524 (critiquing emphasis on formal amendment rules).

²⁰ See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–64 (2001) (arguing Article V amendments have been neither necessary nor sufficient for serious change).

²¹ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (recognizing the possibility of Article V override and reiterating that stare decisis is softer in constitutional adjudication).

²² See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* 3 (5th ed. 2008) (discussing ideological compatibility in the nomination decision); Paul M. Collins, Jr., *Variable Voting*

Constitution cannot be formally altered by Court decision. Of course, constitutional text may be misunderstood or misused by the judiciary, and courts might nevertheless receive respect when they declare constitutional meaning. Still, constitutional text can have influence beyond the courtroom. It might affect arguments and behavior even if, for purposes of litigation, courts sometimes have the power to ignore its meaning.²³ Of similar importance are the sociopolitical consequences associated with each method of change. Using the formal amendment process implicates a distinct set of actors and actions, and one should expect different effects on the political environment. Even if adjudication can produce similar effects on politics, which is doubtful,²⁴ and even if Article V movements influence judicial understanding of the Constitution, which is almost certainly true on occasion,²⁵ it would be a mistake to equate two paths.

The difference, however, is a matter of degree. Ordinary legislation, regulation, private ordering and litigation may be acceptable in light of Article V's procedural hurdles and weaknesses. To be clear, some of these alternatives do not purport to generate supreme law. Change advocates may accept this and settle for something less than nominally supreme federal law when they can do so consistently with the document as interpreted. For instance, those who want states to license cross-sex and not same-sex marriage might prefer a federal constitutional amendment to that effect, yet satisfy themselves with changes in state constitutional law.²⁶ This migration away from supreme law is

Behavior on the Supreme Court: A Preliminary Analysis and Research Framework, 25 JUST. SYS. J. 57, 62 (2004) (indicating that, in cases where precedent was explicitly overruled, justices were most likely to stick with their initial position, but emphasizing that 30% of the studied votes were to overrule precedent that the justice in question had helped set).

²³ See generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 2 (1999) ("Not everything that courts do is consistent with the ideal of interpretation. Not everything that elaborates constitutional meaning is interpretation.").

²⁴ See Jack Citrin & Patrick J. Egan, *When the Supreme Court Decides, Does the Public Follow?* 2-3 (July 5, 2007) (unpublished manuscript), <http://ssrn.com/abstract=998597> (using survey research and finding no effect or a small effect on public opinion from learning about the Court's resistance to regulation of abortion, flagburning, and sodomy); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1830 (2005) (collecting studies finding little influence on public opinion).

²⁵ See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2602 (2003); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("[C]onstitutional law and culture are locked in a dialectical relationship . . ."); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302 (2001).

²⁶ Cf. Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137, 197-98 (2004) (describing the movement for state-level cross-sex marriage amendments, but ultimately supporting a federal

surely real and interesting, but perhaps less controversial than other movements.

Another effort triggers complaints of constitutional perversion: when change advocates seek reform without using Article V and their objective is inconsistent with the document as understood by some set of interpreters. Few advocates will concede that their goals contradict the document as properly interpreted, and proving otherwise depends on the contested notion of "interpretation."²⁷ Usually they will claim, as Franklin Roosevelt did, that resisters misunderstand the Constitution.²⁸ But sometimes those claims will be fairly disputed and a reform movement will nonetheless channel resources away from Article V.²⁹

Among the more controversial of these workarounds is judicial updating. Change advocates might turn to the courts for what amounts to a revision of supreme law. This can have more than one effect on other forums. A possibility is that litigation ultimately energizes non-judicial political action. Successful litigation might clear the way for politics by other means, as when the Supreme Court was urged to modify its understanding of congressional authority during the New Deal.³⁰ Or it could be part of a campaign to trump politics-as-usual, as when the Court was asked to repudiate racial segregation in public schools.³¹ Either way, litigation can be a rough substitute for supreme lawmaking through Article V — not a categorically lower-order alternative that is accepted by all as reversible through ordinary lawmaking.

As well, such litigation could reduce the expected value of Article V amendments. Those amendments might be subject to creative reinterpretation in the future to serve new interests. To

amendment to stop "judicial activism" and "lawlessness").

²⁷ See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change, in* RESPONDING TO IMPERFECTION, *supra* note 13, at 13, 25–36; *infra* Part III.A.

²⁸ See Franklin Delano Roosevelt, Fireside Chat on Reorganization of the Judiciary (Mar. 9, 1937), *available at* <http://www.fdrlibrary.marist.edu/030937.html> ("We must find a way to take an appeal from the Supreme Court to the Constitution itself.").

²⁹ Roosevelt considered an Article V effort, but decided against it. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, 1966 SUP. CT. REV. 347, 362–65, 384–86 (noting, *inter alia*, drafting difficulties, delay, expected opposition from business interests and lawyers, and judicial interpretation thereafter); see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 20–25 (1998) (describing non-Article V constitutional moments involving national political confrontations); LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* ch. 1 (2004) (examining a tradition of popular influence on constitutional meaning).

³⁰ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942) (testing federal regulation by the purportedly substantial effect of its subject on interstate commerce).

³¹ See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (relying on the Fifth Amendment's Due Process Clause to oppose racial segregation in D.C. public schools).

the extent change advocates have lengthy time horizons, the formal amendment rate could spiral downward.

The relationship between judicial review and amendment rates is an empirical question with implications for choosing an interpretive method.³² Yet our understanding of the relationship is notably unsophisticated. Educated guesswork might suggest an inverse relationship, something to “take on faith” for the time being, but conventional wisdom is vulnerable to sustained investigation.³³ It could be that the amendment rate would be equally low if no substantially similar alternatives to Article V existed. It is also possible that Article V alternatives prevented the need for, and risks of, a full-blown rewriting of the Constitution. Perhaps the most that can be said with confidence is that several factors — adequate satisfaction with supreme law allied with the document’s status as a national icon, the practical difficulty in surviving the amendment process in ordinary times given the political environment, and the feasible alternatives including judicial interpretation — probably work together to depress the modern Article V amendment rate.

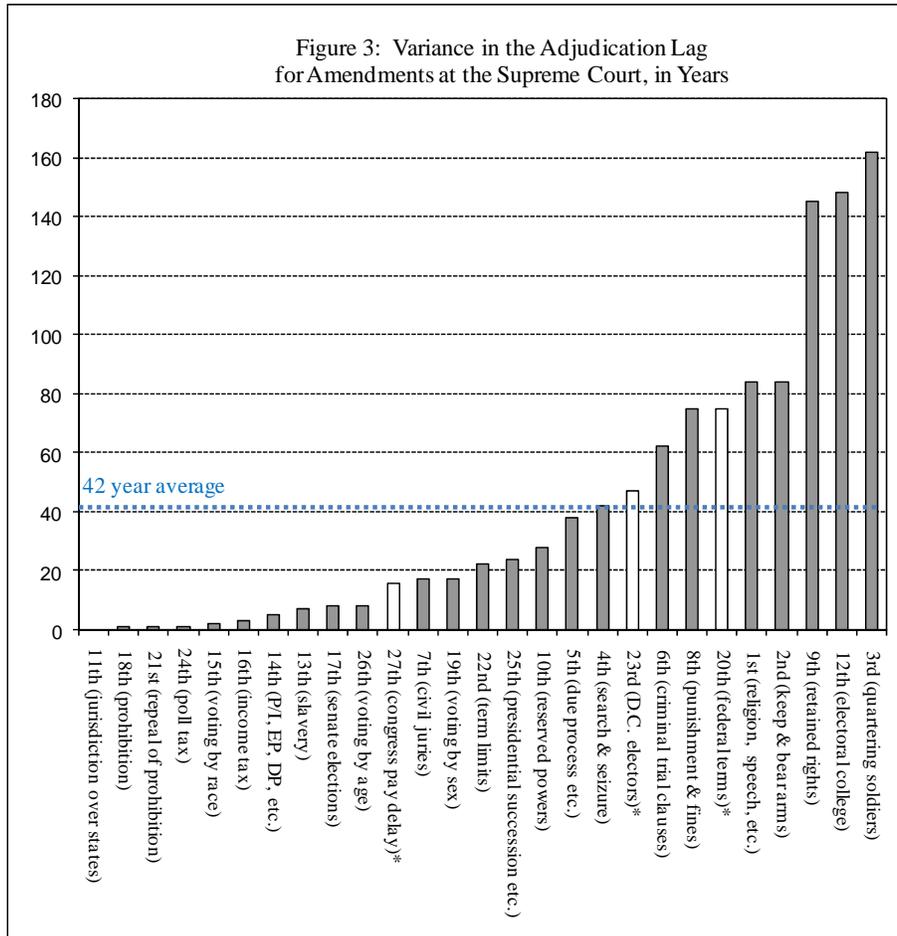
B. *The Adjudication Lag and Its Dynamics*

The adjudication lag is different. It directs attention to one audience for the document: judges resolving disputes. The adjudication lag measures the time between ratification of constitutional text and the use of that text by courts. There might not be anything independently interesting about it if courts were always interpreting constitutional text alongside other decision-makers. But they do not. Judges are interpretation laggards.

Accurately measuring the adjudication lag for all clauses in the document and for all courts in the United States would be burdensome. Existing search engines cannot be relied on to find the first instance of judicial “interpretation” without additional human judgment. Nevertheless, we can make meaningful progress by studying only Article V amendments and only Supreme Court opinions.

³² See *infra* Part IV.D.1 (discussing incentives-based justifications for originalism).

³³ Ferejohn, *supra* note 13, at 525.



* The Twentieth, Twenty-Third, and Twenty-Seventh Amendments have not yet been interpreted by the Supreme Court as of 2008. The calculation of a 42 year average treats these three Amendments as if they had been interpreted in 2008.

Doing so yields the following result: Since 1791, the average lag between ratification of an amendment and its interpretation by the Court has been approximately 40 years.³⁴ To make this calculation, cases were searched for interpretation by a member of the majority coalition on the judgment. “Interpretation” was understood liberally. Meaningful information about the understanding of an amendment was sufficient; reasoned elaboration of textual meaning was not required. For instance, *The Steel Seizure Case* was counted as ending the adjudication lag for the Third Amendment because Justice Jackson’s concurrence pointed to the Amendment during his broader discussion of the balance of authority between the President and Congress.³⁵ Furthermore, the calculation is based on opinions interpreting any part of an amendment. Thus Supreme Court interpretation of the Petition Clause in 1875³⁶ ends the adjudication lag for the First Amendment as a whole. In this respect, the duration of adjudication lags is arguably understated.

Regardless, it is clear that the adjudication lag varies tremendously across constitutional text (Figure 3). For some amendments, the lag is vanishingly short — just one month for the Eleventh Amendment. For others, it lasts decades — 162 years for the Third Amendment. For yet others, the adjudication lag is still mounting.³⁷ The forces that yield adjudication lags, moreover, are not necessarily stable over time. The average lag drops below 23 years for the Eleventh through Twenty-Seventh Amendments. This could be the result of more than chance.

There is a degree of subjectivity in these results, however. Aside from the definition of interpretation and its application, the focus on ratification of Article V amendments is partly a matter of convenience. Neither individual clauses within amendments nor the original document is studied here, and one might be interested in the time lag between any novel constitutional argument and judicial adjudication. A formal amendment need not be the genesis of a claim about supreme law. Consider natural law, fundamental rights, or substantive due process arguments. Some early

³⁴ An Appendix to this Article lists the cases on which this calculation relies. It also lists the first citation of each amendment in a majority coalition opinion. This helps set a lower bound on the interpretation lag. The average “citation lag” in the Supreme Court is about 35 years.

³⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1953) (Jackson, J., concurring).

³⁶ See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

³⁷ The Twentieth, Twenty-Third, and Twenty-Seventh Amendments are treated as if they had been interpreted by the Court in 2008. They have not yet been interpreted. This is a right-censored data issue, which has not been addressed with hazard rates. See JANET M. BOX-STEFFENSMEIER & BRADFORD S. JONES, *EVENT HISTORY MODELING: A GUIDE FOR SOCIAL SCIENTISTS* 15–20 (2004).

advocates indicated that the document reflected, without exhausting, principles that ought to constrain government action.³⁸ Excessive concentration on one text can miss these intellectual streams. Likewise, it might be useful to measure the lag between any judicial opinion referring to historical sources and the age of those sources. The Court's rulings on state sovereign immunity are now disconnected from particular clauses of the document,³⁹ but this does not mean that the Court is ignoring history.

Nevertheless, the variance in adjudication lags is real, and the lag from ratification to interpretation can reach a century or more. Consider the Supreme Court's experiences with the Eleventh and Twelfth Amendments. Both were ratified more than 200 years ago but their adjudication lags are radically different. The Eleventh Amendment's constraint on federal court jurisdiction was addressed one month after its ratification was proclaimed by the President.⁴⁰ In 1798, *Hollingsworth v. Virginia*⁴¹ swiftly rejected arguments that the Amendment was not properly ratified and that its constraint should not apply to pending cases.⁴² The Twelfth Amendment, in contrast, was not even cited by the Supreme Court until 1892.⁴³ And the Court did not interpret the Twelfth until *Ray v. Blair*,⁴⁴ a full 148 years after ratification.

Variance in the adjudication lag is explicable once recognized. Constitutional provisions do not share the same character. Some are prime candidates for judicial use: some text is, or becomes, vague;⁴⁵ some text implicates moral choices and threatens existing interests, as with the Reconstruction Amendments; and some text is directed at judges, such as Article III. But many other provisions do not necessarily foretell litigation. Some provisions sunset.⁴⁶ Some provisions are little more than coordination devices, such as the requirement that Congress assemble at least once a year on a

³⁸ See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1335–38 (3d. ed. 2000) (describing the development of such arguments); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127–28 (1987) (offering a history of “multiple sources of fundamental law”).

³⁹ See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) (describing the Eleventh Amendment as “but one particular exemplification” of state sovereign immunity).

⁴⁰ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 20 (1985).

⁴¹ 3 U.S. (3 Dall.) 378 (1798).

⁴² See *id.* at 379–82 (describing attorney arguments and the Court's disposition).

⁴³ See *McPherson v. Blacker*, 146 U.S. 1, 26 (1892).

⁴⁴ 343 U.S. 214, 228–31 (1952).

⁴⁵ See Schauer, *supra* note 4, at 400–07 (offering clarity as an explanation for dormancy).

⁴⁶ See, e.g., U.S. CONST. art. I, § 9, cl. 1 (setting a sunset involving regulation of the slave trade); *id.* art. V (same).

default date at high noon.⁴⁷ Even the facially plausible candidates for litigation will not always be interpreted by the courts immediately. A real-world controversy must arise that is arguably related to the text. Think about the Bill of Rights while the federal government's domestic regulatory presence was in its infancy. Without an exercise of power implicating these amendments, litigation could be avoided.⁴⁸

More broadly, parties must be willing to litigate and courts must be willing to resolve their claims before adjudication lags end. The federal constitutional system lacks an advisory opinion process. Furthermore, judges have always had devices for avoiding issues, none more than Supreme Court justices. Their docket was declared almost entirely discretionary by statute in 1988 and they exercised substantial discretion long before then.⁴⁹ Judges might be shy about offering an opinion in one timeframe, even if they become self-assured later on.⁵⁰ On the other side, judges might indicate their interest in taking up unlitigated constitutional claims.⁵¹ Either way, the judicial agenda will be set by more than the character of constitutional clauses. A combination of judicial proclivity and litigant interest will help determine when adjudication lags end.

Many variables are in play but some points are clear. In our system, nonjudicial actors bear initial responsibility for understanding the Constitution's meaning. At least when the addressees of constitutional text are not judges, others will work with the text before even the most aggressive court speaks. Adjudication does not start and finish quickly enough to preempt debate elsewhere. As well, bits of text will lurk outside the courtroom only to emerge decades after ratification. Even if Article V is never used again, we are still bound to witness additional adjudication lags ending. Courts have yet to render meaning from all of the document's clauses. And it is anyone's guess how the document's reference to Letters of Marque and Reprisal might

⁴⁷ See U.S. CONST. amend. XX, § 2.

⁴⁸ Accord Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION*, *supra* note 13, at 37, 45, 49.

⁴⁹ See, e.g., H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 274-75, 295-303 (1991); Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally-Induced Selection Bias in the Supreme Court's Agenda* 3, 8-10, 34-35 (Dec. 1, 2007) (unpublished manuscript on file with the author) (finding that congressional preferences influenced probability of Supreme Court review of federal statutes enacted from 1987 to 2001, though perhaps due to party litigation decisions).

⁵⁰ See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 *GEO. L.J.* 1, 62-66 (1979) (describing internal Court deliberations on how to handle *Naim v. Naim*, 197 Va. 80 (1955) (upholding an anti-miscegenation law)).

⁵¹ See, e.g., *Printz v. United States*, 521 U.S. 898, 937-39 (1997) (Thomas, J., concurring) (relying on the Tenth Amendment but raising a Second Amendment argument).

someday influence the legal status of the war on terror.⁵² This leads to three further observations about adjudication lags.

First, the phenomenon is not simply a function of a low amendment rate. Adjudication lags could persist even if the document were amended every year, assuming that the content of amendments would not radically change. There is no assurance that new constitutional text will make its way into the court system swiftly. Nonetheless, a low amendment rate reduces the likelihood of short adjudication lags ending in the present time period. It means fewer fresh targets. Understandably, then, scholars tend to concentrate on interpretation after long lags. Alternatively, a high amendment rate might resolve disputes without litigation. Elements of the Bill of Rights suggest an illustration. One rationale for the Bill was to calm fears about the intended scope of congressional authority.⁵³ Still, it is unrealistic to expect that an amendment process, no matter how lax, will eliminate the likelihood of litigation in a system that accepts some form of judicial review.

A second observation goes to practical consequences. The interpretation and adjudication lags are associated with different decision environments with different available information. By definition, no judicial decisions are available until the adjudication lag runs out. Given enough time, however, parts of the document will be the subject of cripplingly large commentary from the courts. In a system that places any weight on the constitutional opinion of judges, past court decisions will have some influence on future outcomes. Long interpretation lags, therefore, might present the opportunity to settle questions by reference to precedent. In contrast, non-judicial influences are likely to build over time regardless. Populations change, preferences shift, facts and technology evolve, patterns of behavior solidify into traditions and self-reinforcing systems.⁵⁴ If courts are taken seriously and if they offer opinions on constitutional meaning quickly, then judicial opinion will become part of the influence on behavior as the

⁵² See U.S. CONST. art. I, § 8, cl. 11. For an effort to shape understanding of war-related authority with the Letters Clause, see Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1707 (2002) ("The Marque and Reprisal Clause gives Congress authority over a limited form of war, while the Declare War Clause gives Congress control over broader forms of war."); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1667-68 (2002) (reading both clauses, to the contrary, as granting Congress power to characterize legal status rather than to initiate action).

⁵³ See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 19-43 (1999) (discussing the enumerated powers assurance and its abandonment by supporters of a Bill of Rights).

⁵⁴ See, e.g., PIERSON, *supra* note 17, at 10, 24 (discussing path dependence in politics through setup costs, learning effects, network effects, and expectation adaptation).

interpretation lag grows. But if courts act more slowly, if they intervene only after a lengthy lag, they will more likely face high-magnitude changes and the accompanying practical impediments to judicial influence.

An example is *Ray v. Blair*,⁵⁵ which involved presidential elector freedom. Political parties had been effectively dictating elector behavior long before *Ray* was decided in 1952. In fact, presidential electors might not have ever exercised much independent judgment.⁵⁶ Despite these traditions, a candidate for elector sought greater freedom to deliberate than his state and party preferred. He contended that those who originally designed the Electoral College would not have tolerated elector pledges to alienate their judgment to a national party convention.⁵⁷ In these long-distance encounters with constitutional text, how should responsible judges behave? For judicial encounters closer in time to ratification, is the conscientious judge obligated to act differently than the judge who never had the opportunity to intervene when the text was young? Should judges time their interventions with any such difference in mind, if they have the option?⁵⁸ These are the sorts of questions explored below.

Third and finally, constitutional interpretation cannot be fully separated from other types of interpretation. Whenever decision-makers look to history, similar issues surface. Think about *District of Columbia v. Heller*, which invoked the Second Amendment to vindicate a qualified right to possess a handgun in one's home for self-defense.⁵⁹ The Amendment is about 217 years old, but the last time the Court had directly confronted a claim under the Amendment was nearly 70 years prior.⁶⁰ This precedent has its own historical context and it was followed by a tradition outside the courts. In fact, the District of Columbia handgun regulation at issue

⁵⁵ 343 U.S. 214 (1952).

⁵⁶ *See id.* at 229 n.16; EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897, at 51 (rev. ed. 1928) (quoting a Federalist partisan who criticized a 1796 elector for "think[ing]" rather than "act[ing]").

⁵⁷ Compare THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (Alexander Hamilton) (indicating that electors would engage in a "complicated . . . investigation" and act "under circumstances favorable to deliberation"), with *Ray*, 343 U.S. at 228-30 (permitting a state party to require that primary candidates for elector make such a pledge).

⁵⁸ Note a companionship between advocating judicial passivity, *see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS ch. 4 (1962), and advocating narrow judicial judgments or deferential judicial attitudes, *see* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 17, 21 (1999). In practical terms, delayed judicial intervention might amount to judicial minimalism or deference.

⁵⁹ *See* *Dist. of Columbia v. Heller*, 554 U.S. ___, ___, 128 S. Ct. 2783, 2821-22 (2008). The meaning of *Heller* is, like the Second Amendment, contested.

⁶⁰ *See* *United States v. Miller*, 307 U.S. 174, 178 (1939).

was itself written over 30 years ago.⁶¹ Decision-makers must determine whether their approach to an information source ought to be influenced by the distance between the time of decision and the creation of the source — whether the source is constitutional text, a statute, a treaty, a regulation, an executive order, a judicial opinion, evidence of a tradition, and so forth. Most decision-makers will not want to age discriminate against all of these sources, but the degree to which age should matter is an unavoidable judgment.

There are reasons, however, for fixating on the Constitution. A narrowed focus helps make the discussion more concrete and less theoretical. We might begin to understand the normative choices and positive dynamics for supreme law generation, without forgetting that this situation is analogous to others. Second, the choices in this field are partly unique. If nothing else, Article V is an oddity. We can expect something special and perhaps especially important in the interplay between the formal amendment process, a low amendment rate, and the alternative methods of creating law.

II. ORIGINALISM'S TRAJECTORIES

The discussion above identifies two different time lags. Both raise issues for interpretive methods that rely on historical arguments. Indeed a large part of the debate over interpretive method and decision-making in the courts can be organized around these time-related questions. The next step is to fill out the options. This Part sketches some possible and plausible trajectories for the strength of originalism in decision-making over time, and it begins to investigate how the Supreme Court has reacted to the time variable in actual constitutional cases.

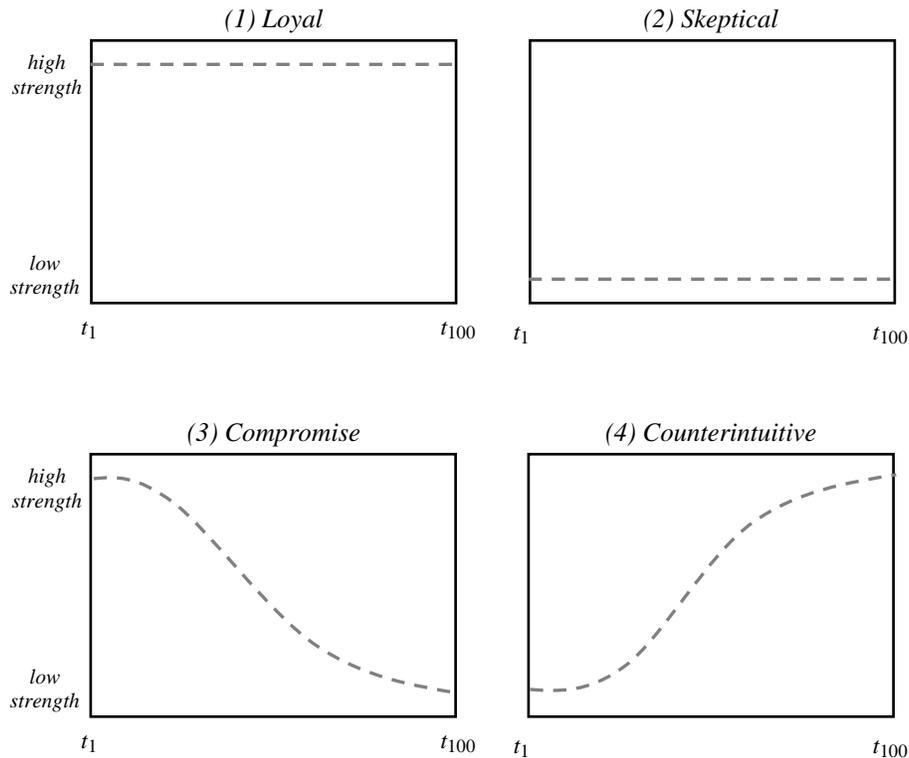
A. *The Possible and the Plausible*

“Originalism” has been used to mean several distinct ideas. Its versions are briefly reviewed in Part III.A, below. For now, we can use the term loosely to encompass a range of historical arguments about the meaning of constitutional text. These arguments might target drafter intent, or ratifier understanding, or public meaning, or some other fact question for the purpose of illuminating textual meaning at the time of adoption. Clearly excluded are bald

⁶¹ See Brief of Petitioner at 4–6, *Heller*, 128 S. Ct. 645 (No. 07-290) (describing handgun data relied on by the D.C. City Council in 1976).

arguments about the best meaning according to present needs. Tradition and practice after ratification are likewise excluded, unless specifically used to understand meaning at the point of ratification. But this leaves room for many historical sources and arguments in Supreme Court opinions that can all be counted as originalist. Although a narrower definition of originalism would better fit today's intellectual trends, it might drastically reduce the number of Court opinions available for analysis.

Whichever version of originalism ought to be prioritized, constitutional decision-makers must assign it a strength value in relation to other considerations. This is true whether one believes that nothing but originalism qualifies as "interpretation" or whether that term is defined capaciously enough to include other activities. Because the strength value for originalism in decision-making could change over time, there are an infinite number of trajectories that originalism's influence might follow. Everything depends on how temporal distance from ratification might affect the normative arguments for and against the use of originalist inquiry in decisions that affect people. Begin by considering the following trajectories:



The first pair of trajectories is insensitive to the passage of time. Originalism sustains its strength level regardless of the distance between ratification (t_1) and subsequent time periods. Opposition to the relevance of time does not depend on support for originalist methods. One can believe that the post-ratification date of interpretation is irrelevant and either dogmatically support originalism or instead deny its value.

Both positions are, however, extreme. To defend the loyal curve, no amount of progress in understanding human affairs and no degree of change in technology, sociology, morality, economics, politics or international relations can affect the overriding influence of originalism. One would have to remain deeply resistant to legal change and think such stasis possible, or believe the world does not actually change in important ways, or have total faith in the formal amendment process, or possess confidence that past constitutional decisions will always incorporate adequate flexibility to serve contemporary needs.⁶² To defend the skeptical curve, originalism must be repudiated by the Court no matter how static the world, clear the sentiment on constitutional meaning or close in time to ratification. The Court would be required, on the afternoon of ratification, to interpret constitutional text without relying at all on originalist inquiries. This probably requires equally heroic assumptions or unconventional values.

The other pair of trajectories represents an emerging compromise for originalism's strength, along with a counterintuitive alternative. The compromise curve shows originalism at the apex of its strength when decision-makers are close in time to ratification, and then a negative slope for subsequent time periods as originalism fades. The intuition is that originalist inquiries at the Supreme Court are more desirable, more feasible, and perhaps inevitable when constitutional text has just been ratified. Thereafter, the justifications and pressures pointing toward originalism dwindle. The optimal shape of this curve is open to debate, but several scholars suggest this moderated position on originalism.⁶³ Hence the issue that divides many theorists is originalism's strength at t_{100} , not at t_1 .

At least theoretically, this compromise trajectory can be turned upside down. On this option, originalism begins weakly and gains strength in decision-making with time. No one appears to advocate this trajectory as a normative matter.⁶⁴ It might well show an

⁶² Originalist inquiry might yield flexibility on these points, but that would be a result of good fortune rather than a judgment at t_{100} that originalism should be moderated.

⁶³ See *supra* note 10 (collecting sources).

⁶⁴ The counterintuitive curve might accurately describe the ebb and flow of originalist

inexplicably delayed onset of nostalgia for antiquated decisions. But on certain conditions and for certain situations, a move from weaker to stronger originalism in the judiciary is defensible. Or so I shall suggest.⁶⁵

Before proceeding, two qualifications should be noted. First, time is only a proxy. Its passage after ratification indicates that originalism's desirability or feasibility might have to be reconsidered, without showing exactly why. Plotting a trajectory for originalism's strength is therefore difficult, even if we are solely interested in the normative question. Second, a sound normative judgment requires a confrontation with judicial precedent. After the adjudication lag ends, precedent might rightly alter the shape of originalism's curve.⁶⁶ To the extent adjudication lags are unpredictable, settling on a preferable trajectory for originalism in the abstract becomes that much more challenging.

B. *Supreme Court Practice*

How have courts actually used originalism over time? This question can be answered only with a panoramic content analysis of judicial opinions, which has not been done. If it were done, it would reveal arguments made for public consumption and not necessarily true motivating forces. And even if opinions do reveal reasons, interpretive method can be opaque. Adverting to history could be a search for wisdom or universal truths, while relying on case law could be functionally originalist if the precedent is grounded in originalism. Hence the value of an exhaustive inquiry

argument at the Supreme Court for certain parts of the document. Such a trend can be the result of, for example, newly appointed justices. Here I treat such influences as contributing to a positive account of originalism's strength, rather than a justification for those trajectories.

⁶⁵ See *infra* Part III.D.4 (discussing randomization).

⁶⁶ Use of precedent-based arguments to defuse originalist inquiries is commonplace. See, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577–81 (2001) (arguing that precedent is itself often accepted as legitimate law). But note that the strength of originalist-like *methods* might *increase* based on judicial precedent. This would happen if (1) the precedent should be taken seriously for a non-originalist reason and (2) the precedent directs subsequent judges to undertake historical inquiry. Just as originalist interpretation theoretically can direct judges to make contemporary moral judgments, non-originalist sources theoretically can direct judges to make historical inquiries. Yet these are distinct analytical routes. For one thing, originalism and non-originalism offer different ways for revising initial impressions. A strong originalist should want better historical argument before reversing her historical judgment that moral reasoning is required by the Constitution, while a common-law constitutionalist might test his commitment to precedent-supported historical inquiry against the length of this judicial tradition and right reason.

into written opinions might exceed the cost of the effort.

A truncated review of Supreme Court cases is nonetheless useful. It provides real-world examples of the trajectories illustrated above. In addition, it can test a supposition about Court behavior: that originalism is likely to be the dominant rhetorical strategy, and perhaps the only feasible basis for decision, when opinions are rendered shortly after ratification. But it turns out that originalist arguments are not exclusive in those time periods. Nor do originalist arguments always disappear after constitutional text ages. Instead, originalism's popularity seems to have followed influences largely unrelated to the logic of time lags.

1. First encounters with text

One strategy for understanding the relationship between time and originalism is to scrutinize the end of adjudication lags. By isolating opinions in which the Supreme Court first interprets constitutional text, the availability of on-point judicial precedent is eliminated and originalism could become more attractive. This is especially true for judicial interpretation shortly after ratification. According to conventional wisdom, anyway, originalism should dominate in this context if nowhere else. The end of long adjudication lags might be informative as well. Although this class of cases also minimizes the role of precedent, here the Court must assess the relevance of non-judicial events and practices since ratification. Unfortunately, only a small number of cases fit these categories (the result of a low amendment rate). And it would be best to know the strength of originalism in other constitutional cases decided at similar times. There might be interpretive epochs more influential than the length of adjudication lags, even if it is not quite true that "the most important fact about any case is its date."⁶⁷ Given these limitations, the analysis can be relatively concise.

a. Short lags

Ten of the Supreme Court's adjudication lags have ended within 10 years of an amendment's ratification. Often an originalist element is fairly apparent.⁶⁸ Consider the Warren Court's first

⁶⁷ L.H. LaRue, *Constitutional Law and Constitutional History*, 36 *BUFF. L. REV.* 373, 373 (1987).

⁶⁸ See *United States v. Chambers*, 291 U.S. 217, 222-23, 226 (1934) (referring to what "the people" accomplished in the Twenty-First Amendment); *Newberry v. United States*,

interpretation of the Twenty-Fourth Amendment, which declares that the right to vote in federal elections “shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.” The justices of this era were known to offer historical arguments in constitutional cases,⁶⁹ but they are not known for a commitment to originalism. Yet the uncelebrated case of *Harman v. Forssenius*,⁷⁰ decided one year after the Amendment’s ratification, is heavy with originalist themes. The Court held that Virginia could not offer prospective federal voters a choice among paying back poll taxes, annually filing a certificate of residency, or not voting. Chief Justice Warren’s opinion for the Court begins with the text of the Amendment, it summarizes the forerunning congressional debates over poll taxes, and it highlights the expressed concerns of proponents to create an interpretive background.⁷¹

We cannot confidently say that *Harman* is entirely originalist. The opinion cites precedent along with the Amendment’s text for the proposition that Virginia’s certificate alternative was an invalid penalty on a right.⁷² And it relies on case law to reject, as insufficiently urgent, the Commonwealth’s argument from administrative necessity.⁷³ Now, even these passages might be consistent with a form of originalism; one could say that the referenced case law indicated a well-understood background against which the Constitution was amended in 1964. But the opinion itself is unclear on this point. The safest conclusion is that the Warren Court was willing to use originalist themes close in time to ratification, but that originalism is probably not a complete account of either the rhetoric of *Harman* or the underlying reasons for the judgment. It is not as if the Virginia statute accorded with the Court’s general attitude toward burdens on voting imposed by Southern states.

256 U.S. 232, 250, 252–53 (1921) (relying on the drafting history of the Seventeenth Amendment); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 10–21 (1916) (using *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), as context for understanding the Sixteenth Amendment). *Slaughter-House Cases* ended the adjudication lag for two Amendments. See 83 U.S. 36, 71–72, 77–78 (1873) (ascertaining a general purpose for the Fourteenth and Fifteenth Amendments).

⁶⁹ See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁷⁰ 380 U.S. 528 (1965).

⁷¹ See *id.* at 529, 538–40; see also *id.* at 540, 543–44 (noting a pre-Amendment concern about African-American disenfranchisement and racist origins of Virginia’s prior poll tax regime).

⁷² See *id.* at 540–41.

⁷³ See *id.* at 542–43 (finding a “lack of necessity” after referencing *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (involving equal protection and voting rights), which was decided after the Twenty-Fourth Amendment was ratified, and *Oyama v. California*, 332 U.S. 633, 646–47 (1948) (involving equal protection and escheat of land turning on parental noncitizenship)).

Lack of clarity in interpretive method reaches other cases in this set. Consider the startling Prohibition Era case of *Rhode Island v. Palmer*,⁷⁴ which was decided within a year of the Eighteenth Amendment's ratification. Without explanation, the majority offered no fewer than eleven conclusions on the validity and meaning of the Amendment.⁷⁵ The conclusions were presented in numbered paragraphs, like a syllabus without the customary opinion thereafter. Some of these holdings were significant. Conclusion 11 was that Congress had authority to reach beverages containing as little as 0.5% alcohol by volume.⁷⁶ Again, the majority might have used some version of originalist interpretation to reach these results, or it might have constructed meaning in the face of vagueness, or it might have made a pragmatic or policy judgment to free the hands of politics. We cannot know with confidence.

Reticence is not the only departure from originalist argument within the ratifying generation. A bolder option is to interpret new text in conformity with the Court's normative commitments. Here the standout is *Osborn v. Nicholson*.⁷⁷

Osborn came seven years after the Thirteenth Amendment's ratification. It considered how the abolition of slavery might affect the apportionment of losses among commercial participants in the slave trade. With thick natural law themes, a majority concluded that the Amendment should not inhibit a slave seller's demand for payment from a slave buyer where their contract was formed before the Amendment. The Court called the protection of such contracts "a principle of universal jurisprudence. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils."⁷⁸ In light of this normative view, the majority shifted the interpretive burden to disfavor statutory repeal or the destruction of so-called vested rights. These outcomes would require an implication "so clear as to be equivalent to an explicit declaration. . . . There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect."⁷⁹

There is a crosscurrent here. *Osborn* incorporates an

⁷⁴ 253 U.S. 350 (1920).

⁷⁵ See *id.* at 384–88 (quoting constitutional text and offering conclusions).

⁷⁶ See *id.* at 387–88; see also *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381–82 (1798) (reporting lawyers' arguments and the bare conclusions of the Court).

⁷⁷ 80 U.S. (13 Wall.) 654 (1872).

⁷⁸ *Id.* at 662.

⁷⁹ *Id.* (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.), in asserting that a different rule would be "contrary to 'the general principles of law and reason'").

originalist thought about intentions. Yet this comes after a clear-statement rule is erected and this rule is grounded in natural law. While any such principle of “universal jurisprudence” might be another background assumption against which amendments are supposed to be drafted, *Osborn* seems more assertive than this. In fact, the majority reserved the question whether it would honor an amendment that explicitly rearranged such property rights among private parties. After mentioning “fundamental principles of the social compact,” the majority remarked: “What would be the effect of an amendment of the National Constitution reaching so far — if such a thing should occur — it is not necessary to consider, as no such question is presented in the case before us.”⁸⁰

b. Long lags

If opinions that end adjudication lags swiftly are methodologically mixed, what about longer delays between ratification and adjudication? Today the Supreme Court’s declarations on constitutional meaning are so often adorned with judicial precedent that it might take a moment to recall options other than case law and originalism. But forces beyond precedent may diminish originalism’s strength, and precedent is unavailable when adjudication lags end.

One standard alternative is deference to the considered judgment of other institutions. This decision strategy was on display no later than *McCulloch v. Maryland*.⁸¹ And the Court has not indicated that deference is due only to the originalist judgments of others. A related ground for dampening originalism is extended practice outside the courts. Tradition can be a factor in constitutional adjudication regardless of whether it informs the Court about original meaning, understanding, or intent.

To take one example, tradition was overpowering in *Ray v. Blair*. Ending the Twelfth Amendment’s 148-year adjudication lag, the majority could not have been much more anti-originalist. They indicated no interest in resetting the presidential election system to accord with any hope or understanding in 1789 of independent deliberation by electors. That life had departed from these designs was given as a reason for judicial blessing, not intervention. The majority announced that it would place heavy weight on

⁸⁰ *Id.* at 662–63

⁸¹ 17 U.S. 316, 401–02 (1819). *McCulloch* ended an adjudication lag for the Tenth Amendment, and it does intimate an originalist argument on that issue. See *id.* at 406–07 (contrasting the Amendment with text in the Articles of Confederation).

contemporary practice backed by tradition — “[t]his long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector.”⁸² Although the majority could have believed that elector independence dwindled so quickly after the founding that those responsible for the Twelfth Amendment must have ratified the change,⁸³ the argument is not clearly and not solely the basis for the judgment.

Still, the anti-originalist path does not dominate, even in cases decided many decades after ratification. The most interesting examples occur shortly before the *Lochner* era arrived in full force.⁸⁴ No long adjudication lag for an Amendment ended during the heart of the *Lochner* period, but *Osborn* confirms that natural law reasoning was alive in 1872 and further previews of substantive due process rights were issued by 1877.⁸⁵ Yet the Court drew on originalist sources when it ended two long adjudication lags in this era. These opinions speak to the First and Eighth Amendments.⁸⁶

*Wilkerson v. Utah*⁸⁷ interpreted the Eighth Amendment 87 years after ratification but nevertheless made space for originalist analysis. One issue addressed was whether a trial judge could order death by public shooting as the punishment for first-degree murder. The Court did cite contemporary military practice in affirming the penalty,⁸⁸ but it also reviewed founding era punishments that

⁸² *Ray v. Blair*, 343 U.S. 214, 229–30 (1952) (noting the contemporary laws of twenty states); see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 371 (1990) (characterizing *Ray* as a “sobering reminder of the limited capacity of law to affect human behavior”).

⁸³ See *Ray*, 343 U.S. at 228 & n.16 (quoting congressional debate); cf. TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804*, at 171–72 (1994) (asserting that the Amendment “in effect recognized the existence of national political parties”).

⁸⁴ See *Lochner v. New York*, 198 U.S. 45 (1905).

⁸⁵ See *Munn v. Illinois*, 94 U.S. 113, 125–26, 134 (1877) (rejecting the instant attack on a rate cap, however); *TRIBE*, *supra* note 38, at 1341–52 (detailing the era).

⁸⁶ To be fair, both Amendments had received glancing attention from the Court without pressing originalist themes. See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (holding that the Petition Clause is not directly applicable to the states); *Pervear v. Massachusetts*, 72 U.S. 475, 479–80 (1866) (holding that the Eighth Amendment does not apply to the states, but then concluding, in the alternative, that the Amendment was not violated by imprisoning the defendant for selling liquor without a license); cf. *Ex parte Watkins*, 32 U.S. 568, 573–74 (1833) (denying jurisdiction over a sentence and stating, in the alternative, that an excessive fine could not be shown on the record). These earlier cases are used in my calculation of the adjudication lag because they provide information on a majority’s view of constitutional text. But these cases offer little or no insight into the Court’s preferred method of constitutional interpretation or argument.

⁸⁷ 99 U.S. 130 (1878).

⁸⁸ See *id.* at 134–35.

supposedly had been repudiated by the Amendment.⁸⁹ *Reynolds v. United States*⁹⁰ is comparable. It interpreted the Free Exercise Clause in the same year, at the same temporal distance from ratification, and with significant reliance on originalist history.⁹¹ The opinion also asserts polygamy's threat to social order and democracy, and it objects to exemptions from criminal statutes for religiously motivated conduct,⁹² but the Court did strive to link its views to 1791.

The end of adjudication lags educates us about what is possible, or at least what was possible, for constitutional argument in the courts. Without precedent to rely on and close in time to ratification, the Court often pushed originalist themes. But not exclusively and not always. Decades after ratification, the picture is not radically different. Several opinions depart from originalist themes and invoke alternative considerations, sometimes pointing to events intervening between ratification and judicial interpretation. But not always and not exclusively.

2. Extended interpretive trajectories

With such variability, it should not be surprising to find long-term interpretive trajectories matching a number of curves for originalism's strength in decision-making.

The compromise trajectory sketched above, with originalism's strength declining over time, tracks the path of several doctrinal fields. The leading candidates for this trajectory are areas of constitutional argument now immersed in case law. Contemporary analysis of cruel and unusual punishment, along with the boundaries of religion and its free exercise, have become largely the domain of common-law reasoning,⁹³ regardless of earlier originalist themes and occasional backtracking.⁹⁴ It might be that today's results could be reached with overtly originalist inquiry, but they tend not to be. And the path back to originalist arguments in the precedent is a long one.

Other trajectories are present. It is possible to view Speech

⁸⁹ See *id.* at 134–37.

⁹⁰ 98 U.S. 145 (1878).

⁹¹ See *id.* at 162–65 (focusing on ratification era history, including state law).

⁹² See *id.* at 165–66 (citing an academic's opinion).

⁹³ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (judging excessive punishment by “standards . . . that currently prevail”); *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (resolving textual ambiguity with a rendition of precedent).

⁹⁴ See *Locke v. Davey*, 540 U.S. 712, 722–25 & n.6 (2004) (relying on a “historic and substantial state interest” in not funding devotional theology degrees).

Clause doctrine as bumping along on a relatively skeptical curve, with the occasional spike toward originalism. When Speech Clause complaints received attention at the Court as a result of World War I related prosecutions, ratification era history did not seem important to the justices.⁹⁵ The same is usually true today.⁹⁶ There are, of course, important exceptions.⁹⁷ But no one familiar with the doctrine would characterize its originalism as more than episodic.

It is also possible to understand Seventh Amendment arguments as somewhat consistently tied to history. The Court's analytical framework for triggering a jury trial right in federal court typically includes a significant originalist element.⁹⁸ Certainly the Court has dealt with new circumstances creatively, and its analogical reasoning may treat the old division between law and equity as quite loose guidance.⁹⁹ Still, the originalist streak is there.

Less intuitive trajectories exist as well. Consider Fourth Amendment cases. Putting aside early and fairly uninformative treatments,¹⁰⁰ originalism appears to have a U-shaped relationship to the doctrine. A crucial opinion early in the Court's doctrinal development is *Boyd v. United States*,¹⁰¹ and it was laced with originalist history. The Court indicated that its aim was to know "the minds of those who framed the [F]ourth [A]mendment."¹⁰² By the 1960s, however, the theme shifted. An exclusionary rule for the states was adopted with reference to "reason and truth" rather than ratification history,¹⁰³ pragmatic interest balancing was injected into the doctrine often to serve law enforcement interests,¹⁰⁴ and

⁹⁵ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919).

⁹⁶ See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down Internet regulation); *Cent. Hudson Gas v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (striking down advertising regulation).

⁹⁷ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995) (relying in part on history and tradition of anonymous political advocacy); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (citing Blackstone's *Commentaries*).

⁹⁸ See *Curtis v. Loether*, 415 U.S. 189, 193 (1974); *Dimick v. Schiedt*, 293 U.S. 474, 476, 487 (1935); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830) (asserting what must have been "present to the minds of the framers of the amendment" when they preserved the right).

⁹⁹ See, e.g., *Curtis*, 415 U.S. at 193 (permitting analogy to modern statutory claims from common-law forms of action and their remedies); *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (referring to "practical abilities and limitations of juries" as a third prong of the inquiry).

¹⁰⁰ See *Den ex dem Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 285-86 (1856) (holding the Warrant Clause inapplicable to a creditors' civil action); *Livingston's Lessee v. Moore*, 32 U.S. 469, 478-79, 482, 539, 551-52 (1833) (denying the claimant's Bill of Rights arguments as inapplicable to states, though without citing the Fourth Amendment).

¹⁰¹ 116 U.S. 616 (1886).

¹⁰² *Id.* at 626-27, 630.

¹⁰³ *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

¹⁰⁴ See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-67 (1976) (upholding a

the Court was open to updating Fourth Amendment concepts when applied to new technologies.¹⁰⁵ Yet lately this kind of innovation seems stalled. In some recent opinions, historical arguments have been featured. Although the majority did not fully follow its suggestion, *Wyoming v. Houghton*¹⁰⁶ indicates that originalist history deserves lexical priority in judging the reasonableness of searches.¹⁰⁷

Finally, consider substantive due process doctrine. Originalism might bear an upside down U-shaped relationship to a strand of it. Admittedly this picture of the doctrinal development requires imagination. But the curve starts to appear by concentrating on three case groupings. The first is Chief Justice Taney's nonhistorical reference to slaveowner property rights in *Dred Scott*,¹⁰⁸ coupled with the "fair" and "reasonable" test of *Lochner v. New York*.¹⁰⁹ Second is the essential common-law privileges depicted in *Meyer v. Nebraska*,¹¹⁰ plus the references to "deeply rooted" national history in *Bowers v. Hardwick*.¹¹¹ The third and final point on the curve is the evolutionary understanding of liberty as a judicially enforceable concept in *Lawrence v. Texas*.¹¹² It is not clear that any routine normative logic prescribes this trend.

My objective is not comprehensiveness. Nor is it to elevate past judicial practice into a test of sound decision-making. My aim is to confirm a variety of approaches across time. It is extremely unlikely that this variety can be eliminated by additional investigation, or justified by one normative theory.

Instead, we can begin to account for the various trajectories by pointing out multiple forces that operate to produce judicial opinions. If nothing else, the mix of methods is likely to change with the Court's personnel. Perhaps this is more probable today, when

border patrol checkpoint); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (permitting stop and frisk).

¹⁰⁵ See *Katz v. United States*, 389 U.S. 347, 351-52 (1967) (relying on precedent as well as "the vital role that the public telephone has come to play in private communication").

¹⁰⁶ 526 U.S. 295 (1999).

¹⁰⁷ See *id.* at 299-300, 303 (turning to balancing after the majority's review of judicial precedent on originalist history suggested no violation); see also *Atwater v. Lago Vista*, 532 U.S. 318, 327-45 (2001) (presenting a history of arrest and judging it inconclusive).

¹⁰⁸ 60 U.S. (19 How.) 393, 450 (1857) (Taney, C.J.).

¹⁰⁹ 198 U.S. 45, 56 (1905). In one sentence, *Lochner* asserts "the Fourteenth Amendment was not designed to interfere" with reasonable conditions on property and liberty. *Id.* at 53.

¹¹⁰ 262 U.S. 390, 399 (1923).

¹¹¹ 478 U.S. 186, 192 (1986) (internal quotation marks omitted). *Bowers* did rely on much more. See *id.* at 190-95 (characterizing case law, recent history, and the judiciary's proper role).

¹¹² 539 U.S. 558, 564-72 (2003) (relying on case law and principle and complexifying history). Even *Lawrence* waded at originalism, however. See *id.* at 579 (asserting that drafters and ratifiers of the Due Process Clauses "knew times can blind us to certain truths").

commitments to precedent or originalism are considered qualifications for judicial appointments. Along these lines, the demands of interest groups, political elites, or the public in general might shift and influence Court judgments and Court opinions. Decision-making methods might be adjusted to become more plausible to salient audiences. And the Court's power relative to other institutions will vary over time, which could likewise influence its freedom to select its decision-making methods.

There is no reason to expect that judicial decision-making trends will match an abstract normative vision of progress. Too many forces are at work. It might be that there is no rational "trajectory" here at all. But there is still reason to formulate a vision. The history of constitutional adjudication in the judiciary shows that much is possible, given the right conditions.

III. ORIGINALISM'S VERSIONS AND VULNERABILITIES

We are now in a better position to evaluate the appropriate relationship between originalism and time. More specifically, should originalism's strength decline when the distance from ratification is long? My response comes in three steps. First, I briefly specify a popular version of originalism. In academic circles, the general notion of original public meaning is surging. Second, I summarize key criticisms of originalism, and I stress the importance of time lags to these critiques. I also question the critic's typical concession that originalism is proper shortly after ratification. Originalism is sometimes weaker than that. Third, in the next Part, I push back in the other direction. Justifications for originalism are organized and evaluated according to their promise in besting time-oriented objections. Justifications with longevity are thus prioritized.

A. *Originalism's Alternatives*

Rational decisions are a function of information and judgment within a given setting. Actors in institutions have particular objectives and capacities, and they select data that seem relevant to serving those goals within those competencies.¹¹³ One

¹¹³ See, e.g., KOMESAR, *supra* note 3, at 4–5 (stressing intelligent institutional choice as necessary for translating social goals into policy choices); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing that debates about legal interpretation must account for institutional capacities and dynamic

informational input is law. Legal interpretation may then be thought of as a process by which information is derived from sources recognized as law for the purpose of decision-making. Scholarship regarding which activities count as “interpretation” is divided,¹¹⁴ but, however one specifies the concept, interpretation involves meaning and it is done for various reasons.

My concern is interpretation of a legal text for the purpose of decision-making, including in a court with authority to issue judgments. Here the relevance of any interpretive method is not in its ability to specify meaning in the abstract, but rather in its capacity to influence actual decisions that affect social life. From this vantage, originalism is worth studying insofar as it indicates normative prescriptions for decision-making.

But “originalism” is a label covering several distinguishable methods, and each version might be justified in different ways. Indeed, the prevailing version and its justifications have adapted over time.¹¹⁵ In general, originalism turns contemporary actors toward sources of information that were generated in the past so as to preserve, rather than revisit, a previous decision. Those who engage in originalism are supposed to understand the meaning of a previous decision and to remain faithful to that decision without making their own judgment about its propriety. It will not always be clear how best to preserve the meaning of a decision in a new setting. And even after understanding something about “preserving meaning” across time, the idea might be operationalized through any number of protocols.

We can begin by considering originalism as a method of assigning meaning to a legal text. Originalism need not be cabined

effects); see generally Samaha, *supra* note 9, at 633–34, 675–77 (discussing law as information).

¹¹⁴ See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 58–64 (1994) (emphasizing the interpreter’s perspective in generating textual meaning); Stanley Fish, *Intention Is All there Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1112, 1114 (2008) (asserting that finding authorial intent “is” interpretation, but that the concept lacks guidance for how to ascertain intent); Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 268–70 (Jules Coleman & Scott Shapiro eds., 2002) (including text, original meaning, underlying rationale or basic values, application to particular cases, and stare decisis in a description of legal interpretation).

¹¹⁵ See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 603–13 (2004); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003). Other recent intellectual histories include DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 20–154 (2005), and JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 101–216 (2005). A relatively unsympathetic review is Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

in this way; it might roam more freely into history. Still, self-described originalists commonly present their approach as a (or the) way to understand written law for the purpose of decision-making, and some advocates of originalist methods may prefer to identify themselves as “textualists.”¹¹⁶ The analysis below generally applies either way, but it will focus on originalism as an option for providing information about the written Constitution’s meaning. This leaves several choices. Considering the debates of self-described originalists and their critics, additional dimensions emerge. Contested elements of originalism’s optimal design have included: (1) the specific informational objective for the method, such as drafters’ intent or ratifiers’ understanding or a more general public meaning; (2) the sources and reasoning acceptable for reaching that objective, such as nonpublic drafting history, dictionaries, legal treatises, and post-ratification practice; (3) the level of generality at which historical lessons are drawn — or whether to prefer concepts over conceptualizations, or general principles over expected applications; (4) the degree of confidence with which historical judgments must be made and the resources appropriately devoted to obtaining these answers; (5) the relative strength of originalist inquiry in a decision process compared to other factors; and (6) decision rules for situations in which the method “runs out” and ends in uncertainty.¹¹⁷ This information must then be brought to bear on a contemporary dispute. A decision-maker might understand a text’s meaning for one era without having confidence about its application to a particular dispute in a subsequent era.¹¹⁸ And because there are still shifting

¹¹⁶ See ANTONIN SCALIA, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22–23, 37–38 (Amy Gutmann ed., 1997).

¹¹⁷ This rendition of choices was informed by RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–113 (2004); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139–160 (1990); RONALD DWORIN, JUSTICE IN ROBES 118–23 (2006); DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 525–52 (2d ed. 2005); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3–22 (1997); TRIBE, *supra* note 38, at 47–70; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 34–37 (1999); Stephen M. Griffin, 2008 *Rebooting Originalism* 1185; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); William Michael Treanor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007); Mitchell N. Berman, *Originalism Is Bunk* (Dec. 30, 2007) (unpublished manuscript) available at <http://ssrn.com/abstract=1078933>; Lawrence B. Solum, *Semantic Originalism*, (U. Ill. Coll. Law Pub. Law & Legal Research, Working Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>. For an argument that “originalism” has evolved and multiplied in its versions, see Thomas B. Colby & Peter J. Smith, *Living Originalism* (Geo. Wash. U. Law Sch. Legal Studies Research Paper No. 393, 2008), available at <http://ssrn.com/abstract=1090282>.

¹¹⁸ See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47

disagreements over the optimal form, one cannot specify a universal and fixed version of originalism.

To evaluate arguments within the intellectual mainstream, I will focus on “original public meaning originalism.” One formulation of its informational goal is “the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”¹¹⁹ This goal can be related to ordinary sentence meaning in accord with conventional usage at ratification, rather than anyone’s subjective intentions. However, more direction is required to make the general inquiry useful to decision-makers. A variety of sources and arguments might still be accepted as relevant beyond, say, old dictionaries and legal treatises.¹²⁰ It does seem clear, however, that the level of generality for this inquiry is not predetermined. Contemporary proponents of original public meaning in constitutional interpretation indicate that such questions are themselves historical, or involve normative commitments external to originalism properly understood.¹²¹ Whether a clause incorporates general concepts or more particular conceptions would then depend on what a reasonable observer would have concluded at the time of adoption.

The notion of original public meaning’s strength is worth

STAN. L. REV. 395, 401–02, 442–43 (1995); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 588–90, 593–98 (2003) (exploring how new circumstances might reveal indeterminacy in the text’s original public meaning).

¹¹⁹ BARNETT, *supra* note 117, at 92. For other formulations in the same family, with differing degrees of connection to a public understanding that actually existed at some point in time, see Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000); Kesavan & Paulsen, *supra* note 115, at 1132, 1143–45 & n.113 (looking to a “hypothetical, objective, reasonably well-informed reader”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002) (looking to “a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world”); Scalia, *supra* note 116, at 17 (looking for “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*”); *see also* BORK, *supra* note 117, at 144 (“[W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. . . . The search is not for a subjective intention.”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (looking for the understanding of “the ratifying public”); *cf.* WHITTINGTON, *supra* note 117, at 34–37, 194–96 (looking for evidence of ratifiers’ intent); Solum, *supra* note 117, at 3–6 (looking for the conventional semantic meaning of clauses).

¹²⁰ Compare, *e.g.*, BARNETT, *supra* note 117, at 92–93 (demoting nonpublic drafting history), with Kesavan & Paulsen, *supra* note 115, at 1118–20 (contending such history can be evidence of how “the hypothetical Ratifier” understood the text).

¹²¹ See BARNETT, *supra* note 117, at 119–20; BORK, *supra* note 117, at 149; *see also* WHITTINGTON, *supra* note 117, at 186–87 (arguing from speaker intentions rather than correct semantic meaning). A contrary view seems to be Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293–95 (2007) (relying on constitutional text plus high-level principle and disregarding original expected applications, but not clearly or solely on historical grounds).

pausing over. As emphasized above, we ought to investigate how originalism influences decisions of consequence, and that mission calls for a comparison between the directions indicated by originalist inquiry and any other effects on decision-making. Advocates have indicated that original public meaning originalism is the proper method of interpreting constitutional text and that it should strongly influence judicial decisions in constitutional cases, perhaps to the exclusion of other resources such as precedent.¹²² Regardless whether one defines “interpretation” and “meaning” differently from these proponents, the central issue for us is how influential their prescription ought to be within concrete decision situations.

It is true that some originalists emphasize the limits of their interpretive method. They do not believe it can exhaust the text’s meaning. Vagueness or other uncertainty will persist, which might be resolved through “constitutional construction” inside or outside the judiciary.¹²³ The more vagueness one sees, the less pressure originalist interpretation can exert on decision-making. It is even possible that many of today’s actual debates over constitutional meaning cannot be resolved with originalist interpretation, strictly speaking. The meaning of the written Constitution might be mostly supplied through construction and, depending on the decision rules for that domain, the document could be “living” within that abundant space. Freedom to construct should not be oversold, however. Whenever determinate meaning is yielded by originalist interpretation, a proponent might believe that judges and others should abide by it always or at least in the absence of extraordinary circumstances. In any event, attention is owed to versions of originalism designed to significantly influence decisions.¹²⁴

¹²² See, e.g., BORK, *supra* note 117, at 5; Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) (stating precedent should fall when inconsistent with a determinate original public meaning); Kesavan & Paulsen, *supra* note 115, at 1142–45.

¹²³ See, e.g., WHITTINGTON, *supra* note 117, at 7 (stating that “constitutional construction is essentially political”); Solum, *supra* note 117, at 68; see also Nelson, *supra* note 118, at 597–98 (observing that originalists can accept a role for nonjudicial actors in liquidating indeterminacy, though that domain may not be well-defined); Michael Stokes Paulsen, *The Intrinsic Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 296 n.18 (2005) (contending that indeterminacy after originalist interpretation should yield democratic discretion); cf. BARNETT, *supra* note 117, at 118–23 (characterizing constitutional construction as principled gap filling to resolve cases after originalist interpretation runs out). Much of the analysis below regards the prescription that courts ascertain and enforce original public meaning through “interpretation,” without speaking to “construction.” In a final section, I explore a use for history that would not plainly qualify as “interpretation” as these scholars use the term. See *infra* Part IV.D.2 (discussing randomization).

¹²⁴ For now, we might bracket the necessary degree of confidence and deserved resources. It seems likely that originalism’s proponents are willing to accept substantial

Skeptics will have already retrieved a mental list of common objections to originalism, including doubts as to whether originalist questions are constraining or even intelligible. A standard reaction is to wonder whether it is meaningful to ask, "What would a reasonable person who lived here in 1789 (or later) have thought about the validity of x if x had occurred then instead of in 2008, or if he were alive in 2008 when x actually occurred?" These deep objections might be persuasive in certain respects, but they can be deferred. For now, recall that many critics of originalism can accept its use when the interpretation lag is short, that a measure of originalism is a feature of public judicial reasoning, and that a substantial audience is willing to at least consider originalist methods. Given the persistence of originalism as an option, skeptics and enthusiasts might pause to ask how, if at all, originalism's influence should vary over time.

B. *Time-Oriented Criticism*

Suppose that a judge must interpret words that were ratified in accord with Article V and that are now considered supreme law. In one possible universe, the word string W was ratified a century ago. In an alternative universe, W was ratified last year. The question is whether a judge ought to approach the interpretation and use of W_{old} differently from W_{new} in rendering her decision.

To move forward, there must be an account of this decision-maker's goals. These accounts are contested even as a matter of accurate description, and certainly there is no universally agreed-upon rendering of good judicial behavior. The continuing debate over interpretive method suggests this much. Instead, the analysis will begin with a series of hopefully plausible elements of appropriate judicial conduct, and then add a concession to simplicity. Much of the discussion will apply on different assumptions, so the reader need not suspend disagreement with these choices. But a general, initial picture of judicial objectives will be constructive.

Assume, then, that our judge is public spirited and committed to improving social well-being in a lawful way. She is acting with the best intentions, she wants to follow her oath to faithfully perform her duties under the Constitution, and she is of at least average competence. Furthermore, this judge understands the

decision costs to achieve relatively high degrees of certainty about public meaning and its limits, but it could be that only some decision-makers should engage in the most extensive historical inquiry. Trial courts, for example, might not be well suited to the task.

practical limits of acting within her institution, her personal abilities and the normative questions surrounding any assumption of power. She is self-aware, practical and honestly searching for the best interpretive method.¹²⁵

To simplify the analysis, however, it will help to bracket intra-judicial strategy for the time being.¹²⁶ Assume that the judge need not convince fellow judges that her understanding of *W* is correct, now or as a matter of coordinating judicial decisions in the future. Nor does she have reason to act strategically in light of other judges' preferences. There is one Supreme Court, she is it, and she is not concerned with her reputation in the lower courts.

1. Objections summarized

A heartfelt critic of originalism might advise that, whatever the judge does, she should not look backward to historical sources associated with the text. And she should avoid these resources whether the target for interpretation is *W*_{-old} or *W*_{-new}. True, recent history will likely influence the judge's reading. She will not be able to ignore the linguistic conventions of her time when she first scrutinizes the text. But the true critic would maintain that no special effort should be made toward re-creating a historical context, however recent, that does not now exist. Other considerations would fill the gap, and the options are numerous: contemporary moral judgment about the text's best meaning for now, respect for existing practices in the absence of a strong justification for disruption, deference to the judgment of other constitutional decision makers, and so on. Doubts about such time-insensitivity were raised above, but it is useful to rehearse the arguments that might underwrite such firm opposition to the use of originalism in decision-making.

One complaint is not exactly a criticism. It has been argued that sound historical inquiry reveals that past generations did not accept certain originalist techniques, and therefore a genuine originalist would have to follow that lead.¹²⁷ This is a possible

¹²⁵ Cf. James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 9 (1983) ("In a nutshell, judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.").

¹²⁶ On the issue of interpretive coordination across judges, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 121–24 & n.3 (2006) (applying the fallacy of division).

¹²⁷ The classic argument is H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889, 894–902 (1985) (finding a form of common-law reasoning

consequence of originalist investigation, not a reason to avoid the investigation. Nor is there an apparent reason within the logic of originalism to short-circuit this effort by assuming that the results of these historical inquiries will be always determinate or always identically liberating. This is especially true in light of the Article V option for supreme lawmaking and the role for states therein.¹²⁸ It seems to require more convincing proof than is presently available to settle the questions whether, for example, the original public meaning of the Commerce Clause or the Coin Money Clause was as “evolutionary” or “static” as the Speech Clause or the Equal Protection Clause. Insofar as the history is ambiguous, one might decide to fill the gap with an assumption of interpretive flexibility over time. But this assumption would not be based on the history; it would move along a path leading us out of originalism and toward a range of objections to its unrestrained use.

At least one methodological attack on originalism is constant across time. Some believe that strong originalism is — often or always, conceptually or practically — impossible to perform. Perhaps there just is no answer to the questions suggested by original public meaning and other forms of originalism. The classic exposition is Paul Brest’s.¹²⁹ Part of his objection to originalism rested on the difficulty of attributing any intent to multimember lawmaking bodies,¹³⁰ but his concerns ran further and he equally questioned the usefulness of strong textualism as applied to new circumstances. His description of textualism resembles original public meaning originalism.¹³¹ Regardless, Brest’s point about indeterminacy can be applied to versions of originalism that disavow subjective intent. There need not be widespread or even majority agreement on a given question of public meaning, at any point in time.¹³² One might press this concern to the edge: Perhaps

with regard to texts). A response is Nelson, *supra*, note 118, at 523–39 (finding some anticipation of invariant meaning and settlement by practice). Powell targeted original intent originalism, not what later became known as original public meaning originalism.

¹²⁸ See THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961) (remarking on Article V as the preferred mode for introducing “useful alterations . . . suggested by experience”); see also THE FEDERALIST NO. 39, at 246 (James Madison) (pointing out state influence in the amendment process). This returns to the issue of how, if at all, to distinguish “amendment” from “interpretation.” See Levinson, *supra* note 27, at 25–36; see also RONALD DWORKIN, LAW’S EMPIRE 67 (1986) (distinguishing “fit” from “the invention of something new”).

¹²⁹ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

¹³⁰ See *id.* at 213–17.

¹³¹ See *id.* at 205–09 (discussing a text’s plain meaning to an ordinary English speaker, and suggesting difficulty in understanding the linguistic and social context of dated legal texts).

¹³² See Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of*

an accepted public meaning for any law is a phantom, a mischaracterization of irreducibly contested understandings for all legal texts. In the case of original public meaning, the observers who are the target for the inquiry are mental constructs.¹³³ At most, according to this attack, there are rhetorical or political reasons for acting as if originalism's questions have answers.¹³⁴ This objection applies with equal force to $W_{\text{-old}}$ and $W_{\text{-new}}$.

But for most, the radically skeptical position claims too much territory. History might even be indispensable to interpretation under certain conditions. Ancient text can lose all conventional meaning with time, at which point it becomes difficult to see how interpretation takes place absent historical investigation. May anything sensible be done with the reference to "Letters of Marque and Reprisal" in Article I, Section 8, without history?¹³⁵ There also are concerns with maximum skepticism for recently enacted text. Here the concept of public meaning could at least preclude certain understandings. Disagreement over meaning does not foreclose operative conventions about the boundary of meaning, even if that boundary is arbitrary in a moral sense.¹³⁶ To accept radical skepticism about originalist investigation, it seems, one must also believe it impossible to understand the words of others when delivered face-to-face in the here-and-now. This has a self-refuting quality.

With a belief that originalism is sometimes guiding, objections to it become heavily dependent on time. Consider a milder infeasibility argument: that substantial time lags make recovery of old concepts both difficult and a creative enterprise.¹³⁷ This could

Originalism, 108 COLUM. L. REV. 529, 534–35 (2008) (arguing on this basis that originalism, including original public meaning originalism, is "quite often" impossible).

¹³³ See, e.g., Lawson, *supra* note 119, at 398 (using an objective, intelligent, and fully-informed public audience as the touchstone for originalism); Kesavan & Paulsen, *supra* note 115, at 1143–45 & n.113 (largely following Lawson).

¹³⁴ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2366–67 (2002) (suggesting that originalism survives for "symbolic and strategic" reasons, not because it constrains).

¹³⁵ Apparently the last such letter issued in or near 1812. See FRITZ GROB, *THE RELATIVITY OF WAR AND PEACE: A STUDY IN LAW, HISTORY, AND POLITICS* 237–39 (1949) (calling the Clause "perfectly obsolete"). Grob distinguishes between letters of marque (commissions for privateers) and letters of marque *and* reprisal (at one time referring to authorized self-help for individual injury suffered abroad, but later referring to armed trading vessels). He reports that the United States commissioned privateers, but never armed trading vessels. See *id.* at 239.

¹³⁶ See Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 734 (2005); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) (discussing semiotic content that is socially attached to action in a given context).

¹³⁷ See CASS R. SUNSTEIN, *RADICALS IN ROBES* 68–71 (2005) (critiquing the coherence, based on time lags, of a "fundamentalist" originalism); Mark V. Tushnet, *Following the Rules Laid*

be acutely true for generalist judges, whose competence with historical sources may be in doubt.¹³⁸ Even if these dated meanings could be accurately excavated, there is the question how an understanding of a different historical episode should be applied to the situation in t_0 .¹³⁹ Given temporal distance, the answers might be more challenging to provide with confidence, at a reasonable level of effort, and without lapsing into indeterminacy. This is a worry about originalism mostly limited to W_{old} .

Impracticality does not exhaust time-oriented objections. If originalism turns out to be accurate, cheap and determinate, a package of normative arguments nonetheless might recommend alternatives. First, a judge opposing the outcomes of ordinary politics with original meaning could be intolerably undemocratic. Depending on the operative theory of democracy, a just decision-maker easily could privilege the will of the living (however defined) over the will of the dead (however defined).¹⁴⁰ The positive law of past generations is not necessarily representative of our characteristics and judgment, particularly insofar as their government was designed to include many fewer voices through suffrage. The settlements they reached reflected a different populace and a different politics. This presentism need not conflict with a commitment to treating the document as valid law, either. An intermediate position is that each generation should have liberty to establish textual meaning according to contemporary understandings or needs.¹⁴¹ And each generation unavoidably chooses whether to respect this text as law; it has no practical force otherwise.¹⁴²

Second, critics test originalism for results on other fronts.¹⁴³

Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 802 (1983) (suggesting that we can understand another era “[w]ith a great deal of imaginative effort” but that “the understanding we achieve is not the unique, correct image of the framers’ world”).

¹³⁸ See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1250–51 (1986).

¹³⁹ See Lessig, *supra* note 118, at 401–02, 442–43 (discussing meaning translation for the purpose of preservation).

¹⁴⁰ See THOMAS PAINE, *THE RIGHTS OF MAN* 12 (E.P. Dutton & Co., 1951) (1791) (“[A]s Government is for the living, and not for the dead, it is the living only that has any right in it.”).

¹⁴¹ See William J. Brennan, Jr., *Education and the Bill of Rights*, 113 U. PA. L. REV. 219, 224 (1964).

¹⁴² See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1053 (1990) (observing that law and culture fade without current effort).

¹⁴³ See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 118 (2005) (arguing that “literalists” themselves ultimately rely on consequences); Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2239 (2006) (arguing that originalism must be justified by its consequences).

Originalism might deliver undesirable consequences, depending on one's value set, and these adverse effects should grow more likely and more severe over time. Originalism has been promoted as a stabilizing force, and surely it is for a subset of cases. But in other instances, the method is a tool for disrupting the status quo. At least on occasion, strong originalism threatens new moral values and judgments, existing practices and political bargains, common decision methods and precedent within the courts. However inevitable or desirable originalism might be for $W_{\text{-new}}$, the argument concludes, it is overly difficult or unwise for $W_{\text{-old}}$.

Little effort is required to locate a reliance on time lags in nearly all of these objections. Whether the argument is impracticality, disruption, democratic threats or other undesirable consequences, the objections tend to be fueled by the passage of time. This has two implications. The first involves the proper emphasis of originalist argument. Those sympathetic to originalism should prize normative justifications that can overcome the reality of time lags in supreme law. This ties to a second implication. Originalism's critics might concede that strong originalism is appropriate shortly after ratification.¹⁴⁴ This concession is limited; because the Article V amendment rate has been low, today's interpretation lags are typically long, and the courts lag behind others in their efforts to understand the document. It is, nevertheless, a meaningful thought that follows from a timing orientation.

2. Originalism in ratification's wake

But in fact the objections to originalist decision-making can be advanced further, to reach $W_{\text{-new}}$ in some circumstances.

First of all, there little reason to believe that originalism is inevitable here. Other approaches to reading text are available in all time periods. The argument is perhaps cleanest for judicial interpretation. While judges are hardly detached from the mores of the political community in which they operate, neither are they a representative sample of that community. There is no guarantee that a judge's view of the best moral reading of $W_{\text{-new}}$, for example, will be screened out from the interpretive process. Nor will any such influence necessarily track a text's public meaning as defined by the hypothetical objective observer. Perhaps judges ought to vigilantly guard against the impact of their ideological

¹⁴⁴ See *supra* note 10 (collecting sources).

commitments when adjudicating constitutional disputes; and perhaps originalism is especially easy to perform close in time to ratification.¹⁴⁵ But this would demonstrate only that original public meaning is less costly to execute at the point of ratification. It would not eliminate alternatives.

Our review of cases ending short adjudication lags is a reminder of originalism's contingency. Perhaps none can be confirmed as wholly originalist, while some have significant non- or anti-originalist themes. Recall the slave sale case of *Osborn v. Nicholson*, which applied a natural law-inspired clear statement rule to a recent constitutional amendment.¹⁴⁶ No resistance from forces responsible for the Thirteenth Amendment seems to have disrupted the Court's preferences in this situation. Of course there is an arguably special attribute to *Osborn*: The case rested closer to the margins of the nation's struggle over slavery than to its center. The Court was helping distribute losses across commercial participants in the slave market and perhaps influencing incentives to plan for the possibility of legal transitions. One probably should expect that judicial departure from any result suggested by originalism close to ratification is most likely to occur when the issue is of secondary importance to the text's enthusiasts. In other situations, judges will more often feel practically or morally constrained.

If judicial departures from originalism for $W_{\text{-new}}$ are possible, perhaps they are defensible. This depends on the applicable normative framework for the institution in action, but perhaps there are persuasive visions for constitutional decision-makers that allow for anti-originalist outcomes in ratification's wake.

Consider the possibility that the Supreme Court is the best place to vet moral principle over some sort of less enlightened policy struggle,¹⁴⁷ and that a formal amendment may come about because of the latter. On this view, the Court can be a valuable counterweight to Article V politics, which cannot be counted on to safeguard these favored principles or engage in this form of reasoning in every instance. Again, the objective public meaning of an amendment need not coincide with a judge's morally best rendering of that text, and some might prefer the latter regardless

¹⁴⁵ After all, a judge's understanding of new text is something like a data point on which public meaning can be established. Cf. Brest, *supra* note 10, at 208 (indicating that, near the time of adoption, an interpreter "unconsciously places the provision in its linguistic and social contexts").

¹⁴⁶ See *supra* text accompanying notes 77–80.

¹⁴⁷ Cf. RONALD DWORKIN, FREEDOM'S LAW 34–35 (1996) (recognizing that the institutional questions reduce to practical considerations and results); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 518 (1981) (defending a principle-oriented role for the Court, for at least some issues).

of the timeframe.

A less philosophical twist on this position involves political pacts. Constitutions and institutions may be seen as arrangements of convenience in which elements of a political community are allocated various roles of influence in order to make social progress or avoid social disaster.¹⁴⁸ On this view and to the extent judges have the ability to influence policy outcomes, the Court might represent either elite values or a countercyclical political force.¹⁴⁹ Either way, nonoriginalist interpretation of new amendments could further these pact-oriented models for judicial behavior.

Our hypothetical judge is not obviously well-suited or sympathetic to these models. Readers might feel likewise. The models might be too controversial, too optimistic, too cynical or too often inoperable. Yet discarding them leaves another concern with unswerving originalism for W_{new} : the problem of disruption.

Unlike the models for judicial behavior just discussed, the disruption concern may arise in lockstep with post-ratification societal developments and without any independent judicial resistance to any change indicated by a constitutional amendment. It helps to remember that adjudication lags of some length are largely unavoidable. Courts will rarely be the very first institution to take a position on contested textual meaning in a system lacking pre-enactment advisory opinions. Others will be grappling with the ramifications of new text before the judiciary offers an official opinion on the matter.

Thus even an extremely short gap between ratification and judicial interpretation opens the possibility for shifts in nonjudicial arrangements and hardening forces that will interfere with any judicial preference for originalist outcomes. To be sure, short time lags make this situation less likely; not every amendment portends swift and major change at odds with plausible renderings of original public meaning. Yet time is only a proxy for serious change. An inflexible rule imposing strong judicial originalism close to ratification seems risky and unlikely. The early partisanship of presidential electors is worth referencing here. Even a courageous Court might have treated the argument for elector independence in *Ray v. Blair* in the same way, and deferred to contemporary

¹⁴⁸ See generally RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 12–18, 87–98, 139–40 (1999) (characterizing successful constitutions as self-enforcing conventions); Barry R. Weingast, *The Constitutional Dilemma of Economic Liberty*, 19 J. ECON. PERSP. 89, 90–99 (2005) (considering constitutions as compacts among competing powers).

¹⁴⁹ Cf. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001) (describing federal judges as “temporally extended representatives of particular parties”).

practice, had the issue been litigated in 1796 instead of 1952.¹⁵⁰ To the extent judges cannot resist powerful sociopolitical change, shifting away from strong originalism can be an institutional given.

In addition, there is the issue of indeterminacy in the wake of ratification. Comprehensive and sophisticated originalist inquiries will not recover decisive information in all litigated disputes touching on new constitutional text. Decades do not have to pass before unplanned developments or unconsidered applications of new clauses are driven into the court system. *Osborn* is again a useful illustration. Recall that the slave buyer argued that the Thirteenth Amendment should immunize him from a lawsuit for nonpayment.¹⁵¹ If they had considered the matter at the point of ratification in 1865, trained professionals might have accurately predicted how the Court would react to such an argument, and they might have believed that such a foreseeable reaction was effectively part of the Amendment's meaning in the first place. But greater imagination is needed to believe that any other objective observer would have reached the same conclusions at the time of ratification. Perhaps no understanding on the issue existed in 1865. In any event, there will be occasions on which new constitutional text generates questions that were not confronted or not resolved during the ratification process and that an objective observer could not confidently answer.¹⁵²

Finally, strategic opportunities surrounding the compromise trajectory are worth mentioning. If litigants know that judges will turn to strong originalism soon after ratification but not thereafter, then litigants might adjust the timing of their suits accordingly. Those whose positions are strengthened by originalist sources will prefer to litigate early, while others will prefer delay. This possibility is moderated to the extent that parties cannot control timing; we might view the federal judiciary's standing doctrine and opposition to advisory opinions as convenient limits on claimant freedom over timing.¹⁵³ Nor does a defendant in a justiciable suit have a right to delay litigation for a generation. These constraints on parties do not eliminate judicial power over timing, however. Judges have used several devices to control timing, and surely sometimes to increase the odds of their preferred outcome.¹⁵⁴ But

¹⁵⁰ See *supra* text accompanying notes 56–57, 82–83.

¹⁵¹ See *Osborn v. Nicholson*, 80 U.S. 654, 663–64 (1872) (Chase, C.J., dissenting) (agreeing that slave contracts “were and are against sound morals and natural justice” and that their positive law basis was eliminated by the Thirteenth Amendment).

¹⁵² In Part IV.D.2, *infra*, I will suggest that a less sophisticated originalism can elide part of this indeterminacy problem, albeit at the expense of some typical originalist values.

¹⁵³ See generally *TRIBE*, *supra* note 38, at 311–33 (reviewing justiciability norms).

¹⁵⁴ See *supra* notes 49–50 and accompanying text.

even if the compromise trajectory is predictable and the relevant players have good reason to prefer one time over another, the opportunity for gaming is bounded by our low formal amendment rate. Most of the document is long past the age when skeptics would concede the propriety of strong originalism.

Still, some critics probably have been too bashful. Originalism is not predestined for new constitutional text, and the issues of determinacy, disruption, and optimal judicial influence indicate that originalism should not always begin strong. This is not to assert that originalism is never an appropriate consideration in decision-making. It could be the presumptive methodology for an initial period, or even be revived at later stages. But there is no time at which strong judicial originalism is a priori inevitable or desirable.¹⁵⁵

IV. STRONG ORIGINALISM'S UNEASY DEFENSE

The above analysis builds a presumptive case against strong originalism in judicial decision-making involving supreme law. Standing alone, the foregoing suggests that judicial originalism not only should expire but is occasionally stillborn. Our final task is to marshal counterarguments. Some of them are standard points from the originalism debate, and many of them are indeed diminished with time or hindered by other weaknesses. This indicates the usefulness of exploring more innovative arguments, which I will attempt in the closing pages. But before moving to affirmative arguments for originalist decision-making, there is a question of historiography to be addressed.

A. *History Over Time*

Incompetence is a persistent charge in debates over

¹⁵⁵ Richard Primus's recent article, which suggests a downward-sloping trajectory for originalism, makes that recommendation in part because the article's scope is different from the investigation here. Primus aims to show a limited set of situations in which originalism is useful under two affirmative justifications for the method. *See* Primus, *supra* note 10, at 24 (calling these justifications "the best"). As for the relevance of time lags, he focuses on democratic authority, *see id.* 2-5 & n.7, 46, and he agrees with a group of scholars who reach the same conclusion on more limited analysis, *see supra* note 10 (collecting sources). Primus's discussion of rule-of-law values does observe that originalism can be destabilizing when practice departs from originalist meaning, *see* Primus, *supra* note 10, at 51, but time is not his theme, *see id.* at 5-7 (addressing justifications from judicial constraint without stressing time).

interpretive method. Some question our capacity to render a sound account of the relatively distant past, a doubt that can be aimed at originalists and historians more generally.

Perhaps the longer the temporal gap between an event and its investigation, the less reliable an investigator's perceptions are likely to be. This decline in quality might not be perfectly linear. But one might believe that a professional history of 1868 is more likely to be excellent if written in 1888 or 1908 instead of 2008, to the extent all other factors can be held constant. This decline might, with time, cripple the case for originalism. Insofar as originalism relies on excellence in historical inquiry to form a basis for evaluating current practices, and insofar as this excellence moves beyond anyone's reach, let alone a judge's reach, there is reason to weaken originalism as a force in decision-making.¹⁵⁶ Ought implies can, as they say.

There surely are trends that make sound professional history less likely over time. Personal recollection of events softens and then disappears as observers age and die off. They may record their impressions, of course, but these recordings cannot be interrogated as human beings. In effect, the authors of past impressions will have restricted the scope of our questions. No one today may canvass citizens about their understanding of the Privileges or Immunities Clause in 1868, any more than Julius Caesar can be asked what he said before crossing the Rubicon in 49 B.C. In one English translation of Plutarch, Caesar seems to have either announced his acceptance of risk by declaring, "Let the die be cast," or indicated fatalism by the time he reached the river, announcing, "The die is cast."¹⁵⁷ Or Caesar might have seen divine guidance in the form of an omen, and then uttered, "The die is now cast"¹⁵⁸ Or he might have deliberated rationally for a time, until finally he "closed the eyes of reason and put a veil between them and his peril," calling out, "Let the die be cast."¹⁵⁹ Or he might have uttered nothing at all. There is uncertainty about what he said, what he

¹⁵⁶ Compare Lawson, *supra* note 119, at 398 (hypothesizing "a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world" to help operationalize originalism), with Nelson, *supra* note 138, at 1250-51 ("[J]udges are not selected for office because they have special skill in reconstructing the intentions of individuals in the past . . ."). This concern is moderated by the possibility that judicial appointment standards, applicant pools and sitting judges are responsive to the interpretive demands of the office.

¹⁵⁷ 4 PLUTARCH'S LIVES 126, 291 (John Dryden & Arthur H. Clough trans., 1859). *But cf.* 5 PLUTARCH'S LIVES 272 (Bernadotte Perrin trans., 1914) [hereinafter PERRIN'S PLUTARCH]; 7 *id.* at 522 (showing Plutarch using the same Greek words in two different *Lives*).

¹⁵⁸ C. SUETONIUS TRANQUILLUS, THE LIVES OF THE TWELVE CAESARS 22 (Alexander Thomson & T. Forester trans., 1896).

¹⁵⁹ PERRIN'S PLUTARCH, *supra* note 157, at 273.

meant, and what a later observer should understand the surviving sources to prove. Similar difficulties may attend originalist inquiry into legal meaning. This seems true whether the goal is to recover actual patterns of language usage or to render the views of a hypothetical informed reader of legal texts.

Nor will every pertinent record survive forever. Documentary evidence can be destroyed and it will degrade on its own.¹⁶⁰ These eventualities are a motivation for statutes of limitations in litigation, and there is a parallel basis for becoming less confident in anyone's ability to generate accurate insights from surviving historical sources. Going forward, this concern might be allayed. Digital formats could allow a greater proportion of evidence to reach the future, and search engines should enhance the future's ability to locate what it deems relevant. But optimism about the quality of 2148's history of 2008 will not improve 2008's history of 1868.

A problem at least equally deep is recovering systems of meaning. Understanding the context and manner of communication within a centuries-old era is a major challenge.¹⁶¹ No history will be fully reliable without making this effort and without possessing the skill to research and contextualize the events of what is in essence a foreign nation. In this regard, critics of originalism and critics of judicial reliance on foreign law have something in common.

That said, a different set of factors suggests another conclusion. This is so even disregarding the virtues of second thought; surely distant reflection on past events sometimes produces a more accurate account, when the participants are no longer the interpreters. Nor must the possibility of improving historical knowledge solely depend on technological innovation. New technologies are indeed allowing today's historians to preserve surviving records more effectively than before, to digitize and search those records with more power, and to extract information from artifacts in ways that could not have been imagined a few decades ago.¹⁶² All of this is true, but the hope for improved

¹⁶⁰ See, e.g., Nancy E. Gwinn, *The Fragility of Paper: Can Our Historical Record Be Saved?*, PUB. HISTORIAN, Summer 1991, at 33, 35–47 (discussing “the brittle book problem” and the cost of various preservation options); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986) (evaluating negatively the quality of surviving sources regarding drafting and ratification).

¹⁶¹ *Accord* Brest, *supra* note 10, at 208 (asserting that a textualist or originalist “must immerse herself in their society”); see generally RAKOVE, *supra* note 117, at 20–21 (emphasizing connections between founding era constitutional decisions and broader intellectual currents).

¹⁶² See, e.g., Ray A. Williamson & Jannell Warren-Findley, *Technology Transfer, Historic Preservation, and Public Policy*, PUB. HISTORIAN, Summer 1991, at 14, 17 (noting that digitizing the L'Enfant Map of Washington, D.C., may show Thomas Jefferson's influence by revealing his pencil marginalia); Ann Longmore-Etheridge, *The Healthy Constitution of*

historical knowledge can be stiffened with other logic.

Allied with technological innovation is progress in historiography. "Progress" is meant in a realistic sense. It refers to the process of developing, vetting, discarding, resuscitating and renovating professional methodologies for historical inquiry.¹⁶³ The shifting perspective on Reconstruction among historians and the multiplication of angles on those events, for instance, is a development that many scholars would view as a stride forward.¹⁶⁴ A few history department enthusiasts might go further and hold that this process generates ever-better approaches with time. This optimism is, however, unnecessary to the argument. It might be that historical methods are merely proliferating without improving on average. But even if historians only expand the methodological options without creating undue distraction, then we have a kind of progress. Better or greater options will assist the intelligent investigator who wants information from the past, assuming that the options are not simply distractions. And a companion for this methodological progress is the growing stock of prior attempts to understand the events in question. Prior studies are the beginnings of new studies.¹⁶⁵

Finally, there is the contested issue of what counts as "good" history. Self-styled originalists are probably unsympathetic to much relativism in historical inquiry; a goal originalists tend to share is constraining the set of results that a judge can produce.¹⁶⁶ But if we put aside the goals that originalists might have and consider instead the usefulness of originalism as a method of acquiring information, then relativity, subjectivity and even postmodernism are oddly useful in responding to worries that sound historical inquiry is slipping away. A message from the postmodern perspective on professional history is that the

Document Security, SECURITY MGMT., Oct. 2003, at 26, 26 (describing high-tech encasements for the Constitution as a parchment).

¹⁶³ See generally ROBERT F. BERKHOFER, JR., *BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE* xi (1995) (suggesting value in an eclectic mix of approaches, both modern and postmodern); GEORG G. IGGERS, *HISTORIOGRAPHY IN THE TWENTIETH CENTURY: FROM SCIENTIFIC OBJECTIVITY TO THE POSTMODERN CHALLENGE* 1-19 (1997) (identifying major shifts in historiography since an institutional professionalization of history in the 1800s, and challenges to a correspondence theory of truth, intentionality and temporal sequence); Pushpa Bhawe, *History: Old and New*, in *HISTORIOGRAPHY: PAST AND PRESENT* 12, 12 (Kirit K. Shah & Meherjyoti Sangle eds., 2005) (relating history to social construction).

¹⁶⁴ A brief recounting of the trends is presented in ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at xix-xxv (Francis Parkman Prize ed., 2005), which was an important effort to synthesize modern learning on the Era.

¹⁶⁵ These observations might fit best for the single investigator. If many observers must agree on how to characterize past events, multiplying the methodological options can increase decision costs without guaranteeing offsetting benefits in improved accuracy.

¹⁶⁶ See *infra* Part IV.C.

interpreter matters as much or more than the target of interpretation.¹⁶⁷ This is a supposedly inescapable condition of human observation. It is time-invariant, holding equally true for the historian in 1908 and the historian in 2008. If historians are in this sense unavoidably presentist, there is no reason to prefer the old vision of 1868 to the new vision. If anything, the postmodern perspective would seem to default to the living's vision of events and not any past vision — which would be dependent on the living for its survival and meaning, anyway. From this perspective, the Constitution is forever young. It is a word string existing for use in present-moment decisions and its age is, in a sense, zero.

This might be pressing too hard. But one can see the lesson without approaching the extremities of postmodern thought. History is performed in different ways, for different purposes, and according to different standards of excellence across time. There is little reason to believe that our capacity to deliver what counts as good history diminishes systematically as time passes, and some reason to believe the opposite. Thinking that renderings of past events are always permeated with subjectivity does nothing to alter this conclusion. To the contrary, it seems to reinforce it. An originalist who requires objective historical investigation has more reason to worry, of course. Relativity is an enemy to that hope. And originalists require a method for applying the lessons they learn from the historical sources they select to the present-day controversies. An excellent understanding of meaning in the past will not close all real cases. Even so, the concern that time is at war with sound history seems weak enough for some form of originalism to survive.

B. *Expiring Justifications*

Our attention can now shift to affirmative justifications for strong originalism. These justifications will be explored in a way that highlights their ability or inability to withstand time lags. This organization might be awkward. Originalists often emphasize the need to control judicial inquiry, but the discussion does not begin with these arguments. There is an upside, however. The central challenge for originalism is to find a form and reason that are convincing across time. The discussion below attends to this priority.

¹⁶⁷ See IGGERS, *supra* note 163, at 9–10 (quoting HAYDEN WHITE, *The Historical Text as Literary Artifact*, in *THE TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 82 (1982)).

Two justifications for originalism do seem to expire over time. Although less prevalent in academic circles today, social contractarian arguments for originalism have been made.¹⁶⁸ The gist is that originalism of some kind is the best or only way to preserve a previous agreement that deserves respect. One might suppose that ratification under Article VII and subsequent Article V amendments represent bargains, or pacts, or contracts, or some other type of agreement to which the people of this country assented, and that the substance of these agreements is best characterized with originalist methods. Dedication to such agreements might be grounded in various normative theories, including the sense that enforcing them respects individual autonomy, even if this means that some third party will force people in the present t_0 to abide by old judgments from t_{-1} . We know that such precommitment can be beneficial when the evaluation includes all time periods instead of only the present moment, and that unconstrained freedom to choose at every time period can be dangerous. This is the story for many drug addicts and spendthrifts, anyway.¹⁶⁹

But precommitment analogies are inapt. One hitch is vagueness. Sometimes historical inquiry will not illuminate the answer to novel questions years later; sometimes the agreement is no deeper than the document.¹⁷⁰ But the problems run further. The U.S. population is 100% different today than it was in 1789 when the first version of the document was ratified. No one alive in 2008 witnessed any constitutional text-making earlier than the ratification of the Sixteenth and Seventeenth Amendments in 1913. From the individual's perspective, there is no same "self" who can be bound by legal arrangements that he or she "chose" in t_{-1} .¹⁷¹ True, today's population might decide, explicitly or implicitly, that adhering to the document is best. Public respect for the text is indeed part of our legal culture. But that decision is not satisfying a

¹⁶⁸ Cf. Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 190, 191-92 (Gaillard Hunt ed., 1910) (arguing that "the guide in expounding" the Constitution ought to be "the sense in which the Constitution was accepted and ratified by the nation"). Madison later suggested that subsequent practice of the legislature is crucial to understanding meaning. See Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 184-86 (1865).

¹⁶⁹ See JON ELSTER, ULYSSES UNBOUND 1-87 (2000) (identifying reasons for and methods of precommitment for individuals); *id.* at 88-174 (applying and critiquing the precommitment model for constitutions).

¹⁷⁰ Cf. JEREMY WALDRON, LAW AND DISAGREEMENT 266-75 (1999) (emphasizing reasonable disagreement and the downside of privileging past judgments).

¹⁷¹ See Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1757-61 (2003).

precommitment, nor would it dictate originalist interpretation of the document. The decision to treat the document as law and the decision to interpret it by some method both require argument that a precommitment model cannot provide.¹⁷² No matter how convincing the model, it becomes vulnerable to additional challenges with the passage of time.¹⁷³

Similar reactions apply to a second justification. Many have favorable impressions of those responsible for the document, especially in its first edition. Perhaps the founders were uniquely intelligent, knowledgeable and public spirited,¹⁷⁴ and hence their judgments should be trusted. In philosophical terms, they might qualify as practical authorities:¹⁷⁵ that the founders made a judgment is itself a reason for acting in accord with that judgment. Although the point is debatable, faith in those who made the text might warrant a search for additional information regarding those judgments. At a minimum, one could believe that the best way to respect their superior judgment is to follow the textual meaning on which those actors operated. If drafters and ratifiers are something like practical authorities, then the argument for our deference to them can be restated with the Condorcet Jury Theorem (CJT). It demonstrates that the majority judgment of large groups can be extraordinarily accurate — so long as the decision-makers have an average accuracy rate better than random, offer their independent judgments and answer the same question.¹⁷⁶ CJT might bolster the

¹⁷² An alternative is to move away from the living individual as the proper unit of moral concern, and instead treat all generations who have lived in this country as a roughly singular People. See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 145–54 (2001) (defining “a people” as persons who exist or existed “under the rule of a particular political-legal order”). Aside from the issue of how to define the class and weight the preferences of each generation, the single-People perspective is contested at a more basic level. See, e.g., Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 212–13 (1993); Michael J. Klarman, *Antifidelity*, 70 *S. CAL. L. REV.* 381, 381–91 (1997) (rejecting an obligation to follow founding era preferences). Regardless, the choice is presentist. Today’s decision-makers are urged to adopt the single-People perspective based on argument.

¹⁷³ Another version of consent need not weaken in this way. As mobility costs drop, it becomes easier to think of residence as effective consent to the laws of the jurisdiction. But this sorting dynamic is probably not robust enough to justify treating all U.S. residents as having consented to the existing constitutional order. See Samaha, *supra* note 9, at 660. In addition, it is difficult to see how strong originalism would follow from such consent. Presumably consent would be to the constitutional system as it exists and not to a method of interpretation not already or predictable in practice.

¹⁷⁴ See, e.g., CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* x–xii (1966); Robert C. Byrd, *The Constitution in Peril*, 101 *W. VA. L. REV.* 385, 387, 395 (1998).

¹⁷⁵ See Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK*, *supra* note 114, at 382, 382–85.

¹⁷⁶ See WALDRON, *supra* note 170, at 134–135 & n.43 (providing a numerical example); Bernard Grofman, Guillermo Owen & Scott L. Feld, *Thirteen Theorems in Search of the Truth*, 15 *THEORY & DECISION* 261, 273–74 (1983) (discussing opinion-leader problems).

credentials of past ratification decisions, without relying on the questionable moral force of cross-generational consent.

But here the time lag problem is altered, not eliminated. First, we should wonder whether past generations of constitution-makers answered the questions we are asking. Even if they meant to incorporate our interests and situation into their overall judgment, presumably they were making judgments for all generations together. Our position is different. Our judgments are for the present and the future. Second, we must doubt their average accuracy. Assuming that the relevant questions have right and wrong answers, CJT only holds if decision-makers from as long as two centuries ago were on average more accurate than not about the appropriate character of constitutional law in 2008. This is possible, and it could be that many constitutional decisions are unimportant anyway. But we can be sure that the founders were imperfect.¹⁷⁷ And, at the least, arguments from practical authority and CJT become more vulnerable with time. As facts, values, experience and judgments change there is often less reason to defer to the decisions of past generations and more reason to depend on judgments in t_0 — which might themselves be designed to satisfy CJT conditions.¹⁷⁸

As with consent-based justifications, there is room for disagreement. The growing ignorance of the founders and subsequent constitution-makers might be preferable to the risks of myopia, selfishness and strategic decision-making in 2008. But the understandable disagreement over whom to trust is related to the passage of time. Time complicates the choice. So we still lack a plausible justification for originalist decision-making that is insensitive to the text's age.

C. *Persisting and Problematic Justifications*

Other justifications for originalist inquiry are resilient to time. They stand or fall regardless. The three explored here, however, have other debilitating problems.

¹⁷⁷ For example, it seems that they foresaw neither the need for an air force, *see* U.S. CONST. art. I, § 8, cls. 12–16; *id.* art. II, § 2, cl. 1 (mentioning an army, a navy and militias), nor the development of national political parties, *see* BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 5–6 (2005).

¹⁷⁸ *See generally* Samaha, *supra* note 9, at 653–55; Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1503–06 (2007) (suggesting that the Constitution's ratifiers compare favorably to contemporary judges but without vouching for the reliability of either).

First, consider the argument that originalism is handy for constraining discretion when courts are playing the high-stakes game of supreme judicial review.¹⁷⁹ This value need not diminish over time. To the extent people today worry about judicial discretion, an honest commitment to originalism might guide judges away from their ideological preferences, and it might offer everyone else a roughly objective standard by which to evaluate the quality of judicial work. Others are comfortable with judicial policymaking, considering the imperfections of alternative institutions, or are not persuaded by assertions of constraint and objectivity. As well, it is conceivable that historical events become more opaque and less guiding with time. But suppose that judicial policymaking is bad and that the assertions about originalism's constraining force are true.

The central problem is that originalism is not plainly superior on the policy dimension of constraint. There is, after all, the possibility of courts deferring almost utterly to other institutions whenever constitutional claims are raised.¹⁸⁰ That constraint is at least as strong and objective. Other interpretive methods might perform similarly. It is unclear why honest attention to reams of judicial precedent is less constraining and less verifiable than honest attention to historical understandings.¹⁸¹ Both call for versions of analogical reasoning. Furthermore, judges already act under a range of influences capable of dampening independent judicial preferences, originalist and other. Even if we could set aside the judicial selection process, which helps fashion the ideological composition of the bench, as well as overt and credible threats from other institutions, there is not much evidence from which to predict that judges will maintain sustained opposition to firm national policy preferences.¹⁸² It is unclear that any

¹⁷⁹ See, e.g., BORK, *supra* note 117, at 7, 143–53 (demanding neutral principles for the exercise of judicial review and arguing that original public meaning delivers them).

¹⁸⁰ The “almost” refers to what has been called judicial inquiry into “existence conditions.” See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1114–15 (2003). It seems that judges must ask what counts as ordinary law to do their job as expected, and this seems to call for constitutional judgments that cannot be reallocated elsewhere without making a constitutional judgment. See also Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 444–65 (2004) (advancing ways in which the doctrine cannot avoid constitutional law questions, or perhaps even political questions).

¹⁸¹ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925–27 (1996); see also ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 156 n.31 (Hart Pub. 2005) (1992) (noting that judges could objectively constrain themselves by flipping coins).

¹⁸² See, e.g., ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT 225 (1960) (estimating that the Court had “seldom strayed very far from the mainstreams of American life”); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338

recommendation on interpretation and decision-making method will bind down judicial behavior much more effectively than politics and culture already do. Additional arguments are required to select out originalism from alternative strategies for constraint.

A second time-insensitive justification is, simply, originalism's results. This does not turn on "our" consent by past ratification, or founder brilliance, or a uniquely constraining force in decision-making. Nor does it matter whether the date is 1808 or 2008. Honestly performed originalism will generate a pattern of results in concrete cases or, more modestly, will foreclose a set of results. The pattern might be normatively alluring. Surely some originalists have been attracted to historical inquiry in constitutional adjudication because abortion rights appeared implausible on that method, while gun rights and public religious displays did not. Similarly for some nonoriginalists, with the normative intuitions and methodological outcome reversed. With fundamental moral commitments satisfied, one can bite the bullet and accept displeasing results on secondary matters. In any event, it does seem irresponsible to select interpretive methods without concern for the foreseeable results. Sufficiently catastrophic outcomes would, and should, dislodge any interpretive method or decision-making protocol.

The low ceiling on this justification for originalism is nevertheless visible. It cannot move attention from the basal policy questions, nor does it create leverage on the straightforward moral issues for which people already possess analytical tools. However essential or timeless, the results question is likely to be more divisive and distracting than encouraging for originalism. It is a component in the analysis rather than a solution to it.

If the counter-impulse is to lurch away from results, consider the argument that originalism is conceptually equal to interpretation. The assertion is that interpretation simply *is* the search for a text's original public meaning. Insofar as a decision-maker is engaged in some other effort, she is not interpreting the document.¹⁸³ Time is plainly irrelevant to this assertion but the stumbling blocks are equally apparent.

(1991) ("U.S. courts can *almost never* be effective producers of significant social reform."); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (finding that Court policy ultimately converges with the positions of national governing coalitions).

¹⁸³ See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823-24 (1997) (seeking to segregate the concept of interpretation from the practice of adjudication); Solum, *supra* note 117, at 3-6 (portraying original semantic meaning as a factual matter, while recognizing that such facts do not themselves justify abiding by that meaning).

As a normative matter, the conceptual assertion is unresponsive. If the assertion is meant as a definition for interpretation, then it seems descriptive rather than normative. If the assertion is meant as a superior understanding of what interpretation entails, it is unclear what test is being suggested for superiority. Suppose someone asserts that we should reserve the word “interpretation,” not for original public meaning, but for the recovery of authorial intent¹⁸⁴ or for the various sources and methods on which judges and lawyers typically rely when they claim to be interpreting a legal text.¹⁸⁵ What good test is there for judging these competing conceptions? Convention is inadequate. Not only does that standard move us back toward description, common use does not restrict “interpretation” to originalism.

A different argument is that the written Constitution is a law, and that judges have a set interpretive practice for law that should apply equally well to this document.¹⁸⁶ However convincing on its own terms, this is not an argument from conceptual necessity. It is a claim about the *desirability* of following “law” *as defined in that particular way* rather than another. And if the argument proceeds to the assertion that “law” simply is what originalism yields, then we are back where we began: working with definitions without clearly entering the normative debate. An originalism proponent who points to conceptual truth must have something else in mind — merely clarifying terms as a matter of throat-clearing, or stepping toward analogical reasoning across legal texts that will operate on substantive principles not yet articulated, or perhaps deploying a rhetorical strategy for capturing the term “interpretation” or “law.” Otherwise the topic of justification is left unaddressed.

D. *Innovative Justifications*

1. Ex ante incentives

There is another time-insensitive justification for strong originalism in constitutional decision-making that might be more

¹⁸⁴ See, e.g., Fish, *supra* note 114, at 1112, 1114; Steven Knapp & Walter Benn Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 187, 193–97 (Gregory Leyh ed., 1992).

¹⁸⁵ Cf. DWORKIN, *supra* note 128, at 65–68 (integrating the “best” justifications for a practice into the concept of interpretation); Kent Greenawalt, *supra* note 114, at 268, 268–70 (including text, original meaning, underlying rationale or basic values, application to particular cases, and stare decisis).

¹⁸⁶ Cf. BARNETT, *supra* note 117, at 100–07 (analogizing contracts).

promising. It concerns incentives for political action, and it returns to the dynamics of supreme-law generation discussed in Part I.¹⁸⁷ The claim would be that respecting the text gives value to a venerable type of political mobilization and, to couple this goal with originalism, that original public meaning best approximates the political victories achieved through Article V or VII.¹⁸⁸

This justification is aggressively forward-looking. Today's decision to respect old Article V successes would be defended as an instrument for inciting political mobilization in the future. It does not require a special affinity for the founders, or a quirky preference for delegating policy to the dead hand of the past, nor a positive evaluation of originalism's results in any particular case. Instead the argument means to be process focused and *ex ante* situated. Victory in the Article V arena would be rewarded with a degree of insulation. Rolling back those victories would essentially require yet another successful attempt to overcome the hurdles of formal amendment. And the threat of "change" through litigation might be reduced with a strong commitment to originalism in judicial decision-making. We should be clear that this move is not quite right for encouraging ordinary politics in the present; sometimes those outcomes will be sacrificed to drive home the message of Article V's value. The issue is whether this technique for rewarding formal amendment would be and ought to be effective.

The logic should be familiar.¹⁸⁹ Essentially the same arguments have been made in law and economics when the question is why testamentary instruments are respected in court.¹⁹⁰ It remains uncomfortable for modern lawyers to suppose that the dead themselves possess legal rights or entitlements. But the living may receive comfort from signs that the terms of a valid will are generally followed if intelligible, and their property might have greater value because of it. They might acquire more or waste less of it. Perhaps the same rationale works for Article V lawmaking.

Translating incentive arguments into justifications for originalism has attractive features, but also complications. Difficult normative and empirical questions must be answered before the

¹⁸⁷ The analysis below expands on Samaha, *supra* note 9, at 660–61.

¹⁸⁸ Going forward, committing to enforcing original public meaning effectively defines Article V victories as such. So the choice of interpretive method can be a transitional question, rather than an entailment of the decision to encourage Article V lawmaking.

¹⁸⁹ It does not seem prominent in the originalism literature. *Cf.* WHITTINGTON, *supra* note 117, at 111–13 (viewing originalism as potentially pro-democracy); *id.* at 207 (suggesting, without empirical evidence, that judicial updating can make "[t]he asserted impossibility of constitutional amendment . . . a self-fulfilling prophecy").

¹⁹⁰ See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 518–20 (6th ed. 2003) (recommending efficiency constraints on testator preferences, however).

incentives justification becomes persuasive. Neither uncertainty nor indifference is enough. To incline toward strong judicial originalism on this justification, one should be satisfied that the Article V process is good enough to promote in light of feasible alternatives and that a judicial commitment to originalism is the effective and appropriate method of encouragement. Given the present state of knowledge on Article V dynamics and the likelihood of normative disagreement, there is reason for caution and reflection.

To frame the analysis, assume that a category of sticky supreme law is desirable but that the content of this category should be revised episodically. Revisions might come in several forms: adding supreme law or deleting some of it, entrenching ordinary political victories or opening the way for them. The optimal method, or combination of methods, for these revisions turns on the desired rate of revision and the character of revisions expected from each of the possible processes. This means that the dynamics of Article V lawmaking must be understood given various conditions, and then compared to alternative dynamics that are equally well-understood.

Putting it roughly, our current system of supreme law comprises some number of Article V attempts and few successes, along with some degree of judicial intervention that is itself revisable through additional litigation or Article V. Other sources might function as a supreme law, but accepting them as such would be controversial and complicate the analysis. As for the judicial contribution to supreme law, it can run on arguments similar in substance to those made during an Article V effort. There is likely to be overlap between, for example, arguments in support of sex equality through formal amendment and through judicial renderings of the Equal Protection Clause. Still, the arguments are subject to different forces in different lawmaking institutions and they will take different forms in court, which might influence outcomes. We know that judges publicly deploy a range of analytic approaches in constitutional cases — sometimes working with precedent and principle,¹⁹¹ sometimes combining originalism with other resources,¹⁹² occasionally presenting extensive originalist histories.¹⁹³

¹⁹¹ See, e.g., *Davis v. Fed. Elec. Comm'n*, 554 U.S. __, __, 128 S. Ct. 2759, 2770–74 (2008) (invalidating a rollback of campaign contribution limits for opponents of certain self-financing candidates); *Ashcroft v. ACLU*, 542 U.S. 656, 665–70 (2004) (affirming a preliminary injunction against the Child Online Protection Act).

¹⁹² See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31–40 (2001) (objecting to home thermal imaging on grounds including precedent, workable doctrine and originalist principle).

¹⁹³ See, e.g., *Dist. of Columbia v. Heller*, 554 U.S. __, __, 128 S. Ct. 2783, 2788–2812, 2816–

How would supreme lawmaking change if the judiciary shifted to a strong form of originalism? As indicated in Part II.B, it appears that no solid empirical study exists on the relationship between judicial methods of interpretation and formal amendment rates. An acceptable coding scheme for opinions needs to be worked out and other variables must be adequately controlled. Until the work is done and vetted, theory and speculation are the best available resources.

One possibility is that a shift to strong originalism would not have much effect on Article V effort, let alone success rates. Remember that the practical choice is not between strong originalism and no originalism, but between strong originalism and today's weak or episodic originalism. The smaller the magnitude of interpretive change, the less significant any incentive is likely to be. Nor is the proposal to subsidize Article V lawmaking. That process is going to be very difficult to complete on most occasions regardless of interpretive practices in the courts. Restricting the judicial role in supreme lawmaking affects relative rather than absolute costs.

Of course, we might not expect any Article V effort if the judiciary predictably intervenes early and with total disregard for the public meaning of what had been accomplished. If adjudication lags are brief and court judgments are always respected, and if courts then ignore Article V text and the general social meaning of the text, those seeking change in supreme law might as well begin with the courts. This picture of judicial behavior is, however, incomplete. Adjudication lags are sometimes long, and the Supreme Court often uses originalist tools when the lag is brief. To the extent the Court dispenses with originalist argument, it might be on issues where those arguments are unhelpful or on issues where Amendment proponents are relatively indifferent.¹⁹⁴

There is also the issue of the time horizon of supreme law reformers. Recall the compromise trajectory for originalism, under which the method strongly influences decision-making close to ratification and then flags over time. Whether or not this has been the pattern in Court cases, it is an alternative to loyal originalism and it might provide equally powerful incentives for Article V effort. Much depends on the discount rate of potential law reformers. If

18, 2821–22 (2008) (invalidating the District's ban on handgun possession in the home by certain law-abiding citizens for the purpose of self defense, although listing presumptively valid regulation without similar historical research); *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004) (revising Confrontation Clause doctrine on originalist arguments, although relying on precedent to note that the Clause is applicable via the Fourteenth Amendment to a state trial).

¹⁹⁴ See *supra* text accompanying notes 146 & 151 (discussing *Osborn*).

their timeframe of concern is shorter than a century, for instance, then strong originalism at t_{100} might be irrelevant. This is true even on the friendly assumptions that strong originalism otherwise makes Article V victories more attractive and that it provides determinate answers on textual meaning. The issue of how courts should behave in a post-originalist period remains unresolved on this analysis but, on the assumptions we have made, the resolution of that question would not influence Article V incentives.

The foregoing is built on educated guesses. Others might have different intuitions. And the issue is importantly comparative: Given a static judicial system that is sufficiently awful, and alternative lawmaking processes that are sufficiently good, it would make sense to experiment with even longshot strategies to minimize judicial influence. Extensive debate about the quality of judicial decision-making is ongoing, and there have been serious attempts to compare the virtues and vices of different methods for supreme lawmaking.¹⁹⁵ In this space, only brief observations are necessary.

The normative questions are unavoidable and controversial. In comparing Article V, judicial adjudication, and any other process for supreme lawmaking, one should have at least a general sense of what counts as good or bad supreme law. This sense is hardly uniform. For example, it might be that the Supreme Court exercises its influence only on the margins of public policy,¹⁹⁶ but that on those margins it tends to favor elite values or countercyclical political ideologies. In contrast, it might be that the institutions involved in Article V lawmaking slant toward the interests of states as states and congressional power centers. The content of supreme

¹⁹⁵ See JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES* ch. 6 (1994); Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 229, 259–71 (Richard W. Bauman & Tsvi Kahana eds., 2006) (comparing common-law constitutionalism with formal amendment as a matter of theory on several dimensions of performance). For a brief recap of potential dangers in Article V, see Kathleen M. Sullivan, *What's Wrong with Constitutional Amendments?*, in "GREAT AND EXTRAORDINARY OCCASIONS": DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 39, 39–42 (Louis M. Seldman & Virginia E. Sloan eds., 1999). On the threat to judicial power, see John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 *TEX. L. REV.* 1929, 1958–60, 1968 (2003); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *COLUM. L. REV.* 121, 144, 174–76 (1996) (worrying about majoritarian forces). Other insight is provided by Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 116 (1993) (worrying about efficient policy outcomes in light of Congress's ability to bottleneck Article V change); William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability — A Comment on Ferejohn and Sager*, 81 *TEX. L. REV.* 1965, 1965–71 (2003) (questioning whether constitutional obduracy via Article V is net beneficial).

¹⁹⁶ See, e.g., KOMESAR, *supra* note 3, at 251.

law generated by these options will differ, and the processes are likely to reward different skills and behavior.

Evaluating those consequences depends on a theory of value. Without making any clear mistakes in logical reasoning, an observer might check his value set and conclude that it would be best if the Court fully inherited the business of supreme lawmaking as a counterweight to other forces in society; or instead Article V lawmaking dominated Court influence in light of the sustained political organizing ordinarily involved; or instead some other form of higher lawmaking became exclusive, such as a popular vote instigated by national petition drives; or instead the above processes were combined in some way, perhaps just as they are now; or instead the project of categorically supreme law were abandoned. These evaluations are not irrational, depending on the operative normative framework.

Adding issues regarding the appropriate rate of revision for supreme law, and the appropriate degree of incentive for the preferred lawmaking process, further illustrates the complexity of the judgments involved. If strong originalism is effective at channeling law reform efforts toward Article V, there is the question of how strong the incentive ought to be. In the extreme case, Article V would be the sole process for higher lawmaking to the exclusion of (relatively) more case specific adjudication, and formal amendments would arrive regularly. Some might consider this outcome too destabilizing, or ultimately demeaning to the value of the document as a national icon, or too sanguine about entrenching value choices in text protected by Article V even with a higher amendment rate. Others will be excited at the prospect of supreme law migrating to supermajorities in Congress and the states. Either way, one must have a sense of the proper level of incentives. This is no easier than choosing the right length for a patent term.¹⁹⁷

Last, there is the related issue of implementation. A cost-effective strategy would be needed for enlisting and retaining strong originalist judges of the right kind. We began the analysis by bracketing questions of coordination within the judiciary by considering the options for a single hypothetical judge. But at some point, an incentives-based argument will want to check the achievable level of firm judicial originalism against the desired strength of the incentive.

This effort to proliferate issues is not meant to be discouraging. Choices must be made regardless of how complex the situation, and

¹⁹⁷ See Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1823-29 (1984) (identifying variables).

incentives arguments have potential for some observers. With certain empirical assumptions and normative commitments, an incentive-based justification for originalism might be attractive. And this justification would minimize if not defeat time-oriented objections. The strong cautionary note, however, is that current knowledge makes the necessary assumptions speculative and the commitment to Article V debatable.

2. The randomization analogy

Finally, there is a randomization analogy that might counsel originalism in some form — or at least reconcile us to originalism's persistence. It is only an analogy. Originalism, in current practice and according to its proponents, is hardly the equivalent of law by lottery. Nor would anyone endorse randomization for all questions raised by our constitutional text. Offering an equal probability of victory to all comers would reward and attract arguments without quality control. Yet, in hard cases, randomization has virtues that originalism often aims to capture, while originalism might be reworked to more closely approximate random selection. This refashioned originalism will not expire with time, at least not according to its internal logic. It could even gain strength with age.

The suggested relationship might sound unfriendly. If there is any current association between originalism and randomization, it is for purposes of criticism. A skeptic might assert that any alleged public agreement about a word's meaning is haphazardly determined by a multiplicity of forces and the observer's selective reaction.¹⁹⁸ More generally, randomization has a poor reputation in law. Deliberately randomizing merits decisions has been a basis for censuring judges,¹⁹⁹ and it has a look of arbitrariness which might contradict intuitions about rational decision-making.²⁰⁰

At least in theory, however, deliberate randomization could play a positive role in adjudication. It has been fruitfully used in other decision situations, after all. Law itself occasionally incorporates a random element, sometimes to resolve high-stakes questions. Examples include military drafts, immigration visa allocation, judicial case assignments, jury selection, land partition,

¹⁹⁸ See Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL'Y & L. 239, 266 (2006) (noting a critique of originalism along these lines).

¹⁹⁹ See *In re Brown*, 662 N.W.2d 733, 740–43 (Mich. 2003) (censuring a judge for publicly flipping a coin to resolve a short-term child custody issue).

²⁰⁰ See NEIL DUXBURY, *RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING* 87–88 & n.6 (1999).

and testing for the use or efficacy of drugs.²⁰¹ These applications suggest the advantages of harnessing chance in a subset of decision situations. Putting aside the possibility of divination, modern theory indicates entirely rational arguments for randomization.²⁰²

In its unweighted and statistical form, randomization offers equal opportunity to receive a benefit or burden within a predetermined pool of recipients. True, people often support allocation by merit, market, need, effort, or equal shares by partition or time before turning to the blindness of an unweighted lottery.²⁰³ But the combination of equal chances and a hard-line rule can be attractive, at least as a last resort when reason cannot identify one outcome superior to all others.

Thus rational choice theorists are open to randomization for resolving persistent uncertainty, incommensurability, or indeterminacy.²⁰⁴ When the correct norm is unclear or additional relevant information is too costly to obtain, and when a decision nonetheless ought to be made, a lottery can be the answer. Egalitarian sentiment supplements the argument with a background commitment to treating people equally.²⁰⁵ Randomization is one way to do that. Consider the allocation of a scarce and indivisible benefit, such as space on an overcrowded lifeboat. Here equal shares are unworkable, while equal chances are possible and perhaps most acceptable to the passengers. Moreover, pragmatists can find admirable features in randomization. The rule-like character of a lottery may be comforting. A guarantee of equal probabilities aims to tie the hands of decision-makers who might be distrusted, cuts incentives to curry favor with them, and is cheap to execute once the rule is in

²⁰¹ See *id.* at 43–45 (collecting examples of social decision by lot); see also 8 U.S.C. § 1153(c) (2006) (regarding excess visas); *Robertson v. Robertson*, 484 S.E.2d 831, 835 (N.C. App. 1997) (regarding partition assignments); HARRY M. MARKS, *THE PROGRESS OF EXPERIMENT: SCIENCE AND THERAPEUTIC REFORM IN THE UNITED STATES, 1900–1990*, at 132–63 (1997) (regarding randomized clinical trials).

²⁰² See DUXBURY, *supra* note 200, at 43–84 (collecting instances of and arguments for randomized social decisions); Adam M. Samaha, *Randomization in Adjudication* (2008) (unpublished manuscript on file with the author); see also Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RES. 757, 758–65, 769–70, 773–74 (1977) (describing “picking” as opposed to “choosing” based on preferences and reasons). The idea of “picking” interpretive rules is helpfully raised in VERMEULE, *supra* note 126, at 168–69, 179–80 (discussing interpretive canons and precedent).

²⁰³ See *generally* GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 41–44 (1978) (critiquing lotteries and comparing them to other allocation rules). A weighted or stratified lottery is a possible compromise between rewarding nothing and ranking everyone. See JON ELSTER, *SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY* 113–14 (1989).

²⁰⁴ See ELSTER, *supra* note 204, at 38, 107–09 (noting that the decision costs of “fine-tuned screening” might be too expensive, leaving a residuum of uncertainty).

²⁰⁵ See BARBARA GOODWIN, *JUSTICE BY LOTTERY* 102–03 (1992) (exploring social lotteries as devices to afford equal respect in situations of scarcity and structured inequality).

place.²⁰⁶ Of course randomizing requires anterior decisions, such as what to randomize and who to include in the pool. But aiming for equal chances may be best when other options run out. Finally, randomization is a foundation for experimentation. In fact, today's best empirical studies on causation often rely on random assignment to treatment and control groups.²⁰⁷

Enough uncertainty surrounds constitutional design and adjudication such that the theoretically optimal number of occasions for randomization must be greater than zero. Despite our experience and knowledge, we cannot with confidence conclude that bicameralism is superior to unicameralism, or that presidential systems outperform parliamentary systems, or perhaps even that democracies yield faster economic growth than dictatorships.²⁰⁸ Even if everyone agreed on the values to be maximized, many choices about the character of government would have little or no impact beyond short-term distributions, so far as we can tell, and we might have difficulty ascertaining both the sign and magnitude of any impact. Some of these choices will be posed in litigation. Granted, no one thinks that all paths are equal in constitutional law. But no one can realistically believe that all outcomes are meaningfully different, and there is more than one way to select a stable solution after the clearly inferior outcomes are weeded out.

Indeed, lot-drawing is part of U.S. constitutional history. Article I, Section 3 of the Constitution announced that "immediately after [the senators] shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes" with initial terms of three different lengths. When the Senate first organized in 1789, its members sought to follow this directive but the text seems unclear about how the three classes should be composed. The senators began working the problem with deliberation. They submitted the issue to a committee, which suggested an initial principle: sorting the senators into three

²⁰⁶ See DUXBURY, *supra* note 200, at 51–56.

²⁰⁷ See, e.g., Gary Burtless, *The Case for Randomized Field Trials in Economic and Policy Research*, 9 J. ECON. PERSP. 63, 66–67 (1995) (explaining the advantages).

²⁰⁸ See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 151 (2004) (arguing that constitutionalization of rights in four studied countries "has achieved little or no real change in arenas such as wealth redistribution, minority political representation, and the equalization of life conditions"); JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 208–10 (1996) (finding little connection between economic outcomes and institutional design in OECD countries); ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990, at 142, 166–67, 178–79 (2000) (finding that economic development is generally not significantly influenced by the division between democratic and dictatorial rule); Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 624–29 (2006) (collecting studies).

geographically diverse groups with no two senators from the same state in the same group.²⁰⁹ But this left the decision of which group of senators to assign to each class. The senators could have deliberated and negotiated on this issue as well. Instead the committee offered another solution: randomization. One senator from each group would draw a lot from a box and the fate of each group would be determined accordingly. The initial allocation was performed in this manner, and a modified version of the lottery has been used upon the admission of new states into the union.²¹⁰ Surviving records may not explain why the first Senate chose randomization. But we can defend the lottery as assuring equal chances when norms beyond geographic mixing were unclear, sharing was not permitted, pool members enjoyed presumptively equal status, and the discretion of fellow politicians might be distrusted.²¹¹

Is it too much to expect the judiciary to act like the first Senate, and on occasion combine deliberation with overt randomization? Probably. Judges have self-regulated against flipping coins on merits decisions, constitutional or not. One might think this position socially suboptimal.²¹² But courts face a public relations problem with deliberately randomizing any judgments, and one might worry that there is no easily articulated test for randomization's proper domain. In any event, we can assume that literal randomization in the courts is foreclosed. The question is whether originalist inquiry is ever a substitute for randomization — a substitute that runs on similar arguments to meet similar goals.

To be sure, originalism as currently practiced is far from randomization. Historical investigation requires human judgment and it can be guided by its users to reach outcomes preferred on other grounds.²¹³ It was not shocking that two coalitions of justices in 2008 described two incompatible lessons from history

²⁰⁹ See generally DANIEL WIRLS & STEPHEN WIRLS, *THE INVENTION OF THE UNITED STATES SENATE* 163–64, 171 (2004).

²¹⁰ See Floyd M. Riddick, *The Classification of United States Senators*, Sen. Doc. No. 103, 89th Cong., 2d Sess., at 1–5 (1966). Some originalists might see the Senate's decision as an example of constitutional construction outside the courts, not interpretation. To reiterate, my interest is in sound decision-making, not interpretation standing alone.

²¹¹ Cf. DUXBURY, *supra* note 200, at 26–32 (presenting a short history of election by lot).

²¹² See Samaha, *supra* note 202 (exploring a restricted domain of merits randomization in adjudication, and the influence of random case assignment on outcomes); cf. ELSTER, *supra* note 203, at 37, 116–17, 121 (suggesting that people tend to cling to “the rituals of reason” even when randomization is a suitable decision rule).

²¹³ See, e.g., Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 *LAW & SOC'Y REV.* 113, 130–32 (2002) (finding that text- or intent-based arguments in party briefs generally do not predict justices' voting behavior as well as proxies for judicial ideology). It is not clear that any interpretive method ties the hands of its users very firmly.

surrounding the Second Amendment.²¹⁴ In addition, for at least some time periods, the historical sources will not offer equal probabilities for plausible outcomes. The history may skew toward one of today's ideological camps, and thus choosing originalism may look like choosing the outcome. This is perhaps less likely for certain structural issues, but a tilt might be supposed for issues including firearms, religion, sex equality, and property rights. Seeking answers from history is also controversial, if not self-destructive, in that it would systematically privilege ancient judgments. Moreover, originalism can be costly when performed conscientiously,²¹⁵ and those resources tend not to foster experiments. Originalism in a strong form joined with *stare decisis* would inhibit further innovation. Nor can originalism guarantee determinate answers to specific questions. Literal randomization can.

Nevertheless, a version of originalism shares strengths with the rational use of randomization in hard cases. Both aspire to a kind of neutrality in decision-making.²¹⁶ Suppose that our hypothetical judge is committed to abiding by the Constitution, but its text is unclear with respect to the contemporary issue she faces, and she screens out understandings plainly intolerable for us. People will disagree about how any screening should be done, but grant the wisdom of critics and accept that non-originalist considerations have been and should be used to reduce social costs. Still the judge remains uncertain. We might be pleased if she then consults historical sources linked to the text, even if we have no confidence that originalist sources will suggest the all-told best outcome on this issue and even if we are not convinced that conceptual necessity, precommitment, or incentive effects justify history's authority. Without any greater faith in originalism, it can be a convenient and culturally acceptable tool for dispute resolution when other options fail. If so, time lags might be unimportant. History would serve as a tiebreaker regardless. Long lags might even assist decision-makers in achieving "arbitrary" results neutralized from present-moment ideology. Time has a way of

²¹⁴ Compare *Dist. of Columbia v. Heller*, 554 U.S. ___, ___, 128 S. Ct. 2783, 2799 (2008) (indicating "no doubt" that the Second Amendment confers a limited individual right unconnected with militia service), with *id.* at 2826 (Stevens, J., dissenting) (asserting that "the Framers' single-minded focus . . . was on military uses of firearms").

²¹⁵ See, e.g., Scalia, *supra* note 117, at 851–52, 856–57 (recommending originalism but acknowledging the decision costs of high-quality historical investigation).

²¹⁶ See, e.g., SCALIA, *supra* note 116, at 17–18, 37–41 (supporting original public meaning textualism with democratic and rule-of-law values against the creation of new law by judicial preferences); Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 284–88 (1996) (similar).

placing nonhistorians behind a veil of ignorance regarding the past's meaning, and of disconnecting current ideological cleavages from older orders.²¹⁷

The argument here is not terribly different from a rationale for paying attention to the written Constitution itself: the focal point theory of authority.²¹⁸ For many disputes, settling them decisively is more important than expending resources in a possibly futile attempt to optimize the outcome. Referring to the document can accomplish this. Every reader agrees that the document calls for bicameralism, people tend to refer to the document to answer such questions, they are already coordinated on bicameralism, and that is good enough. Neither the focal point theory nor the randomization account of historical argument is bothered by arbitrariness in resolving a class of constitutional questions. Both gravitate toward salient solutions instead of answers that are morally justifiable in another way.

There is a potential difference, however. The basic elements of the focal point idea are that the document is already a salient resource for limiting disagreement, that people are willing to accept answers indicated by a "straightforward" reading of the text even if they do not believe those answers are optimal, and that courts should try to avoid disrupting this coordinating function of the document.²¹⁹ However, the theory indicates that the document should become less important when the stakes are high and disagreement is intense.²²⁰ The randomization model for originalism need not conform to these boundaries. While cultural support for historical references helps the technique get off the ground, the importance, stakes, or disagreement surrounding an issue does not rule out judicial use of history to settle disputes. Its propriety begins with serious uncertainty rather than relative unimportance. I would not want to decouple the randomization

²¹⁷ One might wonder whether relying on a roughly fixed set of historical sources can qualify, conceptually, as randomization or anything like it. But if we agree to draw from an urn of blue and red balls to resolve a dispute, the process could still be considered randomization if the balls were placed there 200 years ago. The same holds even if we discover after the draw that 99% of the balls were in fact red. *Accord* ELSTER, *supra* note 204, at 43-46 (discussing a die loaded in an unknown fashion and distinguishing such epistemic randomness from objective equiprobability); Lewis A. Kornhauser & Lawrence G. Sager, *Just Lotteries*, 27 SOC. SCI. INFO. 483, 487-88 (1988) (arguing that the equiprobability event need not come after the decision-maker chooses a lottery as the basis for allocation).

²¹⁸ See Strauss, *supra* note 10, at 1732; *id.* at 1737 (adding that "[p]recedents can be focal; original understandings can be focal"); see also Samaha, *supra* note 208, at 623-29 (stressing uncertainty as a motivator for using focal points).

²¹⁹ See Strauss, *supra* note 10, at 1731-38, 1744 (explaining the idea and criticizing originalism insofar as it prevents common-law development of open-ended provisions with specific historical judgments).

²²⁰ See *id.* at 1743.

analogy from the focal point model; indeed people who prioritize agreement may randomize for the purpose of coordinating, akin to what the first Senate did. But the two accounts do seem distinct.

Stripping history of greater pretensions, however, does indicate that originalism should be kept simple. Professional excellence is unnecessary if the goal is convenient and detached dispute resolution in close cases, and originalism better tracks the virtues of randomization if it is economical and unsophisticated. Here there is no premium for objective historical truth or the complete intellectual map of constitutional thought. To minimize decision costs, it seems best for judges to rely on a relatively quick first take on salient ratification era sources, followed by modest additional research to confirm that their first impression is plausible. This is not so far from the originalism sometimes practiced in court. Contrast professional histories such as Jack Rakove's iconic *Original Meanings*, Eric Foner's masterful *Reconstruction*, and Gordon Wood's triumph, *The Creation of the American Republic*. These would not be the models; in fact, judges might have to avoid reading them. Legal history that is "sloppy, superficial, and sometimes inaccurate"²²¹ would not be a major concern, while the historian's understandable "fondness for nuance, understatement, texture, and even irony"²²² would be a vice. Furthermore, original public meaning need not be the exclusive form of inquiry. Occasionally that question will be too abstract for concrete decisions while drafting history, even if unreliable for judging collective intentions or meaning, will do the trick.²²³

Consider one possible application of this version of originalism. Part of the Twenty-Fifth Amendment describes a dispute resolution mechanism for use when the President is allegedly "unable to discharge the powers and duties of his office" and an Acting

²²¹ DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 17 (2002) (criticizing Robert Bork); see also Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524-30 (1995) (criticizing many originalists for unprofessional histories).

²²² Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J. L. & HUMAN. 191, 195 (1999) (book review).

²²³ When presenting originalist argument, judges have not restricted themselves to an especially narrow set of sources anyway. See, e.g., *Dist. of Columbia v. Heller*, 554 U.S. ___, ___, 128 S. Ct. 2783, 2810-12 (2008) (relying on late nineteenth-century sources to help interpret a 1791 text); *Boumediene v. Bush*, 554 U.S. ___, ___, 128 S. Ct. 2229, 2245-51 (2008) (relying on drafting history at the Philadelphia Convention and other sources to ascertain the significance of habeas corpus at the founding); *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004) (examining English, colonial, and state practice in an Eighth Amendment case); *Bowsher v. Synar*, 478 U.S. 714, 729-30 (1986) (relying on drafting history of the impeachment provisions); *Marsh v. Chambers*, 463 U.S. 783, 787-92 (1983) (relying on practice from the First Congress onward).

President attempts to assume power.²²⁴ The process involves the Vice President's judgment plus majority votes of the principal officers of executive departments "or of such other body as Congress may by law provide."²²⁵ If there were a power struggle under these provisions, and if the courts were called on to say what counts as "unable" or "other body" — suppose that the President was kidnapped instead of mentally incapacitated, or that by statute Congress had selected itself as the other body — few would be shocked if originalist arguments were deployed. They might be rightly outcome-determinative. But this is not to concede that the Amendment's drafters or ratifiers had special insight in 1967 into the finest dispute resolution mechanism for this occasion. Instead, scraps of ratification history could point toward a defensible solution that stops short of extensive judicial design choices or a flat assessment of who among the contenders might make the better president.²²⁶ The alternatives could be worse. It is difficult to imagine a shared presidency or an auction for the office. In tight spots, judges sometimes defer to another institution's judgment, but here there is no apparent location on which to unload the question without making serious normative judgments first.

If the randomization analogy is too weak to endorse, it still might help outsiders accept certain debatable Supreme Court decisions. One might recharacterize several opinions as roughly tolerable coin flips, regardless of how the justices experienced them. For example, Court majorities might have failed to produce professional history in recognizing state sovereign immunity in the absence of consent to suit.²²⁷ But the outcome was consistent with one interpretation of a digression in *The Federalist*,²²⁸ and the possibility of state consent and its federal encouragement will limit the doctrine's impact. Or consider the Court's decision to declare invalid the legislative veto, forms of which had been inserted into countless statutes.²²⁹ To some this is a blockbuster decision. It must be difficult for an empiricist to agree. The case seems to have had no provable lasting impact on policy or power.²³⁰ Empirical

224 U.S. CONST. amend. XXV, § 4.

225 *Id.*

226 For one view of the congressional debate regarding other bodies, see JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 206 (1992) (indicating that Congress may attempt to select itself). On the concept of inability, see *id.* at 200–02 (indicating that kidnapping is included). I do not assert that Feerick's findings match a casual reading of the relevant history. That might be taken to impugn his work.

227 See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68–69 (1996).

228 *THE FEDERALIST* NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

229 See *INS v. Chadha*, 462 U.S. 919, 958–59 (1983).

230 See LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 225 (1988); Samaha, *supra* note 208, at 638; cf. Jessica Korn, *Improving the Policymaking Process*

studies may explain cause and effect in constitutional design, yet they also reveal critical areas of uncertainty. Add the presence of reasonable normative disagreement plus the cultural support for arguments from the nation's past, and the case for originalist randomization improves.²³¹

As with literal randomization, however, the directions suggested by history might be overwhelmed by other considerations. Careful readers of *The Federalist*, for instance, are bound to be startled on occasion. Today we ignore the idea that cabinet secretaries should be able to keep their jobs after a new President is inaugurated unless the Senate consents to their removal.²³² That arrangement is no longer viable even if Hamilton interpreted the text correctly. In any event, an economical originalism must be compared against alternative decision rules²³³ — everything from judicial discretion, to common-law reasoning, to normatively driven presumptions, to judicial abstinence. Judges should be fairly certain that uncertainty surrounds the issue, not just their own ignorance. Often judges have good reason to be unsure about the normatively correct outcome but other officials will be far better prepared to answer. These are not promising cases for using history as a tiebreaker, except perhaps in situations of extrajudicial stalemate. Further, an economical originalism might be too unpredictable to use very often. Literal randomization is even worse on this score, but economical originalism might be less predictable than thorough historical investigation or current judicial practice.²³⁴ Instability in judicial decision-making might be of less concern; ordinary rules of *res judicata* and *stare decisis* would prevent serial destabilization. Yet judges would have to understand which decisions were products of casual historicism to prevent them from having broader subsequent impact. Finally, ideological bias in history is still an issue. Perhaps its likelihood is even greater for relatively superficial investigations when

by *Protecting the Separation of Powers: Chadha & the Legislative Vetoes in Education Statutes*, 26 POLITY 677, 677–80, 687–96 (1994) (claiming, however, that Congress stabilized certain funding decisions, took responsibility for them, and initiated negotiated rulemaking).

²³¹ Support for historical references in the general public can be in tension with the randomization analogy, however. Judges who use history as nothing more than a convenient tiebreaker are not obviously matching the culture's hopes or expectations for that information.

²³² See THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²³³ See Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5, 14 (1999) (comparing costs of various decision strategies at different stages).

²³⁴ See, e.g., Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1152, 1163–79 (2004) (reporting predictive accuracy of a statistical model and expert predictions for case outcomes).

particular litigants and immediate consequences are in plain view. While such bias can be monitored by comparing actual outcomes to a random distribution, effective monitoring does not guarantee its elimination.

Even so, impressionistic history has its place. Constitutional arguments can be close and threaten to be endless, tolerable results can be difficult to rank, split-the-difference compromises might not be available, the text's history might not match the litigants' ideological cleavages, and a look at history is within judicial competence. It is often consistent with public expectations. Economical originalism can thus function like a random solution to a problem that the decision-maker is willing to accept as difficult.

This brand of historicism is not defended with the morality of precommitment, or the conceptual necessities of law, or the belief that fidelity to ancient choices yields correct answers, or the hope that it will incentivize healthy democratic organizing. For those who feel certain about the appropriate content for supreme law, then, the approach will not be attractive. Many lawyers and judges display this kind of certitude; they are often trained to do so. But the reaction should be different for those who become convinced that many constitutional choices are difficult, that some consequences are hard to predict, and that human beings tend to adapt around the decisions of courts regardless. For them, the clipped use of history in adjudication will be, on occasion, the mark of humility and impartiality rather than divination or fatalism when the die is cast.

CONCLUSION

In its documentary form, our supreme law is aging. Even if it were not, the judiciary would tend to arrive late in the process of understanding it. These are facts of life in our constitutional system. They should prompt the question whether the influence of originalism on decision-making should vary with distance from ratification.

In response, I have presented a *prima facie* case for the degrading influence of time on originalism's strength in judicial decision-making, along with challenges to this compromise. In the wake of ratification, originalism often will but should not always dictate outcomes in constitutional adjudication. Like later periods, that will depend on its determinacy, practical feasibility, destructive impact and the chosen role for the judiciary. Long after ratification, originalism probably should expire for many disputes. The passage

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of time makes a strong, broad, and sophisticated originalism much less plausible.

However, the case for a fading originalism might be overcome with one of two innovative arguments. A strong and lasting judicial originalism might generate sufficiently beneficial ex ante incentives for a particular type of political organizing, if one prefers that brand of politics and if one is willing to make a set of empirical assumptions in the face of uncertainty. Or instead the defense of enduring originalist decision-making might begin with an admission that uncertainty will persist, that history sometimes provides no better insight than randomization, and that something like randomization can be a rational response to hard cases. These justifications might be too weak or too narrow to satisfy originalism's typical proponents. But they do begin to confront powerful arguments that will otherwise set an expiration date for originalism.

APPENDIX
CASES USED TO CALCULATE CITATION AND ADJUDICATION LAGS

Amendment	Citation Lag	Interpretation Lag
1st (1791)	84 years — see next column	84 years — United States v. Cruikshank, 92 U.S. 542, 552 (1875) (holding the Petition Clause inapplicable to the states); sSee also Reynolds v. United States, 98 U.S. 145, 162 (1878) (upholding a polygamy ban against a Free Exercise Clause objection)
2nd (1791)	66 years — Dred Scott v. Sandford, 60 U.S. 393, 417, 450 (1857) (opinion of Taney, C.J.)	84 years — United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that Second Amendment rights against Congress did not permit the Enforcement Act of 1870 to be used against citizens who lynched other citizens); see also United States v. Miller, 307 U.S. 174 (1939) (interpreting the Second Amendment to not cover sawed-off shotguns)
3rd (1791)	162 years — see next column	162 years — Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1953) (Jackson, J., concurring) (raising the Third Amendment in a discussion of the balance of authority between the President and Congress); see also Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (noting the Third Amendment to help construct a privacy principle)
4th (1791)	64 years* — Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 285–86 (1855) (holding the Fourth Amendment’s Warrant Clause inapplicable to a creditors’ civil action)	42 years* — Livingston’s Lessee v. Moore, 32 U.S. 469, 478–79, 482, 539, 551–52 (1833) (holding several Bill of Rights arguments inapplicable to the states, but without citing the Fourth Amendment)

* The citation lag can be longer than the adjudication lag. Sometimes the Court resolves a constitutional argument raised by a party without explicitly mentioning the Amendment in question. However, this table relies on searches of text contained in the United States Reports. Although the earlier volumes in this series describe attorney arguments, the series as a whole will not identify every constitutional argument raised by a party and adjudicated by the Court.

5th (1791)	42 years* — <i>Barron v. City of Baltimore</i> , 32 U.S. 243, 250–51 (1833) (holding the Takings Clause inapplicable to the states)	38 years* — <i>Satterlee v. Matthewson</i> , 27 U.S. 380, 406, 413–14 (1829) (rejecting an attempt to build a vested rights objection from multiple clauses, but without citing the Fifth Amendment)
6th (1791)	62 years — see next column	62 years — <i>United States v. Dawson</i> , 56 U.S. 467, 487–88 (1853) (holding that the Sixth Amendment’s venue provision did not apply to crimes committed in “Indian country”)
7th (1791)	17 years — see next column	17 years — <i>United States v. The Betsey & Charlotte</i> , 8 U.S. (4 Cranch) 443, 452 (1808) (permitting a libel trial without jury over a Seventh Amendment objection)
8th (1791)	42 years — <i>Ex parte Watkins</i> , 32 U.S. 568, 573–74 (1833) (denying appellate jurisdiction to revise or reverse a criminal sentence and stating, in the alternative, that an excessive fine under the Eighth Amendment could not be shown on the record)	75 years — <i>Pervear v. Massachusetts</i> , 72 U.S. 475, 479–80 (1866) (holding the Eighth Amendment inapplicable to the states and, in the alternative, that it was not violated by imprisoning defendant for selling liquor without a license); see also <i>Wilkerson v. Utah</i> , 99 U.S. 130, 134–37 (1878) (interpreting the Eighth Amendment as no barrier to a judge ordering death by public shooting for a first-degree murder in Utah territory)
9th (1791)	145 years — see next column	145 years — <i>Ashwander v. Tennessee Valley Auth.</i> , 297 U.S. 288, 330–31, 338–40 (1936) (holding that the Ninth Amendment did not withdraw power from Congress to sell electricity from a government dam)
10th (1791)	28 years — see next column	28 years — <i>McCulloch v. Maryland</i> , 17 U.S. 316, 406–07 (1819) (upholding congressional authority to charter a bank and contrasting the Tenth Amendment with the Articles of Confederation)
11th (1798)**	0 years — see next column	0 years — <i>Hollingsworth v. Virginia</i> , 3 U.S. (3 Dall.) 378 (1798) (concluding that the Eleventh Amendment applied to pending cases)

** The Eleventh Amendment was proclaimed ratified by the President in January 1798, see JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 20 (1987), and *Hollingsworth* followed shortly thereafter. The time lags for this Amendment could be increased by using 1795 as the ratification date, which is apparently when a sufficient number of states had acted to meet the Article V requirements. See *id.*; see also *Dillon v. Gloss*, 256 U.S. 368, 376–77 (1921) (indicating the Court’s belief that amendments’ status as law does not depend on a proclamation from the Secretary of State).

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12th (1804)	88 years — McPherson v. Blacker, 146 U.S. 1, 26 (1892)	148 years — Ray v. Blair, 343 U.S. 214, 224–25 & n.11, 228–30 (1952) (interpreting the Twelfth Amendment as no barrier to party pledges in elector primaries)
13th (1865)	7 years — see next column	7 years — Osborn v. Nicholson, 80 U.S. 654, 662–63 (1872) (allowing enforcement of a slave sale contract that was formed before the Thirteenth Amendment)
14th (1868)	1 year — Worthy v. Commissioners 76 U.S. 611, 613 (1869) (citing Section 1 of the Fourteenth Amendment but dismissing for want of a federal question presented below)	5 years — Slaughter-House Cases, 83 U.S. 36, 77–78 (1873) (interpreting the Privileges or Immunities Clause as no barrier to a state-created monopoly); Bradwell v. Illinois, 83 U.S. 130, 138–39 (1873) (interpreting the Fourteenth Amendment as no barrier to excluding women from the bar)
15th (1870)	1 year — White v. Hart, 80 U.S. 646, 648 (1871) (quoting a federal statute that cited the Fifteenth Amendment)	2 years — Slaughter-House Cases 83 U.S. 36, 71–72 (1872) (using the Fifteenth Amendment to help confine the purpose of the Thirteenth)
16th (1913)	3 years — see next column	3 years — Brushaber v. Union Pac. R. Co., 240 U.S. 1, 10–21 (1916) (upholding a federal income tax as within the scope of congressional authority under the Sixteenth Amendment)
17th (1913)	8 years — see next column	8 years — Newberry v. United States, 256 U.S. 232, 249–53 (1921) (denying congressional power to regulate campaign financing in Senate primaries)
18th (1919)	1 year — Duhne v. New Jersey, 251 U.S. 311, 313 (1920) (denying original jurisdiction over a challenge to the Eighteenth Amendment's validity under Article V)	1 year — Rhode Island v. Palmer, 253 U.S. 350, 385–88 (1920) (stating answers to questions about the scope of the Eighteenth Amendment)
19th (1920)	2 years — Leser v. Garnett, 258 U.S. 130, 135–37 (1922) (denying challenges to the Nineteenth Amendment's validity under Article V)	17 years — Breedlove v. Suttles, 302 U.S. 277, 283–84 (1937) (holding that a state could encourage a white male to pay a poll tax by refusing to allow him to vote unless he paid, while at the same time exempting women from the tax altogether if they did not register to vote)
20th (1933)	< still running >	< still running >

21st (1933)	1 year — see next column	1 year — <i>United States v. Chambers</i> , 291 U.S. 217, 222–23 (1934) (interpreting the Twenty-First Amendment to prohibit pending National Prohibition Act prosecutions from going forward)
22nd (1951)	13 years — <i>Baggett v. Bullitt</i> , 377 U.S. 360, 370 (1964) (citing the Twenty-Second Amendment in a hypothetical)	22 years — <i>Roe v. Wade</i> , 410 U.S. 113, 157–58 (1973) (using the Twenty-Second Amendment as one basis for excluding the unborn from the term “person” in the Fourteenth Amendment)
23rd (1961)	3 years — <i>Reynolds v. Sims</i> , 377 U.S. 533, 555 n.28 (1964) (citing the Twenty-Third Amendment for a trend)	< <i>still running</i> >
24th (1964)	0 years — <i>Reynolds v. Sims</i> , 377 U.S. 533, 555 n.28 (1964) (citing the Twenty-Fourth Amendment for a trend)	1 year — <i>Harman v. Forssenius</i> , 380 U.S. 528, 529, 538–40, 544 (1965) (holding that a state could not demand that a voter in a federal election either pay a poll tax or file a certificate of residence)
25th (1967)	7 years — <i>Lubin v. Panish</i> , 415 U.S. 709, 714 (1974) (citing the Twenty-Fifth Amendment for a trend, although this reference is probably an error in the Court’s opinion)	24 years — <i>Freytag v. Commissioner of Internal Revenue</i> , 501 U.S. 868, 886–87 (1991) (using a Twenty-Fifth Amendment legislative report as instructive regarding the Opinions Clause and therefore the Appointments Clause)
26th (1971)	1 year — <i>Healy v. James</i> , 408 U.S. 169, 197 (1972) (Douglas, J., concurring); see also <i>Lubin v. Panish</i> , 415 U.S. 709, 713 (1974) (citing the Twenty-Sixth Amendment in a discussion of candidate filing fees)	8 years — <i>United States v. Texas</i> , 445 F. Supp. 1245, 1261–62 (D. Tex. 1978) (three-judge panel) (holding that certain registration rules violated the Twenty-Sixth Amendment rights of college dorm residents), <i>summarily aff’d</i> , <i>Symm v. United States</i> , 439 U.S. 1105 (1979)***
27th (1992)	< <i>still running</i> >	< <i>still running</i> >
Average:	35 years	42 years
Standard Deviation:	44 years	47 years

*** This represents a summary affirmance that was identified based on a dissenting opinion.

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