

IN ORIGINALISM'S STEAD: OLD CONSTITUTIONS AND ORIGINALISM'S
NORMATIVE FOUNDATIONS

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NORMATIVE FOUNDATIONS

By

ALEXANDER LOEHNDORF, B.A.

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AUTHOR: Alex Loehndorf, B.A (McMaster University)

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Abstract

This thesis concerns a philosophical analysis of originalism in a context that has not yet received sufficient attention: in the context of old constitutional regimes. Through this lens, the thesis argues that originalism becomes something lesser in that both the normative justification and legitimacy originalism once held begins to withdraw from the theory's principled commitments. In other words, the nature of old constitutions begins to reject a normative argument for an originalist approach. The thesis bases this analysis on one originalist theory in particular for the sake of brevity: Lawrence Solum's public meaning originalism. It proceeds through two avenues of argument: originalism as it relates to 1) historical analysis and the interpretation-construction distinction and 2) *stare decisis* and democratic legitimacy. Taken together, these avenues point to originalism's fading normative justification and legitimacy in light of the challenges that old constitutions and their characteristics pose for the judicial philosophy.

Table of Contents

Introduction

Chapter One: Aged Constitutions and Public Meaning Originalism

i)	Philosophical Generality & American Constitutionalism	5
ii)	Four Features of Old Constitutions	7
iii)	The Originalist Family Tree	11
iv)	Solum and Public Meaning Originalism	12

Chapter Two: A Healthy Dose of Skepticism

i)	Balkin on Constitutionalism and Historical Analysis	17
ii)	The Veneer Behind the Usable Past Argument	19
iii)	Solum on Historical Facts and Public Meaning Originalism	24
iv)	Solum on the Interpretation-Construction Distinction	27
v)	The Interpretation-Construction Distinction and Discretion	30
vi)	Judicial Discretion and Transmutation	33
vii)	Countering the Sense-Reference Distinction	40
viii)	The Interpretation-Construction Distinction's Failings and PMO	43

Chapter Three: Undermining Originalism's Normative Foundations

i)	Originalism and <i>Stare Decisis</i>	49
ii)	Originalism and Democratic Legitimacy: A Short General Account	53
iii)	Solum on Originalist Democratic Legitimacy	54
iv)	Solum on the Problem of Precedent	57
v)	Formidable <i>Stare Decisis</i> : The Historical Significance of Old Constitutions	60
vi)	Revitalizing Democratic Legitimacy	65
vii)	Old Constitutions and Superprecedents	70
viii)	Solum on Superprecedents	79
ix)	Old Constitutions and Reconstruction Amendments	82
x)	Solum on the Desirability of Formal Amendment	85
xi)	Originalism's Folly: The Idealistic Legislature	87
i)	A Final Note: Originalism's Cloak	96

Conclusion

Bibliography

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Introduction

The great debate over originalism has stretched on for decades. Indeed, “Originalism is a juggernaut. It pervades our constitutional discourse, and it has become a fort and font of constitutional legitimacy.”¹ And yet, originalism’s ascendancy has been fundamentally characterized by a colossal and scathing dispute between originalists themselves and their critics. Where does that leave originalism now? That seemingly straightforward question cannot be meaningfully answered without reference to a dozen others, all of which are far more complicated. Here are just a few. Can we coherently isolate a singular strand of originalist theory (of the dozens and possibly hundreds that exist) and point to that theory’s explicit and identifiable influence over the decisions of judges in constitutional adjudication?² Or is originalism coherently ordered in theory but too conceptually muddled in practice to do so? In other words, does any one theory of originalism offer an account that has an accurate basis in the real world? Or has the challenge of pointing to the relevant distinctions between the numerous moderate forms of originalist and nonoriginalist positions become impossible? Although the depth and scope of these questions are fascinating, they will not serve as the focus here.

I have in mind another question, one that aims to investigate originalism in a new light; a light that explains (in small part) the perennial criticism that the theory has endured since its

¹ Guha Krishnamurthi, “False Positivism: The Failure of the Newest Originalism,” *BYU Law Review* 42, no. 2 (2021): 403. The great debate is a term perhaps most famously used by Justice Brennan in his 1985 Georgetown University Text and Teaching Symposium Speech. The term represents the veritable war that had raged for some fifteen years at the time of that speech over the viability of originalism, mainly within American jurisprudence via academic and legal scholars as well as legal and political figures since originalism’s creation in the 1970-80’s. That debate still rages on, perhaps more fiercely than ever before.

² See Mitchell Berman, “Originalism is Bunk,” *New York University Law Review* 84, no.1 (2009): 14-16, where the author substantiates the claim that there are possibly between 72-1000 distinct originalist theses, depending upon one’s endorsement of the principles of fixity, constraint, and the minimal content of the law thesis, all of which are conceptual components of an originalist-based theory of constitutional interpretation.

creation. I ask why originalism incurs such significant challenges with regard to its normative viability as an interpretative methodology in the circumstances of old constitutions. The focus of this work is therefore concerned with a particular kind of constitutional framework in which to investigate the merits and demerits of originalism: old and timeworn constitutions, the kind that can be found in states that have greatly transformed over time in response to a rapidly changing world.³ As such, a key part of my analysis here is to characterize the unique features of old constitutional frameworks that adversely affect the normative appeal of originalism.

Following that analysis, I argue that originalism as an interpretative methodology is not a normatively legitimate prospect in the context of old constitutions. It is not normatively legitimate because the characteristics of old constitutions undermine many of the standard normative justifications for originalist theory. This claim is most clearly demonstrated by reference to two examples. The first of these examples revolves around an important principle underlying originalism: fidelity to historical facts and the degree to which those facts can be utilized as a normative justification for an exercise of originalist constitutional interpretation. The second example entirely concerns originalism's relationship with *stare decisis*, which has proven to be a conceptual thorn that originalism must confront. In the circumstances of old constitutions, originalism's inability to meet the perennial challenges of precedent without incurring normatively undesirable consequences highlights the exacerbated lack of the theory's normative justifiability.

Taken together, these two examples pose momentous challenges for originalism's normative justification, and therefore it's normative legitimacy when situated within the

³ The term constitutional framework here refers to the structuring and limitations of the institutions of government and the establishment of rights provisions that constitutions often entrench as higher order legal rules, which oftentimes are partially made up of a bill of rights or a charter of some sort.

circumstances of old constitutions. This matters greatly: originalism is a normative theory about how correct constitutional interpretation *ought* to occur. If originalism cannot defend itself against the sorts of claims I raise in this introduction, then the conclusion that originalism and old constitutions are (to a point) mutually exclusive becomes more and more plausible. Moreover, if my claims here can be justified and shown to be accurate, then the judicial neutrality that originalism once claimed has been lost; originalist judges are just as liable as those who favour nonoriginalist philosophies to create new law via their decisions in the circumstances of old constitutions.⁴ If this last claim can be convincingly argued for, it follows that many of the normative benefits originalism claims to bring to the table no longer exist. To get this complex argument off the ground, we need, among other things, to establish a baseline definition for originalism and to offer some characteristics of old constitutions. As we will see shortly, assuming what follows from a theory of originalism is a dangerous affair, and certainly not one that assumptions can be made about. It is, after all, difficult to describe and characterize the nuances of a theory that has transformed so greatly over such a relatively short period of time. Before turning to ascertain these things, however, a slightly more detailed breakdown of the chapters that shape this large project will benefit its argumentative clarity.

Chapter one establishes some conceptual parameters that this thesis will operate within. It then defines a basic set of characteristics of old constitutions. Next, the chapter provides a brief account of how varied originalism has become as a theory of constitutional interpretation to better contextualize the inquiry at hand. Finally, the chapter explicates in some detail one account of originalism that is used (for the sake of brevity) over the course of this thesis as a focal point. Chapter two examines how originalism purports to make use of historical analysis. It

then points out that the blatant disjunct between the aims of historical analysis and legal argumentation poses a problem for a judicial philosophy that requires its judges to also be historians. Those observations set the chapter up to highlight the challenges involved in utilizing historical facts as a normative justification for an exercise of originalist constitutional construction, and this discussion questions the feasibility of the crutch of all new originalist theories: the interpretation-construction distinction.

Chapter three entirely concerns the relationship between originalism and *stare decisis*. This chapter is dedicated to an in-depth analysis of the features of old constitutional frameworks and constitutional precedent; and it claims that old constitutions actively defy a principled and coherent originalist approach to constitutional interpretation. The chapter primarily draws in two concepts to exemplify this analysis: the concept of superprecedents, and the ideal of democratic legitimacy. The aim of the chapter is first and foremost to justify and reinforce the thought that in the circumstances of old constitutions, not all originalist possibilities and preferences are able to be actualized without incurring grave normatively undesirable consequences.

Chapter One

The focus here is on old constitutions, and the American constitution represents the quintessential form of an old constitution. Moreover, if we are going to investigate originalism, we are somewhat bound to American constitutionalism by the simple fact that the theory took form and focus in a singularly American context. Arguably, the American constitution is not just old – it is primeval, a document that is explicitly tied to the establishment of the American Constitutional Republic. Formally ratified in 1788, the American constitution is 233 years old as

of 2021, making it the world's oldest operative written constitution. Comparatively, the Mexican constitution is 113 years old – a relatively old constitution. The original Canadian constitution was created by the British North American Act in 1867 (147 years ago) but was patriated in 1982 to include, among many other things, a Charter of Rights. Canada's new constitution is thus relatively young (just 39 years old), although it represents a somewhat unique case. The Brazilian constitution (the most recent of seven) was ratified 32 years ago and is a good example of the fact that not all constitutions become old ones.⁵ But the point here is that none of these constitutions come close to the American constitutions age – the American constitution is almost antediluvian in this sense.

Philosophical Generality & American Constitutionalism

It is in this context, with a necessary (albeit minimal) lens for American constitutionalism that old constitutions will be investigated: in order to draw out the implications for originalism in those circumstances. But there are very real dangers for such a project, and they need to be addressed before moving forward. Legal philosophy demands a sufficiently general and abstract approach, one that does not base itself on context dependent circumstances relating to particular states, lest it becomes mired in particulars unique to each state and thus fail to offer a sufficient level of generality. Joseph Raz authoritatively reminds us of this in *Between Authority and*

Interpretation:

A tempting suggestion is that the way to construct a theory of the authority and the proper interpretation of the (thick) constitution is to explore further the social, cultural,

⁵ And in fact, old constitutions are extremely rare. Roughly 900 constitutions have been created since 1788, and just 1.5% of them have endured for more than 100 years. Tom Ginsburg and James Melton, "Norway's Enduring Constitution: Implications for Countries in Transition," *International Institute for Democracy and Electoral Assistance*, (2014): 1.

and economic conditions that justify it. Surely they hold the clues to an understanding of the nature and function of the constitution and therefore to its authority and interpretation. But the suggestion is misguided. No doubt such an inquiry will be very valuable. It will not, however, yield the hoped-for results. It assumes that the law, constitutional law at the very least, develops exclusively in response to the relatively stable aspects of the social conditions of the country to which it applies.⁶

American constitutionalism reflects the merit of Raz’s thought here especially well. The unique features of American constitutionalism are more numerous than their general counterparts, and those unique features are without a doubt animated by the social, cultural, and economic conditions underlying the country. Examining originalism in a more general manner in this context is tricky to say the least, but it can be done if we acknowledge a specific focus on the abstract circumstances of old constitutions. In other words, the lens applied here investigates originalism and characteristics of old constitutions in general – it is not *explicitly* tied to American constitutionalism or its unique features in order to take Raz’s warning seriously.⁷

Having said that, I focus on American constitutionalism because, as a matter of conceptual clarity, it is prudent to choose one example and stick with it. Caution must be present in doing so, however, and drawing those nuanced characterizations will need to be done carefully. The thought that “One must always be careful not to confuse what is peculiar to a particular instance of X with what is essential or characteristic of X” is especially important here – I do not wish to highlight the peculiarities of American constitutionalism.⁸ My hope is that my

⁶ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, (Oxford: Oxford University Press, 2009), chapter 13, 326.

⁷ The difficulty involved in this endeavor should be made clear from the start. One might ask how it is conceptually possible to discuss a theory of constitutional interpretation in a general and abstract manner when that theory arose in the singular context of American constitutionalism. As I noted, we are somewhat bound to American constitutionalism – but that does not mean all observations, analysis, and arguments within this project must adhere to that context. This is a subtle distinction, but it needs to be acknowledged. Much of the literature I draw upon here is grounded in American Constitutionalism. Notwithstanding that, my aim is to pull back from the American case whenever possible and focus on the features of old constitutions in Western liberal constitutional democracies.

⁸ Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, (Cambridge: Cambridge University Press, 2006), 12.

thoughts here are general and abstract enough to pertain to any Western liberal constitutional democracy which incurs the challenges that accompany aging constitutional frameworks bring to the playing field. Despite the many abnormal circumstances that animate American constitutionalism, there are many general lessons about old constitutional frameworks that one can learn from its investigation that fundamentally alter the ability of originalism to deploy itself in a normatively legitimate manner.

One final caveat before proceeding. The term ‘originalism’ represents such a vast family of theories that attempts to generalize it in any sort of way are nothing short of hazardous. The definition I will provide attempts to mitigate that fact as best as possible, but I want to emphasize that the focus of this thesis is on the academic theory that originalist proponents defend, and not on originalism as it has played out via its political incarnations (sometimes called ‘popular originalism’). Paying undue attention to popular originalism will only lead us back to the social, economic, and cultural circumstances that animate it, and thus would not be helpful in garnering more general observations about old constitution’s effect on originalism’s normative foundations. With that caveat in mind, we can turn to establish what defines old constitutions before moving onto offer a baseline definition of originalism.

Four Features of Old Constitutions

What is an old constitution, as opposed to a young or middle-aged one? What meaningful distinctions are at play? How can one soundly delineate the boundaries of these different sorts of constitutions? These are all important questions, but I am more interested in clear cut examples of old constitutions and their implications and less interested in pursuing a precise or exact

distinction between young, middle aged, and old ones. My aim, after all, is to scrutinize the nature of constitutions whose considerable age has given rise to a host of problems underlying the normative justifiability and legitimacy of originalism. But how can one do so when we have no definitive sense of what makes a constitution old? I offer a four-part definition that is meant to get the distinction off the ground.⁹ Over the course of this thesis, these four characteristics will be employed to help justify the conclusions I arrive at.

First, aged constitutions are constitutions that are not widely perceived to have explicit ties to their authors that validate their moral authority and legitimacy – old constitutions grow beyond such ties over their long lifespans. Importantly, this claim does not necessitate that the authors are wholly irrelevant to the moral authority of old constitutions; the claim is simply that those authors are no longer perceived to be the primary or direct source of that authority. Due to that widespread perception, old constitutions are not understood by their citizenry to be morally legitimate *solely* due to the democratic consensus that ratified their creation. Those citizens typically believe that it is their own capacity for democratic action (i.e., their ability to amend and alter it) that legitimizes the authority of the constitution. Put differently, an old constitution is morally legitimate and authoritative because control of that constitution is perceived to stem from the people-now, and not because a past supermajority ratified that constitution.

Second, and derivative of the first characteristic, old constitutions are sufficiently old that the generation that witnessed its creation have disappeared – in other words, the people-then are no more, and the people-now constitute the citizenry under the operative force of the

⁹ These four characteristics may get the nature of old constitutions off the ground, but that is all they do. I do not intend for the reader to think that these four characteristics alone make a constitution old or that these features completely capture the nature of old constitutions. This short and to the point list is not intended to be especially comprehensive or complete. Old constitutions are incredibly complex things – I am simply pointing to some of the basic features that identity them in the context of Western liberal constitutional democracies.

constitution. This means that the people-now have no *direct* democratic connection to that constitution; they were not part of the electoral process that formed a government that subsequently ratified that constitution. This condition is complicated by the phenomenon of constitutional amendment, because as we will see, some amendments have the power to transform the very soul of a constitution, and in doing so the people-now have contributed to that constitutional framework – they have participated in the process of constitutional amendment. Nonetheless, we are concerned here with the outright creation or ratification of a constitution, and less so with amendments that (more often than not) only instill negligible changes to a constitution's framework.

Thirdly, old constitutions are constitutions in which the social, economic, political, legal, and cultural conditions that the constitution was originally entrenched under have radically changed in way, shape, and form that could not have reasonably been foreseen by the authors or ratifiers of that constitution. By radical change, I mean the sort of change that accompanies industrialization, globalization, technologization, and more generally the great zeitgeist shifts of culture and morality that occur again and again over time. There are endless examples of these sorts of changes that throw a constitution out of sync with the state and citizenry that it presides over, all of which shape the social, economic, political, legal, and cultural realities that influence our lives. Aged constitutions are thus constitutions whose entrenchment, to whatever degree entrenchment is present, will not just entail a disjunction of values and principles between the people-then and now, but present a radically different *worldview* – in an important sense, they are fundamentally removed from the march of time and its effects.

The fourth characteristic of old constitutions is the gradual development of the constitutional common law.¹⁰ The constitutional common law represents legal cases that are decided by judges and result in precedent being established and gradually expanded over time. What sets the constitutional common law apart from regular common law is that the former specifically involves precedent that concerns constitutional provisions and rights – the legal outcomes of these cases have those constitutional phenomena vested within it. So, the constitutional common law is a body of legal decisions that are based upon the written text of a constitution but exist outside of that text.¹¹ Because old constitutions have long lives and rich histories, they typically also have rich constitutional common law regimes. Studying those regimes reveals how law changes over time in response to the sorts of change inherent in the third characteristic. Those changes can be traced via the common law through judicial doctrine, tests, standards, and conventions that are created over time.¹² The rich history of longstanding

¹⁰ Of course, it has to be said that not all constitutions are situated in a common law legal system, and therefore can have no constitutional common law regime. In a civil legal system, the common consensus is that judge made law does not exist; judges in those systems are applying law found in expansive and detailed civil and criminal codes (this claim is disputed by many scholars, however). The focus of this fourth characteristic is accordingly not one that can truly be said to be a general characteristic of old constitutions. For the purposes of this thesis, then, I limit my analysis to old constitutions that are based in a common law legal system, as is the norm in the majority of Western liberal democracies.

¹¹ The gradual development of the constitutional common law is a complicated phenomenon to which my basic definition here does not do justice. We will explore this characteristic in greater detail in chapter three, but for an introductory understanding of this phenomenon, and for how the constitutional common law is typically understood to function with regard to a written constitution, see David A. Strauss's article "Common Law Constitutional Interpretation."

¹² Judicial doctrines and tests are tools in a judge's toolkit, tools which they utilize to decide, balance, and arbitrate matters of legality. Doctrine and tests of these sorts are typically (but not always) comprised by rules and standards. "Rules are strict requirements that define the answer to a dispute, once the predicate facts are established. A rule is something like 'any subsequent and unauthorized use of another's mark constitutes trademark infringement.' Standards, by contrast, are more amorphous guides to resolving disputes, often listing a set of factors to be considered and balanced." For more on the distinction between these two features of a judicial toolkit and how they contribute to judicial doctrine more generally, see Frank B Cross and Emerson H. Hiller, "What is Legal Doctrine," *Northwestern University Law Review* 100, N. 1 (2006). Constitutional conventions are different: they are not exactly part of the judicial toolkit. Instead, we ought to understand them as phenomena that can impact and influence constitutional law while simultaneously existing outside of constitutional law. More precisely, "These [constitutional conventions] are, in effect, social rules arising within the practices of the *political* community and which impose important, but *non-legal*, limits on government powers." For more on the nature of constitutional conventions, see Wil Waluchow, "Constitutionalism," *The Stanford Encyclopedia of Philosophy (Spring 2018 Edition)*, Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>

constitutional common law is thus unique in that its temporal progression (typically but not always) spells out a story of societal development and the evolution of a transformative people and their political morality. With these four characteristics in mind, we can turn to a philosophical analysis of originalism, and we begin with an (albeit limited) definition that is intended to cultivate an idea of the heart and soul of originalist theory before turning to explicate the specifics of Solum's public meaning originalism.

The Originalist Family Tree

Generally, originalism is a judicial philosophy characterized by the view that the only legitimate way for a judge to interpret a constitution is to pay strict fidelity to the original meaning that constitutional text held at the time it was written and/or ratified. Originalism is thus both a judicial philosophy and a philosophy of constitutional interpretation. It has also been subject to great modifications over its relatively short life. The original originalists, the coalition responsible for the creation of originalism in the United States of America during the 1970's would have a difficult time recognizing many of the forms of originalist theory that exist today. The original originalists approach was characterized by the deference that they paid to state and federal legislation that did not clearly and blatantly violate the requirements of the constitutional text, acting upon the famous distinction made by Alexander Hamilton that the judiciary will have the capacity for neither will or force, only judgement.¹³ This maxim is far from the reality in which originalism finds itself operating in present times. In our contemporary day and age,

¹³ Hamilton, Madison, and Jay. *The Federalist Papers* no. 78. May 28th, 1788. For a comprehensive account of the original originalists, see Eric J. Segall's book *Originalism as Faith* chapter four: The Original Originalists and Their Critics.

originalism is a family of theories, with many popular methods, but no singularly authoritative or paradigmatic approach. Some of the more well-known strands of theory include public meaning originalism, old originalism, new originalism, framework originalism, original methods originalism, original expectations originalism, strict-textual originalism, faint-hearted originalism, original law originalism, and popular originalism.¹⁴

I want to stress that this short list utterly fails to properly exhibit the vastness of the branches of originalist theory that constitute the family tree. Recall that in the introduction, I noted that it is entirely possible that there are hundreds of kinds of originalism. In fact, the family tree has grown so vast that it now includes "...the very people whom some originalists identify as their arch-nemeses."¹⁵ This profound diversity allows proponents of originalism to neatly sidestep critiques aimed at the theory in general by claiming that 'that is not *my* originalism, *my* originalism is different...' The sheer variance of originalist theories and the commitments that are oftentimes unique to each strand of theory is a large part of this sort of argumentative maneuver. For our purposes here, however, this limited example of originalism's variance is sufficient to understand why generalizing originalism is precarious. With that variance in mind, we can turn to public meaning originalism.

Solum and Original Public Meaning Originalism

¹⁴ PMO is the particular strand of theory that his thesis will explicate shortly. For the distinction between old and new originalism, see Keith Whittington's article "The New Originalism." For framework originalism, see Jack Balkin's book *Living Originalism*. For original methods originalism, see John O. McGinnis's article "Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction." For original expectations originalism, see Mark Graber's article "Original Expectations. For strict textual originalism, see "Two Kinds of Originalism" by Steven F. Hayward. For faint hearted originalism, see Randy E. Barnett's article "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism." For original law originalism, see William Baude and Stephen Sachs's article "Grounding Originalism." For political originalism, see Calvin Terbeek's article "'Clocks Must Always be Turned Back': *Brown v. Board* and the Racial Origins of Constitutional Originalism."

¹⁵ D.A. Jeremy Telman, "Originalism: A Thing Worth Doing," *Ohio Northern University Law Review* 42, (2016): 25.

We now know that originalism is properly understood as not just one theory but as a family of theories, all of which are concerned with the proper method of constitutional interpretation. So, while my thoughts will occasionally address originalism generally, the focus of this work will be on a singular strand of that theory, and that strand is Lawrence Solum's public meaning originalism (hereafter abbreviated as PMO). Solum is widely considered to be one of originalism's most philosophically sophisticated advocates and, as such, his work is the best place to ground my analysis – good faith philosophical argumentation should always seek out the strongest example to engage with, and that is my aim in drawing upon Solum's originalism. Additionally, PMO is considered to be a mainstream of originalist thought in recent times. Consequently, I wish to show how even the strongest case that one can make for originalism can be critiqued, and that in the circumstances of old constitutions, even originalism's best defended accounts inevitably fade in their normative justification and appeal. Furthermore, since Solum's philosophical defenses of originalism are among the strongest, if I can show that there are deficiencies in his account, then there is reason to believe that there are the same or greater deficiencies within the numerous other forms of originalism.¹⁶

¹⁶ Even this relatively mild claim must be tempered with the acknowledgement that because there are so many differing sorts of originalism, there are just as many differing sorts of approaches, defenses, justifications, and utilizations. What this means is that the same critiques of originalism may apply to some forms of the theory but not others – that is the variance of originalism at work. An example of that variance might help contextualize the matter. Solum is a formidable originalist scholar, and indeed “Perhaps no American scholar has put more time and effort into describing and evaluating originalist theory than Professor Larry Solum.” Eric J. Segall, “The Concession that Dooms Originalism: A Response to Professor Laurence Solum,” *The George Washington Law Review*, 88, no. 33 (2020): 34 Many contemporary originalists, however, offer a markedly different approach to originalism than Solum's. Those originalists include Mike Ramsey, Michael Paulsen, Steve Smith, John McGinnis and Michael Rappaport to name a few.

Let's begin with a generalized definition of originalism that includes four conditions given to us by Solum. This will prove to be a solid benchmark from which we can distinguish PMO. A theory of constitutional interpretation is originalist in nature if it:

- 1) Accepts the fixation thesis, or the idea that the meaning of the constitutional text is fixed at the time it was ratified.
- 2) Accepts – at the very least – the minimalist version of the constraint principle, or the idea the constitutional interpretation should correspond as closely as possible with the communicative content of the original meaning of the text.
- 3) Accepts that there are coherent and capable methods of interpretative investigation that yield plausible accounts of original meaning/intent/understanding.
- 4) Accepts a level of constitutional determinacy that at a minimum recognizes enough determinacy (of the communicative content of the text) to allow for construction to have meaningful effect.¹⁷

Much depends on how one understands fidelity to the twin theses of fixity and constraint. A theory of originalism will justify either a soft or hard view of the proper method that judges utilize via constitutional review.¹⁸ Put very simply, the soft view understands originalism to be a tool in the toolbox that judges can reach into and utilize in hard cases, or cases that offer no determinative or clear interpretative directive. Conversely, the hard view understands that originalism *is* the toolbox. The number of arguments that can be deployed in favor of either view is enormous. Some of those arguments include the claim that originalism is the better choice

¹⁷ Lawrence B. Solum, "The Constraint Principle: Original Meaning and Constitutional Practice," *SSRN Electronic Journal*, 2017, 12.

¹⁸ I will sometimes use the term constitutional review in this thesis because often judicial review is not situated in a constitutional context, and we are interested in judicial review as it relates to originalism and more specifically, originalism and matters of constitutional law.

because it is a value neutral interpretative method, and that it is categorically not a result orientated jurisprudence. Other arguments hinge on the claim that originalism is the only theory consistent with the idea of a written constitution, or a constitution that respects the rule of law and the separation of powers.

Solum's PMO has a few additional features above and beyond this generalized understanding of what originalism entails. One of these is the endorsement of the public meaning thesis, the thesis that the most coherent and workable account of public meaning is the public meaning of the constitutional text, understood at the time that text or provision was framed and ratified.¹⁹ This public meaning is, well, public – it refers to how an ordinary and competent adult member of the public would have understood the term or text in question at the time of its ratification. How that adult was informed of that term or text does not necessarily have to be from reading the constitution itself either. Consider what Solum has to say on this matter here:

This form of originalism focuses our attention on a wide range of sources. If we want to know what the word commerce meant, we could look at newspapers and diaries that used that word—even if the subject at hand was not the Constitution. Because we are looking for patterns of usage that reveal conventional semantic meanings, the best evidence would be the outcome of large-scale empirical investigation of the ways that words and phrases were used in ordinary written and spoken English.²⁰

Given this acknowledgement, it is important to stress that the public meaning is not the literal meaning of the text – Solum thinks that reliance on the semantic and linguistic factors of the time of ratification *alone* prove to be insufficient. His focus is on the communicative content of the constitutional text, and this content is informed by two factors. The first is the linguistic semantics of the text. Solum combines that factor with what he refers to as contextual

¹⁹ Lawrence B. Solum, "Originalist Theory and Precedent: A Public Meaning Approach," *Georgetown Law Faculty Publications and Other Works*, (2018): 4.

²⁰ Robert W. Bennett, and Lawrence B. Solum. *Constitutional Originalism: A Debate* (Ithaca; London: Cornell University Press, 2011), 10.

enrichment, context that quite literally enriches and deepens the meaning of the linguistic definition in question. The role of this context will be expanded upon in the next chapter. For now, all we need to know is that this enriched context is concerned with information that would have been available to the general public and related to information about the circumstances that led to the ratification of the constitution (one example Solum provides is citizen's knowledge of the basic concept of the common law legal regime in effect throughout the United States).²¹

The communicative content envelops those twin factors in its interpretative methodology. In a sentence, these twin factors are what is needed for a judge to utilize PMO in order to arrive at a decision that is consistent with the principles of fixity and constraint. PMO (because it is a form of new originalism) also requires the interpretation-construction distinction to operate. This distinction will be discussed in detail in the next chapter, but in short, the distinction marks the crucial difference between interpretation, or the act of discovering the meaning of a term or text, and construction, the application of that meaning's legal effect to novel facts and situations. One last feature ought to be mentioned about PMO. As noted above, there is a good deal of variance with regard to how originalists understand the determinacy (or lack thereof) of the constitutional text. PMO operates on the assumption that there is a moderate level of linguistic underdeterminacy, which is why the second factor of the assessment of the communicative content (the contextual enrichment) is so important. The idea is that the enriched context of the semantics will provide an adequate level of determinacy to justify originalist constructions. Now that we have a basic understanding of originalism in general and Solum's PMO in particular, we can begin to demonstrate originalism's normative vulnerabilities as they relate to the nature of old constitutions.

²¹ Lawrence B. Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning," *Notre Dame Law Review* 91, no.1 (2015): 21.

Chapter Two

The previous chapter painted an inchoate picture of originalism and its position within constitutional jurisprudence. A more sophisticated understanding of the theory (and PMO specifically) can now be developed. From there, an analysis of PMO and its relationship with old constitutions can be explicated. Before getting there, however, we need to begin by considering originalism's relationship to historical analysis. Expounding Jack Balkin's work on this very subject is a good start. Balkin has written on constitutional theory and its relationship to history in some detail. In the coming section, I examine a generalized picture of how legal arguments meet historical analysis to set the stage for a deeper look at how that relationship impacts originalism. In particular, I wish to demonstrate an avenue of dismissive rhetoric that lawyers, legal academics, and judges typically utilize to ward off the critiques of historians – rhetoric of the sort that many originalists seem all too comfortable with utilizing.

Balkin on Constitutionalism and Historical Analysis

Balkin's article "Lawyers and Historians Argue About the Constitution" is nothing short of a masterclass for getting an initial but nonetheless informative understanding of the long and hotly contested debate among historians, lawyers, and judges. The article revolves around the place and purpose that the proper use of history has in legal arguments made by lawyers and legal interpretations made by judges – both of which are commonly critiqued by historians at the constitutional level. The story that Balkin tells paints a descriptive portrayal of the way that

constitutional arguments arrive before judges. Every legal case rises from a cause for action, or the initiation of legal proceedings. Those proceedings are fundamentally characterized by the adversarial culture that lawyers wielding legal arguments engage in, including arguments about constitutional law. That culture, Balkin explains, “encourages portraying opposing arguments as incomplete, mistaken, anachronistic, or wrong-headed.”²² This sharply contrasts with the sort of evaluative framework that professional historians are taught to examine history through, a framework that seeks to analyze observational data based upon defensibly reliable sources, and reach carefully established and justifiable conclusions.²³ It does not seek to isolate and warp historical phenomena to establish causality arguments. Rather, as historian Shawn Edwards puts it, “The purpose is to evolve good, structured insights, even if rigorous and precise conclusions cannot be drawn from the historical cases alone.”²⁴ Therein lies another stark contrast between lawyers and historians: the teleological goal of a lawyer arguing a case is to present good and compelling reasons as to why their particular narrative has a claim to legal authority. As Balkin notes, this involves promoting the veracity of their own account and the falsity of their opposing council’s arguments. In other words, lawyers attempt to convince judges of the rigor and clear-cut veracity of their position, and their position alone – an aim that is diametrically opposed to the teleological goal of the historian.

When historians engage with lawyers and legal academics and undermine these sorts of legal arguments, there are two avenues identified by Balkin in which lawyers typically respond.

²² Jack M. Balkin, “Lawyers and Historians Argue About the Constitution,” *SSRN Electronic Journal*, 2020. <https://doi.org/10.2139/ssrn.3670280>, 344.

²³ Of course, the contrast between professions is not so simple. As Balkin notes several times, some lawyers and legal scholars have graduate and doctoral education in history, and some historians have L.L.M. and J.D. degrees - but I think it is a relatively safe assumption that this is the exception to the rule and not the rule itself.

²⁴ Shawn Edwards, *Swarming the Battlefield: Past Present, Future*, “Chapter two: Methodology for Historical Analysis,” *RAND* (1964): 8.

These are the *legal science* and the *usable past* arguments. The legal science argument advances the claim that lawyers and judges are privy to a highly specialized knowledge base, and that historians, because they do not share those special techniques of legal reasoning, in turn lack insights of the sort that characterize this privileged knowledge of the law. I have very little interest in the legal science argument for my purposes here - it is predicated upon a blatantly obvious appeal to authority fallacy. Lawyers, like any professional occupation, are taught a particularized skillset and knowledge base, and that knowledge is typically attained by acquiring a law degree, passing the bar, and practicing law. It's certainly true that this criterion is required for the practice of law. But the legal science argument fails to appreciate the distinction between being accredited to practice law and having that same knowledge without those credentials. Put differently, the argument assumes that there is only one valid way in which one can gain the expertise required to understand the law. Accepting that one can comprehend the law to the same degree that one who has the credentials required to practice it purges the legal science argument of its relevance.

One further point. Balkin is exactly right when he states that this claim is the result of a conflation on behalf of lawyers who cannot even agree with one another on allegedly settled matters of history. "When lawyers try to stiff-arm historians, often what they are actually doing is engaging in long-running disputes with other lawyers who disagree with their interpretive theories, their methods, and their conclusions."²⁵ On this view, the legal science argument deploys a false dichotomy – it is not a contest between historians and lawyers, it is a contest between lawyers who endorse differing philosophies of interpretation that motivate radically

²⁵ Balkin. "Lawyers and Historians Argue About the Constitution," 351.

different readings of history. Accordingly, I will not address it any further. The usable past argument is far more important for my aims here, and so we will discuss it in some depth.

The Veneer Behind the Usable Past Argument

The usable past argument does not brush off the critiques of historians in the same way that the legal science argument does. Instead, it switches gears and attempts to undermine historians and their critiques by highlighting the teleological differences between legal argumentation and historical analysis. The thought goes that historians convolute, complicate, and confound history when arguing about it. Lawyers arguing constitutional cases are required to do the opposite; they attempt to wield historical facts as an instrument of argument, not a tool for furthering analysis. Historians argue to establish historical accuracy, comprehensiveness, reliability, and holisticness. Lawyers argue to establish historical authority (to validate their position or argument). The teleological divide between these aims could not be wider – lawyers seek out definite and undeniable conclusions about the role of history, and historians are far more cautious to approach the claim of objective historical determinacy – because they better understand the immense difficulty in justifying such a conclusion.²⁶

For an explicit example of this teleological divide, consider how Balkin describes originalism and the process of crafting public meaning through historical analysis here:

“Original public meaning” is a theoretical construction, a mediated account of the past that serves the purposes of law and legal theory. This theory of interpretation selects certain features of the past as relevant to legal inquiry, and discards the rest. It takes those features of the past that it deems relevant and reconfigures them for purposes of

²⁶ This claim should be treated with a little caution, however. What this claim is *not* intended to convey is the idea that historians never argue for the superiority of their own position over other historical accounts or perspectives. They do so often – but the way in which they argue for the veracity of their conclusions is much different than the way in which lawyers typically do and acknowledging that fact is important to understanding Balkin’s point here.

a particular theory of law. Then, having selected and reconfigured the past, it dubs the result the “original public meaning” and declares it binding on everyone.²⁷

This leads Balkin to straightforwardly acknowledge that, especially in recent times, originalists are beset by historians who claim that “originalist uses of history are narrow, parochial and anachronistic.”²⁸ On the typical historian’s view, an originalist who endorses the usable past argument comes dangerously close to reducing their entire principled position to absurdity. What the usable past argument is truly saying, at its core, is that ‘for our purposes here, history is too complex to take into account comprehensively – and so we must analyze it differently. Because we have important professional mandates, we have no choice but to selectively examine history and attribute determinacy (and therefore legal authority) to the outcome of that selective examination – because our professional mandate requires us to do so.’

This has always struck me as professionalized arrogance, for the following reason more than anything. The above claim is in direct contradiction with the tired assertion that many originalists still feel justified in touting, the claim that originalism is categorically not a result-orientated interpretative method.²⁹ If an originalist is examining constitutional history selectively, they are not engaged in a result-neutral interpretative project – they are, at every nook and cranny, directing that search with purposive intent. Recall how Balkin describes this process in the previous quotation – the interpreter is *selecting* and *reconfiguring* the past – so how on earth can originalists claim that selecting which parts of history to use and which to

²⁷ Ibid, 366.

²⁸ Ibid, 364-365.

²⁹ Randy Barnett has recently made this claim here: <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> and many theories of originalism are predicated upon it. For my part, I would urge the reader to be especially wary of interpretative philosophies that attempt to masquerade as neutral, because this is simply inaccurate. Judicial deference is neutral – anything outside of deference, in some minimal form, is purposive (even if it is pursued in good faith). This is one key strength, it seems to me, that nonoriginalism enjoys: it can appeal to normative arguments that are of a vastly different nature than originalism can appeal to because it doesn’t try to pretend to be result neutral. At least with nonoriginalism, to steal a line from Barnett, the wolf comes as a wolf; it does not attempt to hide its very nature.

ignore leads to a result-neutral outcome? The whole idea smacks of cognitive dissonance. Originalists who dismiss historians and their critiques regarding this line of thought thus undermine to a large extent the veracity of their own theory. The whole point of originalism, after all, is to avoid adjudicative results that deviate from the constitution and create new law – the sort of judicial activism that the first originalist groundswell was predicated upon preventing.³⁰ Those who identify as originalists thus pledge a measure of fidelity to the constitutional text (a measure which depends on the strand of originalist theory in question). That fidelity must be called into question when originalists dismiss historians’ critiques of their position on the grounds that historical analysis is unnecessarily complicated. An originalist is not a literalist. The search for original public meaning is neither an entirely semantic enterprise nor is it a search that is mutually exclusive with what the past tells us about a matter.³¹ A comprehensive historical accounting can only be removed from an interpretative discovery of original meaning at the cost of the historical legitimacy of that interpretative approach. The idea here is that fidelity to the constitutional text requires fidelity to the history that created the text, fidelity that demands lawyers and judges properly examine that history in the same way historians do; but this is not a view many originalists seem to share.

All of this leads to the thought that the usable past argument is actually a thin veneer for an argument about the purposive past: a story of the past that is designed to support one

³⁰ For an in-depth and wonderfully clear summarization of the emergence of originalism, see Eric J. Segall’s book *Originalism as Faith*, which documents both the rise and the transformation of originalism over the course of the prior fifty years.

³¹ Even utilizing Corpus Linguistics (an emergent qualitative and quantitative linguistic methodology that originalists are rallying around in order to lend credence to the authority and determinacy of the communicative content) does not save an originalist from the context that accompanies that communicative content. For example, Solum is readily willing to admit that the semantic content of a text may heavily depend on the differing contexts it was established within – and it is not clear that corpus linguistics can help in that regard. For a comprehensive and clear introduction to what corpus linguistics may have the potential to do for originalism, see Thomas R. Lee and James C. Phillips 2019 article “Data-Driven Originalism.”

interpretative ideology over another, a past that originalism cherry-picks and thus infuses with purposive intent. The moment that there is a reduction in the vast complexity of historical narrative to make it ‘usable’, the determinacy that a valid historical inquiry would lend credence to begins to disappear. For example, if I take an immensely complicated historical event such as the American founding and reduce it to one or two more or less linear narratives (the sort of narrative that the usable past argument entails, a past that aims to establish legal authority and not historical accuracy) then I have created a purposive narrative. But it is a narrative so completely and utterly divorced from a comprehensive historical accounting that it cannot claim to have historical validity on its side at all. History is *messy*. Somewhat ironically, originalists who believe historical analysis can avoid that messiness are essentially practicing a twisted sort of Dworkinian constructivism. In other words, they are looking at an immensely long and complicated chain of history that embodies the history of a constitution and attempting to fit and justify that history in ‘the best possible light’ (in this case, in a light that validates a narrowly construed analysis of a historical meaning so that it can apply to contemporary matters in a determinately justifiable manner). This is a shifting of the goalposts, so to speak: originalism is trying to level the playing field however possible. Consider the following thought from Jonathon Gienapp, a historian who has written on this exact sentiment:

In other words, originalists have stopped trying to beat historians at their own game—by rewriting the very rules by which that game is played. They seem to have realized that they will never know as much as historians about the Constitution’s origins or historical development, so instead of fighting a losing empirical battle why not stake out different conceptual foundations altogether?³²

That different conceptual foundation is fuelled by the usable past argument. What this sentiment represents is *not* fidelity and faithfulness to fixity and constraint – to have that one needs to take

³² Jonathan Gienapp, “Constitutional Originalism and History,” *Process: A Blog for American History*, March 20th 2017, https://www.academia.edu/32258231/Constitutional_Originalism_and_History.

historical analysis seriously. Originalism's 'fidelity' to fixity and constraint therefore seems to be a purposive devotion. To be clear, I am not contesting that historical facts (and by extension original public meanings) can be ascertained with determinacy. My claim is that legal arguments (that are meant to be justified *because* they are historically accurate) which set aside proper historical analysis and the rigour that accompanies it for the sake of interpretative purposiveness do so at the cost of interpretative justifiability. In turn, this lack of justifiability affects originalism's ability to validate a consistent and coherent principled interpretative methodology. This argument will be expanded upon later in this chapter. For now, it is enough to know that originalist attempts to harness something like the usable past argument ought to be viewed with extreme suspicion. Now we can turn to examine how Solum takes into account the challenges that historians pose for PMO.

Solum on Historical Facts and Public Meaning Originalism

Solum has written on the relationship between historical facts and PMO in great detail, perhaps most comprehensively in an article titled "The Role of Historical Fact in Original Meaning." This article is largely focused on one of the two pillars that the originalist family tree is unified by: the fixation thesis. In chapter one, a general definition of originalism was provided, and a minimalistic definition of the fixation thesis was provided. Explicating that thesis in greater detail will lead to the nuances of Solum's thoughts on the connection between historical facts and originalism. Solum defines the fixation thesis in the following way: "The object of constitutional interpretation is the communicative content of the constitutional text, and that

content was fixed when each provision was framed and/or ratified.”³³ The manner in which Solum uses ‘meaning’ here is very specific: it refers to the communicative meaning, not the purposive (the *motive* of the meaning in a set context) or applicative (the possible *implications* of the meaning) sense of the constitutional text. The communicative meaning concerns the linguistic connotation of the word - what is meant by *invoking* it.³⁴

The constraint principle (the second major principle of the originalist family tree) is different: it is the claim that the content of constitutional doctrines and decisions ought to be consistent and in harmony with the original meaning of the constitutional text. The term ‘consistent’ here implies a matter of degree regarding constraint: different originalist theories will mandate different levels of consistency. So, the fixation thesis applies to the constitutional text itself, and the constraint principle applies to judicial adjudication. In a sentence, the basic idea regarding both theses is that if the text is determinate, then it follows that it is fixed and binding. But we are focused on the fixation thesis here, and not the constraint principle – so this woefully basic introduction will do for now.³⁵ Importantly, the fixation thesis does not require that the fixed meaning of terms and texts are applied in the *exact manner* that their meaning stipulates, and this is where the interpretation-construction distinction comes into play. The impact of this distinction cannot be overstated; it is the lynchpin that is responsible for one of the largest transformations that has impacted originalism since its creation: the rise of new

³³ Lawrence B. Solum, “The Fixation Thesis: The Role of Historical Fact in Original Meaning,” *Notre Dame Law Review* 91, no.1 (2015): 15.

³⁴ For Solum’s distinction on how these three terms differ, see *ibid*, 20-21. A simplistic example ought to make this distinction perspicuous. Take the sentence “No cars are allowed in the park.” The communicative sense of the word ‘car’ here simply invokes the idea of a car. The purposive sense of the word ‘car’ implies that we are talking about vehicles being present or driving inside a park. Finally, the applicative sense refers to a series of possible implications – for example, does the term ‘cars’ here also refer to trucks? Does it apply to vans as well?

³⁵ For an extremely comprehensive account of the constraint principle, see Solum’s 2017 work: “The Constraint Principle: Original Meaning and Constitutional Practice.”

originalism.³⁶ Simply put, the distinction is that interpretation of the constitutional text seeks out its *meaning*, and construction of the constitutional text directs that meaning's legal *effect*.³⁷ So, while the fixation thesis requires that the communicative content of the text is fixed, "the facts to which the text can be applied change over time."³⁸ In practice, this means that PMO relies on historical facts à la linguistic facts to determine the communicative content of the original public meaning of a term or text. In turn, those linguistic facts are subject to semantic fixity, in accordance with the fixation thesis.³⁹ But as we know from chapter one, those linguistic facts are not the only determinant. A second factor is utilized by PMO: the enriched context, or the public context of the framing or ratification of the constitutional text. That context allows PMO to consider information that is removed from and outside of the text itself, giving the interpretation-construction more room to operate. As previously noted, that information includes context that would have been available to the general public. In other words, the information is evidence about the circumstances that led to the ratification of the constitution. Solum details what that context might look like here:

The set of facts can only be established by evidence, but it seems likely that the public would have had access to facts about the American Revolution, experience under the Articles of Confederation, and the general shape of the common law legal regime in effect throughout the United States (and perhaps awareness of regional variations within that regime).⁴⁰

³⁶ See Solum's 2010 article: "On the interpretation-construction distinction." The generalized label of new originalism, which includes Solum's PMO, is characterized by its embrace of the interpretation-construction distinction. For an in-depth and wonderfully clear survey of new originalism, see Keith Wittington's 2004 article: "The New Originalism."

³⁷ In other words, the legal effect represents the specific outcome in a case, an outcome established by a judicial decision.

³⁸ Solum "The Fixation Thesis: The Role of Historical Fact in Original Meaning," 21.

³⁹ *Ibid*, 28. Semantic fixity here is established by what Solum calls "regularities in usage" of the particular term in question.

⁴⁰ *Ibid*, 28-29.

The idea is that when purely semantic analysis proves to be insufficient or underdeterminate, contextual enrichment can act as a reinforcement that will bolster the determinacy of the meaning of a historical term or text.⁴¹ Taken together, the linguistic facts and the enriched context (AKA the public context described above) represent the core of Solum's thoughts on the proper role of historical analysis utilized by PMO. Now, in itself, the fixation thesis is not particularly radical. Much of the criticism that has been leveled at originalism in general in the past is mistakenly assumed to impact this thesis, but this is not correct. Most constitutional scholars agree that there must be some level of fixity – they simply disagree on a meta level about to what degree there is a fixed meaning to be found. Disagreement on the degree of fixity is caused by disagreement about the extent to which the constitutional text is vague, open-textured, or irreducibly ambiguous. But the question of whether that fixed meaning (putting aside whether it can be discovered) ought to be an authoritative factor in constitutional adjudication is the domain of the constraint principle. The point of this brief examination was to determine how Solum thinks PMO and historical analysis relate to one another, and the answer is that historical analysis ought to be based upon linguistic facts paired with the enriched context of the constitutional text. Crucially, because PMO draws in historical context, it follows that PMO is susceptible to the dangers posed by the usable past argument. So, we need to address how the usable past argument can impact PMO's reliance on the interpretation-construction distinction. To ascertain that, we need to know a little more about the distinction itself.

⁴¹ To give another example, imagine that an originalist wanted to argue that one particular original meaning of the original American constitutional text is determinate, and that they have evidence provided by a successful analysis a la corpus linguistics that points to multiple meanings of that text. The idea is that the enriched context (in this case, how the American public understood that original meaning at the end of the Philadelphia Convention), can provide an additional measure of determinacy by providing evidence that verifies one meaning over the others as the historically accurate (and therefore legitimate) meaning.

Solum on the Interpretation-Construction Distinction

The previous section outlined how the fixation thesis mandates interpretation of a given text ought to occur according to Solum. To fully understand how the interpretation-construction distinction operates (and to understand how originalists claim the distinction supports their position) the role of construction needs to be addressed. Judicial construction occurs when judges take the semantic meaning of a text and give it legal effect in the specific context of the case that gave rise to the legal proceedings in question. Oftentimes, novel facts and situations not previously cogitated or encountered will necessitate construction. Judges in a common law constitutional system typically do so by relying on doctrine and/or case law that assists the judge in reaching a decision. Crucially, this involves judicial action that moves past pure translation, as Solum notes here: “We can call the zone of underdeterminacy in which construction (*that goes beyond direct translation of semantic content into legal content*) is required for application ‘the construction zone.’”⁴² The function of a construction zone (for PMO) is to harness canons of construction that guide judges in their adjudication in such a way that connection to that original meaning is retained.⁴³ Solum details this process here:

It seems obvious that the linguistic meaning of the text is (at the very least) an important consideration in the development of constitutional doctrine. So long as the semantic content of legal texts contributes (in some nontrivial way) to legal content, thereby making a difference to the legal effect of the texts, the distinction between interpretation and construction is at least relevant to legal practice.⁴⁴

⁴² Lawrence B. Solum, “The Interpretation-Construction Distinction,” *Constitutional Commentary* 27, no 95 (2010): 108. Emphasis mine.

⁴³ Canons of interpretation/construction (which are also sometimes called modalities) are different justifications for reading a constitutional text or term in a particular light or lens. The canons differ in their approach to these justifications. For example, the textualism canon is different than the moral reading canon, just as the national ethos modality differs from the honored authority modality. For an introduction regarding the modalities/canons of interpretation, see Jack Balkin’s article “Arguing about the Constitution: The Topics in Constitutional Interpretation.”

⁴⁴ *Ibid*, 115.

This move seems, *prima facie*, to undermine the fixation thesis, but as I noted earlier, that is not the case; construction occurs under the guise of constraint, not fixity. Importantly, because the fixity of the interpreted text remains the same but the application changes, originalist judges who employ construction cannot *truly* claim to maintain a result-neutral position. This is true of all judges in common law legal systems: at least in some minimal sense, the result of a case will factor directly upon the legal effect the judge in question deems to be the most appropriate one to pursue, and that in turn depends on their judgement of which sort of canon of construction to utilize. This is why I referred earlier to the general claim that originalism is not a result-orientated interpretative method as a tired one – embracing the meaning versus effect distinction (which all new originalist theories do, to the best of my knowledge) blows that claim straight out of the water.⁴⁵

Solum does not try to get around this – in fact, he explicitly acknowledges the accuracy of the above claim here:

Because interpretation aims at the recovery of linguistic meaning, it is guided by linguistic facts – facts about patterns of usage. Thus, we might say that interpretation is ‘value neutral,’ or only ‘thinly normative.’ The correctness of an interpretation does not depend on our normative theories about what the law should be. But construction is not like interpretation in this regard - the production of legal rules cannot be ‘value neutral’ because we cannot tell whether a construction is correct or incorrect without resort to legal norms. And legal norms, themselves, can only be justified by some kind of normative argument.⁴⁶

Of course, this admission in itself does not lead to the much stronger acknowledgement that the utilization of construction zones inevitably produces decisions based upon the subjective

⁴⁵ The immediate response to this claim is that there is a meaningful difference between an interpretative method that is value-neutral and one that is result-neutral. I tend not to put much stock in this distinction. Judicial values (assuming they are acted upon, consciously or otherwise) produce results – the two are concordant.

⁴⁶ *Ibid*, 104.

political morality of the judge issuing the opinion. But that isn't the worry here. My concern is that if PMO cannot adequately justify how the interpretation-construction distinction validates its legitimacy criteria, then originalist judges are no better than any other judge when they create new legal effects (and thereby new law) via their rulings. My concern is thus with what occurs in between the interpretation of meaning and the application of effect. This is a concern that ultimately rests on how one views the efficacy of the interpretation-construction distinction for the goals of PMO.

The Interpretation-Construction Distinction and Discretion

We are concerned here with the nuances that differentiate meaning from effect. We know that interpretation of a text determines semantic meaning, whereas construction of a text determines legal effect (i.e., the actual result of the judicial decision, the implementation of which will affect the parties involved in the case and set a precedent). All well and good. Only constitutional adjudication that is extremely clear cut and determinate can operate without construction, after all, and the meaning versus effect distinction existed in constitutional theory long before originalism did; making the relevance of the interpretation-construction distinction uncontroversial.⁴⁷ What is decidedly controversial, however, is the degree to which novel legal effects constructed from an original public meaning can diverge from that meaning's original effect without testing the practical limits of the interpretation-construction distinction. Put differently, the question is whether an original meaning can (in a manner justified by an accurate

⁴⁷ Solum claims that the actual emergence of the interpretation-construction distinction as it was recognized in scholarly work occurred in the first half of the nineteenth century in the work of Franz Lieber. He makes that claim here: Lawrence B. Solum, "Legal Theory Lexicon: The Interpretation-Construction Distinction," Legal Theory Blog, February 5th, 2017.

historical recovery of the term or text in question) contribute to a legal effect applied to increasingly novel circumstances and still retain a connection to that original public meaning.

Some originalists try to circumvent this question by claiming that there are determinate constraints that can be utilized by judges to ‘bind’ a new effect to its original public meaning. By going down this route, these originalists accept that there is a gap between original meaning and legal effect and double down on the claim that the mere existence of that gap is not an issue. In other words, they claim that the existence of the gap does not logically entail the subjective nature of the gap – there may be straightforward avenues in which original public meaning A leads to novel legal effect A instead of novel effect B or C. If this is correct, the interpretation-construction distinction provides something much more than just symbolic value to PMO: it has practical value. If this is incorrect, however, then Solum needs to explain why an originalist judge would be acting in a more normatively legitimate manner than a judge doing otherwise. PMO is reliant on the interpretation-construction distinction to work. If it cannot do what PMO asks of it, then originalist judges are no better than any other judge when they create new legal effects (and thereby new law) via their rulings because there is no historical evidence that substantiates a historically determinant link between an original public meaning and the application of its novel legal effect.

My goal here is to develop a critique of the interpretation-construction distinction as it is utilized by PMO, and the focus of that critique will concern judicial discretion. The degree to which judicial discretion is present is relevant because the characteristics of old constitutions will test the ability of the interpretation-construction distinction to genuinely maintain a reasonable level of connection between the interpretation of original public meaning and the application of novel legal effect. If one can show how a lack of connection can readily occur, it represents a

serious problem for PMO's claim to normative justification and legitimacy: without justified connection, it is not the original public meaning guiding construction – it is judicial discretion. To begin, we need to break down what the issue is for the interpretation-construction distinction as it relates to PMO. Originalism makes use of this distinction by necessarily maintaining that it is not purely symbolic, that there is a practical and normatively desirable function the distinction has for judges deciding constitutional law cases. That practical and normatively desirable function is the elimination of judicial discretion.

There are no assurances that this is the case when originalism is situated in the context of old constitutions. Recall the third characteristic of old constitutions: the radical shift of the social, economic, political, legal, and cultural circumstances of a constitutional state. The passing of significant periods of time throws a constitution out of sync with those circumstances, oftentimes to a significant degree. These zeitgeist shifts require that the interpretation-construction distinction work overtime to retain its practical and normative desirability. Should it fail, the ability of an original public meaning to maintain a level of justified connection to the novel facts and situations that judicial construction will apply it to is tenuous and fragile. If the distinction cannot meet Solum's criteria (the criteria that the semantic content of the original public meaning must contribute "in some nontrivial way" to the legal effect) then it is symbolic.⁴⁸ If it is merely symbolic, then it is not the crutch that originalism treats it as – it cannot normatively justify a principled commitment to PMO. The point here is that for originalism to be normatively legitimate in the circumstances of old constitutions, the interpretation-construction distinction needs to be something *more* than merely symbolic. It needs to provide a justifiable level of connection between meaning and effect that PMO requires to be effectual. If it cannot do so, then

⁴⁸ Lawrence B. Solum, "The Interpretation-Construction Distinction," *Constitutional Commentary* 27, no 95 (2010): 108.

originalist judges are relying on an entirely symbolic distinction to justify judicial constructions, and it is not at all clear that those radical effects correspond to the original meaning in question. What, then, is the driving force of those constructions? The answer is judicial discretion. When judicial construction is repeatedly applied in circumstances so novel that the constructions simply do not relate to the original meaning in any reasonable form, originalism runs out of steam and judicial discretion – the antithesis of originalism – kicks in.

Judicial Discretion and Transmutation

There are two issues for PMO that can arise within old constitutional regimes that need to be conceptually distinguished before moving forward. The first is the worry of judicial discretion. The thought is that because old constitutions bring increasingly novel facts, situations, and circumstances into play, the number of legal effects that can occur based on those factors massively increases. This is where the worry about discretion enters the picture: if it is not clear which legal effect ought to be applied, and reasonable people will disagree over which legal effect is the correct one (which presupposes that the original public meaning is not determinate in pointing to one construction over all the others) then judicial discretion as a matter of necessity enters the picture. To retain normative legitimacy, PMO needs to produce a coherent approach to construction zones that emphasizes the importance of properly justifying constructions of the communicative content without crossing that line and involving judicial discretion. To do that, it must provide a justified and determinate argument that ascertains why one legal effect ought to be chosen over all other existing possibilities. If PMO can do so, it

avoids the accusation that the existence of the original meaning is trivial and symbolic to construction.

That is the first issue. The second issue involves judicial discretion as well but differs enough to warrant distinction from the first issue. This second issue is the possibility of the transmutation of the original public meaning. This idea needs clarification. The translation of an original meaning to a legal effect is a process wherein the communicative content (the linguistic facts and the enriched context) contributes in a non-trivial way to the rendering of the legal effect. In other words, the connection between the original meaning is still constraining the outcome of the legal effect in a non-trivial manner. Transmutation is different. To transmute something is to fundamentally alter its nature. The transmutation of communicative content – conspicuously – *communicates different content altogether*.

Transmutation poses an even greater problem for PMO than judicial discretion does alone. When a constitution becomes sufficiently old, the range of novel legal effects that will need to be constructed runs the risk of becoming so untethered to the original public meaning that the meaning is original in name only: its communicative content is contributing little or nothing to the novel legal effects. This is the phenomenon of transmutation. We reach a point where the original meaning has, in practice, transformed into a new meaning; one more consistent with the string of constructions that have taken place over the years than the original fixed meaning. Keep in mind that for the purposes of PMO, the interpretation-construction distinction must ensure that a novel legal effect retains some connection (a connection that can be historically warranted and therefore justifiably correlated) to the original meaning of the constitutional text in question. If it does not, then the interpretation-construction distinction is incapable of the sort of constraint that PMO requires of it. We already know that Solum affirms

the fact that construction moves past translation.⁴⁹ What we need to establish now is why construction in old constitutions may oftentimes be transmutation, and this gets a little complicated. Consider a situation where a legal effect is no longer a translation of an original meaning and is instead a transmutation of that meaning. When this occurs, an intrinsically valuable part of the binding connection (*i.e., the constraining feature*) provided by the original meaning is lost. It is lost because one cannot reasonably connect a legal effect that has no semblance of justified connection to an original meaning without the very nature of the communicative content of that original meaning being lost. A novel legal effect cannot be constructed from an original meaning if that construction cannot be justified based upon the communicative content of the original meaning. In other words, when transmutation occurs, to obtain something new (a novel legal effect based upon novel circumstances) something must be lost; and what is lost is the connection to the original meaning that was supposed to constrain construction.

I've been drawing upon the American constitution throughout this thesis, so it makes sense to utilize an example from that constitution. The Second Amendment reads that "A well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Based on this amendment, let's take an (admittedly) overly simplistic example and break down how transmutation renders PMO's use of the interpretation-construction distinction normatively unjustified. Imagine that a case comes before the Supreme Court of the United States (SCOTUS), a case in which one party argues for a construction of the Second Amendment that results in the constitutional right to carry a high-powered assault rifle outside of the home for the purposes of self-protection (so, to increase the scope of the second

⁴⁹ See page 32 for a quotation from *Solum* affirming this claim.

amendment right to carry arms unconnected to service in a militia). For the purposes of this one-dimensional example, set aside the bitterly debated question of whether the linguistic ordering of the commas found in the text of the second amendment actually link the right to bear arms as part of a militia with the individual right to bear arms for the purposes of self-protection.⁵⁰ A translation of the term ‘arms’ here that a PMO utilization of the interpretation-construction distinction could justify might be a class of guns that are reasonably close to the sort of arms used in 1791 (the year the second amendment was ratified, and thus the year that the fixation thesis is concerned with according to PMO). One of the most commonly touted examples of the sort of arms available during 1791 is the musket, or perhaps the flintlock pistol – both primitive ranged weapons.⁵¹ The question becomes how could a court construct a legal effect based on the communicative content of the Second Amendment and apply it in a *non-trivial fashion* to modern day weaponry? A low-powered hunting rifle with limited range and ammunition capacity may be a justifiable utilization of the interpretation-construction distinction here: it would be a construction that retains a reasonable connection to the original public meaning of arms in 1791 applied to modern day facts and circumstances. A transmutation of the term ‘arms,’ however, might argue for a construction that links the primitive sorts of rifles and pistols used in 1791 with any sort of weaponry – such as a high powered assault rifle of some sort, a gun capable of firing thousands of rounds in just a few minutes.⁵²

⁵⁰ For a concise review of the positions of the collective and individualistic second amendment right interpretations, see Saul Cornell and Nathan DeDino, “A Well Regulated Right: The Early American Origins of Gun Control,” *Fordham Law Review* 73, no. 2. (2004): 487-488.

⁵¹ See, for example: “But in reality, centuries of technological stagnation followed the invention of the first gun: for example, the eighteenth- and nineteenth-century ‘Brown Bess’ flintlock musket remained almost unchanged during its use by the British Empire over the course of more than a century. Early muskets and their predecessors had slow rates of fire and poor accuracy and reliability, and thus did not always ensure battlefield superiority over arrows, edged weapons, and hand-launched missiles.” Victor Davis Hanson, “The World’s Most Popular Gun: The Long Road to the AK47,” *The Centre for the Study of Technology and Society*” no. 34 (2011): 140.

⁵² Because this example is a one-dimensional one intended to demonstrate a point about the limits of the interpretation-construction distinction, we must also set aside the well documented historical analysis that points to

The disconnect between this latter comparison and the guns that existed during the era of the Second Amendment's original public meaning of the term arms is a blatant one. Arguing that the original public meaning of the term 'arms' found in the Second Amendment can be reasonably connected to a high-tech modern assault rifle seems to be a ludicrous reach for PMO. To argue otherwise is to straightforwardly admit that the original public meaning of the term arms and the communicative content it entails is *not* constraining the application of this new legal effect to the degree PMO deems legitimate. The construction based on that original public meaning becomes A) entirely trivial and B) merely symbolic, and this is the case because the original public meaning is incapable of constraining legal effects that are based on facts and situations that are so far removed from the original public meaning. The example of the low-powered hunting rifle is an instance of translation; the latter example (the assault rifle) is an instance of transmutation. There is no argument (derivable from the kind of linguistic analysis and historical arguments PMO requires for justification) capable of validating a claim that the sort of arms which Benjamin Franklin famously decreed were more difficult and slower to use than the bow and arrow could retain a non-trivial connection to most kinds of modern-day weaponry – let alone an assault rifle capable of firing thousands of rounds of bullets in a few short minutes.⁵³

I want to be clear that this line of thought only applies to the specific legitimacy criteria that PMO is built upon. It's important to keep in mind the variance of originalism and the

veritable mountains of evidence regarding the claim that "A wide range of gun regulations, including safe storage laws; time, place, and manner restrictions; and even prohibitions on certain classes of weapons have deep roots in American history stretching back before the American Revolution and extending forward in time long after the Second Amendment was adopted." Saul Cornell and Nathan DeDino, "A Well Regulated Right: The Early American Origins of Gun Control," *Fordham Law Review* 73, no. 2. (2004): 516. For far more comprehensive critiques of second amendment originalism, see Daniel A. Farber "Disarmed by time: The Second Amendment and the failure of Originalism" as well as Jack N. Rakove "The Second Amendment: The Highest Stage of Originalism."

⁵³ Ibid.

differing legitimacy standards each theory affirms. For PMO, though, proper application of the interpretation-construction distinction can justify construction in zones of underdeterminacy based on the communicative content of the constitutional text and that content's capacity to justify constrained meanings of what the text meant in a fixed time period. Solum's PMO must therefore show how that communicative content can be justified via the interpretation-construction distinction without incurring transmutation of the constitutional text. In other words, PMO must show that the fixed meaning of the term or text in question can be justifiably applied via legal effect in a novel situation *without* losing connection to the original public meaning. Let's return to our second amendment example with that in mind. As I pointed out just now, there is probably a PMO argument that could justify the right of an American citizen to own a low powered hunting rifle somewhat similar in capacity to the sorts of rifles that existed in 1791 for the purposes of protection. But the same cannot be said for an assault rifle – if one posits that the American people, in the year 1791, used the word 'arms' to refer to a lightweight, portable, long range, and extremely accurate gun capable of firing thousands of bullets in mere minutes, one is engaging in transmutation.⁵⁴ There is no way PMO could justify such a conclusion based on its own legitimacy criteria. The transmutation example is easy to imagine applying to many things in the American constitution – that is partly why I have described the American example as the quintessential form of an old constitution. A good example of this sort of thinking is *District of Columbia v. Heller*, and I am far from the first academic to point out that Heller is

⁵⁴ This emphasis on the dissimilarity of modern day machine guns and the second amendment has also been reached (albeit on vastly different grounds) by Evan Bernick and Randy Barnett here: "Thus, for example, a ban on those 'arms' that create an unreasonable risk of harm to innocent third parties even when properly used in self-defense may well be consistent with the original spirit of the Second Amendment, given the great variety of available arms that do not create such a risk. Under this implementing doctrine, if fully automatic "machine guns" that can 'spray' bullets by holding down the trigger create an unreasonable risk of harm to innocent third parties when properly used in self-defense, then such weapons may constitutionally be banned." "The Letter and the Spirit: A Unified Theory of Originalism," *Georgetown Law Faculty Publications and Other Works* 107, no. 1, (2018): 40.

replete with exactly the sort of law office history that was discussed at the beginning of this chapter.⁵⁵

The idea of transmutation, then, is based on judicial discretion being the impetus for constructions (as opposed to properly justified and historically determinant arguments about original public meanings). But it is not *just* judicial discretion happening when transmutation occurs. The probability of transmutation grows in tandem with the number of novel legal effects that are constructed, because those new legal effects slowly insinuate that the original meaning has (over time and through repeated application) transformed into a new meaning that reflects the essence of all the constructions that have taken place over the years.⁵⁶ Think of this process as the sorites paradox made tangible.⁵⁷ For every novel legal effect derived from an original

⁵⁵ “Moreover, *Heller* ignores that whatever meaning the Second Amendment may have had when it was adopted in 1791 cannot simply be transposed to the present.” Jeffery M. Shaman, “The End of Originalism,” *San Diego Law Review* 47, no. 83 (2010): 108. Also see: “The indisputable truth is that guns today bear as much resemblance to the guns of 1791 as the cannons used by the Continental army bear resemblance to modern bombs dropped from drones. Yes, we must apply general aspirations like free speech principles to modern inventions like the internet and yes we must apply the commerce clause to airplanes, but how to do that will not be aided by evidence from 1791. The same is true for the balance between gun rights and gun safety.” Eric J. Segall “Gun Control, the Second Amendment, and Originalism’s Folly,” *Dorf on Law*, May 17, 2021, <http://www.dorfonlaw.org/2021/05/gun-control-second-amendment-and.html?m=1> Also see Sandy Levinson, “Some preliminary reflections on *Heller*,” *Balkanization*, June 26th, 2008. “If one had any reason to believe that either Scalia or Stevens was a competent historian, then perhaps it would be worth reading the pages they write. But they are not. Both opinions exhibit the worst kind of “law-office history,” in which each side engages in shamelessly (and shamefully) selective readings of the historical record in order to support what one strongly suspects are pre-determined positions. And both Scalia and Stevens treat each other—and, presumably, their colleagues who signed each of the opinions—with basic contempt, unable to accept the proposition, second nature to professional historians, that the historical record is complicated and, indeed, often contradictory.”

⁵⁶ I don’t intend for the reader to think that Solum has not considered this line of thought already. Two arguments that are similar in nature to my own are the aridity argument and the reductionist argument, and Solum addresses those arguments here: Lawrence B. Solum, “Originalism and Constitutional Construction,” *Fordham Law Review* 82, (2013): 408-409 and 477.

⁵⁷ The sorites paradox is an old philosophical problem that originated in philosophical antiquity. The basic idea is this: when vague language is used, that vagueness prevents clear delineation of conceptual boundaries. Those boundaries are important because they provide specification, and thus precision. Put differently, “‘Bald’, ‘heap’, ‘tall’, ‘old’, and ‘blue’ are prime examples of vague terms: no clear line divides people who are bald from people who are not, or blue objects from green (hence not blue), or old people from middle-aged (hence not old). Because the predicate ‘heap’ has unclear boundaries, it seems that no single grain of wheat can make the difference between a number of grains that does, and a number that does not, make a heap. Therefore, since one grain of wheat does not make a heap, it follows that two grains do not; and if two do not, then three do not; and so on. This reasoning leads to the absurd conclusion that no number of grains of wheat make a heap.” Dominic Hyde and Diana Raffman, “Sorites Paradox,” *The Stanford Encyclopedia of Philosophy*, (*Summer 2018 Edition*), Edward N. Zalta (ed.). The

public meaning, there will be another just slightly less connected to that original meaning, but the difference between the two hardly seems noticeable. But then more and more legal effects are constructed, each one slowly growing more and more unconnected to the original public meaning (and thereby entailing more and more discretion each subsequent construction) and on and on it goes. Over time, accurate and comprehensive historical analysis of the original public meaning will begin to have less and less connection to those legal effects. What is guiding those effects instead is judicial discretion that has run wild through a series of increasingly illegitimate constructions. So, when transmutation enters the picture, insisting that the original meaning is anchoring a novel legal effect becomes more and more trivial and symbolic – a different meaning is now guiding construction. This isn't to say that transmutation implies that *all* judges who utilize originalist methodology will transmute the constitutional text – it is only pointing out that it is very likely to happen given the challenges that old constitutions pose for the efficacy of the distinction as it is used by PMO.⁵⁸ And if transmutation is happening, PMO doesn't have the legitimacy-based constraint on judge's construction that it claims to, which means its normative legitimacy goes right out the window. That is the problem with originalism: the bar it sets for legal legitimacy is extremely high. When the theory must contend with the challenges old constitutions bring to the table, it will often struggle to reach it – and if it isn't meeting that high bar, it isn't normatively justified in the way it claims to be. The nature of old constitutions makes this likely to happen, which is why the usable past argument is so important to remember here: in the circumstances of old constitutions, myopic distortions of history may well become the only way to reach the bar.

sorites paradox is quite relevant to constitutional construction in this regard – just consider, for example, how important the word 'reasonable' (a vague term if there ever was one!) is to American constitutional law.

⁵⁸ In other words, with the specific teleological goal that originalism relies on the distinction to achieve, which is an outcome that is harmonious with (and therefore justified by) the constraint principle.

Countering the Sense-Reference Distinction

We aren't done here just yet. There is a further distinction that needs to be addressed to justify this argument. The sense-reference distinction is a philosophical topic, primarily relevant to the philosophy of language. In a sentence, the heart of the sense-reference distinction (in the context of constitutional law) is that "the sense of a constitutional expression is fixed at the time of the framing, but the reference is not, because it depends on the facts about the world, which can change."⁵⁹ It should be fairly obvious why we need to address the sense-reference distinction: it is intimately connected to the idea of the interpretation-construction distinction, and one can understand the interpretation-construction distinction to be the constitutional counterpart of the philosophical sense-reference distinction.

Drawing on the sense-reference distinction, a potential retort to my previous argument might look something like this: The sense-reference distinction poses that the original public meaning of the term 'to bear arms' justifiably includes assault rifles because assault rifles are a referent of the original public meaning of the term 'arms'. On that logic, one can argue that the original public meaning is doing more than trivially contributing to the assault rifle example. One can argue that 'to bear arms' means – and meant in the 18th century – to carry a weapon, and an assault rifle is a weapon. Thereby, there is no judicial discretion involved in constructing a legal effect pertaining to an assault rifle based on the original meaning of the term arms found in the Second Amendment. Here is why this rebuttal doesn't carry out. We know that for PMO the communicative content of the original public meaning must contribute in some nontrivial

⁵⁹ Christopher R. Green, "Originalism and the Sense–Reference Distinction," *St. Louis University Law Journal* 50, (2006): 560.

way towards the legal effect to be justifiably constrained, and therefore legitimate. But the criterion of triviality for PMO is intimately connected to the fixed historical and linguistic facts about the constitutional text. Does the referent retain a connection to those facts expressed by the communicative content? If it does, then judicial construction is justified under PMO. If it does not, then construction is not justified. In the assault rifle example, reasonable people will disagree over whether the original public meaning of the term ‘to bear arms’ is a trivial contribution to a construction involving an assault rifle – *but there is nothing in the text that legitimates one construction over another* (and this is where judicial discretion enters the picture). So, one can admit that the sense-reference distinction is conceptually valid while also pointing out that it does not by itself justify PMO judicial construction in the assault rifle example.

This argument carries out *not* because I’ve presented a case that overcomes the sense-reference distinction objection. It is because Solum’s criteria for construction under PMO sets a higher standard of justification that the sense-reference distinction can establish on its own merits. Solum’s non-triviality condition for properly justified constructions requires more than just showing that a legal effect is a referent of a sense (i.e., the original public meaning). It requires showing that the communicative content of the original public meaning is retaining a historically and linguistically justified connection that is contributing in a non-trivial fashion to the legal effect (the referent). If it can prove that, then it is constraining construction legitimately - but the sense-reference distinction alone does not prove that. One last caveat on this matter. One might think, as Christopher Green once put it, that “...the philosophical viability of the connotation–denotation distinction is surely decisively relevant to the law’s use of that distinction. If a distinction really does not work when philosophers think carefully about it in

their armchairs, it will not work any better when judges think carefully about it in their chambers, as they write appellate opinions.”⁶⁰ There is some accuracy to that statement, to be sure. “Law and philosophy are close cousins” after all.⁶¹ But when considered in the specific context of my arguments here, I have to disagree with Green.

To be clear, I agree that the sense-reference distinction is conceptually valid, and so I have no problem agreeing that its philosophical viability is relevant to the law’s use of that distinction. It’s just not decisively relevant to the justifiability requirement of Solum’s PMO. Relevance in ‘law’s use of that distinction’ is an incredibly general statement; it could mean many things. This is not the case for justified and legitimate construction under PMO: it is a very exact standard with a very strong justifiability requirement. The lesson here is that PMO’s legal legitimacy standard hinders the theory’s valid application in the context of old constitutions. One has to wonder how judicial discretion could *not* enter the equation when a judicial philosophy asks so much of judges. The communicative content of the constitutional text contains so much more information than just the sense-meaning of a particular term or text provides, so faithfully following the requirements of PMO seems to make the sense-reference distinction ineffectual. A PMO judge ought to be much more concerned with what the communicative content is *actually revealing* and less concerned with the abstract connection the sense-reference distinction insinuates. The idea is that if the communicative content is revealing facts, it is in the same stroke setting the boundary for what can and cannot be justified via judicial construction. The facts to be found in the communicative content will constrain judges to a

⁶⁰ Ibid, 579.

⁶¹ For the curious reader, Les Green persuasively elaborates on this sentiment here, and emphasizes why those interested in the law also ought to be interested in what a philosophical appraisal of the law has to offer. Les Green, “Why Study Jurisprudence?” *Semper Viridis*, August 30th 2020. <https://ljpgreen.com/>

greater degree than the sense-reference distinction alone could – the distinction is thus a weak counterargument when we are discussing judicial discretion and transmutation.

The Interpretation-Construction Distinction's Failings and PMO

All of this is not to say that the interpretation-construction distinction is worthless, not at all. The claim is simply that in the circumstances of old constitutions and with the specific aims of PMO in mind, the distinction will oftentimes be trivial and symbolic, and this is not the same as saying the distinction has no worth whatsoever. It is not unsound, but it cannot pull off the massive task that PMO expects of it – it cannot prevent judicial discretion in hard cases in which novel legal effects are required. All of this revolves around the condition that Solum attaches to the value of the interpretation-construction distinction for PMO: “So long as the semantic content of legal texts contributes (*in some nontrivial way*) to legal content... the distinction between interpretation and construction is *at least relevant* to legal practice.”⁶² That is exactly the problem here: there will oftentimes be very little relevance – if any – to be found. In the circumstances of old constitutions, and in the interests of justifying originalist methodology, the distinction is a trivial one. In other words, it has the sort of value that PMO needs it to provide only when it is wholly isolated in world of ideal theory, a world wherein determinate and sound derivations of effect from original meaning can occur, over time and regular utilization, without transmuting that meaning. When we consider the importance of this issue as it relates to the practice of constitutional law and PMO’s ability to deal with contemporary constitutional questions and issues of the utmost importance, the cornerstone of PMO rests on very shaky

⁶² Lawrence B. Solum, "The Interpretation-Construction Distinction," *Georgetown Law Faculty Publications and Other Works*, (2010): 115. Emphasis mine.

ground indeed. The ground is shaky because the point of originalism's use of the interpretation-construction distinction is that it is supposed to constrain construction and prevent discretion, and there are no guarantees that PMO can do so within an old constitution without transmuting the original public meaning of the constitutional text. That shaky ground may very well imply that legal scholars who claim that there are no true differences between living originalism and originalism are correct – we are splitting hairs over a theory that is justified in large part by reference to a distinction that fails to reveal definite differences between originalism and living constitutionalism.^{63 64 65}

Solum has a response for this sort of argument. He writes that “The normative justifications for originalism (legitimacy and the rule of law) will counsel methods of construction that minimize judicial discretion and forbid judges from deciding specific constitutional issues on the basis of the judge's ideological views and political preferences.”⁶⁶ My specific issue with this reasoning is that it seems, on its face, illogical. Recall that Solum admits that judges must employ normative considerations via construction but maintains that an originalist judge's fidelity to legitimacy and the rule of law will intervene to prevent ideology or preference to enter the picture. The problem with this is that different perspectives regarding

⁶³ The term ‘living constitutionalism’ refers to a family of theories that many consider to be in direct opposition to originalism. Living constitutionalists endorse a range of judicial philosophies which place a greater burden on judges interpreting the law. More specifically, living constitutionalism is based upon the idea that theories of interpretation such as originalism and textualism will sometimes be insufficient and limited. Another central tenant of living constitutionalism is a belief about the nature of constitutions: the belief that constitutions are not rigid and dead documents. Instead, constitutions ought to be understood as dynamic entities capable of justified flexibility that allows them to respond to changing circumstances. Three notable proponents of living constitutionalism are David Strauss, Ronald Dworkin, and Wil Waluchow.

⁶⁴ Once more, Solum has considered this thought in exemplary detail and has produced a coherent response. The conclusions he arrives at on this subject are far too complex to attempt to charitably summarize here, but to see how Solum handles this topic, see his article “Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate.”

⁶⁵ For an article that affirms and stresses this precise point in response to Solum, see “The Concession that Dooms Originalism: A Response to Professor Laurence Solum” by Eric J. Segall.

⁶⁶ Laurence Solum, “‘Four Posts Replying to Dorf on Originalism’ Part Two: Determinacy,” Legal Theory Blog, August 26, 2017.

respect and fidelity for the rule of law are bound to occur – this too is an area in which reasonable disagreement goes ‘all the way down’. To think otherwise would be to treat respect for the rule of law as almost akin to a mathematical formula that one simply solves and is provided with a determinate answer to a notoriously difficult question, and this is simply not the case. Solum would probably disagree with that assessment, however. He has written in the recent past that “My own view is that there are a very few open-textured constitutional provisions, but that the indeterminacy of the original public meaning of the constitutional text has been greatly exaggerated.”⁶⁷ Solum relies on the ability of the enriched context of the constitutional communicative content and the determinacy it brings to make this claim, and he is not alone in this.⁶⁸ I do not have the space to contest this view here, although I massively disagree. But even leaving aside massive issues like the realist critiques of this allegedly exaggerated indeterminacy, and further not even involving the claim that judges will inevitably imprint their own values and worldviews onto their interpretation and application of the original public meaning, this claim is one that needs to be thoroughly justified before the sorts of critiques that I have raised here are put to rest.

⁶⁷ Ibid.

⁶⁸ Consider the following example. Evan Bernick and Randy Barnett claim that “The original public meaning of seemingly open-textured provisions can be much more precise once their contextually enriched meaning is revealed by rigorous research” and that “Once enriched, the seemingly vague or ambiguous language of the Constitution may be rendered precise enough to enable judges to arrive at many more answers to interpretive questions that, if not certainly correct, are more plausible than any competing answers.” Randy E. Barnett and Evan Bernick, “The Letter and the Spirit: A Unified Theory of Originalism,” *Georgetown Law Faculty Publications and Other Works* 107, no. 1, (2018): 33-34. These sorts of considerations, the two posit, allow originalist judges to enter the construction zone and reliably determine answers that result in good-faith construction – answers that necessarily flow from the spirit of the constitution (although it ought to be noted that the spirit of the constitution is *only* deferred to when the text ‘runs out’). This article is as ambitious as it is intriguing, but I have serious doubts about its aims. I do not have the space to consider this any further, other than to point out that the challenges which old constitutions raise for originalism naturally apply to Bernick and Barnett’s hopes for originalist construction (and again, it ought to be said that the two are keenly aware of this (see, for example, the first paragraph at the top of page 54 for an explicit acknowledgement of this worry).

Where does this leave us? What do the implications of my argument have for the broader issue of PMO and historical analysis? I have tried to show here that the implications are considerable and weighty. We have seen in this chapter that it is commonplace for originalist uses of historical analysis to distort history. When the interpretation-construction distinction leads to radical divergences between original meaning and legal effect, the outcome is that originalist judges have far more room to manoeuvre their utilization of history than PMO can admit to while retaining its normative legitimacy. This issue is unlikely to fade or lessen – it will likely grow more problematic as a constitution ages and the history of its founding distances itself from the contemporary realities of the constitution in the present day. All of this affirms a claim that is not novel in any sense, a claim that has best been described by Keith Whittington when speaking about the implications of constitutional construction.

Whittington writes that the interpretation-construction distinction is a necessary condition for originalist viability because “originalism is incomplete as a theory of how the constitution is elaborated and applied over time.”⁶⁹ This claim is why I tend to view proponents of originalism who make claims such as ‘originalism has been working itself pure for 40 years’ as nothing short of misguided.⁷⁰ It is critical to keep in mind that there is as much disagreement about originalism within the ranks of its advocates as there is among its critics – so how can an interpretative methodology work itself pure without ever being worked out at all? To adequately overcome this critique, originalism has a space to fill to demonstrate its normative legitimacy, a space that grows ever larger as a constitutional framework grows older. To even begin to work out the kinks in its theoretical methodology, then, originalists must show how the theory can ‘mind the

⁶⁹ Keith Whittington, “The New Originalism,” *Georgetown Journal of Law and Public Policy* (2004): 612.

⁷⁰ This claim about originalism working itself pure is a common one endorsed by many originalists. Ilan Wurman made this exact claim several years ago here: <https://www.nationalaffairs.com/publications/detail/the-founders-originalism>.

gap,’ so to speak. They must demonstrate how originalism can justify the utilization of the interpretation-construction distinction with regard to modern facts and circumstances without entailing transmutation in construction zone. In other words, originalists must show how they can retain justified historical determinacy (and therefore normative legitimacy) in the construction zone.⁷¹ In order to do that, PMO needs to confront the challenges that the usable past argument raises. It must show how the communicative content of the constitutional text can justify how original public meanings entail uniquely correct legal constructions while retaining connection to the original public meaning in a non-trivial sense. If PMO cannot do so, the alleged normative justification that it grants judges in the construction zone is false, and PMO’s normative legitimacy is similarly deceitful – *it is not constraining judges in the way the theory claims to be able to do*. Due to this, in the circumstances of old constitutions nonoriginalist precedent will flourish. It is now time to examine why a constitutional common law legal regime that is wholly infused by nonoriginalist precedent presents debilitating challenges for originalism’s normative legitimacy and appeal. This is the aim of the final chapter: it ups the ante on how originalism’s normative foundations are destabilised in the circumstances of old constitutions, with a specific focus on *stare decisis* and democratic legitimacy.

Chapter Three

⁷¹ This is a big issue that I do not think originalism can adequately deal with when we are talking about old constitutions. Randy Barnett has weighed in on this concern, and his thoughts are reminiscent of Whittington’s. Barnett states that “[o]riginalism is not a theory of what to do when original meaning runs out. This is not a bug; it is a feature . . . *Unless there is something in the text that favors one construction over the other, it is not originalism that is doing the work when one selects a theory of construction to employ when original meaning runs out, but one’s underlying normative commitments.*” Eric J. Segall, *Originalism as Faith*, (New York: Cambridge University Press, 2018), 91. We will examine just how serious this problem is for originalism’s relationship to normative legitimacy in the next chapter.

The relationship between originalism and *stare decisis* is a hotly contested one. On the one hand, originalism *prima facie* seems conceptually at odds with constitutional precedent that implicitly or explicitly deviates from the original meaning of a constitution's text. On the other hand, there are so many varied forms of originalism, all of which differ in their fidelity to fixation and constraint, that understanding *stare decisis* to be a problem for originalism is a big assumption. Of course, we are interested in Solum's PMO here. But it is worth taking a brief look at how differing kinds of originalist theory confront the problem of precedent, and before we can do that, we need a basic understanding of precedent in a constitutional common law legal system. Before turning to do so, however, a rough sketch of my aims in this chapter will augment its structural clarity. This chapter has three parts. In the first part, I explicate the relationship between originalism and *stare decisis*. I then develop a succinct general account of why originalism rejects precedent on the grounds of democratic legitimacy. With that established, I go on to explicate how Solum's thoughts on democratic legitimacy build upon that general account. That clears the way to understand how Solum confronts the problem of precedent. In part two, I draw on the characteristics of old constitutions established in chapter one to show how the normative justifications that underlay the general account falter in the circumstances of old constitutions. I do so by framing the idea of democratic legitimacy in a new light; a light that takes into consideration the characteristics of old constitutions. With this new understanding of democratic legitimacy at hand, I draw in how the concept of superprecedents further undermines the normative legitimacy of originalism in the circumstances of old constitutions. That is part two. In part three, I develop a final critique that further weakens originalism's claim to normative legitimacy. This critique is based on the idea that originalism's fidelity to democratic legitimacy relies on a conception of the legislative branch that is far too idealistic.

Originalism and Stare Decisis

The problem of precedent arises from the varied strength that is attributed by courts to the legal principle of *stare decisis*. There is a nuanced distinction between precedent and *stare decisis*; the terms are not quite interchangeable. *Stare decisis* is most commonly understood as a legal doctrine. Its central principle holds that courts are bound by prior legal decisions that deal with issues similar in nature to the legal issue at hand. Precedents are the embodiment of that principle made tangible via specific legal cases. There are two sorts of precedent, and the distinction between them is cogently spoken to here.

Vertical *stare decisis* requires that lower courts follow the decisions of higher courts. Horizontal *stare decisis* requires that a court follow its own precedents. Vertical *stare decisis* is less mysterious than horizontal. The deference lower courts show to higher courts facilitates coordination among judges, and it has the potential to improve judicial decision making to the extent that higher court judges have greater expertise than lower court judges. *Neither coordination nor expertise, however, can explain the practice of a court considering itself bound by its own precedents.*⁷²

We are primarily interested in how horizontal *stare decisis* impacts the normative legitimacy of originalism when it manifests at the Supreme Court level. Originalism in the context of supreme courts will thus be the focus here, because this is where originalism could have the largest impact. That depends, of course, on the degree to which a legal system utilizes soft or hard judicial review. But the general rule is that supreme courts are not typically constrained in their decision making by their own precedent (although there are exceptions to that rule) and so they

⁷² Scott Hershovitz, "Integrity and Stare Decisis," in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, ed. Scott Hershovitz, (Oxford University Press, 2006), 103. Emphasis mine.

are capable of overturning constitutional precedent whenever a majority of the court wishes to do so.⁷³

If they are generally not at all constrained, then why do Supreme Courts in Western liberal constitutional democracies oftentimes approach constitutional precedent as less than a mandatory rule but more than a soft norm (i.e., as more than something that can be nonchalantly dismissed out of hand)? There are many answers to this question, and we will explore this in more depth later in the chapter. The protection of reliance interests at the level of constitutional rights, however, is one of the most significant reasons. Reliance interests are the vested interests that citizens have in the continuity of legal decisions (including ingrained precedent). The idea is that citizens need to be able to know what the law is to order their conduct around that law. Deference to important constitutional precedent (barring an obvious or blatant situation in which the precedent needed to be overturned or modified) vests a measure of stability into those decisions, and thereby into the lives of the citizens who rely on them to direct and guide their behavior. The way in which supreme courts treat precedent thus plays an important role in safeguarding reliance interests. Consider, for example, the following quote from a dissenting opinion by Justice Owen Roberts speaking to the importance of reliance interests:

The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view

⁷³ There are several differing measures of finality with regard to judicial review. Two that are best known in Western liberal constitutional democracies are soft and hard (or alternatively, weak and strong) judicial review. Soft judicial review allows the judiciary to strike down legislation that is deemed to be inconsistent or in violation of the constitution, but also allows for the legislature to reject this challenge and simply override the judiciary by giving that legislation the force of law once again. Hard judicial review removes that legislative rebuttal: it makes the judiciary the final authority on matters of constitutional law (barring the formation of a legislative supermajority that leads to a constitutional amendment on that issue). There are also forms of weak judicial review that *do not* grant the judiciary the power to strike down legislation. These forms of weak judicial review instead pronounce the legislation or executive action in question incompatible or inconsistent with that country's bill of rights or charter. In states that are not Western liberal constitutional democracies, the role that judicial review plays vary considerably.

of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject.⁷⁴

This is one important reason why supreme courts, while they could overturn constitutional precedents at every turn, may be reluctant to do so. Reliance interests are thus best understood as an implication of the rule of law values (consistency, predictability, stability etc.) that are attached to judicial adjudication. This is one aspect of what makes precedent such an integral part of the judicial system, and how a theory of originalism understands the significance of precedent is very telling indeed. Recall that in chapter one, I gave a brief display of the variance of the originalist family tree, and the markedly dissimilar approaches to interpretation that stem from those differences. This tends to dissuade one from assuming that horizontal precedent is always at issue with a particular theory of originalism – sometimes, the matter is as simple as endorsing the ‘originalist hardline,’ which specifies an unconditional override of precedent in favor of the original meaning of the constitutional text.⁷⁵ Most theories, however, take the problem of precedent to pose a larger conceptual issue for the coherent and consistent application of originalist methodology.⁷⁶ Justice Antonin Scalia, for example, quite famously remarked that “Stare decisis is not part of my originalist philosophy; it is a pragmatic exception to it.”⁷⁷ Building upon that remark, Jack Balkin has written that in the context of old constitutions, “The pragmatic exception eventually swallows the originalist rule...”⁷⁸ Another notable proponent of

⁷⁴ *Smith v. Allwright* U.S. 669. J. Roberts dissent, 321.

⁷⁵ This idea of the originalist hard line is referenced by Solum. See page 7 of “Originalist Theory and Precedent: A Public Meaning Approach.”

⁷⁶ See *Ibid* for a detailed account of the ideological range of interpretative philosophies and their corresponding relationship to horizontal precedent.

⁷⁷ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton University Press, 2018), 139-140.

⁷⁸ Jack M. Balkin, *Living Originalism*, (Massachusetts, the Belknap Press of Harvard University Press, 2011), 111. I want to point out that if one accepts that Balkin’s claim is accurate, it follows that my transmutation argument is at the very least partially correct. Consider the Second Amendment example we encountered in chapter two. The Second Amendment did not protect the individual right to carry arms until *District of Columbia v Heller* was

originalism, Randy Barnett, defends the principle that precedent should never overrule the authority of a constitution's original meaning, except in extremely rare settings – Barnett is thus as close to the originalist hardline referred to above as one can get without completely and utterly ruling out precedent without exception.⁷⁹ That is a rough idea of the range of originalist positions on *stare decisis*. Let's turn now to develop a general account of how these differing approaches to *stare decisis* relate to democratic legitimacy.

Originalism and Democratic Legitimacy: A Short General Account

Originalism is a judicial philosophy as well as a theory of constitutional interpretation (and recent work has tried to conceptualize it as a theory of law).⁸⁰ Inherent in these three related understandings of originalism is the premise that originalism is at heart a theory of *legal legitimacy*. The basis of that legal legitimacy stems in part from democratic legitimacy; it stems from the supermajoritarian democratic processes that ratified the constitutional text. Democratic legitimacy for originalism is therefore centered upon the proper procedural ratification of the democratic citizenry's will. On this view, originalist judges have no say – when they enter the construction zone, they are tracking the will of the electorate via the political and legal commitments that electorate entrenched in the constitutional text at a certain point in time. To

decided. Keep in mind that the Second Amendment was ratified in 1791, and *Heller* was decided in 2008. For 217 years the collective interpretation of the amendment remained unchanged until Scalia, through his myopic historical analysis, provided a perfect demonstration of why the usable past argument ought to be taken seriously. Originalists who try to reconcile the original public meaning of the Second Amendment and *Heller* must confront the challenge that transmutation poses for the conceptual plausibility of their originalist positions. If they cannot do so, they have no way of denying the validity of Balkin's claim. The pragmatic exception will indeed swallow the originalist rule.

⁷⁹ Randy E. Barnett, "It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt," *Minnesota Law Review* 90, (2006): 1232 – 1233.

⁸⁰ For an introduction to how originalism might be understood as a theory of law, see William Baude's article "Is Originalism our Law" as well as Stephen E. Sachs "Originalism as a Theory of Legal Change."

deviate from originalism, then, would be akin to claiming that the role of the Supreme Court is not to be umpires who simply call balls and strikes but players that are actively participating in the game. This would make the judiciary a quasi-legislative body, a “perpetual constitutional convention” that could re-write the constitution as that court saw fit.⁸¹

This is the problem of precedent for originalism: precedent that is not in harmony with the original meaning of the constitutional text is not justified under the constraint principle, and so it cannot be normatively justified or legitimate – nonoriginalist precedent growing and spreading via the constitutional common law is antithetical to the constraint principle. This sort of thinking falls in line with the basic tenets of originalist thought. Originalism is premised upon several foundational ideas. One of these ideas is that judges are not legislators, and that the legislative branch (acting on the will of the people) is the only institution of government that has the sufficient threshold of democratic legitimacy to alter and amend the constitution. Judges who alter, amend, limit, or enhance constitutional provisions and rights outside of the limits imposed by the constraint principle therefore act in a democratically illegitimate manner. That’s the gist of it. Much more could be said, but a brief explanation of how originalism relies on democratic legitimacy to fuel the normative legitimacy of its interpretative prescriptions is all we need here. We are more interested in Solum’s thoughts on the relationship between PMO and democratic legitimacy. Once we have that in hand, we can turn to see how Solum confronts the problem of precedent.

Solum on Democratic Legitimacy

⁸¹ Statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law Georgetown University Law Center. “Hearings on Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States.” Published by the United States Senate Committee on the Judiciary, 2017, 7.

The first thing we want to know about Solum’s view of democratic legitimacy is his basic understanding of the term. As is characteristic of all his work, Solum’s approach to democratic legitimacy is carefully thought out. Let’s work from the ground up and begin with legitimacy. Solum (rightly) thinks that the idea of legitimacy is a complex one. For example, legitimacy ought to be distinguished from justice or rightness: while conceptually related, these terms are not interchangeable.⁸² Solum thinks that legitimacy is a process value, not some objective principle. Democratic legitimacy, then, is the value of a democratic process, where the value relies on the degree to which that process is democratic in nature. On this point, Solum writes that “Democratic legitimacy is a scalar, not a binary. So the relevant question is whether originalism provides a greater degree of democratic legitimacy than does living constitutionalism.”⁸³ Based on this understanding, it becomes quite clear why Solum thinks that PMO provides that greater degree of democratic legitimacy; PMO solely relies on supermajoritarian democratic procedures. The basic thought is that the greater the degree of democratic legitimacy, the greater the normative legitimacy of the judicial philosophy.

Solum also notes the important distinction between legitimacy as democratic process and legitimacy as legal authority. We have just seen how legitimacy as democratic process is important to the originalist position. But legitimacy as legal authority plays a role as well. Legitimacy as legal authority emphasizes the connection between legitimacy and legality, so that “Actions that are not legally authorized are frequently called ‘illegitimate’ whereas actions that are lawful are sometimes seen as legitimate for that reason.”⁸⁴ The key to understanding why

⁸² Lawrence B. Solum, “Legal Theory Lexicon: The Case for Originalism, Part Six: The Argument for Originalism from Legitimacy,” Legal Theory Blog, April 10th, 2017.

⁸³ Ibid.

⁸⁴ Lawrence B. Solum, “Legal Theory Lexicon: Legitimacy,” Legal Theory Blog, May 20th, 2018.

Solum highlights this distinction is that originalism brings these two separate conceptions of legitimacy together: in the context of constitutional interpretation, if legitimacy as democratic process is present (where legitimacy as democratic process = the supermajoritarian requirement) than legitimacy as legal authority (the legitimacy of a judge enforcing that supermajorities will) is present as well. Essentially, both understandings are normative – both refer to an aspect of the normative standard (i.e., the rightness or wrongness) of some action or institution.

On that note, Solum has elucidated how originalism’s normative appeal is strengthened by its complimentary relationship to democratic legitimacy in some detail. Speaking at a 2017 hearing on the nomination of Neil Gorsuch to the Supreme Court of the United States, Solum laid out a basic understanding of that relationship. Although it is basic, I draw upon it here because I have always believed that when academics are required to pare down their complex and nuanced positions in order to provide a more rudimentary version of those positions, what emerges is a distilled version of the arguments at the very heart of their position. I believe that this is true of Solum here. I quote him at length to showcase this distilled summary.

There is a second reason to prefer originalism over living constitutionalism. That reason is rooted in the idea of democratic legitimacy. Each and every provision of the United States Constitution has been ratified by a supermajoritarian process. The original constitution was ratified by the representatives of “We the People” in convention assembled. Amendments must be proposed by two-thirds of the Senate and the House and ratified by three-fifths of the state legislatures. This supermajoritarian process confers democratic legitimacy on the provisions of the Constitution. It is important to acknowledge that this process has not been perfect. In the late eighteenth century, women, slaves and others did not have the vote. But the democratic legitimacy of the constitution must be compared to some alternative. The Supreme Court consists of nine women and men. They are not elected. They are appointed for life terms. In theory, they can be impeached by the House and tried by the Senate, but it is difficult to imagine that any Supreme Court Justice would be removed in this way on the basis that their living constitutionalist jurisprudence was out of step with popular opinion. If we must choose between originalism and constitutional text that has been ratified by the representative of “We the People” and a living constitutionalist constitution that is

ratified by majority vote of a committee of nine, there is no doubt in my mind about which constitution is the more democratic.⁸⁵

Notice that Solum makes it extremely clear that the supermajoritarian process (no matter how mired it was at the time with morally repugnant features) is the function that he thinks conveys democratic legitimacy upon the US constitution. He also points out that the democratic legitimacy of that constitution must be understood as relative to something else, and here Solum compares it to the legitimacy of the nine Justices of the Supreme Court engaging in living constitutionalism. This sort of relative comparison leads us to the basis of why nonoriginalist precedent (and judges who engage with and foster that precedent) is normatively unjustified for PMO. It's time to examine this in detail to get a richer sense of Solum's position on both democratic legitimacy and *stare decisis*.

Solum and the Problem of Precedent

Recall the distinction between the two kinds of legitimacy and how originalism brings them together into its style of democratic legitimacy. This bridging is why the problem of precedent is a problem of both democratic process and legal authority for Solum. On the other hand, Solum is willing to recognize that precedent poses problems for originalism as well. In particular, he specifies two general aspects of the problem of precedent: the practical problem and the normativity problem. The practical problem is the claim that given the pragmatic role precedent has had and will continue to have in guiding and influencing the practice of

⁸⁵ Statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law Georgetown University Law Center. "Hearings on Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States." Published by the United States Senate Committee on the Judiciary, 2017, 7-8.

constitutional law, originalism will oftentimes not be a persuasive option for a judge to pursue given the contextual factors affecting the adjudication in question. Hence, even a devout originalist will more than likely need to abstain from pursuing originalist outcomes all of the time and to the strongest degree possible.⁸⁶ The practical problem of precedent for originalism affirms that, as Jonathon Adler has cogently put it “Not every originalist outcome is still on the table.”⁸⁷ Adler’s claim is especially true in the circumstances of old constitutions, although the claim would more accurately read that ‘Not every originalist outcome is still on the table if the judiciary wishes to avoid normatively disastrous outcomes.’⁸⁸ The normativity problem is the assertion that, even discounting the practical problem, the normative desirability of utilizing originalism on a constant basis is questionable. The normativity problem points to factors like respect for the rule of law, the need to maintain reliance interests, and the superior normative appeal of precedent compared to original meaning.⁸⁹ This last consideration seems to be the largest issue that directly relates to *stare decisis*. The practical problem of precedent is a claim about how judges might handle originalism and not a blow to originalism itself. The normativity problem, on the other hand, is just that sort of point: setting aside the practical problems, there is no guarantee that it would be normatively desirable to override such precedent in favour of PMO.⁹⁰ Taken together, these problems have created a sort of theoretical floundering for

⁸⁶ Lawrence B. Solum, "Originalist Theory and Precedent: A Public Meaning Approach," *Georgetown Law Faculty Publications and Other Works*, (2018): 457.

⁸⁷ Supreme Myths, episode 3, “A Review of the Supreme Court’s Latest Term,” Eric J. Segall & Jonathan Adler. Aired July 14th, 2020. <https://podbay.fm/p/supreme-myths/e/1594771200>

⁸⁸ See, for example, what Solum says here on the topic: “Originalist judges on a collegial court may need to write nonoriginalist opinions as part of the give and take required to get judicial business done—and even to limit the number of occasions upon which they write extensive originalist concurrences and dissents. An originalist judge might make the tactical decision that a precedent-based decision that moves the law towards original meaning is better than a dissent or concurrence accompanying a decision that moves the law in the opposite direction.” Solum, "Originalist Theory and Precedent: A Public Meaning Approach," 465.

⁸⁹ *Ibid.*

⁹⁰ We will see over the course of this chapter that the normative problems originalism invites into the constitutional arena (in the context of old constitutions) are nothing short of gigantic.

originalists grappling with the problem of precedent. But that floundering is not an assured thing; some precedents may be entirely consistent with originalist interpretations of original public meaning and would pose no problems at all: they would be entirely harmonious with PMO.⁹¹ That harmony in itself depends upon how an originalist thinks the constraint thesis ought to be applied, and as such is subject to disagreement among the various theories of originalism. When it comes to the implementation of the constraint principle on constitutional precedent, Solum occupies a sort of middle ground, as opposed to the originalist hardline.

The nature of Solum's middle ground is *transitional*. As a matter of ideal theory, he thinks that precedent ought to conform to the original public meaning of the constitutional text but also notes that this is obviously not the case in American constitutional law. In light of that non-ideal context, Solum thinks that an entirely originalist court might adhere to precedent in the early stages of the transformation of an originalist constitution. Why is this the case? Solum believes that democratic legitimacy works in favour of an originalist position in such a transition. In other words, democratic legitimacy for Solum is a legitimacy-based justification for constraint of constitutional decisions made by judges. The democratic legitimacy that infuses the original meaning with its authority (for PMO) means that a transition to originalism brings constitutional practice into a complimentary relationship with democratic legitimacy. But if this were to occur overnight, that complimentary relationship would suffer greatly.⁹² Suddenly abandoning all nonoriginalist principles so abruptly will create far too much chaos. But more prudently for our interest in democratic legitimacy, it would frustrate far too many reliance interests. A gradual

⁹¹ Lawrence B. Solum, "Originalist Theory and Precedent: A Public Meaning Approach," 463. The example that Solum provides in this article is nonoriginalist precedents in the context of voting rights, precedents that may be "consistent with the underlying democratic legitimacy arguments for originalism" 462-463.

⁹² For more detail on the harms of a theoretical implementation of originalism overnight, see Solum's thoughts on the originalist big bang thought experiment in "Originalist Theory and Precedent: A Public Meaning Approach" page 461-462.

transition that mitigated these issues would be Solum's preferred route. But, he thinks, "Once originalism is fully implemented, though, the use of precedent ought to be brought into line with the original meaning of the constitutional text."⁹³

Recall that Solum thinks that democratic legitimacy is scalar and not binary. On this much, Solum and I completely agree. I am even willing to go so far as to say that Solum is correct when he argues that originalism has a greater degree of democratic legitimacy than living constitutionalism does – *in the circumstances of a (very) young constitution*.⁹⁴ But this thesis is not about the circumstances of young constitutions. It is about the circumstances of old ones, and old constitutions radically reconfigure the normative playing field that originalism usually has the advantage in. Given that reconfiguration, I will challenge Solum's notion of democratic legitimacy in some depth in this chapter. In doing so, my aim is to compare the supermajoritarian political commitments of the people-then (the political commitments PMO takes as authoritative and binding) to the democratic mandates and the political morality of the people-now. I wish to show that fidelity to the former option is a mistake in the circumstances of old constitutions: it is a normatively illegitimate aim. As we will see, the originalist understanding of democratic legitimacy is normatively flawed when it is situated in the circumstances of old constitutions. Those circumstances require a scalar shift, and when one considers the implications of that shift, one sees that suddenly it is living constitutionalism that has the greater degree of democratic

⁹³ Ibid, 463

⁹⁴ It is possible that many living constitutionalists would agree. Some advocates of judicial conservatism unfairly claim that living constitutionalism involves no judicial restraint at all (a claim that is strongly opposed by living constitutionalists in a variety of different fashions). This sort of rhetoric typically takes living constitutionalists claim that 'constitutions can and should change' and reduces it the absurd: to the idea that 'constitutions can and should change at every instance possible.' This is bad-faith rhetoric. Living constitutionalists largely agree that judicial restraint is an important factor in constitutional law; they simply disagree on what constitutes proper restraint.

legitimacy. The chapter will now turn to develop why these claims are worth serious consideration.

Formidable Stare Decisis: The Historical Significance of Old Constitutions

Let's go back to the fourth characteristic of old constitutions established in chapter one. Aged constitutions acquire incredibly rich histories. That history cannot be understated; "A constitution, after all, like a novel, invents and tells the story of a place and people."⁹⁵ That story includes the entirety of the constitutional common law, the judicial doctrines and tests designed around and by that common law, and the norms that direct judicial and constitutional conventions of all sorts.⁹⁶ The first thing we ought to note about old constitutions and *stare decisis*, then, is that this rich history gradually adds to and transforms the soul of a constitution over long periods of time in ways not sanctioned by the original meaning of the text. Consider, for example, that "In the words of Thomas Grey, it is 'a matter of unarguable historical fact' that over time the Court has developed a large body of constitutional doctrine that does not derive

⁹⁵ Linda Colley, *The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World* (New York: Liveright Publishing Corporation, 2021), 12.

⁹⁶ An originalist might retort that my description of old constitutions here begs the question; that the fourth characteristic assumes features about old constitutions that I need to be true in order for my argument to carry out. It's important to remember here that there is a distinct difference between what originalists believe a legitimate constitution ought to be understood as and the empirical reality that old constitutional frameworks exhibit. The typical originalist believes that a legitimate constitution is just the words of the constitution and their original meaning. But that is a normative belief, and my fourth characteristic is not a normative claim, it is an empirical one. On page 12 of this thesis, I limit my analysis to Western constitutional democracies and their common law legal systems out of conceptual necessity. It is one thing for an originalist to assert the normative belief that the constitutional common law should not trump the original meaning of the constitutional text. It is quite another thing for an originalist to deny that in a common law legal system, constitutional common law (and the judicial tests, doctrines, norms, and conventions inherent within that common law) do not factor into constitutional law on a regular and reoccurring basis. The fourth characteristic does not beg the question – it points to features of Western constitutional democracies that are empirically verifiable, and that empirical verifiability has nothing to do with what one believes to be normatively legitimate. On that point, see Thomas Grey's quotation on this page.

from the original understanding of the document.”⁹⁷ In such a setting, important and longstanding precedent is considered by some constitutional scholars to acquire a similar level of authority as the constitutional text itself. David Strauss is one notable proponent of this view; he believes that the American constitutional text is considerably removed from the modern-day practice of constitutional law. Strauss elaborates on that view here:

Advocates know what actually moves the Court. Briefs are filled with analysis of the precedents and arguments about which result makes sense as a matter of policy or fairness. Oral arguments in the Court work the same way. The text of the Constitution hardly ever gets mentioned. It is the unusual case in which the original understandings get much attention. In constitutional cases, the discussion at oral argument will be about the Court’s previous decisions and, often, hypothetical questions designed to test whether a particular interpretation will lead to results that are implausible as a matter of common sense.⁹⁸

This leads Strauss to distinguish between two senses of a constitution: the ‘big C’ constitution, or the written text of the constitution, and the ‘small c’ constitution, which refers to the actual practices of the courts when dealing with matters of constitutional law. Attempting to understand the practice of constitutional law by reference only to the ‘big C’ constitution is a descriptive mockery of that practice, as Strauss tells us here: “...if you think the Constitution is just the document that is under glass in the National Archives, you will not begin to understand American constitutional law.”⁹⁹

⁹⁷ Jeffery M. Shaman, “The End of Originalism,” *San Diego Law Review* 47, no. 83 (2010): 87.

⁹⁸ David Strauss, *The Living Constitution*, (New York: Oxford University Press, 2010), 34.

⁹⁹ *Ibid.* This is doubly true when the rich histories of old constitutions enter the picture. A great example that shows the accuracy of Strauss’s claim is the judicial doctrine and case law that has piled up around the First Amendment. Consider what Kim Wehle has to say about this here “The first thing to notice about the First Amendment is that, although relatively short, it’s a whopper. One might reasonably expect that something so basic would be fairly easy to understand and apply. Yet if measured by the number of Supreme Court cases explaining what the language means, First Amendment law is massive. The court’s decisions are complicated, multitiered, highly dependent on the particular facts before it, laden with squishy policy considerations and even contradictory at times. Because nothing short of an algorithmic flowchart is needed for the law at a glance, even the best lawyers can’t answer many questions under the First Amendment without doing significant research first. Surely, then, the guy on the street has no meaningful idea about what the First Amendment is really doing for him. Which is all to say: What the heck is going on here?” Kim Wehle, *How to Read the Constitution and Why*, (New York: HarperCollins Publishers, 2019), 120.

The result of this admission is that the influence of constitutional precedent is being continually enhanced, and first and foremost this means that Adler is correct about the idea that not all originalist outcomes are still sensible results to pursue. The direct implication of this sort of acknowledgement is that in a fundamental sense, old constitutions deny the free reign of originalist methodology for reasons that go far beyond the ordinary challenges that originalism faces in young and middle-aged constitutions. Let's examine this in more depth. The rich history of longstanding constitutional common law is unique in that its temporal progression (typically but not always) spells out a story of moral development and the transformation of political morality within a changing citizenry. The people-then entrenched certain political and moral beliefs in the principled text of the constitution, and the people-now live under the prescriptions of those principles, modified and transformed by the constitutional common law along the way. The way that this story was modified and changed, and the shape and form it took profoundly impact the story as a whole. By exclusively dedicating itself to a backwards looking view, originalism denies the progression of this history (save for the existence of formal constitutional amendments, and formal amendments only). This is a normative problem because the sum of that rich history is the people-now, represented by the judiciary adding to that story via the constitutional common law.¹⁰⁰ Consequently, to understand a common law constitution merely in terms of formal amendment would produce a story that lacks vital plot points intrinsic to itself.

Because originalism is predicated upon the claim that the only legitimate form of democratic change to a constitution is through formal amendment, most forms of originalism

¹⁰⁰ See Strauss, *The Living Constitution*, page 36-39 for a description of how judges following the constitutional common law adjudicate based not solely upon existing precedent but also common law values like fairness, consideration of social policy, and more generally the welfare of society. Also see pages 43-46 for Strauss's explication on why a common law approach is superior to an originalist point of view (it is worth mentioning that if you accept the four characteristics of old constitutions that I establish in chapter one, then it follows that these four factors provided by Strauss are all doubly true in the context of old constitutions).

cannot accept the formative role that the constitutional common law plays as an instrument of legitimate democratic constitutional change. In other words, originalism will always challenge the democratic legitimacy of the courts as an institution of government capable of modifying and adding to the story that is the common law regime of an old constitution. But to deny the judiciary's role in this regard is to deny that constitutions require expounding at all: constitutions are not highly detailed and heavily thorough documents like civil or criminal codes, and they cannot be treated as such; a fact that rings especially true in aged constitutional frameworks.¹⁰¹ So, when originalism is utilized to return to the original meaning of the constitutional text over precedent, in effect that decision has the potential to dismiss generations of constitutional common law development. Enacting originalism and after decades and perhaps centuries of growth of the small c constitution has the potential to devastate the reliance interests of the people-now. That factor alone deserves significant attention.¹⁰² Every case that contributes to constitutional precedent has a story behind it – a cause for action, a plaintiff and a defendant. Those stories become case law and form, in part, the small c constitution – and substantial reliance interests are built into that small c constitution.

The constitutional common law is a phenomenon that citizens come to rely upon to order their conduct around. This is no small thing: individuals whose life choices rely on or are affected by the legal effect of that judge-made law really do shape their actions around them

¹⁰¹ For a fascinating account of what a constitution might look like if it could act as a civil code, and thus *truly* embodying originalism (a highly idealized originalism, but originalism nonetheless) see Grégoire Webber's fascinating paper "Originalism's Constitution" in *The Challenge of Originalism: Theories of Constitutional Interpretation*.

¹⁰² Aside from my focus on reliance interests as they relate to the democratic legitimacy of the people-now in the context of old constitutions, it needs to be said that there are many other ways of approaching the importance of reliance interests. One prominent way to do so is to understand laws (and their implementation) as an avenue of social planning, where citizens rely on laws (and specifically, the structure and coordination that law creates) in order to successfully plan their actions around the content of said laws. See Scott Shapiro's book *Legality* for the development of this idea.

(consider the impact that *Obergefell v. Hodges* had for LGBTQ+ folk, for example). Originalism situated here represents the withdrawal of constitutional authority from the people-now (exercised by judges adhering to and developing the constitutional common law) to the people-then (the people who formed the supermajority required for the ratification of the amendment or constitutional text in question). Given that, the characteristics of old constitutions seem to necessitate that fidelity to original public meaning must be balanced with the democratic mandates and the political morality of the people-now. Constitutional considerations that leave no room for the people-now undermine the nature of democracy far more than living constitutionalism might.¹⁰³ I want to maintain that this line of thought is not in tension with the objective of the entrenchment of constitutional law. When a constitution is created, it's very design functions to shield institutional roles, government rules, and individual rights provisions from the sway of everyday political and legal deliberation – to put into writing the affirmation of ideas that are essential to that constitution's purpose as a state's fundamental law. But judges can do that without engaging in explicitly anti-democratic activity against the people-now. Crucially, there is a massive difference between judicial rulings that protect the *clear and identifiable* laws and limits of a constitution and judicial rulings that place a stranglehold upon judges in order to ensure that a constitution remains, as Justice Scalia proclaimed “Dead, dead, dead!”¹⁰⁴

Revitalizing Democratic Legitimacy

¹⁰³ Naturally formal amendment complicates this line of thought. Formal amendment will be discussed in depth shortly.

¹⁰⁴ Ushma Patel, “Scalia Favors ‘Enduring,’ Not Living, Constitution,” News at Princeton, Princeton University, December 11th 2012, <https://www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution>.

We need to pause here and take stock. Over the course of this chapter, we have been discussing an originalist understanding of democratic legitimacy and how the implications of that understanding affect how originalism grapples with *stare decisis*. In the last section, I tried to show why in the circumstances of an old constitution the constitutional common law is not only intrinsically tied to the rich histories of old constitutions, but also why that connection prevents originalism from manifesting with the same normative legitimacy that it could in the setting of a young constitution. To better justify that claim, however, and to show why a rich common law regime rejects originalism's normative advantages, we need to flesh out exactly *why* the former disrupts the latter's normative status. To do so, we need to think about a new conception of democratic legitimacy. Solum and I approach democratic legitimacy in diametrically different ways. It is high time to revitalize how we frame the idea of democratic legitimacy by situating it in the circumstances of an old constitution.

Before doing so, remember that Solum thinks we must contrast the level of democratic legitimacy of originalism with that of nine unelected judges seeking to pursue living constitutionalism. I want to suggest that this is a fundamental mistake. This is where that important scalar shift that I referenced earlier enters the picture. When we are speaking of striking down precedent in an old constitutional framework (and otherwise engaging in constitutional review that befits an originalist perspective) Solum's comparison is inherently flawed. When speaking about originalism, we should be comparing the democratic legitimacy of the supermajoritarian process (i.e. of the people-then) with the democratic legitimacy that lies with the people-now. To do that, we need to acknowledge that the constitutional common law acts as a bridge that binds the judges building upon that common law with the people who that

common law applies to – the people-now. When we apply this lens, we shift the relative comparison that Solum suggests is correct, and the situation drastically changes.

That shift can be felt when consider the four characteristics of old constitutions. In important ways, all four characteristics have ties to the concept of democratic legitimacy. The first characteristic claims that old constitutions are moderately disengaged from the moral influence of their initial authors and ratifiers. The moral authority and legitimacy of old constitutions stems more from the people who currently live within the scope of its legal authority rather than those who have long since left this world. Similarly, the second characteristic establishes that old constitutions are sufficiently old that the generation responsible for its creation have disappeared – in other words, the people-then are no more, and the people-now constitute the citizenry under the operative force of the constitution. Put differently, legitimacy as democratic process is undermined by the sheer amount of time that has passed and the fact that the population who used the supermajoritarian democratic process to ratify the constitution have long since left the world. The first two characteristics of old constitutions emphasize this acknowledgement – how democratically legitimate can a democratic process be when the process in question was ratified centuries before the current citizenry was born? The democratic legitimacy scalar shifts here – how could it not?

The third characteristic of old constitutions is the radical transformation of social, economic, political, legal, and cultural conditions that underlie a given constitutional framework. The scalar shift here is not concerned with democratic legitimacy in the sense that the first and second characteristics are. Instead, the third characteristic undermines the idea of legitimacy itself in that the radical shifts of social, economic, political, legal, and cultural conditions will bring about new conceptions of what is and is not legitimate. It's helpful here to remember the

second form of legitimacy that Solum mentions, legitimacy as legal authority. What is perceived to be lawful and unlawful will profoundly change over the lifespan of an old constitution.¹⁰⁵ This is how the third characteristic contributes to the scalar shift of democratic legitimacy. Finally, the fourth characteristic plays a vital role in the scalar shift. The constitutional common law bridges the gap between the people-then and the people-now. The gradual development of that common law framework has the potential to slowly and carefully align the interpretation of the constitutional text with the political morality of the people-now. The first three characteristics implicitly point to the scalar shift of democratic legitimacy that the nature of old constitutions age towards. The fourth characteristic is that scalar shift made tangible.

To be clear, in the circumstances of a young constitution, there is no question as to which party (the people-then versus the people-now) has the better claim to democratic legitimacy – of course it is the people-then, because in a young constitutional regime *there are no people-now*. The people-then ratified the constitutional laws the authority of which they are subject to, end of story. The same simply cannot be said about an old constitution. This is the scalar shift of democratic legitimacy: it lies with the people-now more than it does with the people-then. To argue otherwise is to place more importance on a supermajoritarian procedure than the actual nature of democracy (the fair representation of a people and their politics who live within a democratic state) itself. And of course, this is how originalism attempts to justify its position. The difficulty of justifying that position grows by leaps and bounds as a constitutional framework ages, and the interpretation-construction distinction grows less efficacious and more symbolic. The result of these events for originalist understandings of democratic legitimacy is

¹⁰⁵ Return once again to the example of the American constitution. The political morality infused in the original meaning of the constitutional text is radically different in nature compared to the political morality of the present day American reality.

that justifiable fidelity to fixation and constraint begins to corrode – what democratic legitimacy requires has transformed drastically just as originalism itself has.

Implementing originalism in an old constitutional regime has the potential to blatantly reject the scalar shift represented by the four characteristics. That is the basis of my disagreement with Solum over what the concept of democratic legitimacy requires. An originalist understanding of the term is entirely too rigid, and that rigidity is out of step when it is situated in the context of an old constitution. Old constitutions change the shape of the game: we need to understand democratic legitimacy very differently than Solum understands the term. We need to understand it as an affirmation of the political morality of the people currently living under a constitution's framework, the populace that is subject to its authority. We need to understand it not as a fixed point of affirmation cemented by a certain political affirmation (a supermajority decision etc.) but as the standard that can be more or less achieved (as a scalar). That standard depends on the people-now and their democratic mandates, which are shaped and changed over time. It is this populace, after all, whose capacity for democratic decision making is legitimate: they can challenge, change, and choose to abide by the rules of the game via their voices and votes – and *that* is democratic legitimacy made manifest. My conception of democratic legitimacy attempts to show how the concept can survive (and even thrive) in an old constitution. More than anything, this is because I understand democratic legitimacy to partially stem from the growth and development of the constitutional common law, since I think that the common law bridges judges interpreting the constitution with the political morality of the people-now. That doesn't mean every constitutional common law precedent is perfect – in the American example, there are countless judicial decisions made on the basis of common law reasoning every year that can be viewed as wrongheaded or unjust or immoral. And yet if one had to choose, it seems sensible

to prefer the constitutional common law and the various considerations it can bring to the table rather than judges playing at being historians and seeking out daunting original public meanings. Put differently, I think reliance interests are better off vested in the constitutional common law than they are in original public meanings. True, an originalist can argue that said reliance interests are illegitimate because they are not derived from the constitutional text itself – they can thus claim those expectations are not warranted. I would point out to that originalist that the ordinary citizen cares very little about fidelity to original public meaning, especially if that fidelity overturns the laws that citizen relied upon to order their lives around. Imagine for a moment that an originalist marches up to a group of Second Amendment fanatics and announces that, in the course of implementing originalism, the individualistic interpretation created by *Heller* (a constitutional common law decision!) must be struck down. If you think that those citizens would grudgingly accept that decision because fidelity to the original public meaning of the Second Amendment requires it, you are in for a shock – and that is just one of so very many examples of those reliance interests vested in the constitutional common law.¹⁰⁶ More likely than not, the implementation of originalism in an old constitution would devastate the reliance interests of the people-now; reliance interests that are vested within the constitutional common law. Those interests would be wiped out – and in favour of what? Archaic and antiquated (not to mention *immensely* morally problematic) original public meanings that the nature of old

¹⁰⁶ This isn't a political point: the same seems to be true of most American citizens regardless of their ideological affiliation or political leanings. More so than other Western liberal democracies, "Americans see rights as our national inheritance." Moreover, "A right's very *raison d'être*, Americans today believe, is to exempt the rights holder from the law's reach." Jamal Green, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* (Boston: Houghton Mifflin Harcourt, 2021), 7, 10.

constitutions will often render unsettled, indeterminant, and compounded.¹⁰⁷ ¹⁰⁸ Where on earth is the normative appeal and legitimacy in that?

Old Constitutions and Superprecedents

We can take this line of argument further. So far, we have been discussing the constitutional common law and its considerable importance to old constitutional frameworks (and especially the small c constitution). It's time to consider an especially important kind of precedent, the kind that takes root in old constitutional regimes and plays a pivotal role in the continuation of the constitutional common law: superprecedents. A critically important part of the rich history of old constitutions are the longstanding precedents that come to define the transformative progress that a constitution's common law history acquires over time. Some of

¹⁰⁷ Pointing to the ineffectual application of originalism is not relevant to a discussion of the normative appeal of the theory as a judicial philosophy – but morally repugnant results that would stem from the normative prescriptions of a judicial philosophy certainly are. For an insightful article based on the immoral normative prescriptions that originalist judicial adjudication could result in, see “Original(ism) Sin” by G. Alex Sinha. To be completely fair to originalism, however, a growing number of constitutional scholars are seeking to prove that originalism can be viewed favourably and with an explicit emphasis on originalism as a progressive judicial philosophy. These advocates believe that since its creation, the theory has simply been utilized incorrectly and in bad faith but now has potential to work in favour of a more progressive agenda. You can find more information on this line of thought in a newsletter written by the President of the Constitutional Accountability Centre, Elizabeth B Wydra, titled: “Originalism Watch: Reclaiming the Constitution, Exposing ‘Fauxoriginalism.’”

¹⁰⁸ This may be accurate of some forms of originalism more generally, depending on the particular theory and its commitment to fixation and constraint. It is (probably) not accurate of Solum and his PMO, however. See Solum's response to my charge: “Fixed original public meaning can give rise to different outcomes given changing beliefs about facts. The constraint principle does not require constitutional actors to adhere to false factual beliefs held by the drafters, Framers, ratifiers, or the public.” Lawrence, B. Solum, “Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate,” *Northwestern University Law Review* 113, no. 6, (2019): 1269. I say that it is probably not accurate because Solum is merely stating that accepting the constraint principle for PMO does not entail accepting results that strict adherence to the principle would bring about if those results are false beliefs. This is important to point out to charitably detail his position but in actuality amounts to very little. It is one thing to affirm that the constraint principle does not require erroneous factual beliefs to be acted upon, but it is another thing entirely to decide what beliefs count as false. Moreover, it is worth pointing out that in the circumstances of old constitutions, a great many beliefs that were once held to be true are now widely perceived to be false – and I would be remiss if I did not point out that this concession by Solum makes the transmutation of the constitutional text by judges utilizing PMO all the more likely.

these precedents play an especially critical role in that historical story – they stand out in terms of the impact they have on the constitutional common law. These sorts of precedents are labelled by some legal scholars as superprecedents, or precedents that have become so important to the structure of the constitutional common law that they are ingrained in the constitutional framework. If one accepts Strauss’s arguments about common law constitutionalism, then one can argue that superprecedents take on an authoritative status almost akin to the constitutional text itself. Put differently (by John McGinnis and Michael Rappaport) superprecedents are precedents the validity of which have been reaffirmed, sometimes numerous times, by the rulings of judges in subsequent judicial opinions.¹⁰⁹ McGinnis and Rappaport have also noted that, on the closely related topic of what they call ‘entrenched precedent,’ that these sorts of precedent acquire such a favourable and supported status that to overturn them via constitutional review *may* result in a formal amendment to the constitution in order to give the relevant precedent’s legal effect the force of law.¹¹⁰

Following that line of thought, Michael Gerhardt has described superprecedents as a phenomenon that explicitly defies an idea raised in the first section of this chapter, the idea that the ability of Supreme Courts to challenge *stare decisis* is something between a binding rule and a soft norm. On this view, superprecedents are categorically beyond the pale of judicial criticism;

¹⁰⁹ John McGinnis and Michael B. Rappaport, “Reconciling Originalism and Precedent” *Northwestern University Law Review* 103, No. 2, (2009): 38-39. Of course, the reaffirmation of such precedents by a multitude of judges within a common law legal system does not *in itself* indicate the normative validity of those precedents. What numerous reaffirmations does tell us, though, is that the precedent in question has been deemed to be reasonably acceptable by various judges (judges who no doubt will hold different judicial philosophies and thus different criteria of acceptance and rejection). The normative validity of the superprecedent, then, is perhaps not the real issue – the mere fact that it exists and has been reasonably accepted in multiple judicial contexts is the factor that matters for the status of those precedents. Those numerous reaffirmations cement that precedent in the constitutional common law tradition, and as we have seen, there are compelling reasons to accept that the constitutional common law plays an authoritative role in the small c aspect of old constitutions.

¹¹⁰ *Ibid*, 35.

they are decisions “whose correctness is no longer a viable issue for courts to decide...”¹¹¹ That status seems to imply something close to an immunity from constitutional review – in other words, to overturn such precedent would not only violate strongly embedded reliance-interests, but it would also undermine the very zeitgeist shifts in society that cemented the precedent as a super precedent in the first place. I want to suggest that if this is the case, then overturning such superprecedents in favour of a return to the original public meaning of the constitutional text results in the dismissal of the democratic legitimacy of the people-now in favour of the people-then; in favour of the originalist conception of democratic legitimacy.

Superprecedents embody a constitution’s moral authority (more so than the original meaning can for an old constitution) because they represent the changing will of the people, which is recognized and acted upon by the judiciary in these sorts of ground-breaking precedents. Of course, not all, and sometimes not many superprecedents will correspond to the contemporary population living within a constitutional democracy (especially if a constitution is very old) but this does very little to undermine my point. Superprecedents do not explicitly represent the democratic mandates and the political morality of the people-now, nor are they meant to. Think of the lifespans of old constitutions as a story of sorts. That story begins with the founding text of a constitution, but it does not end there by a long shot. Superprecedents represent the journey that story takes. Because of this, the contemporary population of a constitutional democracy (the people-now) does not need to have existed in the time frame that a particular superprecedent came about; that superprecedent is an addition to the story that the contemporary people vest reliance interests in nonetheless. The critical difference between this affirmation of superprecedent and the same affirmation of the constitutional text lies in the

¹¹¹ Michael Gerhardt, “Super Precedent,” *Minnesota Law Review* 90, (2006): 1205-1206.

purposive value of the superprecedent – it lies outside of the constitutional text, and its purpose is to fill in the holes that the original text and subsequent amendments left bare. Superprecedents thus have an intrinsic connection to the value of the democratic legitimacy of the people-now – they are a symbolic representation of the gradual transformation that a constitutional framework undergoes.

Writing on the topic of superprecedents, Amy Comey Barrett has made note of this exact acknowledgement. Barrett understands the concept of superprecedents not to be one that is tied to *stare decisis* so much as one that is tied to the exact understanding of democratic legitimacy that I outlined in a previous section. In this regard, Barrett and Gerhardt agree that the social facts which contextualize and underlie superprecedents move them beyond the reach of *any* judicial philosophy that can be utilized via constitutional review. To see this line of thought fleshed out, consider the following quotation from Barrett, written in 2013:

The force of these cases derives from the people, who have taken their validity off the Court’s agenda. Litigants do not challenge them. If they did, no inferior federal court or state court would take them seriously, at least in the absence of any indicia that the broad consensus supporting a precedent was crumbling. When the status of a superprecedent is secure—e.g., the constitutionality of paper money—a lawsuit implicating its validity is unlikely to survive a motion to dismiss.¹¹²

It needs to be said that different judges with different judicial philosophies and different perceptions of what it means for precedent to ‘crumble’ in the way described by Barrett make this a complex situation.¹¹³ Moving past that, however, the existence of nonoriginalist

¹¹² Amy C. Barrett, “Precedent and Jurisprudential Disagreement,” *Texas Law Review* 91, no.1711 (2013): 1735. Emphasis mine.

¹¹³ This is more complex than it initially seems. Because scholars disagree over *exactly* what constitutes a superprecedent, it seems reasonable to expect that there is just as much disagreement about that question as there is disagreement about the proper principles of originalism itself. In the American example, many constitutional scholars proclaim that *Roe v. Wade* is a superprecedent, and many fervently disagree (it’s almost as if one’s political morality will strongly influence that view...) This air of subjectivity surrounds superprecedents, and it gives originalism the space needed to argue that case law which is *not* a clear example of superprecedent (unlike the example Justice Barrett uses above) has not actually attained that status and therefore does not merit the same normative consideration on the subject of whether or not to strike it down or otherwise throttle its legal effect.

superprecedents poses problems for originalism's normative legitimacy. If a superprecedent deviates from the original meaning of the constitutional text and gains the status that Barrett describes above, then originalism is fighting an uphill battle to retain normative legitimacy. It is highly likely to be a battle that grows more and more pitched for originalism as time advances and constitutions age. In a sentence, the more superprecedents that exist within a constitutional framework, the fewer options originalism has to secure itself without inviting normatively disastrous results (results that involve constitutional review overturning those superprecedents on originalist grounds). Many originalists straightforwardly admit that precedent, and superprecedent in particular, make the coherent and consistent application of originalism at the constitutional level normatively difficult. To be clear, this difficulty does not undermine originalism as a theory of constitutional interpretation based on the principles of originalism. What it *does* undermine is the normative desirability and legitimacy that originalism brings to the table once a nonoriginalist constitutional common law has been developed – and the vast majority of old constitutions found in common law legal systems develop such common law histories. Let's return to the American example. Think back to Thomas Grey's thought. It cannot be denied that over its long life the American constitution has developed a titanic body of constitutional doctrine that does not derive from (and often explicitly rejects) the original meaning of that short document. It is not at all clear why one would want to reject all the valuable content within the small c constitution and the value it provides, certainly not in favor of original meanings that belong to a citizenry who have absolutely no stake in whether or not they are, in fact, enforced. Perhaps if originalist judges could harness the interpretation-construction distinction to translate meaning into effect in a historically determinate manner (*without transmuting the identity of that original meaning*) then the idea would have appeal to

advocates of hardcore judicial conservatism. But as we saw in chapter two, there is no guarantee of this (and in fact, transmutation is likely to occur). To borrow a line of thought from Strauss, originalism requires judges to be historians of unyielding acumen. Following the constitutional common law simply requires judges to be judges.¹¹⁴

In the circumstances of an old constitution, the thought that a return to originalism (at the cost of eviscerating the rich history of the constitutional common law) could be normatively desirable, justifiable, or legitimate is highly questionable. And crucially, this is true even if that return to originalism does not occur all at once but instead happens cautiously and over time. What, then, does all this mean for fidelity to PMO? The empirical truth of the matter that rules courts and their conduct is that even the bare minimum of respect for horizontal *stare decisis* and the sheer buildup of the constitutional common law binds courts and their considerations more tightly than any theory of originalism. The interpretation-construction distinction has limits, and the characteristics of old constitutions as I have explicated them in this thesis work to test those limits. PMO can rely on the interpretation-construction distinction when a constitution is young and have all of the normative benefits that the theory claims to entail – I do not contest that in the least. But the same categorically cannot be said about old constitutions. Unless the country is frozen in time, it will inevitably encounter drastically changing circumstances that all but demand the judiciary take a more active role in the maintenance and continuation of the constitutional framework, and they do so by heavily leaning on the antecedent guiding value of *stare decisis*. So many examples of this claim exist across all constitutional states. The expansion of the administrative state. The growth of the executive branch's size and powers. The dwindling efficacy of the legislative branch. The ever-increasing advancement of the corporate and

¹¹⁴ David Strauss, *The Living Constitution*, (New York: Oxford University Press, 2010), 43.

industrial technological influence and activity that complicates the protection and maintenance of constitutional rights, among many others. Time marches on, and constitutions (and the judges that oversee matters of constitutional law) can either fall into step with that temporal progression, or they can attempt to uncover originalism’s normative legitimacy – but that legitimacy waxes and wanes as a constitutions common law regime grows more robust.

The originalist principles of fixity and constraint are only normatively desirable when the historical perspective that preoccupies these principles is reasonably reflective of the lived reality of the citizens within that given constitutional state. Once that historical perspective is distanced from that lived reality, then judges embracing originalism are acting according to the political morality of the people-then and not the people-now. Why does this matter in the context of a discussion of superprecedents? Think of superprecedents like pillars of the small c constitution. In the circumstances of old constitutions, the lived reality of the people-now will correspond much more closely to constitutional superprecedents than it could possibly hope to with the original meaning of a constitutions text. The only avenue for PMO to avoid this charge is to exist as a type of faint-hearted originalism. Christopher Green said it best: “If we define originalism in a strong way, as requiring that nothing about the Constitution change, no one will be an originalist. But if we define it weakly, as saying merely that some things about the Constitution stay the same, everyone will be an originalist.”¹¹⁵ It is the latter sense that originalism must abide by in the context of old constitutional frameworks in which a rich common law and superprecedents exist. The clear and determinate clauses and rules of a constitution – the *truly* clear rules – cannot be challenged without resorting to formal amendment; this should never be controversial. It is in the penumbra of uncertainty that all the problems I raise in this thesis lie,

¹¹⁵ Christopher R. Green, “Originalism and the Sense–Reference Distinction,” *St. Louis University Law Journal* 50, (2006): 560.

and it is the penumbra from which superprecedents draw their strength and influence – they fill gaps that are unaddressed by the constitutional text.¹¹⁶

If we take this line of thought seriously, PMO cannot claim to be justified by democratic legitimacy if employing originalism results in the removal of decades and centuries of the growth of the constitutional common law. Here is why. Originalism that does not make space for these intrinsic aspects of the small c constitution, is in effect, practicing judicial activism, and strikingly, this claim is completely at ease with the claim that the original meaning of the text is the proper interpretative target. In the return to the original meaning of the text (even a gradual one) the endorsement of PMO would create a greater level of judicial activism than the theory it was created to oppose – *even if that activism was required and absolutely necessary to ‘level the playing field’ and restore ‘legitimacy’ to constitutional law.* In this way, old constitutions shift the lens of the democratic legitimacy that Solum claims PMO is predicated upon respecting and upholding; the original meaning no longer has the same value (or the same role to play) in the

¹¹⁶ The sorts of gaps and grey areas of a constitution's text thus invite the creation of precedent that can attempt to provide some clarity within the penumbra. Those gaps, after all, are caused by the general and oftentimes abstract language that constitutions make inevitable. It is these gaps that courts must contend with, oftentimes with minimal clear direction from the constitutional text itself. Justice David Souter does an especially nice job of getting at this very point in a 2010 speech: “If one of today’s 21-year-old college graduates claimed a place on the ballot for one of the United States Senate seats open this year, the claim could be disposed of simply by showing the person’s age, quoting the constitutional provision that a senator must be at least 30 years old, and interpreting that requirement to forbid access to the ballot to someone who could not qualify to serve if elected. No one would be apt to respond that lawmaking was going on, or object that the age requirement did not say anything about ballot access. The fair reading model would describe pretty much what would happen. *But cases like this do not usually come to court, or at least the Supreme Court. And for the ones that do get there, for the cases that tend to raise the national blood pressure, the fair reading model has only a tenuous connection to reality.*” Souter went on to explain in the same speech that “The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another.” David Souter, “Text of Justice David Souter’s speech,” *The Harvard Gazette*, May 27th 2010, <https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>

practice of constitutional litigation when compared to superprecedents whose status may well rival the normative authority of the original meaning.¹¹⁷

So, to overrule and overturn superprecedents (and this is typically or usually what a return to the original meaning of the text would require) flips the argument on its head – the democratic legitimacy originalism is predicated upon upholding is lost. This is especially true if my claim that modern-day originalism will (more often than not) entail the transmutation of the identity of the original meaning of the constitutional text carries out. The interpretation-construction distinction cannot keep up with the target of PMO in the circumstances of old constitutions. It is being overworked and overutilized; it is worth repeating that the interpretation-construction distinction has *limits*. As the distance between the historical perspective of an original public meaning and the lived reality of the people-now grows, the more susceptible PMO's use of the interpretation-construction distinction is to the transmutation of the identity of that original public meaning. In stark contrast to that transmutation, superprecedents flourish through the constitutional common law, and that flourishing represents judges working to enhance the democratic legitimacy of the small c constitution – to bring it into line with the lived realities of the people-now. Not so for originalism. The result is that you now have judges who utilize originalism to legislate from the bench, and critically, they are not legislating for the people-now, they are legislating for the people-then. But they are doing so in a

¹¹⁷ It's worth pointing out here that the richer an old constitutions constitutional common law is, the less work the original meaning does in constitutional adjudication. Recall what Strauss has to say on this exact matter: "*The text of the Constitution hardly ever gets mentioned. It is the unusual case in which the original understandings get much attention.* In constitutional cases, the discussion at oral argument will be about the Court's previous decisions and, often, hypothetical questions designed to test whether a particular interpretation will lead to results that are implausible as a matter of common sense." David Strauss, *The Living Constitution*, (New York: Oxford University Press, 2010), 34. It's also worth mentioning that the sense of implausibility as a matter of common sense Strauss refers to is the small c constitution at work.

warped historical fashion that they cannot hope to justify and therefore cannot hope to show to be normatively legitimate.

Solum and Superprecedents

It's time to consider what Solum has to say about superprecedents. He thinks that nonoriginalist precedents that enjoy wide and deep support of the kind that may entail the status of superprecedents can be (sort of) reconciled with PMO. With regard to these sorts of precedent, Solum argues that "In such cases, the value of democratic legitimacy might itself support a gradual transition to originalism, such that democratic processes could produce constitutional amendments that would bring the original meaning of the constitutional text into line with the results preferred by democratic consensus."¹¹⁸ In other words, if there are superprecedents that are so widely popular that the move to PMO (and thus the overturning of those superprecedents) would frustrate the reliance interests implanted by those precedents on a massive scale, then the popularity of those superprecedents will ensure the entrenchment of their legal effect through constitutional amendment. In a somewhat similar vein of thought, Solum has also made the claim that:

...there are strong arguments for a constitutional compromise that "grandfathers in" canonical cases like *Brown v. Board of Education*. These cases are cemented in the fabric of American constitutional law and supported by a wide and deep consensus of public opinion. Uprooting them is arguably inconsistent with the rule of law and democratic legitimacy concerns that form a large part of the case for originalism.¹¹⁹

¹¹⁸ Lawrence B. Solum, "Originalist Theory and Precedent: A Public Meaning Approach" (2018). Georgetown Law Faculty Publications and Other Works, 463.

¹¹⁹ Lawrence B. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate," *Northwestern University Law Review* 113, (2019): 1285.

On my view, it not entirely clear how Solum thinks precedents that hold superprecedent status ought to relate to his PMO, nor is it clear how superprecedents could be ‘grandfathered in’ to PMO. Assuming, *arguendo*, that Solum endorses the former quotation more so than the later, I want to briefly speak to the line of thought that suggests a gradual transition to originalism could involve an originalist Supreme Court striking down superprecedents under the assumption that doing so would instigate the process of constitutional amendment to reaffirm the substance of those cases as a constitutional amendment.

This is one area of Solum’s work that I firmly believe is not well justified at all. Here is why. Solum’s thoughts hinge on the assumption that precedents of the sort that PMO would strike down via constitutional review enjoy a level of political support sufficient to create a legislative supermajority in order to trigger the amendment formula. There are, very simply, no guarantees that this would come to fruition. For one, it is extremely difficult to guess at the exact measure of that public support without intensive analysis and polling of the matter in question (and this is a matter for legislators and absolutely not for judges). Secondly, there is no guarantee that the legislative representatives embodying the populace in question would endorse the amendment due to a large variety of reasons to be explored in the next section. Thirdly, this line of thought is premised on the assumption that the constitutional democracy in question is a healthy one in which the amendment formula enjoys viable utilization when required. These three reasons all seem to imply that if we are speaking about democratic legitimacy, it is best to leave superprecedents in place – if they are removed, they strike a massive blow to the reliance interests attached to superprecedents that the people-now may well have shaped their lives around (in the American example, the two famous examples are *Roe v. Wade* and *Brown v. Board of Education*).

There is one last reason as to why Solum’s thought process here is erroneous that we ought to point out. An originalist Supreme Court in the business of striking down superprecedents under the assumption that ‘if the legal substance of the superprecedent is important enough’ it will be reaffirmed via constitutional amendment is surely engaging in judicial activism. In this example, that court is essentially saying ‘not good enough, do better’ where ‘do better’ means ‘if you feel so strongly about this matter, formally amend the constitution to make it so.’ That doesn’t seem characteristic of a neutral judicial philosophy! The thing is, originalism is a theory of legal legitimacy – but the bar for what counts as legitimate is incredibly demanding. Striking down superprecedents, despite the fact that they ‘are cemented in the fabric of American constitutional law and supported by a wide and deep consensus of public opinion’ (Solum’s own words) because they do not meet that demanding legitimacy requirement is not a normatively justified action for an originalist court to take *without admitting that the democratic legitimacy justification the theory relies on is being undermined*.¹²⁰ This is not a court fixated upon calling balls and strikes, it is a court that is actively shaping the conditions of the game while insisting that it is doing no such thing.¹²¹

Coupling that with my arguments about the failings of the interpretation-construction distinction and the danger of transmutation, originalism loses a great deal of its normative

¹²⁰ And Solum explicitly admits that this is the case here: “These cases are cemented in the fabric of American constitutional law and supported by a wide and deep consensus of public opinion. Uprooting them is arguably inconsistent with the rule of law and democratic legitimacy concerns that form a large part of the case for originalism.” Lawrence B. Solum, “Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate,” *Northwestern University Law Review* 113, (2019): 1285. That is nature of old constitutions at work: The characteristics of old constitutions place originalism between a rock and a hard place.

¹²¹ It’s also worth pointing out that my claim is accurate *even if* the originalist court in question does not straightforwardly strike down the superprecedent in question and instead minimizes, discriminates, or otherwise mediates the legal effect of the superprecedent in form or fashion that negatively impacts the reliance interests created by that superprecedent (thus hurting the democratic legitimacy vested in the political morality of the people-now). This is especially true when the superprecedent involves constitutional rights. For an explanation of the distinction between judicial minimalization, discrimination, and mediation of rights see Jamal Green’s book *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* (Introduction, xvii- xx).

justification and legitimacy when it is implemented (even implemented gradually) in the circumstances of old constitutions. Engaging in judicial activism without a clear error basis and overruling the people-now's connection to the common law (and thus an important measure of their democratic legitimacy) does not seem like a very strong normative justification for an interpretative philosophy obsessed with judicial restraint. Remember that Solum thinks that the use of precedent ought to be brought into line with the original meaning of the constitutional text. If the people-now wish to make changes to the original meaning of the constitutional text, the people-now can amend the constitution to "bring the original meaning of the constitutional text into line with the results preferred by democratic consensus."¹²² The thing is, there is simply no guarantee that the legal realities which those precedents sanctioned could be revitalized via formal amendment.

Old Constitutions and Reconstruction Amendments

I want to pause here and address one extremely important caveat that needs to be applied to the general line of argument found in this chapter. If it is not, my arguments are disingenuous to originalism, full stop. My thoughts here are focused on the problematic consequences of the original meaning of a constitutional text that has endured long decades, even centuries of disconnect from the political morality of the current populace of a constitutional democracy. Following the American example, this would be the initial constitution, or the articles of confederation ratified in 1781. But this is an incomplete picture, and an originalist response to my arguments here could look something like the following retort. The democratic disconnect is

¹²² Lawrence B. Solum, "Originalist Theory and Precedent: A Public Meaning Approach" (2018). Georgetown Law Faculty Publications and Other Works, 463.

real between an old constitutions original text and the social, legal, political, economic, and cultural practices and beliefs of its current populace. No one can deny that. But this is not the crushing blow to originalism that you claim it is. Constitutional amendments are part and parcel of the constitutional text, and because those amendments occur throughout the long lifespan of old constitutions, originalism is quite literally revitalized each time an amendment becomes part of the constitution. It is revitalized in the sense that originalism gains access to the full communicative content (i.e., the semantic fixity and contextual enrichment) of the time period the amendment was ratified in, and in effect, this can ‘bring originalism back into line’ with the current political morality of the people-now.¹²³ In cases where originalism is not brought back into line in this way, the originalist response continues, this simply indicates that the people-now are not sufficiently bothered by the disconnect between the legal implications of the original meaning of the constitutional text and the political realities of their current lives to bother with formal amendment. Moreover, the originalist can suggest that the people-now have effectively asserted their intention to leave things the way they are in a manner comparable to the idea of tacit acceptance and implicit social contract theory.

At first glance, this is a somewhat convincing argument, but it has major pitfalls. For one, even if an amendment is ratified extremely recently, this does not consider the existence or influence of superprecedents as they might relate and impact such an amendment, and we have just seen why such considerations matter greatly. Secondly, as noted previously, there is no guarantee – no guarantee at all – that amendments will be successfully passed, thus ensuring

¹²³ Following the American example, an instance of this is detailed here: “But the most important function of Reconstruction was to demolish the infrastructure of slavery in the original constitution. The eventual Thirteenth Amendment and the two others that followed it together tore down the major pillars of America’s original sin, codified in the constitution for all to see: the Three- Fifths Clause, the Fugitive Slave Clause, the Migration or Importation Clause, and the Proportionate Tax Clause. Scholars have suggested that the Reconstruction created a new constitution, a new constitutional order, or a new regime.” Albert, *Constitutional Amendment, Making, Breaking, and Changing Constitutions*, 83.

originalism's revitalization. On the contrary, old constitutions (and especially Western liberal constitutional democracies, which is the focus here) invite the emergence of long stretches of time in which no amendments come about, times in which the social, legal, political, economic, and cultural circumstances radically transform. Such constitutions are typically severely entrenched, and thus there are no clean metrics here. A constitutional democracy can change with regard to these factors in 10 years to an extent that previously took 100 years to occur; and the opposite is also true. The creation and direction of supermajoritarian political coalitions is similarly very difficult to accurately predict, and this invites layers of subjectivity and uncertainty. Constitutional law, after all, is all about cycles – cycles of people and politics, cycles that are not routine or predictable or linear. The assumption that if the people-now wanted to amend the constitution, they would simply do so is the absolute height of ideal theory.¹²⁴ It entirely fails to consider the layers and layers of reasonable disagreement that permeate constitutional democracies and their reasonable pluralism. Indeed, it treats those considerations with something akin to contempt... the idea is that if there is *truly* a reason to amend the constitution, that reason will have little to no trouble garnering the support of a supermajority consensus, a foolishly idealistic thought. That is my rebuttal to the problem of reliance on formal amendment. Now it is time to question the fundamental premise that originalist line of thought is

¹²⁴ This argument also assumes that the legislators representing those people would agree with them on the particulars of the constitutional amendment in question, and it also assumes that even if the legislators did not agree that they would nonetheless abide by the democratic mandate of their constituency. Both of these assumptions are premised upon a singular and rigid view of the relationship between legislators and their constituencies. In other words, the argument assumes that the delegate model of representation – and only the delegate model – is in effect. This is simply not the case in reality. A legislator may certainly act at times as a delegate (a legislator who simply abide by the wishes of their electorate) but they may also act as a trustee (a legislator who acts upon their own understanding of the right course of action). More often than not, a legislator will balance between these two modes, which is sometimes called the politico model of representation (where the legislator attempts to balance their own normative considerations with those of their constituency). All of this is to say that once again, originalism's rhetoric assumes too much and justifies too little. See the Stanford Encyclopedia of Philosophy entry on political representation for a detailed and comprehensive account of all three forms of representation. Suzanne Dovi, "Political Representation," *The Stanford Encyclopedia of Philosophy, (Fall 2018 Edition), Edward N. Zalta (ed.)*.

based upon: an ideal picture of the efficacy of the legislative branch. Before we can do that, however, we need a little more detail (provided by Solum) on why the legislative branch is the only legitimate way to alter a constitution.

Solum on the Desirability of Formal Amendment

In the not-too-distant past, Solum has detailed why the legislative branch and its ability to amend the constitution is an important part of originalism's criteria for legal legitimacy. Speaking at one of the Senate confirmation hearings for Justice Gorsuch's appointment in 2016, Solum explicitly connects constitutional amendment as the solution to the dead hand of the past problem for originalism. Before examining that quote, however, we need a basic understanding of that connection. The dead hand of the past argument is one of the most commonly invoked issues that originalism must defend itself against, and many involved in the great debate claim that it is originalism's greatest deficiency. The argument goes like this: originalism is normatively undesirable because, above all else, it mandates that judges must enforce values and rules that were created by and for people and populations who have long since left this world. And yet, the dead hand of those people continues to affect the lived realities of the people-now. The argument concludes that the dead have no right to exercise control over the living – an explicit endorsement of Thomas Jefferson's now famous statement that 'the earth belongs in usufruct to the living'.

Let's examine how Solum thinks the dead hand of the past argument is overcome and how originalism gets around it.

Constitutional amendment is not easy; it requires a consensus of most Americans. But it is not impossible. In this regard, it is important to remember that living

constitutionalism undermines the lawful process of constitutional amendment. These days if a social movement is seeking constitutional change, they have two alternatives. They can marshal their forces for a constitutional amendment; this is a hard road. Or they can attempt to eke out five votes from the Supreme Court, the easy path. It is hardly surprising, that many choose the easy path over the hard road. But in this case, the hard road is also the high road. Constitutional change through the amendment process enable “We the People” to overcome the dead hand of the past through the rule of law.¹²⁵

To be clear, we are not interested in the dead hand of the past argument in itself here; we are interested in how – and why – Solum connects it to constitutional amendment and democratic legitimacy as a way of rescuing originalism from the negative implications of the dead hand argument. Note the last sentence of this quotation in particular. Solum implicitly suggests, through the way he choose to phrase this sentence, that the sheer existence of the amendment formula and its capacity for utilization entirely overcomes the dead hand of the past objection. When the need is sufficiently great to trigger a successful amendment attempt, it will occur – end of story. Anything lesser than this, any judicial activism, represents judicial malfeasance; the manifestation of “the easy path over the hard road,” as Solum claims. This is troubling for several reasons (some of which we have seen in the previous section). I do not have the space to explicate an adequate argument for *all* those reasons, so we focus on one of the strongest one here – the fact that Solum explicitly premises this entire quotation, and in effect his entire perspective on the appeal of originalism on a legislative branch immersed in ideal theory all the way down.

Originalism’s Folly: The Idealistic Legislative Branch

¹²⁵ Statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law Georgetown University Law Center. “Hearings on Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States.” Published by the United States Senate Committee on the Judiciary, 2017, 9-10.

What does it say about a judicial philosophy that implicitly relies on an idealistic conception of another branch of government to maintain both its standard of legitimacy and its normative justification? We will examine this question in this section, and my initial answer is a highly skeptical one. Before really getting into it, though, I want to remind the reader that the concept of judicial review is built upon the idea that the legislative branch can not only ‘get it wrong’ but that they need to be carefully monitored by the judicial branch. Let’s continue to stick with the American example. The United States Courts Website states that judicial review consists of “the ability of the Court to declare a Legislative or Executive act in violation of the Constitution” and goes on to assert that the Court “plays an essential role in ensuring that each branch of government recognizes the limits of its own power.”¹²⁶ Notice that both descriptions of judicial review involve the need to countermand the legislative and executive branches when their actions violate the constitution or exceed their powers as defined by that constitution.

It’s always struck me as just a little ironic that originalism (a judicial philosophy that maintains the only legitimate form of constitutional change is via formal amendment) operates because judicial review exists, and that judicial review is premised on the worry that the legislative branch may act illegitimately and in bad faith.¹²⁷ That’s what led me to ask the question from the first sentence of this section. Originalism is completely reliant upon the

¹²⁶ “About the Supreme Court,” United State Courts Website, Accessed Saturday May 29, 2021, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about>

¹²⁷ This point shouldn’t be made without subsequently acknowledging that not all Western liberal democracies require the legislative branch to trigger formal amendment. Consider the Canadian case, where national referendums can play a role in certain circumstances (but are not strictly legally required for formal amendment). Referendums are typically understood to be more democratic than formal amendment via the legislative branch because referendums are essentially an exercise of direct democracy. However, we are considering the American example here, and the legislative branch (at the federal and state level) is a necessary component of constitutional amendment.

legislative branches' ability to act both effectively and in a normatively desirable manner; and yet the theory can only operate because it is premised on the thought that legislatures will often err in their ability to make constitutionally sound legislative mandates.

On the specific subject of constitutional rights and provisions (remember, we are more concerned with constitutional review here and less so other forms of judicial review) far from being able to assume that the legislative branches in Western constitutional democracies are idealistic institutions, they ought to be understood as non-ideal and perhaps thoroughly non-ideal institutions. If this claim is correct, then it seems likely that since originalism requires an idealistic legislative branch that if it does not have one, the originalist claim that the theory has a complimentary relationship to democratic legitimacy is at least a little bit disingenuous.^{128,129}

Let's get a sense of why one ought to think that there are good reasons to believe that legislatures are non-ideal entities for a judicial philosophy to base its criterion of legal legitimacy upon. To do so we need to ask what substantiates the claim that the legislative branch has the potential to be a thoroughly non-ideal institution. The two main issues that I am thinking of is the refusal of legislators to work together as a cohesive body based on differing constituent values and/or the emergence of polarization of the sort that encourages legislators of different ideological factions to oppose one another's mandates on a consistent and bad faith basis. I don't mean to suggest

¹²⁸ The thought here is that the concept of democratic legitimacy is in part based upon legitimacy via democratic consensus. If the legislative branch is for whatever reason unable or unwilling to reach the supermajority votes required by many (but not all) legislatures to enact that democratic consensus, doesn't it seem strange that originalism is powerless to enact any judicial change not justified by a substantiated interpretation of the original public meaning of the constitutional text in question, no matter how unjust or morally repugnant?

¹²⁹ An easy way to strawman this line of thought is to say that my claim implies that legislatures will act consistently good or bad, only one or the other. But that isn't it at all. My claim is that far from understanding legislatures as ideal institutions (*so ideal that a theory of judicial interpretation can rely on it to validate its normative principles*) we ought to think of them as thoroughly nonideal institutions when we are discussing their ability to mediate on contentious issues arising from constitutional rights disputes. While such institutions can regularly pass legislation and reach policy agreements, their understanding of the implications for constitutional matters is so often lacking. That lacking and the repercussions which stem from it constitute an important function of the judiciary: to ensure that legislative aims do not violate rights and to modify or strike down law that infringes on constitutional rights and provisions.

that these are inherent features of the legislative branch – merely that legislative assemblies in Western liberal democracies (particularly in recent decades) do tend to be deficient to a degree that inhibits their optimal efficacy - *especially* with regard to the formation of supermajoritarian political coalitions.¹³⁰ One can read this as a clear rejection of Edmund Burke’s statement that legislatures are not fractured and inimical entities, that they are legislative bodies with one interest – that of the nation – controlling their deliberations.¹³¹ It’s a statement that reasonable people can disagree upon. But when we are talking about supermajoritarian political coalitions and formal amendment, it’s a utopian belief.

When we remove the ideal theory that originalism operates upon in this regard, we see more and more clearly the numerous reasons an amendment that ideally would have succeeded can fail. There are a multitude of reasons (sometimes isolated, sometimes interconnected) why potential amendments which enjoy considerable support can and do fail to reach the sufficient threshold required by the often-stringent requirements of a constitutional amendment formula.¹³² Some of those reasons might be the refusal of legislators to act in such a way as to endanger their odds of re-election, political polarization of the institutional body in question resulting in ideological factions acting in bad faith, differing/oppositional ideological majorities in bicameral

¹³⁰ An especially cogent and concise article on this exact topic is Richard Albert’s “The Difficulty of Constitutional Amendment in Canada.” This article is a work of comparative constitutionalism, and in part it pits the American and Canadian constitutions against one another to demonstrate why many scholars are no longer speaking of the difficulty of formal constitutional amendment in these Western liberal democracies – they are instead speaking of the *impossibility* of formal amendment. See footnote seven of this paper for three further sources that directly address this issue.

¹³¹ Burke is famous for claiming that “Parliament is not a congress of ambassadors from different and hostile interests, which interest each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole... You choose a member, indeed; but when you have chosen him he is not a member of Bristol, but he is a member of Parliament.” Suzanne Dovi, “Political Representation,” *The Stanford Encyclopedia of Philosophy, (Fall 2018 Edition), Edward N. Zalta (ed.)*.

¹³² Consider, for example, the following contrast. There are 27 successful amendments to the American Constitution – 27 out of approximately 11, 848 measures that have been proposed to amend the Constitution from 1789 through January 3, 2019. “Measures Proposed to Amend the Constitution,” United States Senate, January 3rd 2019, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm>

legislatures, excessively demanding amendment formula requirements, failure on the part of the citizenry to mobilize as part of that formula, and competing demands relating to the substance and effect of the amendment in question.^{133, 134}

Aside from all of these potential factors, it deserves to be said that legislators are elected political officials and are subject to all of the pressures, temptations, and failings that can and do occur when one's job is recurrently at risk if the 'right moves' are not made. And although legislators are oftentimes individuals who share a heightened appreciation for the importance of avoiding such pressures, oftentimes they are not. None of this is to suggest that there is some inherent failing of legislatures in constitutional democracies – these observations are merely demonstrating that an originalist who points to the *mere possibility* of formal amendment as a surefire counterargument to the dead hand of the past argument is relying on a rather flimsy justification for the normative goals of their judicial philosophy. Relying on the legislative body to successfully enact constitutional amendments, then, when so much room for less than good faith action to occur seems to be a *prima facie* precarious assumption to base an entire criterion of legal legitimacy upon. Originalism's failing in this example seems brazen: it requires such a rigid touchstone (supermajority amendment) that it is blind to anything that does not meet that incredibly high standard. Because of this, originalism's fidelity to democratic legitimacy can better be understood as a stranglehold upon it to ensure no judicial decisions escape the original public meaning of the constitutional text.

¹³³ For an in-depth analysis of the more general question of why constitutional amendments can fail, see "Why do Formal Amendments Fail? An Institutional Design Analysis" by Christopher P. Manfredi and Michael Lusztig.

¹³⁴ The failure on the part of the citizenry to mobilize as part of that formula represents a much larger problem, the democratic deficit that Western liberal democracies have been experiencing for decades. This is not something we can explore in even brief detail here, but for excellent and recent work on this issue see "Democracy Without Participation: A New Politics for a Disengaged Era" by Phil Parvin (especially pages 31-43) for an appreciation of why this issue is such a concerning one when we are discussing democratic legitimacy.

This originalist conception of democratic legitimacy fails to account for the fact that constitutions (or rather, the dominant political cycles that animate constitutionalism) may well fail to live up to their potential – but this does not mean that they fail to be valuable, significant, or steeped in the definition of democratic legitimacy that I have defined in this chapter. Moreover, those political cycles of societal change (and the chances of waves in those cycles becoming large enough to reach supermajoritarian levels) can regress and be disproportionately affected. Consider when constitutional states experience times of war, times of sickness, intense political polarization, ineffective legislatures, tyrannical executive officials and their influence over the legislative branch, and similar events that negatively impact the ability of a citizenry to amend their constitution and the ability of the legislative branch to achieve a supermajority – even in times of large political coalitions intent on bringing about urgent socio-political action and change. This is why it's critical to remember that the small c constitution and the constitutional common law is in itself a normatively viable way of addressing the legal matters (in particular I am thinking of constitutional rights claims, grievances, and violations) that can help align a constitution with the political and legal values of the people-now.¹³⁵ Some of the

¹³⁵ The constitutional common law is normatively viable – it is not normatively perfect, and no theory of constitutional interpretation can or should claim to be perfect. The idea here is not that judges drawing on originalism will always ‘get it wrong’ and judges drawing on the common law will always ‘get it right’. Far from it. The idea is simply that the common law gives judges the space to consider a huge host of considerations (considerations like decades upon decades of precedent, judicial doctrine, standards, and balancing tests to name just a few factors) that are beyond the original public meaning of the constitutional text, and it is this quality that makes the common law normatively superior to an originalist approach. What’s more, judges adhering to the common law can also restrain themselves and not engage in matters that they deem are better left to the legislature, matters like controversial and divisive socio-political questions of morality. They can do so because adherence to the common law (unlike originalism) does not set an incredibly high bar for legal legitimacy. This exact line of thought ought to appeal to proponents of judicial conservatism more than modern day originalism does. Originalism mandates a black and white view of legitimacy – the common law is a sea filled with shades of grey. So, while the common law does give judges the space to consider a huge host of considerations, crucially, it also gives them the room to not make a choice at all. The bottom line is that I believe judges should not have as much sway over contentious socio-political issues - but the reality in the most Western constitutional democracies is that they do – and so neutrality is not an option, and *if I must endorse one judicial approach over the other*, the common law approach is clearly the normatively desirable option.

events I listed above are more than likely to occur over the long lifespan of old constitutions than not. When these sorts of events occur, the judiciary ‘fills the void’ in the sense that it approaches constitutional law in ways not sanctioned by an originalist lens when this is required to avoid normatively undesirable results.

I want to suggest that in the circumstances of old constitutions, the judicial branch must step up to the plate, so to speak. I do not think judges ought to get into the habit of occupying that plate – but if the legislative branch is mired in non-ideal conditions, and the choice is between originalism and the constitutional common law, the choice is clear which is normatively justifiable with regard to an old constitution. But we really can’t go any further here without dealing with the flip side of the coin. Our focus is Western liberal democracies, and in them, the legislative branch has the potential to be downright non-ideal. But in most Western liberal democracies judicial review (in some form) is and will continue to be in effect. The question then becomes how can we trust judges who are not elected and serve for life? We cannot. The thought that the judiciary are infallible guardians of all things constitutional, that they do not have the capacity to be a non-ideal institution is actually more problematic than assuming the legislative branches’ ideality.¹³⁶ This is the basis of one of the big disputes in legal philosophy: the dispute that, at its core, asks ‘what option are citizens of a democracy better off with? Do we want decisions made by elected officials with limited terms – officials who are accountable to their failings in the non-ideal conditions they will encounter? Or do we want decisions made, also in non-ideal circumstances, by a much smaller number of people who are neither selected

¹³⁶ It is more problematic because judicial hubris is a dire threat to constitutional democracies. But to think that originalism avoids that hubris whereas judges who utilize constitutional common law considerations encourage it seems entirely misguided. Originalism almost requires originalist judges to be Dworkin’s Hercules... to be expert lawyers, expert historians, and even expert ethicists (in the sense that they cannot allow even a shred of their personal or political morality to affect their decisions, and like it or not that is *far* more difficult than it initially might seem). Surely it is more hubristic to believe that judges are capable of meeting those requirements than it is to say that a judge should simply be a judge.

by, nor accountable to the democratic citizenry?’¹³⁷ No one can deny that judges engaging in judicial review is, *procedurally*, less democratic than legislators engaging in the process of lawmaking. But one must weigh the value of that democratic process with the nature of democracy itself. Put differently, one must ask themselves what is more important: a democratic process that has the potential to yield undemocratic results or an undemocratic process that has the potential to uphold the ideals of democracy when they are threatened. For my part, I believe judges who utilize the constitutional common law to align the political morality of the people now with the constitutional rights provisions those people are entitled to is vastly preferable to entrusting that awesome responsibility to the legislative branch. I should specify that I only endorse this claim when supermajoritarian political coalitions (the sort required for formal amendment) fail to form for long periods of time: that is when judges have a valuable role to play in this context. Those judges may well get it wrong; the constitutional common law is not a sure-fire way of making correct constitutional decisions. But the same is true of the legislative branch and its ability to bring about formal amendment.¹³⁸

Judicial review was never meant to be the sole or even primary factor in dealings of constitutional hotbed issues. The legislative branch was always meant to be the main source of maintenance because the legislature has the much higher claim to the traditional understanding

¹³⁷ There is a wide variety of literature that addresses this issue. The strongest arguments for the anti-judicial review camp have come from the work of Jeremy Waldron. To get an initial idea of the positions both the advocates and the critics hold on the debate over judicial review, I recommend Wil Waluchow’s article “Constitutions as Living Trees: An Idiot Defends.” In its first few pages, the article breaks down the basics of the debate and some of the different positions within it on both sides. Moreover, it is written in such a way that one with no prior knowledge of the debate can quite easily learn a great deal from it. Because the critics of judicial review are represented quite charitably, this article is an excellent way of taking good measure of both sides of the debate in one paper. If one seeks more extensive sources, for advocates of judicial review see work by Ronald Dworkin, Joseph Rawls, and Samuel Freeman. For judicial review’s critics, see work by Waldron, Andrei Marmor, and Alexander Bickel.

¹³⁸ Waldron and his anti-judicial review arguments cannot be dismissed nearly so quickly as that, of course, and I don’t wish for the reader to assume this awfully short address is near enough to adequately deal with the thoughts Waldron raises. But addressing those points are outside the scope of this thesis.

of democratic legitimacy. The question becomes what happens when the legislature does not act (or more accurately cannot act) to amend the constitution when it is normatively desirable to do so? The strain that this puts on constitutional review to ‘get it right’, so to speak, is a massive one – and I have tried to show here that originalism would only worsen that strain in an old constitutional regime.¹³⁹ This is why I have argued that Solum’s reasoning about the amendment formula solving the dead hand of the past argument is misguided: it fails to account adequately for the thoroughly non-ideal conditions that the legislative branch may find itself immersed in. The direct consequence of this is the admission that without a healthy legislative branch, originalism loses one of its most convincing reasons for fidelity to the theory.

This is a central point to stress. Originalism and living constitutionalism are widely assumed to trade in different currencies but in one critically important way are more accurately understood as two sides of the same coin. Both profess fidelity to the political morality of the people under a constitutional democracy. The difference is that originalism focuses on the supermajoritarian affirmed values of the people-then, and common law constitutionalism recognizes the rigidity (and the error that rigidity can lead to) of that approach and instead supports the values of the people-now. With that thought in mind, and given that the very nature of constitutionalism privileges the political commitments of the people-then, the judicial branch should privilege the political morality of the people-now in the circumstances of old

¹³⁹ We have to be careful here: the originalist hardline would absolutely worsen the strain. When thinking about PMO, however, we need to remember that (as we saw in this chapter) Solum is not opposed to a gradual move away from abiding by precedent and endorsing nonoriginalist results. As such, PMO on Solum’s view could recognize that when it is essential for judicial review to ‘get it right’ (and more precisely, in cases where it would be “arguably inconsistent” with the rule of law and democratic legitimacy to utilize originalism, to use Solum’s phrasing) then PMO would not worsen the strain. Fair enough – but a judicial philosophy that must tiptoe around enforcing its normative principles in the circumstances of an old constitution surely implicitly demonstrates that an old constitution is not a suitable place to desire the enforcement of those normative principles.

constitutions.¹⁴⁰ Not doing so doubles down on the claim that judges are engaged in anti-democratic behavior; after all, what could be more anti-democratic than a small group of unelected elites favoring political consensus and a political morality that is wholly unreflective of the people whom those judges and their decisions affect? When understood through this lens, the situation quite literally reverses; living constitutionalism is now the theory that champions democratic legitimacy more so than originalism. That is the radical effect that the circumstances of old constitutions inflict upon originalism – it is the scalar shift made tangible. Some originalist advocates genuinely believe that living constitutionalism is “an ingredient for a corrosive society” as Justice Rehnquist notoriously put it once.¹⁴¹ I have tried to show why this is misguided. Aged constitutions, very simply, require more from their judiciaries; they require judges to conceive of old constitutions as a reflection of a transformative and aspirational people, “a people with faith in progress.”¹⁴² Old constitutions and their development should be seen as the embodiment of those aspirations.

One Last Note: Originalism's Cloak

¹⁴⁰ This is not a statement endorsing a free for all on judicial activism that originalists so often accuse living constitutionalism of incurring – far from it. It is instead the result of the implication that old constitutions require more from their judiciaries. Realignment of old constitutions with the political morality of the people-now, when that realignment is pursued through the small c constitution and is done with a healthy dose of judicial humility and respect for the importance of antecedent guidance is showing *true* fidelity to democratic legitimacy. Crucially, that fidelity doesn't require judges to be “philosopher-kings with a pipeline to moral truth,” it requires them to take note of two ideas: 1) that old constitutions require *more* from the judicial branch and that 2) deciding what constitutes ‘more’ ought to be done with humility, accompanied by the constant reminder that judges are not legislators. Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, (Cambridge: Cambridge University Press, 2006), 226. For a fleshed out version of this line of thought, see the following speech given by Waluchow regarding his version of living constitutionalism, where he states that “...when pursued with humility and due respect for the competing needs of antecedent guidance and flexibility, living constitutionalism can exemplify the enlightened pursuit of the rule of law.” Wil Waluchow, “The Living Tree,” June 6th, 2020, McMaster University, YouTube, 2:21:16, <https://www.youtube.com/watch?v=qaXFdwti3Y0&t=2839s>

¹⁴¹ William H. Rehnquist, “The Notion of a Living Constitution” *Harvard Journal of Law & Public Policy* 29, (1976): 415.

¹⁴² William J. Brennan, “The great debate” Georgetown University, Text and Teaching Symposium (1985). For those interested in how old constitutions can be understood in this way (and the American constitution specifically) see Barry Friedman and Scott Smith's article “The Sedimentary Constitution.”

I want to address one final matter before concluding this thesis. When discussing originalism, one should always keep in mind that the principles embodying originalism were created based upon a severe ideological reaction. Originalism rose from the dismay of conservative politicians, lawyers, judges, and academics in reaction to the Warren and early Berger courts. The claim that originalism is not a result orientated jurisprudence is precisely that – a claim. I have tried to show, over the course of this thesis, that we should understand this claim to be a tenuous one. In chapter one, I acknowledged that the focus of this thesis was on academic theories of originalism and not originalism as it has (or has not) manifested in the real world. Because of this, I treated originalism as a theory that is truly aimed at achieving ideological neutrality. But make no mistake: there is a deep and disturbing conflation here, one that has fuelled the failure to resolve the great debate, and one that must be resolved if we are ever to make any headway. The fact that originalism rejects deviation from the original meaning of the constitutional text, and the corresponding fact that conservative ideology often falls in line with that aim is a correlation that should be treated with extreme suspicion – and already, there is work in the field of political science that aims to analyze the quantitative data of originalist judges’ political ideology and their corresponding beliefs about originalism.¹⁴³ This is the problem of originalism’s cloak; a façade of neutrality that many believe shields the theory from all of the accusations that are consistently leveled against nonoriginalism. It should not be particularly shocking to anyone who favours a realist view of the originalist debate that the results of initial research on this subject strongly correlates originalism with political

¹⁴³ A basic review of that research can be found here: <https://www.gsb.stanford.edu/insights/neil-malhotra-debunking-myth-liberal-supreme-court>. For a short compilation of qualitative scholarly work on this topic, see “Original(ism) Sin” by G. Alex Sinha, footnote eight.

conservativism. If this claim can be enhanced and verified then originalists are, frankly, in trouble – it would represent the most formidable challenge originalism will ever face, and originalism seems to be facing more challenges than ever before. Those challenges pile up for one very simple reason, a reason that I have tried many ways to demonstrate here: to a certain degree, originalism is mutually exclusive with the nature of old constitutions.

There is one way – and only one way – that originalism can avoid both the worry of originalism’s cloak and the challenges that I raise over the course of this thesis: a return to the judicial deference that the originalist family tree was born from. That deference was the driving force of the original originalism, after all. For my part, modern originalists discredit themselves when they dismiss the legitimacy of combining originalist principles with strong deference – they have forgotten their roots. Perhaps those originalists are still clinging to the idea that originalism is working itself pure – that originalism is nascent. Regardless of whether that is true, “As more and more Originalists drop the deference aspect of the theory, however, and tell judges to apply the original meaning of the constitutional text differently as relevant facts (and values) change, then judicial discretion will be maximized,” and transmutation will invariably enter the picture.¹⁴⁴ Without strong deference originalism, the theory’s normative foundations erode in the circumstances of old constitutional regimes.¹⁴⁵ Absent strong deference, advocates of originalism ought to take note of Ludwig Wittgenstein’s famous pronouncement that ends the *Tractatus*:

¹⁴⁴ Eric J. Segall, “The Concession that Dooms Originalism: A Response to Professor Laurence Solum,” *The George Washington Law Review* 88, no. 33 (2020): 46.

¹⁴⁵ It is worth pointing out that strong deference originalism captures the most valuable role that the theory can play in the context of an old constitution – protecting the clear rules and desirable fixity that grounds constitutionalism and rejecting blatantly unconstitutional legislation. Over the course of this thesis, I have advocated for nonoriginalist jurisprudence, but this does not mean that I reject all originalism, in every form, in every situation. The nature of old constitutions undermines originalism, yes – but it does not entirely eradicate normative arguments for an originalist approach to interpretation. Constitutionalism is not constitutionalism without initial and weighty respect for antecedent guidance and fixity over flexibility. Where originalists so often get it wrong is when they argue that fixity should always dominate flexibility, which is emblematic of an originalist understanding of constitutions as dead documents incapable of change outside of formal amendment.

“Whereof one cannot speak, thereof one must be silent.”¹⁴⁶ In other words, where originalism is not clearly and justifiably determinate, originalist judges must be silent in the construction zone. Where originalism cannot be demonstratively legitimate, originalism ought to be nowhere at all.

Conclusion

In the context of old constitutions, originalism will struggle to be normatively legitimate and justified; in truth many of its forms seem barely capable of flexing their conceptual muscles without incurring results that are normatively disastrous. But what I categorically do not want to claim here is that these two lines of argument provide a fatal rebuke of originalism outside of the context of old constitutions. The same is true of Solum and PMO – I have absolutely no doubt that should he engage with my work here, he will meet my numerous critiques head on and in a frightfully proficient manner. But this should be understood as a good thing. The great debate over originalism will not be solved by one academic or another – indeed it may never be solved at all, and certainly not by academics alone. Notwithstanding that, the paramount importance and impact of constitutionalism demands that we continue to try to settle this issue. The only way that we can progress in achieving that aim is to continue to meticulously fuel the conceptual grounds of the dispute. So, while my arguments here do not even come close to derailing originalism in general, I hope that I have shown why they deserve to be taken seriously regarding old constitutional regimes.

What is certain is that originalism will not fade away, no more than the clear-cut and determinate provisions of a constitution can be overruled or common sense constitutional

¹⁴⁶ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans. Kegan Paul (New York: Routledge, 2001), 90.

stability and predictability can be discounted as valuable. In that minimal sense, yes, we are all surely originalists, and originalism will always be a required tool in the judicial toolbox. But trying to understand originalism as *the toolbox* only shows that originalism can and has dwindled and diminished in its normative desirability, legitimacy, and justification in the circumstances of old constitutions. Unfortunately, the view that originalism ought to be the whole toolbox will retain its supporters. Originalism is a theory of legal legitimacy – it cannot give way to other theories, theories that one who accepts originalism’s principled commitments must deem illegitimate. Above all else, this seems to be the root of the problem. Originalism’s claim to singular legitimacy has far reaching and negative repercussions outside of academic theory. Though I cannot speak directly to it here, I believe that these ramifications hurt originalism’s claim to be nothing more than a judicial philosophy. Put differently, those repercussions alter the widespread perception of the theory more and more into something reminiscent of an ideological banner to rally around, and an article of faith to adhere to. The great debate over this contention continues because proponents of originalism will not alter their legitimacy claim. I have endeavoured over the course of this thesis to demonstrate why that claim is very distant from the reality of the situation in the circumstances of old constitutions. An originalist constitution is categorically not an aged constitution; the normative appeal of originalism has come and gone. In originalism’s stead, nonoriginalist considerations dominate the normative landscape of old constitutions in Western liberal democracies.

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