

ORIGINALISM'S EXPIRATION DATE

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This Article investigates the influence of time on the interpretation of supreme law. The Constitution of the United States declares itself supreme law, but even the amended document is ancient and most of its authors are long dead. By 2008, the predicted age of a randomly selected word in this text reached 178 years. The judiciary, moreover, often does not interpret constitutional text until many years after ratification. For Article V amendments, the average time lag between ratification and Supreme Court interpretation has been approximately 40 years. But this lag varies enormously across amendments. The question is how these temporal features of our supreme law might influence the choice of methods for interpreting the text, in the courts and elsewhere. In particular, some commentators indicate that originalism might be a strong force in adjudication when constitutional text is still fresh, but should then fade with time.

This Article is an attempt at reassessment. It isolates the Court's first efforts to understand Article V amendments plus several interpretive trends thereafter. And it moderates the concession by skeptics that originalism is desirable or required in the wake of ratification. Originalism is sometimes weaker than that. But the Article also plays out the most promising justifications for a timeless originalism. A set of arguments might retain strength over time. An example is the possibility that originalism is a forward-looking incentive for Article V lawmaking. Although unacceptable to some on normative grounds, for others this justification would become persuasive on certain empirical facts. Finally, the Article explores an unorthodox justification that might grow stronger as it ages: Originalism could function as a culturally acceptable substitute for randomization. It turns out that a corner of supreme law is probably best determined at random, even if judges will never roll dice.

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INTRODUCTION

Among the more bizarre provisions in the Constitution of the United States is the procedure for its formal amendment.¹ Article V describes a series of supermajority votes in state and national institutions before new text becomes supreme law under Article VI. Normal constitutions — national, state, and local — do not share this design. In the 219 years since the first version of the document was ratified, it has been amended through Article V on no more than eighteen occasions yielding twenty-seven numbered amendments. Most of the document advertising itself as supreme law is ancient and not getting any younger. By 2008, the predicted age of a randomly selected word in this text reached 178 years.² This creates long temporal distances between Article V ratification and present-day interpretation. This is “the interpretation lag.”

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

The interpretation and adjudication lags are embedded into our supreme law. The question is whether they ought to influence how we treat constitutional text. Later this year, when the Supreme Court decides *District of Columbia v. Heller*,⁶ should it matter that the Second Amendment is 217 years old? Was a different interpretive approach required in 1791? More generally, what is the appropriate relationship between the passage of time and the content of supreme law?

There are several possible answers. On one side is the option of disregarding the document. Perhaps a sufficiently long time lapse after ratification destroys any justification for enforcing the document as law. No official would openly advocate this position today, but one might say that certain long-running practices

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

² See *infra* Part I.A. & fig.2.

³ See Neil K. Komisar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 123, 251 (1994) (noting that courts can address only a small fraction of significant policy disputes); cf. Frederick Schauer, *Foreword: The Court’s Agenda — and the Nation’s*, 120 *Harv. L. Rev.* 4, 9, 49 (2006) (arguing that most Supreme Court adjudication deals with nonsalient, even if influential, policies).

⁴ Cf. Frederick Schauer, *Easy Cases*, 58 *S. Cal. L. Rev.* 399, 400–07 (1985) (observing that many clauses are rarely or never litigated, and pointing to differences in clarity).

⁵ See *infra* Part I.B. As I am using these terms, there is always an interpretation lag but the adjudication lag ends at some point. Obviously the Court may revisit its interpretations.

⁶ 128 S.Ct. 645 (2007) (granting a writ of certiorari to review *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (invalidating a D.C. handgun regulation)).

are departures from the document's meaning to serve contemporary needs. At the other extreme is the option of ignoring time lags. Perhaps the document should be equally authoritative today as it was in 1789 and interpreted as if it had been ratified yesterday. Strong forms of originalism come close to this position.⁷ Alternatively, it is possible to take an intermediate position on the influence of time lags. Or perhaps judges should adopt a firm originalist stance during their first encounter with text, but not thereafter.

Contemporary debate over originalism in the United States is, to a degree, already shaped by the brute facts of interpretation and adjudication lags. Skepticism about the use of history in constitutional adjudication often depends on the passage of time. Hence critics might conclude that originalism is justifiable or predictable when ratification is a recent memory, but that originalism should have an expiration date.⁸ Originalists are sensitive to these arguments. Their preferred method continues to evolve in its specific decision protocol and its justifications; these modifications are partly reactions to incisive criticism. But neither the criticism nor the defense of originalism is fully organized around temporal issues.

This Article is an effort to better understand the influence of time lags on judicial interpretation of supreme law. It aims to make two general contributions. First, it presents measures and explanations for the interpretation and adjudication lags. While the numbers are provisional and not wholly uncontroversial, the positive account for these lags is subject to greater uncertainty. We now know that the Constitution is aging and that the Court is often a laggard, but we do not always know precisely why. Second, the Article reorganizes and refashions arguments about originalism to concentrate on the potential implication of these lags. My claim is that originalism should not always dominate in the wake of ratification, but that justifications for originalism thereafter should be renovated. Perhaps our ability to construct useful history does not degrade with time. On the other hand, some popular justifications for originalism run headlong into time-related objections or, even if they seem unaffected by age, are problematic for other reasons. This leaves a smaller set of arguments to prioritize.

⁷ See *infra* Part II.A (discussing versions of originalism as a method of textual interpretation).

⁸ See Richard Primus, *When Should Original Meanings Matter?* 46–48 (2008) (unpublished manuscript on file with the author) (arguing that originalism can satisfy a democratic objective shortly after enactment, but not long after). The time-related analysis in Primus's article is characterized in note 143, below. For earlier work reaching similar conclusions, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. Rev.* 204, 205 (1980) (referring to a form of nonoriginalism in which the presumptive force of text and history is "defeasible over time in the light of changing experiences and perceptions"); Micheal C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *Geo. L.J.* 1765, 1819–20 (1997) (arguing that, even when a court faces a paradigm case that inspired an amendment, "the strength of originalist arguments diminishes over time"); Thomas W. Merrill, *Bork v. Burke*, 19 *Harv. J.L. & Pub. Pol'y* 509, 512 (1996) (recommending contemporary conventional meaning over original meaning when they diverge over time); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 *Yale L.J.* 1717, 1752–54 (2003) (arguing that it may be appropriate to start with originalist interpretation but to employ other methods as time passes).

In the end, I spotlight two justifications. The first involves forward-looking incentives for Article V effort. The supposition is that putative law reformers might favor the politics of formal amendment-making instead of litigation if the judiciary would hold to a strong form of originalism. This justification is presently hindered by normative disagreement and empirical uncertainties, but it should be attractive to some. The second justification is less orthodox. Perhaps originalism can be defended, within a limited domain, as a culturally acceptable substitute for settling disputes by randomization. If used as directed, originalism can amount to throwing dice on supreme law. This is not a perfect substitute for randomization, of course, and the analogy might sound unfriendly. But the idea is that picking and applying originalism is somewhat arbitrary once other rational arguments weaken, and that a kind of arbitrariness is virtuous in some decision situations. In any event, the goal here is to explore the possibilities for historical inquiry in constitutional adjudication, even if the arguments cannot track the premises of the originalist movement or its opponents. That divide probably works on a distinct logic.

Part I of the Article introduces the interpretation and adjudication lags. Included in the discussion is a weighted average age for the Constitution over its lifespan, and a measure of the adjudication lag for amendments in the Supreme Court. Part II charts trajectories for originalism over time. It begins with possible and plausible changes in originalism's strength. It then identifies the Supreme Court's first encounters with Article V amendments, characterizes the variety of reasoning on display, and briefly reviews trends for originalism in several doctrinal fields. Part III interrogates the options. It discusses time-oriented critiques of originalism, it defends historiography against the threats of aging, and it then develops pro-historicist arguments least likely to degrade with time. The assessment ends by exploring justifications grounded in *ex ante* incentives and randomization, along with the premises on which they depend.

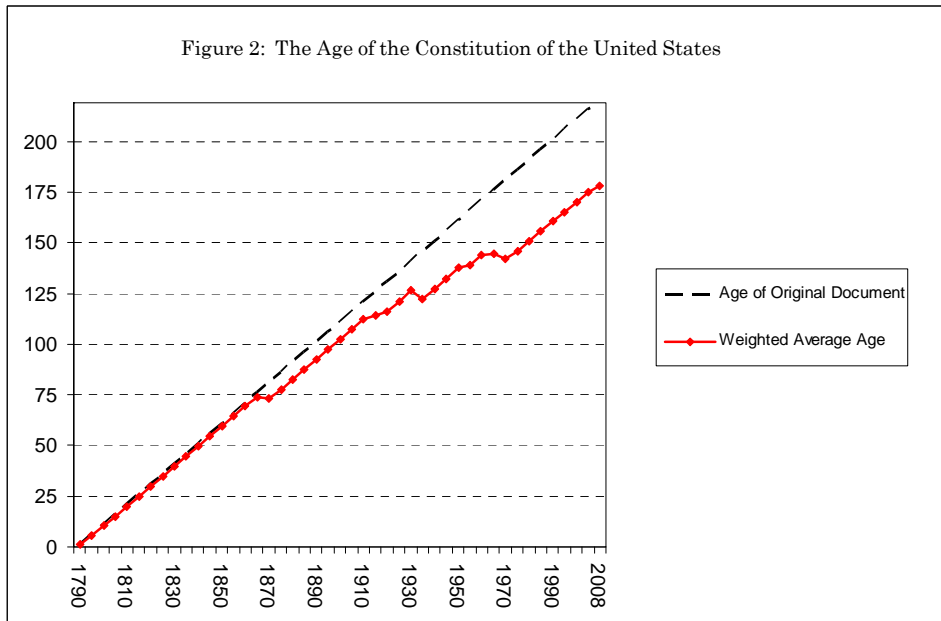
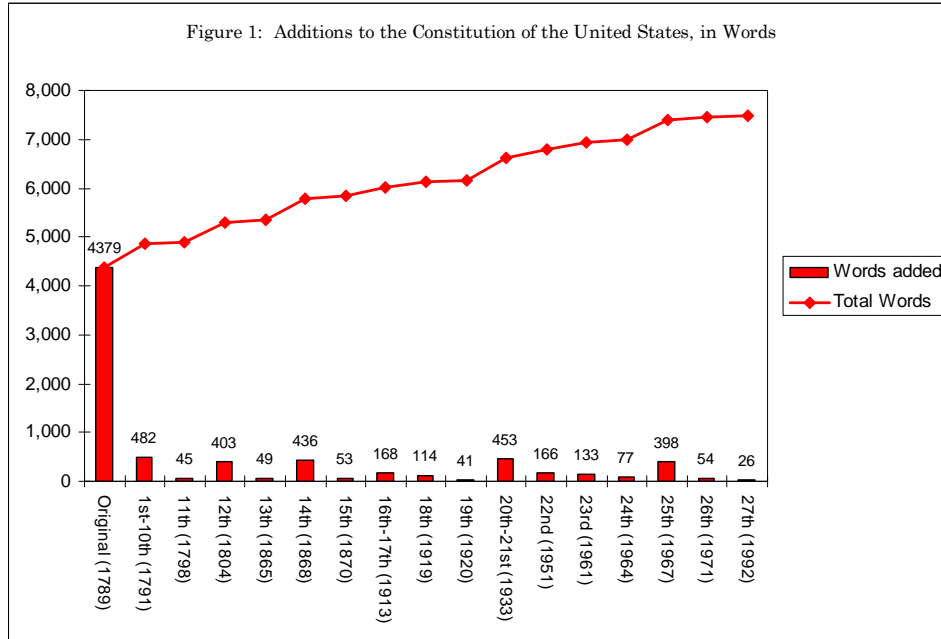
I. TIME LAGS IN SUPREME LAW

Insofar as the Constitution of the United States is treated as enforceable, time lags become hardwired into supreme law. This is true in at least two senses: there will always be a growing gap from the ratification to interpretation by any decision-maker, barring repeal of the text in question; and there will usually be a substantial gap from ratification to a judge's first attempt to understand that text. This Part specifies and attempts to account for these phenomena.

A. *The Interpretation Lag and Its Dynamics*

The words in the document are aging. Instead of a stable and continuous process of textual updating, Article V amendments often arrive in clumps and with significant delays between them (Figure 1). If we count the Twenty-Seventh Amendment as ratified in 1992, there have been six amendments since Franklin Roosevelt's first term in the White House. Although 40% of the document's words were added by amendment after 1789, not much more than one quarter of these additions happened after 1933. The result is that the age of the words ratified in 1789 (i.e., 219 years old) is not dramatically higher than the predicted

age of a randomly selected word in the amended document (i.e., 178 years old). At times, enough text has been added to seriously alter the rate of increase. But the document's weighted average age has been increasing fairly steadily since 1789 (Figure 2).⁹ Anyone interpreting the document's meaning is most likely advertising to text that was enacted generations earlier.



⁹ A note on methodology is included below as Appendix A.

This point is generally understood, but the reasons for an aging constitutional text are actually a matter of honest disagreement. The immediate cause is, of course, retention of the document as law combined with a low formal amendment rate and the absence of wholesale textual revision through that process. The debatable issue is the precise explanation for the rare and modest use of Article V. A growing empirical literature in comparative law attempts to answer such causation questions.¹⁰ The answers are not conclusive. And the simplest explanations, such as the formal rules for amendment in Article V, are not plainly best. One might begin by supposing that the amendment rate is driven by a combination of (1) the degree of satisfaction with the status quo, (2) the formal rules for amendment, and (3) the available alternatives for achieving the same or similar outcomes, including new interpretations of existing text.

Genuine popular satisfaction is not a complete explanation for the Article V amendment rate. We can expect satisfaction to fluctuate, at least over long spans of time, and there is no guarantee that low satisfaction yields amendments. Periods of rather intense demand for law reform have not always been reflected in amendments.¹¹ Moreover, the document has achieved the status of national icon,¹² which might strangely dampen the use of its Article V. There are cases of Article V allergies. As the congressional debate over a Twelfth Amendment began in 1802, one House member reportedly declared that “he trembled at the idea of altering [the Constitution], though he was attached to that part of it which gave the right of altering it.”¹³ Still, the existence of formal amendments suggests textual changes are not anathema. The other two factors might fill the gap. The formal rule for amendment suggests how costly it is to complete the process, which should become relatively less attractive with the availability of cheaper substitutes and alternatives.

As to formal rules, the veto gates described in Article V are indeed extraordinary.¹⁴ They are probably even more demanding today because the number of states participating in the Union has grown to fifty since 1789. In any event, the Article V process is more difficult to complete than the legislative process described in Article I, Section 7, and it seems more demanding than

¹⁰ See, e.g., Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 236, 247–52 (Sanford Levinson ed., 1995) (suggesting that difficult processes lower amendment rates, despite arguably higher pay-offs for such amendments); Bjørn E. Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *Democratic Constitutional Design and Public Policy: Analysis and Evidence* 319, 333–35 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) (discussing the relationship between stringent processes and amendment rates across countries).

¹¹ The political victories of Jacksonian Democracy, the New Deal, the Civil Rights Movement, and even the Reagan coalition of the 1980s are possible illustrations.

¹² See, e.g., Michael Kammen, *A Machine that Would Go of Itself* 3 (1986) (tracing the rise of the written Constitution as a national symbol).

¹³ 11 *Annals of Congress* 1286, 7th Cong., 1st Sess. (1802) (remarks of Rep. Huber).

¹⁴ See Lutz, *supra* note 10, at 247–49 & tbl. 1 (discussing U.S. state and foreign national constitutions); Janice C. May, *State Constitutional Developments in 2003*, in 36 *The Book of the States* 3, 6 tbl. B (2004) (describing state constitutions).

perhaps any constitution in the world. Additional factors must be considered, however. An amendment process might appear onerous without resulting in a low amendment rate. For example, an amendment might be considered more durable, more valuable, and therefore worth more effort than ordinary legislation. Or it could be that the political climate, such as one-party dominance, is a more important factor in the amendment rate than the formalities of process.¹⁵ The practical effect of written procedures should be understood with reference to the actual circumstances in which they are invoked. Still, the United States has rarely experienced partisan political dominance across national and state institutions, and perhaps the time horizon for most law reform movements is too short for Article V victories to be prized. It is possible, then, that the amendment rate cannot be explained by widespread satisfaction or the difficulty of Article V amendment compared to ordinary legislation.

A third factor is the availability of substitutes and alternatives. But at least equal levels of uncertainty surround the magnitude of this influence. To begin, there is a sound reason for denying that Article V has been effectively duplicated, regardless of how creative courts become. Different routes to change have different features and they present different opportunities for reversal. Thus Supreme Court interpretations of the Constitution are advertised as final renderings of supreme law reversible by Article V amendment, but they also can be reversed by a subsequent Court decision.¹⁶ They are thus vulnerable to personnel changes in the courts, if nothing else.¹⁷ Conventionally speaking, Article V amendments cannot be reversed by Court decision.¹⁸ Of comparable importance are the sociopolitical consequences associated with each method of change. Using the formal amendment process implicates a distinct set of actors and actions, and one should expect somewhat different effects on the political environment. Even if adjudication sometimes produces similar political effects,¹⁹

¹⁵ See Daniel Berkowitz & Karen Clay, *American Civil Law Origins: Implications for State Constitutions*, 7 *Am. L. & Econ. Rev.* 62, 64, 74–75 (2005) (studying states and downplaying formal amendment rules after accounting for partisan political competition); see also John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *Law & Soc. Inquiry* 501, 524 (1997) (critiquing Lutz’s emphasis on formal amendment rules in U.S. states).

¹⁶ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (recognizing the possibility of Article V override, reiterating that *stare decisis* is a softer force in constitutional adjudication than elsewhere, and overruling cases).

¹⁷ See Henry J. Abraham, *Justices, Presidents, and Senators* 3 (5th ed. 2008) (discussing ideological compatibility in the nomination decision); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1067 (2001) (describing federal judges as “temporally extended representatives of particular parties”); see also Paul M. Collins, Jr., *Variable Voting Behavior on the Supreme Court: A Preliminary Analysis and Research Framework*, 25 *Just. Sys. J.* 57, 62 (2004) (indicating that, in cases where precedent was explicitly overruled, justices who participated in both the overruled and overruling cases were most likely to stick with their initial position on the legal rule — although 30% of the votes were to overrule precedent that the justice in question had helped set).

¹⁸ Functionally speaking, the story might be different — at least in the long term.

¹⁹ But cf. Jack Citrin & Patrick J. Egan, *When the Supreme Court Decides, Does the Public Follow?* 2–3 (2007), available at <http://ssrn.com/abstract=998597> (unpublished manuscript) (using

and even if Article V movements influence judicial understandings of the Constitution,²⁰ it would be a mistake to think of these two paths as identical.

The difference is a matter of degree, however, and non-Article V change can have a similar in effect. From the perspective of a change proponent, a supply of alternative methods of lawmaking can be attractive. Ordinary legislation, administrative regulation, private ordering, and litigation may be acceptable in light of Article V's procedural hurdles and any skittishness that the culture has developed regarding textual change. To be clear, some of these alternatives do not purport to generate supreme law. Change advocates may accept this and settle for something less than supreme federal law when they can do so consistently with the document as interpreted. For instance, those who want states to license heterosexual and not homosexual marriage might prefer a federal constitutional amendment to that effect, yet satisfy themselves with changes in state constitutional law as Article V efforts stall.²¹ This migration away from supreme law is real and interesting, but less controversial than other movements.

It is a separate type of reform effort that prompts complaints of lawlessness and constitutional perversion: when change advocates seek reform without using Article V and their objective is at least arguably *not* consistent with the document as currently understood by some relevant set of interpreters. This is a demand for supreme-law workarounds. Of course few change advocates will concede that their goals violate the document as written. Proving otherwise requires establishment of a controversial line between interpretation and amendment.²² Usually they will claim, as Franklin Roosevelt did, that resisters misunderstand the true meaning of the text.²³ But sometimes those claims will be fairly contested and the reform movement will nevertheless channel its resources away from Article V, toward other avenues of change.²⁴

survey research and finding no effect or a small effect on public opinion from learning about the Court's resistance to regulation of abortion, flagburning, and sodomy); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1830 (2005) (collecting studies finding little influence on public opinion).

²⁰ See Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596, 2602 (2003); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4 (2003); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. Pa. L. Rev. 297, 302 (2001).

²¹ Cf. Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. St. Thomas L.J. 137, 197–98 (2004) (describing the movement for state-level heterosexual marriage amendments, but supporting a federal amendment to stop “judicial activism” and “lawlessness”).

²² See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?*, in *Responding to Imperfection*, supra note 10, at 13, 25–36.

²³ See Franklin Delano Roosevelt, *Fireside Chat on Reorganization of the Judiciary* (Mar. 9, 1937) (“We must find a way to take an appeal from the Supreme Court to the Constitution itself.”), available at <http://www.fdrlibrary.marist.edu/030937.html>. Roosevelt charged the Court with amending the Constitution by fiat and improperly refusing to give legislation the benefit of the doubt on questions of constitutionality. See *id.*

²⁴ See generally 2 Bruce Ackerman, *We the People: Transformations* 20–25 (1998)

Among the most controversial of these workarounds is the possibility of judicial updating. Change advocates might turn to the courts for what amounts to a revision of supreme law as conventionally understood. This can have more than one effect on other forums. A possibility is that successful litigation ultimately energizes non-adjudicatory political action. In other words, litigation might clear the way for politics by other means, as when the Supreme Court was urged to modify its understanding of congressional authority during the New Deal.²⁵ Or it could be part of a campaign to trump politics-as-usual, as when the Court was asked to repudiate racial segregation in public schools with federal constitutional law.²⁶ Either way, litigation can be a rough substitute for supreme lawmaking through Article V — not a categorically lower-order alternative that accords with supreme law as presently understood and is accepted by all as reversible through ordinary lawmaking. As well, such litigation could reduce the expected value of Article V amendments. Those amendments might be subject to creative reinterpretation in the future to serve subsequently emerging interests. To the extent change advocates have lengthy time horizons, the formal amendment rate could spiral downward.²⁷

The relationship between judicial review and amendment rates is an empirical question with potentially crucial implications for appropriate interpretive method. I will return to the issue in evaluating justifications for originalism.²⁸ Yet for all its importance, our understanding of the amendment/adjudication relationship is notably unsophisticated. Educated guesswork might suggest an inverse relationship, something to “take on faith,”²⁹ but conventional wisdom is vulnerable to sustained investigation. It could be that the amendment rate would be equally low if no substantially similar alternatives to Article V existed. It is

(describing non-Article V constitutional moments); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* ch. 1 (2004) (examining a tradition of popular influence on constitutional meaning); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1060 (1988) (arguing that a proper understanding of the Constitution permits amendment by majoritarian national plebiscite); Siegal, *supra* note 20, at 299–303 (exploring the relationship of social movements and legislative action to supreme constitutional law); see also David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1458–64 (2001) (arguing Article V amendments have been neither necessary nor sufficient for change).

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

²⁶ See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (relying on the Fifth Amendment’s Due Process Clause to oppose racial segregation in D.C. public schools).

²⁷ Even in this scenario, supreme law might change often and significantly. The formal amendment rate is falling, not necessarily the informal amendment rate. The key questions would be which *process* for lawmaking seems superior and which *distribution* of outcomes is preferred. But cf. Robert G. McCloskey, *The American Supreme Court* 225 (1960) (“[T]he Court seldom strayed very far from the mainstreams of American life and seldom overestimated its own power resources.”); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957) (similar).

²⁸ See *infra* Part III.C.3 (discussing incentives-based justifications).

²⁹ Ferejohn, *supra* note 15, at 525.

also possible that Article V alternatives prevented the need for, and risks of, a full-blown rewriting of the Constitution. Perhaps the most that can be said with confidence is that at least three factors — adequate satisfaction with supreme law allied with the document’s status as a national icon, the practical difficulty in surviving the amendment process in ordinary times, and the feasible alternatives including judicial reinterpretation — probably work together to depress the modern Article V amendment rate below that of most constitutional systems.

Whatever the precise causes, the Constitution is aging. This is a persistent feature of constitutionalism in the United States, and it is partly attributable to the document’s content.

There is, however, a sense in which the attention to time lags is misguided. For purposes of interpretation, the document might be forever young. Interpretation takes place in the present. A reader identifies words in a source that has survived until then and processes that information for the purpose of decision. Concluding that the document is worth considering is always for decision-makers acting in the present.³⁰ This is true even if contemporary culture and the threat of sanction effectively require the decision-maker to treat the text as governing law. The pressure might be overwhelming and it might be attributable to earlier choices that made a new path infeasible or imprudent for the time being, but the pressure is nonetheless a contemporary force. Nor is this point affected by the decision-maker’s interpretive method. Whether the decision-maker engages in a moral, thematic, originalist, populist, or common-law reading, her interpretive choice takes place now. On this view, there is no temporal gap between the document and its interpretation. The Constitution’s age would be, in effect, zero.

This is not the complete story, however. Certain methods for interpreting the text make relevant the time elapsed since ratification. Any method calling for excavation of historical information surrounding enactment is a commitment to rolling back the clock. The interpretive effort occurs in the present but the information relevant to decision is, for these interpretive approaches, mired in the past. Reliable reconstructions of that past might become more difficult over time, and the strength of the reasons for historical reconstruction might change.

B. The Adjudication Lag and Its Dynamics

The adjudication lag is different. It directs attention to one audience for the document: judges resolving constitutional disputes. The adjudication lag measures the time between ratification of constitutional text and the use of that text by courts. There might not be anything independently interesting about it if courts were always interpreting constitutional text alongside other decision-makers. But they do not. For purposes of adjudication, judges are interpretation laggards. There is essentially always an initial time period during which others are making judgments about textual meaning while judges are not. The adjudication lag measures when this time period ends.

³⁰ See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 *Colum. L. Rev.* __, __ (forthcoming 2008) (manuscript at 3).

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

According to my best judgment, the average lag between ratification and interpretation at the Supreme Court is over 40 years long (Table 1).³¹ This calculation is based on majority opinions interpreting any part of an amendment. Supreme Court interpretation of the petition clause in 1875,³² for example, ends the adjudication lag for the First Amendment as a whole. In this respect, the calculation arguably understates the significance of adjudication lags. On the other hand, it is clear that the adjudication lag varies tremendously across constitutional text (Figure 3). For some amendments, the lag is vanishingly short — just 1 month for the Eleventh Amendment. For others, it lasts decades — 174 years for the Third Amendment. For yet others, the adjudication lag is still mounting. The forces that yield adjudication lags, moreover, are not necessarily stable over time. The average lag drops below 23 years for the Eleventh through Twenty-Seventh Amendments. This could be the result of more than chance.

There is a degree of subjectivity in these results. Some readers might adopt different, more stringent tests for the kind of judicial attention to constitutional text that should count as “interpretation.” Furthermore, relevant information might be obscured by the small number of formal amendments. In addition, the focus on ratification of Article V amendments is partly a matter of convenience. Aside from the adjudication lags for individual clauses and for the rest of the document, one might be interested in the time lag between “novel” constitutional arguments and judicial adjudication, or the lag between any judicial opinion referring to historical sources and the age of those sources. At least in retrospect, the Supreme Court’s rulings on the scope of state sovereign immunity are disconnected from particular clauses of the document.³³ The same might be said of natural law, fundamental rights, or substantive due process arguments in the 1800s (and earlier). Some advocates indicated that the document reflected, without exhausting, principles independently constraining government action.³⁴ Excessive concentration on one text can miss these intellectual streams.

³¹ Appendix B lists the citing and interpreting cases on which these Figures rely, along with brief descriptions to give the reader a sense of the standards used in the case-identification process.

³² See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

³³ See, e.g., *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) (describing the Eleventh Amendment as “but one particular exemplification” of state sovereign immunity); *infra* note 54.

³⁴ See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (relying on the contracts clause or “general principles which are common to our free institutions”); 1 Laurence H. Tribe, *American Constitutional Law* 1335–38 (3d. ed. 2000) (describing development of such arguments); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1127–28 (1987) (offering a history of “multiple sources of fundamental law”).

Table 1: Citation Lags and Adjudication Lags at the Supreme Court

Amendment	Ratified	Citation lag	Adjudication lag
1st (religion, speech, etc.)	1791	84	84
2nd (bear arms)	1791	66	84
3rd (quartering soldiers)	1791	162	174
4th (search & seizure)	1791	64	42
5th (due process etc.)	1791	42**	38
6th (criminal trial clauses)	1791	62**	62
7th (civil juries)	1791	17	17
8th (punishment & fines)	1791	42	75
9th (retained rights)	1791	145	145
10th (reserved powers)	1791	28	28
11th (jurisdiction over states)	1798	0	0
12th (electoral college)	1804	88	148
13th (slavery)	1865	7	7
14th (p/i, equality, dp, etc.)	1868	1	5
15th (voting by race)	1870	1	2
16th (income tax)	1913	3	3
17th (senate elections)	1913	8	8
18th (prohibition)	1919	1	1
19th (voting by sex)	1920	2	17
20th (federal terms)*	1933	75	75
21st (repeal of prohibition)	1933	1	1
22nd (term limits)	1951	13	22
23rd (D.C. electors)*	1961	3	47
24th (poll tax)	1964	0	1
25th (presidential succession etc.)	1967	7	24
26th (voting by age)	1971	1	8***
27th (congress pay delay)*	1992	16	16
Average:		35 years	42 years

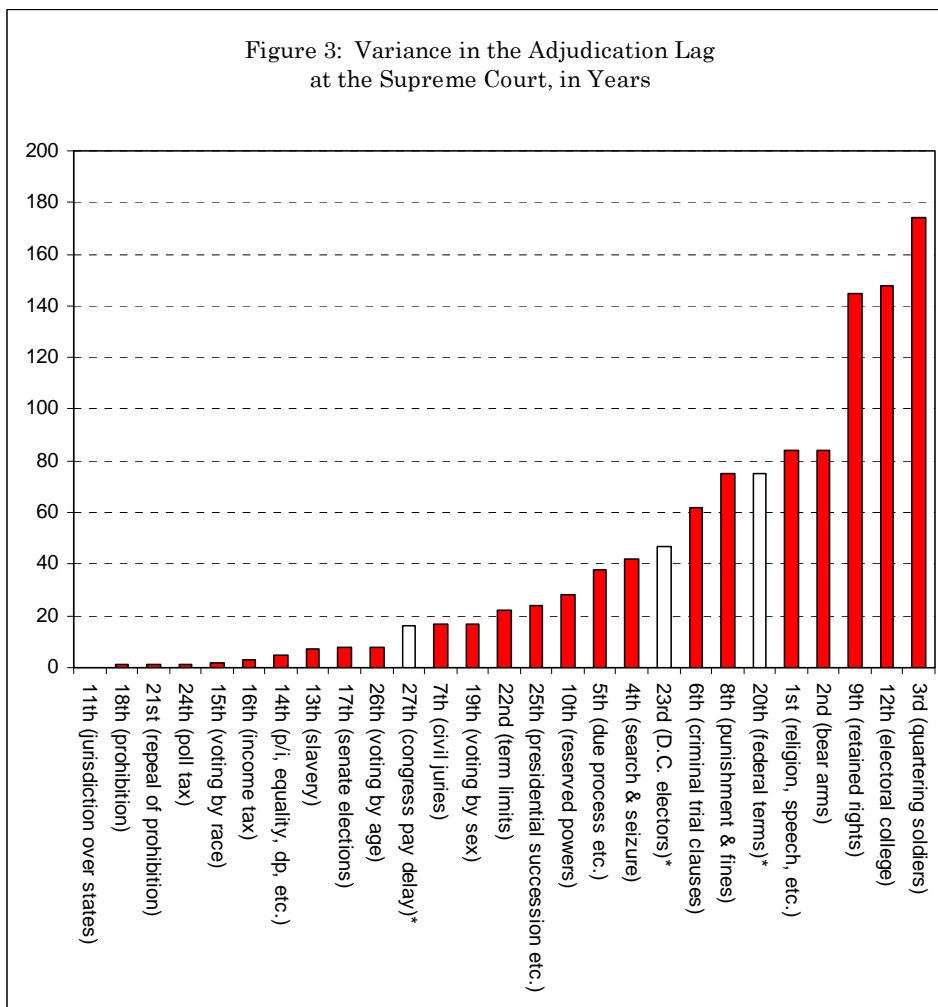
* These Amendments have not yet been interpreted by the Supreme Court.

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

*** This represents a summary affirmance that was identified based on a dissenting opinion. It is possible other summary affirmances were overlooked.

Note: Cases were searched for Amendment citations and interpretations within an opinion authored by a member of a majority coalition on the judgment. Dissenting opinions were ignored.

Figure 3: Variance in the Adjudication Lag at the Supreme Court, in Years



* These calculations treat the Twentieth, Twenty-Third, and Twenty-Seventh Amendments as if they had been interpreted by the Supreme Court in 2008. They have not yet been “interpreted” as of the date of this writing. This is a right-censored data issue, which I have not otherwise addressed in the calculation of an average adjudication lag. See Janet M. Box-Steffensmeier & Bradford S. Jones, *Event History Modeling: A Guide for Social Scientists* 15–20 (2004) (discussing the issue and hazard rates).

That said, some conclusions are inescapable. The variance in adjudication lags is real, and the lag from ratification to interpretation can reach a century or more. Consider the Supreme Court’s radically different experience with the Eleventh and Twelfth Amendments. Both were ratified more than 200 years ago and they are only six years apart in age. But the Eleventh was confronted by the Court just one month after its ratification.³⁵ In 1798, *Hollingsworth v. Virginia*³⁶ rejected arguments that the Amendment was not properly ratified and that its constraint on federal court jurisdiction should not apply to pending cases.³⁷ The Twelfth Amendment, in contrast, was not even cited by the Supreme Court until 1892.³⁸ And the Court did not plainly interpret the Twelfth until *Ray v. Blair*,³⁹ a full 148 years after ratification.

Variance in the adjudication lag should not be especially surprising. Constitutional amendments serve different purposes, not all of which foretell litigation. Some provisions sunset.⁴⁰ Some provisions are nothing or little more than coordination devices, such as the requirement that Congress assemble at least once a year at high noon.⁴¹ Contrast the description of cases and controversies falling within the federal judicial power in Article III, Section 2, which was directed at federal judges and bound to be interpreted by them at some point. Even the more likely candidates for litigation will not necessarily be interpreted by the courts immediately. This was largely true of the first set of amendments, which were adopted in 1791 while the federal government’s domestic regulatory presence was in its infancy.

Another part of the explanation is probably the relative clarity of a provision’s meaning,⁴² as determined by linguistic conventions at any given time. In addition, adjudication might be stalled by relatively low stakes associated with any disputes that the provision touches upon. Furthermore, in another set of cases, courts might hesitate to resolve perceived ambiguity no matter the stakes or the ambiguities. Judges might be shy about offering an opinion on meaning in one turbulent timeframe and then become self-assured later on.⁴³

³⁵ See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 20 (1985) (reporting that, within one month of ratification in 1798, the Court dismissed all pending suits involving a citizen of one state suing another state).

³⁶ 3 U.S. (3 Dall.) 378 (1798).

³⁷ See *id.* at 382 (describing attorney arguments and relating the Court’s disposition, which was reached the day after oral argument).

³⁸ See *McPherson v. Blacker*, 146 U.S. 1, 26 (1892).

³⁹ 343 U.S. 214, 228–30 (1952).

⁴⁰ See U.S. Const. art. I, § 9, cl. 1 (setting a sunset); *id.* art. V (same); see also *id.* art. I, § 2, cl. 3 (addressing initial state representation in the House); *id.* art. I, § 3, cl. 2 (addressing initial classification of senators).

⁴¹ See U.S. Const. amend. XX, § 2 (“The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.”).

⁴² See Schauer, *supra* note 4, at 400–07 (offering clarity as an explanation).

⁴³ An example might be the Supreme Court’s initial refusal and later agreement to consider

Regardless of the specific explanation for past lags, bits of constitutional text lurk in the background of adjudication only to emerge decades after ratification as real-life arguments. We will soon know how today's justices wish to use arguments from the text and history of the Second Amendment and the Militia Clauses in assessing modern gun control legislation.⁴⁴ It is anyone's guess how the document's reference to letters of marque and reprisal or the Captures Clause might influence the legal status of the war on terror or the executive's use of military power more generally.⁴⁵ Even if Article V is never used again, we are still bound to witness additional instances of the adjudication lag ending. The courts have yet to render meaning from all of the document's clauses. This leads to three further observations about adjudication lags:

1. Adjudication lags and amendment rates

First, the phenomenon is not simply a function of Article V's stringency. Adjudication lags would persist, sometimes extending over decades in time, even if Article V were so easy to use that the document was amended every year. In fact, the addition of more text creates additional opportunities for adjudication lags. Unlike the interpretation lag — which simply measures the time from ratification to the present and which can be essentially eliminated by rapid rates of formal amendment — there is no assurance that new constitutional text will make its way into the court system without significant delay.

Formal amendments can, however, influence how adjudication lags play out. A *low* rate of amendment reduces the likelihood of short adjudication lags ending in the present time period. Take the extreme case in which the document's text is static. Each passing year would extend adjudication lags for any text not yet interpreted, without adding text that the judiciary could work on right away. Because our amendment rate is relatively low, it is understandable for scholars to concentrate on the issue of judicial interpretation after long adjudication lags. Knowing whether originalism has an expiration date is somewhat more urgent

the constitutionality of state laws prohibiting interracial marriage. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (intervening with strict scrutiny); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 *Geo. L. J.* 1, 62–66 (1979) (describing Court deliberations on how to handle *Naim v. Naim*, 197 Va. 80 (1955) (upholding an anti-miscegenation law)). Whether the justices' resolution of this dispute had much to do with text or ratification history is debatable.

⁴⁴ See *District of Columbia v. Heller*, 128 S.Ct. 645 (2007) (granting certiorari).

⁴⁵ See U.S. Const. art. I, § 8, cl. 11 (“The Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”). A plain-textualist glance at these clauses is offered in *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125–26 (1814) (using the captures clause to help conclude that a declaration of war should not alone authorize capture of enemy property on U.S. territory). For a modern effort to shape understanding of war-related authority with the letters of marque clause, see Michael D. Ramsey, *Text and History in the War Powers Debate: A Response to Professor Yoo*, 69 *U. Chi. L. Rev.* 1685, 1707 (2002) (“The Marque and Reprisal Clause gives Congress authority over a limited form of war, while the Declare War Clause gives Congress control over broader forms of war.”); John C. Yoo, *War and Constitutional Texts*, 69 *U. Chi. L. Rev.* 1639, 1667–68 (2002) (reading the clauses as powers to characterize legal status rather than to initiate action).

than determining the best interpretive method for a hypothetical Twenty-Eighth Amendment.

Alternatively, a *high* rate of amendment might resolve disputes and preempt litigation altogether. Delay for congressional pay raises is a rough illustration. The Supreme Court has not yet cited the Twenty-Seventh Amendment since it was declared ratified in 1992. Although there was a debate over its validity, convention appears to have overcome any controversy.⁴⁶ But it is unrealistic to expect that any amendment process, no matter how lax, could eliminate the likelihood of litigation over constitutional meaning in a system that accepts some form of judicial review. Our system happens to include judicial review, and so adjudication lags are inevitable. The live empirical questions include the length and variance of these lags, along with the number of interpretive questions that will never be reached by the judiciary.

2. *Implications for judicial decision*

A second observation goes to practical consequences. The interpretation and adjudication lags are associated with different decision environments. This is not only because the adjudication lag is restricted to the judicial setting. The key difference is the information available to decision-makers. By definition, no judicial decisions are available until the adjudication lag runs out; this lag is measured by the length of judicial silence. Interpretation lags are different. Given enough time, many parts of the document will be the subject of crippling large commentary from the courts. In a system that places any weight on the constitutional opinion of judges, the existence of past court decisions will have some influence on future outcomes. Therefore, long interpretation lags might or might not present the opportunity to settle questions by reference to precedent.

In contrast, non-judicial influences are likely to build over time regardless. Populations change, preferences and normative judgments shift, facts and technology evolve, patterns of behavior solidify into traditions and self-reinforcing systems.⁴⁷ Each of these influences is associated with significant interpretation lags, and their magnitude is likely to grow as ratification becomes more distant. If courts are taken seriously and they offer opinions on constitutional meaning quickly, then judicial opinion will become part of the influence on behavior as the interpretation lag grows. But if courts act more slowly, if they intervene only after a lengthy adjudication lag, they will more likely face high-magnitude changes (and without judicial precedent for guidance, for whatever that is worth). This is a common reality.

⁴⁶ Note, however, that the D.C. Circuit adjudicated a dispute under the Twenty-Seventh Amendment two years after that announcement. See *Boehner v. Anderson*, 30 F.3d 156, 161–62 (D.C. Cir. 1994) (treating the Amendment as properly ratified without explanation and upholding an automatic cost of living adjustment for Representatives).

⁴⁷ See, e.g., Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* 10, 24 (2004) (discussing path dependence in politics through self-reinforcing dynamics, including daunting setup costs for an alternative system, learning effects from familiarity with the current system, network effects from mass participation, and expectation adaptation as institutional patterns appear stable).

Ray v. Blair is an example. National political parties developed long before that case was decided in 1952, and presidential electors were perhaps never independent deliberators.⁴⁸ A budding candidate for elector, however, sought greater freedom to think than his state and party would allow. He contended that those who planned the electoral college would not have tolerated elector pledges to alienate their judgment to a national party convention.⁴⁹ In these long-distance encounters with constitutional text, how should the responsible judges behave? What if, perhaps unlike *Ray*, the long-term stakes are low? For judicial encounters closer in time to ratification, is the conscientious judge obligated to act differently than the judge who never had the opportunity to intervene when the text was young? If there is a difference in obligation, should judges consciously choose on that basis the timing of their interventions, to the extent they have the option?⁵⁰ These are the sorts of questions explored below.

3. *Other types of law*

Finally, constitutional interpretation cannot be fully separated from other types of interpretation. Whenever decision-makers look backward in time, similar issues surface. Think about the Second Amendment case pending before the Supreme Court. The Amendment is about 217 years old, but the last time the Court directly confronted a claim under the Amendment was 1939.⁵¹ In fact, the handgun regulation at issue was itself written over 30 years ago.⁵² Decision-makers must determine whether their approach to an information source ought to be influenced by the distance between the time of decision and the creation of the source — whether the source is a constitutional text, a statute, a treaty, a regulation, an executive order, a judicial opinion, or any other document. Most decision-makers will not want to age discriminate against all of these sources. But the degree to which age should matter for interpretive method is an unavoidable judgment.

There are reasons, however, for fixating on supreme law. First, a narrowed focus of some kind helps make the discussion more concrete and less theoretical.

⁴⁸ See *Ray v. Blair*, 343 U.S. 214, 229 n.16 (1952) (quoting Albert Bushnell Hart, *Presidential Elections*, in 3 *Cyclopedia of American Government* 8 (1914)); Edward Stanwood, *A History of the Presidency from 1788 to 1897*, at 51 (rev. ed. 1928) (quoting a Federalist partisan who criticized a 1796 elector for “*think[ing]*” rather than “*act[ing]*”).

⁴⁹ Compare *The Federalist* No. 68, at 412 (Clinton Rossiter ed., 1961) (Alexander Hamilton) (indicating that electors would engage in a “complicated . . . investigation” and act “under circumstances conducive to deliberation”), with *Ray*, 343 U.S. at 228–30 (permitting a state party to require that candidates for elector in the party’s primary make such pledge).

⁵⁰ Note the companionship between advocating judicial passivity, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* ch. 4 (1962), and advocating narrow judicial judgments or deferential judicial attitudes, see Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 17, 21 (1999). In practical terms, delayed judicial intervention might amount to judicial minimalism or deference.

⁵¹ See *United States v. Miller*, 307 U.S. 174, 178 (1939).

⁵² See D.C. Code §§ 7-2502.02(a)(4) & 7-2507.02; Brief for Petitioner at 4–6, in *District of Columbia v. Heller*, 128 S.Ct. 645 (2007) (No. 07-290) (describing handgun data relied on by the D.C. City Council in 1976).

We might begin to understand the normative choices and positive dynamics for supreme law generation, without forgetting that this situation is conceptually connected to others. Second, the choices in this field are partly unique. If nothing else, Article V is an oddity. Its procedure for lawmaking stands apart, even if the basic tools of judicial interpretation are not so different. We can expect something special and perhaps especially important in the interplay between formal amendment process, a low amendment rate, and likely and preferable influence on alternative methods of supreme-law creation.

II. ORIGINALISM'S TRAJECTORIES

The discussion above identifies two different time lags that are built-in features of our supreme law. Both raise issues for interpretive methods that rely on historicist arguments. The first (the interpretation lag) presents questions for all of us. Anyone seeking to interpret the document must determine the relevance of ratification dates and of Article V's likely dormancy in the future. The second phenomenon (the adjudication lag) trains our attention on courts. It prompts questions about how the judiciary might adjust its decision protocol depending on the length of delay between ratification and the judiciary's first chance at interpretation. These questions are rich and significant, partly because the adjudication lag has been highly variable over the nation's history. Indeed much of the debate over interpretive method in the courts can be organized around these time-related questions. The next step is to fill out the options.

This Part concentrates on one type of historicist argument within the domain of constitutional decision-making. It specifies an increasingly popular version of originalism. The analysis then sketches some possible and plausible trajectories for the strength of originalism over time. Finally, this Part investigates how the Supreme Court has dealt with the time variable in actual constitutional cases. There are few obvious patterns here, my review is not exhaustive, and judicial rhetoric need not reflect true motivations for decision. But some insight and inspiration can be drawn from the cases. They are organized into first encounters with constitutional amendments, and then longer-term methodological trajectories in constitutional doctrine.

A. *Originalism's Alternatives*

Originalism is a label for an evolving group of theories. It covers several distinguishable methods of dealing with legal texts, and it might be justified in several different ways. Both the method and its justifications have adapted over time.⁵³ Some of this evolution was a response to criticism grounded in the time lag phenomena, and such criticism is recapped in the next Part. For now, I want to specify a target for analysis.

⁵³ See, e.g., Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol'y* 599, 603–13 (2004). A recent intellectual history sympathetic to originalism is Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (2005). A less sympathetic review is Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *Fordham L. Rev.* 545 (2006).

The overarching mission of originalist methods is to direct interpreters toward sources of information that were generated in the past. The notion is that a decision in the past ought to be preserved and defended rather than revisited. Originalism need not affix itself to a particular legal text, such as the Constitution of the United States or a statute; originalist methods might roam more freely and yet still provide guidance to legal decision-makers.⁵⁴ But today's self-described originalists may present their methodology as a way to extract meaning from legal texts. In fact, some advocates of originalist methods may prefer to identify themselves as "textualists."⁵⁵ The analysis presented below generally applies either way, but it will focus on originalism as an option for providing additional information about the document's meaning.

This leaves several choices. Among the most prominent design elements in an operational originalism are: (1) the informational objective for the method, such as drafters' intent or ratifiers' understanding or public meaning; (2) the sources and reasoning acceptable for use in reaching that objective; (3) the level of generality at which historical judgments are to be ascertained, including the choice between concepts and conceptualizations, or general principles and expected applications; (4) the degree of confidence with which historical judgments must be made; (5) the resources appropriately devoted to obtaining these answers; (6) decision rules for situations in which the method is indeterminate or "runs out"; and, more generally, (7) the relative strength of the method compared to all other influences on decision-making in a particular setting.⁵⁶ Because there is some disagreement on the optimal form, one cannot easily specify a universal version of originalism. Nor is any conventional wisdom about the best specification likely to remain fixed. It has not in the past.

For convenience and in the interest of evaluating arguments within the intellectual mainstream, "original public meaning originalism" will be our starting point. The objective for this method is to discover what a reasonable and

⁵⁴ This is one version of what the Supreme Court has done with the concept of state sovereign immunity. See, e.g., *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) (describing the Eleventh Amendment as "but one particular exemplification" of this immunity); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) ("The dissent's lengthy analysis of the text of the Amendment is directed at a straw man . . .") (citations omitted).

⁵⁵ See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation* 3, ___ (Amy Gutmann ed., 1997).

⁵⁶ This rendition of the design choices is informed by scholarship including Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 89–113 (2004); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 139–160 (1990); Ronald Dworkin, *Justice in Robes* (2006); Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* 525–52 (2d ed. 2005); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 3–22 (1997); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 34–37 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849 (1989); William Michael Traenor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 *Mich. L. Rev.* 487 (2007); Whittington, *supra* note 53, at 603–13.

intelligent observer would have thought the text meant when it was ratified.⁵⁷ A variety of sources and arguments might be accepted toward this end, although non-public drafting histories might be disregarded.⁵⁸ Moreover, the level of generality for this inquiry will not be predetermined. Contemporary advocates seem drawn to the thought that the level of generality is itself a historical question. The answer depends on what our reasonable observer would have concluded at ratification.⁵⁹ In addition, this form of originalism is often strong and even exclusive of other potential influences on decision-making, such as judicial precedent (these theorists tend not to be judges).⁶⁰ In any event, attention is owed to versions of originalism that are designed to influence decisions, not as makeweight arguments, and a mission of this Article is to consider the interaction between originalism's strength and the course of time. This investigation is less meaningful for versions of originalism designed to be weak in the first place. For now, we might bracket choices involving degrees of confidence, deserved resources, and decision rules for cases of indeterminacy.

Skeptics will have already retrieved a mental list of well-vetted objections to originalism, including doubts as to whether originalist questions are intelligible or constraining.⁶¹ A standard reaction is to wonder whether it is meaningful to ask, "What would a reasonable person who lived here in 1789 (or later) have thought about the validity of *x* if it had occurred then instead of in 2008?" or, "What would a reasonable person who lived here in 1789 (or later) think about the validity of *x* if he/she were alive in 2008?" These deep objections to originalism might be persuasive in some respects, but they can be deferred.⁶² For now, recall that many critics of originalism can accept its use when the interpretation lag is short, that a measure of originalism is an occasional feature of public judicial reasoning, and that a substantial audience is willing to at least consider originalist methods. Given the persistence of originalism as an option, skeptics and

⁵⁷ See, e.g., Barnett, *supra* note 56, at 92; Bork, *supra* note 56, at 144 ("The search is not for subjective intention."); Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 *Harv. L. Rev.* 26, 29 (2000) (similar); Scalia, *supra* note 56, at 17 (similar). Contrast Whittington, *supra* note 56, at 34–37 (looking for evidence of ratifiers' specific, clause-by-clause intent).

⁵⁸ See, e.g., Barnett, *supra* note 56, at 92–93; Amar, *supra* note 57, at 29. For a counterargument, see Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Geo. L.J.* 1113, 1118–20 (2003) (contending that secret drafting history can be evidence of how "the hypothetical Ratifier" understood the text).

⁵⁹ See Bork, *supra* note 56, at 149. A contrary view seems to be Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comment.* (forthcoming 2007) (depending on Fourteenth Amendment text plus high-level principle and not expected applications, but not clearly or solely on historical grounds).

⁶⁰ See, e.g., Bork, *supra* note 56, at 5; Kesavan & Paulsen, *supra* note 58, at 1142.

⁶¹ Analogous complaints are asserted against the endorsement test for establishment clause violations. The test makes the validity of state displays turn on whether (a judge believes that) a reasonable observer would believe that the government sent a message favoring religion. See *Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring); Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 *Sup. Ct. Rev.* 135, 148–49 (noting subjectivity and vagueness issues).

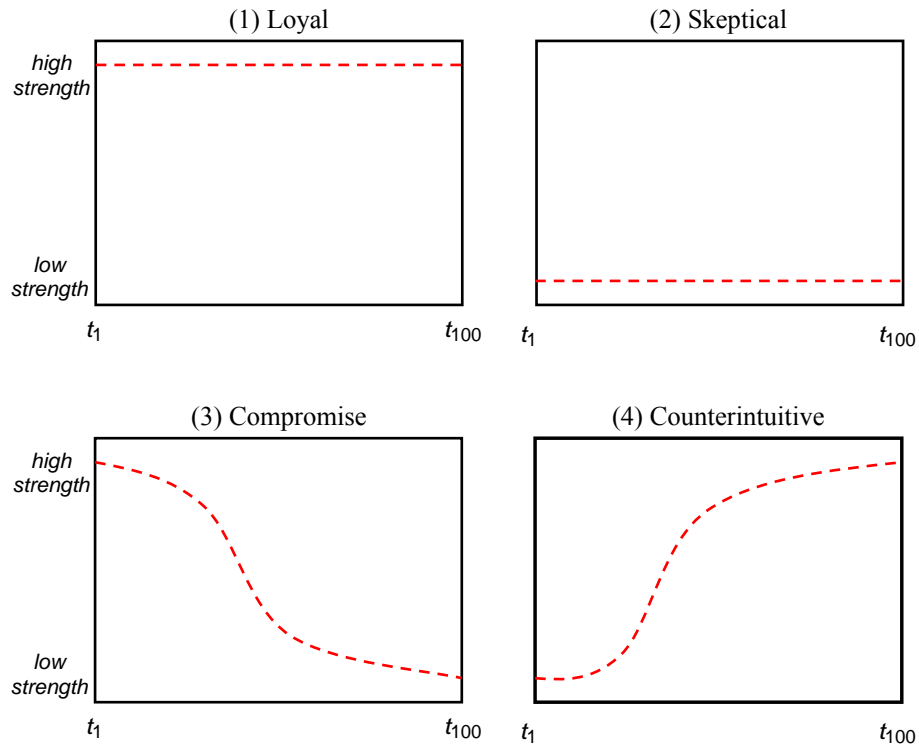
⁶² See *infra* Part III.A.1.

enthusiasts might pause to ask how, if at all, originalism should vary over time.

B. *The Possible and the Plausible*

There are an infinite number of trajectories that originalism might follow. This is true even for judicial interpretation alone, ignoring other locations for interpretation and the effects that time might have on dimensions of originalism other than strength. Further, the odds of multiple trajectories across constitutional doctrines increase if many different factors can influence originalism's strength. So, for example, originalism might be a justifiably strong force if the Supreme Court is acting close to the date of ratification. From that point, the strength of originalism could increase or decrease at various slopes and for various timeframes. Everything depends on how the temporal distance from ratification might affect the arguments for and against originalist inquiry.

To highlight several possible stances on the time variable, consider the following trajectories for originalism's strength:



The first pair of trajectories — the loyal and skeptical — is insensitive to the passage of time. Originalism sustains its strength level regardless of the distance between the ratification of new constitutional text (t_1) and subsequent time periods (with t_{100} representing some relatively long time lag). Opposition to the relevance of time does not depend on support for originalist methods. One can believe that the post-ratification date of interpretation is irrelevant and also dogmatically support originalism or maintain radical skepticism about the value or feasibility of the method.

Both positions are, however, extreme. To defend the loyal curve, no amount

of progress in understanding human affairs and no degree of change in technology, sociology, morality, economics, politics, environment, or international relations can affect the overriding influence of originalism in Supreme Court adjudication. One would have to remain deeply resistant to legal change and think such stasis possible, or believe the world does not actually change in important ways, or possess confidence that past constitutional decisions will always incorporate adequate flexibility to serve contemporary needs.⁶³ And to defend the radically skeptical curve, originalism must be repudiated by the Court no matter how static the world, clear the popular and elite sentiment on constitutional meaning, or close in time to ratification. The Court would be required, even on the afternoon of ratification, to interpret constitutional text without relying at all on originalist inquiries. This probably requires equally heroic assumptions or unconventional values.

The other pair of options represents an emerging compromise for originalism's trajectory, at least among moderate skeptics of originalism, along with a counterintuitive alternative. What might be called the compromise curve shows originalism at the apex of its strength when interpreters are close in time to ratification, and then a negative slope for subsequent time periods as originalism fades. The intuition is that originalist inquiries at the Supreme Court are more desirable, more feasible, and even inevitable when constitutional text has just been ratified. Thereafter, the justifications and pressures pointing toward originalism might dwindle. The optimal shape of this curve is open to debate, but several scholars suggest this moderated position on originalism.⁶⁴ So the issue that divides many theorists is originalism's strength at t_{100} , not at t_1 .

At least theoretically, this compromise curve can be turned upside down. In this option, originalism begins weakly and gains strength with time. It seems that no one takes this position as a normative matter *ex ante*.⁶⁵ Indeed this curve might show an inexplicably delayed onset of nostalgia for antiquated decisions. But on certain conditions and for certain situations, a move from weaker to

⁶³ Originalist inquiry might require flexibility on these points, but that would be a result of good fortune rather than a judgment at t_{100} that originalism should be moderated. One might need to know whether originalism in fact yields such flexibility before deciding that originalism should be moderated according to logic external to the method. These issues create uncertainty about the proper relationship between time and the strength of originalism *per se*. On judging originalism by its results, see *infra* Part III.A & B.2.

⁶⁴ See *supra* note 8 (collecting sources).

⁶⁵ The counterintuitive curve might accurately display, as a descriptive matter, the ebb and flow of originalist argument at the Supreme Court for certain parts of the document. Such a trend can be the result of, for example, newly appointed justices who are committed to originalism where their predecessors were not. One might believe that appointment trends should be incorporated into normative argument about interpretive method. For example, the methodological preferences of appointed justices might indicate the desires of key public officials or politically influential interests or the public more generally, and those facts might influence one's judgment about the propriety of originalism. Here I treat such influences as contributing to a descriptive or positive account of originalism's strength on the Court across time, rather than a justification for those trajectories.

stronger originalism in the judiciary is defensible. Or so I shall suggest.⁶⁶

Before proceeding, two related qualifications should be noted. First, time is only a proxy. Its passage after ratification indicates that originalism's desirability or feasibility might have to be reconsidered, without showing exactly why. Plotting a trajectory for originalism's strength is therefore difficult, even if we are solely interested in the normative question. And there are other trajectories that one might prefer given the complexities. Second, making the normative judgment requires a confrontation with judicial precedent. Ignoring precedent, a judge at the end of an adjudication lag could ascertain the time elapsed since ratification and then consult the appropriate curve to determine how seriously to take originalist inquiries. But prior judicial interpretation might rightly alter the shape of the curve. Intervening judicial precedent might soften the appropriate force of historical arguments.⁶⁷ To the extent adjudication lags are unpredictable, settling on a preferable trajectory for originalism is more challenging.

No single discussion is apt to capture all relevant normative considerations. There are too many contingencies. An achievable goal is to make substantial progress on plausible, if somewhat generic, arguments.

C. Supreme Court Practice

How have courts actually used originalism over time? This question can be answered only with a panoramic content analysis of judicial opinions. This has not been done. If it were done, it would reveal arguments made for public consumption and not necessarily true motivating forces. Even if opinions do reveal reasons, any interpretive method can be opaque. Adverting to ratification area history could be a search for wisdom or universals rather than original public meaning, while relying on case law could be functionally originalist if the precedent is grounded in originalism. So the value of an accurate inquiry into interpretive behavior might exceed the cost of the effort (although at least one

⁶⁶ See *infra* Part III.D (discussing randomization).

⁶⁷ Use of precedent-based arguments to defuse originalist inquiries is commonplace. See, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 577–81 (2001) (arguing that precedent is itself often accepted as legitimate law); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 744–49 (1988) (contrasting *stare decisis* and strict originalism). But note that the justifiable strength of originalist-like *methods* might *increase* based on judicial precedent. This would happen if (1) the precedent should be taken seriously for a non-originalist reason and (2) the precedent directs subsequent judges to undertake historical inquiry. Cf. *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (suggesting a two-step test for the reasonableness of searches that prioritizes ratification era historical research). Just as originalist interpretation theoretically can direct judges to make contemporary moral judgments, non-originalist sources theoretically can direct judges to make historical inquiries. Yet these are two distinct second-order analytical routes with meaningful differences. For one thing, originalism and non-originalism offer different ways for revising initial impressions. A strong originalist should want better historical argument before reversing her historical judgment that moral reasoning is required by the Constitution, while a common-law constitutionalist might test his commitment to precedent-supported historical inquiry against the length of this judicial tradition and right reason.

significant normative judgment depends on such information).⁶⁸

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

1. *First encounters*

One strategy for understanding the relationship between time and originalism is to scrutinize the end of adjudication lags. By isolating opinions in which the Supreme Court first interprets constitutional text, the availability of on-point judicial precedent is eliminated. The interpretive options become restricted and originalism could become more attractive. This is especially true for judicial interpretation shortly after ratification. According to conventional wisdom, anyway, originalism should dominate in this context if nowhere else. The end of long adjudication lags might be informative as well. Although this class of cases also minimizes the role of precedent, here the Court must assess the relevance of non-judicial events and practices since ratification. Unfortunately, only a small number of cases fit these categories. This is the result of a low amendment rate. And it would be best to know the strength of originalism in other constitutional cases decided at similar times. There might be interpretive epochs far more influential than the length of adjudication lags, even if it is not quite true that “the most important fact about any case is its date.”⁶⁹ Given these limitations, my analysis will be relatively concise.

a. Short lags. — Ten of the Supreme Court's adjudication lags have ended within ten years of an amendment's ratification. Often an originalist element is fairly apparent.⁷⁰ Consider the Warren Court's first interpretation of the Twenty-Fourth Amendment, which declares that the right to vote in federal elections “shall not be denied or abridged . . . by reason of failure to pay any poll tax or

⁶⁸ See *infra* Part III.C.3 (exploring incentives-based arguments for originalism).

⁶⁹ L.H. LaRue, *Constitutional Law and Constitutional History*, 36 *Buff. L. Rev.* 373, 373 (1987).

⁷⁰ See *Harman v. Forssenius*, 380 U.S. 528, 529, 538–40 (1965) (interpreting the Twenty-Fourth Amendment, ratified one year prior); *United States v. Chambers*, 291 U.S. 217, 222–23, 226 (1934) (referring to what “the people” accomplished with the Twenty-First Amendment, ratified one year prior); *Newberry v. United States*, 256 U.S. 232, 250, 252–53 (1921) (relying on drafting history of the Seventeenth Amendment, ratified eight years prior); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 10–21 (1916) (using *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), as context for understanding the Sixteenth Amendment, ratified three years prior). *Slaughter-House Cases* ended the adjudication lag quickly for two Amendments. See 83 U.S. 36, 71–72, 77–78 (1873) (ascertaining a general purpose for the Fourteenth and Fifteenth Amendments, ratified five and three years prior, respectively); cf. *Bradwell v. Illinois*, 83 U.S. 130, 138–39 (1873) (relying on *Slaughter-House Cases*).

other tax.” The justices of this era were known to offer historical arguments in constitutional cases, of whatever weight and accuracy,⁷¹ but they are not known for a commitment to originalism. Yet the obscure case of *Harman v. Forssenius*,⁷² decided one year after the Amendment’s ratification, might be distinctive. The Court held that Virginia could not offer prospective federal voters a choice among paying back poll taxes, annually filing a certificate of residency, or not voting. Chief Justice Warren’s opinion for the Court began with the text of the Amendment and it summarized the forerunning congressional debates over poll taxes, thus highlighting publicly expressed concerns of the Amendment’s proponents.⁷³

We cannot confidently say that *Harman* is entirely originalist, however. The opinion cited precedent along with the Amendment’s text for the proposition that Virginia’s certificate alternative was an invalid “penalty” on a right.⁷⁴ And it relied on case law to reject, as insufficiently urgent, the Commonwealth’s argument from administrative necessity.⁷⁵ Now, at least part of these passages are consistent with a form of originalism. One could say that the reference to case law indicated another facet of the background against which the Constitution was amended in 1964. But the opinion itself is not fully clear on this point. The safest conclusion is that even the Warren Court was willing to use originalist themes close in time to ratification, but that originalism is probably not a complete account of either the rhetoric of *Harman* or the underlying reasons for the judgment. It is not as if the Virginia statute accorded with the Court’s general attitude toward burdens on voting imposed by Southern states.

Ambiguity in interpretive method reaches other cases in this set. Take the startling prohibition era case of *Rhode Island v. Palmer*,⁷⁶ which was decided within a year of the Eighteenth Amendment’s ratification. Without explanation, the majority offered no fewer than eleven conclusions on the validity and meaning of the Amendment.⁷⁷ The conclusions were presented in numbered paragraphs, like a syllabus without the customary opinion thereafter.⁷⁸ Some were significant.

⁷¹ See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“It is in the light of such history that we must construe Art. I, § 2, of the Constitution . . .”).

⁷² 38 U.S. 528 (1965).

⁷³ See *id.* at 529, 538–40; see also *id.* at 540 (“It is against this background that Congress proposed, and three-fourths of the States ratified, the Twenty-Fourth Amendment . . .”); *id.* at 539–40, 542 (observing that the regulation in question required early action by voters and that this implicated “one of the disenfranchising characteristics” that the Amendment “was designed to eliminate”); *id.* at 540, 543–44 (noting a pre-Amendment concern about African-American disenfranchisement and racist origins of Virginia’s prior poll tax regime).

⁷⁴ See *id.* at 540–41.

⁷⁵ See *id.* at 542–43 (finding a “lack of necessity” after referencing *Carrington v. Rush*, 380 U.S. 89, 96 (1965) (involving equal protection and voting rights, decided after the Twenty-Fourth Amendment was ratified), and *Oyama v. California*, 332 U.S. 633, 646–47 (1948) (involving equal protection and escheat of land turning on parental noncitizenship)).

⁷⁶ 253 U.S. 350 (1920).

⁷⁷ See *id.* at 384–88 (quoting constitutional text and offering conclusions).

⁷⁸ See *id.* at 388 (White, C.J., concurring) (“I profoundly regret that in a case of this

Conclusion 11 was that Congress had authority to reach beverages containing 0.5% alcohol by volume.⁷⁹

But reticence is not the only alternative to originalism within the ratifying generation. One possibility is to attempt plain text reasoning (to the extent this is different from originalism).⁸⁰ Or a court might use its analogous work on statutes or elsewhere to elaborate concepts in new amendments.⁸¹ A yet bolder option is to interpret new text in conformity with normative considerations. Here the standout is *Osborn v. Nicholson*.⁸²

The Court's first opinion on the Thirteenth Amendment's scope, *Osborn* came seven years after ratification. It considered how the abolition of slavery might affect the apportionment of losses among participants in the slave trade. With thick natural law themes, a majority concluded that the Amendment should not inhibit a slave seller's demand for payment from a slave buyer where their contract was formed before the Amendment. The Court called the protection of such contracts "a principle of universal jurisprudence. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils."⁸³ In light of this normative view, the majority shifted the interpretive burden to disfavor statutory repeal or "the destruction of vested rights." This result would require an implication "so clear as to be equivalent to an explicit declaration. . . . There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect."⁸⁴

There is a crosscurrent here. *Osborn* incorporates an originalist thought about intentions. But this comes after a clear-statement rule is erected, and this rule is grounded in natural law reasoning. Again, any such principle of "universal jurisprudence" might be a background assumption against which amendments are supposed to be drafted. Yet *Osborn* seems more aggressive than this. The majority appeared to reserve the question whether it would honor an amendment

magnitude . . . the court has deemed it proper to state only ultimate conclusions . . ."); see also *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381–82 (1798) (reporting lawyers' arguments, including one asserting "the policy of the people," and the bare conclusions of the Court).

⁷⁹ See *Parker*, 253 U.S. at 387–88.

⁸⁰ Cf. *Roe v. Wade*, 410 U.S. 113, 157–58 (1973) (using the Twenty-Second Amendment as a basis for excluding the unborn from the term "person" in the Fourteenth Amendment). *Roe* was decided a full 22 years after the Twenty-Second Amendment, however.

⁸¹ Cf. *United States v. The Betsey & Charlotte*, 8 U.S. (4 Cranch) 443, 452 (1808) (permitting a libel trial without jury 17 years after the Seventh Amendment, based on *La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) (interpreting a statute)).

⁸² 80 U.S. 654 (1872).

⁸³ *Id.* at 662.

⁸⁴ *Id.* (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.), in asserting that a different rule would be "contrary to 'the general principles of law and reason'"); see also *id.* at 663 (noting support in state supreme court cases and claiming no contrary authority in the common law, equity jurisprudence, or civil law).

that explicitly rearranged such property rights among private parties.⁸⁵

b. Long lags. — If opinions that end adjudication lags quickly are somewhat methodologically mixed, what about more delayed interpretation? There are countless examples of precedent-focused constitutional opinions, but more than precedent may diminish originalism’s strength. The Court may face competing bases for decision even when an adjudication lag ends long after ratification.

A standard alternative is deference to the considered judgment of other institutions, on display no later than *McCulloch v. Maryland*.⁸⁶ A related ground for dampening originalism is extended practice outside the courts. That consideration was overpowering in *Ray v. Blair*, described above. Ending the Twelfth Amendment’s 148 year adjudication lag, the majority could not have been much more anti-originalist. They indicated no interest in resetting the presidential election system to accord with any hope in 1789 for independent deliberation by electors. That life had departed from these expectations was given as a reason for judicial blessing, not intervention. The majority announced that it would place heavy weight on “[t]his long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector.”⁸⁷ The contemporary laws of twenty states were part of this evidence against constitutional violation.⁸⁸ Although the majority could have believed that elector independence dwindled so quickly that those responsible for the Twelfth Amendment must have ratified the change, the argument is not clearly (and not solely) the basis for the judgment.⁸⁹

Still, the anti-originalist path does not dominate. After all, it should be more difficult for the Court to ignore originalist history in the absence of relevant judicial precedent. There is evidence of this, even in cases decided many decades after ratification. Perhaps the most interesting examples occur shortly before the *Lochner* era arrived in full force.⁹⁰ No long adjudication lags ended for an Amendment during the heart of the *Lochner* period. But *Osborn* confirms that natural law reasoning was alive in 1872, and further previews of economic rights

⁸⁵ See *id.* at 662–63 (mentioning takings, due process, and “fundamental principles of the social compact” before concluding, “What would be the effect of an amendment of the National Constitution reaching so far — if such a thing should occur — it is not necessary to consider, as no such question is presented in the case before us”).

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

⁸⁷ *Ray v. Blair*, 343 U.S. 214, 229–30 (1952); see David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986*, at 371 (1990) (characterizing *Ray* as a “sobering reminder of the limited capacity of law to affect human behavior”).

⁸⁸ See *Ray*, 343 U.S. at 229.

⁸⁹ See *id.* at 228 & n.16 (stating that “[h]istory teaches that the electors were expected to support the party nominees” and quoting congressional debate); cf. Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804*, at 171–72 (1994) (asserting that the Amendment “had a partisan motive” among Jeffersonians and “in effect recognized the existence of national political parties”).

⁹⁰ See *Lochner v. New York*, 198 U.S. 45 (1905).

under substantive due process doctrine were issued by 1877.⁹¹

The Court ended two long adjudication lags in this general timeframe. And, depending on which cases qualify as the Court's first interpretations, originalism played a role. These pro-originalism examples speak to the Eighth Amendment and the religion clause of the First. To be fair, both Amendments received glancing attention from the Supreme Court without pressing originalist themes.⁹² These earlier cases are used in the above calculation of the adjudication lag because they provide concrete information on a majority's view of constitutional text. But neither offers much insight on interpretive method. Moving to the next instances of Court adjudication, the gap is partly filled with originalist argument.

*Wilkerson v. Utah*⁹³ interpreted the Eighth Amendment 87 years after ratification yet still made space for originalist analysis. One issue addressed was whether a trial judge in the territory could order death by public shooting as the punishment for first-degree murder. The Court did consider military practice in affirming the penalty,⁹⁴ but it also reviewed founding era punishments that the nation apparently repudiated with the Amendment.⁹⁵ *Reynolds v. United States*⁹⁶ is comparable. It interpreted the free exercise clause in the same year, at the same temporal distance from ratification, and with significant reliance on originalist history.⁹⁷ The opinion also asserts polygamy's threat to social order and democracy, and it objects to exemptions from criminal statutes for religiously motivated conduct.⁹⁸ But the Court did strive to link its views to 1791.⁹⁹

The end of adjudication lags educates us about what is possible (or what was

⁹¹ See *Munn v. Illinois*, 94 U.S. 113, 125–26, 134 (1877) (rejecting the attack on rate caps, however); Tribe, *supra* note 34, at 1341–52 (detailing the era).

⁹² See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (following the theme set out in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), by holding that the petition clause is not directly applicable to states); *Pervear v. Massachusetts*, 72 U.S. 475, 479–80 (1866) (similarly holding that the Eighth Amendment does not apply to the states, but then concluding, in the alternative, that the Amendment was not violated by imprisoning defendant for selling liquor without a license); cf. *Ex parte Watkins*, 32 U.S. 568, 573–74 (1833) (denying jurisdiction over a sentence and stating, in the alternative, that an excessive fine could not be shown on the record).

⁹³ 99 U.S. 130 (1878).

⁹⁴ See *id.* at 134–35.

⁹⁵ See *id.* at 134–37.

⁹⁶ 98 U.S. 145 (1878).

⁹⁷ See *id.* at 162–65 (focusing on ratification era history including state law).

⁹⁸ See *id.* at 165–66 (citing an academic's opinion). For even clearer sentiments of this kind, see *Davis v. Beason*, 133 U.S. 333, 341–42 (1890) (“To call [the advocacy of bigamy and polygamy] a tenet of religion is to offend the common sense of mankind.”).

⁹⁹ The Second Amendment has an analogous interpretive history. Long after the quick references by Chief Justice Taney in *Dred Scott v. Sandford*, 60 U.S. 393, 417, 450 (1857), the Court took another brief look in *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (holding that Second Amendment rights against Congress did not permit the Enforcement Act of 1870 to be used against citizens who lynched other citizens), and decades later issued a relatively detailed interpretation with historical argument in *United States v. Miller*, 307 U.S. 174, 178–82 (1939) (applying the Amendment to exclude the right to keep and bear a sawed-off shotgun).

possible) in constitutional interpretation. Without precedent to rely on and close in time to ratification, the Supreme Court often pushed originalist arguments. But not exclusively, and not always. Decades after ratification, the picture is not radically different. Several opinions depart from originalist themes and invoke alternative considerations, sometimes pointing to events intervening between ratification and interpretation. But not always, and not exclusively. Hence the use of originalist argument is not foreordained when the Court first interprets constitutional text, nor is it ruled out.

2. *Extended trajectories*

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

The compromise trajectory sketched above, with originalism's strength declining over time, matches the path of several doctrinal fields. The strongest candidates for this trajectory are areas of constitutional argument now immersed in caselaw. Contemporary analysis of cruel and unusual punishment, along with the boundaries of religion and its free exercise, have become largely the domain of common-law reasoning,¹⁰⁰ regardless of earlier originalist themes¹⁰¹ and occasional backtracking.¹⁰² It might be that today's results could be reached with overtly originalist inquiry, but they tend not to be justified in that fashion. And the path back to originalist arguments in the precedent is a long one.

Other trajectories are present. It is possible to view speech clause doctrine as bumping along on a relatively skeptical curve, with the occasional spike toward originalism. When speech clause complaints received attention at the Court as a result of World War I related prosecutions, ratification era history did not seem especially important to the justices.¹⁰³ The same is usually true today.¹⁰⁴ There are, of course, important exceptions.¹⁰⁵ But no one familiar with speech clause doctrine would characterize its originalism as more than episodic. It is also possible to understand Seventh Amendment interpretation as somewhat consistently historicist. The Court's analytical framework for triggering a jury trial right in federal court typically includes a significant originalist element.¹⁰⁶

¹⁰⁰ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (judging excessive punishment by “standards . . . that currently prevail”); *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990) (resolving textual ambiguity in the free exercise clause with a rendition of precedent).

¹⁰¹ See *supra* text accompanying notes 92–99.

¹⁰² See *Locke v. Davey*, 540 U.S. 712, 722–25 & n.6 (2004) (relying on a “historic and substantial state interest” in not funding devotional theology degrees).

¹⁰³ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919).

¹⁰⁴ See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down Internet regulation); *Central Hudson Gas v. Public Serv. Comm’n*, 447 U.S. 557 (1980) (striking down advertising regulation).

¹⁰⁵ See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–43 (1995) (relying in part on a history and tradition of anonymous political advocacy, including *The Federalist*); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (citing Blackstone’s *Commentaries*).

¹⁰⁶ See, e.g., *Curtis v. Loether*, 415 U.S. 189, 193 (1974); *Dimick v. Schiedt*, 293 U.S. 474, 476, 487 (1935) (stating that “we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791”);

Certainly the Court has dealt with new circumstances creatively, and its analogical reasoning may treat the old division between law and equity as quite loose guidance.¹⁰⁷ Still, the originalist streak is there.

Stranger trajectories exist, as well. Consider Fourth Amendment cases. Putting aside early and fairly uninformative treatments,¹⁰⁸ the doctrine appears to have a U-shaped relationship with originalism. A crucial opinion early in the Court's doctrinal development is *Boyd v. United States*,¹⁰⁹ and it was laced with originalist history.¹¹⁰ By the 1960s, however, the theme shifted. An exclusionary rule for the states was adopted without dependence on ratification era history,¹¹¹ pragmatic interest balancing was injected into the doctrine often to serve law enforcement interests,¹¹² and the Court was open to updating Fourth Amendment concepts in application to new technologies.¹¹³ Lately this kind of innovation seems stalled. In some recent opinions, historical arguments have been featured. Although the majority did not fully follow its suggestion, *Wyoming v. Houghton*¹¹⁴ indicates that originalist history deserves lexical priority in judging the reasonableness of searches.¹¹⁵

Finally, consider substantive due process doctrine. A strand of it might bear a \cap -shaped relationship to originalism over time. Admittedly, this picture of the doctrinal development requires some imagination. But the curve starts to appear if we couple Chief Justice Taney's nonhistorical reference to slaveowner property rights in *Dred Scott*¹¹⁶ with the categories and balancing of *Lochner v. New*

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830) (asserting what must have been “present to the minds of the framers of the amendment” when they “preserved” the jury trial right).

¹⁰⁷ See, e.g., *Curtis*, 415 U.S. at 193 (permitting analogy to modern statutory claims from common-law forms of action and their remedies); *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (referring to “practical abilities and limitations of juries” as a third prong of the inquiry); see also *Colgrove v. Battin*, 413 U.S. 149, 152–60 (1973) (permitting a six-member jury as not interfering with the “substance” of the right, while offering originalist arguments).

¹⁰⁸ See *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 285–86 (1855) (holding the warrant clause inapplicable to a creditors' civil action); *Livingston's Lessee v. Moore*, 32 U.S. 469, 478–79, 482, 539, 551–52 (1833) (denying the claimant's Bill of Rights arguments as inapplicable to states, though without citing the Fourth Amendment).

¹⁰⁹ 116 U.S. 616 (1886).

¹¹⁰ See *id.* at 626–27, 630 (aiming at “the minds of those who framed the fourth amendment” and finding that those who proposed the Amendment would not have approved the laws at issue).

¹¹¹ See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (“Our decision, founded on reason and truth, . . .”).

¹¹² See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 555–67 (1976) (upholding border patrol checkpoint); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (permitting limited stop and frisk).

¹¹³ See *Katz v. United States*, 389 U.S. 347, 351–52 (1967) (relying on precedent as well as “the vital role that the public telephone has come to play in private communication”).

¹¹⁴ 526 U.S. 295 (1999).

¹¹⁵ See *id.* at 299–300, 303 (turning to balancing after the majority's review of (the Court's past view of) history suggested no violation); see also *Atwater v. Lago Vista*, 532 U.S. 318, 327–45 (2001) (presenting a history of arrest and judging it inconclusive).

¹¹⁶ 60 U.S. (19 How.) 393, 450 (1857) (opinion of Taney, C.J.).

York,¹¹⁷ then turn to essential common-law privileges depicted in *Meyer v. Nebraska*¹¹⁸ plus the references to “deeply rooted” national history in *Bowers v. Hardwick*,¹¹⁹ and then end with the more contemporary understanding of liberty as a judicially enforceable concept in *Lawrence v. Texas*.¹²⁰ It is not clear that any routine normative logic prescribes this trend.

My objective is not comprehensiveness, but rather confirming a variety in interpretive approach across time. It is extremely unlikely that this variety can be eliminated by additional investigation, or justified by one normative theory. Instead, we can begin to account for the various trajectories by understanding the multiple forces that operate to produce judicial opinions. If nothing else, the mix of interpretive methods is likely to change with the Court’s personnel. Perhaps this is more probable today, when commitments to precedent or originalism or “strict construction” are considered qualifications (or disqualifications) for judicial appointments. Along these lines, the demands of interest groups, political elites, or the public in general might shift and influence not only Court judgments but also Court opinions. Interpretive methods might be adjusted to become more plausible to salient audiences. And the Court’s power relative to other institutions will vary over time, which could likewise influence its freedom to select interpretive methods.

There is, therefore, no reason to expect that judicial trends in interpretive method will match a convincing normative vision of interpretive progress. Too many forces are at play. But there is still reason to work toward formulating such a vision. And the history of constitutional interpretation in the judiciary shows that much is possible, given the right conditions.

III. ORIGINALISM IN TIME₀

We are now in a better position to evaluate the appropriate relationship between originalism and time. More specifically, in the present — the perpetual t_0 — should originalism’s strength decline as our distance from ratification increases? My response to this question has two steps. First, key criticisms of originalism are summarized, particularly as they apply to courts adjudicating arguments about supreme law. This summary emphasizes the importance of time lags to the critique. And it tempers the concession that originalism is proper or unavoidable shortly after ratification. Second, justifications for originalism are

¹¹⁷ 198 U.S. 45, 56 (1905) (“Is this a fair, reasonable, and appropriate exercise of the police power of the state . . . ?”). In one passage, *Lochner* does assert that “the Fourteenth Amendment was not designed to interfere” with certain reasonable conditions on property and liberty. *Id.* at 53.

¹¹⁸ 262 U.S. 390, 399 (1923).

¹¹⁹ 478 U.S. 186, 192 (1986) (internal quotation marks omitted). *Bowers* relied on much more. See *id.* at 190–95 (characterizing case law, recent history, and the judiciary’s role).

¹²⁰ 539 U.S. 558, 564–72 (2003) (concentrating on case law and principles, complexifying the historical record, and stressing recent law and tradition). Even *Lawrence* waded at originalism, however. See *id.* at 579 (asserting that the drafters and ratifiers of the due process clauses “knew times can blind us to certain truths”).

sketched out. These justifications are organized according to their promise in besting time-oriented objections. Justifications with longevity are singled out for special attention. This priority suggests arguments for originalism and its optimal form that have not been extensively explored, or that are unheard of.

A. Time-Oriented Criticism

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

To move forward, there must be an account of this decision-maker's normative goals and the setting in which she operates. These accounts are controversial, even if an accurate description is the only thing at stake and not recommendations for appropriate judicial behavior. There is no universally agreed-upon rendering of "good" judicial behavior, which the continuing debate over interpretive method suggests. Instead, the analysis will rely on a series of hopefully plausible elements of appropriate judicial behavior, and then add a concession to simplicity.

So assume that this hypothetical judge is public spirited and committed to improving social welfare (appropriately defined). She is acting with the best of intentions and she is of at least average competence. Furthermore, this judge understands the practical limits of acting within her institution, the normative questions surrounding her assumption of power, and the extent of her personal abilities and resources. She is self-aware, well-meaning, practical, and honestly searching for the best interpretive method.¹²¹ To simplify the analysis, however, it will help to bracket intra-judicial strategy.¹²² Assume that the judge need not convince any fellow judges that her understanding of W is correct, now or as a matter of coordinating judicial decisions in the future, nor does she have reason to act strategically in light of other judges' preferences. There is one Supreme Court, she is it, and she is not concerned with her reputation in the lower courts.

1. Objections summarized

A heartfelt skeptic of originalism might advise that, whatever the judge does, she should not look backward to historical sources associated with the text. And she should avoid these resources whether the target for interpretation is W_{old} or W_{new} . True, recent history will undoubtedly influence the judge's reading of the text. She cannot avoid the linguistic conventions of her time. But the true skeptic

¹²¹ Cf. James Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 *Political Behavior* 7, 9 (1983) ("In a nutshell, judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.").

¹²² On the issue of interpretive coordination across judges, see Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 121–24 & n.3 (2006) (applying the fallacy of division).

would maintain that no special effort should be made toward re-creating a historical context (however recent) that does not now exist. Other considerations would fill the gap, and the options are numerous: contemporary moral judgment about the text's best meaning, respect for the existing t_0 practices, deference to the judgment of other constitutional decision makers, and so on.¹²³

Doubts about such time-insensitive skepticism were raised in Part II.B above. But it is useful to note the typical grounds for opposition to originalism. One complaint is not exactly a criticism: It has been argued that an honest historical inquiry reveals that past generations preferred nonoriginalist interpretive method, at least for parts of the Constitution, and therefore a genuine originalist would have to follow that lead.¹²⁴ This is a possible consequence of originalist investigation, not a reason to avoid the investigation. We can set aside this observation and move on to deeper methodological objections.

At least one attack on originalism is constant across time. Some might believe that strong originalism is conceptually impossible. The contention is that there just is no answer to the questions suggested by original public meaning or other forms of originalism.¹²⁵ Perhaps an accepted public meaning for any law is a phantom, a mischaracterization of irreducibly contested understandings for any legal text. And in the case of original public meaning, the observers are essentially mental constructs for interpreters. At most, according to this attack, there are rhetorical or political reasons for acting as if originalism's questions have answers and a public meaning existed at a historical moment before interpretation.¹²⁶ This objection applies with equal force to W_{old} and W_{new} .

But for most, the radically skeptical position claims too much territory. First of all, history might become indispensable to interpretation under certain conditions. Some dated text loses all conventional meaning with time. In these cases, it becomes difficult to understand how "interpretation" takes place without historical investigation. May anything sensible be done with the reference to "letters of marque and reprisal" in Article I, Section 8, without history?¹²⁷ There

¹²³ Stare decisis is another possibility for W_{old} and I will return to this point later on.

¹²⁴ The classic argument is H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 889, 894–902 (1985) (finding a form of common law reasoning). A response is Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 523–39 (2003) (finding some anticipation of invariant meaning and settlement by practice).

¹²⁵ Cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 213–17 (1980) (addressing intent in multimember bodies).

¹²⁶ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2366–67 (2002) (suggesting originalism survives for "symbolic and strategic" reasons, not because it constrains judges in hard cases).

¹²⁷ Apparently the last such letter was issued in 1812. See *An Act Declaring War*, 12th Cong., 1st Sess., 2 Stat. 755 (1812) (authorizing the president to issue letters of marque and general reprisal); *An Act Concerning Letters of Marque, Prizes, and Prize Goods*, 12th Cong., 1st Sess., 2 Stat. 759 (1812) (regulating the use of letters of marque); Fritz Grob, *The Relativity of War and Peace: A Study in Law, History, and Politics* 237–39 (1949) (calling the constitutional clause "perfectly obsolete"). One might ignore clauses once they become unintelligible to the

also are concerns with maximum skepticism for recently enacted text. The concept of public meaning could preclude certain understandings, whether or not it can yield a single answer in many applications. Disagreement over meaning does not foreclose operative conventions about the boundary of meaning, even if that boundary is arbitrary in a moral sense.¹²⁸ To be convinced by the strong form of this argument, it seems, one must also believe it impossible to understand the words of others when delivered face-to-face in the here-and-now. This assertion has a self-refuting quality. One can still oppose originalism, or want it restricted to certain conditions, without maintaining that it is impossible.

On the assumption that originalism is sometimes possible and guiding, the objections become heavily dependent on time. Consider milder infeasibility arguments. Here the contention is that a long time lag makes recovery of old concepts both difficult and a creative enterprise.¹²⁹ This could be acutely true for generalist judges, whose competence with historical sources may be in doubt, as well as their ability to restrain normative preferences from influencing the reconstruction of ancient meaning.¹³⁰ And even if these dated meanings could be accurately excavated, there is the question of how this past meaning from a different historical episode should be applied to the situation in t_0 .¹³¹ Given temporal distance, the answers might become more challenging to provide with confidence, at a reasonable level of effort, and without lapsing into indeterminacy. This is a worry about originalism mostly limited to W_{old} .

Impracticality does not exhaust the time-oriented objections. Even if originalism is accurate, cheap, and determinate, a package of normative arguments might recommend alternative methods. First, a judge opposing the outcomes of so-called ordinary politics with original meaning could be intolerably undemocratic. Depending on the operative theory of democracy, a decision-maker easily could privilege the will of the living (however defined) over the will of the dead (however defined).¹³² This presentist orientation need not conflict with a commitment to treating the document as valid law. An intermediate position is that each generation at t_0 should have the liberty to interpret textual

contemporary reader. The discussion here concerns the interpretation of text regarded as law.

¹²⁸ See Jack M. Balkin, *Deconstruction's Legal Career*, 27 *Cardozo L. Rev.* 719, 734 (2005); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. Chi. L. Rev.* 943, 951 (1995) (discussing semiotic content that is socially attached to action in a given context).

¹²⁹ See generally Cass R. Sunstein, *Radicals in Robes* 68–71 (2005) (critiquing coherence, based on time lags, of a “fundamentalist” originalism); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781, 802 (1983) (suggesting that we can understand another era “[w]ith a great deal of imaginative effort” but that “the understanding we achieve is not the unique, correct image of the framers’ world”).

¹³⁰ See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 *Va. L. Rev.* 1237, 1250–51 (1986).

¹³¹ See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395, 401–02, 442–43 (1995) (discussing meaning translation for preservation).

¹³² See, e.g., Thomas Paine, *The Rights of Man* 12 (E.P. Dutton & Co., 1951) (1791) (“The circumstances of the world are continually changing, and the opinions of men change also; and as Government is for the living, and not for the dead, it is the living only that has any right in it.”).

meaning according to contemporary understandings.¹³³ And each generation unavoidably chooses whether to respect this text as law. It has no practical force otherwise.¹³⁴

Second, critics test originalism for acceptable results on other fronts.¹³⁵ Originalism might deliver seriously undesirable consequences, depending on one's value set. And these adverse effects should grow more likely and more severe over time. Originalism has been promoted as a stabilizing force, and surely it is for a subset of cases. But in other instances, the method is a tool for disrupting the status quo. Strong forms of originalism threaten new preferences and judgments, existing practices and political bargains, longer-term traditions, common decision methods within the courts, relatively settled judicial precedent, and perhaps morally intolerable results in particular cases given present conditions. However inevitable or desirable originalism might be for $W_{\text{-new}}$, the argument concludes, it is overly difficult or unwise for $W_{\text{-old}}$.¹³⁶

Not much effort is required to locate a reliance on time lags in nearly all of these objections to originalism. Whether the argument is impracticality, democratic threats, or other undesirable consequences, the objections tend to be fueled by the passage of time. This has two immediate implications. The first involves the proper emphasis of originalist argument in the academy. Those sympathetic to originalism should prize normative justifications that can overcome the reality of time lags in supreme law. In certain ways, this is already happening. This ties in to the second implication. Originalism's critics may concede that something like strong originalism is appropriate or unavoidable shortly after ratification.¹³⁷ This concession is practically limited; because the Article V amendment rate is low, adjudication lags are typically long. It is, nevertheless, a meaningful thought that follows from a timing orientation.

2. *On originalism in ratification's wake*

But the objections can be pushed further, to reach $W_{\text{-new}}$ in some circumstances. Originalism might be questioned even during initial time periods.

First of all, there little reason to believe that originalism is always or ever inevitable, even close in time to ratification. Other approaches to reading text are available. The case is clearest for judicial interpretation. The judge's view of the

¹³³ See, e.g., William J. Brennan, Jr., *Education and the Bill of Rights*, 113 U. Pa. L. Rev. 219, 224 (1964) (“[T]he genius of our Constitution resides . . . in its applicability and adaptability to current needs and problems.”).

¹³⁴ See Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L.J. 1029, 1053 (1990) (observing that law and culture fade without current effort). But cf. Pierson, *supra* note 47, at 10 (explaining that politics and institutions can be path dependent and locked-in for a time).

¹³⁵ See generally Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 118 (2005) (arguing that “literalists” ultimately rely on consequences); Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 Colum. L. Rev. 2234, 2239 (2006) (arguing that consequentialist arguments must justify originalism).

¹³⁶ See generally Farber & Sherry, *supra* note 56, at 529–52 (collecting arguments).

¹³⁷ See *supra* note 8 (collecting sources).

best moral reading of W_{new} , for example, need not match public meaning as defined by the hypothetical objective observer. True, the judge's understanding of newly ratified text could track a more general convention about meaning without surprising anyone. And, in a sense, her understanding of the text is perhaps a data point on which public meaning can be established.¹³⁸ But would demonstrate only that original public meaning is easier to execute at the point of ratification. It does not eliminate alternatives.

Our review of Supreme Court cases ending short adjudication lags confirms this. Perhaps none can be characterized as wholly originalist; some have strong anti-originalist themes. Recall *Osborn v. Nicholson*, which applied a natural law-oriented clear statement rule to a recent constitutional amendment.¹³⁹ No pushback from other locations seems to have disrupted the Court's preferences in this situation.

The mandate for judicial originalism becomes softer once substantial adjudication lags are accepted. We now know that decades-long adjudication lags have been common in U.S. history.¹⁴⁰ But even an extremely short gap between ratification and judicial interpretation opens the possibility for major shifts in nonjudicial arrangements and hardening forces that will interfere with any judicial preference for originalist outcomes. To be sure, short time lags make this situation less likely; not every amendment portends swift and major change at odds with plausible renderings of original public meaning; and constitutional text directed at judges might be associated with immediate judicial action.¹⁴¹

Yet it would not be shocking to find judicial review following quickly hardening practices that lack a connection to originalist interpretation. The early partisanship of presidential electors is worth considering. A fairly courageous Supreme Court nevertheless might have assessed the argument for elector independence in *Ray v. Blair* in precisely the same way, deferring to contemporary practice, had the issue been litigated in 1796 instead of 1952.¹⁴² Even without case law, courts have tools for dealing with fresh constitutional text.

Originalism's critics are probably too bashful, then. They cannot easily defend an invariably downward-sloping trajectory for originalism. To the extent these critics grant originalism as normatively appropriate for courts in the (rare) case when text is new, they overlook the practical and theoretical implications of a judiciary that is nearly always second-guessing the practices of others. This is not to assert that originalism is never appropriate. It could be the presumptive methodology for some time period following ratification. Public meaning originalism can have democratic benefits (depending on your theory of democracy), and it is not particularly costly for judges to perform when little

¹³⁸ Cf. Brest, *supra* note 8, at 208 (indicating that, near the time of adoption, an interpreter “unconsciously places the provision in its linguistic and social contexts”).

¹³⁹ See *supra* text accompanying notes 82–85.

¹⁴⁰ See *supra* Part I.B.

¹⁴¹ See *supra* text accompanying notes 36–37 (discussing the Eleventh Amendment).

¹⁴² See *supra* text accompanying notes 48–49, 87–89.

relevant change has occurred since ratification. But there is no time at which judicial originalism is a priori inevitable or desirable.¹⁴³

B. Historiography Over Time

Before moving to the affirmative case for originalism, there is a question of historiography to be addressed. Incompetence is an element in the standard critique of originalism. Some question the ability to render a sound account of the past at some later present time. Perhaps the longer the temporal gap between an event and its interpretation, the less accurate and reliable our perceptions are likely to be. This decline in quality might not be perfectly linear. It might slow to a halt for certain time frames, or reverse course, or cycle. But maybe we should expect that a professional history of 1868 is more likely to be excellent in 1888 or 1908 than in 2008, to the extent all other factors can be held constant. This might ultimately cripple the case for originalism. Insofar as originalism relies on excellence in historical inquiry, and insofar as excellence moves beyond anyone's reach, let alone a generalist judge's reach, there is reason to moderate or eliminate originalism.¹⁴⁴ "Ought implies can," as they say.

Although this thought is valuable, it is also incomplete. As to its value, certain trends surely do make the production of good history less likely. Live personal recollection of events softens and then disappears as observers age and die. They may record their impressions, of course, but these recordings cannot be interrogated as human beings. In a sense, the authors will have restricted the scope of our questions.

Nor will every pertinent record survive forever. Documentary evidence can be destroyed and it will degrade on its own.¹⁴⁵ These eventualities are a motivation for statutes of limitations in litigation, and there is a parallel basis for becoming less confident over time in anyone's ability to generate accurate insights from surviving historical sources.¹⁴⁶ Going forward, this concern might

¹⁴³ Richard Primus's recent article, which suggests a downward sloping trajectory for originalism's strength, makes that recommendation in part because the article's scope is a bit different from the investigation here. On the relevance of time, Primus focuses on one salient affirmative justification for originalism: democratic authority. See Primus, *supra* note 8, at 2–5 & n.7 (arguing that this justification runs out over time); see also *id.* at 5–7 (addressing justifications from judicial constraint but not stressing the temporal dimension, and wrapping arguments from the rule of law into the democratic authority justification). [*Note to readers:* This is my initial take on a new draft of the article, which Richard Primus was kind enough to send me.]

¹⁴⁴ As William Nelson put it when the originalism debate was heating up in the 1980s, "[J]udicial judgments about the credibility of various accounts of the constitutional past may be idiosyncratic and otherwise unsound. . . . After all, judges are not selected for office because they have special skill in reconstructing the intentions of individuals in the past . . ." Nelson, *supra* note 130, at 1250–51. This concern is moderated by the possibility that selection standards, applicant pools, and sitting judges are responsive to the interpretive demands of the office.

¹⁴⁵ See, e.g., Nancy E. Gwinn, *The Fragility of Paper: Can Our Historical Records Be Saved?*, *The Public Historian*, Summer 1991, at 33, 35–47 (discussing "the brittle book problem" and cost of preservation options).

¹⁴⁶ See, e.g., James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1, 2 (1986) (evaluating the quantity and quality of

be allayed. Digital formats could allow a greater proportion of evidence to reach the future, and computer-driven search engines should enhance the future's ability to locate what it deems relevant. But optimism about the quality of 2148's history of 2008 will not improve 2008's history of 1868.

Source availability is not the only difficulty. A problem at least equally deep is recovering systems of meaning. Understanding the context and manner of communication within a centuries-old era is a major challenge.¹⁴⁷ No history will be reliable without making this effort and without possessing the skill to research and contextualize the events of what is in essence a foreign nation. Critics of originalism and critics of judicial reliance on foreign law, it seems, have something in common.¹⁴⁸

Yet there are influential factors pointing in another direction. This is true even disregarding the virtues of second thought — surely the distant reflection on past events sometimes produces a more accurate account. Nor must the possibility of improving historical knowledge depend on technological innovation. New technologies are indeed allowing today's historians to preserve surviving records more effectively than before, to digitize and search those records with more power than ever, and to extract information from artifacts that could not have been imagined a few decades ago.¹⁴⁹ Given adequate resources, these advances help us with historical inquiry today; their benefits are not confined to future historians. All of this is true. But the hope for improved historical knowledge can be stiffened with other logic.

Allied with technological innovation is progress in historiography. “Progress” is meant in a realistic sense. It refers to the continuing process of developing, vetting, revising, discarding, resuscitating, and renovating professional methodologies for historical inquiry.¹⁵⁰ The deepening and shifting

surviving sources regarding the drafting and ratification of the original Constitution).

¹⁴⁷ Accord Brest, *supra* note 8, at 208 (asserting that a textualist or originalist “must immerse herself in their society”); see generally Rakove, *supra* note 56, at 20–21 (emphasizing connections between founding era constitutional decisions and broader intellectual currents).

¹⁴⁸ Cf. Noah Webster, *On Bills of Rights*, 1 *Am. Mag.* 13, 14 (1787) (arguing that the “attempt to make perpetual constitutions, is . . . to legislate for those over whom we have as little authority as we have over a nation in Asia”).

¹⁴⁹ See, e.g., Ray A. Williamson & Jannell Warren-Findley, *Technology Transfer, Historic Preservation, and Public Policy*, *The Public Historian*, Summer 1991, at 14, 17 (observing that technology may influence historians' understanding of past cultures, and noting that “[d]igitizing the l’Enfant map of Washington, D.C. . . . may show what Thomas Jefferson did to change the original landscape design vision by revealing Jefferson’s long-observed pencilled notes in the margins of the document”); Ann Longmore-Etheridge, *The Healthy Constitution of Document Security*, *Security Mgmt.*, Oct. 2003, at 26, 26 (describing high-technology encasements to preserve an original parchment version of the Constitution).

¹⁵⁰ See generally Robert F. Berkhofer, Jr., *Beyond the Great Story: History as Text and Discourse* xi (1995) (suggesting value in an eclectic mix of approaches, both modern and postmodern); Georg G. Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to the Postmodern Challenge* 1–19 (1997) (identifying major shifts in historiography since a kind of institutional professionalization of history in the 1800s, and challenges to a correspondence theory of truth, intentionality, and temporal sequence); Pushpa Bhawe, *History:*

perspective on Reconstruction is probably this generation's leading example of long strides forward in historiography.¹⁵¹ A few history department enthusiasts might even believe that this process generates ever-better approaches with time. This degree of sanguinity is, however, unnecessary to the argument. It might be that historical methods are merely proliferating without improving on average. But even if historians only expand the methodological options without creating undue distraction, then we have a kind of progress. Better or greater options will assist the intelligent investigator who wants information from the past. And a companion for this methodological progress is the growing stock of prior attempts to understand the events in question. Prior studies are the beginnings of new studies.¹⁵²

Finally, there is the issue of what counts as “good” history. This might be helpfully contested. True, self-styled originalists could be unsympathetic to much relativism in historical inquiry; a goal originalists tend to share is constraining the set of results that a judge can produce.¹⁵³ But if we put aside the goals that *originalists* might have and consider instead the usefulness of *originalism* as a method of acquiring information, then relativity, subjectivity, and even postmodern thought are oddly useful in responding to worries that sound historical inquiry is slipping away. A message from the postmodern perspective on professional history is that the interpreter matters as much or more than the target of interpretation.¹⁵⁴ This is a supposedly inescapable condition of human observation. However persuasive, this message does not vary with time. It is equally true for the historian in 1908 and the historian in 2008. If historians are in this sense unavoidably presentist, there is no reason to prefer the old vision of 1868 to the new vision. If anything, the postmodern perspective would seem to default to the living's vision of the events in question and not any past vision — which would be dependent on the living for its survival and meaning, anyway.

One can understand the point without ever approaching the extremities of postmodern thought. The notion is that history is performed in different ways, for different purposes, and according to different standards of excellence across time. There is little reason to believe that our capacity to deliver what counts as good history diminishes systematically as time passes, and some reason to believe just the opposite. Thinking that renderings of past events are always permeated with subjectivity does nothing to alter this conclusion. To the contrary, it seems to

Old and New, in *Historiography: Past and Present* 12, 12 (2005) (relating history to social construction).

¹⁵¹ A brief recounting of the trends is presented in Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at xix–xxv (Francis Parkman Prize ed., 2005), which was an important effort to synthesize modern learning on the Era.

¹⁵² These observations might fit best for the single investigator. If many observers must agree on how to characterize past events, multiplying the methodological options can increase decision costs without guaranteeing offsetting benefits in improved accuracy.

¹⁵³ See *infra* Part III.C.2.

¹⁵⁴ See Iggers, *supra* note 150, at 9–10 (quoting Hayden White, *The Historical Text as Literary Artifact*, in *The Tropics of Discourse: Essays in Cultural Criticism* 82 (1982)).

reinforce it. An originalist who requires objective historical investigation to justify originalism has more reason to worry. Even so, the concern that time is at war with sound history seems weak enough for us to proceed.

C. Evolving Replies

We have seen that the critique of originalism emphasizes the passage of time, although it can reach the period shortly after ratification under certain conditions. And I have suggested that originalism is not doomed by ever-less reliable history. Our attention can now shift to justifications for originalist method. These justifications will be explored in a way that highlights their ability or inability to withstand time lags. This organization might be awkward. Originalists often emphasize the need to control judicial inquiry in constitutional cases, but the discussion below does not begin with these arguments. There is an upside, however. The central challenge for originalism is to find a form and reason that are convincing across time. The discussion below attends to this priority. In addition, the principal concern continues to be whether originalism as a method might be useful, not whether the goals of originalists can be achieved.

1. Expiring justifications

Two justifications for originalism seem to weaken or expire over time. They involve social contractarian theory and deference to the judgments of past generations, which can be translated into Condorcet Jury Theorem terms.

Although it might not be so prevalent in academic circles today, social contractarian arguments for originalism have been made.¹⁵⁵ The gist is that originalism of some kind is the best or only way to preserve a prior agreement that deserves respect. One might suppose that the ratification of the original document under Article VII and subsequent Article V amendments represent bargains, or pacts, or contracts, or some other type of agreement to which the people of this country assented, and that the substance of these agreements is best characterized with originalist methods. Dedication to such agreements might be grounded in various normative theories, including the sense that enforcing them respects individual autonomy — even if this means that some third party will force people in t_0 to abide by their old judgments from t_{-1} . We know that such precommitment can be beneficial when the evaluation includes all time periods instead of only the present moment, and that unconstrained freedom to choose at every time period can be dangerous. This is the story for many drug addicts and spendthrifts, anyway.¹⁵⁶

¹⁵⁵ Cf. Letter from James Madison to Henry Lee (June 25, 1824), in 9 *The Writings of James Madison* 190, 191–92 (G. Hunt ed., 1910) (arguing that “the guide in expounding the Constitution” ought to be “the sense in which the Constitution was accepted and ratified by the nation”). Madison later suggested that subsequent practice of the legislature is crucial to understanding meaning. See Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 *Letters and Other Writings of James Madison* 183, 184–86 (J.B. Lippencott & Co., 1867).

¹⁵⁶ See, e.g., Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* 1–87 (2000) (identifying reasons for and methods of precommitment for individuals); *id.* at 88–174 (applying and critiquing the precommitment model for constitutions).

But precommitment analogies are inapt. One hitch is indeterminacy. Sometimes historical inquiry will not illuminate the answer to novel questions years later; sometimes the agreement is no deeper than the constitutional text.¹⁵⁷ But the problems run further. The U.S. population is 100% different today than it was in 1789 when the first version of the document was ratified. Indeed no one alive in 2008 witnessed any constitutional text-making earlier than the ratification of the Sixteenth and Seventeenth Amendments in 1913. From the individual's perspective, there is no same "self" who can be bound by legal arrangements that he or she "chose" in t_{-1} .¹⁵⁸ True, today's population might decide, explicitly or implicitly, that adhering to the document is best. Public respect for the text is indeed part of our legal culture. But that decision is not satisfying a precommitment, nor would it dictate originalist interpretation of the document. The decision to treat the document as law and the decision to interpret it by some method both require argument that a precommitment model cannot provide.¹⁵⁹ And no matter how convincing the model, it certainly becomes vulnerable to additional challenges with the passage of time.¹⁶⁰

Similar reactions apply to a second justification. Some have favorable impressions of those responsible for the document, especially in its first edition. Perhaps the founders were uniquely intelligent, knowledgeable, and public spirited,¹⁶¹ and hence their judgments should be trusted. In philosophical terms,

¹⁵⁷ Cf. Jeremy Waldron, *Law and Disagreement* 266–75 (1999) (emphasizing reasonable disagreement on the content of principles and the downside of privileging past judgments).

¹⁵⁸ See Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 *Tex. L. Rev.* 1751, 1757–61 (2003).

¹⁵⁹ An alternative is to move away from the individual as the proper unit of moral concern, and instead treat all generations who have lived in this country (or some other intertemporal class) as a roughly singular People. See Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 143–54 (2001) (defining "a people" as persons who exist or existed "under the rule of a particular political-legal order"); see also Kronman, *supra* note 134, at 1064–68 (proposing a duty to nurture past undertakings). Aside from the issue of how to define the class and weight the preferences of each generation, the single-People perspective is contested at a more basic level. See, e.g., Rebecca L. Brown, *Tradition and Insight*, 103 *Yale L.J.* 177, 212–13 (1993) (critiquing Kronman's argument); Michael J. Klarman, *Antifidelity*, 70 *S. Cal. L. Rev.* 381, 381–91 (1997) (rejecting an obligation to follow founding era preferences). Regardless, the choice is presentist. Today's decision-makers are urged to adopt the single-People perspective based on argument. See Samaha, *supra* note 30, at __ (manuscript at 44–47).

¹⁶⁰ Another version of consent need not weaken in this way. As mobility costs drop and information about foreign options becomes readily available, it becomes easier to think of residence as effective consent to the laws of that jurisdiction. But this sorting dynamic is probably not robust enough at the international level to justify treating all U.S. residents as having consented to the existing constitutional order, and there might be other normative objections to or constraints on this strategy for legitimizing constitutional law. See Samaha, *supra* note 30, at __ (manuscript at 47–48). In addition, it is difficult to see how stronger forms of originalism would follow from such consent. Presumably consent would be to the constitutional system as it exists and not to a method of interpretation not already in practice (or not foreseeably in practice).

¹⁶¹ See, e.g., Catherine Drinker Bowen, *Miracle at Philadelphia* x–xii (1966) (lauding drafters' judgment); Robert C. Byrd, *The Constitution in Peril*, 101 *W. Va. L. Rev.* 385, 387, 395 (1998).

they might qualify as practical authorities:¹⁶² that the founders made a judgment is itself a reason for acting in accord with that judgment. Although the point is debatable, faith in those who made the text might warrant a search for additional information regarding those judgments. At a minimum, one could believe that the best way to respect their superior judgment is to follow the textual meaning on which those actors operated. If drafters and ratifiers are something like practical authorities, then the argument for our deference to them can be restated with the Condorcet Jury Theorem (CJT). The Theorem demonstrates that the majority judgment of large groups can be extraordinarily accurate — so long as the decision-makers have an average accuracy rate better than random, offer their independent judgments, and answer the same question.¹⁶³ CJT might bolster the credentials of past ratification decisions, without relying on the questionable moral force of transgenerational consent.

But the time lag problem has been altered, not eliminated. First, we should wonder whether past generations of constitution-makers answered the questions we are asking. Even if they meant to incorporate our interests and situation into their overall judgment, presumably they were making judgments for all generations together. Our position is different. Our judgments are for the present and the future. Second, we must doubt their average accuracy. Assuming that the relevant questions have right and wrong answers, CJT only holds if decision-makers from as long as two centuries ago were on average more accurate than not about the appropriate character of constitutional law in 2008. This is possible, and it could be that many constitutional decisions are unimportant anyway. But we can be sure that the founders were imperfect.¹⁶⁴ And, at the least, arguments from practical authority and CJT become more vulnerable with time. As facts, values, experience, and judgments shift, there is often less reason to defer to the decisions of past generations and more reason to depend on judgments in t_0 — which might themselves be designed to satisfy CJT conditions.¹⁶⁵

As with consent-based justifications, there is room for disagreement. The growing ignorance of the founders (and subsequent constitution-makers) might be

¹⁶² See generally Scott J. Shapiro, *Authority*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 382, 382–85 (Jules Coleman & Scott Shapiro eds., 2002).

¹⁶³ See Robert E. Goodin, *Reflective Democracy* ch. 5 (2003); Waldron, *supra* note 157, at 134–135 & n.43 (providing a numerical example); Bernard Grofman, Guillermo Owen & Scott L. Feld, *Thirteen Theorems in Search of the Truth*, 15 *Theory & Decision* 261, 273–74 (1983) (discussing opinion-leader problems).

¹⁶⁴ For example, it seems that they foresaw neither the development of national political parties, see Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* 5–6 (2005), nor the need for an air force, see U.S. Const. art. I, § 8, cls. 12–16; *id.* art. II, § 2, cl. 1 (mentioning an army, a navy, and militias).

¹⁶⁵ Cf. Adrian Vermeule, *Common-Law Constitutionalism and the Limits of Reason*, 107 *Colum. L. Rev.* 1482, 1503–06 (2007) (suggesting that the Constitution’s ratifiers compare favorably to the judgment of contemporary judges, but without vouching for the reliability of either today). Further remarks on CJT and the Constitution are provided in Samaha, *supra* note 30, at __ (manuscript at 40–43 & n.188) (noting Article V’s supermajority process and its apparent preference for false negatives on the question of need for formal amendment).

preferable to the risks of myopia, selfishness, and strategic decision-making in 2008. But the understandable disagreement over whom to trust is related to the passage of time. Time complicates the choice. So we still lack a plausible justification for originalism that is insensitive to the text's age.

2. *Persisting justifications*

Other justifications are resilient to time. The three explored here, however, have other debilitating problems.

First think about the argument that originalism is handy for constraining discretion when courts are playing the high-stakes game of supreme judicial review.¹⁶⁶ This value need not diminish over time. To the extent people today worry about judicial discretion, an honest commitment to originalism might guide judges away from their ideological preferences, and it might offer everyone else a roughly objective standard by which to evaluate the quality of judicial work in supreme law. Others are comfortable with judicial policymaking, considering the imperfections of alternative institutions, or are not persuaded by assertions of constraint and objectivity. But suppose judicial policymaking is bad and that the assertions about originalism are true.

The problem is that originalism is not obviously superior to other methods of constraint. There is, after all, the possibility of courts deferring (almost) utterly to other institutions whenever constitutional claims are raised.¹⁶⁷ That constraint is strong and objective. Other interpretive methods might perform similarly. It might be hard to understand why honest attention to reams of judicial precedent is less constraining and less verifiable than honest attention to historical understandings.¹⁶⁸ Both call for versions of analogical reasoning. Additional arguments are therefore required to select out originalism from the alternatives.

A second time-insensitive justification is, simply, originalism's concrete results. This does not turn on "our" consent, or founder brilliance, or a uniquely constraining force. Nor does it matter whether the date is 1808 or 2008. Honestly performed originalism will generate a pattern of results in concrete cases or, more modestly, will foreclose a set of results. The outcome might be normatively alluring. Surely some originalists have been attracted to historical inquiry in constitutional adjudication because abortion rights seemed implausible on that method, while gun rights did not. Similarly for some nonoriginalists, with the

¹⁶⁶ See, e.g., Bork, *supra* note 56, at 7, 143–53 (demanding neutral principles for the exercise of judicial review, and arguing that original public meaning delivers them).

¹⁶⁷ The "almost" refers to what has been called judicial inquiry into "existence conditions." See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 *Va. L. Rev.* 1105, 1114–15 (2003). It seems that judges must ask what counts as ordinary law to do their job as expected, and this seems to call for constitutional judgments that cannot be reallocated elsewhere without making a constitutional judgment. See also Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 *J. Marshall L. Rev.* 441, 444–65 (2004) (advancing ways in which the doctrine cannot avoid constitutional law questions, or perhaps even political questions lying beyond the conventional boundaries of law).

¹⁶⁸ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 925–27 (1996).

normative intuitions reversed. The same logic might play out for structural issues, too, such as presidential power vis-à-vis Congress. With fundamental moral commitments satisfied, one can bite the bullet and accept displeasing results on other matters. And it does seem irresponsible to select interpretive methods without concern for the foreseeable results. Sufficiently catastrophic outcomes would dislodge any interpretive method, anyway.

Still, the limits of this justification are apparent. Attention cannot be moved from the basal policy questions. It does not create much if any leverage on the straightforward moral issues for which people already possess analytical tools. However essential or timeless, the results question can be more divisive than encouraging for originalism. It is a component in the analysis rather than a solution to it.

If the counter-impulse is to lurch away from results, consider the argument that originalism is conceptually necessary. The assertion is that interpretation *is* the search for a text's original public meaning. Insofar as a decision-maker is engaged in some other effort, she is just not interpreting the document.¹⁶⁹ Time is plainly irrelevant to this assertion.

The stumbling block is that, as a normative justification for originalism, the conceptual assertion is unresponsive. If the assertion is meant as a definition for interpretation, then it seems descriptive rather than normative. If the assertion is meant as a superior understanding of what interpretation entails, it is unclear what test is being suggested for superiority. Suppose someone contends that we should reserve the word "interpretation" not for original public meaning, but for the recovery of authorial intent,¹⁷⁰ or for the various sources and methods on which judges and lawyers typically rely when they claim to be interpreting a legal text.¹⁷¹ What good test is there for judging these competing conceptions? Convention is inadequate. Not only does that standard move us back toward description, common use does not restrict "interpretation" to any strong form of originalism. A different argument is that the written Constitution is a law, and that judges have an interpretive tool box for law that should apply equally well to this document.¹⁷² However convincing, this is not an argument from conceptual necessity. An originalism proponent who points to conceptual truth must have something else in mind — clarifying terms, stepping toward the analogical

¹⁶⁹ See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *Geo. L.J.* 1823, 1823–24 (1997) (seeking to segregate the concept of interpretation from the practice of adjudication).

¹⁷⁰ See, e.g., Stanley Fish, *Intention Is All there Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 *Cardozo L. Rev.* 1109, 1112, 1114 (2008) (asserting that intention "is" interpretation, as in the meaning of a text, but that the concept lacks guidance for how to ascertain authorial intent); Steven Knapp & Walter Benn Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, in *Legal Hermeneutics: History, Theory, and Practice* 187, 193–97 (Gregory Leyh ed., 1992) (similar).

¹⁷¹ Cf. Kent Greenawalt, *Constitutional and Statutory Interpretation*, in *Handbook*, supra note 162, at 268, 268–70 (including text, original meaning, underlying rationale or basic values, application to particular cases, and *stare decisis*).

¹⁷² Cf. Barnett, supra note 56, at 100–07 (analogizing written constitutions to contracts).

reasoning just mentioned, or deploying a rhetorical strategy for owning the term “interpretation.” Otherwise the topic of justification is left unaddressed.

3. *Ex ante incentives*

There is another time-insensitive justification that might offer hope. It concerns incentives for political action, and it returns to the dynamics of supreme-law generation discussed in Part I.¹⁷³ The claim would be that respecting the Constitution’s text gives value to a type of political mobilization; and, to couple this goal with originalism, that original public meaning best approximates the political victories achieved through Article V or VII.¹⁷⁴

This justification is forward-looking. Today’s decision to respect past Article V successes is an instrument for inciting political mobilization in the future. It does not require a special affinity for the founders, nor positive evaluation of originalism’s results in particular cases. Instead, the argument is procedural and *ex ante*. Victory in the Article V process would be rewarded by a degree of insulation. Rolling back those victories would essentially require yet another successful attempt to overcome the hurdles of formal amendment, and the threat of revision through constitutional litigation might be reduced with a strong commitment to originalist interpretation.

The logic should be familiar.¹⁷⁵ Essentially the same arguments have been made in law and economics when the question is why testamentary instruments are respected in court.¹⁷⁶ It remains uncomfortable for modern lawyers to suppose that the dead themselves possess legal rights or entitlements. But the living may receive comfort from signs that the terms of a valid will are generally followed if intelligible, and their property might have greater value because of it. Perhaps the same rationale works for Article V lawmaking.

Translating incentive arguments into justifications for originalism has attractive features, but also complications. Difficult normative and empirical questions have to be answered before the incentives justification becomes persuasive. It is worth emphasizing that neither uncertainty nor indifference is enough. To incline toward originalism under this justification, one should be satisfied that the Article V process is good enough to promote in light of feasible alternatives and that a judicial commitment to originalism is the effective and

¹⁷³ The analysis below draws from Samaha, *supra* note 30, at __ (manuscript at 48–49).

¹⁷⁴ Going forward, committing to interpreting the text in accord with original public meaning effectively defines Article V victories as such. In this sense, the choice of interpretive method can be a transitional question rather than an entailment of the decision to encourage Article V lawmaking. The issues would be whether interpretation of existing amendments is best done with original public meaning inquiries, and whether this interpretive method is the appropriate manner in which to encourage Article V efforts in the future.

¹⁷⁵ It does not seem prominent in the originalism literature. But cf. Whittington, *supra* note 56, at 111–13 (viewing originalism as potentially pro-democracy).

¹⁷⁶ See Richard Posner, *Economic Analysis of Law* 518–20 (6th ed. 2003) (recommending efficiency constraints on testator preferences, however).

appropriate method of encouragement.¹⁷⁷ Given the present state of knowledge on Article V dynamics and the likelihood of normative disagreement, there is reason for caution and reflection.

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

Putting it roughly, our system of supreme constitutional law comprises some number of Article V attempts and few successes, along with some degree of judicial intervention that is itself revisable through additional litigation or Article V. Judicial intervention might be animated by arguments similar to those embedded in an Article V effort. But judges deploy a range of analytic approaches in constitutional cases — sometimes offering no explicit reliance on originalism and instead working with precedent and principle,¹⁷⁸ sometimes combining originalist arguments with other resources,¹⁷⁹ occasionally presenting extensive originalist histories.¹⁸⁰

How would supreme lawmaking change if the judiciary shifted to a strong form of originalism? The answer seems unclear. It appears that no solid empirical study exists on the relationship between judicial methods of interpretation and formal amendment rates. Until the work is done and vetted, theory and speculation are the best available resources. A possibility is that a shift to strong originalism would not have much effect on Article V effort, let alone success rates. Remember that the practical choice is not between strong originalism and no originalism, but between strong originalism and today's weak or episodic originalism. The smaller the magnitude of interpretive change, the

¹⁷⁷ One also needs a method for generating and sustaining this judicial commitment, considering alternative routes for achieving the same or similar goals. To be generous, assume that converting the judiciary to a strong form of originalism would be quick and costless.

¹⁷⁸ See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming a preliminary injunction against the Child Online Protection Act); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (invalidating, under the commercial speech doctrine, a compounded-drug advertising restriction imposed as a condition for FDA approval).

¹⁷⁹ See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (objecting to a warrantless thermal imaging of a home); *Wyoming v. Houghton*, 526 U.S. 295 (1999) (permitting a warrantless purse search after a car stop).

¹⁸⁰ This has yet to happen in a majority opinion during the Roberts Court, as far as I know. But this Term's Second Amendment case might end that short streak. In any event, there are modern examples of fairly strong originalist argument. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004) (revising confrontation clause doctrine on originalist arguments, though quickly relying on precedent for the clause's application to a state trial).

less significant any incentive effect ought to be. Nor is the proposal to subsidize Article V lawmaking. That process is going to be very difficult to complete on most occasions, and restricting the judicial role affects relative rather than absolute costs.

Of course, we might not expect any Article V lawmaking effort if the judiciary predictably intervenes early and with total disregard for participants' understanding of what had been accomplished. If adjudication lags are brief, and if courts then ignore Article V text and the general social meaning of the text, those seeking change in supreme law might as well begin with the courts. This picture of court behavior is, however, incomplete at best. Adjudication lags are sometimes long, and the Supreme Court often uses originalist tools when the lag is brief. To the extent the Court dispenses with originalist argument, it might be on issues where those arguments are unhelpful or on issues where Amendment proponents are relatively indifferent.¹⁸¹

There is also the issue of the time horizon of putative supreme law reformers. Recall the compromise trajectory for originalism, under which the method retains strength close to ratification and then diminishes over time.¹⁸² Whether or not this has been the pattern in past Court cases, it is an alternative to loyal originalism and it might provide equally strong incentives for Article V effort. Much depends on the time horizon of supreme law reformers. If their timeframe of concern is shorter than forever, then strong originalism at t_{100} might be irrelevant. This is true even on the friendly assumptions that strong originalism otherwise makes Article V victories more attractive and that it provides determinate answers on textual meaning. The issue of how courts should behave in a post-originalist period remains unresolved at this point. But on the assumptions we have made, the resolution of that question would not influence Article V incentives. The question needs an answer, but no answer would advance a time-insensitive justification for originalism based on forward-looking incentives.

The foregoing is built on a series of educated guesses. Others might have different intuitions.¹⁸³ And the issue is importantly comparative and normative: Given a static judicial system that is sufficiently awful, and alternative lawmaking processes that are sufficiently good, it would make sense to experiment with even longshot strategies to minimize judicial influence. Extensive debate about the quality of judicial decision-making is ongoing, and there have been serious attempts to compare the virtues and vices of different methods for supreme

¹⁸¹ *Osborn v. Nicholson* might be a good example. The question was, in effect, which commercial participant in a slave sale should bear losses associated with a major change in positive law. See *supra* text accompanying notes 82–84.

¹⁸² See *supra* Part II.A.

¹⁸³ Cf. 2 Bruce Ackerman, *We the People: Transformations* 20–25 (1998) (describing constitutional moments beyond Article V and judicial review standing alone); Strauss, *supra* note 8, at 1741–44 (indicating that the significance of constitutional text to modern judicial decision-making varies inversely with the importance of the issue); Strauss, *supra* note 24, at 1458–64 (arguing that, historically, Article V amendments have been largely ineffectual or superfluous to change occurring by other means).

lawmaking.¹⁸⁴ In this space, only a few quick observations should be made.

The normative questions are unavoidable and controversial. In comparing Article V, judicial adjudication, and any other substitute process for supreme lawmaking, one should have at least a general sense of what counts as good or bad supreme law. This sense is hardly uniform. For example, it might be that the Supreme Court exercises its influence on the margins but systematically favors elite values or countercyclical political philosophies, while the combination of institutions involved in Article V lawmaking slant toward the interests of states as states and congressional power brokers. The content of supreme law generated by these two options will differ. And the processes are likely to reward different skills and behavior. Evaluating those consequences depends on a theory of value.

Without making any clear mistakes in logical reasoning, an observer might check his value set and then conclude that it would be best if (1) the Court fully inherited the business of supreme lawmaking as a mild counterweight to other forces in society, or instead (2) Article V lawmaking dominated Court influence in light of the sustained political organizing ordinarily involved, or instead (3) some other form of higher lawmaking became exclusive, such as a popular referendum that could be instigated by national petition drives, or instead (4) the above processes were combined in some way, perhaps just as they are now, or instead (5) the project of categorically supreme law were erased. These evaluations are not irrational, depending on the operative normative framework.

Adding issues regarding the appropriate rate of revision for supreme law, and the appropriate degree of incentive for the preferred lawmaking process, further illustrates the complexity of the normative questions involved. Even if strong originalism or some other technique is effective at channeling law reform efforts toward Article V and away from its substitutes or alternatives, there is the question of how strong the incentive ought to be. In the extreme case, Article V would be the sole process for higher lawmaking to the exclusion of (relatively) more case specific adjudication, and formal amendments would arrive regularly.

¹⁸⁴ See John R. Vile, *Constitutional Change in the United States: A Comparative Study of Constitutional Amendments, Judicial Institutions, and Legislative and Executive Actions* ch. 6 (1994); Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law, in The Least Examined Branch: The Role of Legislatures in the Constitutional State* 229, 259–71 (Richard W. Bauman & Tsvi Kahana eds., 2006) (comparing common-law constitutionalism with formal amendment as a matter of theory on several dimensions of performance). For a brief recap of potential dangers in Article V, see Kathleen M. Sullivan, *What’s Wrong with Constitutional Amendments?*, in “Great and Extraordinary Occasions”: *Developing Guidelines for Constitutional Change* 39, 39–42 (1999). On the threat to judicial power, see John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 *Tex. L. Rev.* 1929, 1958–60, 1968 (2003); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 144, 174–76 (1996) (worrying about majoritarian forces). Other insight is provided by Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amending Process*, 62 *Fordham L. Rev.* 111, 116 (1993) (worrying about efficient policy outcomes in light of Congress’s ability to bottleneck Article V change); William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 *Tex. L. Rev.* 1965, 1965–71 (2003) (questioning whether constitutional obduracy of the Article V kind is net beneficial).

Some might consider this outcome too destabilizing, or too sanguine about entrenching value choices in text protected by Article V. Others will be excited at the prospect of supreme law migrating to the institutions of Congress and the states. Either way, one must have a sense of the proper level of incentives. This is no easier than choosing the right length for a patent term.¹⁸⁵

This effort to proliferate issues is not meant to be discouraging. Complexity will not prevent choices from being made, sometimes implicitly, and it is better to pinpoint the relevant elements of those choices. Likewise, the potential for incentives arguments should not be ignored. On certain empirical assumptions and normative commitments, an incentive-based justification for originalism might be attractive. And it might be able to minimize, if not altogether defeat, time-oriented objections.

4. *Randomization*

Finally, there is the randomization model for originalism. If there is any current association between originalism and randomization, it is for purposes of criticism. A skeptic of originalist justifications might assert that any allegedly public agreement about a word's current or past meaning is essentially arbitrary. No matter how fixed for a spate of time, the meaning is in some sense randomly determined by a multiplicity of forces. If an originalist judge is not choosing her favorite outcome, she is picking out conceptualizations without much constraint in the historical record.¹⁸⁶

Randomization does have a fairly bad reputation in law. Random decision-making is sometimes offered as a paradigmatic due process violation.¹⁸⁷ When scrutiny is restricted to the time of application, decision according to chance has nonrational features inconsistent with common expectations for most legal decisions.¹⁸⁸ Yet whatever the cultural constraints on widespread use of randomization, it can be part of a decision protocol with virtues. Law itself occasionally requires government decision by lot: case assignments among

¹⁸⁵ See Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 *Harv. L. Rev.* 1813, 1823–29 (1984) (identifying variables).

¹⁸⁶ See Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 *Va. J. Soc. Pol'y & L.* 239, 266 (2006) (noting a critique of originalism along these lines).

¹⁸⁷ See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (dictum on flipping coins for clemency); see also *In re Brown*, 662 N.W.2d 733, 740–42 (Mich. 2003) (censuring a judge for publicly flipping a coin to resolve a short-term child custody argument that she thought equally matched).

¹⁸⁸ See Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* 87–88 & n.6 (1999) (citing John Finnis, *Natural Law and Natural Rights* 161 (1980) (noting that fair lotteries need not produce just outcomes)). Duxbury's is an excellent introduction to the issues and arguments. On randomization and decisions in general, see Jon Elster, *Solomonic Judgments: Studies in the Limitations of Rationality* 36–122 (1989). On the related concept of “picking” as opposed to “choosing” based on preferences and reasons, see Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 *Social Research* 757, 758–65, 769–70, 773–74 (1977). The idea of picking interpretive rules as a solution for uncertainty is helpfully raised in Vermeule, *supra* note 122, at 168–69, 179–80 (discussing canons of construction and precedent).

judges, land partition disputes, election ties, immigration visas, and military drafts may include a random element.

Use reflects advantages.¹⁸⁹ *First*, the decision costs are remarkably low at the execution stage. This is especially true since the development of computerized random number generators.¹⁹⁰ Of course one cannot avoid the possibly taxing decision to randomize, nor the task of choosing possible outcomes to randomize. But the costs are steeply downhill from there. *Second*, randomization can advantageously tie the hands of the nominal decision-maker. If conducted honestly, the decision-maker's subjective preferences are irrelevant and the risks of corruption fall at the execution stage. *Third*, decision by lottery might provide a congenial solution when normative frameworks clash, when the appropriate rationalistic framework is unclear to anyone, or when information on which we would like to decide the disagreement is costly or impossible to obtain. Randomization might bridge these divides. It is superior to hand-wringing and paralysis when close calls must be made on imperfect information. *Fourth*, randomization can be useful when benefits or burdens are functionally indivisible, such that only a subset of the relevant class may gain or lose from the outcome, or as a method for distributing benefits or burdens across time. *Fifth*, picking by lottery might be a learning effort. Random outcomes could be a form of pilot project, assuming adequate imagination for the outcomes across which selection occurs. Note finally that randomization's morally plausible domain is not restricted to low stakes situations. Military drafts are a leading example.¹⁹¹

Honestly conducted originalism is not exactly randomization. For one thing, originalism can be costly if thoroughly done.¹⁹² If randomization is truly best for a class of disputes, it theoretically could be adopted instead of an imperfect alternative. Politically, however, "true" and avowed randomization for disputed supreme law questions seems unimaginable. So the question is whether a version of originalist inquiry is ever an understandable substitute for randomization — a substitute that runs on similar arguments to meet similar goals, despite the greater effort involved. If so, time lags might be unimportant. Originalism would serve as a kind of tiebreaker regardless of the temporal distance between ratification and adjudication. Long time lags might even assist decision-makers in achieving arbitrary results. Time has a way of placing nonhistorians behind a veil of ignorance regarding the past's meaning, and of disconnecting current ideological

¹⁸⁹ See generally Barbara Goodwin, *Justice by Lottery* 45–47 (1992) (listing advantages and disadvantages); Philip Bobbitt & Guido Calabresi, *Tragic Choices* 41–44 (1978) (taking a relatively negative attitude toward randomized decision-making, but noting the upside of non-responsibility and the problem of information collection).

¹⁹⁰ See Duxbury, *supra* note 188, at 104–05. A Web service advertising "true random numbers" based on atmospheric noise is at <http://www.random.org>.

¹⁹¹ See Duxbury, *supra* note 188, at 65 & n.109 (citing Harvard Study Group, *On the Draft*, 9 *The Public Interest* 93, 95 (1967), on the Vietnam draft but noting complications in its execution); see also A.W. Brian Simpson, *Cannibalism and the Common Law* 166–76 (1984) (describing suggestions that lots be drawn to select persons to be thrown overboard from a lifeboat).

¹⁹² See, e.g., Scalia, *supra* note 56, at 851–52, 856–57 (recommending originalism but acknowledging the decision costs of high quality historical investigation).

cleavages from older orders.

The randomization justification for originalism operates under a low ceiling of applicability, but it deserves to be played out. The first point is that randomization and originalism can share a prominent value: neutrality and impersonality in adjudication. Originalism is often joined with endorsements of the founders' judgment, but we have already seen that these arguments are logically tenuous and they become unnecessary when the goal is simply settling constitutional disputes impartially. Originalism and randomization have also been promoted as methods for defusing intractable moral disagreement over policy; and each can be put forth as decision mechanisms when consequences or appropriate valuations are uncertain. The thought is that, in the absence of superior alternatives, adjudicators of different perspectives might sign-on to a decision protocol that lacks an obvious ideological slant. Certain detached uses of ratification era history, which I will sketch in a moment, might provide this sense of neutrality.

Furthermore, the primary historical sources are largely fixed and, going forward, we might expect a persistently low amendment rate. This translates into few opportunities for advocates to strategically fashion salient ratification history in the hope of sidestepping the balance of power suggested in Article V. The issue is primarily one for the legislative history of statutes. Granted, this use for originalism will not necessarily offer predictability in supreme law. Nor are the outcomes particularly experimental insofar as judicial judgments are sticky. But originalism might be understandable if fashioned to impartially pick lines from a history largely alien to us all, in order to adjudicate zero-sum constitutional disputes with no clearly correct answer. Whether or not God plays dice, human judges might turn to originalism.¹⁹³

This is not any kind of originalism presented by its typical advocates. But I want to suggest that it is not terribly far from the originalism practiced in court. Indeed, randomization-oriented justifications suggest a design for originalism that is faintly familiar. First, original public meaning need not be the exclusive form of historical inquiry. Occasionally that question will be too abstract for concrete decisions, while obscure drafting history will do the trick. The randomization justification is politically bounded, but those boundaries probably leave room for several types of historical sources. When presenting originalist argument, judges have not restricted themselves to an especially narrow set of sources anyway.¹⁹⁴

¹⁹³ One might wonder whether searching a roughly fixed set of historical sources can qualify, conceptually, as randomization or anything like it. But if we agree to draw from an urn of blue and red balls to resolve a dispute, the process could still be considered randomization if the balls were placed there 200 years ago. The same might hold even if we discovered after the draw that 99% of the balls were in fact red, assuming we had no information about the mix beforehand. Accord Elster, *supra* note 188, at 43–46 (discussing a die loaded in an unknown fashion and distinguishing such epistemic randomness from objective equiprobability); Ullmann-Margalit & Morgenbesser, *supra* note 188, at 773–74 (discussing ignorance of the physically determined dice roll). Relying on a past allotment, moreover, solves one type of manipulation problem.

¹⁹⁴ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 43–50 (2004) (examining English, colonial, and state practice); *Bowsher v. Synar*, 478 U.S. 714, 729–30 (1986) (relying on drafting

To the extent this practice violates other normative justifications for originalism as the morally superior instrument for finding textual meaning, we have left those arguments behind.

Second, originalism might have to be economical and unsophisticated. To minimize the decision cost of historical inquiry, it seems best for judges to use a relatively quick first take on salient ratification era sources, followed by somewhat more extensive research to confirm that the first impression is at least rational. More thorough investigation is not necessarily inappropriate but each additional step adds distance between the virtues of randomization and the actual practice of originalism. The object, after all, is to utilize an element of arbitrariness to resolve disagreement. Within this domain, there is no premium for an objective historical truth or the complete intellectual map of constitutional thought at the point of ratification.¹⁹⁵ Originalism-as-randomization places no special faith in past judgments about the content of supreme law, nor does it depend on history worthy of a professional. To the contrary. For those who believe today's practitioners of originalism are simply amateurs,¹⁹⁶ their criticism has become a recommended protocol.

As such, there is an affinity between randomization justifications and the coordination or focal point theory of authority for constitutional text.¹⁹⁷ Neither is bothered by arbitrariness in the resolution of constitutional questions, and both gravitate toward salient solutions instead of answers that are morally justifiable in another way. But there is a difference. The premises of the focal point idea are that society is usefully coordinated around certain constitutional texts, people's preferences do not seriously diverge with respect to the answers suggested by these texts, and courts should be careful not to disrupt this settlement unless the issue is important. The randomization justification for originalism does not depend on these premises. It might be defeated by other conditions for its use, but not these.

Consider a possible application. Part of the Twenty-Fifth Amendment describes a dispute resolution mechanism for when the President is allegedly "unable to discharge the powers and duties of his office" and an Acting President attempts to assume power.¹⁹⁸ The process involves the Vice President's judgment plus majority votes of the principal officers of executive departments "or of such

history of the impeachment provision at the Philadelphia Convention); *Marsh v. Chambers*, 463 U.S. 783, 787–92 (1983) (relying on practice from the First Congress onward).

¹⁹⁵ Contrast Jack Rakove's professional constitutional history, *Original Meanings*, and masterful works such as Eric Foner's *Reconstruction* or Gordon Wood's *The Creation of the American Republic*. These would not be the models. For purposes of economy, judges might need to avoid reading them.

¹⁹⁶ See Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 *Colum. L. Rev.* 523, 524–30 (1995) (criticizing many originalists and others for unprofessional histories).

¹⁹⁷ See Strauss, *supra* note 8, at 1733–35 (explaining the theory); see also Adam M. Samaha, *Undue Process*, 59 *Stan. L. Rev.* 601, 623–29 (2006) (stressing uncertainty as a motivator).

¹⁹⁸ U.S. Const. amend. XXV, § 4.

other body as Congress may by law provide.”¹⁹⁹ If there were a power struggle under these provisions, and if the courts were called on to say what counts as “unable” or what are the limits to this “other body,” few would be shocked if originalist arguments were deployed. They might be rightly outcome-determinative. Which is not to say that the Amendment’s drafters or ratifiers had special insight, according to the politics and political science of 1967, into the finest dispute resolution mechanism for this occasion. Or that “we” committed ourselves to the meaning thereby derived. But scraps of ratification history could point toward a defensible solution stopping short of extensive judicial design choices or a flat assessment of who among the contenders might make the better president. A casual reading of the ratification history for each judge would be recommended.²⁰⁰ And the alternatives could be worse. In tight spots, judges sometimes defer to another institution’s judgment. In this situation, however, there is no convenient alternative without making serious and apparent normative judgments first.

There are weaknesses to the randomization justification, without doubt. One is the risk that judicial investigation of history cannot be arbitrary in practice. Incompetent judicial history might be prevalent, but there is doubt that judges have effectively screened out ideological preferences in a way that the randomization justification would demand.²⁰¹ Interpreting the import of historical sources for any given issue seems unavoidable, even if the sources are in some sense randomly selected, and thus there will be room for ideological influence.²⁰² Regardless, some would not endorse our set of historical sources as the raw material for randomization. It could be that the most salient pieces of this data set are ideologically skewed in a way unacceptable to some people. In this respect, surviving records would not be a “neutral” device for bridging normative disagreement or uncertainty. There also could be an issue of judicial candor. Given the popular reputation of founding generations, it is hard to envision courts

¹⁹⁹ *Id.*

²⁰⁰ For one view of the congressional debates regarding other bodies, see John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications* 206 (1992). On the concept of inability, see *id.* at 200–02, and John D. Feerick, *The Twenty-Fifth Amendment: Its Origins and History*, in *Managing Crisis: Presidential Disability and the Twenty-Fifth Amendment* 1, 15–16 (Robert E. Gilbert ed., 2000). I do not assert that Feerick’s characterizations match a casual reading of the ratification history. That might be taken to impugn Feerick’s work.

²⁰¹ See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 *Md. L. Rev.* 150, 165 (2007) (adopting this conclusion based on an assessment of the professional quality of some originalists’ history); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 *Law & Soc’y Rev.* 113, 130–32 (2002) (finding that the presence of text- or intent-based arguments on statutory or constitutional questions in party briefs generally does not predict justices’ voting behavior as well as proxies for judicial ideology); see also Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 *UCLA L. Rev.* 217, 223–25 (2004) (finding that, in federalism cases, majority and dissenting justices cite different parts of the historical record). I do not vouch for these particular conclusions, but the concern is understandable.

²⁰² For a satirical take on interpretative disagreement after randomization, see 3 Francis Rabelais, *Gargantua and His Son Pantagruel* chs. 11–12 (Thomas Urquhart trans., 1693).

acknowledging that their historical findings are importantly arbitrary (although their current justifications for historical inquiry might not be plausible, either).

In addition, suggestions from ancient ratification eras can be seriously disruptive if followed. Careful readers of *The Federalist*, for instance, are bound to be startled on occasion. Today we ignore the idea that Senate-confirmed cabinet secretaries should be able to keep their jobs after a new President is inaugurated, unless the Senate consents to their removal. Whatever stability benefits Hamilton saw,²⁰³ that arrangement is no longer viable. Insofar as today's adverse reactions indicate good reasons for reducing the influence of history on supreme law, and insofar as they are likely to increase as interpretation lags grow, the randomization justification becomes time sensitive in practice. Equally important, economical originalism must be compared against viable decision protocols²⁰⁴ — everything from judicial discretion to common-law reasoning to various interpretive presumptions. Surely this type of originalism cannot dominate constitutional adjudication. Attraction to economical originalism in my Twenty-Fifth Amendment hypothetical is perhaps attributable to its abstract quality and the reader's lack of information about the ratification history.

Even so, there is likely a domain in which impressionistic history is a useful interpretive tool that fits with judicial capabilities and even popular demand. The domain is probably not large but it almost certainly exists. Numerous questions of constitutional design have, as yet, no clearly superior answers. Empirical studies sometimes explain cause and effect in constitutional design, but they also help show important remaining areas of uncertainty.²⁰⁵ Often they reveal grounds for humility. Add the presence of reasonable normative disagreement plus the cultural support for arguments from the nation's past, and the case for originalist randomization improves. There is, therefore, a little less reason for dismay when a Supreme Court opinion contains shallow history and reaches a morally debatable result.

This turn to randomization is a bit perverse, perhaps especially to those who are otherwise sympathetic to originalism. It is probably a poor vote-getter. Which is to acknowledge that disagreement over the proper content of supreme law and judicial behavior occurs in multiple locations, for different purposes, and

²⁰³ See *The Federalist* No. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁰⁴ See Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 *Ethics* 1, 14 (1999) (comparing costs of various decision strategies at different stages).

²⁰⁵ See, e.g., Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 151 (2004) (arguing that constitutionalization of rights in Canada, Israel, New Zealand, and South Africa “has achieved little or no real change in arenas such as wealth redistribution, minority political representation, and the equalization of life conditions”); Jan-Erik Lane, *Constitutions and Political Theory* 208–09 (1996) (studying OECD countries and finding little connection between economic outcomes and democratic institutional design); Adam Przeworski et al., *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990*, at 142, 166–67, 178–79 (2000) (finding that economic development is generally not significantly influenced by the division between democratic and dictatorial rule); Samaha, *supra* note 197, at 624–29 (collecting studies and stressing uncertainty).

with different standards for convincing argument.²⁰⁶ The analysis here plays out one kind of logic. It need not carry over to other venues. There is little political appeal in a justification for an interpretive method that touts its non-rationality, or discounts the likelihood of founder wisdom. Still, the immediately viable is not always a healthy constraint on thought. A popular or political commitment to the veneration of past choices or to the perception that “we” achieved constitutional greatness generations ago, strong as it may be, need not bind every debate. It may be part of today’s feasibility constraints, but that is only one element of productive normative argument. If nothing else, we might acknowledge practical barriers for any interpretive method aspiring to be convincing in all time periods and for all locations.

CONCLUSION

This Article is an effort to orient the analysis of judicial interpretation of supreme law. The orientation it adopts is a reaction to the systematic and peculiar features of that law in the United States. In its documentary form, our supreme law is aging and, even if it were not, the judiciary would often be a late entrant into the process of interpreting it. This raises the question whether interpretive method — in particular, reliance on historical sources — ought to vary with distance from ratification. The analysis here suggests that often it should, but that strong originalism is occasionally inappropriate when ratification is recent and that strong originalism might be appropriate long after ratification. These conclusions depend on certain normative commitments and empirical suppositions, however. There is more work to be done. But the attention to time lags in supreme law allows us to prioritize. It characterizes an important theme in the criticism of originalism, it helps sort uses and defenses of historical analysis, and it exposes key points of contention for the future.

²⁰⁶ See, e.g., Eskridge, *supra* note 126, at 2366–68; Post & Siegel, *supra* note 53.

APPENDIX A:
METHODOLOGICAL NOTE
ON THE CONSTITUTION'S AGE

Words contained in the Constitution of the United States (as amended) were tallied with Microsoft Word's Word Count function. This function was applied to a modified version of the Constitution of the United States that is posted at the National Archives' website. The printer-friendly HTML text is available in three segments:

http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html

http://www.archives.gov/national-archives-experience/charters/bill_of_rights_transcript.html

http://www.archives.gov/national-archives-experience/charters/constitution_amendments_11-27.html

After this HTML text was cut and pasted into a Word document as unformatted text, the following words were deleted: the Archives' document titles, the Archives' references to ratification dates, the Archives' lines separating Articles and Amendments, the Archives' notes on the document, and the words following Article VII but before the First Amendment (i.e., the attestation, date, and signature block for the original Constitution and the preamble or cover sheet to the Bill of Rights). Words denoting separate Articles, Sections, and Amendments were left in. Thus "Section 1" counts as two words, as does "Amendment II." A copy of this Word document is on file with the author.

The age calculation is based on the words as they appear in the file described. It does not allow for more creative judgments, such as the idea that the document became older when Section 1 of the Twenty-First Amendment repealed the Eighteenth Amendment, or that the Eleventh Amendment should not be counted as additional text because it restored the correct meaning of Article III. Finally, 1992 is used as the ratification date for the Twenty-Seventh Amendment, thereby ignoring its extended ratification process.

The weighted average age of the text was calculated in five-year intervals beginning with 1790, plus 2008. The weighted average age is the sum of the ages of each part of the text, adjusted according to the fraction of the total text that each part represents in any given year. For example, the weighted average age of the document for 1795 is $((4379 \text{ words in the original Constitution} / 4861 \text{ total words in 1795}) * 6 \text{ years of age for the original Constitution}) + ((482 \text{ words in the Bill of Rights} / 4861 \text{ total words in 1795}) * 4 \text{ years of age for the Bill of Rights}) = 5.8 \text{ years}$.

APPENDIX B:
 SUPREME COURT CASES USED
 TO CALCULATE CITATION AND ADJUDICATION LAGS

Amend.		First Majority Coalition Citation	First Majority Coalition Interpretation
1	1791	United States v. Cruikshank, 92 U.S. 542, 552 (1875)	United States v. Cruikshank, 92 U.S. 542, 552 (1875) (holding that the petition clause is not directly applicable to states); see also Reynolds v. United States, 98 U.S. 145, 162 (1878) (clearly interpreting free exercise and “religion”)
2	1791	Dred Scott v. Sandford, 60 U.S. 393, 417, 450 (1857) (opinion of Taney, C.J.)	United States v. Cruikshank, 92 U.S. 542, 553 (1875) (holding that Second Amendment rights against Congress did not permit the Enforcement Act of 1870 to be used against citizens who lynched other citizens); see also United States v. Miller, 307 U.S. 174 (1939) (clearly interpreting the Second Amendment as applied to sawed-off shotguns)
3	1791	Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1953) (Jackson, J., concurring)	Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (noting the Third Amendment to help construct a privacy principle)
4	1791	Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 285-86 (1855) (holding the warrant clause inapplicable to a creditors’ civil action)	Livingston’s Lessee v. Moore, 32 U.S. 469, 478-79, 482, 539, 551-52 (1833) (denying the claimant’s Bill of Rights arguments as inapplicable to states, though without citing the Fourth Amendment)
5	1791	Barron v. City of Baltimore, 32 U.S. 243, 250-51 (1833) (holding the Fifth Amendment’s takings clause inapplicable to the states)	Satterlee v. Matthewson, 27 U.S. 380, 406, 413-14 (1829) (rejecting the claimants’ attempt to build a vested rights objection from multiple clauses, though without citing the Fifth Amendment)
6	1791	United States v. Dawson, 56 U.S. 467, 487-88 (1853)	United States v. Dawson, 56 U.S. 467, 487-88 (1853) (holding that the Sixth Amendment’s venue provision did not apply to crimes committed in “Indian country”)
7	1791	United States v. The Betsey & Charlotte, 8 U.S. (4 Cranch) 443, 452 (1808)	United States v. The Betsey & Charlotte, 8 U.S. (4 Cranch) 443, 452 (1808) (permitting a libel trial without jury and relying on La Vengeance, 3 U.S. (3 Dall.) 297, 301 (1796) (interpreting a statute to permit libel trial without jury for illegal arms export)
8	1791	Ex parte Watkins, 32 U.S. 568, 573-74 (1833) (denying appellate jurisdiction to revise or reverse a criminal sentence and stating, in the alternative, that an excessive fine could not be shown on the record)	Pervear v. Massachusetts, 72 U.S. 475, 479-80 (1866) (holding that the Eighth Amendment does not apply to the states and, in the alternative, that it was not violated by imprisoning defendant for selling liquor without a license); see also Wilkerson v. Utah, 99 U.S. 130, 134-37 (1878) (interpreting the Eighth Amendment to permit a judge to order death by public shooting for a first-degree murder in Utah territory)
9	1791	Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330-31, 338-40 (1936)	Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 330-31, 338-40 (1936) (holding that the Ninth Amendment did not withdraw power from Congress to sell electricity from a government dam)
10	1791	M’Culloch v. Maryland, 17 U.S. 316, 406-07 (1819)	McCulloch v. Maryland, 17 U.S. 316, 406-07 (1819) (upholding congressional authority to charter a bank and contrasting the Tenth Amendment with the Articles of Confederation)
11	1798	Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)	Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (holding that the Eleventh Amendment was properly ratified and applied to pending cases)
12	1804	McPherson v. Blacker, 146 U.S. 1, 26 (1892)	Ray v. Blair, 343 U.S. 214, 224-25 & n.11, 228-30 (1952) (interpreting to permit party pledges in elector primaries)
13	1865	Osborn v. Nicholson, 80 U.S. 654, 662-63 (1872)	Osborn v. Nicholson, 80 U.S. 654, 662-63 (1872) (allowing enforcement of a slave sale contract made before the Thirteenth Amendment)

14	1868	Worthy v. Commissioners 76 U.S. 611, 613 (1869) (citing Section 1 of the Amendment, but dismissing for want of a federal question presented below)	Slaughter-House Cases, 83 U.S. 36, 77-78 (1873) (interpreting the privileges or immunities clause to permit a state-created monopoly); Bradwell v. Illinois, 83 U.S. 130, 138-39 (1873) (interpreting the clause to permit exclusion of women from the bar)
15	1870	White v. Hart, 80 U.S. 646, 648 (1871) (quoting a federal statute that cites the Fifteenth Amendment)	Slaughter-House Cases 83 U.S. 36, 71-72 (1872) (using the Fifteenth Amendment to help confine the purpose of the Thirteenth Amendment, and thereby reject a claim thereunder)
16	1913	Brushaber v. Union Pac. R. Co., 240 U.S. 1, 10-21 (1916)	Brushaber v. Union Pac. R. Co., 240 U.S. 1, 10-21 (1916) (upholding a federal income tax)
17	1913	Newberry v. United States, 256 U.S. 232, 250, 252-53 (1921)	Newberry v. United States, 256 U.S. 232, 250, 252-53 (1921) (denying congressional power to regulate primaries)
18	1919	Duhne v. New Jersey, 251 U.S. 311, 313 (1920) (denying original jurisdiction over a challenge to the Eighteenth Amendment's validity)	Rhode Island v. Palmer, 253 U.S. 350, 385-88 (1920) (stating answers to questions about the validity and scope of the Eighteenth Amendment)
19	1920	Leser v. Garnett, 258 U.S. 130, 135-37 (1922) (denying challenges to the Nineteenth Amendment's validity)	Breedlove v. Suttles, 302 U.S. 277, 283-84 (1937) (holding that a state could attempt to encourage a white male to pay a poll tax by refusing to allow him to vote unless he paid, while at the same time exempting women from the tax altogether if they did not register to vote)
20	1933	< none >	< none >
21	1933	United States v. Chambers, 291 U.S. 217, 222-23 (1934)	United States v. Chambers, 291 U.S. 217, 222-23 (1934) (interpreting the Twenty-First Amendment to prohibit the adjudication of pending prosecutions)
22	1951	Baggett v. Bullitt, 377 U.S. 360, 370 (1964) (citing the Twenty-Second Amendment in a hypothetical)	Roe v. Wade, 410 U.S. 113, 157-58 (1973) (using the Twenty-Second Amendment as one basis for excluding the unborn from "person" in Fourteenth Amendment)
23	1961	Reynolds v. Sims, 377 U.S. 533, 555 n.28 (1964) (citing the Amendment for a trend)	< none >
24	1964	Reynolds v. Sims, 377 U.S. 533, 555 n.28 (1964) (citing the Amendment for a trend)	Harman v. Forssenius, 380 U.S. 528, 529, 538-40, 544 (1965) (holding that a state could not demand that a voter in a federal election either pay a poll tax or file a certificate of residence)
25	1967	Lubin v. Panish, 415 U.S. 709, 714 (1974) (citing the Twenty-Fifth Amendment for a trend, but this reference is probably an error in the Court's opinion)	Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 886-87 (1991) (using a Twenty-Fifth Amendment legislative report as instructive regarding the opinions clause and therefore the appointments clause); see also Clinton v. Jones, 520 U.S. 681, 698 (1997) (using Twenty-Fifth Amendment drafting history to concede the office of the president's unique importance)
26	1971	Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring); see also Lubin v. Panish, 415 U.S. 709, 713 (1974) (citing the Twenty-Sixth Amendment during a discussion of candidate filing fees)	Symm v. United States, 439 U.S. 1105 (1979), summarily aff'g United States v. Texas, 445 F. Supp. 1245, 1261-62 (D. Tex. 1978) (three-judge panel) (holding that certain registration requirements violated the Twenty-Sixth Amendment rights of college dorm residents)
27	1992	< none >	< none >