

Rawlsian Originalism

1. Introduction

How should judges reason in a well-ordered constitutional democracy? According to John Rawls's famous remarks in *Political Liberalism*, they ought to do so in accordance with the idea of public reason, to the point that they act as an (if not the) institutional *exemplar* of public reason (Rawls 1993/2005: 231). There are many attractive features of this view, but it is still too vague. For the idea of public reason is permissive – it rules certain modes of reasoning and discourse out, but the modes of reasoning and discourse it deems permissible are pluralistic. The current paper tries to remedy this indeterminacy by further fleshing out how judges ought to reason in a Rawlsian well-ordered constitutional democratic society. Our conclusion may come as a surprise: judges in such a society should be *Originalists*.

Here is how we reach this conclusion. After carefully explicating Rawls's idea of public reason (§2), we argue that demanding judges adhere to the idea of public reason is indeterminate and consistent with several different interpretive frameworks, two broad bundles of which we call *Originalism* and *Living Constitutionalism* (§3). In order to provide determinacy and choose one interpretive framework over the other, we should take a close look at the underlying reasons for insisting on public reason in the first place. One such reason is that public reason helps secure the stability of a well-ordered constitutional democracy. From here we explore a stability concern of Rawls's that has hitherto been ignored in the literature: when political parties fight over the constitutional structure of government in times of ordinary politics, the stability of a constitutional order breaks down (§4). Rawls's solution to this problem – what we call the *political stakes problem* – is that citizens must come to an overlapping consensus on constitutional essentials. Such a solution, we argue, fails.

Another solution to the political stakes problem is for the judiciary to enforce the governing constitution anytime a majority position in government tries to *de facto* alter the constitutional structure of government in times of ordinary politics (§5). Though both Originalism and Living Constitutionalism purport to do this, Originalism does it better than Living Constitutionalism does, or at least so shall we argue. Indeed, because Living

Constitutionalism is a much more expansive and flexible interpretive framework when compared to Originalism, the identity of particular judges matters much more in a regime characterized by this theory of judicial interpretation, which just shifts the political stakes problem to the capture of the judiciary (i.e., control of judicial nominations). Because Originalism is a much tighter and more constrained interpretive framework the identity of who sits on the bench matters to a much lesser degree, thereby doing more to mollify the political stakes problem. To end, we consider an objection to our central argument (§6). A final note to the reader before beginning: though much of our analysis, for ease of exposition, is couched in terms of the United States Constitution, we believe that the analysis applies, *mutatis mutandis*, to constitutional interpretation generally speaking.

2. On Public Reason

In *Political Liberalism*, Rawls draws a tight connection between the Supreme Court and the idea of public reason. We are told that “public reason is well suited to be the court’s [*sic*] reason in exercising its role as the highest judicial interpreter but not the final interpreter of higher law” (Rawls 1993/2005: 231). In other words, “the political values of public reason provide the Court’s basis for interpretation” (Rawls 1993/2005: 234). To better understand what exactly this means we need to know a bit more about Rawls’s idea of public reason.

Rawls opens his discussion of public reason by telling us that “a political society... has a way of formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly. The way a political society does this is its reason” (Rawls 1993/2005: 212). Rawls’s idea of public reason is but one way of fleshing out how a political society does this; that is, public reason is but one way of specifying how a political society ought to reason and to make its collective decisions together. Very roughly, the idea of public reason says that when certain kinds of questions are at stake in the public sphere (matters of basic justice and constitutional questions), the only reasons and considerations to which it is permissible to appeal to stem from a shared conception of justice.

What would democratic discourse look like were citizens to only appeal to reasons and considerations stemming from a shared conception of justice? As an example, if the overarching

conception of justice for society is Rawls's justice as fairness, then the demands of public reason would permit citizens to appeal to the principles constituting justice as fairness in their deliberation. A citizen Althea, for instance, could say to her fellow citizen Bertha that "we should support policy *p*, because *p* is most likely to maximize the welfare of the least advantaged, and the difference principle requires this." Moreover, principles of justice also imply a certain constitution and economic institutions as well.¹ The requirements of public reason make it fair game to appeal to these along with the principles of justice themselves. And finally, a political conception of justice is formed on the basis of certain ideas founded in a constitutional democracy's "public political culture," which includes "historic texts and documents that are common knowledge" (Rawls 1993/2005: 14). Public reason would also allow these to be appealed to in deliberation: persons in the United States could appeal to the Declaration of Independence, Abraham Lincoln's Gettysburg Address, and so on.

So the idea of public reason says that when engaged in democratic discourse persons must only appeal to certain considerations. In particular, the norms of public reason allow citizens to appeal to (i) the shared conception of justice governing society; (ii) the constitution and economic institutions implied by this shared conception of justice; and (iii) historical documents that are a part of the public political culture. In saying that public reason is the reason of the Court, Rawls is saying that the Court, in making its decisions, may only appeal to these considerations. Cases must be decided strictly on the basis of the shared, governing conception of justice; the constitution and economic institutions implied by this conception of justice; as well as a society's founding documents.

Before discussing how Rawls justifies public reason's onerous demands, there are two things we need to note. First, the idea of public reason is not so much concerned with the outcome of public discourse, but rather the way in which this discourse proceeds. Indeed, different and conflicting resolutions to political questions can be reached through public discourse that adheres to public reason. As an example of this, when it comes to the troubled issue of abortion, there exist both pro-choice and pro-life argument consistent with public reason

¹ In Part II of *A Theory of Justice*, Rawls (1971: 195-257) discusses the kind of constitution justice as fairness entails. For a discussion of the problem of constitutional choice in a Rawlsian framework, see Kogelmann (forthcoming(b)). In *Justice as Fairness: a Restatement*, Rawls (2001: 135-140) discusses the sorts of economic institutions justice as fairness requires.

(Rawls 1993/2005: 243n; Rawls 1997/1999: 605n80; de Marneffe 1994: 234; Quinn 1997: 150; Kogelmann forthcoming(a)). If a polity reaches a pro-life stance on abortion there is nothing to say, from the perspective of public reason, so long as this decision was reached in a manner consistent with public reason's demands. And if a polity reaches a pro-choice position on abortion then there is also nothing to say, from the perspective of public reason, so long as this decision was reached in a manner consistent with public reason's demands. Of course, there may be other normative principles or frameworks for evaluating these decisions that are independent of public reason. But the idea of public reason only evaluates the discourse leading up to these decisions, not the decisions themselves. In particular, public reason is concerned with the kinds of considerations citizens appeal to in public debate, not the decisions they reach.

Second, public reason is meant to regulate a well-ordered society. In Rawls's words: "the idea of public reason, as I understand it, belongs to a conception of a well-ordered constitutional democratic society" (Rawls 1997/1999: 573). Basically, in a well-ordered society persons (*i*) are presumed to act justly, and (*ii*) institutions are more or less just.² This second feature of well-ordered societies is particularly important for public reason's plausibility. For consider: as we have seen, public reason allows us to appeal to society's institutions (e.g., its governing constitution) and founding documents. This, it might be thought, is plausible *only if* such institutions and documents are reasonably just. As an example, if society's founding constitution institutionalizes a caste system, then appealing to this constitution in our deliberation might be the precisely wrong thing to do. Since it was worked out as an ideal to govern discourse in a well-ordered constitutional democracy, public reason is not immediately applicable in these sorts of cases. Of course, it does not follow that we should completely abandon public reason should our society not be well-ordered. What public reason demands when we face injustice is a difficult and important question that has received insufficient attention in the literature.³ For our purposes, though, we work with the presumption of a well-ordered society, and ask how its judges should reason. We know that they should do so in accordance with public reason, but we do not yet know what exactly this means.

² For a detailed overview of what well-orderedness means, see Kogelmann (2017).

³ An exception here is Quong (2011: ch. 10), who does address what public reason demands in non-ideal cases.

The demands of public reason seem quite onerous, so it is worth inquiring why Rawls thinks it important for persons to comply with them. He offers two arguments for this. First, public reason serves an important normative function. The liberal principle of legitimacy, Rawls tells us, requires that we exercise coercive political power in a manner justifiable to all. This creates a “moral, not a legal, duty” – the duty of civility – which requires citizens “be able to explain to one another... how the principles and policies they advocate and vote for can be supported by the political values of public reason” (Rawls 1993/2005: 217). That is, as a basic normative requirement, we have an obligation to exercise coercive force in a manner that is justifiable to all those who are subject to such force (this is the liberal principle of legitimacy), which further requires that we adhere to the requirements of public reason in our democratic discourse (this is the duty of civility). Doing so legitimizes our use of coercive force to our fellow citizens, thus treating them in a morally desirable way.

Perhaps more important than this normative function is the practical function public reason is meant to serve. According to much recent scholarship, the stability of a well-ordered constitutional democracy relies crucially on citizens’ allegiance to public reason (Weithman 2010: 327; Weithman 2015; Hadfield and Macedo 2012).⁴ When citizens adhere to the requirements of public reason while engaged in public discourse they signal commitment to the political conception of justice over their own private interests, assuring their fellow citizens that they will continue to act justly rather than abandon their sense of justice in pursuit of private gain. When citizens do not adhere to the requirements of public reason, though, the worry is that they signal commitment to their own private interests over the governing conception of justice, leading to a breakdown of assurance. In Rawls’s words: “For without citizens’ allegiance to public reason and their honoring the duty of civility, divisions and hostilities between doctrines are bound in time to assert themselves... harmony and concord depend on the vitality of the public political culture and on citizens’ being devoted to and realization of the ideal of public reason” (Rawls 1997/1999: 610).

So we have two reasons why it is important for persons to adhere to the demands of public reason when engaging in the public sphere. First, public reason serves a valuable moral

⁴ For criticism of public reason’s ability to solve this problem, see Thrasher and Vallier (2015); Kogelmann and Stich (2016).

function; and second, public reason serves an important practical function. Though we know what the restrictions of public reason are, it is not quite clear what it exactly means for judges to act as the institutional exemplar of public reason, as Rawls insists. When judges reason in accordance with the demands of public reason in deciding cases, what exactly does their reasoning look like? The next section addresses this question.

3. Originalism, Living Constitutionalism, and Public Reason

Judges in Rawls's well-ordered society must reason in accordance with and act as the institutional exemplar of public reason. This is so that public reason may serve its valuable moral function and important practical function. It is required for persons to treat one another in a certain morally desirable way, as well as to maintain the stability of a well-ordered constitutional democracy. Reasoning in accordance with public reason means that, in deciding cases, judges may permissibly appeal to (i) the shared conception of justice governing society; (ii) the constitution and economic institutions implied by this shared conception of justice; and (iii) historical documents that are a part of society's public political culture. It is impermissible and in violation of public reason if judges appeal to considerations outside those listed.

As it turns out this should not be too hard for judges to do. Indeed, if one reads seminal Court decisions one quickly sees that these norms of reasoning are already roughly followed. Certainly the Constitution itself is appealed to, as well as ordinary pieces of legislation (e.g., the Voting Rights Act or Civil Rights Act) when appropriate. Moreover, basic values that are arguably a part of our shared conception of justice are also frequently referenced. As a recent example of this, the idea of "equal dignity" seemed to play a fundamental role in the *Obergefell v. Hodges* (576 U.S. ___) decision.⁵ And finally, founding documents that are a part of our public political culture are also cited. Indeed, in *Cotting v. Godard* (183 U.S. 79) the Court examined the relationship between constitutional interpretation and the Declaration of Independence: "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." This of course is not to say that the Court *always* adheres to public reason. For example, the authors seriously doubt that the opinion in *Muller v. Oregon* (208 U.S. 412) – with

⁵ For detailed analysis of equal dignity jurisprudence see Ewing (2018).

its speculative claims about female physiology and the implications of this for women's role in the division of labor – counts as a *bona fide* instance of public reasoning. But still, it seems like the demands of public reason are already roughly adhered to, at least in the case of the Supreme Court of the United States.

Indeed, public reason seems to be more about ruling *out* certain modes of reasoning – those grounded in religious beliefs, controversial philosophical conceptions of the good life that some could reasonably reject, etc. – rather than providing a determinate framework for judicial decision-making. This is something Rawls notes: “the idea of public reason does not mean that judges agree with one another, any more than citizens do, in the details of their understanding of the constitution. Yet they must be, and appear to be, interpreting the same constitution in view of what they see as the relevant parts of the political conception and in good faith believe it can be defended as such” (Rawls 1993/2005: 237).

Yet what if we wanted more determinacy concerning how a judge ought to reason in a well-ordered constitutional democracy? We know, following Rawls, that such a judge must reason in accordance with public reason. So much is clear. But this could be consistent with many different theories of judicial interpretation. Consider first *Originalism*. By “Originalism” we refer to a broad class of theories of judicial interpretation, all holding that the meaning of the constitution is fixed and stable, and interpretive changes are dangerous because they are likely to amount to *de facto* constitutional revisions, which should instead proceed according to formal amendment procedures (cf. Barnett 2003; Berger 1977/1997; Bork 1990; Farber 1989; Nelson 2003; Scalia 1989, 1997; for difficulties, see Berman 2009). Originalism typically comes in two varieties. According to *original intent theory*, the relevant interpretive benchmark is the intent of those who drafted the document. This view is a minority position among Originalist judges and scholars.

Most instead subscribe to *original meaning theory*, which holds the relevant interpretive benchmark is the public meaning of the text at the time of drafting, as a reasonable person would have understood it. We will use the term “Originalism” as synonymous with original meaning theory. Originalists offer many persuasive arguments in defense of their position, some of the most important of which include the primacy of democracy (something we discuss more in §6 below) and the legitimacy of the constitutional order itself. While Originalism necessarily entails

significant difficulty in its application – applied consistently, an Originalist jurist must make recourse not just to the text in question, but to supporting documents which can include private correspondence and public speeches by the relevant actors, as well as linguistic histories and sometimes even literature to understand the meaning and context of key words and passages⁶ – Originalists argue these difficulties are surmountable, and that they are a small price to pay for the sustenance of constitutional democracy. We think Originalism is consistent with the idea of public reason, as what is primarily being appealed to is the governing constitution itself, along with documents surrounding its founding (e.g., *The Federalist Papers* in the case of the United States) that help the judge gain leverage on what the original meaning of the relevant constitution was. A society’s constitution and founding documents (i.e., parts of a society’s public political culture) are, according to public reason, permissible considerations that can be appealed to. As a result, Originalism is consistent with public reason.

Consider next *Living Constitutionalism*. We believe this theory of judicial interpretation is also consistent with the idea of public reason. Living Constitutionalism is not so precise an interpretive framework as Originalism (cf. Strauss 2010, Balkin 2009; Ackerman 2007; Waluchow 2007; for difficulties see Rehnquist 1976). It is tempting to assert that Living Constitutionalism is simply “not Originalism.” To the extent it conforms to any general principle, it is that a constitution “evolves, changes over time, and adapts to new circumstances, without being formally amended” (Strauss 2010: 1). Indeed, David Strauss and W.J. Waluchow compare Living Constitutionalism to the evolution of the common law. The belief of many advocates of Living Constitutionalism is that constitutions not only *ought to* be treated as living, in the above sense, but that they *must* be. Again, Strauss (2010: 1-2) summarizes the argument admirably:

...there’s no realistic alternative to a living constitution. The written U.S. Constitution...was adopted more than 220 years ago. It can be amended, but the amendment process is very difficult...Meanwhile, the world has changed in incalculable ways. The United States has grown in territory, and its population has multiplied several times. Technology has changed, the international situation has changed, the economy has

⁶ For detailed analysis of the debate over what extrinsic sources Originalists can appeal to, see Kesavan and Paulsen (2003).

changed, social mores have changed – all in ways that no one could have foreseen when the introduction Constitution was drafted. And it is just not realistic to expect the cumbersome amendment process to keep up with these changes.

Saying that a constitution should be interpreted as a living document that changes with the times does not imply that judges have *carte blanche* to rule as they please. There are still constraints on the Living Constitutionalist judge.⁷ Many Living Constitutionalist judges take seriously – as Originalist judges do – a society’s constitution, standing laws, and founding documents (e.g., Balkin 2009). Insofar as a Living Constitutionalist judge does this, her reasoning is similar to an Originalist judge’s.

Yet the Living Constitutionalist judge – in holding that a constitution’s meaning can change with the times – will end up appealing to more than those considerations that Originalist judges appeal to. In particular, Living Constitutionalist judges will appeal to moral and ethical considerations that are unavailable to Originalist judges; such judges offer *moral readings* of constitutions (Dworkin 1996; Fleming 2012; Fleming 2015). This is something that Strauss makes very clear:

In fact, *Brown* illustrates an important way in which the common law approach [i.e., Living Constitutionalism] is superior to approaches that claim simply to be discovering original meanings. The common law approach allows courts to be candid. Of course the immorality of segregation played a role in *Brown*. For a court to claim that a moral judgment about segregation played no role in the decision – or for a commentator, after the fact, to try to justify *Brown* without acknowledging that moral judgment played a role – would almost certainly be disingenuous (Strauss 2011: 984).

The fact that moral considerations play a role in Living Constitutionalism does not imply that this account of judicial interpretation is inconsistent with public reason. For recall, public reason says it is permissible to appeal to political values – equality, dignity, fairness, and the like – that are a part of society’s conception of justice. On a charitable reading, this is precisely what Living Constitutionalist judges do. Indeed, in explicating the Court’s role as the exemplar of public reason, Rawls notes that “it is expected that the justices may and do appeal to the political values

⁷ For an overview of some of these constraints, see Rawls (1993/2005: 236).

of the public conception whenever the constitution itself expressly or implicitly invokes these values” (Rawls 1993/2005: 236). In holding that judges can appeal to these sorts of considerations, Living Constitutionalism certainly goes beyond Originalism, but is still consistent with the idea of public reason.⁸

A key difference between Originalism and Living Constitutionalism concerns the *scope* of permissible judicial decisions. In particular, what kinds of decisions can a judge reach who in good faith adheres to Originalism? What kinds of decisions can a judge reach who in good faith adheres to Living Constitutionalism? Now it would be a mistake to think that Originalism implies a determinate interpretation. Originalist judges and legal scholars disagree with one another all the time, so Originalism (broadly construed) admits a multiplicity of permissible judicial decisions.⁹ Yet we think it is clear that the scope of possible decisions reached by Originalist judges is smaller than the scope of possible decisions that can be reached by Living Constitutionalist judges.

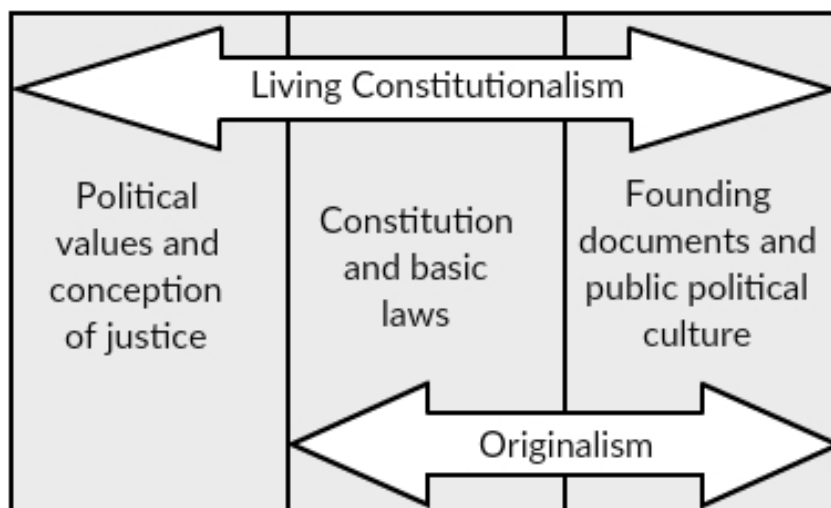
The reason why this is the case has to do with the kinds of considerations Originalist and Living Constitutionalist judges can appeal to in their decision-making. Originalist judges, we have seen, can appeal to a society’s laws and constitution, as well as founding documents that are a part of society’s public political culture. Certainly, judges can in good faith reason from these kinds of considerations and still disagree with one another. Living Constitutionalist judges can appeal to these considerations as well, *along with* moral and political values that are a part of society’s conception of justice. Originalism says that appeal to such considerations is impermissible. This is highlighted in Figure 1. The three panels represent the three different

⁸ One theory of judicial interpretation we do not examine at length is so-called *Living Originalism* (Balkin 2014). On this view, Living Constitutionalist ends are justified with Originalist means. In particular, the argument is (very roughly) that an Originalist interpretation of the United States Constitution shows that original meaning requires a dynamic, moral reading of the Constitution. (On a similar basis, some [e.g., Goldsworthy 2000; Whittington 2000] have claimed that Ronald Dworkin is an Originalist.) We do not treat this theory of judicial interpretation as a separate category, because we think that Originalism is preferable to it on public reason grounds, for the exact same reason that Originalism is preferable to Living Constitutionalism. That is, the narrower scope of judicial decision-making under Originalism will do more to assuage the political stakes problem, at least when compared to Living Constitutionalism (or Living Originalism, which has a similar scope of judicial decision-making as Living Constitutionalism).

⁹ Indeed, the fact that Originalist jurists disagree with one another is, according to Eric Seagall (2018), a mark against Originalism as a theory of judicial interpretation.

sources of public reason’s content, and the arrows represent which sources Originalists and Living Constitutionalists respectively deem it permissible to appeal to.

Figure 1: Public Reason’s Content and Judicial Interpretation



Insofar as Living Constitutionalist judges can appeal to those considerations Originalist judges can permissibly appeal to, a Living Constitutionalist judge can reach any decision an Originalist judge can reach. Yet because Living Constitutionalist judges can appeal to other considerations that Originalist judges cannot appeal to, it follows that Living Constitutionalist judges can reach decisions that Originalist judges cannot. Again, this does not mean that Living Constitutionalist judges are unconstrained in the kinds of decisions they can make. Rather, it means that they are simply *less* constrained in terms of possible decisions they can reach when compared to Originalist judges. Any decision an Originalist judge reaches a Living Constitutionalist judge can also reach, but the opposite does not hold.¹⁰

¹⁰ Our argument presumes that Originalism is indeterminate, but less indeterminate than Living Constitutionalism. A bit more formally: for any given judicial decision, the set of permissible interpretations under Originalism has a smaller cardinality than the set of permissible interpretations under Living Constitutionalism. A radical criticism of Originalism states that Originalism is indeterminate in a quite different sense. Rather than admitting multiple interpretations for a judicial decision, Originalism will often yield *no* permissible interpretation, because the considerations it draws upon are too coarse. This, it might be thought, creates a problem: in such a case, the Originalist judge is permitted to rule as she pleases (a sort of “anything goes”). When this happens, Originalism becomes *more* indeterminate than Living Constitutionalism. Our argument thus fails.

We have two responses. First, we simply deny that Originalism is indeterminate in this radical sense. As McAfee (1996) carefully shows, nearly all important cases can be decided based on Originalist considerations. But suppose this is incorrect, and sometimes Originalist considerations bear no relevance to the question at hand. In this

As a final note worth highlighting in our discussion of Originalism and Living Constitutionalism, it is incorrect to associate Originalism with conservative or right-wing policy decisions and Living Constitutionalism with liberal or left-wing policy decisions. Judge Robert H. Bork – perhaps one of the most ardent and consistent Originalists ever to sit on the bench – often criticized so-called conservative judges for adhering to something like Living Constitutionalism: “The Courts headed by Chief Justice Warren Burger and now by Chief Justice William Rehnquist, while perhaps less relentlessly adventurous than the Warren Court, displayed a strong affinity for legislating policy in the name of the Constitution” (Bork 1990: 101). Indeed, an entire chapter of his book on Originalism – *The Tempting of America* – is dedicated to “the theorists of conservative constitutional revisionism” (Bork 1990: ch. 10). It is thus a mistake to associate our two respective camps with policy positions. Rather, the camps are defined in terms of what sorts of considerations are appealed to in making judicial decisions. Originalists appeal to society’s constitution and laws as well as founding documents; Living Constitutionalists may appeal to these as well, along with moral and political values. All such considerations are a part of public reason.

Public reason is thus permissive. It is consistent with what we have called both Originalism and Living Constitutionalism. In trying to further flesh out how it is judges ought to reason in a well-ordered constitutional democracy, perhaps the thing to do is look at why Rawls insists on the idea of public reason in the first place: will either Originalism or Living Constitutionalism better serve the goals public reason is meant to advance? Recall from the last section that there are two such goals. Public reason, when adhered to, legitimizes coercion and allows us to treat persons in a certain morally desirable way (this is public reason’s normative function); and public reason, when adhered to, helps secure the stability of a well-ordered constitutional democracy (this is public reason’s practical function). We do not think that the normative function of public reason can do much to adjudicate between Originalism and Living Constitutionalism. This is because both theories of judicial interpretation are grounded in a shared conception of justice; therefore, both theories appeal only to reasons all accept, and both

case, the response is not that anything goes. Rather, Originalists typically defer to default rules here; in particular, if the Constitution is silent, deference is made to legislators (e.g., Bork 1991: 166; Whittington 2013: 404). Far from being indeterminate, this default rule is uniquely determinate. When such cases arise (which we think will rarely happen), there is one and *only* one thing for the judge to do: defer to the legislative branch. Originalism is thus (still) less indeterminate than Living Constitutionalism.

thereby legitimize coercion and thus treat persons in the morally appropriate manner. But the practical, stabilizing role public reason is meant to serve might help us adjudicate between Originalism and Living Constitutionalism. This is what we turn our attention to in the next two sections.¹¹

4. Political Stakes and Constitutional Essentials

The last section argued that both Originalism and Living Constitutionalism are consistent with public reason's demands. Thus, if we want more determinacy concerning how judges should reason in a well-ordered constitutional democracy, then we should look to *why* Rawls thinks it important for persons to adhere to public reason's demands in the first place. One such reason is public reason's role in stabilizing society. To this end, the current section examines a stability concern of Rawls's that is completely ignored in the secondary literature. Indeed, Rawls did not intend public reason to solve the problem we are about to examine, as he did for society's assurance dilemma.¹² Rawls proposes a different solution to this stability concern, one not grounded in public reason. But, since we argue that this solution fails, perhaps public reason can solve this stability problem as well. Not only this, but perhaps either Originalism or Living Constitutionalism is the unique manifestation of public reason capable of remedying the current concern.

To begin, consider the following passage:

[Constitutional essentials] can be specified in various ways. Witness the difference between presidential and cabinet government. But once settled it is vital that the structure of government be changed only as experience shows it to be required by political justice or the general good, and not as prompted by the political advantage of one party or group

¹¹ An important proviso for our forthcoming argument is the presumption that a society faces this problem *de novo*. In other words: if a Rawlsian well-ordered society were to begin anew tomorrow, how should judges reason? How judges ought to reason in such circumstances does not *immediately* transfer over to a case in which there is already established law and constitutional precedent (for more on this difficult question, see Kozel 2017). That said, we do believe that how one answers the former, ideal case will have some significant influence on how one answers the latter, non-ideal case. We thus view the current argument as a first – but not final – step in a broader argument that traces the implications of Rawlsian public reason for the theory of constitutional interpretation.

¹² For an overview of the assurance problem and public reason's role in solving it, see Kogelmann and Stich (2016).

that may at the moment have the upper hand. Frequent controversy over the structure of government, when it is not required by political justice and when the changes proposed tend to favor some parties over others, raises the stakes of politics and may lead to distrust and turmoil that undermines constitutional government (Rawls 1993/2005: 228).¹³

Rawls's worry in the above passage can, we think, be articulated as follows. There are times when it is legitimate to call into question the constitutional structure of government – at times of what Bruce Ackerman calls “constitutional politics.” In such cases it is permissible for citizens and government officials to try to alter the constitutional order, so long as certain (quite demanding) conditions are met (Ackerman 1989; Ackerman 1990: ch. 10). Outside such constitutional moments, though, trying to change the structure of government is impermissible. Not only is it impermissible, but doing so raises the stakes of politics by increasing the prize of holding a majority position. Instead of fighting over mere policy alternatives, political actors are now fighting over the very rules of the game itself. This breeds a pathological and vitriolic politics inimical to a stable and just constitutional regime. Call this the *political stakes problem*. The political stakes problem says that whenever the constitutional structure of government is up for grabs, politics will become increasingly vitriolic and polarized because the prize of holding office is comparatively higher to the world in which only ordinary legislation is on the table.

The key to solving the political stakes problem is simple: don't allow society's constitution to be up for grabs in the course of ordinary politics. But how does one actually do this? For, as Rawls notes, “in the long run a strong majority of the electorate can make the constitution conform to its political will. This is simply a fact about political power as such” (Rawls 1993/2005: 233). Rawls's solution to this particular stability problem is that in a well-ordered society there is agreement on “constitutional essentials”: citizens all agree on “fundamental principles that specify the general structure of government and political process,” as well as “equal basic rights and liberties of citizenship that legislative majorities are to respect” (Rawls 1993/2005: 227). Agreement solves the political stakes problem by simply making it the

¹³ For similar remarks see what Rawls (2001: 49) says about the relationship between an overlapping consensus on constitutional essentials and the idea of loyal opposition. See also Rawls (1989/1999: 496).

case that those involved in the political process will not try to alter the constitutional structure of government, because they all agree that the current constitutional structure of government is just. The constitution is, in a sense, no longer up for grabs in ordinary politics because *no one wants to grab it*. All are happy with the current state of affairs.

Consider an example of this. If party P_1 believes constitution C_1 is the most just constitution, but party P_2 believes constitution C_2 is the most just constitution, P_1 might try to illegitimately bring about C_1 whenever they hold a simple majority position through ordinary statutory enactments, whereas party P_2 might try to illegitimately bring about C_2 whenever they hold a majority position through ordinary statutory enactments. Doing so raises the stakes of electoral races which can lead to distrust among political opponents – it is now much more important for P_1 to win out over P_2 and vice versa given the prize of holding a majority position in government. This can then cause P_1 and P_2 to behave in undesirable ways that threaten the prospect of a stable constitutional order. Yet, if both parties P_1 and P_2 believe that C_3 is the just constitution – that is, if both P_1 and P_2 agree on constitutional essentials – then by definition such a problem cannot exist. Now, P_1 and P_2 merely fight over ordinary policy outcomes, because both believe constitution C_3 is just. This, according to Rawls, keeps what is at stake in politics comparably lower to what it otherwise would be.

Though we agree that the political stakes problem is deep and troubling – one that, in our judgment, afflicts many Western liberal democracies today – we do not think that agreement on constitutional essentials is an adequate solution. This can be shown via a proof by cases. Consider the following disjunction: either (a) agreement on constitutional essentials means agreement on broad, constitutional principles (like the freedom of speech) or (b) agreement on constitutional essentials means agreement on *every last detail* of a constitution (the wording and interpretation of every last amendment and clause, for instance). Consider first (a). Agreement here is not sufficient to solve the political stakes problem, because agreement on general principles is not sufficient to generate agreement on constitutional details, and constitutional details can still be worth fighting over in times of ordinary politics. Indeed, as Alexander Bickel notes, when it comes to “majestic concepts” such as freedom of speech and due process, “men may in full and equal reason and good faith hold differing views about... [their] proper meaning and specification” (Bickel 1962/1986: 36-37). If parties P_1 and P_2 both agree on something like

the First Amendment, but disagree radically over its interpretation, then this might be sufficient to have the parties fight over how to implement their preferred interpretation in ordinary politics. The political stakes problem is then back in play *even though* there is agreement on constitutional essentials (according to interpretation (a) of what agreement on constitutional essentials means).

Now consider possibility (b). Here, agreement on constitutional essentials means agreement on every last detail of a constitution. Note how, were this true, we get around the problems raised above with the first interpretation. We reject this side of the disjunction simply because we believe it is far too utopian. Though we can expect some broad agreement in liberal orders over certain basic values and institutions – liberty, equality, freedom of speech, democratic elections, and so on and so forth – it is a hopeless ideal to think that parties can ever agree on every last detail of how a constitution should look. So interpretation (a) of what constitutional essentials are won't solve the political stakes problem and, though interpretation (b) could, we do not think it is sufficiently likely to count as a serious proposal. We thus need some other solution to ensure the stability of a well-ordered constitutional democracy.

5. Political Stakes, the Courts, and Judicial Capture

Agreement on constitutional essentials isn't sufficient to solve the political stakes problem. There are other ways of solving the political stakes problem, though, and here is where judicial interpretation comes back in. Though persons will never agree on every last detail of a constitution, it is the case that they *have* a fully specified constitution, and this fully specified constitution can be *enforced*. If political parties P_1 and P_2 both know that constitution C will be rigidly enforced and all legislation counter to C declared unconstitutional, then P_1 and P_2 won't bother trying to change the constitutional structure of government in times of ordinary politics. Such being the case, the political stakes problem is solved. Here, the constitution is no longer up for grabs in ordinary politics because persons know that, should they try to grab it, the judiciary will simply take it right back. Knowing this, there is no reason to try to make constitutional revisions in times of ordinary politics. With only ordinary legislation on the table, the stakes of politics have been lowered. In order to see precisely how this solution to the political stakes

problem works, we need to examine the political stakes problem a bit more formally to better understand its underlying structure.

The political stakes problem is really an example of the Prisoners' Dilemma at the level of constitutional politics. The Prisoners' Dilemma is perhaps the most famous model in non-cooperative game theory, because it possesses both simplicity and enormous explanatory power. Again, consider the case where P_1 and P_2 are both trying to implement their views as to a just constitution, respectively C_1 and C_2 . They face the choice of trying to force through their preferred constitution in the course of ordinary majoritarian politics, or restrain themselves by trying to implement their preferred constitution only via the established formal amendment procedures. If both practice restraint, each receives a payoff of $A > 0$. The positive payoff even in the absence of one's most preferred constitution reflects the fact that there is still some value of living within even a non-ideally just constitutional order. If one party practices restraint and the other tries to force through their preferred constitution through ordinary politics, then the party practicing restraint receives $B < 0$, while the party willing to forsake restraint receives $C > A$. This is self-explanatory: the sucker party who restrained themselves gets a negative payoff, and the party that forces through its ideal constitution gets a higher payoff than in the world in which both parties restrain themselves and accept the current, non-ideal constitution. And if both parties forsake restraint, they counteract each other, receiving a payoff of 0 each despite their efforts. The ordinal ranking of payoffs is thus $C > A > 0 > B$. The strategic scenario is represented below in Figure 2.

Figure 2: A Constitutional Prisoners' Dilemma

		Party P_1	
		Restraint	Forced revision
Party P_2	Restraint	A, A	B, C
	Forced revision	C, B	0, 0

The best result for the maintenance of the constitutional order is if each party chooses restraint. But this is not in each party's *individual* interest. Both P_1 and P_2 have an incentive to force through their own constitution in moments of ordinary politics. Furthermore, this is a

dominant strategy: no matter what the other party does, both P₁ and P₂ do best by choosing forced revision. The result of each party trying to force through its own best conception of the just constitution, without regard for the stability of the constitutional order and the importance of pursuing revision only through formally established means, is that the overall constitutional order breaks down, just as Rawls feared. Each party is worse off for this.

This is where the importance of the independent judiciary, empowered to protect the constitutional order, shows its importance. Judges can credibly commit to striking down attempts to subvert the constitution through majoritarian means. This means that if one party strategically chooses to force *de facto* constitutional revision in the event of the other party’s choice of restraint – the (C, B) and (B, C) payoffs respectively – the judge can overrule such behavior. By “eliminating the off-diagonals” (Buchanan and Congleton 1998/2003), the judge thus makes it in the interests of P₁ and P₂ to practice restraint. This is displayed in Figure 3. There is now no longer any private payoff to pushing for constitutional change, except through formal amendment procedures. This lowers the stake of ordinary politics and makes it much more feasible for those whose conceptions of the just society are at odds to coexist peacefully and to mutually benefit.

Figure 3: Judiciary Eliminating Off-Diagonals

		Party P ₁	
		Restraint	Forced revision
Party P ₂	Restraint	A, A	Blocked by the judiciary
	Forced revision	Blocked by the judiciary	0, 0

But what does it mean to say that the judiciary enforces the governing constitution and how does this relate to Originalism and Living Constitutionalism? Indeed, proponents of both Originalism and Living Constitutionalism claim to be enforcing the constitution. While we do not deny this – all judges, we think, should be given the benefit of the doubt as doing their best to uphold the governing constitution of their society regardless their interpretive theory – we

believe that Living Constitutionalism, in solving the political stakes problem by enforcing the constitution, is likely to just *relocate* the political stakes problem to a different sphere of political activity. There is less of a chance of this happening with Originalism, however. Hence our central thesis: Originalism does a better job at solving the political stakes problem, at least when compared to Living Constitutionalism. Supposing our thesis is true, this gives one compelling reason – on Rawlsian public reason grounds – to prefer Originalism as an interpretive framework over Living Constitutionalism.¹⁴

The reason why Originalism does a better job at solving the political stakes problem when compared to Living Constitutionalism has to do with a fact about our two respective theories of judicial interpretation discussed in §3 above: Originalism is a much more constrained interpretive framework when compared to Living Constitutionalism. As we noted in our discussion of Originalism and Living Constitutionalism, every decision an Originalist judge can make a Living Constitutionalist judge can make, yet the opposite does not hold. An Originalist judge, in other words, has a far less extensive set of possible decisions she can in good faith reach when compared to a Living Constitutionalist judge. This fact is grounded in the sorts of considerations Originalists and Living Constitutionalist judges can appeal to in deciding cases, as highlighted in Figure 1. Originalist judges can appeal to existing legal as well as founding documents. Living Constitutionalist judges can appeal to these considerations *along with* moral and political values that Originalists deem inadmissible in decision-making. Because the considerations available for reasoning are more expansive under Living Constitutionalism when compared to Originalism, the scope of decisions Living Constitutionalist judges can reach are more expansive than the scope of decisions Originalist judges can reach.

On the margin, then, Living Constitutionalism allows for a wider scope of possible judicial decision when compared to Originalism. This fact, though, means that the *identity of the judge* empowered to uphold the constitutional order now becomes comparatively more critical under a regime characterized by Living Constitutionalism when compared to a regime characterized by Originalism. Under a Living Constitutionalist regime, there are more possible outcomes a judge can reach through her decisions, so selecting the right judge matters a great

¹⁴ There is a similarity between the argument we offer here and the one offered in Pojanowski and Walsh (2016) in defense of Originalism, though the framework used to drive their argument is grounded in natural law, not Rawlsian public reason.

deal insofar as one can secure one's favored outcome. In comparison, under an Originalist regime, there are less possible outcomes a judge can reach, so selecting the right judge matters much less. In all likelihood, a judge – constrained by Originalist interpretation – will be unable to reach one's favored decision anyways, so the identity of the judge doesn't matter too much. In the words of Justice Antonin Scalia, under Living Constitutionalism “judicial personalization of the law is enormously facilitated” (Scalia 1989: 863). Since there is much less an Originalist judge can do – the tighter interpretive framework permits a much more constrained range of possible choices – who ends up sitting on the bench matters much less, meaning that judicial personalization of the law is facilitated to a much lesser degree.

Given the comparative importance of the identity of judges in a Living Constitutionalist order, the rational response of constitutional partisans in a society so characterized is thus to continue pursuing *de facto* constitutional amendment through majoritarian politics. Only now, the particular avenues of politics will change, from a narrowly legislative focus to one relatively more intent on capturing the selection process for judges. How judges are selected differs greatly within constitutional systems, but this variety is ultimately not important to our argument. What matters is that, if judges are to be given expansive authority to reinterpret (and hence amend *de facto*, as even Living Constitutionalism's advocates fully admit) the governing constitution, then the locus of conflict associated with the political stakes problem has not been eliminated; it has merely been transferred to the selection of the judiciary. Indeed, we think those following politics in the United States over the past few years cannot help but agree on this point – consider here the fall-out over the nominations of Merrick Garland and Brett Kavanaugh respectively. Thus, though Living Constitutionalism can solve the political stakes problem as first articulated – enforcing the constitution as understood by Living Constitutionlists can lower political stakes in some sense – it actually gives rise to it in a different domain. If judges are to be Living Constitutionlists, then what really matters is capturing judicial selection.

With Originalism, though, the personalities and commitments of judges matters less. If judges are committed to offering an interpretation of the original meaning of the constitution rather than articulating broad and vague values they think are implicit in the document, then we roughly know what we are getting regardless of who sits on the bench, though there is still room for some disagreement. That is, the range of possible decisions two arbitrary Originalist judges

could reach is much smaller than the range of possible decisions two arbitrary Living Constitutionalist judges could reach. Given this, there is less reason to fight over who gets to sit on the bench, *so long as* we are sure that the judges will adhere to Originalism. This being the case, Originalism is less likely to relocate the political stakes problem when compared to Living Constitutionalism, as being able to control appointment to the judiciary is not so important when there is certainty that whoever is appointed will adhere (as best they can) to the text's original meaning, rather than theorize about moral and political values from society's governing conception of justice.

Here, then, is a summary of our central argument. The political stakes problem says that when political parties try to *de facto* amend the governing constitution in ordinary politics, the stakes of politics are raised. This breeds polarization and vitriol inimical to a stable constitutional order. Rawls proposes to solve this problem by positing agreement on constitutional essentials. We have argued that this solution fails. Another solution is to have the judiciary block attempts at altering the constitutional order through judicial review. But, not all theories of judicial interpretation will mollify the political stakes problem to the same degree. With Living Constitutionalism, the permissible range of decisions is expansive. Thus, resources are shifted from *de facto* amending the constitution through ordinary statutory enactments to capturing judicial nominations, so one can get a judge that favors one's understanding of the constitution. But with Originalism, the judge is far more constrained in her decision-making – if all judges are Originalists, then who sits on the bench matters far less. As a result, we have enforcement of the constitution, in a manner that is less likely to incentivize an arms race towards capturing the judiciary. The political stakes problem is thus solved.

6. Originalism and Democracy

The last section argued that Rawls's idea of public reason favors Originalism over Living Constitutionalism (but is consistent with both). One potentially fatal objection to our argument is that, while Originalism may better serve public reason's stability function when compared to Living Constitutionalism, it is nonetheless ruled out because it is *anti-democratic*. Since public reason is supposed to serve as a method of reasoning for a well-ordered democratic society, this

would indeed be a troubling conclusion to reach, troubling enough to rule out Originalism as a permissible theory of judicial interpretation, regardless its overall effects on stability. And indeed there are some who argue for such a view. Samuel Freeman, a devout Rawlsian and defender of the idea of public reason, argues that “originalism turns out to be a profoundly undemocratic view” (Freeman 1992: 5). The purpose of this section is to show that Freeman’s argument fails. In doing so we hope to convince the reader that there is nothing anti-democratic about Originalism as an approach to judicial interpretation, thereby solidifying our proposal of Rawlsian Originalism.

By our reading, Freeman advances two arguments. The first argument hopes to show that – *contra* most defenders of the doctrine¹⁵ – Originalism is not, in fact, a theory of constitutional interpretation consistent with democracy, given an intuitive, pre-theoretical understanding of what democracy means. The second argument advances a novel understanding of the idea of democracy, and then argues that such an understanding *requires* one adopt some form of Living Constitutionalism over Originalism. Our goal is to only show why the first argument fails. We do this for several reasons. For one, the first argument relies on an intuitive understanding of what democracy is, such that, were the argument to succeed in showing that democracy is inconsistent with Originalism, then such a conclusion would indeed be genuinely troubling. Moreover, we believe that Freeman’s second argument relies on a controversial conception of democracy that many (including the authors) do not accept.¹⁶ Showing that this controversial understanding of democracy entails Living Constitutionalism is thus not greatly troubling.

Freeman’s argument is that, given a pre-theoretical and intuitive understanding of what democracy means, Originalism is inconsistent with democracy. The argument is neatly summarized in the following passage:

The Constitution is a document written, ratified, and imposed upon us by people in the distant past. Even if it had been democratically accepted by them (it was not because of exclusion of blacks, women, and so on from the franchise), *we* have not actually approved it. And surely we cannot be bound by the commitments and agreements of people long since dead, and much less so by their intentions and implicit understandings.

¹⁵ This, for instance, seems to be the central argument Bork (1990) advances in favor of Originalism.

¹⁶ This conception of democracy and its relationship to judicial review is further explored in Freeman (1990).

Why, then, should we be led at all by the intentions of those who wrote or ratified the Constitution, when it is not clear what *democratic* grounds we have for looking to that document in the first place? (Freeman 1992: 9).

The general idea here seems to be this: Originalism is anti-democratic because it prioritizes the voice of those in the past over our voices. Though the Founders all roughly agreed to the Constitution and it was ratified via a reasonable procedure (let us at least suppose), we the living have not in any sense agreed to or ratified the document. Because such is the case, enforcing the original meaning of the Constitution as a judge prioritizes the voice of those in the past over the voice of those in the present, which is anti-democratic in that some voices are louder and take precedent over others.

The problem with this argument is that it proves far too much. Consider an example. It is clearly the case that everyone alive when the Civil Rights Act (CRA) of 1866 was passed is now no longer living. Let point in time t be the point in which the last person alive for the passing of the CRA died. Suppose a judge, after t , enforces a clause of the CRA according to its original meaning. This seems like a reasonable and intuitively just thing to do. Yet according to Freeman's argument, this judge has acted anti-democratically. For the judge, in enforcing the original meaning of the CRA after time t , is prioritizing those voices in the past (those who were actually alive when the CRA was passed) over we the living (for by hypothesis the judge does not consult what *we think* the CRA does or should say, but rather the bill's original meaning in 1866). Thus, Freeman's argument entails the counter-intuitive implication that a judge enforcing the original meaning of the CRA after time period t is acting anti-democratically. We consider this to be a *reductio* on the argument.

Freeman has a plausible response here. The response is that there is a difference between enforcing the original meaning of the Constitution and enforcing the original meaning of the CRA, such that the former is anti-democratic but the latter is not. The relevant difference here is that (i) the amendment procedure (Article V) of the Constitution is too onerous in its requirements to be considered a democratic procedure, but (ii) the procedure for repealing and revising the CRA (through ordinary statutory enactments in Congress) does reflect democratic control. As such, we can infer that, since persons after time t have not amended or repealed the CRA, it expresses their will; yet, given the demands laid out in Article V, we cannot suppose this

to be the case for the Constitution. In Freeman's words: "It may be that tacit consent figures into an account of why the present is bound by ordinary laws enacted in the distant past (e.g., the Civil Rights Act of 1866). Since ordinary legislation can be altered by a bare majority, present majorities may be deemed to have assented by their inactivity to past laws enacted by a bare majority" (Freeman 1992: 11).

The problem with this response to our objection is that it is grounded in a false understanding of how American political institutions work. Freeman's claim seems to be that, since the CRA can be repealed or altered through a bare majority, enforcement of its original meaning is *not* anti-democratic. Yet, since the Constitution cannot be repealed or altered through a bare majority, enforcement of its original meaning *is* anti-democratic. The problem here is that the CRA of 1866 cannot be repealed through a bare majority of citizens. Indeed, many of the political institutions of the United States make it such that bare majorities do not wield political power. Think here of the Electoral College's role in picking the President (Hillary Clinton won the popular vote; Donald Trump won the presidency), as well as how Senators are equally apportioned to states regardless population size. Institutions like these clearly make it such that ordinary statutory enactments most certainly do not reflect a bare majority's preferences. As such, we cannot infer that inactivity towards the CRA of 1866 reflects the will of the majority. So we are back to the conclusion that a judge enforcing the original meaning of the CRA is acting anti-democratically which, again, we take to be a *reductio*.

Perhaps, though, the claim is not that the CRA reflects the will of the people because a bare majority of *the people* have not repealed it, but rather because a bare majority of *Congressman and Senators* have not repealed it. Thus, all it takes to make enforcement of the original meaning of the CRA democratic is for it to be possible for a bare majority of *legislators* to repeal or amend it – and, clearly, a bare majority of legislators cannot alter or amend the Constitution. But even this misunderstands the nature of our political institutions. As prominent work in political economy has shown, the use of a bicameral legislature (both a House of Representatives and a Senate) is effectively equivalent to a supermajoritarian rather than bare majoritarian legislature (Buchanan and Tullock 1962/2004: ch. 16). So even here, Freeman is *still* committed to the claim that a judge enforcing the original meaning of the CRA of 1866 is anti-democratic. Again, we find this deeply implausible.

A final rejoinder Freeman can make here is that what matters for a bill to be democratic is that (i) the threshold required to repeal or amend it is (ii) the same as the threshold required for it to originally be passed as well. So it does not matter that Congress does not reflect the will of the bare majority, nor does it internally proceed by bare majority rule. Rather, what matters is that the same threshold of assent to pass the CRA in 1866 is all that is required for the CRA to be amended and repealed. The symmetry, here, is thus what makes enforcement of the original meaning of the CRA democratic.

This response, though, now entails that Originalism, applied to interpreting the United States Constitution at least, *is* democratic. For consider: what was required for the Constitution to be ratified? Article VII stipulates that, in order for the Constitution to become law, nine states had to ratify it. Now clearly, nine states acting alone are not sufficient to amend the Constitution. But consider proportionality. At the time of ratification, there were thirteen states, so requiring ratification among nine was asking for *more than* two-thirds of the states to assent to the Constitution. But note (one of) the ways the Constitution can be amended according to Article V: two-thirds of the states is sufficient. Thus, we see the requisite symmetry: the threshold required to appeal or amend the Constitution is roughly the same as what was required to ratify it in the first place. Thus, if Freeman wants to maintain by the current strategy that enforcing the original meaning of the CRA of 1866 is democratic, then he will also give the game away. For now enforcing the original meaning of the Constitution is democratic.

So here is what we can conclude. Freeman can only establish that enforcing the original meaning of the Constitution is anti-democratic at a pretty significant cost: he must also hold that enforcing the original meaning of bills like the Civil Rights Act of 1866 is also anti-democratic. The only successful attempt at saving himself from this implausible conclusion, though, then grants that enforcement of the original meaning of the Constitution *is* democratic. From this conclusion we believe that we can safely conclude that there is nothing particularly undemocratic about Originalism as a method of constitutional interpretation. Because it meets this baseline (along with, we believe, Living Constitutionalism), the argument above gives reason to support Originalism over Living Constitutionalism as the best expression of Rawls's idea of public reason.

7. Conclusion

We explored the question of how judges should reason in a well-ordered constitutional democracy. That judges should reason according to public reason is valid, but incomplete. In particular, the public reason requirement is indeterminate: too many different principles of interpretation are commensurate with public reason for this injunction to prove useful. But the problem increases when we explicitly consider an important but understudied Rawlsian phenomenon: the political stakes problem. The political stakes problem is that the stakes of ordinary politics will become intolerably high when the basic structure of the constitution is “up for grabs” through *de facto*, as opposed to *de jure* amendment. Rawls’s proposed solution – basic agreement on constitutional principles – fails, either because it does not go far enough at securing agreement on the rules of the game, or because it is impossible to achieve. But this problem can be solved in a way that also answers the basic question of how judges ought to reason. Judges who adopt an Originalist interpretive framework further codify the constitution by committing to potential constitutional entrepreneurs that their attempts to force through their preferred constitution in the course of majoritarian politics will fail. Judges can “eliminate the off diagonals,” thereby maintaining the basic principles of constitutional order in democratic societies.

We thus come to an unintuitive, but deeply meaningful, conclusion: there are strong Rawlsian grounds for preferring Originalism as a principle of constitutional interpretation. In contrast, various interpretive principles that fall under the rubric of Living Constitutionalism fail to satisfactorily solve the political stakes problem. Under Living Constitutionalism, the idiosyncrasies of judges matter much more in determining how the constitution will be interpreted and enforced. This shifts the locus of the political stakes problem to whatever political arena determines the selection of judges. Thus while both Originalism and Living Constitutionalism satisfy the requirements of public reason, only Originalism does so in a manner that is conducive to the maintenance and flourishing of a well-ordered constitutional democracy.

We have seen that perhaps the most powerful counter-argument to Originalism, that it is inherently undemocratic, fails. The road seems open to embracing Originalism on Rawlsian grounds. But future analysis of this question must further flesh out the changes in supporting

institutions that enable Originalism as a solution to the political stakes problem, without giving ground to the possibility of entrenched injustices. Our analysis proceeded within the normative contractarian tradition, but a turn towards the positive contractarian tradition (e.g., Buchanan and Tullock 1962/2004) can help us achieve our broader normative vision.¹⁷ In particular, knowledge of how the constitution will be interpreted and applied impinges on the basic principles of constitutional design itself. Constitutional structures, including formal amendment procedures, are made by balancing fears of the tyranny of the majority against the inconveniences of high decision-making costs. Knowledge of an explicit constitutional interpretation principle will probably affect both of these. A fuller theory of constitutions grounded in Rawlsian considerations will also have to consider the interdependencies between constitutional interpretation and constitutional design.

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¹⁷ For other attempts at reconciling the positive and normative contractarian traditions, see Kogelmann (2018)

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