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THE DEAD HAND REVISITED

*Andrew Coan**

ABSTRACT

Perhaps the oldest and most central question in constitutional theory is what gives the Constitution its special status as fundamental law. One of the oldest answers, and the answer many originalists still give today, is that the Constitution is the command of the sovereign people. Originalism, in its canonical form, may be seen as a corollary of this view. Yet almost before this argument was made, it attracted a powerful criticism, most commonly associated with Thomas Jefferson, who declared: “[T]he earth belongs in usufruct to the living. The dead have neither powers nor rights over it.” This is the famous dead hand problem, which many nonoriginalists have thought decisive, even unanswerable.

Needless to say, originalists have not been persuaded. Indeed, many originalists today seem to have forgotten that the dead hand problem requires any response at all. This essay serves as a reminder, examining the best responses to the dead hand problem and finding them wanting. In the process, it clarifies the stakes of the dead hand problem for originalists and nonoriginalists alike. As the United States confronts a mass movement for racial justice and a catastrophic pandemic presenting problems never anticipated by the founders, those stakes have seldom been more pressing.

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INTRODUCTION

Perhaps the oldest and most central question in constitutional theory is what gives the Constitution its special status as fundamental law. One of the oldest answers, and the answer many originalists still give today, is that the Constitution is the command of the sovereign people. As such, it is both the source and limit of the governmental powers it establishes.¹ Originalism, in its canonical form, may be seen as a corollary of this view. Many have made this point,² but perhaps none more famously than James Madison, arguing against the Jay Treaty in the House of Representatives in 1796:

[W]hatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.³

This argument from popular sovereignty is originalism's trump card. Judges, the theory goes, are not free agents; they are the people's agents and exercise the judicial power only as such. For them to improvise a constitutional tune as they go along would be to exercise sovereign power without popular consent and thus to usurp the people's fundamental right to govern themselves.

¹ See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.").

² See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (describing popular sovereignty as "the most common and most influential justification for originalism"); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1137 (1997); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 110 (1999); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 2-3 (1977).

³ James Madison, *Jay's Treaty*, [6 April] 1796, in 16 THE PAPERS OF JAMES MADISON 290, 295-96 (J.C.A. Stagg, Thomas A. Mason & Jeanne K. Sisson eds., 1989). The reliability of this speech as evidence of Madison's own original understanding has been questioned, but I quote it only as a representative statement of the view it expresses. Cf. Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 160-61 (1996).

Almost before this argument was made, it attracted a powerful criticism, most commonly associated with Thomas Jefferson, who put the point thus:⁴

I set out on this ground, which I suppose to be self-evident, ‘*that the earth belongs in usufruct to the living*’: that the dead have neither powers nor rights over it On similar ground it may be proved, that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.⁵

This is the famous dead hand objection, which many critics of originalism have thought decisive, even unanswerable.⁶

Needless to say, originalists have not been persuaded, and so the debate has raged on, having long since settled into a familiar *pas de deux* of moves and counter-moves. It is *de rigueur* for critics of originalism to point out that originalism is not, in fact, rule by the people but rather rule by dead, white, male landowners, whose dictates Article V makes exceedingly difficult (and, in some cases, impossible)⁷ for the people of today to change.⁸ Originalists offer a ready retort. The dead hand objection is a head fake, they insist. Critics of originalism don’t want to increase flexibility for contemporary majorities, but rather to fit them with the bit and bridle of judicial tyranny, in the form of newly discovered rights under the Due Process and Equal Protection Clauses.⁹

Neither of these arguments is particularly convincing in its most frequently repeated form. I have no wish, however, to rehash this unifying debate. Instead, this brief essay examines a few of the more persuasive but less discussed arguments made on originalism’s behalf. On close analysis, these arguments

⁴ Similar arguments were made by a number of other well-known figures around the same time, including Adam Smith, Noah Webster, and Marquis de Condorcet. See Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1088–89 (1998).

⁵ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 395–96 (Julian P. Boyd ed., 1958).

⁶ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980) (describing the popular sovereignty argument as “largely a fake”); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980); cf. Rubenfeld, *supra* note 4, at 1104 (“Like every good originalist, Bork never had any account—no account at all—explaining why the will of the dead should govern.”).

⁷ U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

⁸ See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 74–76 (2005).

⁹ See, e.g., BORK, *supra* note 2, at 170–71; ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 41–42 (1997).

turn out to be just as unpersuasive as the more familiar ones, but they are considerably more interesting.

Part I dispenses with a few of the more facile responses to the dead hand problem. Part II considers the Burkean response offered, in different forms, by Jed Rubenfeld and Michael McConnell. Part III turns to Keith Whittington's agency slack and "potential sovereignty" arguments. Two decades after their original publication, these arguments remain the best responses to the dead hand problem, but they have not received the attention they deserve. Indeed, many originalists today seem to have forgotten that the dead hand problem requires any response at all.¹⁰ This essay serves as a reminder. In the process, it clarifies the stakes of the dead hand problem for originalists and nonoriginalists alike. As the United States confronts a mass movement for racial justice and a catastrophic pandemic presenting problems never anticipated by the founders, those stakes have seldom been more pressing.

I. BRUSH CLEARING

A few originalist responses to the dead hand problem may be quickly dispensed with at the outset. This Part addresses three of them.

Originalists occasionally attempt to deflect the dead hand objection by pointing out that most Americans venerate the Constitution.¹¹ This argument is unpersuasive for two reasons. First, and most obviously, most Americans have not read the Constitution.¹² What they venerate is a hazy idea that bears little relationship to the actual text of the document, much less its original meaning. Second, the American public's high opinion of the Constitution reflects a large body of nonoriginalist precedents that dictate what the Constitution means in practice. If adherence to original meaning required the Court to return to its pre-*Wickard v. Filburn*¹¹ federalism jurisprudence, striking down Social Security,

¹⁰ I do not mean that they have literally forgotten. Rather, there seems to be a broadly shared assumption among originalists that the challenges of justifying originalism have been overcome, freeing its proponents to move on to questions of implementation and application. This is a reflection of originalism's success in generating a community of committed academic adherents.

¹¹ See McConnell, *supra* note 2, at 1132.

¹¹ 317 U.S. 111 (1942).

¹² Press Release, The Annenberg Pub. Pol'y Ctr. of the Univ. of Pa., Americans Are Poorly Informed About Basic Constitutional Provisions (Sept. 12, 2017), <https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2017/09/Civics-survey-Sept-2017-complete.pdf> or 2; Sharon R. Fitzgerald, *Survey: U.S. Admires, but Hasn't Read the Constitution*, DAILY PROGRESS, https://dailyprogress.com/news/survey-u-s-admires-but-hasnt-read-constitution/article_a4d58bd4-3e2d-50e3-859b-fcede87ec145.html (last updated May 15, 2019).

the Clean Water Act, and the federal minimum wage, the level of Constitution worship would very likely decline markedly. Alternatively, most people might come to view such decisions as a betrayal, rather than a restoration, of the Constitution. Either scenario would forcefully undercut the originalist assumption that veneration for the Constitution implies approval of its original meaning.

More substantive is the claim of some originalists that a simple majority of the people can lawfully amend the Constitution outside the formal strictures of Article V.¹³ If this were true, and there is some evidence that it was understood to be true at the founding, it would go a long way toward mitigating the dead hand problem.¹⁴ Original meanings would receive only what amounts to a tie-breaking vote, which stability and reliance and coordination considerations might justify giving them anyway. But there is a serious difficulty with this view, even beyond the need for a procedure determining whether an amendment has the requisite majority support—though that is hardly a small concern. It simply isn't true, in any meaningful sense. Everyone besides a few legal academic cognoscenti believes that the Article V amendment procedures are exclusive.¹⁵ In light of this fact, to suggest that there is no dead hand problem because the people really have the power to amend the Constitution by simple majority is like saying Dorothy had no wicked witch problem because her ruby slippers really gave her the power to teleport back to Kansas all along. In both cases, the power is meaningless without knowledge of its existence, a point underscored by the fact that popular majorities outraged by Supreme Court decisions on subjects such as school prayer, flag burning, and campaign finance have felt compelled to proceed through the cumbersome Article V process.¹⁶

A more interesting argument is Stephen Holmes's claim that the dead hand of the past can enable rather than constrain present generations by putting in place democratic institutions and procedures that will function better if they are

¹³ See, e.g., Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); McConnell, *supra* note 2, at 1131.

¹⁴ Amar, *supra* note 13, at 1073–75.

¹⁵ Cf. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2631 (2003) (“Think about the large public majority in the Gibson, Caldeira, and Spence study of public knowledge who said the Supreme Court has the final authority to say what the Constitution means.”).

¹⁶ See, e.g., H.R. Rep. No. 105-543 (1998) (proposing a constitutional amendment granting a right to pray). Of course, these groups have also worked through the democratic process to advocate for the appointment of judges sympathetic to their views. But even originalists who believe in popular constitutional amendment outside of Article V presumably do not view this as a legitimate avenue of constitutional change. If they did, they would have no standing to criticize the legitimacy of nonoriginalist decisions produced by the same political process of judicial appointment.

difficult to change.¹⁷ As an analytical matter, this is clearly true: entrenched constitutional meanings can enable as well as constrain. Indeed, such provisions can enable *by* constraining. Without reasonably well-settled rules of the game, democratic politics—like chess or football—would be impossible. But Holmes’s argument fails as a general response to the dead hand problem because it provides no reason to respect past constitutional commitments as such, only those commitments that are integral to the democratic process. Even as to those commitments, Holmes supplies a consequentialist, rather than democratic, defense of originalism. The point is that the present generation will do better if judges rigidly enforce some original commitments. It is not that the principle of popular sovereignty compels this approach. Other considerations could and presumably will outweigh the benefits of rigidity in particular cases.

Finally, while the survival of democracy may require that not all democratic institutions be subject to change simultaneously, this is very different from saying that every constitutional rule must be fixed from the date of its ratification. Treating most constraints as mostly fixed most of the time seems likely to be quite sufficient. Indeed, the entire original meaning of the Constitution might be incrementally supplanted over time—like the planks of the ship of Theseus—without compromising the stability required in the constitutive rules of the democratic game.¹⁸ Thus, Holmes neither supplies a convincing argument for respecting the democratic authority of original meaning to bind contemporary Americans, nor a compelling alternative justification for originalism in constitutional interpretation.

II. FREEDOM OF THE MAYFLIES

Two additional responses to the dead hand objection warrant more substantial attention. The first, espoused by Jed Rubenfeld and Michael McConnell and rooted in the philosophy of Edmund Burke, is the claim that “written constitutionalism can only be properly understood, it can only claim

¹⁷ Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988); see also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (defending countermajoritarian constitutionalism more generally, on consequentialist grounds). Another excellent, though more conventional, response to the dead hand objection that I shall not discuss here is Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

¹⁸ The Ship of Theseus paradox poses the question whether a ship whose planks have all been replaced can remain the same ship. See 1 PLUTARCH, *The Life of Theseus*, in LIVES 55 (John Dryden trans., Edinburgh, A. Donaldson & J. Reid 1763). For present purposes, the important question is not whether the rebuilt ship—or Constitution—is “the same” in some rarefied philosophical sense. What matters is that it floats.

legitimate authority, as an effort by a nation to achieve self-government *over time*.”¹⁹ I cannot do full justice to their richly textured argument here, but it can be fairly summarized as follows: human beings exist in time and therefore, to be truly free, they must be able to make decisions and commitments that extend over time. In fact, our ability to make such decisions and commitments is the essence of human freedom. It is what sets us apart from “the flies of summer,” who are free to act for themselves in all cases, “unburdened by the past or the future,” but for this very reason are not free in any recognizably human sense.²⁰

The implications for the dead hand problem should be obvious. The concealed premise of that objection—that the people must be free to decide for themselves from moment to moment—would reduce us to the state of mayflies. That may be fine for Jefferson, but Rubinfeld and McConnell prefer Burke’s richer version of freedom, which recognizes that “we are not alone in the present, but part of a historical community” with a corresponding “web of rights and obligations”²¹ arising from our “nation’s struggle to lay down temporally extended commitments and to honor those commitments over time.”²²

This is a powerful vision but ultimately only partially compelling. It is undoubtedly true that human beings would be less free if we could not make commitments that extend over time. This is not just because such commitments—to democratic institutions, for example—provide a necessary framework for self-government, as Stephen Holmes observes.²³ It is also because making temporally extended commitments is itself a vital human activity, whether in the form of marriage, parenthood, or the Apollo Space Program. But analogies across these various human activities cannot be extended too far. It is one thing to say that parents would be meaningfully less free if they could not assume gradually diminishing life-long obligations to their children (obligations which, not incidentally, serve an important social function). It is quite another to say that societies would be less free if they could not bind their distant posterities to a fixed constitutional mast. Both statements are literally true, but it is not clear why we should respect the latter form of

¹⁹ McConnell, *supra* note 2, at 1134 (quoting Rubinfeld, *supra* note 4, at 1111). The two draw starkly different conclusions on the basis of this claim, but these need not concern us here. Compare McConnell, *supra* note 2, at 1136–40 (defending a fairly conventional amalgam of originalism, traditionalism, and restraint), with Rubinfeld, *supra* note 4, at 1107 (defending a somewhat idiosyncratic “paradigm-case” method). Rubinfeld’s views are elaborated at greater length in JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001).

²⁰ McConnell, *supra* note 2, at 1134 (describing Burke’s “flies of summer” metaphor).

²¹ *Id.*

²² Rubinfeld, *supra* note 4, at 1105.

²³ See generally Holmes, *supra* note 17.

freedom. What is it to James Madison or John Bingham and their contemporaries whether present-day Americans respect the original meaning of the Commerce and Equal Protection Clauses?²⁴ Surely, their interest in these questions—if it exists at all—is far weaker than the interest of present-day Americans.

This does not quite settle the question, however. Present-day Americans might themselves have reason to prefer that judges respect the original meaning of these provisions. Perhaps the original meaning of the Equal Protection Clause is capacious and, if properly understood, would still be seen as compelling today.²⁵ Perhaps that meaning has so shaped contemporary American understandings of equal citizenship that for judges to depart from it and strike out on their own would be deeply unsettling. Or perhaps the original meaning is cramped by contemporary standards, but judges will nonetheless do better according to those standards by hewing to it closely because their own preferred readings would be even worse. All of these possibilities seem quite remote, but if true, they would provide good, present-regarding reasons for contemporary judges to care about original meaning.

More plausible reasons could be constructed if we substitute “tradition” for “original meaning.” There are two arguments, however, that cannot provide a good reason for adhering either to original meaning or tradition. The first is the quasi-mystical idea that we owe a duty to the past for its own sake;²⁶ the second is the equally superstitious claim that we are part of a single, historically extended, self-governing abstraction called the American people, whose past decisions are our own and can therefore bind us.²⁷ The point is nicely summed up in Justice Holmes’s famous dictum: “continuity with the past is only a necessity and not a duty.”²⁸ Whatever homage we pay to previous generations, we pay—or ought to pay—for our own sake, not for theirs.²⁹

²⁴ Bingham, of course, was the principal draftsman of first section of the Fourteenth Amendment. See Richard L. Aynes, *On Misreading John Bingham and the 14th Amendment*, 103 YALE L.J. 57, 58 (1993).

²⁵ See, e.g., Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648 (2016); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997). But see Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 TUL. L. REV. (forthcoming 2020–21) (criticizing these optimistic accounts on historical grounds).

²⁶ See, e.g., Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 369 n.82 (2006) (“In my view, this idea [that the past has an authority of its own] should be discredited on the ground that it is mystical.”).

²⁷ *Id.* at 369.

²⁸ OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 211 (1920). For a superb elaboration of Holmes’s point as a central tenet of legal pragmatism, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 807 (1989).

²⁹ This point is fully consistent with Richard Primus’s observation that originalist argument—paying homage to previous generations—is not only a technology of decision-making. It is also a mechanism for

Two points follow. First, and most obviously, originalists are wrong to claim that judges are democratically obligated to adhere to original meaning, without regard to the views of present-day majorities. Second, nonoriginalists who object to dead hand control by the founders must explain why control by contemporary judges interpreting an ancient constitutional text is any better. This is the sting of the dead hand problem for nonoriginalists. Of course, as Holmes succinctly points out, there can be no categorical objection to the influence of past majorities on contemporary legal and political affairs. That influence is simply a fact of life, reflected every bit as much in the actions of Congress and the President—both created by long-dead founders—as in decisions by politically insulated federal judges.³⁰ But where a constitutional decision would provoke strong and sustained opposition among a majority of present-day Americans, the democratic premises of the dead hand problem imply at least a presumption—rebuttable, to be sure—that the views of the majority should prevail. Any nonoriginalist who wields the dead hand objection against originalism must take this implication seriously.

III. POTENTIAL SOVEREIGNTY

This becomes even clearer when we examine Keith Whittington's response to the dead hand objection. Whittington begins with the forthright admission that "the neutral enforcement of [constitutionally] embodied values will necessarily go against current majoritarianism."³¹ He then goes on to offer a two-part defense of this arrangement. His first, quite straightforward point is that originalism protects the people against the risks associated with agency slack—the discretion of imperfectly accountable government representatives to act against the people's interests—which he suggests are particularly serious in the constitutional context.³² His second point is somewhat subtler. Judges should adhere to original meaning, he says, because treating past expressions of popular sovereignty as legally binding is the only way to "render the possibility of [future] expressions meaningful."³³ Whittington calls this the doctrine of

helping Americans feel themselves connected to the Framers of the Constitution and thereby to diminish our sense of being ruled by an inherited law that we did not choose." Richard Primus, *Sinai and Philadelphia*, TABLET (Mar. 25, 2020), <https://www.tabletmag.com/sections/holidays/articles/sinai-and-philadelphia>.

³⁰ See Christopher Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1615 (1997) ("Whether we have a written constitution or not, we inherit our politics from the past; no people writes on a blank slate.").

³¹ WHITTINGTON, *supra* note 2, at 44.

³² *Id.* at 131.

³³ *Id.* at 155.

“potential sovereignty” and presents it as the most important democratic argument for originalism.³⁴

Neither of these defenses is persuasive. Most obviously, Whittington’s agency slack argument has little purchase where judges adhering to original meaning would override the wishes of an aroused public majority, say, by striking down the Clean Air Act, Social Security, or the Bipartisan Campaign Reform Act. In such cases, judges do not restrain government officials from acting against the interest of the people; they *become* such officials. Even where the public is indifferent to judicial invalidation, Whittington’s argument falls flat. There is no question that agency slack is a serious problem in such situations, which comprise the great majority of constitutional questions. But the effect of originalism would be to appoint long-dead framers and ratifiers as the people’s agents on these issues. This is hardly an obvious improvement over their current representatives or even contemporary judges chosen through a highly politicized appointments process.

The potential sovereignty argument is weightier but still significantly overstated. Popular sovereignty would be fatally undermined only if judges refused to enforce *relatively new* constitutional amendments in accordance with their original meaning, an approach almost no one advocates.³⁵ Flexible interpretation of the Commerce Clause, by contrast, poses no threat at all to the people’s sovereign right to pass a fully effective amendment banning flag burning—or, for that matter, an amendment restoring the horse-and-buggy Commerce Clause of the early Hughes Court.

Even if Whittington’s potential sovereignty argument were correct, it would not be at all clear that a duty of fidelity to the original sovereign ratifiers would compel the Court to follow an originalist approach. It is, after all, a Constitution the Court is expounding.³⁶ In the unforeseeable event that their handiwork survived more than 200 years, the sovereign people of 1789 may well have preferred the Court to interpret the Constitution with a “statesman’s breadth of view” rather than a “pedantic and academic” originalism.³⁷ How else could a

³⁴ *Id.*

³⁵ See Mark Graber, *Original Expectations*, CONN. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3536639; Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 211 (2008).

³⁶ *Cf. McCulloch v. Maryland*, 17 U.S. 316 (1819).

³⁷ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893). While perfectly plausible—and perhaps even compelled—as a matter of agency theory, this account of fidelity hardly amounts to originalism at all. See Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395, 411 (1997).

Constitution intended to endure for ages to come be adapted to the various crises of human affairs, such as a viral pandemic and a long overdue reckoning with centuries of racial injustice?

CONCLUSION

Originalism might still be defended on other grounds, of course. Perhaps originalism is inherent in the concept of interpretation or written constitutionalism. Perhaps originalism produces better consequences than alternative approaches. Or perhaps originalism is simply “our law” in the positivist sense.³⁸ But the most sophisticated originalists have recognized the deficiency of conceptual arguments from interpretation and writtenness.³⁹ And deprived of the trump card of democracy, consequentialist defenses of originalism face the substantial difficulty of showing that original meaning would yield better results than the universe of plausible alternatives—globally, or in particular cases.⁴⁰ Positivist defenses of originalism, which purport to dissolve the dead hand problem, have serious problems of their own.⁴¹ Even if successful, any of these defenses would have to be weighed against the democratic deficits of originalism. For those defenders of originalism who view popular sovereignty as paramount, the only principled response to the dead hand problem is probably to abandon originalism altogether.

The dead hand problem has implications for nonoriginalists, too. Any nonoriginalist who invokes the dead hand problem as a basis for rejecting originalism must be prepared to explain how her own preferred interpretive approach can be reconciled with popular sovereignty. But as a group, nonoriginalists have grappled with this challenge more directly and productively than have originalists. Some nonoriginalists grasp the nettle and forthrightly defend the need for a countermajoritarian judiciary as a good in itself or as a prerequisite to democratic legitimacy. Some take the opposite tack and advocate Thayerist judicial restraint, popular constitutionalism, democratic constitutionalism, or representation reinforcement. Others defend countermajoritarian judicial review on pragmatic grounds. Whatever the merits of these arguments, revisiting the dead hand problem underscores that this is the

³⁸ See Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 833, 837–38 (2017).

³⁹ See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015); Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL’Y 817 (2015).

⁴⁰ See Coan, *supra* note 38.

⁴¹ See, e.g., Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017); Coan, *supra* note 38, at 864–84; Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (2016).

terrain on which the battles of constitutional theory must be fought.