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ORIGINALISM VS. PRECEDENT: AN EVOLUTIONARY PERSPECTIVE

*Theodore P. Seto**

Despite repeated attempts to kill it, originalism is flourishing. It survives, in my view, not because of the superiority of intellectual arguments in its defense. It survives rather because of its inherent intuitive appeal. Even nonoriginalists, when advocating a result defensible by originalist arguments, will almost inevitably make such arguments.

Originalism is not, of course, unique to constitutional interpretation. Statutory interpreters use originalist techniques in construing statutory texts.¹ In the United States, lower courts profess to be bound by the text of Supreme Court and other appellate court opinions, parsing sentences written by recent law graduates as if they were divine revelation.² Nor is originalism restricted to law. Islamic traditionalists insist on the originalist primacy of the Koran and *hadith* or *sunna*;³ Christian Reconstructionists, on the literal text of the Christian Bible.⁴

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1. For an exploration of the relationship between theories of statutory and constitutional interpretation, see Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1 (2004).

2. For a discussion of the textualization of precedent, see Peter Tiersma, *The Textualization of Precedent*, LOY. L.A. LEGAL STUD. RES. PAPER SERIES, Loyola-LA Legal Studies Paper No. 2005-6 (forthcoming 2005) (copy on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=680901.

3. See, e.g., JOHN BURTON, THE SOURCES OF ISLAMIC LAW: ISLAMIC THEORIES OF ABROGATION 9–11 (1990); Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP. L. 1, 1–2 (1998); YASSIN DUTTON, THE ORIGINS OF ISLAMIC LAW 1 (1999); Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in THE OXFORD HISTORY OF ISLAM 107, 107–10 (John L. Esposito ed., 1999).

4. See, e.g., ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL

The problem of originalism arises in any context in which a fixed text is deemed authoritative. Once we concede the existence of an authoritative text, we must necessarily define our relationship to that text. Originalism is the simplest such relationship: the text and its original meaning are authoritative, period. No subsequent interpretation or development is comparable in persuasive weight. A decision-maker may legitimately ignore intervening learning and explore the text *de novo* whenever the two conflict. Any credible alternative to originalism must either deny the authoritativeness of the text or define some other plausible relationship between the text and its reader. This is often difficult. Hence originalism's intuitive appeal.

It is not my purpose here to review the extensive literature on originalism in American law.⁵ I propose instead to ask and answer a question less commonly addressed in that literature: Is there any reason to believe that originalist interpretive methods will, on average, produce better or worse rules than nonoriginalist interpretive methods? I am not asking about legitimacy; originalist methods may well produce more legitimate outcomes. My focus is rather on the merits of the resulting rules themselves. A rule requiring a belief that the world was created in seven days,⁶ a rule requiring that adulterers be put to death,⁷ or a rule allowing states to establish separate public facilities for persons of different races⁸ may be "bad" even if legitimate interpretation of some authoritative text requires it.

LAW 2-4 (1973).

5. For reviews of the statutory originalist literature, see, for example, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 13-47 (1994); Carlos E. Gonzáles, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 594-634 (1996); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 804-59 (1994). For reviews of the constitutional originalist literature, see, for example, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89-117 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 18-34 (1999); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

6. See *Genesis* 1:1-2:2 (New Revised Standard).

7. See *Leviticus* 20:10 (New Revised Standard); RUSHDOONY, *supra* note 4, at 394, 398-400.

8. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896).

But how, one may ask, can one postulate any plausible general criterion for determining whether a given interpretation of the Constitution, a statute, a Biblical verse, or any other authoritative text is substantively “good” or “bad”? The approach I take in this essay is to describe how cultures learn and, on the basis of that description, assert that such learning is itself adaptive. If cultures learn and such learning is adaptive, then any decision-making procedure that systematically ignores such learning is problematic.

Originalism is just such a procedure. By “originalism” I mean any text-based decision-making technique that permits its user to ignore intervening learning and rely on some aspect of the original text—the “intent” of its author(s), its purpose, its public meaning, or the language of the text itself—whenever the two conflict. Assuming the text incorporates all relevant cultural learning at the moment it is issued, in the early days of its interpretation, originalism should produce decisions incorporating that learning. The more a culture learns after the text becomes fixed, however, the more problematic originalism becomes. If the text is amended periodically to reflect such subsequent learning, the problem is ameliorated—perhaps even eliminated. In our system of government, however, even statutes are often hard to amend; indeed, lawmakers rarely attempt to codify intervening learning on an ongoing basis.⁹ Amendments to the U.S. Constitution are generally undertaken only when intervening learning cannot be reconciled with the existing text using interpretive techniques other than strict originalism. And most religious texts are, at least in theory, not subject to amendment at all.

I should note at the outset that my use of the term “originalism” may not, in some cases, correspond to conventional usage. Applied at a sufficient level of abstraction, originalism as more conventionally defined may never, in practice, require that we discard intervening learning. If, for example, we view the Internal Revenue Code as providing for the taxation of “income,” with courts supplying the details as needed, the exact wording of, say, Code Section 1001 becomes less interesting.¹⁰ If we view the Bible as mandating something like the Golden Rule, we can gracefully ignore

9. Under the U.S. Constitution, statutory amendments must be approved by three entities: both houses of Congress and the President. A simple majority vote is not sufficient. U.S. CONST. art. I, § 7.

10. See *infra* text accompanying notes 67–74.

the details of Leviticus 20:10.¹¹ If we view the Fourteenth Amendment as merely constitutionalizing an abstract norm of equality, mid-Nineteenth Century notions of the proper treatment of women and people of color become irrelevant.¹² At some point, abstract originalism ceases to be “originalism” for purposes of this essay. Here, I mean to focus on originalism with real teeth.

I. CULTURAL LEARNING, ON THE WHOLE, IS ADAPTIVE

Cultures learn. In many respects, this is a trivial observation. Two hundred years ago, we traveled in horse-drawn carriages; today, we travel by jet. Two hundred years ago, we communicated beyond voice range by laboriously hand-delivered letter; today, distance communication is electronic and effectively instantaneous. Two hundred years ago, bacterial disease killed princes and paupers alike; today, for the most part, it is a relatively minor threat to public health.

Some would argue, however, that cultural learning takes place primarily with respect to material well-being, that the most fundamental aspects of any culture—its values—remain constant over time. In his Second Inaugural Address, for example, President George W. Bush declared that: “Americans move forward in every generation by reaffirming all that is good and true that came

11. See *Leviticus*, *supra* note 7.

12. In American constitutional law, originalist techniques can be applied in a variety of ways: the interpreter can look at the literal text or the specific intent of its framers, on the one hand, or at their more general purposes at any of a variety of levels of abstraction, on the other. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 17–25 (1997). The more abstract an originalist inquiry, the more likely it can accommodate subsequent learning, and the less likely it will require a court to discard intervening learning. As Chemerinsky notes, “[A]t the highest level of abstraction, the framers desired liberty and equality; almost any imaginable court decision can be justified as consistent with these values.” *Id.* at 23. I use the term “originalism” here to refer only to interpretive techniques the use of which entails a real possibility of discarding intervening learning. My use of the term encompasses strict textualism, which some view as conceptually different. See, e.g., Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985); *Symposium: Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1081 (1998); see also Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner’s Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451 (2002) (discussing textualism in statutory interpretation).

before—ideals of justice and conduct that are the same yesterday, today, and forever.”¹³ In other words, that what is really important does not change. This simply is not so.¹⁴

Consider, for example, that less than a century and a half ago, eminent Americans commonly praised genocide as a legitimate tool of public policy. Oliver Wendell Holmes, father of the U.S. Supreme Court justice and himself a well-known physician, commentator, and poet,¹⁵ argued in 1855 that eradication of the Native American “was the necessary ‘solution of the problem of his relation to the white race.’”¹⁶ In 1876, William Dean Howells, America’s leading literary intellectual,¹⁷ expressed “patriotic pride”

13. George W. Bush, Second Inaugural Address (Jan. 20, 2005), at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html> (last visited Feb. 18, 2005).

14. Henry Louis Gates elegantly expresses this point as follows:

History is, in no small part, a chronicle of formerly acceptable outrages. Once upon a time, perfectly decent folk took it for granted that watching two gladiators hack each other to death was just the thing to do on a summer afternoon, that co-religionists with whom you had teensy doctrinal differences were best roasted on an open fire, that making slaves of Africans was a good deal for all concerned, and that participation in politics should be restricted to male landowners. What were they thinking? You could say that posterity is a hanging judge, except that sooner or later capital punishment, too, will turn up on that chronicle of outrages.

Steven R. Manley, *The Constitution, the Punishment of Death, and Misguided “Originalism”*, 1999 L. REV. MICH. ST. U. DET. C.L. 913, 914 (1999) (quoting Henry Louis Gates, Jr., *Men Behaving Badly*, NEW YORKER, Aug. 18, 1997, at 4).

15. See generally WILLIAM SLOANE KENNEDY, OLIVER WENDELL HOLMES, POET, LITTÉRATEUR, SCIENTIST (1976) (describing the accomplishments of Oliver Wendell Holmes).

16. DAVID E. STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD 244 (1992).

17. See The William Dean Howells Society, *About W.D. Howells*, at <http://guweb2.gonzaga.edu/faculty/campbell/howells/hbio.html> (last visited Feb. 28, 2005). Known during the late nineteenth and early twentieth century as the “Dean of American Letters,” William Dean Howells (1837–1920) served as Assistant Editor, then Editor, of the *Atlantic Monthly* from 1866 to 1881. *Id.* His best-known novel is *The Rise of Silas Lapham*, published in 1885. *Id.* In 1908, he was elected the first president of the American Academy of Arts and Letters, now the American Academy and Institute of Arts and Letters. *Id.* The Howells Medal for American Fiction is still presented by the Academy twice a decade for the most distinguished work of American fiction published during the preceding five years. See *American*

in advocating “the extermination of the red savages of the plains.”¹⁸ In 1904, G. Stanley Hall, America’s leading psychologist,¹⁹ wrote: “Never, perhaps, were lower races being extirpated as weeds in the human garden, both by conscious and organic processes, so rapidly as to-day. . . . The world will soon be overcrowded, and we must begin to take selective agencies into our own hands.”²⁰ Soon-to-become-President Theodore Roosevelt opined that the extermination of the Native Americans and expropriation of their lands “was as ultimately beneficial as it was inevitable.”²¹ Adolf Hitler especially admired the American approach to groups viewed as genetically inferior and cited it in support of his policies.²² Today, by contrast, Americans abhor genocide. It is true, of course, that Americans have

Academy and Institute of Arts and Letters, in THE COLUMBIA ENCYCLOPEDIA 84 (Paul Lagassé ed., 6th ed. 2001).

18. STANNARD, *supra* note 16, at 245.

19. See G. Stanley Hall Lectures, *A Brief Biographical Sketch of G. Stanley Hall*, at http://www.ithaca.edu/beins/gsh/gsh_bio.htm (last visited Feb. 20, 2005). After studying at Harvard under William James, Hall (1844–1924) established the first psychology laboratory in the United States at Johns Hopkins. He founded the *American Journal of Psychology* in 1887, the *Journal of Genetic Psychology* in 1891, and the *Journal of Applied Psychology* in 1915. In 1892, he was elected the first president of the American Psychological Association, to which position he was reelected shortly before his death. He has been characterized as “the great teacher of graduate students in the first decades of American psychology.” DAVID HOTHERSHALL, HISTORY OF PSYCHOLOGY 296 (2d ed. 1990). As of 1898, he had supervised thirty of the fifty-four existing American-educated Ph.D.’s in the field. Today, the American Psychological Association honors Hall with the G. Stanley Hall Lecture Series. See G. Stanley Hall Lectures, *A Brief Biographical Sketch of G. Stanley Hall*, at http://www.ithaca.edu/beins/gsh/gsh_hist.htm (last visited Feb. 20, 2005).

20. STANNARD, *supra* note 16, at 245.

21. *Id.*

22. *Id.* at 245–46; see EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE 275–76 (2003). In 1924, when Hitler wrote *Mein Kampf*, he frequently quoted American eugenic ideology and openly displayed a thorough knowledge of American eugenics and its phraseology. “‘There is today one state,’ wrote Hitler, ‘in which at least weak beginnings toward a better conception [of immigration] are noticeable. Of course, it is not our model German Republic, but the [United States].’” *Id.* Hitler proudly told his comrades just how closely he followed American eugenic legislation. “‘I have studied with great interest,’” he told a fellow Nazi, “‘the laws of several American states concerning prevention of reproduction by people whose progeny would, in all probability, be of no value or be injurious to the racial stock.’” *Id.*

always claimed to be bound by the commandment, “Thou shalt not kill,”²³ but our abhorrence of genocide, a deeply held modern value, is new. It is not an “ideal[] of justice and conduct . . . the same yesterday, today and forever.”²⁴

Similarly, less than half a century ago, major American politicians routinely defended racial segregation and were praised for doing so. In 2001, Senator Trent Lott gave a speech celebrating a former segregationist’s career, echoing that praise: “I want to say this about my state. When Strom Thurmond ran for president, we voted for him. We’re proud of it. And if the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years either.”²⁵ American attitudes had changed so profoundly in the interim that public outrage forced Senator Lott to resign as Senate Majority Leader.²⁶ This year, under a conservative U.S. president, an African-American woman succeeds an African-American man as Secretary of State.²⁷ Again, most Americans have always claimed to believe that “all men are created equal.”²⁸ Our generally accepted implementation of this norm, however, has only recently come routinely to include people of other races—again, a profound change in values.

Of course, the fact that fundamental behaviors change over time does not necessarily mean they change for the better. In the United States, the past half-century has witnessed both the Warren Court’s expansion of the rights of criminal defendants and a partial reversal of that expansion by subsequent Courts.²⁹ Attitudes towards pre-

23. *Exodus* 20:13 (King James).

24. Bush, *supra* note 13.

25. See Adam Clymar, *Divisive Words: The Downfall; 30-Year Dream of Leadership Is Undone by a Lack of Allies*, N.Y. TIMES, Dec. 21, 2002, at A19.

26. See Nick Anderson, *Lott Resigns His Post as Senate GOP Leader*, L.A. TIMES, Dec. 21, 2002, at A1.

27. See Richard B. Schmitt & Tyler Marshall, *Rice Is Confirmed Despite Opposition*, L.A. TIMES, Jan. 27, 2005, at A24.

28. American Declaration of Independence (1776), reprinted in IV THE ENCYCLOPEDIA OF DEMOCRACY 1432 (Seymour Martin Lipset ed., 1995).

29. See, e.g., Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185 (1983); Darryl K. Brown, *The Warren Court, Criminal Procedural Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004); Stephen F. Smith, *The Rehnquist Court and Criminal*

marital sex have become far more permissive.³⁰ Women spend less time raising children, more time in the workplace.³¹ The Rehnquist Court has proclaimed a robust new federalism.³² I do not mean to endorse or condemn any of these changes. My point is simply that the mere fact they have occurred does not necessarily mean they are good. How then can we conclude that, on the whole, cultural learning is adaptive and should be valued?

A. *What is Evolution?*

The model I propose to use to explore this question is based on evolutionary theory.³³ The concept of evolution I invoke is unfamiliar to some; I therefore begin by outlining the concept itself. Evolution, as I use the term, has nothing inherently to do with biology or the origins of life. It is simply a probabilistic process that changes the characteristics of populations of a wide variety of phenomena in predictable ways over time—what science sometimes calls “selection.” In Part I, I argue that a culture’s learned behaviors are subject to this process; in Part II, that American judicial decisions are subject to the same process.

How does evolution work? Imagine the following game played with a bag of marbles. Initially, the marbles are a variety of colors,

Procedure, 73 U. COLO. L. REV. 1337 (2002); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?*, 20 HARV. J.L. & PUB. POL’Y 435 (1997).

30. See, e.g., Helen M. Alvaré, *Saying “Yes” Before Saying “I Do”: Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 7 (2004).

31. See, e.g., Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000); Pamela J. Smith, *Part I—Romantic Paternalism—The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER RACE & JUST. 107, 122–29 (1999).

32. See, e.g., Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570 (2003) (“[T]he dominant theme of the second Rehnquist Court has been constitutional federalism, including the scope of federal power under the Commerce Clause and Section 5 of the Fourteenth Amendment, Tenth Amendment limitations on federal power, and state sovereign immunity from private lawsuits reflected in the Eleventh Amendment.”).

33. Aspects of this model are outlined in Theodore P. Seto, *Intergenerational Decision Making: An Evolutionary Perspective*, 35 LOY. L.A. L. REV. 235 (2001).

randomly selected. At each turn, two things happen. First, half the marbles are taken out of the bag. For evolution to operate, the probability that a particular marble will be removed depends on one or more criteria external to the marbles themselves. Assume, for example, that the darker the marble, the more likely it will stay in; the lighter, the more likely it will be taken out. The second thing that happens is that the marbles remaining in the bag replicate themselves—each produces a second, identical marble. As a result, at the end of the turn the bag holds the same number of marbles it started with. But the average marble at the end of the turn is likely to be darker than the average marble at the beginning of the turn. Given a large enough bag, this should be true even if the probability of a light marble being removed is only *slightly* larger than the probability of a dark marble being removed. Now assume the procedure is repeated again and again. Eventually, with a probability approaching one hundred percent, the average marble in the bag will be very dark.

This is evolution in operation. Staying in the bag is equivalent to survival. Our marbles are, in effect, surviving and reproducing differentially in response to environmental conditions—in this case, a preference for dark marbles. The net effect is to produce a final population of marbles quite different from that with which we began. The process will work even if all the marbles in the bag are initially white, provided that we add one additional factor: imperfect reproduction. Assume that when the marbles remaining in the bag replicate themselves they *almost* always—but not always—produce marbles of identical color. On occasion they mutate, randomly generating offspring of some slightly darker or lighter color. With this additional factor, even if we start with marbles that are completely white, evolution will still eventually produce a bag of dark marbles.

We most commonly apply evolutionary theory to explain genetic change. As a matter of logic, however, the process itself applies to any phenomena that meet three criteria: (1) such phenomena survive or reproduce differentially in response to a common set of environmental conditions; (2) they reproduce imperfectly; and (3) adaptive imperfections in their reproduction are

not systematically disfavored.³⁴ If these three criteria are met and environmental conditions are relatively stable, logic tells us that over time such phenomena will, with a probability approaching certainty, become better adapted to the environmental conditions they face. This is the law of evolution.³⁵

B. Learned Behaviors Evolve

Some behaviors are triggered by genetically-controlled mechanisms. Ants forage. Bees dance. Opossums play dead. Beavers build. We call such behaviors “instinctive.” They are transmitted genetically, which means that a change in such behaviors requires genetic change. In humans, the beating of our heart, breathing, and suckling all appear to be triggered by genetically controlled mechanisms. Humans differ from most other species, however, in that most of our behaviors are, at least to some extent, learned. By “learned behaviors” I mean simply behaviors that can be transmitted other than genetically. Importantly, such behaviors can change without the requirement of any genetic change.

Evolutionary theorists are still struggling with the problem of how to think about learned behaviors. Biologist Richard Dawkins suggested one approach in 1976. In an afterthought at the end of a book on genes, he suggested that evolution might also apply to “memes,” which he defined alternatively as units of cultural transmission or units of imitation.³⁶ Others have picked up on his suggestion.³⁷ Unfortunately, it remains unclear what a “meme” is.³⁸

34. See 2 ENCYCLOPEDIA OF EVOLUTION 798–99 (Mark Pagel ed., 2002).

35. This is a generalized nonmathematical restatement of Fischer’s Fundamental Theorem of Natural Selection. See 1 *id.* at 371–72; DANIEL L. HARTL, A PRIMER OF POPULATION GENETICS 244–45 (2d ed. 1988). For purposes of this definition and law, an “environmental condition” is a condition external to the phenomena in question that affects their survival or reproduction; it is “relatively stable” if it does not change as fast as evolution operates; a characteristic is “adaptive” if such phenomena are more likely to survive and reproduce successfully with that characteristic than without it; and phenomena are said to become “better adapted” to the environmental conditions they face if an increasing portion of the population of such phenomena has adaptive characteristics.

36. RICHARD DAWKINS, THE SELFISH GENE 192 (1976).

37. See, e.g., SUSAN BLACKMORE, THE MEME MACHINE (1999); RICHARD BRODIE, VIRUS OF THE MIND: THE NEW SCIENCE OF THE MEME (1996); DANIEL DENNETT, CONSCIOUSNESS EXPLAINED (1991); DANIEL DENNETT, DARWIN’S DANGEROUS IDEA (1995); AARON LYNCH, THOUGHT CONTAGION:

Most commonly, the term refers to an undefined set, of which “idea” is one of the principal subsets. Some imply that virtually everything we know is a meme. Others limit the term to ideas or behaviors acquired solely by transmission from others.³⁹ I use the term to refer to any non-genetic internal mechanism that motivates behavior.⁴⁰ Ideas motivate behaviors; ideas are therefore memes. Other non-genetic motivators may exist as well.

I do not propose to focus on memes; I propose instead to focus on the learned behaviors themselves.⁴¹ We often think of behaviors separately from the humans who undertake them. I read, so do you. We both carry the learned behavior of reading. Hopefully, I will transmit this behavior to my children. At some point, I may cease to carry the behavior. But the behavior will almost certainly persist in others. As long as someone carries it, the behavior will continue to exist.

For analytic purposes, it is useful to make this separation complete, to think of learned behaviors as entities completely independent of the individuals who carry them, almost like bacteria—some beneficial, some not—that get their start in one or more individuals and then spread across the population. Consider,

HOW BELIEF SPREADS THROUGH SOCIETY (1996). See generally 2 ENCYCLOPEDIA OF EVOLUTION 713–16 (2002) (discussing the “meme”).

38. Some other attempted definitions of “meme” include: (1) an element of culture transmitted non-genetically; (2) “a contagious information pattern that replicates by parasitically infecting human minds and altering their behavior, causing them to propagate the pattern”; (3) “a unit of information residing in the brain”; (4) “whatever it is that is passed on by imitation”; (5) “a unit of cultural inheritance” analogous to the gene, “naturally selected by virtue of its ‘phenotypic’ consequences.” LEE ALAN DUGATKIN, THE IMITATION FACTOR: EVOLUTION BEYOND THE GENE 117 (2000).

39. See, e.g., BLACKMORE, *supra* note 37, at 45.

40. To use a biological analogy, the “meme” is the genotype of which the learned behavior is the phenotype. My definition is thus closest to the definition favored by Dugatkin. See DUGATKIN, *supra* note 38, at 118. Discussion of the relationship between genetic and non-genetic motivators is beyond the scope of this essay. Suffice it to say that thirst itself appears to be genetically programmed; a desire for Coca-Cola, by contrast, is memetic.

41. I focus on learned behaviors rather than memes for several reasons: (1) for the most part, behaviors, not memes, determine whether we survive and reproduce; (2) we know a lot about behaviors, very little about memes; (3) behaviors are observable and measurable; and (4) a focus on behaviors tends to reduce the importance of the nature/nurture problem, since behaviors evolve regardless of whether they are learned or genetic.

for example, the learned behavior of using a telephone. It originated with Alexander Graham Bell and has since infected most of the U.S. population. Children are not born with the behavior but, at least in the United States, very quickly receive it from others. Thus far it has proved highly successful at surviving and reproducing. By contrast, consider the learned behavior of playing what Americans call "Russian roulette," a game in which the player loads one bullet into a revolver, spins the chamber randomly, points the gun at his own brain, and pulls the trigger. If the gun fires, he loses. He also, of course, dies. This learned behavior has not spread widely; it tends to kill individuals who carry it before they can transmit it to others, thus making further infection less likely.

So characterized, it becomes plausible to analyze learned behaviors much as we would bacteria, exploring their survival strategies and evaluating their relative evolutionary success or failure. Indeed, so conceived, learned behaviors meet all three criteria for application of the law of evolution. First, they survive or reproduce differentially in response to environmental conditions. One of the avowed purposes of law is to influence the survival and reproduction of learned behaviors by shaping the environmental conditions their human carriers face; law often seeks to extinguish some learned behaviors and encourage others. Second, the reproduction of learned behaviors is imperfect, as any parent or teacher will attest. And third, there is no evidence that adaptive imperfections are systematically disfavored. In other words, learned behaviors evolve.

C. The Capacity to Carry Learned Behaviors is Adaptive

Human beings make extraordinary evolutionary sacrifices to carry learned behaviors. We are born with enormous heads that sometimes kill our mothers in childbirth. The young of other mammals can commonly walk and perform other routine survival tasks independently immediately upon birth. We, by contrast, take years to learn how to perform all but the most primitive acts, consuming major amounts of parental resources in the meantime. Infantile helplessness and the consequent demand on parental resources obviously cannot be adaptive for their own sake; they must lead to some major evolutionary payoff. Otherwise, we would expect them to be washed out of the gene pool. Why do we make

these sacrifices?

The answer is that the power of evolution depends on its speed. Evolution, recall, is a probabilistic process through which phenomena (ourselves included) adapt to environmental challenges. The faster a population can adapt, the more likely it is to survive and flourish. Because genetic change is not a prerequisite for changes in and transmission of learned behaviors, learned behaviors can evolve orders of magnitude more quickly than instinctive behaviors. This means, in turn, that organisms whose behaviors are learned can adapt far more quickly (and, ultimately, in far more complex ways) to environmental challenges than organisms whose behaviors are genetically-determined and who must therefore wait for the evolution of new DNA to encode new behaviors. Humans dominate Earth because our behaviors evolve more quickly than those of any other species. The sacrifices we make to enable ourselves to carry learned behaviors appear thus far to have paid off spectacularly.

D. How Cultures Learn

We are now ready to describe cultural learning. What does it mean to say that a culture has “learned” a particular behavior? It means simply that the learned behavior in question has spread across the culture to the point that it dominates competing behaviors. Complex dynamics may have been involved in causing the behavior to spread, but in declaring that a culture has “learned” a behavior, all we are really doing is counting instances of that behavior and comparing its success to that of its competitors. For a behavior to be “learned,” there is no requirement that anyone in the culture choose it, understand it, or even be conscious of it. No one ever designed or chose a Congress that behaves the way our current Congress behaves. No one envisioned the complex of behaviors that comprises the Internet. We did not convene one day and vote to revolutionize sexual mores. Nor does anyone fully understand any of these phenomena. Each, nevertheless, reflects cultural learning.

Reason is profoundly important to our success as a species, but its role is commonly misunderstood. The function of reason is not to decide how we should behave; evolution ultimately determines the fate of all learned behaviors, rational or irrational. The function of reason is rather to accelerate the evolutionary process.

An example may usefully illustrate this point. Assume a

population, half of which is careful when crossing the street; the other half, inattentive. Assume in addition that individuals who are careful are more likely to survive and transmit their behavior to others than inattentive individuals. What will happen to this population over time? Evolutionary theory tells us that individuals who are careful when crossing the street will likely comprise an increasingly large portion of the population as a whole.⁴² This is true regardless of whether the population in question consists of humans or squirrels. Given enough time and a stable set of environmental conditions, the populations of both should become dominated by careful street crossers. Reason is not necessary to the process at all.

Yet we know that squirrels are not, for the most part, careful street crossers while humans are, at least in cultures that have used cars for a while. Why the difference? In a human society to which vehicles have just been introduced, reason makes the initial development of careful behaviors far more likely. "Oh! That person was just hit by a car. Perhaps I should be careful when crossing the street." It also facilitates transmission of the resulting careful behaviors. "Remember, look both ways before you cross." Evolution of the same careful behaviors in squirrels requires genetic innovation and transmission, which generally take much longer. Given thousands, perhaps millions, of generations, squirrels should eventually become street smart. Humans, however, typically acquire this trait in less than a generation. This is the special advantage of reason: it facilitates the evolution of learned behaviors. Reason may predict, but does not determine, evolution's course. If its predictions are correct, it accelerates the evolutionary process; if they are incorrect, sooner or later they fall to experience.

Some forty-five years ago, economist/philosopher Friedrich Hayek explored the respective roles of reason and evolution in the

42. The percentage that remains inattentive will not necessarily decline to zero, for at least two reasons. First, transmission may not be perfect. A careful parent may produce an inattentive child or a careful teacher an inattentive pupil. Second, the system will likely contain some amount of "noise"—good and bad things happening to both careful and inattentive individuals for reasons having nothing to do with their care or inattention. If there is sufficient noise—that is, if enough good or bad things happen randomly to both groups—some portion of the population as a whole may remain inattentive even if transmission is perfect, despite the fact that inattention is less adaptive than care.

development of culture. He asserted, in effect, that we should view culture as the product of evolutionary processes operating on learned behaviors—although he referred instead to the evolution of “institutions,” “tools,” “practices,” and “rules.”⁴³

While the rationalist tradition assumes that man was originally endowed with both the intellectual and the moral attributes that enabled him to fashion civilization deliberately, the evolutionists made it clear that civilization was the accumulated hard-earned result of trial and error; that it was the sum of experience, in part handed from generation to generation as explicit knowledge, but to a larger extent embodied in tools and institutions which had proved themselves superior—institutions whose significance we might discover by analysis but which will also serve men’s ends without men’s understanding them.⁴⁴

It is the accumulation of transmitted learned behaviors over centuries—indeed, millennia—that makes civilization possible. We do not, through the exercise of reason, rediscover the essential attributes of our culture from scratch each generation; we learn them from our forbearers, adding to them only incrementally. As Hayek stated, “[man] is successful not because he knows why he ought to observe the rules which he does observe, or is even capable of stating all these rules in words, but because his thinking and acting are governed by rules which have by a process of selection been evolved in the society in which he lives, and which are thus the product of the experience of generations.”⁴⁵

E. The Adaptivity of Cultural Learning

This brings us to the core question: is there any reason to believe that, on the whole, cultural learning is adaptive and should be

43. See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 54–70 (1960) [hereinafter HAYEK, *THE CONSTITUTION OF LIBERTY*]; 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 8–34 (1973) [hereinafter HAYEK, *RULES AND ORDER*]. “The cultural heritage into which man is born consists of a complex of practices or rules of conduct which have prevailed because they made a group of men successful but which were not adopted because it was known that they would bring about desired effects.” *Id.* at 17.

44. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 43, at 59–60.

45. See HAYEK, *RULES AND ORDER*, *supra* note 43, at 11.

valued? We know that the very essence of the human evolutionary strategy is to make cultural learning possible.⁴⁶ We know that this strategy has been spectacularly successful. Is there really any question?

Here, evolutionary theory offers two important cautions. First, behaviors, like genes or bacteria, are evolutionarily successful if *they* survive and reproduce. Although generally helpful, it is not necessary that *their human carriers* also thrive. An obvious example is the vow of chastity, which, if actually observed, prevents its human carriers from reproducing altogether. Of course, such a pronounced effect makes it unlikely the behavior will become widespread. The Shakers insisted that all adherents practice celibacy; not surprisingly, for all its virtues, Shakerism has gone completely extinct.⁴⁷

More commonly, this means that behaviors may persist despite a modest negative effect on their human hosts or, indeed, no effect at all. When a learned behavior persists, we need to ask whether it does so because it actually helps its human carriers adapt effectively to the challenges they face or rather because some characteristic makes the behavior likely to persist despite its effect (or lack of effect) on human carriers. For example, texts tend to survive, spread their hold across human populations, and resist change far more effectively than non-textual competitors. They do so because they are more easily reproduced and transmitted without corruption, not necessarily because the behaviors they prescribe are better for their human carriers. I return to this aspect of texts in Part III below.

A second reason that a given change in values may not actually be good for its human carriers is that evolution is inherently a process of experimentation. Some experiments fail. Our culture is already well adapted to most of the challenges we face. Minor maladaptive effects, therefore, are not likely to have any perceptible effect on individual success in the short run. Expanded tolerance for premarital sex, for example, may ultimately prove to have been an interesting experiment that failed. If so, it should eventually come to be carried by a diminishing portion of our population. Or such tolerance may, in some form, make its human carriers more adaptive.

46. See *supra* Part I.C.

47. See THE COLUMBIA ENCYCLOPEDIA, *supra* note 17, at 2579.

If so, in the long run evolutionary theory predicts that it will become a permanent part of our culture. The fact that it exists today, however, tells us little about how the experiment will ultimately turn out.

Notwithstanding either of these caveats, evolutionary theory strongly supports the conclusion that, on the whole, cultural learning is adaptive—indeed, that it is at the core of the human evolutionary strategy. We should therefore be able to frame accounts of our most important modern values—rule of law, equality, democracy, and liberty, among others—in terms of their adaptivity. Some are undoubtedly responses to the single most deadly challenge humans face: other humans. We know that members of cultures with less internal violence prosper dramatically better, on average, than members of internally violent ones. Behaviors and associated memes that reduce intra and inter-group conflict—democratic decision-making, racial equality, rule of law, and aversion to genocide, among others—should therefore be strongly adaptive. Liberty and a tolerance of behavioral diversity, on the other hand, allow behaviors to evolve more quickly. Because the speed at which evolution operates determines its power, they too should be adaptive. Full discussion of these issues is well beyond the scope of this essay. My point here is rather that the adaptivity of cultural learning is not merely an abstract advantage; it relates directly to the core of the legal enterprise.

In sum, although we cannot be certain that specific experiments will always be successful, evolutionary theory nevertheless allows us to conclude with confidence that cultural learning is, on the whole, adaptive to us as humans.

II. ORIGINALISM LEGITIMIZES REJECTION OF CULTURAL LEARNING SUBSEQUENT TO THE TEXT

I have defined “originalism” to include any decision-making technique based on an authoritative text that permits its user to ignore intervening learning and rely on some aspect of the original text whenever the two conflict. If cultural learning is adaptive, the more a culture learns after the text becomes fixed, the more problematic originalism becomes.

In American law, the issue pits originalism against precedent. At a 2005 Association of American Law Schools (AALS) conference

to be published in *Constitutional Commentary*, Professors Randy Barnett and Akhil Amar took the position that, in general, in the event of a conflict between the original public meaning of the U.S. Constitution, on the one hand, and subsequent precedent, on the other, judges should discard the precedent.⁴⁸ Professors David Strauss and Thomas Merrill, for the most part, disagreed.⁴⁹ To locate this essay within that debate, I need first to define the evolutionary role of precedent.

Recall that, as a matter of logic, evolutionary processes operate on any phenomena that meet three criteria: (1) such phenomena survive or reproduce differentially in response to a common set of environmental conditions; (2) they reproduce imperfectly; and (3) adaptive imperfections in their reproduction are not systematically disfavored. In the common law tradition, judicial decisions constitute precedent. What this means is that judges feel obligated, when issues recur, to reproduce the rationale and result of earlier decisions addressing the same issues. In other words, because judges are supposed to follow precedent, American case law reproduces itself.⁵⁰ Such reproduction is clearly imperfect, and there is no reason to believe that adaptive imperfections are systematically disfavored, so the second and third criteria for evolution are met. It follows that if the first criterion is met—if lines of cases survive and reproduce differentially in response to a common set of environmental conditions—then case law must evolve.

Clearly, lines of cases survive and reproduce differentially, some

48. Amar advocates, most importantly, an exception for precedent “ratified” by public acceptance. See *infra* pp. 2020–2021.

49. Posting of Lawrence Solum, lsolum@sandiego.edu, Legal Theory Blog, *Blogging from San Francisco: Precedent and Originalism*, at http://lsolum.blogspot.com/archives/2005_01_01_lsolum_archive.html (Jan. 8, 2005) (reporting AALS Conference Session).

50. See generally Mei-Fei Kuo & Kai Wang, *When Is an Innovation in Order?: Justice Bader Ruth Ginsberg and Stare Decisis*, 20 U. HAW. L. REV. 835 (1998) (stating that the Supreme Court preserves legal consistency by adhering to well-established precedent). Whether law is subject to a similar dynamic in civil law systems is a fascinating question, but beyond the scope of this essay. See, e.g., Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT’L L.J. 333 (1999) (contrasting theory and practice in the common law and civil law systems); Richard B. Cappalli, *At the Point of Decision: The Common Law’s Advantage Over the Civil Law*, 12 TEMP. INT’L & COMP. L.J. 87 (1998) (same); Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT’L L. 1 (2003).

more successfully than others. Some die out altogether. We do not fully understand the environmental conditions that affect this differential success. In our less trusting moments, we worry that the social class or politics of the judges may play an undue role. I do not deny this possibility. All else being equal, however, I submit that judges of all classes and politics tend to favor rules they believe will help humanity survive and reproduce, and to disfavor rules they believe will not—in other words, to favor adaptive rules and disfavor maladaptive ones. Their judgments in this regard may, of course, be erroneous and will undoubtedly be colored by personal experiences, backgrounds, and attitudes. Nevertheless, if my premise is correct, then over time, with a probability approaching certainty, case law should become increasingly adaptive to us as humans.

In effect, case law collects and reflects a particular type of cultural learning—learning with regard to the legally enforceable rules most likely to make our culture adaptive at the individual level. *Brown v. Board of Education*⁵¹ replaces *Plessy v. Ferguson*.⁵² The Rule of Destructibility of Contingent Remainders is abandoned as obsolete.⁵³ Comparative negligence replaces contributory negligence.⁵⁴ Punitive damage awards are limited.⁵⁵ *Miranda* warnings become mandatory.⁵⁶ In short, the law evolves.

But if this is so, then any rule that permits a court to disregard intervening case law and return to the state of societal thinking one hundred, two hundred, or two thousand years ago is unlikely, on the whole, to be adaptive. It is unlikely to help humans flourish. Human flourishing may not be the be-all or end-all but, all other things being

51. 344 U.S. 1 (1952).

52. 163 U.S. 537 (1896).

53. See T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 530–34 (2003); Patricia J. Roberts, *The Acceleration of Remainders: Manipulating the Identity of the Remaindermen*, 42 S.C. L. REV. 295, 311–13 (1991).

54. See Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 3 (1996); Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 43 (2003).

55. See Bridget E. Leonard, *State Farm Mutual Automobile Insurance Co. v. Campbell: Refining BMW of North America, Inc. v. Gore and Further Restricting Punitive Damages*, 38 U. RICH. L. REV. 545 (2004).

56. *Miranda v. Arizona*, 384 U.S. 436 (1966).

equal, we should prefer it. Insistence on a mode of statutory, constitutional, or any other kind of interpretation that systematically rejects intervening cultural learning seems hard to defend.

The problem is not remedied by originalist arguments, however brilliant, that the possibility of subsequent learning was in fact anticipated in the authoritative text—that the Framers of the Fourteenth Amendment, for example, meant to leave open the possibility of imposing the Bill of Rights on the states,⁵⁷ requiring racially integrated public schools,⁵⁸ and protecting women's rights.⁵⁹ As long as reasonable originalist arguments to the contrary exist, endorsement of originalism as a rule of decision legitimizes the possible rejection of such subsequent learning.

Nor is the problem likely to be solved by a robust theory of ratification, which in effect makes a text easier to amend. In the Constitutional context, for example, Akhil Amar has argued that “[w]hen the citizenry has widely and enthusiastically embraced an erroneous precedent, when even most initial skeptics have deemed it fundamental and admirable, it is sensible—and consistent with the document’s emphasis on popular sovereignty—to view this precedent as sufficiently ratified by the American People so as to insulate it from judicial overruling.”⁶⁰ *Brown v. Board of Education*, he has asserted, is saved on this theory and therefore should not be

57. For a review of the literature on this issue, see Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000).

58. For reviews and samples of the literature on this issue, see, for example, Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); William H. Manz, Brown v. Board of Education: *A Selected Annotated Bibliography*, 96 LAW LIBR. J. 245 (2004); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael J. Perry, Brown, *Bolling, & Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53 (1995); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000); Ronald Turner, *Was “Separate but Equal” Constitutional?: Borkian Originalism and Brown*, 4 TEMP. POL. & CIV. RTS. L. REV. 229 (1995).

59. For a review of the literature on this issue, see Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229 (2000).

60. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 85 (2000).

overturned on originalist grounds. In my view, Amar's theory is useful primarily in that it illustrates the difficulties of this approach to solving the originalist problem. First, few judicial decisions ever themselves become visible enough to permit plausible popular ratification arguments. How many non-lawyers, for example, have ever heard of *Griswold v. Connecticut*?⁶¹ Second, to maintain consistency with his own arguments for originalism, Amar must set a high threshold for deemed ratification: "Although the counterfactual cannot be proved with absolute certainty, if *Brown* were not already on the books, wouldn't We the People have explicitly inscribed its basic rule in the document alongside the other inclusionary amendments of the late twentieth century?"⁶² Such a standard, realistically applied, can save only a very small portion of the cultural learning embodied in judicial precedent. Third and most importantly, Amar's approach only saves old precedent; it does not authorize the incorporation of future cultural learning into future cases. If Amar's theory were to become widely adopted, courts would never decide the next *Brown*. Indeed, had Amar's approach effectively controlled judicial decision making in 1954, there is a real possibility that American public schools would still be racially segregated.

III. IS STRICT ADHERENCE TO AUTHORITATIVE TEXTS ADAPTIVE?

There remains the possibility that strict adherence to authoritative texts is itself either adaptive or required for reasons irrelevant to adaptivity. If so, the maladaptivity of originalism may be outweighed by such other considerations. Why do we or should we give such dominant status to texts?

A first possibility explains why we do, but not why we should. As I have already noted, a cluster of learned behaviors and associated memes will be evolutionarily successful if *it* survives and reproduces. Learned behaviors tend to be more evolutionary successful if they help their carriers thrive, but this is not strictly necessary. When any cluster of learned behaviors and associated memes persists, we need to ask whether it does so because it actually

61. 381 U.S. 479 (1965) (holding that a law prohibiting the use of contraceptives unconstitutionally intrudes on a person's right to marital privacy).

62. Amar, *supra* note 60, at 85–86.

helps its carriers or whether some other characteristic makes it *likely to persist despite a negative or neutral effect on its human carriers*. I have also noted that, because they are more easily reproduced and transmitted without corruption, texts tend to survive, spread their hold across human populations, and resist change far more effectively than non-textual competitors. In other words, the fact that an authoritative text is a text makes it *per se* more likely to survive, regardless of whether the behaviors it prescribes are adaptive to their human carriers. This may explain why we respect the written word, but it does nothing to justify discarding intervening learning.

A second possibility is that adherence to a particular text is required because it is inherently authoritative. Religious texts claim such authority. One must read, believe, and follow the Christian Bible, Christians assert, because it is the word of God, period. God knows all. We therefore need not worry about subsequent cultural learning; the text already contains all possibly relevant learning. And, some might add, since God loves us, the text is necessarily adaptive. Legal originalists sometimes make similar claims: we must adhere to the literal word of the statute or the Constitution because it is the word of the People, period. Judges (being unelected, or at least some of them) do not speak for the People. Precedent, being merely the word of judges, should be ignored whenever it conflicts.

It is not my purpose here to evaluate the claims of Christianity or any other religion. Evolutionary theory predicts, however, that if the Bible does not incorporate all possible moral learning, the problem of originalism should become more acute as the Bible ages. Specifically, we should find modern Christians ignoring parts of the Bible that conflict with intervening cultural learning. And we do. The Bible clearly requires that adulterers be put to death;⁶³ most Christians ignore this. The Bible prohibits lending money for interest.⁶⁴ Christians observed this commandment for a millennium and a half; they ignore it today.⁶⁵ An honest reading of the Bible reveals countless further examples.⁶⁶ But if intervening cultural

63. *Leviticus* 20:10 (New Revised Standard).

64. *Deuteronomy* 23:19 (New Revised Standard).

65. See Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth In Lending Act*, 55 FLA. L. REV. 807 (2003).

66. See generally RUSHDOONY, *supra* note 4 (examining a variety of “fun-

learning allows us to ignore the word of God, why should the word of the People command stricter adherence?

Ultimately, therefore, legal originalists must justify their position instead on instrumental grounds—in evolutionary terms, on the ground that adhering to specific authoritative texts is adaptive. In the case of statutes, which is an easier context, these instrumental arguments fall into two broad categories. First, decisions will be more legitimate, thereby reducing potential intra-group conflict, if they are made by representatives elected by the people—or, in the case of direct democracy, by the people themselves. This is, I should point out, an empirically testable but untested claim. I know of no studies supporting the premise that intra-group conflict is lower when judges adhere systematically to originalist norms.

A second class of argument focuses on institutional competence: legislatures are better able to bring all relevant expertise to bear on any given issue; judges, sitting in solitary splendor in their chambers, lack such competence and should therefore limit the factors they consider to those considered by the enacting legislature. There are at least two problems with this class of argument. First, the factual predicate is questionable; judges often have far more experience with the problem of applying a given set of rules to the real world than the legislature that enacted those rules. If so, it should be adaptive for them to incorporate that experience into their decision making. Second, this class of argument simply does not address the problem of intervening learning. Even if the legislature considered all existing learning at the time of enactment, it has no superior institutional competence with respect to subsequent cultural learning.

An example may usefully illustrate some of these issues. In the U.S. income tax system, taxpayers are generally taxed on income, including gain from the sale of property. Section 1001(a) of the Internal Revenue Code defines gain as the amount by which a taxpayer's "amount realized" exceeds her "adjusted basis."⁶⁷ "Amount realized," in turn, is defined in Section 1001(b) as "the sum of any money received plus the fair market value of the property (other than money) received."⁶⁸ In other words, when a taxpayer sells property, the statute directs her to perform an arithmetic

damental" biblical principles that are often ignored).

67. 26 U.S.C. § 1001(a) (2000).

68. *Id.* § 1001(b).

operation—add the cash she got to the fair market value of any property she got and subtract her “adjusted basis” (roughly, her cost adjusted by a variety of factors)—and report the difference on her tax return. This definition of “amount realized” first appeared in the Revenue Act of 1924 and has been carried forward verbatim ever since.

But what if seller receives something other than cash or property as consideration for the property being sold? Assume, for example, that the property is subject to an assignable non-recourse mortgage. Say the property is worth \$100,000 and is subject to an \$80,000 mortgage. Taxpayer sells the property for \$20,000 in cash subject to that mortgage. In other words, buyer pays \$20,000 for taxpayer’s net equity interest in the property. What is seller’s “amount realized”? Her cash received is \$20,000. She receives no property other than cash. If she reads the statute literally, her “amount realized” must be \$20,000. In *Crane v. Commissioner*, decided in 1947, the Supreme Court held instead that her “amount realized” should also include the amount of the debt to which the property was subject.⁶⁹ In other words, in our hypothetical, the taxpayer’s “amount realized” should be \$100,000. In subsequent cases and rulings, “amount realized” has also been held to include the value of (1) services received or promised,⁷⁰ (2) the use of property,⁷¹ (3) a franchise extension,⁷² and (4) the release of marital rights,⁷³ none of which appear to be encompassed by the statutory language, read literally.

What has happened is that courts, in the course of repeated encounters with the statutory language in question, have concluded that that language, although duly enacted by Congress, often does not in fact measure taxpayers’ incomes correctly. In consequence, courts have effectively rewritten the statute to define “amount realized” as “the sum of [any money] received plus the fair market value of [any economic benefit (other than money) received].”⁷⁴ This rewriting reflects three-quarters of a century of accumulated learning on the

69. 331 U.S. 1, 13–14 (1947).

70. *Int’l Freighting Corp. v. Comm’r*, 135 F.2d 310, 313 (2d Cir. 1943).

71. Rev. Rul. 79-24, 1979-1 C.B. 60 (1979).

72. *Phila. Park Amusement Co. v. United States*, 126 F. Supp. 184, 189 (Ct. Cl. 1954).

73. *United States v. Davis*, 370 U.S. 65, 72–73 (1962).

74. James Edward Maule, *Gross Income: Overview and Conceptual Aspects*, 501-2nd Tax Mgmt. (BNA), at A-145 (May 19, 2003).

question. It is easy enough to construct originalist arguments in support of the change. At the same time, an honest plain language originalist would probably have to reject the change and insist that Congress correct its own sloppy drafting or live with the consequences. Standard instrumental justifications for doing so seem thin indeed.

Might originalism be more instrumentally defensible in the constitutional context? Note the nature of the question. I am no longer asking whether the authorship of the Constitution by the People requires originalism. I am asking rather whether there is something in the nature of constitutionalism that makes the systematic discarding of intervening learning about constitutional, as opposed to statutory, issues adaptive. The problem of constitutional interpretation is the subject of massive literature, a review of which is beyond the scope of this essay. I would, however, make two points that I believe to be new.

First, given the general adaptivity of cultural learning, a heavy burden should rest on originalists to justify adoption of a decision-making technique that legitimates systematic discarding of such learning—particularly with regard to the most fundamental legal issues we face: rule of law, equality, liberty, and the like. We humans have made profound evolutionary sacrifices to make cultural learning possible. The strategy seems to have worked. Advocates of a change in this strategy should be required to put forth compelling reasons for such a change. “In the constitutional context,” originalists effectively claim, “the core human strategy, which has served us spectacularly well throughout our history, doesn’t work and should be abandoned.” Against this background, their case needs to be compelling indeed. A preponderance of the evidence should not suffice.

Second, the evolutionary model of cultural learning I have described in this essay itself justifies judicial review. Case law, I have argued, evolves. This is possible in significant part because courts generally follow precedent. The requirement that courts adhere to precedent serves to preserve the cultural learning embodied in that precedent. As we learn more about rule of law, equality, liberty, and other fundamental values, our case law comes to reflect that learning. Legislatures have no comparable mechanism. As a result, it is easier for legislatures to discard cultural learning in the

heat of the moment. Decision making by popularly-elected representatives is viewed as legitimate, and therefore serves to minimize potential intra-group conflict. But because it lacks any mechanism for the systematic preservation of cultural learning, it can sometimes produce rules seriously at odds with such learning. Judicial review corrects this problem, at least with respect to our most fundamental values. One of the functions of judicial review, in other words, may be to preserve cultural learning with respect to fundamental principles and thereby permit their continued evolution.

But if this is so, originalist judicial review is inherently implausible. Unconstrained democratic decision making and originalist interpretation share a common flaw: they both permit abandonment of intervening learning. Both are therefore maladaptive. Using the one to correct the other is likely to prove futile at best, counter-productive at worst.

IV. CONCLUSION

The perspective this essay brings to bear on the problem of originalist interpretation is relatively unusual and has not been tested in the rough and tumble of academic debate. I anticipate that at least some of my arguments will require refinement, perhaps even retraction. Until rebuttal is made, however, evolutionary analysis leaves me profoundly skeptical of originalist claims. To hold up Islamic traditionalism as a methodological model for U.S. statutory or constitutional interpretation strikes me as bizarre. And yet that, ultimately, is what originalists are doing.

We have learned, we will learn, we should learn. No one has yet persuaded me to the contrary.