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DEAD DOCUMENT WALKING

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INTRODUCTION

As this symposium commences, originalism is a hot topic to discuss and a cool position to advocate. Either portion of that statement would have been nearly inconceivable two decades ago when I started in academia. Originalism at that time was something of an intellectual backwater, with a very limited set of adherents and an even more limited set of critics who were willing to take originalist ideas seriously.¹

Today, as Boston University School of Law welcomes Jack Balkin and David Strauss, two of the leading lights in modern constitutional theory, to a conference dedicated to their recent books on constitutionalism,² originalism has gained a whole new set of sophisticated defenders³ and critics.⁴ Professor Balkin is particularly prominent among those new defenders, having emerged as arguably the foremost representative of what is sometimes called the “New Originalism” (or occasionally even the “New New Originalism”⁵). Professor

* Professor of Law and Michaels Faculty Research Scholar, Boston University School of Law. I am grateful to Jack Balkin and David Strauss for inspiring and improving this Comment.

¹ For nearly identical thoughts from another quarter on the increasing prominence of originalism, which I came across *after* I had written this paragraph, see Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 575-76 (2011).

² JACK M. BALKIN, *LIVING ORIGINALISM* (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*]; DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). In Professor Balkin's case, one should properly say *one* of his recent books on constitutionalism. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

³ See, e.g., Lawrence B. Solum, *Semantic Originalism* (Univ. of Ill. Coll. of Law Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

⁴ See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).

⁵ Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS

Balkin's *Living Originalism* is certain to become the canonical expression of an important variant of originalist theory. Professor Strauss, for his part, has long been one of the most prominent of originalism's "Old Critics," and *The Living Constitution* is the most artful and legally grounded affirmative statement that I have read of the "common law constitutionalist" approach. It is a pleasure to be able to comment on these remarkable works by these remarkable scholars.

My comments here will focus on two observations that must (for reasons that will become evident quite shortly) stand more as clarification than as critique. First, I think it is a mistake to analyze the work of either Professor Balkin or Professor Strauss from the standpoint of legal interpretative theory, because neither of them is really setting forth a theory of legal interpretation – either an originalist theory or an alternative to originalist theory. Rather, Professors Balkin and Strauss are both engaged in projects that are most appropriately understood and examined by reference to disciplines other than (or at the very least in addition to) legal interpretation, such as political theory, moral theory, or sociology. This is most clear with respect to Professor Strauss, who is openly setting forth a theory of *adjudication and governance* rather than a theory of *legal interpretation*. Professor Balkin is harder to pin down because his project is simultaneously pursuing a rather large number of ends, of which legal interpretation is plainly one. But legal interpretation is a small part of Professor Balkin's overall project, and so the project is probably predestined to be relatively unsuccessful as legal interpretation (though it may prove to be extremely successful at other tasks). In Part I of this Comment, I describe the potential problems with asking too much of interpretative theory, as I think Professor Balkin does. Interpretative theory should focus on interpretation, not on other activities, however useful those other activities might be.

Second, as do many of the so-called "New (or New New) Originalists," Professor Balkin draws heavily on a distinction between the *ascertainment* of a text's objectively-discoverable meaning and the *construction* of a text's meaning when ascertainment of meaning is impossible (or otherwise undesirable).⁶ Using Professor Balkin as an exemplar for the larger "construction project" that now dominates much of the originalist literature, I suggest that the move from ascertainment to construction is premature, or at least inadequately defended. Construction is an adjudicative response to interpretative indeterminacy, but it is not the only possible response. In Part II, I argue that, at least in the context of the federal Constitution, there is an interpretative response to interpretative indeterminacy that (largely) obviates any need for construction, because the response itself is not interpretatively indeterminate in any relevant sense. As the old story goes, it's interpretation all the way down.

L.J. 707, 709 (2011).

⁶ See BALKIN, *LIVING ORIGINALISM*, *supra* note 2, at 4-5.

Given the constraints of time and space, I am largely passing over the many important points on which Professor Balkin and I agree.⁷ Those points of agreement could easily consume an entire article. We agree that, inter alia, (1) it is a conceptual mistake to confuse questions of interpretation with questions of institutional role,⁸ (2) there is a crucial distinction between interpreting the Constitution and giving normative weight to those interpretative conclusions,⁹ (3) original expectations do not determine original meaning,¹⁰ and (4) one should not pre-judge how rule-like (or un-rule-like) any particular constitutional provision must be.¹¹ That is much upon which to agree.

But it is generally more productive, or at least more fun, to discuss matters on which people disagree, and so that is where I will direct my energy.

I. *CITY SLICKERS III*: THE LEGEND OF CURLY'S INTERPRETATIVE THEORY

In formulating a theory of interpretation of the federal Constitution, what functions does one want that theory of interpretation to perform?

In Jack Balkin's case, the list is quite long. Professor Balkin has very grand ambitions for interpretative theory. According to *Living Originalism*,

⁷ Professor Strauss and I agree on much less, but that is not particularly surprising. One very important point on which we do agree concerns the Constitution's potential role as a locus of "common ground," STRAUSS, *supra* note 2, at 101-02, or as economists might call it, as a Schelling point. But while Professor Strauss would essentially limit that "common ground" function to matters that need to be settled rather than settled correctly, *see id.* at 104, I would consider using the coordination function of the Constitution as part of a broader account of the normative reasons why one might choose to be a "deadhead" and follow a document written and ratified more than two centuries ago, *see* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1832-33 (1997). But since I do not have a normative theory of constitutionalism that I am prepared to describe in a scholarly work, I will content myself for now with just considering it.

With respect to what the world might look like if originalism as an interpretative theory was faithfully followed as an adjudicative theory, *see* STRAUSS, *supra* note 2, at 12-16, Professor Strauss is partly right and partly wrong, at least from the standpoint of the (correct) originalist approach that I would advocate, *see* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006) (setting forth a theory of "reasonable observer originalism"). However, to sort out from among Professor Strauss's conclusions the clearly correct ("[s]tates could freely violate the principle of 'one person, one vote' in designing their legislatures") from the mostly correct ("[m]any federal labor, environmental, and consumer protection laws would be unconstitutional") from the probably correct ("[t]he Bill of Rights would not apply to the states") from the mostly wrong ("[t]he government would be free to discriminate against women") from the clearly wrong ("[r]acial segregation of public schools would be constitutional" and "[t]he federal government could discriminate against racial minorities (or anyone else) pretty much any time it wanted to") would take a separate article. STRAUSS, *supra* note 2, at 12-16.

⁸ *See* BALKIN, *LIVING ORIGINALISM*, *supra* note 2, at 16-17.

⁹ *See id.* at 38.

¹⁰ *See id.* at 6-10.

¹¹ *See id.* at 6-7, 14, 23-24, 45.

interpretative theory *at a minimum* needs to (1) ascertain the semantic meaning of constitutional language,¹² (2) construct meaning when the ascertainment of semantic meaning is not possible,¹³ (3) be “adequate to our history as a people”¹⁴ by explaining and accounting for constitutional developments widely regarded as good, (4) explain the process of constitutional change by (among other things) “account[ing] for how political and social movements and post-enactment history shape our constitutional traditions,”¹⁵ (5) allow for “viable critiques of existing practices in the name of a deeper constitutional fidelity,”¹⁶ (6) provide a vehicle for popular discourse about political and social change,¹⁷ (7) connect the present and past in a fashion that promotes “identification between ourselves, those who lived in the past, and those who will live in the future,”¹⁸ and (8) “promote the democratic legitimacy of a constitutional and legal system that is based on the idea of popular sovereignty,”¹⁹ which requires attention to sociological, procedural, and moral aspects of legitimacy.²⁰ An interpretative theory that can ascertain meaning, construct meaning, explain history and change, facilitate critique and discourse, and legitimate a political order along at least four dimensions of legitimacy is quite an amazing phenomenon. But is it *the best interpretative theory*?

Probably not, *if* – and this is a very large *if* – one judges an interpretative theory by how well it interprets. Asking an interpretative theory to perform all of the tasks asked of it by Professor Balkin is like asking schools to teach reading, writing, arithmetic *and* social skills *and* self-awareness *and* comparative cultures *and* the facts of life *and* a dozen other topics that have not been part of formal education until recent decades. The notion that one can do all of those things and still teach reading, writing, and arithmetic at the same levels as before is highly problematic (as anyone who has tried to take eighth-grade reading, writing, or arithmetic tests from a century ago can attest).²¹ Just like smartphones that surf the net, keep appointment calendars,

¹² *Id.* at 4.

¹³ *See id.* at 5.

¹⁴ *Id.* at 10; *see also id.* at 90 (“A theory of constitutional interpretation should be able to explain why . . . changes [that demonstrate the best features of the American constitutional tradition] are faithful to the Constitution rather than being mistakes or deviations from constitutional fidelity . . .”).

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 94.

¹⁷ *See id.* at 71-72, 93-94.

¹⁸ *Id.* at 63.

¹⁹ *Id.* at 64.

²⁰ *See id.* at 64-65.

²¹ *See Are the People of the World Being Dumbed Down?*, THE CROWHOUSE, http://www.thecrowhouse.com/8th_test.html (last visited May 28, 2012) (providing what purports to be a middle-school exam from 1895). There are some questions about whether the exam was really aimed at students rather than teachers, but even if it was aimed at teachers, it says something about what was expected to be taught.

and function as mobile gaming stations, but fail dismally as telephones because they drop calls whenever your hair brushes against the screen, an interpretative theory that multitasks may gain its breadth and power only by losing a big chunk of its ability to interpret.

In *City Slickers*, Curly Washburn (played by an Academy-Award-winning Jack Palance) had the following memorable exchange with Billy Crystal's lead character, Mitch Robbins:

Curly: Do you know what the secret of life is?

Mitch: No, what?

Curly: [holds up one finger] This.

Mitch: Your finger?

Curly: One thing. Just one thing. You stick to that and everything else don't mean sh*t.

Mitch: That's great, but what's the 'one thing'?

Curly: [smiles] That's what *you*'ve got to figure out.²²

Curly was a smart man – or at least a smart interpretative theorist. There are a great many circumstances – as anyone familiar with David Ricardo can verify – in which it makes sense to focus on one task rather than to split attention, energy, and resources among multiple tasks. Of course, that is not universally the case; sometimes pursuing multiple ends is independently desirable even if it is, by some measure, inefficient.²³ But the cost – the opportunity cost, if one will – is likely to be some loss, perhaps a very significant loss, in the achievement of the original, principal task.²⁴

So what is Curly's "one thing" for interpretative theory? Without waxing too Aristotelian, I will venture to say that the distinctive excellence of interpretative theory is to interpret – that is, to ascertain meaning. It is quite possible to charge interpretative theory with many additional tasks. Indeed, I have just read a multi-hundred-page book that graphically demonstrates that it is possible to give it such a charge with flair, eloquence, and great sophistication. But to the extent that interpretative theory is asked to perform tasks beyond the ascertainment of meaning, there is the danger that it will do a poorer job of ascertaining meaning than if it was given only that single task.

²² CITY SLICKERS (Castle Rock Entertainment 1991).

²³ See, e.g., ROBERT A. HEINLEIN, TIME ENOUGH FOR LOVE: THE LIVES OF LAZARUS LONG 248 (1973) ("A human being should be able to change a diaper, plan an invasion, butcher a hog, conn a ship, design a building, write a sonnet, balance accounts, build a wall, set a bone, comfort the dying, take orders, give orders, cooperate, act alone, solve equations, analyze a new problem, pitch manure, program a computer, cook a tasty meal, fight efficiently, die gallantly. Specialization is for insects.").

²⁴ To use Heinlein's example: time that I spend learning to butcher hogs is time that I do not spend raising my kids or learning how to teach Evidence. And the chances of my ever achieving proficiency at hog-butchering, given that I have motor-planning problems, are fairly low.

There is also the danger that it will do a poorer job of accomplishing the additional tasks with which it is charged than would some other enterprises or disciplines that are more tailored to those tasks. For example, perhaps moral theory or political theory might be a better tool for pursuing democratic or moral legitimacy than is interpretative theory, and perhaps sociology might do a better job of explaining and accounting for social change and addressing issues of sociological legitimacy.

There is nothing logically necessary about any of these speculations. It is surely theoretically possible for an interpretative theory to turn out to be the ultimate, optimal tool for ascertaining meaning, explaining change, providing legitimacy, and doing any number of other tasks that seem better suited to pursuit by other methods or disciplines. It just seems darned unlikely.

To demonstrate conclusively that any particular interpretative theory with divided attention will do a poorer job of ascertaining meaning than will a different interpretative theory with a one-track mind, one would have to lay out the correct approach to ascertaining meaning and then show how some specific dedicated interpretative theory better discovers that meaning than does the multitasking theory at hand. That is obviously an ambition well beyond this modest Comment. My narrow point here – which I style as a clarification rather than as a critique of Professor Balkin’s work – is simply to raise the issue.

Yet it is an important issue to raise. Just suppose, hypothetically, that some version of what Professor Balkin calls “skyscraper originalism”²⁵ – say, a theory that locates the meaning of the Constitution in the understandings that would have been held at the Constitution’s origin by a reasonable observer in possession of all relevant information – turns out to be the best theory for ascertaining objectively-discoverable constitutional meaning but does a very poor job of legitimating the constitutional order, accommodating social movements, explaining historical developments, or inspiring the populace. And suppose that one can get more legitimation, accommodation, explanation, and inspiration by tweaking the interpretative theory in a fashion that reduces its ability to ascertain meaning. Is it a better interpretative theory for the tweaking?

It may very well be a better theory across a range of metrics, but it is not clear that it is a better *interpretative theory* for the change. A hammer might well be improved, as measured by some considerable number of metrics, by being whittled down to a very thin stick of wood – if, for example, one really wants something that will stir coffee or pick food out of teeth rather than something that will pound nails. But it will not be a better *hammer*, even if it will be a better *implement*. Similarly, a multitasking interpretative theory could well be considered, on balance, a better theory than a focused interpretative theory, depending upon what goals one is trying to accomplish. It just will not be a better *interpretative theory qua* interpretative theory.

²⁵ BALKIN, LIVING ORIGINALISM, *supra* note 2, at 21.

Professor Balkin need not be deeply threatened by any of this, because interpretation-as-ascertainment-of-meaning is only a subsidiary goal of his theory. In this he is not alone. When Professor Balkin says that “[c]oncerns about legitimacy underwrite theories of constitutional interpretation . . . [and] we argue for or against different theories of constitutional interpretation in terms of their effects on legitimacy,”²⁶ he is not simply describing his own project but is also describing the vast majority of what the legal culture regards as constitutional scholarship and argument. He is certainly describing Professor Strauss, who takes legitimation and explanation as touchstones of constitutional theory because he is really setting forth a theory of adjudication (governance) rather than a pure theory of interpretation. Professor Balkin is also describing most self-proclaimed originalists, especially “Old Originalists,” for whom interpretation is generally an instrumental goal in ultimate pursuit of some version of legitimacy (meaning that they, too, are generally more interested in theories of adjudication and governance than in theories of interpretation *simpliciter*).²⁷ In fact, Professor Balkin may be describing pretty much everybody in the American legal culture except me and Mike Paulsen.²⁸

Accordingly, it would be somewhat sideways for me to argue that Professor Balkin’s approach does not ascertain constitutional meaning as accurately as would some other approach. I am not at all sure that Professor Balkin would even contest the point. Accordingly, I will leave him (and to a lesser extent Professor Strauss) with the following thought: If one has objects other than the ascertainment of meaning in mind for interpretative theory, perhaps one should pursue those objects with methods and disciplines uniquely suited to pursuing them. Interpretative theory can always share the load with political theory, moral theory, history, sociology, political science, anthropology, psychology, and a host of other disciplines that are ready and eager to explain, account for, and legitimate all manner of social practices. I fear that by loading all of the weight upon interpretative theory, Professor Balkin has sacrificed a perhaps considerable degree of ascertainment²⁹ in order to achieve goals that could better be achieved by other, non-interpretative means. As Mr. Scott once said, “The right tool for the right job.”³⁰

II. THE NO-CONSTRUCTION ZONE

Why interpret the Constitution? Why bother ascertaining its meaning? One possible reason, of course, is to follow the Constitution as a plan for

²⁶ *Id.* at 64.

²⁷ See Gary Lawson, *Conservative or Constitutionalist?*, 1 GEO. J.L. & PUB. POL’Y 81, 82 (2002).

²⁸ See, e.g., Larry Yackle, *In Medias Res*, 92 B.U. L. REV. 1259 (2012).

²⁹ In particular, his understanding of the scope of federal regulatory power, see BALKIN, *LIVING ORIGINALISM*, *supra* note 2, at 138-82, is much easier to defend as legitimation than as ascertainment, though that is a topic for a separate article.

³⁰ STAR TREK V: THE FINAL FRONTIER (Paramount Pictures 1989).

governance. If, for example, one has sworn an oath (as a judge or other public official) to preserve, protect, and defend the Constitution, and if one takes oaths seriously as moral obligations (perhaps defeasible obligations if following them leads to extremely vile consequences), one might think it important to know precisely what one has sworn to preserve, protect, and defend. Indeed, one might even want to know that information *before* deciding whether to take the oath.

As Professor Balkin points out, that is hardly the only reason one might want to ascertain constitutional meaning. One might interpret the Constitution, for example, “to understand its historical or sociological importance or to compare it with other constitutions.”³¹ But assume for the moment that one has decided, however contingently, to accept the Constitution as a plan for governance (perhaps because doing so will push the world marginally closer to a normative ideal, at a lower cost, than other readily-available strategies). How much guidance does the Constitution actually provide? Does the Constitution provide direct answers to most or all of the concrete questions that arise in governance, or does it provide only a skeletal outline of the rough shape of those answers? Is the Constitution a largely completed (and therefore mostly dead) skyscraper or a largely unfinished (and therefore mostly living) framework?

That is one of the most fundamental questions posed by Professor Balkin, and he spends much of his book defending and articulating the latter position. The mechanism for filling out the supposedly skeletal constitutional framework is *constitutional construction*, which involves “implementing and applying the Constitution using all of the various modalities of interpretation”³² It is (to borrow a phrase) common ground among many, and perhaps even most, modern originalists that construction begins where interpretation-as-ascertainment leaves off.³³ According to these thinkers, construction is the inevitable and unavoidable response to interpretative indeterminacy. If the constitutional text answered all possible questions, there would be no need for construction. But given any degree of indeterminacy, something must fill the gap. Thus, so the argument goes, *all* plausible

³¹ BALKIN, *LIVING ORIGINALISM*, *supra* note 2, at 38.

³² *Id.* at 4. The terminological distinction between interpretation and construction is often traced to KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1-2 (1999), though the substantive distinction between discovering and applying norms is ancient. For a remarkably thorough but compact introduction to the interpretation/construction distinction, see Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL’Y* 65, 66 (2011).

³³ *See, e.g.*, BALKIN, *LIVING ORIGINALISM*, *supra* note 2, at 22 (observing that originalism-as-ascertainment “will not be sufficient to decide a wide range of controversies”); Barnett, *supra* note 31, at 70 (“Unless there is something in the text that favors one construction over the other, it is not originalism that is doing the work when one selects a theory of construction to employ when original meaning runs out, but one’s underlying normative commitments.”).

originalist theories need (and employ) construction, and so *all* plausible originalist theories are “framework” rather than “skyscraper” theories. At that point, the only remaining questions are (1) how much indeterminacy actually exists (i.e., how many floors of the skyscraper remain to be built) and (2) which tools for construction will one employ. Since the latter question is seemingly normative rather than interpretative,³⁴ originalism-as-ascertainment cannot choose from among the plausible methods of construction. Accordingly, the only relevant metrics for choosing among interpretative theories – treating construction as an aspect of interpretation – involve precisely the multifaceted considerations that drive Professor Balkin’s analysis.

I want to dissent from the originalist construction project and declare the Constitution a “no-construction zone.” In adjudicative theory, one does not need construction to deal with interpretative uncertainty because there is an interpretative answer to interpretative uncertainty in adjudication.³⁵ I have set forth that answer elsewhere³⁶ and will only briefly reiterate it here.

In a normal trial within the American legal system, there can be considerable uncertainty about the facts. The trier of fact may be genuinely uncertain about what really happened. The solution to this uncertainty is not to come up with some extra-evidentiary mechanism for constructing facts but to *allocate the burden of uncertainty* to one party or the other.³⁷ In a criminal case, if the government cannot establish its version of the facts beyond a reasonable doubt, the government loses. If a civil plaintiff cannot convince the fact-finder that its version of events is more likely than not the true account, that party loses. It loses *not* because the fact-finder necessarily constructs some alternative account of the facts, decides that the alternative account is correct, and then enters a verdict. It loses *because of the resulting uncertainty, not because the resulting uncertainty is somehow resolved*. In adjudication, one does not need epistemological *certainty* in order to achieve adjudicative *determinacy*.³⁸ One only needs the appropriate standards of proof and burdens of proof that, together, determine who wins and loses when the epistemological answer is “beats me.”³⁹

³⁴ See Barnett, *supra* note 32, at 70-72.

³⁵ As a matter of pure interpretative theory, apart from the demands of adjudication, the problem of construction can never arise, because “I don’t know” is always available as an interpretative answer. In adjudication, however, “if you choose not to decide, you still have made a choice.” RUSH, *Freewill, on PERMANENT WAVES* (Mercury 1980).

³⁶ See Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 421-28 (1996).

³⁷ *Id.* at 423.

³⁸ *Id.*

³⁹ *Id.*

Suppose that Nicolas Cage, Diane Kruger, and Jon Voight squeeze some lemon juice on the Constitution, add some heat, and see a new Article VIII emerge⁴⁰ that reads,

In the event that there is any uncertainty about what this Constitution means in any specific application, resolve the uncertainty *against* the existence of federal power and *in favor* of the existence of state power. In other words, presume that state laws and acts are constitutional unless something in this Constitution convinces you otherwise and presume that federal laws and acts are unconstitutional unless something in this Constitution convinces you otherwise.

This provision would not, by itself, turn epistemological uncertainty into adjudicative determinacy. To do so, the provision would also have to specify the *standard of proof* that has to be satisfied in order for the Constitution to convince you otherwise of something.⁴¹ But it would be a good start. It would tell you, in essence, to do the best job that you can to ascertain constitutional meaning, would acknowledge that sometimes your best will not be enough to yield an epistemologically determinate answer, and would then tell you how to respond to that epistemological indeterminacy. It would *not* tell you to engage in construction using “all of the various modalities of interpretation.” It would tell you to declare the side with the burden of proof the loser and move on.⁴²

The Constitution, of course, does not contain any such Article VIII. Or does it? The federal government is entirely created – “ordain[ed] and establish[ed]”⁴³ – by the Constitution. This basic fact gives rise to the principle of enumerated powers and simultaneously gives rise, at least as a first-cut measure, to more or less the allocation of the burden of proof described in the hypothetical Article VIII for federal acts. He who asserts must prove, and anyone claiming the authority of a federal act must assert the validity of that act, which requires showing that something in the federal Constitution authorizes the appropriate federal institution to perform the act in question.⁴⁴ Of course, once that authorization is shown, there may be some other provision in the Constitution that arguably “trumps” or qualifies the basic authorization, such as the various “thou shalt not” provisions in Article I, Section 9 or the Bill of Rights.⁴⁵ In that case, once the proponent of federal power has satisfied its initial burden of proof, the role of assertion switches to

⁴⁰ Cf. NATIONAL TREASURE (Walt Disney Pictures 2004).

⁴¹ Lawson, *supra* note 36, at 411.

⁴² *Id.* at 424.

⁴³ U.S. Const. pmbi.

⁴⁴ See Lawson, *supra* note 36, at 425-26 (“[T]here is always at least an implicit assertion in any exercise of federal power that there is something in the Constitution that affirmatively authorizes the federal government to act.”).

⁴⁵ See, e.g., U.S. Const. art. I, § 9, cl. 2. (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

whoever is claiming the protection of a trump, and that party accordingly bears the burden of proof, and therefore the burden of epistemological uncertainty, with respect to those claims.

This framework also establishes the appropriate burden of proof for constitutional challenges to state laws and acts. States do not need federal constitutional authorization to act.⁴⁶ Anyone claiming that a state law or act violates the federal constitution is necessarily the asserter and therefore bears the burden of proof. If it is uncertain whether the Constitution forbids a state from acting, the state (or whoever claims under the relevant state act) wins. The correct answer, in other words, is almost exactly the opposite of current practice, in which federal laws enjoy (at least in theory) a presumption of constitutionality while state laws come with a good measure of suspicion.

One could, of course, call this allocation of burdens of proof a kind of constitutional construction: a principle not derived from any specific textual command (at least until *National Treasure III* reveals one) that nonetheless picks up the adjudicative slack in the face of interpretative indeterminacy. Fine. Application of the Aristotelian laws of logic is also an extra-constitutional “construction” of sorts, as is the notion that one should read the Constitution as though it was written in English. These are very different kinds of “constructions” from those that Professor Balkin (or Professor Whittington or Professor Barnett) has in mind. The proposition that he who asserts must prove is a basic principle of rational thinking, not a normative theory of governance. My only point here is that a method of dealing with (not resolving, but dealing with) interpretative uncertainty emerges from ordinary interpretation-as-ascertainment. One can ascertain what to do when one cannot ascertain.

Well, almost. One important dimension of the adjudicative enterprise does not appear to have an interpretative solution: the selection of a *standard of proof* for claims about constitutional meaning.⁴⁷ Does someone trying to show, for example, that a particular federal institution is authorized to take a certain action have to make that showing by a preponderance of the evidence, beyond a reasonable doubt, beyond a conceivable doubt, or by some other standard? The selection of a standard of proof can be outcome-determinative in adjudication, and I do not see anything in the Constitution that even implicitly selects the standard of proof. Accordingly, one cannot shut down constitutional construction altogether; it is hard to see how one could select a standard of proof through anything other than moral theory. But one can rope it off into a very small area.

Professor Balkin, however, wants to fill *all* of the spaces left by the Constitution – however vast or small those spaces might be – with

⁴⁶ Lawson, *supra* note 35, at 427.

⁴⁷ For a general discussion of the crucial role of standards of proof for establishing the truth of legal propositions, see Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 870 (1992).

constructions of various sorts. But it is quite possible to have a functioning constitutional system that simply leaves those spaces empty as an interpretative matter and fills them as an adjudicative matter without fixing or ascertaining any particular meanings in those spaces. *Interpretative uncertainty* is not the same thing as *adjudicative indeterminacy*. And without adjudicative indeterminacy, there is no need for construction.

I am confident that Curly would have agreed.