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On Reading Recipes -- And Constitutions

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Modern theories of constitutional interpretation typically make the truth of propositions about constitutional meaning depend, at least to some degree, on the extent to which those propositions (1) lead to politically legitimate results[1] and/or (2) cohere with modern constitutional practice.[2] That is, such theories generally maintain that correct interpretations of the Constitution must provide normative grounds to apply those interpretations in real cases, must be consistent with at least a substantial amount of real-world constitutional decisionmaking, or both.

This approach to constitutional interpretation gets it completely backwards. The Constitution's legitimacy and consistency with modern practice depend on the meaning of the Constitution; the Constitution's meaning does not generally depend on its legitimacy or on current practice.[3] One must first determine, through interpretation, what the Constitution means. Then, and only then, can one determine whether the properly interpreted Constitution generates any political obligations and whether current practice is consistent with the Constitution. The legitimacy of the constitutional order and the constitutionality of modern practice should be objects of inquiry rather than presuppositions of constitutional theory.

In large measure, the backwardness of much modern constitutional theory rests on a failure to distinguish theories of *interpretation* from theories of *adjudication*. Theories of interpretation concern the meaning of the Constitution. Such theories can be normative (what is the correct way in which to interpret the Constitution?) or descriptive (how do various people in fact, rightly or wrongly, interpret the Constitution?). Theories of adjudication concern the manner in which decisionmakers (paradigmatically public officials, such as judges) resolve disputes. Again, such theories can be normative (how should disputes be resolved?) or descriptive (how are disputes in fact, rightly or

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1. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1770-72 (1997) (noting interpretative theory's fascination with legitimacy).

2. The chief advocate of coherence with practice as a criterion for interpretation is, of course, Ronald Dworkin. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW 10-11 (1996) [hereinafter DWORKIN, FREEDOM'S LAW]; RONALD DWORKIN, LAW'S EMPIRE *passim* (1986) [hereinafter DWORKIN, LAW'S EMPIRE]. As Professor Dorf points out, virtually every "eclectic" theory of interpretation gives consistency with past and/or current practice at least some degree of relevance. *See* Dorf, *supra* note 1, at 1794. And almost everyone in the modern world employs an eclectic theory of interpretation.

3. There can be limited circumstances under which legitimacy, practice, or both can be relevant to constitutional meaning. *See infra* notes 35-36 and accompanying text. But those circumstances, if any, must be identified through interpretative tools that do not use legitimacy or practice as primary criteria of interpretation.

wrongly, resolved?). Thus, at the normative level, which is the primary concern of most scholars, a theory of interpretation allows us to determine what the Constitution truly means, while a theory of adjudication allows us to determine what role, if any, the Constitution's meaning should play in particular decisions.

It is plausible (even if ultimately mistaken) to think that normative theories of constitutional adjudication should take strong account of principles like political legitimacy and consistency with current practice. However, that is no reason to allow such concerns to spill over into the very different enterprise of interpretation. Interpretation is a search for the meaning of the interpreted document. Adjudication is a search for the morally correct course of action. The relationship between the two is contingent on a variety of elements.[4]

To his great credit, Professor Michael Dorf suffers from a much less virulent form of getting it backwards than do most modern constitutional scholars.[5] Nonetheless, the problem still hangs over his characteristically interesting and provocative article, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*.[6] Professor Dorf declares that "[t]he ultimate test of any constitutional theory will be two-fold: how well it describes the actual practice of constitutional law and how well it justifies that practice . . . ."[7] If by "constitutional theory" Professor Dorf means a theory of adjudication, then these are indeed plausible (even if wrong) criteria for evaluation.[8] If, however, by "constitutional theory" he means a theory of interpretation—a theory of constitutional meaning—then the relevance of his criteria is much less evident. And if, as seems most likely, he means some relationship between interpretation and adjudication, then the distinct role that each element plays in that relationship needs to be very clearly explicated.[9]

In short, we need to separate interpretative theory from adjudicative theory before we can determine whether and to what extent integrating normative and descriptive constitutional theory is a desirable goal. My narrow aim in this comment is to sharpen the separation between normative and descriptive theory

4. Indeed, one good conception of constitutional theory is the elaboration of the proper relationship, if any, between constitutional meaning and constitutional adjudication. The determination of constitutional meaning—the theory of constitutional interpretation—is then a subpart of the larger enterprise of constitutional theory.

5. In particular, he (correctly) downplays the role that legitimacy should play in constitutional interpretation. *See* Dorf, *supra* note 1, at 1772.

6. Dorf, *supra* note 1.

7. *Id.* at 1772.

8. The correct test for a normative theory of constitutional adjudication, as for any other form of normative political theory, is whether it conforms to true principles of justice. It is possible (though doubtful) that this test and Professor Dorf's test ultimately converge, but that is obviously a matter that would have to be argued at great length by expert moral philosophers. It is less clear that there is a single correct test for descriptive theories of adjudication—accuracy, simplicity, and predictive power might all be thought relevant.

9. Professor Dorf does not expressly say whether he is discussing interpretation, adjudication, or both; in this, he is squarely in the mainstream of modern constitutional scholarship. Perhaps, these comments can be of some use in prompting clarification of his (and other scholars') claims—even if they are of no other use whatsoever.

by demonstrating, contrary to Professor Dorf's assertions, that the merit of originalism as a normative theory of interpretation does not depend on social contract theory or any other theory of political legitimacy. One can be a strict interpretative originalist and forcefully deny that the Constitution has any political legitimacy.[10] Nor does the merit of originalism as a normative interpretative theory depend in any fundamental way on its ability to describe past or current practice (though such practice is not necessarily irrelevant to originalism). I also suggest in this comment the form that a defense of originalism as a normative theory of adjudication might take, though the elaboration of such a defense must await another day.

I. ON READING RECIPES

Suppose that we find a document hidden in an old house. The document appears to be written in English, and both linguistic analysis and scientific dating techniques indicate that the document was produced in the late-eighteenth century in the area commonly known as Philadelphia, Pennsylvania. The document lists quantities of items such as "one 2 1/2 pound chicken," "1/4 cup of flour," "one teaspoon of salt," "plenty of lard for frying," and "pepper to taste." It also contains instructions for combining and manipulating those items, such as "combine the one teaspoon of salt with the 1/4 cup of flour," "add pepper to taste to the salt and flour mixture," "coat the chicken with the flour," and "fry the coated chicken in hot lard until golden brown." The document, in other words, appears to be a late-eighteenth-century recipe for preparing fried chicken.

Sophisticated academics, however, find this document to be a great puzzle. After all, we can not really *know* that it is a recipe, can we? Perhaps it was a secret code giving instructions to military troops. Perhaps it was a private diary, and the items in it were really representations of people or events. Perhaps it was a poem, or an expression of aspirations for the good life. Or perhaps it was a blueprint for a form of government. Indeed, the academics will continue, the very notion that a document "is" one thing rather than another is meaningless. Even if the document's authors wrote it as the blueprint for a government, the document is a recipe for us if we choose to treat it as a recipe; and even if the authors wrote it as a recipe, it can be a blueprint for a form of government if we (or others) choose to treat it as such.[11] One can readily imagine the academics somberly holding symposia to discuss the characterization of the document—and perhaps the political significance of the enterprise of characterization.

At one level, the academics are right: The description of a document as a

10. Depending upon what one means by the Constitution's "legitimacy," I come pretty close to meeting this description.

11. Fans of *Star Trek*—the original *Star Trek*—will remember "A Piece of the Action," in which a book on Chicago gangs of the 1920s became the blueprint for a social order on a distant planet. *Star Trek: A Piece of the Action* (NBC television broadcast, Jan. 12, 1968).

recipe, a poem, or a blueprint for government requires consideration of human purposes, and those purposes can only result from an interaction between the document and purposive human beings. At another level, however, the academics are just being silly. Of course the document is a recipe; any fool can see that.[12] We have no evidence whatsoever to support any of the exotic alternative characterizations that can be put forward, whether one determines the document's characterization by reference to the authors' intentions, the consensus of people at the time of the document's issuance, or the consensus of people today. The document is a recipe, just as surely as the Sears Tower is a building.

So what does the recipe mean? We know, from our general knowledge of recipes and our study of this one in particular, that recipes are sets of instructions designed to achieve specific goals—in this case, the production of fried chicken. We know that recipes are frequently, though not invariably, designed to be read by persons other than the authors.[13] Such recipes present themselves to the world of human observers as communications of a particular kind, just as buildings or trees present themselves to the world of human observers as entities of a particular kind. Accordingly, at least absent specific evidence that would support a nonstandard usage of "meaning" or "recipe," the meaning of a recipe is its public meaning—the meaning that it would have to the audience to which the document addresses itself. And because every document is created at a particular moment in space and time, documents ordinarily, though not invariably, speak to an audience at the time of their creation and draw their meaning from that point.[14]

All of this gobbledygook leads to a conclusion so obvious that it can be obscured only by an advanced degree: The presumptive meaning of a recipe is its original public meaning. The meaning is merely presumptive because if there is good reason to think that a particular recipe was designed only for private rather than public consumption, then one must take account of both its original public meaning and its original private meaning to its intended audience.[15] In that case, the original private meaning might even be the standard one, though

12. Or, put more precisely, the proposition "the document is a recipe" is epistemologically warranted, while all other propositions that purport to describe the document are not epistemologically warranted unless those propositions make clear that they are using terms in a nonstandard fashion or we have some specific knowledge about this document that I have not included here. For example, if the proposition "the document is a poem rather than a recipe" means that the speaker finds it more interesting to read the document for its poetic rather than its culinary content, the proposition is no doubt true, but it uses the term "is" in a nonstandard fashion. There is nothing wrong with using terms in a nonstandard fashion so long as those usages are clearly identified and one scrupulously avoids the fallacy of equivocation.

13. Some recipes might be constructed only for the author or for a very small group of persons well known to the author.

14. One can, of course, imagine a document that is addressed exclusively to a future audience.

15. Conceivably, under certain circumstances, we might also want to take account of various present meanings, or even meanings at some nonoriginal point in the past. However, in the case of a recipe, it is hard to come up with plausible circumstances in which anything other than original meaning would be the standard account of meaning.

that is an empirical matter for linguists to explore. In our case, however, all indications are that this recipe presents itself to the world as a public document. Its meaning, therefore, is its original public meaning. One can ask interesting questions about how the specification of an ambiguous text[16] might change over time as surrounding contexts change,[17] but those questions, when properly formulated, concern *how to apply* rather than *whether to apply* a methodology of original meaning.

Determining the recipe's original public meaning poses a variety of interpretative problems. Some of the recipe's instructions are very clear and very specific. For example, in the instruction "combine the one teaspoon of salt with the 1/4 cup of flour," the quantity terms ("one teaspoon" and "1/4 cup") are very clear and precise and do not instruct the reader (the cook) to apply individual judgment.[18] Other instructions are very clear but imprecise. For example, the quantity term "to taste" in the instruction, "add pepper to taste the salt and flour mixture," is perfectly clear but not specific. By its terms, the instruction calls for the cook to apply individual preferences and judgment (though the instruction does not say *whose* taste—the cook's or someone else's—should be determinative).

Other instructions are neither clear nor precise. For example, when the recipe says to "fry the coated chicken in hot lard until golden brown," it is not linguistically obvious whether the chicken or the oil is supposed to be golden brown. Upon quick reflection on the evident purpose of the recipe, however, one can readily determine that the chicken is the proper object of attention. But "golden brown" is not a term with transparent meaning. It could refer to a quite specific color, or it could refer to a range of colors of uncertain breadth. Even a term as simple as "flour" may not be as simple as it first appears. Does "flour" refer to a specific product made from specific grains using a specific process, or does it include essentially any powdered grain product? Thus, the instruction "combine one teaspoon of salt with the 1/4 cup of flour" may be very precise but not clear if there is ambiguity about the proper referent of the term "flour". Finally, there is a problem of a different order. Whatever the proper referent of "flour" may be, 1/4 cup of it simply is not going to do a very good job of coating a 2 1/2 pound chicken. A bird that size requires at least 1/2 cup, and possibly 3/4 cup, in order to provide a coating that anyone will find acceptable. The instruction to use 1/4 cup of flour seems very strange in light of the evident purpose of the recipe to help produce a satisfying meal.

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16. Specification is a nondeductive, judgmental process of giving meaning to a norm that is indeterminate in a particular context. For a more detailed discussion of specification, see MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 74-75, 96 (1994).

17. *See generally* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). For an example of such an interesting question about the application of originalism, see *infra* note 26.

18. This statement assumes that we know that the relevant standards of measurement were the same in the eighteenth century as today.

The document thus presents a number of interpretative problems that are generated rather than solved by noting that the document's meaning is its original public meaning. There is also an important interpretative problem that is not unique to recipes or to original public meaning as a method of interpretation, but instead must be faced by all forms of interpretation in all contexts. Interpretation involves identification of three elements: *principles of admissibility* that determine what counts toward establishing an interpretation as correct; *principles of significance* that determine how heavily various kinds of admissible evidence should be weighted; and a *standard of proof* that determines how strong and significant the admissible evidence needs to be in order to justify a truth claim about the interpreted text.[19] The standard of proof is indispensable to interpretation: In addition to knowing what kind of evidence to look for, we need to know how much evidence we have to find before we can call off the search for meaning. Put another way, we need to know how certain we have to be about, for example, the proper meaning of "flour" before we can legitimately say that we have correctly interpreted the recipe's instructions concerning flour. The standard of proof thus plays a critical role in determining the amount of ambiguity that a document presents.[20] This is true regardless of whether we search for the meaning of "flour" using original public meaning, present public meaning, present private meaning, or any other principles of admissibility and significance.

So how do we deal with these various interpretative problems? I honestly do not know how to generate an appropriate standard of proof for interpreting recipes, so I will simply pass over that problem for now by holding the standard of proof constant at X. In examining how a theory of original meaning might address apparent ambiguities in the interpreted text through considerations of admissibility and significance, a number of solutions suggest themselves.

One solution is to argue that the document should be construed to be the best document that it can be—the document that best achieves its evident purposes.[21] On this understanding, whatever interpretation leads to the best fried chicken is correct. This, however, is a classic example of getting it backwards. Interpretation must precede evaluation, not vice versa. We need to know what the recipe means in order to judge whether it is successful as a recipe; the extent to which the recipe achieves its desired ends ought to be an open question rather

19. For elaboration of this model of interpretation, see Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992) [hereinafter Lawson, *Proving the Law*]. For applications that probably explain the issues more clearly, see Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411 (1996) [hereinafter Lawson, *Legal Indeterminancy*], and Gary Lawson, *Proving Ownership*, 11 SOC. PHIL. & POL'Y 139 (1994) [hereinafter Lawson, *Proving Ownership*].

20. *See* Lawson, *Legal Indeterminacy*, *supra* note 19, at 412-21 (exploring this issue in the context of constitutional interpretation).

21. *Cf.* DWORKIN, FREEDOM'S LAW, *supra* note 2, at 38 ("It is in the nature of legal interpretation—not just but particularly constitutional interpretation—to aim at happy endings."); DWORKIN, LAW'S EMPIRE, *supra* note 2, at 53-56 (discussing the principle of charity in artistic interpretation); *id.* at 225-28 (discussing how legal interpretation should aim at presenting legal practice in its best light).

than a starting point.[22] Of course, if we know that the authors were great chefs who were unlikely to produce a truly bad recipe, then a principle of "interpretative charity" might well be appropriate. However, we might choose instead to use this recipe as an occasion for reconsidering our views about the authors—even the best of us makes mistakes.

Another solution would be to argue that ambiguities must be resolved over time. Rather than study the original recipe, we should instead look to see how chefs over the past two centuries have in fact prepared fried chicken in light of this recipe. The recipe then draws meaning—and perhaps even draws most of its meaning—from what we might call the common law of cooking.[23] This is a plausible view, because a normal background assumption of recipes might well be that they will evolve over time as practitioners gain experience with them. In other words, it is plausible to think that the recipe's original public meaning includes an implied instruction to the effect that "ambiguities in this recipe shall be resolved by reference to the practices of cooks." This understanding necessitates determining which practices and which cooks count. One might, for instance, give particular weight to the views of cooks who practiced near the time of the recipe's origin, on the assumption that they are in a better position than their successors to grasp the context in which the recipe was produced. Or one might give special weight to modern cooks who are particularly skilled at understanding the original context of the recipe. Or one might give special weight to modern cooks who are particularly skilled at pleasing modern chicken-eaters, if that is our best understanding of what the recipe commands. Note, however, that the practice of cooks (whether original or modern) is constitutive of the recipe's meaning only (1) when the recipe's original public meaning on some point is ambiguous and (2) the recipe's original public meaning is best understood to designate practice (whether immediate or distant) as the proper means for resolving ambiguity. The recipe itself—including its background assumptions and understandings—determines the extent to which future practice is relevant to the recipe's meaning and the form that such future practice must take in order to be a valid source of meaning.

The interpretative role of past practice can be illuminated by carefully distinguishing what Chris Moore and I have elsewhere called, in the context of legal interpretation, *legal deference* and *epistemological deference*.[24] Legal deference describes a situation in which the views of a particular actor are authoritative simply because they are the views of that actor. The actor, in other words, has a status that automatically privileges (at least some) of the actor's interpretations. Epistemological deference, on the other hand, results when one

22. The recipe's degree of ambiguity may be an important aspect of this evaluation.

23. *Cf.* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883-88 (1996) (arguing that common-law tradition offers "the best model" for understanding constitutional interpretation).

24. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270-71, 1278-79 (1996).

has good reason to have confidence in an interpretation. In such a case, the interpretation is deemed authoritative only because, and only to the extent that, it is good evidence of the right answer. Thus, if the recipe said, "the practices of the head chef at The Everest Room are conclusive as to the meaning of any term in this document," then the views of the Everest's head chef would be entitled to legal deference; the document would designate an authoritative interpreter whose practices are constitutive of the document's meaning. If the recipe contains no such provision, the practices of the Everest's chef may be entitled only to epistemological deference, or even to no deference at all.[25] After all, a person talented enough to be head chef at The Everest Room may not be the best person to determine the original public meaning of a late-eighteenth-century recipe for fried chicken—even if he or she may be the best person to design a new, modern recipe for fried chicken. Such a person simply may not be interested enough in the recipe's original meaning to pursue the interpretative enterprise with much vigor.

Suppose now that in the years after the recipe's circulation, cooks began to depart from the recipe in significant ways. For instance, cooks today might overwhelmingly substitute rosemary for pepper because that is what current consumers seem to prefer. Suppose that there is a clear consensus in modern times that a recipe that uses rosemary is superior to a recipe that uses pepper. Does that practice affect the meaning of the recipe?

Clearly not (absent something in the recipe giving legal deference to the views of modern cooks or modern consumers). The recipe says "pepper," and if modern cooks use rosemary instead, they are not *interpreting* the original recipe, but rather they are *amending* it—perhaps for the better, but amending it nonetheless. The term "pepper" is simply not ambiguous in this respect.[26]

Perhaps, however, one could reason as follows: The object of the recipe is to produce tasty fried chicken. When the recipe specified "pepper to taste," it meant for pepper simply to be one possible seasoning among many. The recipe's use of the phrase "to taste" indicates that the object of that particular instruction was to maximize the attractiveness of the ultimate product. The best understanding of "add pepper to taste" is therefore "add seasonings, such as pepper, to taste."

The problem with this view, of course, is that the recipe could very easily have said "seasonings," but instead it specified "pepper." One suspects that this view is really collapsing into the previous view that the recipe should be read to

25. Of course, deference—whether legal or epistemological—can be a matter of degree rather than an all-or-nothing proposition; deference can be absolutely conclusive, strongly presumptive, or weakly presumptive.

26. Although it is unlikely that any plausible understanding of "pepper" would include rosemary, there might be other respects in which the term "pepper" is ambiguous. If refining techniques have changed over the past 200 years, so that what we today call "pepper" has a very different taste and texture than the "pepper" of 1789, one must determine whether a 1789 reference to "pepper" means "pepper as it exists in 1789," "pepper as it evolves over time," "whatever most closely approximates the taste and texture of pepper in 1789," or something else.

be the best recipe that it can be and that we are once again getting it backwards. A good recipe might well have said "add seasonings, such as pepper, to taste," but this recipe may just be a bad recipe.

There is one more variation on this interpretative technique. Perhaps, one might argue, the recipe contemplates an even more active role for the common law of cooking than simply the resolution of textual ambiguities. Perhaps the recipe should be read to contain an implicit instruction to the effect that "the overarching purpose of this recipe is to produce a good dish of fried chicken, so interpret this recipe—contrary to its express terms, if necessary—in order to achieve this goal." Such a provision would permit, or even require, cooks following the recipe to, for example, use more than 1/4 cup of flour despite the specific reference in the recipe to 1/4 cup of flour. If recipes are generally best understood, as a matter of original public meaning, to contain such a proviso, then maybe the method of reading the recipe to be the best that it can be is not backwards after all. Maybe that is precisely what the recipe calls for.

Suppose, however, that the recipe contains a specific instruction dealing with changes. It may provide, for example, that the instructions in the recipe may be altered through an elaborate procedure, such as securing the agreement of a majority of the cooks (or representatives selected by the cooks) in three-quarters of the restaurant associations in the country. Such a provision would make it very difficult to argue that the document is best read to contain an additional, implicit method for change. Difficult, but not impossible. If one could show that, at the time of the recipe's origin, certain methods of change—such as a direct referendum of all the cooks in the country—were so taken for granted that they would be part of a recipe unless *expressly* excluded, then perhaps the recipe's specific method for change would not be exclusive.[27] But any changes in the recipe must be made in accordance with either the explicit or implicit procedures for change contained in the recipe. Otherwise, one is *substituting* a new recipe rather than *interpreting* the old one.[28]

So, one might ask, what is wrong with substituting a new recipe for the old one, especially if the new recipe is clearly better than its predecessor? The answer is: quite possibly nothing. But that is a matter quite different from the

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27. *Cf.* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 487-94 (1994) (arguing that direct majority vote is an unenumerated means of constitutional amendment); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1050-61 (1988) (same).

28. Suppose that 50 years ago, cooks overwhelmingly began using rosemary instead of pepper and 1/2 cup of flour instead of 1/4 cup when employing the recipe. Also suppose that the leaders of the restaurant associations at that time were selected largely because they favored such substitutions. Could one say that there was at that time so much support for these changes that there was a "culinary moment" that effectively amended the recipe? *Cf.* 1 BRUCE ACKERMAN, WE THE PEOPLE 34-57 (1991) (arguing that the Revolution of 1937, in which the Supreme Court effectively stopped policing Congress's legislative jurisdiction, was a "constitutional moment" that validly amended the Constitution). Only if that culinary moment used a mechanism of change that is explicitly or implicitly authorized by the recipe. Otherwise, as before, one is substituting a new recipe rather than interpreting the old one.

proper interpretation of the old recipe. It is one thing to know what the old recipe means; it is another thing altogether to decide whether one ought to follow the old recipe. Indeed, one would think that the decision whether to follow the old recipe would depend, at least in part, on what the old recipe in fact means.

Let us be very clear about this: The question whether to follow the old recipe is distinct from the question of the old recipe's meaning. If one concludes that the old recipe is in fact the best recipe for fried chicken that one has ever encountered and that it cannot be improved in any way, *and* one thinks that good fried chicken is a desirable outcome, then one would have good reason to follow the recipe. But what if one believes that the recipe is flawed in some way and that the recipe does not authorize the particular changes that would be required to improve it in this case?[29] If one is making fried chicken, is there any reason why one would follow the recipe instead of one's own best judgment?

There are several reasons, though they are contingent on a number of circumstances. First, one might think that past cooks, such as the recipe's authors, can provide useful insight into the problems of modern cooking. One might call this *ancestral cooking*.[30] Note that ancestral cooking would not necessarily require *following* the recipe as opposed merely *to considering it carefully* in crafting one's own approach toward fried chicken. Second, one might have good reason to believe that the authors of the recipe were very wise chefs, so that their judgment about fried chicken is, on the whole, likely to be more reliable than one's own. One might call this *heroic cooking*,[31] and it could justify a strong policy of following the recipe even when one has doubts about it (though it could also justify a weaker policy of giving the recipe presumptive, though not necessarily determinative, force).

There is a third, very different kind of argument for following the original recipe, which one might call the argument from *coordination*. In many circumstances, there is no good reason to follow the recipe; we are all better off using our own best judgment in deciding what to do. However, there are some circumstances in which social coordination is paramount. For example, if one is running a nationwide chain of restaurants, there is real value in standardization; customers should know that they can enter any such restaurant anywhere in the country and receive food of known and familiar quality. Accordingly, it is very important in those kinds of circumstances for the cooks in the various restaurants to use the same recipe. While we may all be able to think of ways to improve the original recipe, we may not be able to agree readily on precisely which improvements are worth making. In other words, we can agree that the original recipe is not ideal but disagree about what an ideal recipe would look

29. As we have seen, the recipe might well contemplate some changes by future cooks. But the types and methods of change contemplated by the recipe are determined by the recipe itself.

30. *Cf.* Dorf, *supra* note 1, at 1801-03 (describing "ancestral originalism" as a possible justification for constitutional originalism).

31. *Cf. id.* at 1803-05 (describing "heroic originalism" as a possible justification for constitutional originalism).

like. Securing agreement on something as important as a recipe for fried chicken can be enormously costly, especially in a culinarily pluralistic society. In such a case, the original recipe may be the point around which standardization can most conveniently be constructed; the costs of reaching consensus on a new recipe may exceed the benefits to be gained from substituting an improved recipe for the old one. Of course, if the old recipe is really dreadful, it is likely that we should take the trouble to try to find a new one that can serve as a nexus for coordination, but if the old recipe is pretty good, though imperfect, keeping with it may be better than the available alternatives. To paraphrase Winston Churchill, following the old recipe may be the worst form of cooking, except for all of the others.[32]

Note that there are several other kinds of arguments for following the recipe that have little or no persuasive value. Suppose that a convention of cooks in the eighteenth century formally adopted the recipe as their guide to making fried chicken, and a majority of the chicken-eating public at that time formally ratified that decision. There is absolutely no plausible argument that would bind a present cook to their actions—or at least no argument that does not reduce to considerations of ancestral or heroic cooking or both. That is, we might have good reasons to view those past actors as repositories of wisdom, but absent those considerations, the bare *fact of their agreement on the recipe* has no normative force for present day cooks. Neither, for the same reasons, does *present* agreement among cooks or chicken-eaters. Present actors may also be repositories of wisdom, but the mere fact of their agreement on something does not provide a normative reason for any individual cook to follow their views.

To summarize: Interpreting a recipe and following a recipe are distinct enterprises. Ordinarily, the proper way to interpret a recipe is to determine its original public meaning. If the recipe is ambiguous, we should first inquire whether the recipe itself contains an unambiguous directive on how to resolve ambiguities. Once we have interpreted the recipe, then we must decide whether to apply it in any specific case of cooking to which it might be applicable. That is a normative judgment, and the best answer may well be that we should not apply it. The binding quality of the recipe, in other words, must be a conclusion rather than a premise of (to invent a phrase) "recipeal theory." One can construct arguments for why the recipe should be followed in certain circumstances, but those arguments are contingent and contestable and must be developed at great length.

II. ON READING CONSTITUTIONS

The Constitution of the United States is a recipe—a recipe for a particular form of government. It aims at certain ends, though the extent to which

32. Churchill declared in 1947 that "it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." THE OXFORD DICTIONARY OF QUOTATIONS 202 (Angela Partington ed., 4th ed. 1992).

following the recipe will achieve those ends is a question for inquiry. As a recipe of sorts that is clearly addressed to an external audience, the Constitution's meaning is its original public meaning. Other approaches to interpretation are simply wrong. Interpreting the Constitution is no more difficult, and no different in principle, than interpreting a late-eighteenth-century recipe for fried chicken.[33]

Some of the Constitution's provisions are very clear and very specific. Others are clear but not specific, and still others are not entirely clear. Are they clear enough to be known? That depends in large part on the appropriate standard of proof for claims about constitutional meaning; the higher the standard, the less likely we are to be able to make justified knowledge claims. I honestly do not know how to generate an appropriate standard of proof for interpreting constitutions, so I will simply pass over that problem for now by holding the standard of proof constant at X. Instead, I will look at how a theory of original meaning might try to address apparent ambiguities in the interpreted text through considerations of admissibility and significance.

Should ambiguities be resolved by construing the Constitution to be the best constitution that it can be? Certainly not. Interpretation must precede evaluation, rather than vice versa. The Constitution's merit as a constitution depends on its meaning, and one should not prejudge that question by allowing preconceptions about merit to affect the interpretative enterprise. The Framers of the Constitution were wise in the ways of government and human nature—arguably far wiser than most of their counterparts today[34]—so a principle of "interpretative charity" may be appropriate. However, we may want to use the Constitution as an occasion for reconsidering our views about the Framers; even the best of us makes mistakes.

Does the Constitution anticipate that the practices of future actors, such as judges, presidents, and constitutional lawyers, will help resolve these ambiguities? Yes, but in a very limited way.[35] Such actors, especially those who operate near the time of the Constitution's promulgation, are a likely source of wisdom concerning the meaning of ambiguous constitutional terms (such as "[t]he executive Power," "the judicial Power," and "the free exercise [of religion]"), and their views are accordingly entitled to weight in the interpretative process. But such views deserve consideration because they are good evidence of the

33. One can try to argue that constitutions are unique kinds of documents that require unique methods of interpretation. I will gladly listen to any such argument, *see, e.g.*, Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 564 (1985) ("For the American polity, the constitutional text is not (simply) a book of answers to particular questions . . . . It is, rather, a principal symbol of, perhaps *the* principal symbol of, the aspirations of the tradition."), but I still contend that the Constitution looks a lot like a recipe.

34. *See* Steven G. Calabresi & Gary Lawson, *Two Visions of the Nature of Man*, 16 HARV. L.J. & PUB. POL'Y 1 (1993).

35. I will defend the conclusory assertions in this paragraph in a forthcoming article tentatively entitled "An Originalist Theory of Precedent." For some preliminary thoughts, see generally Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

right answers, not because they are constitutive of the Constitution's meaning. In other words, they are generally entitled only to epistemological deference, not legal deference.[36] The Constitution does not generally designate a body of persons who are authorized, by virtue of their station, to define with finality the Constitution's meaning.[37] Instead, the Constitution contains an implicit set of burden-of-proof principles for resolving ambiguities: When the issue is the scope of enumerated national powers (and all national powers are enumerated), resolve doubts against the national government, and when the issue is the scope of specific limitations on national or state powers, resolve doubts in favor of the government.[38]

But interpreting the Constitution and applying the Constitution are two different enterprises. Once one knows what the Constitution means, there remains the (open) question whether to apply that meaning in any given case in which it might be thought potentially applicable. Interpretative theory is one thing, adjudicative theory is quite another. Any claim that the Constitutions's meaning should guide adjudication, like any other claim about what people "should" do, must be justified by sound moral arguments. And that is a tall order.[39]

Arguments for the authority of the Constitution, like arguments for following a recipe, cannot rely on its past ratification or its current acceptance. There is simply no way to bridge the gap between *A*'s acceptance and *B*'s obligation. Past majorities cannot bind present individuals, and neither can present majorities. If two people encounter a third person in an alley and they vote two-to-one to seize a portion of the third person's assets, the third person is under no moral obligation of compliance, though prudence may often dictate nonresistance as the better part of valor. If one changes the hypothetical to 150 million people

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36. Judicial judgments in specific cases generate limited obligations of legal deference, *see* Lawson & Moore, *supra* note 24, at 1313-27, but other actors are free to disregard the views expressed in such judgments in future cases. *See id.* at 1327-29.

37. Anyone who thinks that the Constitution designates the Supreme Court as the final, definitive expositor of the Constitution simply has not read the Constitution very carefully. The Supreme Court, through the Article III Vesting Clause, has the power and duty to interpret the Constitution in the course of resolving disputes, but that is a far cry from a power to fix the Constitution's meaning or to bind other interpreters (including future Supreme Courts). *See id.* at 1290-1302; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 294-300 (1994).

38. *See* Lawson, *Legal Indeterminacy*, *supra* note 19, at 424-28. When the national government is concerned, however, most claims about limitations turn out in fact to be claims about enumerated powers because of the relationship between the Bill of Rights and the Sweeping Clause (or, as moderns call it, the Necessary and Proper Clause). *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 315-26 (1993).

39. *See* Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 775-83 (1988) (suggesting that law professors are unlikely to advance moral knowledge in any significant way); *see also* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 57 & n.16 (1992) (concluding that my previous discussion was too optimistic about the value of normative legal scholarship, but suggesting that a fair amount of seemingly normative work can be recast as useful descriptive analysis).

voting to seize a portion of the assets of 100 million others, all one has changed is the number of victims. Social contract theory and any other process-based theory of legitimacy, such as Professor Dorf's present-day acceptance theory,[40] can ground political obligation only if there is *unanimous* consent of the governed—and that is never the case in the real world.

It is highly improbable that any plausible argument for the Constitution's authority can be made that does not, at least to some extent, depend on the Constitution's substance.[41] Perhaps an argument for a strictly originalist theory of adjudication can be made that is analogous to my coordination argument for following old recipes. But that is a subject for another day. For now, it is enough to recognize that interpretation and adjudication are distinct endeavors and that theories of adjudication depend on theories of interpretation—rather than the reverse.

40. *See* Dorf, *supra* note 1, at 1772.

41. There can, of course, be good reasons for following a constitution even if it does not correspond perfectly to ideal political theory—just as there can be good reasons for following a recipe even if the recipe is not ideal. Any such arguments will surely take some account of the extent to which the constitution in question departs from sound political theory.