**A Textualist Argument for a Living Constitution**

1. **Introduction**

In considering the interpretation of legal documents, there is a well-known debate between so-called “textualists”[[1]](#footnote-1) and those who adopt a “living tree” account. The former, roughly, believe that the interpretation of laws is to be determined relative to the meaning of the language of laws at the time of their writing. The latter believe that the meaning of the law changes as beliefs and mores of society change. Clearly, presuming one view or another can have a significant impact on the interpretation and application of law. The view defended here suggests that a version of the living constitution view of the law is correct, and that the conflict between this view and textualist accounts is only apparent. In fact, it is argued that the very intuition that underlies a textualist conception of legal interpretation, that the meaning of a legal test is fixed by the meaning of the words as used by the law’s ratifiers, actually supports an idea of the law as living.

To be sure, there are several related, though importantly different views that fall under the *textualist* and *originalist* banners (as there are for living treeaccounts). I will largely ignore these differences here, as my goal is not, ultimately, to endorse a particular version of textualism (though I find such an account plausible). Rather, it is to show that two views that largely taken to be diametrically opposed, need not be viewed as such.

1. **Defending Textualism**

Critiques and defenses of textualist theories of legal interpretation, in all their incarnations, have been, to say the least, well gone-over in the literature. I can’t pretend to revisit all of this here, but I do need to say what I take textualism to be and why I think such an account is plausible. By “textualism”, I mean the view that suggests that the proper interpretation of the law begins, and very nearly ends, with the meaning of the words in the relevant texts – and that the meanings of the text is fixed to the meanings of the words at the time the text was made law. The caveat “very nearly” is there to recognize the obvious fact that not all law is textual – perhaps the best example of which is the prevalence of common law in many English-speaking countries. In any event, many have found the above-mentioned textualism wanting on several counts. To be sure, I am not fully convinced of it myself. The point I wish to raise here is that, even granting this view of legal interpretation, there is reason to accept the law as living.

It should be noted that the account of textualism I am working with does not endorse the idea that it is legislative intent that determines the meaning of a law. What is key is the act that makes a law in the first place. If the voting of a legislative body is sufficient to constitute the making of a law, then the meaning of the words of the text reflecting the law are fixed in reference to the meaning of the words as used by the legislators at the time of the voting. However, if a law is created by referendum of the general voting populace, then the meanings of words of the text are fixed in reference to the meaning of those words as used by the general voting populace – even if that conflicts with the author’s[[2]](#footnote-2) intent. The rationale here is that if the meaning of a law is determined by referencing beliefs or activities external to the law-making act itself, the law will be illegitimate. In other words, such a text, so interpreted, should not be considered law at all.[[3]](#footnote-3),[[4]](#footnote-4)

Similarly, that the author of a law meant something or other by her text is beside the point as it pertains meaning of that text in relation to its being law, since she is not empowered to make the law (other than her perhaps having a say in the matter via her vote). Part of the motivation for this view is the desire to endorse democracy generally – that laws are legitimate when a people subject to the law are the makers of the law. [[5]](#footnote-5) Of course, much more needs to be said in defense of this version of textualism, but this will suffice for our purposes here.

1. **Law and Authority Over Time**

How, though, does the foregoing allow for a living constitution? Regardless of who is referenced in fixing the meaning of law, isn’t it still fixed and thus not subject to changing mores and beliefs over time? The answer to this is “yes”, but there is a built-in assumption here that deserves challenge. This assumption is that, if a law is created in a nation’s past (say, at its founding), that, absent repeal or legislative clarification, that law remains law for the nation indefinitely. This is, I think, mistaken. To see why, we need consider what it is that gives a law its authority over time.

Going forward, I will be assuming that there is, in fact, a close connection between a law’s being authoritative and it’s being legitimate - – that at least a necessary condition for a law’s having authority is that it be legitimate or that it derive from a legitimate process.[[6]](#footnote-6) In what follows, I will assume that, in democratic societies, laws have authority because they are arrived at through a democratic process of some sort.

What, then, is the problem for determining a law’s legitimacy over time? The difficulty arises when one considers that many extant laws were enacted generations before any current members of a citizenry were born. As such, the current citizenry had no say in the enacting of the law. How then, can such laws be rightly said to have authority over that citizenry?[[7]](#footnote-7)

 One well-known approach to addressing the problem is to invoke the idea that the current citizenry (and others) give their implicit consent to accept the authority of law by their actions or inactions. Primarily, an individual agrees to abide by the law of the land by living in the territory governed by law. Simply not leaving is sufficient to count as tacitly accepting the authority of law. There are, of course, several rather significant difficulties that arise in defending such an account. But, for my purposes here, I will assume that something like an account of this sort is correct.

Traditionally, the tacit acceptance to be governed by living in a territory has been taken to apply to citizens and non-citizens alike. So, when, say, an American visits Poland, he agrees to abide by the laws of Poland, and he does so even if massively ignorant as to the nature of most of the laws. This would seem to apply to Polish citizens as well. Assuming that Polish citizens are much like citizens of other nations, they are likely ignorant of much of their nation’s law (how could they not be, given the vast legal codes common in developed nations?). But, such ignorance of the law does not preclude tacit acceptance of it, or one’s being subject to it.

Though this may be correct, the roles of tacit acceptance of law by citizens and non-citizens should not be conflated. The tacit acceptance of law by citizens determines the law’s legitimacy in a general sense; whereas the tacit acceptance of law by tourists, residents (whether legal or illegal) does not.[[8]](#footnote-8) The latter justifies not the law, but the application of law to the individuals in question (it’s authority over them). This can be seen by considering explicit acceptance of law. The explicit accepting of law by a citizenry (say, by voting) creates the law. The explicit accepting of law by non-citizen residents does not. It is, in fact, largely irrelevant, as by being a resident, one consents already.[[9]](#footnote-9) Perhaps another way of thinking of difference is that non-citizen consent allows for the law to govern the individual consenting, whereas citizen consent, tacit or explicit, allows for the governing of others (the populace as a whole).[[10]](#footnote-10),[[11]](#footnote-11)

1. **Tacit Consent to What?**

So, if it is the tacit consent of citizens that gives the law its legitimacy (and thus, I’m assuming, it’s authority) over successive generations, to what do citizens tacitly consent? A more traditional textualist might claim that citizens assent to be governed by the law according to the meaning of those laws present in the legal code[[12]](#footnote-12) at the time of their writing. But this seems to be a mistake. The reason is that the citizenry of, say, the year 2011, may not have ready epistemic access to that meaning, when the ratification of the law was in the significant past. And, if they have no ready epistemic access to that meaning, it cannot be meaningfully claimed that the citizenry tacitly (or explicitly) consents to it.

The principle at issue here will be familiar to many. It is the widely accepted legal principle of non est factum. Typically, a contract is held to be valid, even if one participant in the contract is unaware of its contents (say, by failing to read it), so long as they have signed it. That is, negligent ignorance is no excuse and does not invalidate the contract.[[13]](#footnote-13) However, not all cases of ignorance involve negligence. On numerous occasions, courts have held[[14]](#footnote-14) (reasonably) that someone who cannot read a contract, and as a result misunderstands the content of the contract, does not enter into a binding contract even if the individual affixes his signature. The upshot is that in circumstances where one cannot be reasonably held to understand the content of the contract to which one ‘consents’, one is not bound by the contract.

If this is a reasonable principle for contracts generally, then it should hold for social contracts, including the sort of which we are discussing here. For, the tacit consent mentioned above just concerns a kind of social contract. The point is that claiming that a person in the year 2011 tacitly consents to be governed by the legal code, according to the meaning of that legal code at the time of its writing (when that writing is in the significant past), is akin to claiming that a person can consent to a contract that they cannot read.

One can see why it is that contemporary citizens may have no ready epistemic access to the meaning of a bit of legislation at its writing by considering how it is that one ever has access to meaning. Typically, one acts under the very reasonable supposition that the words of others were acquired by those others in the same manner that one has acquired those words – and thus, that those words have the same meanings as yours. The idea is that there is a public meaning of words that competent language users share in.

This is, of course, a reasonable supposition concerning considering the meaning of laws as well. But, it will necessarily yield the wrong result when confronting words that have changed their meaning over time – as happens with the interpreting of some legal texts.[[15]](#footnote-15) The only other option would be for the citizenry to engage in some sort of radical interpretation. That is, to discover the meaning of, say, a 200-year old legal text, a citizenry would have to (under the assumption of a similar conceptual scheme), correlate the linguistic behavior of the laws ratifiers with their other behavior.[[16]](#footnote-16) This is a practical impossibility.

Of course, it won’t always (or even often) be the case that the meaning of a word or phrase at the time of its writing varies from its contemporary meaning[[17]](#footnote-17), not least because the writing of many laws is itself contemporary. In such cases, it may be legitimately held that a modern citizenry does tacitly consent to be governed by a legal code according to its meaning at the time of its writing, as the aforementioned supposition is justified. But, for most nations with a long established legal history, it cannot be seriously argued that this holds universally.

It may be rightly pointed out that there are experts in such matters of legal interpretation, perhaps the courts, even – such that while typical citizens cannot themselves be expected to know the meanings of words from 200 years ago, they can and are responsible for appealing to these experts. It might then be argued that citizens who do not avail themselves of such interpreters are indeed negligent, and are thus not excused from the contract by mere ignorance of the law to which they consent.

Indeed, there must be a penumbral reasonableness standard in play, here. Surely though, a requirement that all who enter into contracts solicit the assistance of such experts would be onerous. [[18]](#footnote-18) This is typically not a requirement for contracts in general – neither should it be so for social contracts. And this seems especially so for constitutional interpretation, as the contract in question does not appear to be in a language foreign to the contractors. It may well be reasonable, as some courts have held[[19]](#footnote-19), to expect a signatory to a contract written in a foreign language to seek out interpretive expertise. However, the reasonableness of this requirement results from the epistemic deficit being obvious to the signatory. This is not so concerning cases of constitutional interpretation.[[20]](#footnote-20)

 What remains for the citizenry to consent to, if not the original meaning of the legal code when it was written? The answer is the text itself, with the meaning that those words have contemporarily.[[21]](#footnote-21) The idea is that a society of a given period consents (tacitly) to be governed by law as it would be reasonably interpreted by a competent language user of that period. The text remains fixed, but different generations can, and often will, live in a time when the words of the text have different meanings. And in such cases, the laws to which those generations subject themselves by tacit consent will vary from those to which the original ratifiers subjected themselves. In effect, what I am suggesting is that documents like the U.S. constitution undergo perpetual ratification, and as the meanings of words change over time, so does the constitution ratified. The text of the Bill of Rights to which we are bound is the same as that of the founders, yet it is a different (though similar) bill of rights.

 Again, there will be penumbral cases. Perhaps given times in a populace’s history, there will be no fact of the matter concerning the normal meaning of a word or phrase. In other cases, though the meanings of words that appear in legal documents may change, there will be readily understandable modern judicial decisions that clarify the meaning of a text to contemporary generations, such that text retains its original meaning for these later generations.[[22]](#footnote-22) I leave resolution of these matters for another time.

1. **“Living” Legal Documents**

It should now be clear in what sense the above account endorses the view of legal documents as living. Though parts of the legal code (the text) will remain constant, the meaning will vary over time as the meaning of the words vary. The above account is also textualist, in that that the meaning of a legal text is determined by reference to the meaning of its words at the time of ratification. At the outset, the ratifiers will likely be representative bodies (or the populace generally, in cases of referenda). In successive generations, it will be the citizenry by their tacit consent.

 “Living” should here be taken in a limited sense. For instance, it does not follow from the above that a law means whatever the citizenry thinks it means. And this is simply because the meanings of words are not derived (solely) from what their users intend by them.[[23]](#footnote-23) It is an interesting and, I think, open question concerning whether majority of language users could be mistaken as to the meaning (and proper use) of a word. I take no stand on that here.

Further, the sense of “living” considered does not by itself imply that legal interpretation rests on requirements of social necessity or the evolving mores of a society. It may, but only if the meanings of words is so fixed.

To see what is at issue in actual practice, consider the (oft and over-used) example of the 8th Amendment and the death penalty.[[24]](#footnote-24) The amendment rules out (among other things) cruel and unusual punishments in the U.S. – the words “cruel and unusual” being in the text itself. Let us suppose both that the meaning of a predicate is its extension, and that it’s extension is determined by its use.[[25]](#footnote-25) Suppose further that the word “cruel” today is applied differently than it was at the time of the Constitution’s ratification, such that such punishments are not included in the extension now, but were in the 18th century. Then, according to the view presented here, the constitution in effect at the time of ratification in the 18th century permits the death penalty, whereas the constitution currently in effect would not – even though the text is of course the same.

1. **Conclusion**

Undoubtedly, the issues raised here deserve further consideration[[26]](#footnote-26) – the responses too quick. In any event, I think the basic intuition behind textualism correct – that the meaning of a law is fixed by referencing the meaning of its words according to the meaning common to the law’s ratifiers. However, even if true, it does not follow that interpretation of a law goes through the original ratifiers. Rather, a citizenry continually ratifies the laws to which it subjects itself, and as the meanings of those words change over time, so will those laws. Concerning, say, the U.S. Constitution, though the text may be very nearly the same now as in the 18th century, a different constitution is in effect.

1. [↑](#footnote-ref-1)
2. By “author”, I mean whoever devised the text that was to become law. [↑](#footnote-ref-2)
3. This last raises a host of difficult problems, including: Who is empowered to create law? Is there a fact of the matter as to the meaning of words as used by the general populace? How is this fact discovered? What is to be referenced when there is a multi-stage process that creates a law (legislative voting, executive signing, and referendum)?, etc. Though legitimate concerns, for fear of turning this into a different paper, they cannot be addressed here. [↑](#footnote-ref-3)
4. An analogy with the rules of games may be appropriate here. There are of course, several bodies the set the rules for basketball games: FIBA, the NBA, the NCAA, the WNBA, etc. But, consider a pickup game of basketball. Anyone familiar with such playground games is aware that the rules at work seem to vary rather dramatically from those of more organized games – especially concerning fouls. What counts as a foul will vary even among the different levels of organized basketball. Which sets of rules properly govern pickup games? That a particular pick-up game uses the rules of, say, the text of the NCAA rulebook as a working model does not mean that their game is governed by the NCAA rule-makers. It is the participants in the pickup game that that are empowered to set and interpret the rules. And so, if the participants’ interpretation of “foul” differs significantly from that of the author of the NCAA rules committee, this is does not invalidate that interpretation. The meaning of the word as it pertains to the proper playing of the pickup game is fixed in reference to those who are empowered to set the rules of the game, its players – regardless of either the author’s intent in the writing of the NCAA rulebook or the implementation of that rulebook at the collegiate level. Thus, the players may rightly be viewed as the true authors of the rules of their game – though they had no hand in writing the text of the rulebook from which rule is taken. [↑](#footnote-ref-4)
5. It is worth noting that Antonin Scalia, a textualist if there ever was one, agrees on at least this point: “ . . . it is simply incompatible with democratic government, or indeed even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated”. (Scalia, Antonin. *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), p. 17) [↑](#footnote-ref-5)
6. Adopting this assumption is to ignore recent scholarship challenging just this point. See Garthoff, Jon (2010). *Legitimacy is Not Authority*. Law and Philosophy 29 (6):669-694, for one such example. Though these challenges deserve response, and I believe the connection between legitimacy and authority can withstand these critiques, I will not address these here, for fear of turning this in a different paper. [↑](#footnote-ref-6)
7. This problem concerns not just a law’s legitimacy over generations, but the authority of the law over those that, for whatever reasons, did not participate in the ratification process or are ignorant of the law – for instance, children who come of age, or legal (and illegal) residents, tourists, etc. [↑](#footnote-ref-7)
8. I realize there is a problem here concerning who counts, legitimately, as a citizen. Clearly, if citizens are so determined as a matter of law, there is a risk of begging the question. But again, I will ignore this on the grounds that any social contract theory of this sort has the same difficulty. [↑](#footnote-ref-8)
9. It should be noted that, in some municipalities, legal residents, though non-citizens, are permitted to vote. In what follows, consider my use of “citizenry” to include anyone empowered to determine the law of the land. [↑](#footnote-ref-9)
10. Recall that the appeal to implicit consent was an attempt to explain how law can remain legitimate over time. If it is not implicit consent of the governed, then one is at a loss for an explanation. Surely, law does not attach itself to a landmass. [↑](#footnote-ref-10)
11. To carry this point a bit further, consider the population of Monaco during the weekend of a Formula 1 race. It is very likely that in such cases, the majority of those residing in the principality are not in fact citizens. Surely a law’s being illegitimate in the eyes of these visitors is not sufficient for the law’s illegitimacy – in fact, it would seem to play no role at all. The attitudes of the citizenry are the only ones that matter, if any do. Implicit consent by citizens, then, plays a role similar to that of explicit consent of the body of the law. Such consent carries over the explicit social contract of past generations to current ones. Of course, individuals may explicitly reject significant blocks of their country’s legal code, but they consent to be governed by the will of the masses or results of the legislative process. Returning, then, to the question of the law’s authority over those who seemingly did not create the law, the question would seem to be answered by stating that citizens accept the existing law as it is, merely by remaining a resident of their country (county, town, etc.) upon reaching the age of consent. However, this is not so obvious, and in what follows, I will argue that it is false. [↑](#footnote-ref-11)
12. By “legal code” here, I mean the law as written – uninterpreted. [↑](#footnote-ref-12)
13. Technically, the issue here is not whether a contract is invalidated, but rather whether a contract is entered into at all. [↑](#footnote-ref-13)
14. Foster v. Mackinnon (1869), L.R. 4 C.P. 704 at p. 711. [↑](#footnote-ref-14)
15. Here, “interpreting” should be taken in its more colloquial sense, and not as technical term as applied to legal interpretation. [↑](#footnote-ref-15)
16. Something akin to Davidson’s view seems at least plausible. (Davidson, Donald. "Radical Interpretation," *Dialectica*, 27, (1973), 313-328) [↑](#footnote-ref-16)
17. It is surely more correct to say that words never change their meaning. As per Kaplan, words with the same spelling and pronunciation but different meanings are in fact different words. (Kaplan, David. “Words”, in *Proceedings of the Aristotelian Society*: Supplement 64 (1990), pp. 93–119) [↑](#footnote-ref-17)
18. I take it that this is the reason contracts are often invalidated for containing technical jargon that the contractors could not be reasonably be expected to understand. Given the increasing technocratic nature of government and lawmaking, it would be interesting to see the courts’ response to a legal challenge to statute on the grounds that the language involved could not be reasonably understood by those under its authority (the citizenry). [↑](#footnote-ref-18)
19. Italian court – get source [↑](#footnote-ref-19)
20. And in any event, the fact that there are such divergent views on the meaning of particular legal texts, even among legal experts (textualist or otherwise) suggests such an appeal to experts cannot be definitive. [↑](#footnote-ref-20)
21. If it is admitted that a law can only be legitimate if promulgated, it bears asking what exactly is being promulgated. The answer presented here is simply the text. In fact what else could it be? The law’s content? That comes via the text. The citizenry is presented with the text, and it is their responsibility to employ the assumption of sameness of meaning of their words with the text’s. Thus the importance of writing laws in terms the citizenry can reasonably be expected to understand. [↑](#footnote-ref-21)
22. The assumption here is that a populace tacitly consents to be governed by laws as interpreted by the appropriate court. [↑](#footnote-ref-22)
23. There is ample reason to think that the meanings of words are not always transparent to their users. One could not misuse words otherwise. This topic deserves fuller discussion, but not here. [↑](#footnote-ref-23)
24. Despite being commonly invoked in discussions of legal interpretation, this issue is as much a question of application as it is of interpretation – and is thus perhaps not the example best suited to highlight the differences in interpretive methods. [↑](#footnote-ref-24)
25. These assumptions are of course controversial and can’t be adequately defended here. They simply serve to elucidate the main point. It’s entirely possible that current and past ratifiers do and have misapplied predicates like “cruel”. [↑](#footnote-ref-25)
26. 25The foregoing has passed over quite a bit that, though plausible, is nonetheless deserving of further scrutiny. And while much of that must remain little argued for here, in the space remaining there a couple of difficulties I wish to consider. The first concerns how to fit common law into the above-defended account of legal interpretation. Since, by definition, common law does not involve legislative action, what is the text (with its contemporary meaning) that is tacitly accepted by a citizenry, and thus made law? In cases where courts are legitimate (in a sense similar to that described above), their decisions, and thus precedent, are binding on current and later generations – but again, only when then language of those decisions is considered with its contemporary meaning. So, it may well be the case that more recent court decisions carry more weight as precedent, not least because the language of more recent decisions will more readily fit that of the contemporary citizenry. There will, however, be conflicts – as when a decision of a legitimate court conflicts with the language of a law itself. Since, by stipulation, both are tacitly accepted (if to be legally binding at all) and both have legal force, it will be a sticky matter as to which holds sway. Situations where the superiority of the courts is itself codified are more easily handled – but this is not so in all such cases (as with the U.S. Supreme Court). Another and more troubling issue concerns a potential objection to the claim that a citizenry tacitly accepts the meaning of the text as the reference point of their consent. It might be argued that citizens simply tacitly accept “whatever those that have come before recognized as law”, or perhaps “whatever is currently law”, instead. If the history of a people is filled with successive such tacit acceptances, then the original meaning of a text would be that to which a contemporary citizenry consents – a view that is simply traditional textualism. This is an interesting line of thinking, but one ultimately worth rejecting – the reason being that it fails to recognize the above-mentioned difference between the tacit consent of citizens and that of tourists, illegals, visa-holders, and the like. As above, the tacit consent of citizens is what makes the law. The tacit consent of these others merely legitimates the law’s application to themselves. For the latter, merely ‘I accept whatever is the law’ may well suffice. There is a social contract already in place – one they make themselves party to, but inessentially so. The consent of citizens, however, is constitutive of the contract. There is no contract, without this tacit consent. Consider then, a modern citizenry wherein the entire population consents to “whatever those that came before consented to”, where there is no text to which they can refer. Such a citizenry would subject themselves, in their entirety, to law that they could not even accurately articulate. It is not clear that, in such a case, the citizenry is subject to any law at all. [↑](#footnote-ref-26)