Why Constitutional Meaning is not Necessarily Fixed – A Reply to Solum*

¿Por qué el significado constitucional no es algo necesariamente fijo. Una respuesta a Solum

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Resumen:

En este artículo argumento que algunas partes de los textos constitucionales pueden ser plausiblemente pensadas como textos con un significado que cambie y evoluciona por sí solo. Esta idea es ampliamente rechazada, especialmente, pero no sólo por un grupo de filósofos quienes comparten la teoría de la interpretación constitucional llamada originalismo. En un artículo reciente, el originalista Lawrence Solum ha defendido la llamada "la tesis de la fijación", de acuerdo con la cual el significado del texto constitucional es fijado cuando es promulgado, sin cambios posteriores. Solum rechaza la idea de que el significado del texto constitucional pueda evolucionar, porque no puede identificar una forma plausible en que cualquier texto pueda tener un significado evolucionante. Sostengo que sí existen tales textos, y ofrezco cuentos populares como un ejemplo. Después presento razones del porqué las Constituciones pueden ser consideradas como textos, que similares a los cuentos populares, son textos que cambian sus significados de manera independiente.

Palabras clave:

Originalismo, tesis de la fijación, texto constitucional, significado evolucionante

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Abstract:

In this paper, I show that certain parts of constitutional texts can plausibly be thought of as having a meaning that changes and evolves on its own. This idea is widely rejected, especially but not only by a group of legal theorists who subscribe to a theory of constitutional interpretation called originalism. In a recent paper, the originalist Lawrence Solum has defended the so-called "fixation thesis", according to which the meaning of the constitutional text is fixed when it was first enacted and does not change later on. Solum rejects the idea that the meaning of the constitutional text might evolve because he cannot identify a plausible way in which any text could have an evolving meaning. I argue that there are such texts and offer folk-fairy-tales as an example. I then go on to present reasons why constitutions can plausibly be considered to be texts that, like fairy-tales, change their meanings independently.

Keywords:

Originalism, fixation thesis, constitutional text, evolving meaning

Summary: I. *Introduction*. II. *Originalism and Solum's Fixation Thesis*. III. *Different Kind of Text*. IV. *Folk-Tales and Constitutions*. V. *Conclusion*. VI. *Bibliography*.

I. Introduction

This paper is written as an answer to a challenge of sorts.[1] It is meant to show that certain parts of the constitutional text (importantly many of the rights usually included in charters and bills of rights) can plausibly be thought of as having a meaning that changes and evolves on its own. This idea is widely rejected, especially but not only by a group of legal theorists who subscribe to a theory of constitutional interpretation called *originalism*. For example, Jeffrey Goldsworthy claims that the idea that a text might change its meaning without the interpreter changing it is "odd" and "at best a fig leaf for the quite different idea that the judges are entitled to act creatively, and give it a new, more «up-to-date» meaning".[2] In a re-

[1] I would like to thank Wil Waluchow, Stefan Sciaraffe, Maggie O'Brien and Matthew Grellette for their support and helpful comments.

[2] He shows that he is not alone by citing non-originalist Ronald Dworkin who has said that "the notion that constitutional provisions "are chameleons which change their meaning to conform to the needs and spirit of new times" [is] "hardly even intelligible" and Lawrence Tribe who "emphatically denies that he regards the constitution «as something that 'grows and changes' by some mystical kind of organic, morphing process»" (Goldsworthy, Jeffrey "The Case for Originalism", in Huscroft, Grant; Miller, Bradley W. (eds.), *The Challenge of Originalism*, New York, Cambridge University Press, 2011, pp. 52 and 53). Other originalists who reject the idea are for example Larry Alexander (Alexander, Larry, "Simple Minded Originalism", in Huscroft, Miller (ed.), 2011, *The Challenge of Originalism*, Cambridge, Cambridge University Press) and Larry Alexander; Saikrishna Prakash, "Is That English You're Speaking? Some Arguments for the Primacy of Intent in Interpretation", *San Diego Law Review,* 2003. Available at SSRN: *http://ssrn.com/abstract=446021* or *http://dx.doi.org/10.2139/ssrn.446021),* Stanley Fish (Fish, Stanley, "The Intentionalist Thesis Once More", in Huscroft, Grant; Miller, Bradley W. *(*eds.), *The Challenge of Originalism,* New York, Cambridge University Press, 2011; John McGinnis and Michael Rappaport (McGinnis, John and Rappaport, Michael, "Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction", *Northwestern University Law Review,* 2009. Justice Antonin Scalia has also often been quoted as

cent paper, the originalist Lawrence Solum defended the so-called "fixation thesis", according to which the meaning of the constitutional text is fixed when it was first enacted or ratified and does not change later on.[3] Solum's paper is long and complex, but at the very end, he discusses the possibility that the constitution could have more than one meaning at once - one meaning that is fixed, and one that evolves. Solum rejects this possibility because he cannot find a plausible way in which the constitutional text might have gotten an evolving meaning. This paper is an attempt at showing that there is such a way. It will proceed in three steps. In the first step, I will explain Solum's fixation thesis, his positive argument for it and his rejection of the multiple-meaning possibility. I will also argue that it is important for non-originalists to show that the constitution can plausibly be thought of as having an evolving, changing meaning. In the second step, I will use an analogy to illustrate why certain texts might, from the very beginning, have a meaning that is changing. In the third step, I will point out some properties that parts of modern day constitutions have that make it plausible to think of them as such texts.

II. Originalism and Solum's Fixation Thesis

The name "originalism" has been given to a host of theories that according to Solum, even though they vary widely in the details, have two theses in common.[4] The first of these theses is the "fixation the-

emphatically rejecting the idea of an evolving constitutional meaning – as for example by the Washington Times: '"But you would have to be an idiot to believe that", Justice Scalia said, "The Constitution is not a living organism; it is a legal document. It says something and doesn't say other things" (*http://www.washingtontimes.com/news/2006/feb/14/20060214-110917-5396r/,* retrived 26.09.2016)

[3] Solum, Lawrence, "The Fixation Thesis: The Role of Historical Fact in Original Meaning", *Notre Dame Law Review,* 2015.

[4] Lawrence Solum (n 2). See also: Solum, Lawrence, "What Is Originalism? The Evolution of Contemporary Originalist Theory", in Huscroft, Grant; Miller, Bradley W. (eds.), *The Challenge of Originalism,* New York, Cambridge University Press, 2011.

sis", according to which "[t]he object of constitutional interpretation is the communicative content of the constitutional text, and that content was fixed when each provision was framed and/or ratified".[5] The second thesis is the constraint principle, "which holds that the original meaning of the constitutional text should constrain constitutional practice".[6] I am here concerned with the fixation thesis. Even though I will concede that constitutions *have* a fixed meaning, I claim that at least parts of them also have another, evolving meaning. Solum's belief that the fixation thesis is self-evident and obvious leads him to say that the main discussion about constitutional interpretation should revolve around the constraint principle.[7] That is, it should revolve around the question of whether and how much the fixed meaning of the constitution should constrain the decision-making of judges. I agree with his conclusion, but not with how he gets there. I believe that the main discussion between originalists and non-originalists should be about how much and whether the fixed meaning of the constitution should constrain judicial decision making. But I do not believe that this is so because the fixation thesis is true. Instead, I think that this is so because it is limited: in many cases, the interpreter can choose from more than one meaning and the important question (that I will not discuss here) is how and what to choose.

1. *Two Short Clarifications*

Before I get to Solum's argument for the fixation thesis and his reservations against the possibility that certain parts of constitutions might have an evolving meaning, I should explain two important distinctions that have some bearing on the topic of this paper.

First, many originalists have come to distinguish between two activities that both fall under what common-language users might

[5] Solum, Lawrence (n. 2), p. 15. I will discuss Solum's use of "communicative content" instead of "meaning" below, in section 1.2.

[6] *Ibidem*, p. 1.

[7] *Ibidem*, p. 78.

mean when they use the term "interpretation" loosely: there is interpretation-strictly–so-called (from now on: interpretation) on the one hand, and *construction* on the other. Different theorists word the distinction slightly differently, but in general it comes down to this: Interpretation aims at discerning the meaning the text already has, *independently of its interpreters*. Construction aims at determining what the text means with respect to specific cases.[8] Construction might well involve normative reasoning on the side of the interpreter. In other words, when an interpreter enters the area of construction, she might use her own judgement of what would be *better* for the text to mean with respect to a certain case.[9]

Construction becomes necessary when interpretation does not deliver a meaning that is clear enough to conclusively determine what should be done in a certain case. If the constitutional meaning retrieved through interpretation is vague, for example, then judges will have to engage in constitutional construction in order to come to a decision. While interpretation is an empirical inquiry into what the text already means when interpretation begins, construction has normative elements. Many originalists understand themselves to be offering a theory of how the constitutional text should be *interpreted*.[10] That is: they offer a theory of what it means to retrieve the

[8] Randy Barnett offers the following definition: "*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances" (Barnett, Randy, "Interpretation and Construction", *Harvard Journal of Law & Public Policy,* 2011, p. 66). See also: Wittington, Keith, *Constitutional Construction: Divided Powers and Constitutional Meaning*, Cambridge, Harvard University Press, 1999, and Solum, Lawrence B., "Originalism and Constitutional Construction", *Fordham Law Review,* 2013.

[9] Barnett, Randy (n 7), p. 69 f. Barnett distinguishes between a text or word being ambiguous (as "bank" is ambiguous between "river-bank" and "money-lending institute") and a text or word being vague. Ambiguity can usually be resolved through interpretation, vagueness sometimes makes construction necessary. (See Barnett, Randy, *ibidem*, p. 67 ff).

[10] Like, *e. g*. Randy Barnett, *ibidem*, and Solum (n 2). Some originalists however, like for example John McGinnis and Michael Rappaport, claim that if interpretation is carried out correctly, there is no room for construction. Therefore they reject the distinction, or, at least, claim that it is not relevant for questions about the meaning of constitutions see, *e. g.* John McGinnis and Michael Rappaport (n. 1).

meaning the text already has at the time of the interpretation, independent of the interpreter. The fixation thesis, too, is a thesis about the meaning that is retrieved through interpretation, the meaning the text has independent of its interpreter. Clearly, the meaning that a text is given through construction might change. But, according to the fixation thesis, the text has only one fixed meaning *independently* of its interpreters. I, too, will make a claim about interpretation, not construction. I will claim that in addition to the fixed meaning, some parts of the constitutional text also have an evolving meaning that can be determined through interpretation, not construction.

The second distinction I should introduce is one that Solum makes in order to clarify what his fixation thesis is really about: Take the US-American constitution for an example. Solum is aware that we may imagine that the same constitutional text, same words, sentences, paragraphs, was enacted *for a second time* in 2016, by different people and in a different political climate. This text might then have a different meaning than the text as it was 1787, in the same way as it means something different whether a priest uses the words "you should act according to human nature" or whether a behavioural biologist uses the same combination of words: "you should act according to human nature". The two constitutional texts would together belong to the same expression-type, sharing the same words, sentences and paragraphs. They would, however, be two different tokens of the expression-type, one originating in 1787, and one today. Solum admits that the meaning of an expression-type can easily be different from time to time and from use to use. The two tokens of the same sentence-type, for example, might contain a word the semantic meaning of which has changed over time.[11] However, the fixation thesis is about expression-tokens – that is, in our example, the fixation thesis deals with the meaning of the constitution that was enacted in 1787, not with the meaning of a hypothetical constitution

[11] Solum uses the example of the word "deer". "Deer", in middle English, meant any kind of animal. So two sentence tokens of the same type "There is a deer on the law" might mean different things if they were used once in the year 1100 and once in the year 2000, simply in virtue of the changes in the common semantic meanings of the words employed in them. Solum, Lawrence (n. 2), p. 17.

from 2016.[12] When I present my argument, I will therefore have to argue that certain parts of constitutions can plausibly be thought of as always having had two meanings, one of which was evolving. In other words: my point is not the one that Solum rejects - the idea that the constitution may be interpreted as an expression-type. I accept that the constitution is an expression-token, but I will claim that parts of it do and have always expressed a meaning that was changing and evolving.

2. *Solum's Argument*

The positive argument Solum presents for his fixation thesis is, according to his own estimate, based on common-sense and intuition. According to Solum, there is no reason to treat the constitutional text any different from any other text. And for texts in general we usually accept his so called "generalized fixation thesis":

The communicative content of a communication (oral or written, verbal or nonverbal) is fixed at the time the communication occurs.[13]

Solum supports his claim by referring to the way he believes we usually determine the meaning that a text communicates. He summarizes his argument as follows:

The affirmative case for the Fixation Thesis can be articulated via intuitive and commonsense observations about the nature of written communication. If we want to know what a text means and the text was not written very recently, we need to be aware of the possibility that it uses language somewhat differently than we do now. Moreover, meaning is in part a function of context—and context is time-bound. So if we want to know what a text means, we need to investigate the context in which the text was produced.[14]

[12] *Ibidem*, p. 35 ff.

[13] *Ibidem*, p. 21.

[14] *Ibidem*, p. 20. Allow me to shortly clarify what Solum means when he talks about "communicative content": Elaborating on this argument, Solum explains that the fixation thesis is not about questions like "What does the text imply for the handling of this specific case?" In order to answer this question, it might well be necessary to engage in construction as well as in interpretation. Nor does it concern

Solum distinguishes the meaning of a text-type, and even the semantic meaning of a text according to a certain set of semantic and grammatical conventions from the meaning that a text *communicates.* The meaning a text communicates is determined by the text-type the text is a token of, the semantic and grammatical conventions that governed at the time the text was produced *and, importantly* the context in which the text was produced. According to Solum, when we come across a text or other communicative artefact,[15] our ability to speak the language of that text might not be enough to determine the meaning that the text communicates. This might be so because the text is old, or because it was produced by people in other circumstances than our own, etc. Then we need to use our knowledge about the "conventional semantic meanings of the words and phrases comprised by the sentence and the grammatical relationships between these units of meaning" that were accepted when and where the text was produced.[16] But while this might well get us to the semantic meaning of the text, we might still not know what meaning the text really communicates. The example I gave above is instructive again here: it means something different whether a priest tells you to "act according to human nature" or whether a behavioural biologist tells you to "act according to human nature", even if they tell you this at around the same time, assuming the same conventions. Therefore, we also take into account the context in which the text was produced. For example, we might inquire by whom the text was produced, in what manner, for what purpose etc.[17]

Solum points out that both the conventional semantic meanings and the context of the production of a text are fixed when the text is produced.[18] Together, he believes, they fix the meanings of communicative

questions like "What did the authors mean to do by writing this text?" These are questions about the hopes and aspirations the authors had by putting the text out there. Instead, the fixation thesis is concerned with the meaning the text communicates, what it refers to or talks about (Solum Lawrence (n. 2), p. 21).

[15] Like, for example, a recording.

[16] *Ibidem*, p. 24.

[17] Solum Lawrence (n. 2) p. 24f.

[18] I agree with this claim.

artefacts.[19] If I read a letter from the 13th century, and I want to figure out what meaning the letter communicates, then I inform myself about the linguistic conventions of the 13th century. But this only gives me the semantic meaning of the text. I also need to know about the context in which the text was produced, for example about the person who wrote the letter and the circumstances under which it was written. I expect that, if I use this information correctly, I will determine a meaning for the letter that is the same as when the letter was first written. This meaning is the communicative content of the letter.

It is important here to say a word about Solum's use of the term "communicative content". As Solum specifies, the term "communicative content" is supposed to be neutral on theories where that content comes from. Importantly, Solum does not limit what the text communicates to what the author of the text intents to communicate. If the context of the production of the text —the constitutional text in this instance— shows that the text is supposed to be read as the specification that cruel and unusual punishment is unacceptable as it was understood by the general population at the time of the text's production, then the text communicates the meaning of cruel and unusual punishment as it was understood by the general population when the text was enacted. What the author intents to communicate and what the text communicates are therefore not necessarily the same. Rather, what the text communicates is determined by the semantic content of the text according to the conventions at the time of production *and* the context in which the text was produced. This context could point to something else than the author's intentions, like the general public meaning at the time of the production of a text. Solum uses the term "communicative content" instead of the term "meaning" to show that he does *not* mean to say something about the semantic meaning of a text that it has in virtue just of the words it comprises of and its grammatical structure. Instead he means to say something about the meaning of the text as *also* determined by the context of its production.[20]

[19] This paper is written to show why I disagree with this claim.

[20] Solum, Lawrence (n. 2), pp. 15-18.

I have highlighted this feature of Solum's argument because it figures importantly in my own argument. I will not argue against Solum's claim that, when we read a text, we use our knowledge about common semantic meanings and grammatical relationships as well as our knowledge about the context of the production of the text in order to determine its meaning. Neither will I reject the idea that the common use and the context at time of production do not change. Indeed, I will follow Solum in his suggestion that in addition to the common semantic meanings, the context of a text's production guides an interpretation aimed at determining what the text means (what it communicates). However, I will use this very idea about the importance of context to make my point about the possibility that a text might have a changing meaning – or that what a text communicates might change. I will claim that it is the context of their production that shows us that they do. (When I talk about the meaning of a text, I will from now on refer to Solum's "communicative content", as determined by both semantic meaning and context).

However, before I can get to that, I would like to ask the reader for a moment's patience. Solum believes that the acceptance of the fixation thesis will mainly have the effect to redirect the discussion to the constraint principle. He claims that both originalists and non-originalists might think that the attention he gives the fixation thesis is unwarranted because its truth is so easily grasped that it is not interesting.[21] I do not agree. I believe that a discussion of the constraint principle based on the acceptance of the fixation thesis would put non-originalists at an argumentative disadvantage. Let me shortly explain why.

3. *Interpretation and Being Afraid of Judges*

Some originalists argue that allowing judges to aim at anything else but the original meaning of the constitution when they do what they call "interpretation" is allowing them to make law behind the mask of applying it.[22] For example, Larry Alexander, who argues

[21] *Ibidem*, p. 78.

[22] We find the idea that judges should be constrained and not allowed to participate in lawmaking, or that judges, when they do not retrieve the original meaning,

for an author's-intent-originalism[23] claims that if the meaning that judges should aim for in their interpretation is not fixed as the original meaning, then judges can freely choose among possible meanings. Thereby they effectively become the authors of a new text instead of the interpreters of the old one. His argument for this, in short, goes like this: if the judge is not restricted in his interpretation of the text by having to aim at the original meaning then she can freely choose another meaning instead. For example, she might want to give the text the meaning that will make it the best possible constitution, trying her hand at a version of Dworkinian interpretation.[24] Or she might decide to give the text the meaning it would have simply according to the meanings the words have today. Because there is no way to determine which of these possible meanings is the most appropriate one, the choice is up to the judge. But if the judge chooses which of the many possible meanings she should give the text, then it is the judge who chooses the text's meaning. This is so especially if the judge decides to "interpret" the text so that it has the best possible meaning – after all, the judge has nothing but her own moral and political commitments to guide her in determining what this best meaning is. As a result, the judge's act of interpretation becomes an act of authorship. The judge chooses what the text is supposed to mean, according to her own ideas of what it should mean. In Solum's terms, she produces a new token constitution of the same expression-type as the old constitution, under the guise of determining the meaning of the old constitution.

This, however, means that the judge becomes a law-maker instead of someone who applies the law. In interpreting the constitution, she no longer determines what she has to do in a specific case according

are really making law, for example in Berger, Raoul, "Originalist Theories of Constitutional Interpretation", *Cornell Law Review,* 1988; Barnett, Randy, "An Originalism for Non-Originalists", *Loyola Law Review,* 1999; Fish Stanley (n. 1), Goldsworthy, Jeffrey, "Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on András Jakab, 'Constitutional Reasoning in Constitutional Courts—A European Perspective'", *German Law Journal,* 2013, and Alexander, Larry (n. 1).

[23] *E. g.* Alexander, Larry (n. 1) and Alexander, Larry, Saikrishna Prakash (n. 1).

[24] See Dworkin, Ronald, *Law's Empire*, Cambridge, Belknap Press, 1986.

to already enacted law. Instead, she takes the occasion of her case to make new law and apply it in one single decision.

The argument that judges become lawmakers if they determine what the constitutional text means unconstrained by its original meaning draws its strength from the fixation thesis. According to the fixation thesis, the constitutional text only has *one* meaning independently of its interpreters, and that is the original meaning. Attributing any other meaning to it means giving it a new one, and thereby turning it into a different text. Once the fixation thesis is in place, this argument is not only plausible, but it also makes a strong point in favour of the constraint principle. After all, it is a widely accepted common place that judges are put into office to apply law, not to make it. An argument that reveals that all but one kind of interpretation amount to nothing else but judicial lawmaking is a strong argument for the one kind of interpretation that is left. Once the fixation thesis is in place, non-originalist legal theorists therefore find themselves arguing uphill, having to establish one of two difficult points: Either they have to show that interpretation aimed at a meaning the text did not already have when the interpretation began is not the same as putting a meaning into the text the interpreter would like it to have. Or they have to show that judicial lawmaking is, to some extent, desirable. I do not think that either of these tasks are impossible to accomplish. But they do put the non-originalist in a difficult starting position.

III. Different Kind of Text

Solum has formulated my argument for me, so I will cite it directly from his text, changing it only a little by adding a "some" at the beginning and taking "(in the linguistic sense)" out:

> [Some] [t]exts do not have a single meaning...; instead they have multiple meanings. Some of these meanings are fixed, but others are not. Because there are multiple meanings, we must select between them, and this process of selection must be guided by normative consideration. Because some of the possible meanings are not fixed in time, it follows that the

> Fixation Thesis does not hold with respect to the complete set of the multiple meanings of the constitutional text.[25]

Solum rejects this argument. He concedes, as it has been argued several times, that it is possible to assign multiple meanings to any given text as an expression-type.[26] And indeed, a text can be said to have, at the same time, the meaning the speaker intended it to have, all the semantic meanings the words and grammatical constructions would —without taking context into account— signify to a reader of different times and circumstances, the meaning the reader would give it if she was the one writing it down. However, Solum claims that all the plausible candidates he can think of for the meaning a text as an expression-token actually communicates (the communicative content, as determined by both the semantic meanings of the words at the time of production and the context of production) are fixed meanings, and, more explicitly, meanings fixed at the time the text was produced. All possible unfixed meanings, according to Solum, do not connect to the constitutional text in the right way.[27] He ends this section with what I take to be a challenge to find a changing meaning the constitution can plausibly be said to have: "If none of the *unfixed meanings* is plausible on its own, these unfixed meanings do not acquire respectability by putting them in a box with other plausible but *fixed meanings".*

The reminder of this paper has the one modest goal to show that it is plausible to think that certain parts of constitutions, from the moment they are produced on, might have an evolving, unfixed meaning in addition to their fixed meaning. The first step in doing so is to destabilize the intuition upon which Solum's positive argument for the fixation thesis is based: that the meaning of texts in general is always fixed when they are produced.

[25] Solum, Lawrence (n. 2), p. 68.

[26] He cites Mark Greenberg, who argues for different possible linguistic meanings of legal texts in Greenberg, Mark, Greenberg, Mark, "The Moral Impact Theory of Law", *Yale Law Journal* (2014).

[27] Solum, Lawrence (n. 2), p. 69.

1. *Of Recipes, Letters, and Folktales*

It seems almost a fashion among originalists to make points about constitutional interpretation by referring to other kinds of texts: Solum talks about a 13th century letter and his own lectures,[28] Alexander speaks of instructions for assembling toys made in China,[29] Lawson of an old recipe,[30] Goldsworthy of Shakespeare,[31] Fish of *Finnegans Wake*.[32] It should therefore not be surprising that I add my own example to the long line of examples, this time one that does not fit with the fixation thesis as easily as the examples chosen by the writers above: folk-tales. What is so different about folk-tales? Different is that if you pick up a book of collected fairy-tales, for example, and you open it to find *Cinderella* or *Little Red Riding Hood*, the content of the text you see has not been shaped (or shaped completely) by a determinable group of authors, or at a determinable time, or at a determinable place, or in a determinable political setting. An important part of the context in which Solum's 13th century letter was produced was the author of that letter, what she wanted to say, what she assumed to be true, etc. But folk-tales have a different context than letters. The context the text of folk-tales was written in involves that it is a version of a folk-tale. And this context makes a big difference. Allow me to elaborate.

The realm of fairy-tales is divided into two different groups. One kind of fairy-tale, like for example *The Little Mermaid*, is produced in the same way as the examples originalists favour. *The Little Mermaid* was conceived and written by Hans Christian Andersen and published in 1837. It is a so-called literary fairy-tale. Andersen's story has been retold many times,[33] but all the other versions of the

[28] *Idem*.

[29] *Idem*.

[30] Lawson, Garry, "On Reading Recipes… and Constitutions", *Georgetown Law Review,* 1997.

[31] Goldsworthy, Jeffrey (n. 1).

[32] Fish, Stanley (n. 1).

[33] In movies, TV series, operas, plays and comic books. (A list can be found easily on Wikipedia).

Little Mermaid are adaptations from one, central original – Andersen's story. In writing it, Andersen copied the style of the other kind of fairy tale, the folk-tale.

When you read a folk-tale, like *Cinderella* or *Little Red Riding Hood,* then you are always just reading a version. There is no original, like there is with the *Little Mermaid*. *Cinderella,* for example, is the main character in hundreds and hundreds of versions of what folklorists call a tale type.[34] In these versions, Cinderella changes her character, her ethnic origin, her behaviour, even her ultimate fate.[35] Every time someone tells her story, a new version appears.[36] The versions are held together through certain reoccurring elements, but no one knows, though considerable effort has been made by folklorists to find out, where *Cinderella* comes from, when she first appeared, and how exactly her character developed.[37] There simply is no original story of *Cinderella*. *Cinderella* is not the product of a certain time, or of any author's imagination. She is, in some sense, the product of the imagination of thousands and thousands of interpreters over literally thousands of years.[38] For the most part, these interpreters are

[34] Dundes, Alan, *Cinderella, a Casebook*, New York, Wildman Press, 1983, Introduction. Anna Birgitta Rooth wrote her doctoral dissertation on the *Cinderella*-tale, it was based on seven hundred versions (*idem*). Tale-types are classified in the Aarne-Thompson tale type index, a classification system for folk-tale versions, using recurring plot patterns, etc. (Aarne, Antti; Thompson, Stith, *The Types of the Folktale: a Classification and Bibliography: Antti Aarne's Verzeichnis der Märchentypen,* Helsinki, Academia Scientiarum Fennica, 1961). The tale-type index is not perfect, there is overlap and some stories fit into several types. For a discussion see, *e. g.* Dundes, Alan, "The Motif Index and the Tale-Type Index: A Critique", *Journal of Folklore Research,* 1997.

[35] For an easily accessible online-collection of different versions, see: *http://www.pitt.edu/~dash/type0510a.html#turkeyherd*

[36] It is possible to identify groups among these versions. There are vast differences between some versions, and only small ones between others. As can be expected, an Arabic version of the Cinderella tale-type is much more different from an European one than from another Arabic one.

[37] Dundes, Alan (n. 32). Introduction.

[38] She is indeed a very old Lady, which might be the reason she refuses to allow her age to be known. "Rhodopsis" a story from ancient Egypt is often considered the oldest known version of her tale, (see, *e. g.*, Hansen, William F., *Ariadne's threat: A Guide to International Tales Found in Classical Literature*, Ithaca, Cornell University Press, 2002, p. 86).

not at all aware that they are creating new versions. Instead, they simply re-tell a story they know, inadvertently making changes here and there. These changes accumulate over time until an easily distinguishable new version has appeared.

When an interpreter tries to understand what the *Little* Mermaid means, the fact that it was written by Hans Christian Andersen is a very important, maybe the *most* important part of the context that will guide the interpretation. We may assume that Hans Christian Andersen tried to communicate something with his story and chose for this purpose its plot, its characters, the way he would tell it. What *he* tried to communicate is important for what the story means. However, someone who decides to sit down and document one of *Cinderella*'s versions does not thereby become the author of her tale in this way. Plot and characters are not of her choosing. The context of the production of this text —unlike others— does not inform us only of the character and situation of its writer. Rather, its context also informs us that the text is a version of a tale-type, and that the tale-type is the product of thousands of re-tellers, living in dozens of historical and political situations over hundreds of years. The result is that the context of every folk-tale-token allows for the version to be read in two different ways, from the very moment it was written down on. First, it can be read as if it was a self-contained product, an original like Andersen's *Little Mermaid*. It is possible to ask what the situation of the person writing the tale-version down was, what she likely wanted to say, what she used it for. But it is also possible to ask for the meaning of the tale as a whole, independent of the version – to ask for the meaning of *Cinderella* in general (or, alternatively, within a certain culture).[39] Indeed, the famous folklorist Alen Dundes points out that, after all, *Cinderella's* versions *are* versions of the same story type, found all over the world, retold in Africa and Asia, Europe and America by people of the most differ-

[39] It should be noted that sometimes folklorists shied away from turning to the meaning of folk-tales and instead dealt with, for example, questions of the age and origin of the narratives (Röhrich, Lutz, *The Quest of Meaning in Folk Narrative Research,* Urbana, University of Illinois Press, 1988).

ent belief systems, religions, experiences etc.[40] Behind the many meanings, Dundes identifies common, much broader meanings and themes. For example, in his interpretation of the many versions that together constitute *Little Red Riding Hood*, he demonstrates that the tale is a specific way of dealing with sexuality.[41] In addition to their own, specific meanings, versions of a folk-tale have an underlying, vague meaning, common to all of them. Folklorists have pointed out that this meaning cannot be accessed through the reading of one version alone.[42] Each version is a mere example of its tale-type. The common meaning remains almost hidden if only one version is considered and can be identified easier the more versions are brought together.

There are then two plausible ways to approach the meaning of any folk-tale version. This is so because the context in which this text was produced contains both, that it was written down by a specific writer, at a specific time; but also that it is a mere version and that it does not wholly belong to this writer. Therefore, on the one hand, you can read it as a product of the time when it was put on paper. You can ask what the version's re-teller intended to say with it, in the political and social circumstance in which it was written down. This allows you to determine a meaning for it that is fixed. But you can also plausibly read it in its role as a version, a tale-token that is so intimately connected to its type that it is a mere example of

[40] Dundes believes that by identifying and interpreting the similarities or "near-similarities" between the different versions and "the probably non-cognate folkloristic parallels which seem to depend upon universal or quasi-universal human experiences..., one has convincing data which can effectively be used to promote international understanding". (Dundes Alan and Bronner, Simon J., *The Meaning of Folklore: The Analytical Essays of Alan Dundes*, Logan, Utah State University Press, 2007, p. 56.

[41] Dundes, Alan, *Little Red Riding Hood: A Casebook,* Madison, University of Wisconsin Press, 1989, p. 16 ff.

[42] "First, the full meaning of either a tale, a theme, an episode, a motif, or an element is not contained within an isolated text and, therefore, cannot be derived from it alone". (Calame-Griaule, Geneviève *et al*., "The Variability of Meaning and the Meaning of Variability", *Journal of Folklore Research*, vol. 20, no. 2/3, Special Dual Theme Issue: Verbal Folklore of Ancient Greece and French Studies in Oral Literature (Jun.-Dec., 1983), p. 155.

it.[43] This is a role it necessarily has from the beginning, because it is a folk-tale version. Then you, like Dundes are looking for the meaning of the tale-type it is a version of. There is a sense in which this meaning is not fixed. What sense is this?

The tale-type exists as a function of all its versions, and so its meaning is dependent on the versions that exist and come into existence. Every time a new version appears and an old one is forgotten forever, this meaning might change. The meaning of the tale-type evolves with every new version. Because the context in which every tale-version was produced includes that it is a version of a tale-type, this context warrants that the version can be read *as* an example of the tale type, carrying, from the very beginning, its evolving meaning. When it comes to the tale-type, the context does fix *something*, namely that an interpreter reading the tale-version as an example has to find its meaning by aiming at identifying the meaning of the tale-type. But that meaning changes, and so, in an important sense, the meaning of the tale-version is *unfixed*, changes with the changing tale-type.

To summarize: The context in which a tale-version was produced does guide the interpretation of the version, but it leaves two different directions for this interpretation open: One direction is to find the version's meaning as an expression of the person who wrote it down, then the meaning is always the same, no matter when the interpretation takes place. The other direction is to find the version's meaning as an example of a tale-type. The context fixes *something* here because in each case, the interpreter looks for the same thing, what the tale-type means. But what the tale-type means changes with time, so the meaning the interpreter will identify will not be the same independent of when she undertakes the interpretation. In this sense, this meaning is not fixed.

[43] This is not the kind of type Solum had in mind: Solum thought of that a combination of words, such as: "Act according to human nature" as an expression-type that takes on different meanings depending on the context in which it is used. And it is quite possible that the same expression-type is used at the same time with different meanings. A tale-type is not the same as an expression-type. It has one meaning at a time that is the function of all its versions.

IV. Folk-Tales and Constitutions

Earlier on I pointed out two important distinctions that I would have to take into account while I argue for the possibility that parts of constitutional texts might have meanings that change. These where the distinction between interpretation and construction and the distinction between an expression-token and an expression-type.

Above I argued that folk-tale versions are texts that can plausibly be said to have two meanings. The first one is a fixed one that can be determined with reference to circumstance and re-teller when the tale-version was written down. But the second one is an evolving meaning, the meaning of the tale-type that every specific version carries just in virtue of being a folk-tale-version.

Do either of the two distinctions provide grounds for an objection to the line of reasoning as it has been presented so far? I believe not. First, I do not confuse expression-token with expression-type. I would be guilty of this if I invited interpreters to search for the meaning of these texts simply by taking the combination of words that form them and reading them *as if* they had been written according to the semantic conventions and in a context of their choosing. But I do not do that. Instead, I claim that every folk-tale-version-token, in virtue of a part of the context of its production, communicates an additional meaning that changes. This part of the context of its production is that it is a version of a folk-tale. Second, I do not confuse interpretation with construction. I do not say that the meaning of folk-tale versions changes because interpreters might have to find additional meaning where the text alone does not offer enough in order to deal with certain situations. Instead, I say that interpreters can plausibly ask for the additional, changing meaning of the tale-type that the folk-tale version carries in virtue of being a folk-tale version.

In addition, I should make the following point: Whether or not a text is a version of a folk-tale is not for the re-teller to decide. If you sit down to tell your children the story of *Cinderella*, or even a story that follows the narrative line of *Cinderella* but you replace the little girl with a little boy, then you cannot simply decide that your

story has nothing to do with the versions produced by Walt Disney, Perrault, the Brothers Grimm and unnamed re-tellers all over the world. If the tale you tell has taken roots in your head because you heard a version of it from your grandmother, saw one on television or in a play, etc., then you are telling a folk-tale-version, whether you like it or not.

The section above served to illustrate the following point: There are texts that communicate several meanings, at least one of which changes over time. They carry these several meanings because the context in which they were produced leaves open the possibility to read the text in more than one way. Folk-tales are an example for these texts. A version of a folk-tale does have, as part of its context, a specific writer with specific ideas and intentions etc., and therefore a fixed meaning. But versions of folk-tales also communicate a changing meaning in virtue of that aspect of the context of their production that they *are* versions of a tale-type that has formed through a long line of re-tellings.

What do constitutions have to do with all of this? It might be hard to see the similarities between folk-tale-texts and the texts of constitutions. Constitutions are usually written after long debates and by identifiable groups of people. They seem to be the deliberate and intentional creations of specific individuals – much more like *The Little Mermaid* than like a version of *Cinderella.* Why should it bother us that folk-tales exist if constitutions appear to be nothing like them? The answer is this: despite appearances, constitutions share interesting similarities with fairy-tales. Of course, they are not like fairy-tales in every way. Most obviously, fairy-tales are narratives while constitutions are prescriptive texts, and fairy-tales contain fairies while constitutions contain rights.[44] However, this is not what I am interested in. I am interested in the origin of their contents, their context of production. I want to argue that constitutions can plausibly be thought of as being like versions of folk-tales when it comes to context of the production of constitutional texts and the relationship between their texts and their meanings. We are most used to texts (expression- tokens) that are produced in a context

[44] Just as elusive, much less glitter.

which determines only one fixed meaning for them. But as the case of folk-tales illustrates, there are also text (expression-tokens) with more complex contexts, contexts that show that a text (expression-token) has more than one meaning, and that some of its meanings are not fixed.

When it comes to letters from the 13th century, Andersen's *Little Mermaid* or to shopping lists, we have a rather clear picture of how they were made. A single person in some determinable historical context chose what to write about, how to write it, and what messages to convey. Letters belong to the letter writers and my shopping lists belong to me in a way that Cinderella *does not* belong to you if you decide to write down a version of it.

Some parts of constitutions are like this. There are passages that can be ascribed to determinable persons or groups. They might have been included as the result of political bargaining, devised carefully as part of a compromise between opposing parties. The *Notwithstanding Clause* in the Canadian Constitution is a good example.[45] It is plausible to say that these passages belong to those involved in the bargaining process and that those specific people who arrived at the compromise are their authors. However, not all passages in a constitutional text have the same origin. Many will be the result of constitutional borrowing. In the best case, most of them are included in order to reflect the values and ideas that are already part of the national identity[46] of the country's inhabitants. (In what fol-

[45] The Canadian Notwithstanding Clause allows parliament and provincial legislature to expressedly enact legislation that has been determined to be in conflict with the charter by the courts. The clause was included as a compromise that was reached during the debates over the enactment of the Canadian Constitution. (A very short history of the Notwithstanding- clause can be found at *http://maple-leafweb.com/features/notwithstanding-clause-section-33-charter)*

[46] According to Montserrat Guibernau, a national or ethnic identity is a kind of group identity that people adopt when they are conscious of taking part in a community that shares a culture, a past, and a project for the future. (Guibernau, Maria Montserrat, *The Identity of Nations*, Cambridge, Polity, 2007, p. 60. Ethnic and national identities are determined by a host of common traditions, symbols, often a way to speak or even a language and, most important for my purposes, ethical and social values. They have an important psychological dimension: The individual

lows, I have chosen an example for both cases from the Canadian Constitution to illustrate how one constitution can contain all three types of passages). The context in which these parts are included in the constitution makes it plausible to say that they carry an additional, changing meaning. Allow me to elaborate.

1. *Constitutional Borrowing or Migration*[47]

Constitutional borrowing[48] occurs when at least part of the constitutional text is a copy or a more or less slightly altered version of (constitutional) law found elsewhere. The migrated or borrowed part might be a whole passage, a sentence, or an idea or structure.[49] Borrowing and migration happen consciously or unconsciously, voluntarily or involuntarily.[50] Whenever it occurs, the passage of the

that endorses a national identity thereby usually has strong emotions regarding the core values, symbols and traditions embedded in the national identity (*ibidem*, pp. 11-13). Therefore, an individual will usually adopt the values embraced by the national or ethnic group she belongs to: To such an individual the word dignity, for example, means what it means to the other members of the endorsed group.

[47] I use the term "borrowing" here only to refer to the migration of constitutional ideas, passages and so on during the designing of new constitutions. As Epstein and Knight point out, constitutional borrowing also happens on the level of judicial interpretation of constitutional passages and even on the level of citizen-interpretation of what their constitution means or should mean (Epstein, Lee and Knight, Jack, "Constitutional Borrowing and Non-Borrowing", p. 196). I do believe that the points I make here about the meaning of constitutional passages that are the result of borrowing could be used to justify judicial constitutional borrowing.

[48] For a very informative summary of the discussion around constitutional borrowing and constitutional transplants see Perju, Vlad, "Constitutional Transplants, Borrowing, and Migration".

[49] *See* Adler, Matthew D., "Can Constitutional Borrowing be Justified: A Comment on Tushnet"*, University of Pennsylvania Journal of Constitutional Law,* 1998.

[50] Involuntary borrowing occurs if a framers are coerced into adding certain parts into the constitution by political powers from the outside – this happened, *e. g.* with the Japanese Constitution after the World War 2. Borrowing happens unconsciously when the framers are not aware that they are mimicking the content of other constitutions, when it is not their intention to do so. (See Perju, Vlad, "Constitutional Transplants, Borrowing, and Migration", in Rosenfeld; Michel, Sajo,

text that is borrowed is a version of another text rather than an original. For example, there are a number of rights that are virtually always included whenever a new Bill of Rights is adopted. These rights seem to be versions of the Human Rights we find in international treatises like, for example, the ICCPR (International Covenant on Civil and Political Rights).[51] An example of a right versions of which appear virtually everywhere is Section 12 of the *Canadian Charter of Rights and Freedoms*, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment".[52] It does not seem too far fetched to say that this right is a version of a right-type, given that other versions of the same right can be found for example in the UDHR,[53] the American *Bill of Rights*[54] and the English *Bill of Rights* of 1689.[55] Just like we have a general idea of what *Cinderella* is, independent of whether we think of a certain version of this specific tale-type, we have a certain idea of what a right not to be subjected to cruel and unusual punishment is, and we would be able to say rather confidently whether some right-formulation we were presented with would be a version of the right not to be

Andras, (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, U. K.: Oxford University Press, 2012, pp. 1316-1319).

[51] See the text of the ICCPR at *http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.* As Vlad Perju points out, rights enshrined in constitutions might even be the result of a state having to implement human rights obligations it assumed in an international treaty (Perju, Vlad (n. 49), p. 1320). Guenter Frankenberg uses the almost universal adoption of certain rights in modern constitutions to provide support for his *IKEA* theory, according to which there is something like a kind of "global constitution", "a supermarket, where standardized constitutional items —grand designs as well as elementary particles of information— are stored and available, *prêt-à-porter*, for purchase and reassemblage by constitution makers around the world" (Frankenberg, Guenter, "Constitutional Transfer: The IKEA Theory revisited", in *I•CON* (2010), p. 565).

[52] Section12 of the *Canadian Charter of Rights and Freedoms*

[53] *Universal Declaration of Human Rights e. g. (http://www.un.org/en/documents/udhr/)*

[54] *The American Bill of Rights* (*e. g. http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html)*

[55] *The English Bill of Rights 1689* (*e. g. http://avalon.law.yale.edu/17th_century/england.asp).*

subjected to cruel and unusual punishment.[56] With the appearance of these versions and the way they were handled, the way this right-type is understood changed.[57] New versions will change it further. This makes Section 12 more similar to a version of *Cinderella* than to the *Little Mermaid*. It is hard to see how one could attribute the invention of the right not to be subjected to cruel and unusual punishment to the ones who wrote it into the Canadian Constitution or even the American Bill of Rights, just like it is hard to see how one could attribute the invention of *Cinderella* to Walt Disney.[58] Instead, it appears that they merely wrote down a version of the type, the main content of which they took from other versions. This hardly makes them authors in the sense Andersen was an author, or even in the sense you are the author of your emails.[59]

[56] This interpretation of some rights being versions of right-types fits fairly well with Frankebergs IKEA theory, mentioned in footnote 48 (Frankenberg, Guenter (n. 50), 2010).

[57] A new version of a right-type, like a new version of a fairy-tale might be (to a degree) different from the older versions and will have many similarities to older versions. Adding it to the host of versions changes the balance of similarities and differences between the versions and thereby the right-type that exists through their similarities.

[58] The idea that certain rights as they are guaranteed in Charters or Bills of Rights are versions of Human Rights as they are acknowledged internationally also has an impact on the way these rights are interpreted by courts. David Kretzmer, writing about the Israeli Supreme court, explains that "in an number of decisions handed down by justices of the Supreme court, the view is taken that certain fundamental rights not explicitly men-tioned in the Basic Laws, such as the right to equality and freedom of expression, are protected under the umbrella of human dignity". He reports that Barak J (former president of the Supreme Court of Israel) mentioned in his extra-judicial writings that "the concept of human dignity must be interpreted in the light of its 'objective purpose', which can be deciphered from its meaning in international human rights instruments and other democratic constitutions." (Kretzmer, David, "Israel: Basic Laws as Bill of Rights", Alston, Phillip (ed.), *Promoting Human Rights Through Bills of Rights*, Oxford, New York, Clarendon Press, 1999, p. 80.

[59] The reader might be curious about the connection between rights, right-types and moral rights. She might even suspect that right-types are something similar to moral rights. I do not think that such a connection exists. A constitutional right-type exists if versions of it can be found in many different constitutions. There could easily be moral rights that do not appear in any constitutions. In turn, we can easily

I believe that we can extend the argument I made about the several meanings of folk-tales to parts of constitutions that can plausibly be claimed to be versions of constitutional types. The Canadian Section 12 can plausibly be read, like Cinderella, as a version of the right-type not to be subjected to cruel and unusual punishment. As such, the context of the production of this section guides its interpretation, but allows the choice to interpret in order to identify the meaning of the right-type.

Of course, not all passages of a constitutional text will be the result of such borrowing. Additionally, even borrowed passages are more than mere copies. They have been picked out intentionally for *this* constitution and their details and specific wording reflect deliberate choices. Constitutions are written with care and much work goes into every part of them, including the borrowed ones. When a version of a right-type is included in a constitution, the framers of that constitution will often use careful formulation to adapt the right to fit the needs of their country.[60] Therefore it would be wrong to say that the meaning of for example a right included in a constitution just *is* the meaning of the right-type. Where explicit choices to diverge from the general understanding of the right have been included in the text, this has to be taken into account. Therefore, even though passages that represent borrowed constitutional ideas remain connected to their types and their evolving meaning, the following objection seems plausible: Even if certain rights can plausibly be understood to be versions of right-types, and can therefore

imagine right-types that have no corresponding moral rights. There could be, for example, a world in which every constitution contains a right allowing every citizen to steal food from those that are starving. Then there would be a food-stealing-right-type, but this would certainly not entail that a corresponding moral right would also be in existence.

[60] Frankenberg, points out that imported constitutional ideas get re-contextualized and made to fit the general constitutional model frames are trying to adopt, (Frankenberg Guenter (n. 50), p. 578 ff.) Likewise, Wiktor Osiatynski points out that even when rights are borrowed, often idiosyncratic details are included in their formulation to assert the special nature of the country the constitution is constructed for (Osiatynski, Wiktor, "Paradoxes of Constitutional Borrowing", *I.CON*, 2003).

plausibly be thought of as having a changing meaning, this has almost no impact on judicial interpretation.

Adding a right to freedom of speech to a particular constitution might commit us to a right-type whose meaning is determined by the development of all its versions. But this meaning must necessarily stay vague to allow for the many differing and specific implementations of its versions. When judges deliberate on difficult questions about constitutional law, such vague meanings will not be of much help. It is the judge's job to determine the correct *specific* meaning. This more specific meaning lies in the details and the specific wordings of the passage as well as its relationship to the other passages that were chosen for *this specific* constitution. It is a result of the deliberate choices made at the point of the constitutions creation, and therefore fixed. Therefore, all the important questions judges have to answer can only be tackled by referring to the *fixed* meanings of these passages.

How might one respond to this argument? First, we might note that the meanings that borrowed passages bring with them are not at all as inconsequential as the argument makes them seem. The heated debate over the influence of international law on national judicial decision making might serve as a piece of evidence for this: Why should the practice to consider international understandings be so hotly disputed if such consideration made no difference?[61] Another piece of evidence are situations in which judges are legally obligated to interpret constitutional law so as to render it consistent with prior commitments made when signing international treatises. The meanings imported through these treatises sometimes have a lot of influence on judicial decisions in constitutional law. For exam-

[61] See, *e. g.* Annus, Taavi, "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments", *Duke Journal of Comparative and International Law,* 2004; Scalia, Antonin, "Foreign Legal Authority in the Federal Courts", *American Society of International Law Proceedings,* 2004; Waldron, Jeremy, "Partly Laws Common to All Mankinds", *Foreign Law in American Courts,* New Haven, Yale University Press, 2012, ch 3; Bobek, Michal, *Comparative Reasoning in European Supreme Courts,* Oxford, Oxford University Press, 2013; Canale, Damiano, "Comparative Reasoning in Legal Adjudication", *Canadian Journal of Law & Jurisprudence,* 2015.

ple, the European Convention of Human Rights (ECHR), equipped with its own court (ECtHR), is an international treaty that is supposed to protect human rights in Europe. It gives any person whose rights have been violated by one of the participating states the right to bring her case to the ECtHR. Participating countries oblige themselves to give effect to the judgements of the ECtHR, even though it is up to them in what manner this is done. Germany, after signing the treaty, made it a policy to interpret its *Basic Law* (the German version of a Bill of Rights) in such a manner that it is consistent with the ECHR and the rulings of the ECtHR. For example, the ECHR, but not the *Basic Law*, includes an individual right to the presumption of innocence. However, a key element of the German constitutional order is the rule of law. Under the influence of the ECHR, that element is being interpreted as implying a right to the presumption of innocence as it is understood by the ECtHR. This means that the court changed its interpretation of what the rule of law implies in order to comply with the international understanding.[62]

Second, even if rights are not borrowed, or if the borrowed rights are formulated to reflect the specific identity of a country, there is an argument to be made that the context in which some of these rights were included allows us to assume that they have an evolving meaning in addition to their fixed meaning. This argument relies on the idea that parts of constitutions are often included in order to reflect the values that are already present in the national identity of a country's citizens.

2. *Acquiescent and Militant Constitutions*

Constitutions often (but not always) mirror the values and norms embedded in the national identity of the people in the constitution's

[62] For a detailed description of the impact of the ECHR on the German legal system, including more cases in which the interpretation of the German versions of rights were changed to make them more compatible with the international versions of the ECHR, see: Tomuschat, Christian, "The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court", *German Law Journal* (2010). Also available at *http://www.germanlawjournal.com/index.php?pageID=11&artID=1253.*

domain. Their text can plausibly be seen as not so much an original creation as the formulation of content found in the existent commitments, beliefs and values of the people.

Constitutions are usually not written in a vacuum. Instead, they are formulated as the constitutions for a certain group of people, those living in the constitution's domain. These people have their own identity, values, religions, beliefs. Gary Jacobsohn argues that these identities have to be taken into consideration when constitutional law is made.[63] Constitutions are written *for* their subjects, in response to the people they are constitutions for. Such a response does not have to embrace the identity of the constitution's subjects. It can just as well reject them. But it is always directed at them.

Gary Jacobsohn distinguishes between acquiescent and militant constitutions. Militant constitutions reject (parts of) the identity of their subjects. They are set out to fundamentally change the national identity of their subjects or to form a new national identity that negates, rather than embraces, its most fundamental elements. The values found in such constitutions are not yet the values their subjects actually endorse. The goal is to replace the values embedded in the national or ethnic identities with those chosen in the constitution.[64]

However, we are much more used to constitutions that are geared to reflect the values and identity of those they are set out to govern. Jacobsohn uses the term "acquiescent" to describe this relationship between the constitution and the national identity of its subjects. Acquiescent constitutions (and constitutional passages) are oriented towards accommodating the national identity or identities of the constitution's subjects.[65] The values included in the constitution are supposed to express the values found in the national or ethnic identity of the peoples.

[63] Jacobsohn, Gary, *Constitutional Identity,* Cambridge, Harvard University Press, 2010, 112 ff.

[64] Jacobsohn gives (among others) the example of the Indian constitution, set out to fundamentally change important ways in which the Indian caste system structures Indian life (Jacobsohn Gary (n. 62), p. 24).

[65] *Ibidem*, 213 ff.

A typical example for an acquiescent passage is section 27 in the *Canadian Charter of Rights and Freedoms* which expresses the Canadian value of multiculturalism.[66] But Canada's commitment to multiculturalism did not come into existence with the Charter. The Canadian government claims that Canada was the first country to adopt multiculturalism as an official policy (in 1971). But even this official act should not be viewed as bringing the value into the set of commitments that, at least in part, define the national identity of Canada. On the contrary, the value was part of the distinctly Canadian national identity well before either of these political decisions were made. It had been theorized, discussed and embraced (though not always under this name) long before legislative policies implemented it.[67] As a result, it seems implausible to suppose that those who decided to include a passage about multiculturalism in the Canadian Constitution did the same thing that Shakespeare did when he created King Lear or what I do when I write a shopping list. It makes little sense to insist that these authors were the ones who instilled Section 27 with meaning simply because they were the ones who put it in the constitution. It seems much more natural to say that they added a textual passage meant to include in the constitution a reference to a value that was —and is— part of the national identity of Canadians. The framers of the constitution made the conscious choice to include multiculturalism. But that they made this decision does not necessarily entail that their understanding of what multiculturalism is determines what this passage means.[68] Indeed, it

[66] This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians (Canadian Charter of Rights and Freedoms).

[67] For a history of Multiculturalism in Canada see *e. g*. Day, Richard, *Multiculturalism and the History of Canadian Diversity,* Toronto, University of Toronto Press, 2000, Chapter 7, show various examples of early theories of Canadian Multiculturalism (*ibidem*, 146 ff.).

[68] In the USA, where the originalism/non-originalism debate is carried out with the greatest vigour, we find something interesting: According to Farber, scholars engaged in historical investigation about the founding fathers have concluded that these they understood themselves as "merely scriveners, drafting a document for possible use by others". (Farber, Daniel A., "The Originalism Debate: A Guide for the Perplexed", *Ohio State Law Journal,* 1988. Available at *http://scholarship.law.berkeley.edu/facpubs/1092,* p. 49).

does not even necessarily mean that the passage refers to the understanding of multiculturalism that was prevalent when the passage was included. If the text, from the very beginning, refers to the value of multiculturalism as it is embedded in the national identity of Canadians, if the constitution is supposed to implement into law the values central to this national identity, then the term "multiculturalism", as used in the constitutional text can be understood as referring to an evolving meaning. This is so because it is used in a text composed for the purpose to integrate values that are part of Canadian national identity into law. Allow me to explain.

As we have just seen, acquiescent passages in constitutions point beyond their authors' intentions and to the values, ideas, and beliefs that are part of the national and ethnic identities of the constitution's subjects. To be sure, the framer's specific choices to include these passages together with their further choices regarding the details of the specific wording employed, contribute to the meaning of the relevant passage(s). But they do not exhaust it. Insofar as the content of these acquiescent passages is taken from the people's national or ethnic identities, it is from this source that a good deal of their meaning can be derived. However, when interpreters turn to the people's national and ethnic identities to determine what the value is that was included in the constitutional text, they will likely find that the people's understanding of it at one point in time is somewhat different than ten or a hundred years earlier. The understanding of the value of multiculturalism that is a part of Canadian's national identity changes as the way Canadian people think about this value changes. The framers, by including acquiescent passages in the constitutions, cannot help but include, with them, the connections they have to the national and ethnic identities of the people they are supposed to govern. As with folk-tales, the context of production for these kinds of passages can guide the interpretation aimed at identifying the passage's meaning, but it allows interpretation in two different directions. It is possible to interpret passages like this one in order to find the meaning the framers believed them to have when they implemented them. But it is also plausible to read these passages as ones that are supposed to give legal authority to values embedded in the national identity of the people. Again, if read like this the meaning of the passage is not fixed.

Sure, the context does fix *something*: The interpreter must look for the meaning of the value as it is embedded in the national identity of the people governed by the constitution at any point in time at which she undertakes her interpretation. But the value itself evolves, and therefore the meaning an interpreter might identify at one point in time might be different —have evolved away from— the meaning she might have identified had she interpreted the passage at an earlier point in time.

This thought is no invention of this paper. In fact, a whole theory of constitutional interpretation has been built based on the idea that it is the task of a constitutional bill or charter of rights to reflect the values embedded in the identity of the people it governs as these values evolve. This is the theory of common-law-constitutionalism that has been proposed for example by David Strauss and especially Wil Waluchow, who supplements it with his theory of the so-called Community's Constitutional Morality (CCM).[69]

According to the theory of common-law-constitutionalism, judges should use earlier decisions as precedents that can guide their decisions. The use of earlier decisions as precedents allows judges to develop the constitutional law in a stable and flexible way.[70] Waluchow proposes that judges should refer to the community's constitutional morality when they decide constitutional cases in order to ensure that their interpretation of constitutional law stays in touch with the values that the people the constitution governs are committed to. When it is debatable which decision needs to be reached, judges should decide according to the values and principles underlying the community's constitutional morality. CCM does not describe an abstract, objective morality. Neither does it refer to the moral or normative opinions the people in a country might actually hold at some specific moment in time.[71] Rather, it refers to those serious norma-

[69] Strauss, David A., *The Living Constitution,* Oxford, New York, Oxford University Press, 2010*);* Waluchow, Wil, *A Common Law Theory of Judicial Review,* Cambridge, New York, Cambridge University Press, 2007.

[70] For a defense of common-law reasoning as both stable and flexible see, *e. g.* Strauss, David A. (n. 68)*,* p. 2ff.

[71] Waluchow, Wil, "Constitutional Morality and Bills of Rights", p. 67.

tive commitments the community has made through legal and political acts, such as enacting laws or entering international treatises. The content of these commitments can be determined using Rawls' ideal of the reflective equilibrium; a state in which all normative commitments an entity has made are consistent and ideally also coherent with each other. In order to attain reflective equilibrium, inconsistencies in the normative belief-system have to be eliminated. This means letting go of conflicting normative opinions and adopting new normative commitments only if they fit with the rest of the system. When judges decide a constitutional case, they establish a normative commitment on the part of their community by officially determining the meaning of the relevant part of their constitutional law. As result, they are required to make their constitutional decisions in harmony with the rest of the commitments the community has already made by, for example, enacting laws or entering into binding international treaties.[72]

I believe that judges who make decisions using CCM access the values embedded in the national identity of their community. At least in working democracies, laws are enacted and treatises are signed by members of the community elected to do so. These individuals are charged with the responsibility to make decisions that represent the will of the community, or at least the majority of it. Before a fashionable normative opinion becomes integrated into the legal commitments of a community, it usually has been tested in public debates, discussed in newspapers and it has earned the majority's approval. Additionally, one enacted law is only a small voice in the big chorus of a legal system. Therefore, a judge who makes use of the legal normative commitments of a community is well equipped for integrating only those changes into constitutional law which are truly part of the national identity. By attempting to make decisions that will further the community's attempt to achieve reflective equilibrium, the judge expresses not her own, but her community's values.[73]

[72] Waluchow, Wil (n. 68), p. 224 ff.

[73] Serious doubts have been raised, for example by Waldron, as to whether there is such a thing as a set of community values judges could rely upon. Waldron argues that people's moral views and opinions differ dramatically; therefore it is not possible to find such a thing as community-values that could inform constitutional

V. Conclusion

I have argued that we may plausibly claim that (parts of) constitutional texts have —from the very beginning— an evolving meaning in addition to their fixed meaning. They have this evolving meaning as expression-token, that is, they do not have it because the words they are composed of can have different meanings depending on the context in which they are used. Instead, they have this evolving meaning in virtue of the context in which they are written: For example, this could be because their writing constitutes a case of borrowing or constitutional migration. Then it is plausible to say that the borrowed passage, for example a right included in a bill or charter of rights, refers to a right-type the meaning of which evolves and develops on the international level. Alternatively, they have this evolving meaning because they are written to reflect values embedded in the national identity of the people they are meant to govern. As this national identity evolves, the value embedded in it evolves, and so does the text meant to integrate this value in the constitutional law.

interpretation (see Waldron, Jeremy, *Law and Disagreement*, Oxford, Clarendon Press; New York, Oxford University Press, 1999, p. 244). Waluchow has suggested several possible solutions to this problem, *e. g.* Waluchow, Wil, "Constitutions as Living Trees: An Idiot Defends", *Canadian Journal of Law and Jurisprudence,* 2005. One of them is the distinction he makes between mere moral opinions and serious moral commitments. Communities, as well as people, can have any number of moral opinions, and they can get to them in any number of ways. Moral opinions have not necessarily run through a process of reflection. They might not have been tested for consistency or coherence with the other moral opinions held by the person or community. Serious moral commitments are moral opinions that have been tested for consistency and coherence with other moral commitments and that have passed this test. Waluchow agrees that in any healthy community, there will be lively debate about matters of political morality, and many different opinions will enter this debate. However, he believes that it is the serious moral commitments that should be taken up in important decisions about constitutional matters. These commitments manifest themselves at the outcome of debates – when laws are enacted, treatises signed etc. It is therefore justified for judges to favour commitments expressed in this way over the opinions that are still the subjects of debates (Waluchow, Wil (n. 68), p. 223 ff.).

I should stress that the question whether such an evolving meaning exist is different from the question whether we should allow judges to refer to it when they decide constitutional cases. There is a fixed meaning both to borrowed constitutional passages and to acquiescent constitutional passages: it is always possible to ask what the passage meant to the frames, or to the public at the time it was adopted, even though the answer to this question might be hard to find. It is therefore debatable which meaning judges should refer to when they interpret constitutions. But this question has to be answered with recourse to normative arguments, for example about the role we want constitutions to fulfill in our political systems. The goal of this text was merely to point out that this normative debate cannot be avoided or even influenced by reference to descriptive theories about the kinds of meanings constitutional texts can be said to have.

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