

LEGAL INDETERMINACY: ITS CAUSE AND CURE

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Legal indeterminacy—the extent to which any particular legal theory cannot provide knowable answers to concrete problems—is one of the principal themes of modern jurisprudence. Indeterminacy plays an important role in debates concerning interpretation, the nature of legal obligation, and the character and possibilities of the rule of law.¹ Indeterminacy looms particularly large in debates concerning originalism as a method of constitutional interpretation. Some scholars insist that originalism resolves too few problems to be of much use,² while others argue that originalism's indeterminacy is often overstated.³

I do not intend here to enter the debate concerning the relative determinacy of originalism and other theories of constitutional interpretation. Instead, my aim is to identify an important misunderstanding about the nature and causes of legal indeterminacy that often mars this debate. *Indeterminacy* is typically treated as synonymous with *uncertainty*. These two concepts, however, are very different, and a failure to keep them distinct has led to much mischief. In Part I, I describe the correct relationship between uncertainty and indeterminacy. I show that indeterminacy is a function both of the level of uncertainty concerning any particular claim and of the standard of proof that is needed to establish a claim. In other words, one needs to know *how much uncertainty* is enough to create *indeterminacy*. In Part II, I explore how originalists should deal with indeterminacy in interpreting the federal Constitution. The answer depends in large measure on whether the controversy at hand involves state or federal action. When federal governmental action is at issue, constitutional indeterminacy should usually work to defeat the challenged gov-

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1. For a thoughtful analysis of some of the principal modern arguments concerning indeterminacy, see Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

2. See Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437 (1996).

3. See Thomas B. McAfee, *Originalism and Indeterminacy*, 19 HARV. J.L. & PUB. POL'Y 429 (1996).

ernmental action; when state governmental action is at issue, constitutional indeterminacy should usually work to sustain the challenged governmental action.

I. UNCERTAINTY AND INDETERMINACY

Originalism is largely an historical enterprise. Panelists at this conference have carefully explored many of the uncertainties that inevitably will be encountered by originalists in their quest for constitutional meaning.

First, there is uncertainty about some aspects of the proper *definition* of originalism. Originalists must determine *what materials count* towards establishing a provision's original meaning. Do we look to the linguistic views of Eighteenth-Century dictionary authors, to the views of those persons who ratified the Constitution, to the views of those persons who participated in the ratification process, to the views of some subset of especially famous people who participated in the ratification process, to the views of those persons who, for whatever reasons, chose not to participate in the ratification process (or who were deliberately excluded from it), to the views of some hypothetical ideal observer (for example, "a fully-informed member of the general public in 1789"), or to some other putatively authoritative source? As Larry Alexander so elegantly put it: Who is Fred?⁴ Originalists must also determine *how much* the various materials ought to count. Once we have identified the relevant authorities, in what order of priority do we look at those authorities, and if different authorities give conflicting answers, what is the hierarchy among them? Suppose, for example, that we have determined that both Fred and Larry are relevant authorities and that we know their positions on a question. If the positions are inconsistent, we need to know whether we should care more about what Fred says than what Larry says (or vice versa), and there might be uncertainty in that inquiry.

Second, once originalism is properly defined, there can be uncertainty about the proper *application* of originalism. For instance, once we have gathered together and evaluated the appropriate historical materials, there is uncertainty about whether those materials reliably reflect history. The records of

4. See Larry Alexander, *Originalism, or Who is Fred?*, 19 HARV. J.L. & PUB. POL'Y 321 (1996).

the state ratification debates on the Constitution—one of the key sources for many originalists—are incomplete and may well have been altered to serve partisan purposes.⁵ Furthermore, the early issues of the *Annals of Congress*⁶ are also of highly questionable accuracy, as the first reporter for the House of Representatives was a notorious drunkard whose notes were filled with pictures of horses and other doodles in the margins.⁷ And anyone who has studied legislative history knows that the modern *Congressional Record* is equally (if not quite as blatantly) suspect.⁸ There might also be uncertainty about our ability to understand communications that were made in a different time and context. There often is a danger of anachronistically reading modern understandings into texts to which those understandings are alien.⁹ Finally, once we have gathered, evaluated, and authenticated all the materials, there might be uncertainty about what the materials really tell us. We might all agree on the relevant sources and their appropriate weight but disagree about the inferences or conclusions to be drawn from those sources on any given question.¹⁰

So all of these considerations, and probably many more, generate uncertainty about what the Constitution, as construed by originalism, prescribes.¹¹ But *uncertainty is not the same thing as indeterminacy*. People who talk about indeterminacy typically shift back and forth between indeterminacy and uncertainty as though these concepts were interchangeable. But once we have gathered up and analyzed all of the available uncertainties regarding a question, we still have to ask whether those uncertain-

5. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 12-13, 20-24 (1986).

6. For a description of the early *Annals of Congress*, see *id.* at 36.

7. See *id.*

8. The reports of floor debates in Congress are subject to prepublication editing by members of Congress and their staffs. Members are permitted to insert into the *Congressional Record* speeches that were never delivered; indeed, the *Congressional Record* can report a floor speech by a member who was not even present when the speech was supposedly delivered. In principle, the *Congressional Record* is supposed to indicate when remarks have been inserted after the fact and were not actually delivered on the floor of Congress, but the practice is sometimes honored in the breach. See *Gregg v. Barrett*, 771 F.2d 539, 541 (D.C. Cir. 1985).

9. The need to avoid anachronism is a persistent theme in Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

10. See Sherry, *supra* note 2.

11. There is nothing unique in this respect about either originalism as a method of interpretation or constitutional law as a discipline. One can perform the same exercise of listing sources of uncertainty with, for example, products liability law, under which one must identify, order, and synthesize (at a minimum) statutes, court decisions, and administrative regulations.

ties are enough to make the question indeterminate. Or put another way, we need to know *how uncertain* one must be about an answer before one ought to throw up one's hands and pronounce the question indeterminate.

Let me illustrate this with an academic example—and by “academic” I mean, of course, “self-promoting.” Consider for a moment the so-called Necessary and Proper Clause of the Constitution.¹² And I say “so-called” because virtually everybody in the founding generation called that provision the Sweeping Clause.¹³ It is one thing to say (as do many critics of originalism) that we are not going to pay much attention to the meaning of what the founding generation wrote and ratified, but it is another thing altogether gratuitously to ignore the founding generation's label for its own work product. Accordingly, I will henceforth refer to the provision at hand as the Sweeping Clause.

In an article published in 1993,¹⁴ Patty Granger and I surveyed the available historical materials on the meaning of the Sweeping Clause. We concluded that, far from being a blank check to Congress (as seems to be the modern consensus about the clause's meaning), the Sweeping Clause was in fact an integral part of the constitutional design of limited government. In particular, the oft-neglected word “proper” (the clause authorizes Congress to pass “all Laws which shall be necessary and proper for carrying into Execution” powers of the federal government¹⁵) requires that all laws enacted pursuant to the Sweeping Clause keep the federal government and each of its departments within their constitutionally enumerated jurisdictions. To make a long story short, laws enacted pursuant to the Sweeping Clause, which turns out to include the overwhelming majority of federal laws, must conform to background principles of individual rights, federalism, and separation of powers. Congress thus had to obey (at least in large measure) the Bill of Rights before there was a Bill

12. U.S. CONST. art. I, § 8, cl. 18 (stating that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

13. See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270-71 (1993).

14. See *id.*

15. U.S. CONST. art. I, § 8, cl. 18.

of Rights. It had to obey the Tenth Amendment¹⁶ before there was a Tenth Amendment. And it has to take account of principles of separation of powers even though the Constitution does not seem to contain a "Separation-of-Powers Clause."

This is a very powerful, and I dare say elegant, theory of the Sweeping Clause. But is it *correct*? After all, every one of the sources of uncertainty in the originalist enterprise discussed above shows up prominently in an inquiry into the original meaning of the Sweeping Clause. Although a number of important historical figures made statements that directly and indirectly support Ms. Granger's and my interpretation,¹⁷ a number of notable Anti-federalists maintained that the Sweeping Clause gave Congress essentially unlimited powers.¹⁸ We are thus faced with the problem of identifying the relevant authorities and their respective weights. Furthermore, because some arguably relevant statements from historical figures appeared in the reports of the state ratification debates and the *Annals of Congress*, there is uncertainty about those statements' accuracy.¹⁹ In addition, Ms. Granger's and my argument relies most heavily on a comparison of the language of the Sweeping Clause with similar language in other clauses of the federal Constitution and contemporaneous state constitutions and on inferences from the Constitution's overall design rather than on direct statements by historical individuals.²⁰ This gives rise to additional uncertainty about the identity and weight of the relevant authorities and about the appropriate conclusions to be drawn from the available evidence.

Thus, each stage of the interpretative process compounds one uncertainty upon another. There is uncertainty about what materials we are supposed to be looking at, about how much significance those materials have, about the accuracy of those materials, and about the proper conclusions to be drawn from those materials, especially when different materials point in different directions. Whatever answer one comes up with about the original meaning of the Sweeping Clause will probably not be held with one-hundred percent certainty. Thus, in view of all of

16. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

17. See Lawson & Granger, *supra* note 13, at 298-308.

18. See *id.* at 281-84, 321-22.

19. See *id.* at 334-35.

20. See *id.* at 308-26.

these uncertainties, can we possibly say *determinately* that Ms. Granger's and my interpretation of the Sweeping Clause is the correct originalist interpretation of that Clause?

The answer to that question depends on the relationship between uncertainty and indeterminacy. How much *uncertainty* is enough to generate *indeterminacy*? In other words, just how certain of an answer do we need to be in order to say *determinately* that the answer is correct?

Consider another example, which may seem at first glance to be far removed from the heady world of constitutional interpretation. Suppose that we are talking about a simple fact—for example, whether a particular person (call him "A") pulled the trigger on a gun at a specific time. To determine whether that fact has been established in a legal proceeding, we need to resolve a number of uncertainties that are similar to the kinds of uncertainties encountered in originalist constitutional interpretation. First, we need to know what materials might count for or against any given answer to the question. In the case of factual disputes, the law, via the rules of evidence, to some extent tells us what materials to look at. Some of the rules of evidence govern the *admissibility* of different materials and thus categorically tell us what we, as fact-finders, are permitted to consider. The rules of evidence are thus analogous to the rules of interpretation in legal theory. Theories of interpretation tell you, *inter alia*, what materials you are supposed to look at to figure out the right answer. And just as there can be uncertainty in identifying and applying an interpretative theory's rules of admissibility, there can also be uncertainty about the identification and application of rules of admissibility for evidence to prove facts.

Once we have worked through that first level of uncertainty and have figured out what materials to look at in determining whether A did or did not pull the trigger, we also need to know how much each of those materials count, how we can assess their reliability, and what to do when those materials point in different directions—just as we need to address those problems in constitutional interpretation. And as with constitutional interpretation, there will be uncertainties at each stage of the process. Once we have proceeded through the entire process and have totted up all of the uncertainties, we can then ask whether we have established that A pulled the trigger.

We cannot answer that ultimate question, however, until we know one more very important thing: are we trying to establish the fact in a civil case or a criminal case? If we are trying to establish the fact in a criminal case, and the fact is relevant to the defendant's guilt, then the sum total of uncertainty that we can have while still proclaiming to have "established" that *A* pulled the trigger is very low—low enough so that we must be able to reach the conclusion *beyond a reasonable doubt*. If we are trying to establish the fact in a civil case, however, we can stand a great deal more uncertainty and still reach a firm conclusion, as civil cases only require that one establish the relevant facts by a preponderance of the evidence. So if, for example, the relevant evidence for *A* having pulled the trigger satisfies a preponderance-of-the-evidence standard but fails to satisfy a beyond-a-reasonable-doubt standard, the fact can be deemed established in the civil case but not in the criminal case. In the criminal case, we would have to say that we just do not know whether *A* pulled the trigger. We cannot say that *A* did pull the trigger because we have not established that fact beyond a reasonable doubt. But neither can we say that *A* did not pull the trigger, as that claim fails any plausible standard of proof (it is not true by a preponderance of the evidence, and it is not even the best answer available). Thus, in the present example, the fact is *determinate* in a civil case but *indeterminate* in a criminal case.

The punch line is that one cannot know whether *uncertainty* translates into *indeterminacy* unless one knows the applicable *standard of proof*. A problem is indeterminate only if there is enough uncertainty about the right answer so that the applicable standard of proof cannot be satisfied. Indeterminacy is therefore a function both of the amount of uncertainty and of the standard of proof: the same amount of uncertainty will lead to more indeterminacy as the standard of proof is raised (for example, from a preponderance-of-the-evidence standard to a beyond-a-reasonable-doubt standard), and the same standard of proof will lead to more indeterminacy as the amount of uncertainty increases.

Exactly the same principles apply to claims about the original meaning of constitutional provisions (and, for that matter, to any claims about any subject in any discipline). I have explored at length elsewhere the ways in which many of the principles governing proof of *legal* claims are identical to principles governing

proof of *factual* claims.²¹ For now, all that is important is the recognition that no claims about original meaning (or anything else pertaining to the law) can be evaluated unless we know the appropriate standard of proof for those claims. This is an obvious point, but one that is almost universally ignored by the legal system. We all know that any time you have to prove a fact in a legal proceeding, the law must and will provide a standard of proof; somebody will have to prove all relevant facts in accordance with some prestablished standard of proof. The standard might be "beyond a reasonable doubt," it might be "preponderance of the evidence," or it might be "clear and convincing evidence," or some other less-common standard. But, when facts are involved, the law recognizes that *some* standard is necessary, and it always provides one. The law, however, does not seem to think as carefully about standards of proof when it comes to proving *legal* rather than *factual* claims. Nonetheless, there *has* to be a standard of proof operating with respect to claims about the Constitution's original meaning, whether or not the standard is expressly identified or recognized.²² Claims about constitutional (or other kinds of legal) meaning can be correct or incorrect only *relative to some standard of proof*, just as is true of claims about the identity of trigger-pullers. It is part of what it *means* for an answer to be correct.

Now we can finally ask whether the interpretation of the Sweeping Clause put forward by Patty Granger and myself is the correct interpretation of that Clause from the perspective of con-

21. See Gary Lawson, *Proving the Law*, 86 Nw. U. L. REV. 859 (1992) [hereinafter *Proving the Law*].

22. At a minimum, originalist claims require a standard of proof to the extent that such claims involve *historical*, and therefore *factual*, assertions. The question, however, whether my analysis applies to all aspects of all originalist claims, or to all legal claims more generally, turns out to be (I confess somewhat to my surprise) highly controversial.

Michael Perry, for example, maintains that originalism is only partly an historical, factual enterprise. He agrees that identifying the norm that is represented by the original meaning of a constitutional provision is ultimately a factual inquiry. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 55-56 (1994). He maintains, however, that norms are not always self-applying; they often underdetermine the outcome of specific disputes and therefore sometimes must be shaped in the course of their application. See *id.* at 72-74. According to Professor Perry, this task of bringing an underdeterminate norm to bear in a specific dispute involves *normative* reasoning that does not readily yield to analysis in terms of my evidentiary categories. See *id.* at 74-76. (Other commentators, in conversation, have made similar comments to me concerning the allegedly normative, nonfactual character of much legal analysis.)

It seems to me that normative claims, if they are assertions of truth, require a standard of proof just as much as do historical claims. To pursue this matter here, however, would take me far afield; for the moment, I am content to limit my discussion to that portion of originalist analysis that unambiguously involves historical, factual inquiry.

stitutional originalism.²³ The answer, as I have indicated, depends on the standard of proof to which we hold claims about constitutional meaning. If all we mean by an interpretation being right in this context is that it is better than any available alternative, I think we have a slam dunk. Our theory of the Sweeping Clause accounts for the available historical evidence better, and I would claim substantially better, than any competing theory of the clause that has been put forward. I would even say that it is true beyond a reasonable doubt that our theory is the best available alternative.

If being the best alternative is enough, then we have a determinate meaning for the Sweeping Clause. But someone could easily object that “best available alternative” is not much of a standard. In interpreting the Constitution or a statute, one often has more than two choices. Sometimes there can be many competing interpretations of a provision, so that it is not just a question of *X* or *Y*, but of *U*, *V*, *W*, *X*, *Y*, or *Z*. It may well be that *Z*, out of these six possible interpretations, stands out as the best alternative once one has gone through all of the problems and uncertainties that each answer generates. But because there are six possible interpretations, option *Z*, even though it is the *best* option, might be pretty lousy. If we can attach cardinal percentages to the various options, one can imagine *Z* having a 17 percent chance of being right and all of the others being somewhere in the neighborhood of 16.5 percent. *Z* is better than the other options, but there is an 83 percent chance that *Z* is wrong—and if there are really twenty options, *Z* can be the best available option even though there can be nearly a 95 percent chance that *Z* is wrong. So it is entirely possible for someone to insist that, before we are willing to say that we have a determinately correct meaning for the Sweeping Clause (or any other provision), we must at least demand that the interpretation meet a preponderance-of-the-evidence standard. A correct interpretation, on this understanding, must not only beat the competition, but must satisfy an absolute threshold of plausibility by beating all of the other possible interpretations put together.

It turns out to be very difficult to give a good account of what it means for a claim (whether legal or factual) to meet a prepon-

23. If originalism is the wrong theory of interpretation to employ, then of course answers reached by means of originalism are unlikely to be correct interpretations of the Constitution, even if they result from a determinately correct application of originalism.

derance-of-the-evidence standard, as evidence does not come to us in ready-to-weigh, commensurable units.²⁴ Nonetheless, to the extent that we all think we understand, at least in some sense, what kind of level of uncertainty a preponderance-of-the-evidence test is meant to represent, I think that Ms. Granger and I can meet that standard too.

Suppose for the sake of argument, however, that our interpretation of the Sweeping Clause fails to meet the preponderance-of-the-evidence standard even though it is the best available alternative. Then, if ours is the best available alternative but cannot meet the preponderance-of-the-evidence standard, that means that *no* interpretation of the Sweeping Clause will meet the preponderance-of-the-evidence standard. In that case, one would have a bona fide case of indeterminacy: the level of uncertainty is such that no interpretation meets the relevant standard of proof, and therefore no interpretation can be said to be correct. But to get to that conclusion about indeterminacy, we not only had to make some powerful assumptions about the level of uncertainty surrounding the relevant claims, but we also had to say something very specific and very powerful about the standard of proof to which we are going to hold interpretative claims.

And, of course, we can imagine ratcheting the standard of proof up yet another level. Perhaps we should not say that we have a determinate meaning of a constitutional provision unless we can establish the meaning beyond a reasonable doubt. That is a very tough standard, and it is questionable whether Ms. Granger's and my interpretation of the Sweeping Clause can meet it (though I am willing to make the case). If that is really the appropriate standard and our interpretation fails to meet it, then we would have to say that the meaning of the Sweeping Clause is indeterminate—as would be the meaning of virtually every other interesting clause of the Constitution.

The moral of the story is that one cannot make any claims about determinacy or indeterminacy without knowing the applicable standard of proof. If the standard of proof is high enough, there will be plenty of indeterminacy. But if the standard of proof is low enough so that all you are looking for is the best answer that you can possibly attain under the circumstances, the level of *indeterminacy* goes essentially to zero even if the level of

24. See *Proving the Law*, *supra* note 21, at 869-70.

uncertainty is very high. There almost always will be a *best* answer, even if that answer does not command a high degree of confidence. If you are willing to drop the standard of proof low enough, you can essentially eliminate legal indeterminacy no matter how much uncertainty you face. If you are willing to raise the standard of proof high enough, you can essentially eliminate legal determinacy no matter how much certainty you can generate. The *cause* of indeterminacy is therefore always a combination of uncertainty and the standard of proof. As economists might say, $I = f(U, S)$.

II. DEALING WITH INDETERMINACY

So now we know something about the *cause* of legal indeterminacy. What about its *cure*?

One part of the cure, of course, is less uncertainty. All else being equal, the more certain we can be about our conclusions, the less indeterminacy we will find. It is therefore important for originalists to work to reduce uncertainty on all fronts—to figure out which sources are authoritative and to what degree, to understand and respect the limits on the reliability of historical materials, and to avoid anachronistic thinking.

The other cause of indeterminacy is the standard of proof to which originalist claims are held. Before one can determine whether that cause requires a cure, however, one first needs a diagnosis. We need to know the standard of proof that actually operates in the world, and we need to know whether that standard is appropriate. If the operative standard is higher than the appropriate standard, then one can properly reduce the amount of indeterminacy by adjusting the standard of proof.

It is very difficult to identify the operative standard of proof for judging originalist claims, primarily because legal actors—including legal scholars—generally do not think about standards of proof in the context of claims about legal meaning. Virtually no scholars or judges discuss the standard of proof that they are applying to legal claims, so the standard in any given context usually must be inferred. Moreover, because of the lack of consciousness about the need for standards of proof for legal claims, the standard employed in any context may shift without warning. It is difficult to apply a standard consistently if one is

not aware of the standard or is not even aware that a standard is being applied.²⁵

It is also difficult to determine the appropriate standard of proof. As is true for the various standards of proof that govern the determination of facts in legal proceedings, the selection of a standard of proof for originalist claims (or any other kinds of legal claims) is a profoundly normative enterprise. As far as I can tell, there is nothing in the nature of interpretation, of originalism, or of the Constitution that can provide the answer.

Nonetheless, while I have little to say about the appropriate standard of proof for originalism, and therefore little to say about just how much indeterminacy originalism is likely to generate, there is a great deal to be said about how originalists should handle whatever indeterminacy they may encounter. Of course, if the correct standard of proof is the best-available-alternative standard, the problem of indeterminacy largely disappears. If the correct standard of proof involves some absolute threshold, however, such as a preponderance-of-the-evidence or a beyond-a-reasonable-doubt standard, then indeterminacy may be a serious problem. In that circumstance, one can cure indeterminacy by making it go away (which means reducing uncertainty so that the appropriate standard of proof is satisfied) or by treating its symptoms. The principal symptom of legal indeterminacy is the inability to resolve issues correctly: you cannot apply the law if you do not know it. So how should originalists resolve issues in the face of indeterminacy?

The answer depends in large measure on who you are and what you are doing. If you are an originalist academic scholar and you come across a case of genuine indeterminacy, you can do pretty much anything you like with it, including throwing up your hands, saying "I don't know," and moving on to the next problem.²⁶ That kind of quick surrender, however, is not avail-

25. A cynic might infer that the operative standards of proof in legal scholarship are as follows: if your own work is involved, the claims are determinately established as long as they are not laughable; if someone else's work is involved, the standard of proof is "beyond a conceivable doubt," and if the flaws in the other person's work are not immediately evident, it is only because Rene Descartes's evil demon is preventing you from seeing them. Obviously, I mean this (mostly) in jest, but I do think it is empirically true that, to a large extent, legal scholars tacitly apply a much harsher standard of proof to the works of others than they apply to their own work.

26. Better yet, you can say that indeterminacy depends on the standard of proof, cite my articles, and *then* move on to the next problem.

able if you are a judge who must decide a case.²⁷ It is not available even in theory, because to say that you are going to throw up your hands means essentially to leave the status quo in place, which means that whoever is asking the court to do something loses. As the rock band Rush once said, if you choose not to decide, you still have made a choice.²⁸ Thus, the judge needs a device for handling indeterminacy that allows the judge to reach a decision of liability or nonliability (or guilty or not guilty) in the case at hand.

The law provides precisely such a device. Thus far, I have dealt with *standards* of proof and the way in which the legal system ignores them when propositions of law are involved. There is another, related concept that also tends to be ignored when legal rather than factual claims are involved, and that is *burdens* of proof. Burdens of proof are, at least in function, devices for dealing with indeterminacy. A burden of proof lets you resolve issues even when the answer is indeterminate. How can that be? How can you resolve an issue when, by hypothesis, the answer is indeterminate? Quite simply, whoever has the burden of proof on an issue for which there is no determinate answer *loses*. Suppose once again that we are trying to decide whether A pulled the trigger on a gun and that a conclusion of legal liability rests on that determination. Imagine that we present all of the evidence and the trier of fact says: "When I consider the evidence in light of the appropriate standard of proof, I have to conclude that I just don't know what happened. I can't say, given the appropriate standard of proof, either that A pulled the trigger or that A did not pull the trigger." Even though the question whether A pulled the trigger is indeterminate, the resolution of the lawsuit is entirely determinate. One party is going to have the burden of proof on the issue in question, and that party simply loses the issue, even though the fact-finder never really finds the relevant fact in the winning party's favor. Through the assignment of burdens of proof, the outcome of a lawsuit can be determinate even when the relevant facts are indeterminate.²⁹

27. *But see* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 626-31, 644 (1949) (describing a fictitious judge who refuses to decide whether trapped explorers who killed and ate one of their fellows to avoid death by starvation are guilty of murder).

28. NEAL PEART, *Free Will, on RUSH, PERMANENT WAVES* (1980).

29. I discuss this point in more detail in *Proving the Law*, *supra* note 21, at 896-98.

The same principles apply to claims about legal meaning. Suppose that you are trying to establish the meaning of a constitutional provision and you think about it as hard as you can, you look at all the relevant materials, you apply the relevant standard of proof, and your conclusion is, "I just don't know." You can still decide the case if you know the assignment of the burden of proof. Any legal theory, including originalism, can handle as much indeterminacy as the world can throw at it, so long as it can figure out where to place the burden of proof.

One way to allocate the burden of proof in constitutional adjudication is to say that when in doubt, the government wins. That is, when you are asking whether a court can invalidate an action by a governmental body, if the meaning of the relevant constitutional provision is indeterminate, the challenged law stands. This view has a very impressive historical pedigree. James Bradley Thayer took precisely that position in what is arguably the most famous article in American legal scholarship,³⁰ as did virtually everybody in the founding era who had anything at all interesting to say about judicial review.³¹ It is not a position that can be dismissed lightly.

Another way to allocate the burden of proof is to say that when in doubt, the government loses. This is essentially the position represented by the modern rule of lenity in the interpretation of criminal statutes. As traditionally conceived, the rule of lenity was a *standard* of proof more than it was an allocation of the *burden* of proof: the government had to show beyond a reasonable doubt that the defendant violated the applicable law, just as it must show beyond a reasonable doubt that the defendant performed the acts in question.³² As the rule of lenity is applied today by the

30. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139-56 (1893). Thayer is also one of the few legal scholars explicitly to discuss standards of proof for legal claims. See *id.* at 144 (stating that courts should invalidate governmental action only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question").

31. See SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990). The rule has modern proponents as well. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 165-66 (1990) (stating that, when the constitutional text is indeterminate, judges cannot use the text to invalidate governmental action).

32. See, e.g., *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (stating that "before a man can be punished as a criminal under the federal law his case must be 'plainly and unmistakably' within the provisions of some statute"). The rule of lenity still operates this way in some States. See Robert Batey, *Techniques of Strict Construction: The Supreme Court and the Gun Control Act of 1968*, 13 AM. J. CRIM. L. 123, 133-35 (1986).

Supreme Court, however, it appears to do little more than to place the burden of proof on the government in the interpretation of criminal statutes.³³ Accordingly, one could simply extend that allocation of the burden of proof to the government in cases involving constitutional interpretation as well.

One can make arguments for and against both of these positions. But the real question is whether the Constitution itself tells us how to allocate burdens of proof and thus how to deal with indeterminacy. I think it does, and it tells us that the Thayerian approach and the rule of lenity approach (as I will call them) are both partially correct.

Consider how we deal with burdens of proof in contexts other than constitutional adjudication, be it a high school debate or a civil or criminal trial. The usual rule is that he who asserts must prove. In the law, that amounts to a presumption in favor of the status quo. Anyone who is seeking to change the status quo, to convince the legal system to take action on behalf of a party, bears the burden of establishing whatever propositions are necessary to justify that action. I must leave for another day a full epistemological and normative defense of this position.³⁴ For now, it is enough to suggest that there is every reason to believe that this tradition is a background principle against which the Constitution was ratified and that would have been widely acknowledged by informed members of the public in 1789. He who asserts must prove.

How would that simple, common sense principle play out in constitutional adjudication? It depends on a number of factors, including most notably which level of government—state or federal—we are talking about. The federal Constitution treats these two levels of government very differently. The federal government, as we all know, is a government of limited and enumerated powers. Accordingly, when we are dealing with action by the federal government, whether through the legislature, the executive, or the federal courts, the first question is always, “Where in the federal Constitution does this institution get the power to do what it’s doing?” In other words, there is always at least an implicit assertion in any exercise of federal power that there is something in the Constitution that affirmatively authorizes the

33. See *Moskal v. United States*, 498 U.S. 103, 106-14 (1990).

34. This is not the first time that I have punted this issue. See *Proving the Law*, *supra* note 21, at 893-94.

federal government to act. The Constitution's implicit baseline assumption is that the federal government is powerless unless and to the extent that the Constitution says otherwise. That means that the first allocation of the burden of proof always will be on the federal government to prove that it is not acting *ultra vires*. If there is indeterminacy, and one cannot establish (given the appropriate standard of proof) the meaning of one of the provisions granting powers to the federal government, the federal government loses in any case in which it must rely on that provision. To uphold an action of the federal government, one must be able to say affirmatively that the government has the power to act.

The government, of course, can satisfy that burden of proof and still lose the case. There are all sorts of provisions in the federal Constitution that are in the form of "Thou shalt nots" to the federal government; the lists of rights in Article I, Section 9 of the Constitution and in the Bill of Rights come immediately to mind. These provisions say, in essence, "Even if, as a *prima facie* matter, the federal government can do what it claims the right to do, that right is trumped by another provision; or at least the government cannot exercise its asserted power in this particular way at this particular time." If the federal government has satisfied its initial burden of proof by showing that it has the enumerated power to act, then the burden of proof would naturally shift to the person who is claiming that the Constitution affirmatively *forbids* that which the government has done. The person challenging the government action—saying, "No, you can't do this because there's a provision in the Constitution that says that you can't"—becomes theasserter, and hence assumes the burden of proof, and hence the burden of indeterminacy. If one cannot establish (given the appropriate standard of proof) the meaning of a rights-bearing provision of the Constitution, such as a provision of the Bill of Rights, then anyone who seeks to rely on that provision will lose, as that person is now making an insupportable claim about what the text allows.

Matters, however, are not quite as simple as they seem. If Patty Granger and I have correctly interpreted the Sweeping Clause (and we have done so unless the appropriate standard of proof is something ridiculously high like a beyond-a-reasonable-doubt standard), most claims of rights against the federal government putatively based on the Bill of Rights are really claims about enu-

merated powers in disguise. If we are right, virtually all of the important principles contained in the Bill of Rights were in 1791 already contained in the text of the Constitution via the Sweeping Clause—a federal law providing, for example, for prior restraints on speech, for general warrants, or for the taking of private property without just compensation would not be “proper” and hence would violate the Sweeping Clause. That is crucial for burden-of-proof purposes because the Sweeping Clause is a power-granting provision. Congress is given power to implement the federal government’s other granted powers, but only if those implementing laws are “necessary and proper for carrying into Execution” other granted powers. Thus, if a law purportedly enacted pursuant to the Sweeping Clause is in fact not “proper,” that means that Congress was not affirmatively granted the power to enact the law in the first instance. Because such cases implicate Congress’s enumerated powers—by hypothesis, the government cannot meet its initial burden of showing that it has the power to act without invoking the Sweeping Clause—the government is the initial asserter and bears the initial burden of proof. The opponent of government action bears the burden of proof only if he must claim that the rights-bearing provision in question goes beyond the limitations on governmental power implicit in the Sweeping Clause. Of course, if the government can justify its exercise of power without recourse to the Sweeping Clause, the challenger to the government action may well bear the burden of proof. But there will be very few such cases, as, *inter alia*, virtually all of the laws creating the federal government’s law enforcement machinery and laws imposing penalties involve exercises of the Sweeping Clause power. Thus, the rule of lenity approach should generally govern constitutional claims involving federal action.

The situation is very different where state governments are concerned. With very few exceptions, state governments do not have to turn to the federal Constitution for grants of power. The federal Constitution presumes that they have the affirmative power to do things in the first instance and enters the scene only in the form of affirmative prohibitions on state action.³⁵ So when

35. Lest I be misunderstood (and I have been misunderstood on this point more than once), I do not mean that state governments are unlimited. They are clearly limited by their own constitutions, and perhaps even by natural law. But *as far as the federal Constitution is concerned*, state governments are unlimited in the sense that they do not have to show an affirmative power-grant to justify their actions under the federal Constitution.

state government action is involved, the burden of proof in federal constitutional adjudication ordinarily would be on the person challenging the government action to show that the federal Constitution forbids the State from doing what it is doing. And when the provisions purporting to limit state action are indeterminate, the burden of that indeterminacy falls on the person challenging the State. Thus, the Thayerian approach generally should govern constitutional claims involving state action.

This common sense allocation of burdens of proof conforms very elegantly to pretty much everything we know about the original design of the Constitution and its conception of the roles of the state and federal governments. But is it *right*, from the perspective of originalism? The reader at this point may be thinking, "In order to say that the Constitution provides for a specific burden of proof, Lawson needs to specify a *standard* of proof for his claim. After all, he is making a claim about constitutional meaning, and didn't he just go to a lot of trouble to convince me that all claims about constitutional meaning require specification of a standard of proof?"

If the reader is indeed thinking that, I am going to declare victory and go home.