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Authority and Meaning

Laurence Claus

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Essay

Authority and Meaning

LAURENCE CLAUS

This conference contribution celebrates Richard Kay's contention that a sound theory of legal meaning depends on a sound theory of legal status. Contrary to Kay, I conclude that identifying law's true source reveals that we should seek law's meaning not primarily in lawgivers' intentions, but in public understanding.

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Authority and Meaning

LAURENCE CLAUS*

INTRODUCTION

A decade ago, Richard Kay reminded us that where we look for words' meaning should depend on why we are paying attention to them. Identifying the meaning of a constitution, he contended, cannot be disconnected from the source of its status as law. This contribution to the celebration praises Kay's insight that a sound theory of legal meaning depends on a sound theory of legal status. While acclaiming that conclusion, we will examine Kay's account of what makes the United States Constitution our law and notice how adjusting our vision of the Constitution's legal status alters our approach to identifying the Constitution's meaning.

I. KAY'S VISION OF AUTHORITY AND MEANING

For Kay, "[t]he central problem with the original public meaning view of constitutional interpretation is that it severs the connection between the Constitution's rules and the authority that makes us care about those rules in the first place."¹ Kay argues that "[t]he normative force of any legal rule is, first and foremost, the consequence of regard for the lawmaker,"² and that "[n]o constitution—no posited norm of any kind—can succeed if it is not regarded as the authentic command of a legitimate lawmaker."³

Whence comes the legal status of the United States Constitution? Kay locates it in the decisions of state ratifying conventions that were understood by the founding generation to reflect "the will of 'the people.'"⁴ Whether or not characterizing those decisions in that way is plausible, "[t]he critical point," according to Kay, is "that the United States Constitution, like any other piece of legislation, derives its force from regard for the circumstances of its enactment."⁵ Kay concludes that

* Professor of Law, University of San Diego.

¹ Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 714 (2009).

² *Id.* at 715.

³ *Id.*

⁴ *Id.* at 716.

⁵ *Id.* at 717.

“recourse to the original intentions provides a link that is essential to the legitimacy of constitutional judicial review.”⁶

II. THE NATURE OF LAW

Let us look a little closer at the conceptual building blocks of Kay’s argument for treating the quest for legal meaning as a quest for lawmaker intent. Among these elements, we can see authority, legitimacy, normative force, and success. Do these elements each describe something we have real reasons to care about, and if so, do they describe different things or are they really just alternative ways of saying the same thing? Let’s start with *success*. We clearly have to care about that. What makes a constitution successful? As we are considering success en route to a theory of constitutional meaning, it would be question begging to treat conformity to the results of applying a particular theory of constitutional meaning as our criterion of success. But we can surely say that inducing conformity in *some* rational sense is what success at being a constitution—indeed success at being any sort of law—involves.

What causes conformity to law? Many things might in various circumstances—well-made law will often track what we would have, or could acquire, moral reasons to do or not do anyway. But what is the common denominator reason that we can confidently call conformity to law *because it is law*? In search of that, we could peel back the legal layers to reach the core of a legal system, what H. L. A. Hart called its “rule of recognition.”⁷ What makes *that* successful? Hart ultimately concluded that the rule of recognition is a convention—that its reality as a progenitor of law in a community depends on a shared understanding and expectation among strategically situated members of that community, those Hart called “officials.”⁸ Officials, including official dispute resolvers, owe their legal status to their general conformity to a shared understanding and expectation about what counts as law and who count as lawgivers. Their understanding is accurate, their expectation is reasonable, because that understanding and expectation are shared. Each actor looks from side to side at what others are likely to do and to expect. As in the formation of all

⁶ *Id.* at 704.

⁷ H. L. A. HART, *THE CONCEPT OF LAW* ch. 6 (2d ed. 1994).

⁸ *Id.* at 116–17. “Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance. . . . [C]onventional social rules . . . include, besides ordinary social customs (which may or may not be recognized as having legal force), certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.” *Id.* at 255–56.

social customs, the understanding and expectations so formed are self-vindicating and self-fulfilling.⁹

If the core of a legal system emerges through shared expectations, if its essence is social custom, then doesn't the whole legal system grow forth from shared expectations, from social custom? Our following particular persons pedigreed by that system as lawgivers, including constitutional lawgivers, would then be not a departure from custom, but an extension of custom, morally supported by whatever morally supports following custom. Customs of following leaders would just be custom-based fast tracks to many more customs. Our underlying reason for following law "because it is law" would be the thing that makes it law, namely its success at self-fulfillingly expressing what people in our community are likely to do and to expect, including how various among them are likely to respond to how we act—for example, by expressing disapproval of nonconformity or even punishing us for it. That weighty (though not preemptive) and law-specific reason for following law would be not only about eliciting approval and avoiding punishment, but more deeply about our *need* to have the shared expectations that law alone can provide. The shared expectations that law gives us are the only way we can live together in large groups, with people with whom we have no personal intimacy. Those expectations depend on a feedback loop to and from our general conformity to them. Law's ongoing reality in our lives depends on our general conformity to it, without which its constitutive expectations evaporate. Our realizing and acting on that understanding of our circumstances, our choice to live in a way that enhances our prospects of maintaining the system that lets us live together well, distinguishes our disposition from that which might appear in crude caricatures of legal realism. Legal systems are multifaceted prediction systems that we have strong moral reason to preserve, because we live inside them. Hart rightly rejected the notion that statements of obligation are just predictions,¹⁰ but a prediction system can produce moral obligation if there is good in having that system. And the general conformity that enables our shared expectations depends upon shared understanding of what the law is. Without a way to identify and share legal meaning, we would, as Jürgen Habermas observes, have to give up on "the very function of law, to stabilize expectations."¹¹

⁹ Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 99, 121 (Jules Coleman ed., 2001) ("They are, in a sense, officials in virtue of that rule, but they are not officials prior to it (in either the factual or the logical sense). Their behaviour makes the rule possible; but it is the rule that makes them officials."). See also Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 191–92 (1981) (considering Hart's descriptive account of the rule of recognition).

¹⁰ HART, *supra* note 7, at 84.

¹¹ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY*

III. CONSTITUTIONALISM

Let us return to Kay's bottom line, "that the United States Constitution, like any other piece of legislation, derives its force from regard for the circumstances of its enactment."¹² What is the distinctively *legal* nature of that *regard*? What perception of the acts of the ratifying conventions turned the Philadelphia document into the law of the land? Kay notes a range of rationales that might potentially be cited within a group to explain that group's regard for the circumstances that generated its law:

Those circumstances may be compelling because they embody what is thought to be the will of the people. Or they may be thought to incorporate special safeguards that filter out unsound decisions. Or they may be perceived as eliciting the judgments of the wisest members of society or the holiest.¹³

In such a miscellany of potential rationales we might detect a scent of rationalization. The world abounds with failed constitutions for which such nice things could similarly be said. However much people may have paid lip service to, and even believed in, approbations of these kinds, their applicability, real or apparent, cannot in itself explain what makes the difference between success and failure at becoming and staying *law*. Only one explanation supplies a universally necessary and sufficient criterion for becoming and staying law, and that is the explanation of Hart's rule of recognition. Constitutions become real, words become law, when enough people in a community expect that enough other people in that community will treat them as law, that is, will treat them as expressing what people in the group are likely to do and to expect. Words become law when they succeed self-fulfillingly in expressing what is custom *for us*. And that turns completely on how we understand and expect most others in our group to be regarding those words. *That* is the crucial *regard* achieved by the circumstances of the United States Constitution's enactment. Not that the process of adoption was really or apparently the most morally worthy one—its revolutionary departure from the amendment rules of the existing system was vociferously condemned by opponents¹⁴—but that those

OF LAW AND DEMOCRACY 201 (William Rehg trans., Mass. Inst. of Tech. 1996) (1992) ("A flat revocation of any guarantees of legal certainty leads to the conclusion that the legal system must ultimately give up the idea of satisfying the very function of law, to stabilize expectations. The realists cannot explain how the functionally necessary accomplishments of the legal system are compatible with a radical skepticism on the part of legal experts.")

¹² Kay, *supra* note 1, at 717.

¹³ *Id.* (internal citation omitted).

¹⁴ See, e.g., 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 189 (Max Farrand ed., 1911) [hereinafter RECORDS] (Luther Martin's, "Genuine Information," which he delivered to the Maryland legislature on November 29, 1787: "The same reasons which you now urge for destroying

circumstances of enactment made it what most everyone was thereafter likely to treat as *the thing*. Initially fragile expectations about the Constitution's status strengthened as, month by month, people continued to act as if it was going to be *the thing* by doing the acts that it contemplated: holding elections, convening, governing. We could call that emerging regard . . . the internal point of view.¹⁵

Kay contends that “[t]his cannot be the whole story. There is always a reason why an attempted assertion of power is effective.”¹⁶ In particular, he concludes that “[i]n the case of a constitution, it will be essential that there exists an explicit or implicit determination by some significant part of the population that the makers of the constitution are or were an appropriate source of constitutional rules.”¹⁷

In evaluating whether others are likely to follow, we have reason to ask whether what is being held out, and the way it is being held out, make it something others are likely to follow. Relevant to that enquiry are whether the content looks like a recipe for good government and whether those who came up with it received the opportunity to do so in a good way. But those things are relevant to whether purported law becomes and stays law only to the extent they help inform people's understanding of what others are likely to do and to expect. Members of a community might undertake a morally impeccable process of consultative and representative constitution writing. That community might engage in an act of indisputably democratic adoption of a text that exudes virtue in applying our best understandings of what will maximize the odds of good governance. None of that will be reason enough for us to follow, if we do not think that others are likely to do so too. In deciding whether to follow purported law, we have no reason to step out and try to make the sound of one hand clapping. Being seen as “an appropriate source of constitutional rules”¹⁸ is not sufficient to turn that source's words into law. But is it necessary?

No. We have strong reason to follow a lot of purported law that comes from bad leaders who came into leadership in bad ways if that is what most others in our community are likely to do and to expect. Bad governance is of course more likely to trigger a moment of revolutionary transition. But those moments arise infrequently and unpredictably precisely because they depend on concerted mass action without the coordinative guidance of the

our present federal government, may be urged for abolishing the system, which you now propose to adopt; and as the method prescribed by the Articles of Confederation is now totally disregarded by you, as little regard may be shown by you to the rules prescribed for the amendment of the new system”). See ARTICLES OF CONFEDERATION of 1781, art. XIII (declaring unanimous consent of the states necessary for amending the Articles).

¹⁵ Cf. HART, *supra* note 7, at 88–91.

¹⁶ Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 721 (2011).

¹⁷ *Id.*

¹⁸ *Id.*

existing legal system and usually subject to that system's coordinated moves to suppress. In the meantime, we have reason to recognize that our existing sub-optimal law and government are *real*. Most decent human beings in most mass societies throughout human history have lived their whole lives in conformity to law and government that were not "appropriate" sources of guidance if "appropriate" implies more moral support than that which comes from being customary. Most human mass societies have spent most of their history under the thumbs of successive strongmen who were mediocre or worse. They did so, as David Hume observed in his famous demolition of social contract theories, because "they were born to such an obedience."¹⁹ They went with the best path of life that they could see, drawing value from the way law lets us live together even when our leaders are bad. Their choice to conform did not depend on their being convinced of their leaders' appropriateness. Having a virtuous and credible backstory is neither necessary nor sufficient for a legal system and government. Good stories, whether credible or incredible, may help motivate conformity, but mainly by cluing us into what others are likely to do and to expect, as we hear them retelling those stories.

Hart's contrast between law and the demands of a bank-robbing gunman is sharpened by the ad hoc, arbitrary character of such a gunman's actions.²⁰ Law's distinctive contribution to our lives is to make our relations with one another less ad hoc, more predictable, and so let us live together in large groups. But there is no necessary contrast at all between the morality of individual governing actions and the morality of bank robbing. Often enough, so-called "authoritarian" leaders *are* gunmen; criminal gangs *do* run whole nations. Nonetheless, those nations have law; those gangs are government. That understanding is part and parcel of legal positivism—what's legal isn't necessarily what's moral.

What makes people leaders is the fact of following. What makes their words law is their actual success in expressing what people in their community are likely to do and to expect. Of course we would rather have good leaders than bad ones, but good or bad, people are lawgivers if their community in fact treats their words as law. Whether lawgivers came to power in good ways or bad, and whether their acts of purported lawgiving are morally justified or not, their words are law for us if and only if enough people in our community understand and expect them to be law. Our ever-present reason to care about law is not that we owe something to lawgivers, but that we need law's help to live together. We read law not to understand lawgivers. We read law to understand one another, to learn how

¹⁹ DAVID HUME, A TREATISE OF HUMAN NATURE 548 (L. A. Selby-Bigge ed., Clarendon Press 1888) (1740) (for reference in other editions of this work, this citation may be found in book III, part II, section VIII).

²⁰ HART, *supra* note 7, at 19–25, 82–85, 281.

life is likely to be in our community. And that fact tells us where to look for law's meaning.

The understanding we need when we read law is not what lawgivers intended, but what our community understands its law to be. We do not need our lawgivers even to intend to be lawgivers. They could be as reluctant to fulfill the role as the hapless protagonist in Monty Python's *Life of Brian* or as insensible to our circumstances as was the Emperor Justinian to the European communities that, centuries later, latched onto the *Corpus Juris Civilis*.²¹ What we need is a vehicle for shared understanding across our community and over time about how our life together is going to be. And for that, we need law to have a public meaning.

IV. AUTHORITY, LEGITIMACY, AND NORMATIVE FORCE

Our deployment of the words *authority* and *legitimacy* often slides, sometimes even within a sentence, between use as a *synonym* for what is truly law and government and use to describe the *source* of what is truly law and government. Synonymous uses will always be with us, but do not really add to arguments about what morally justifies trying to make or follow law. If we are saying that an act of purported governing is outside authority or illegitimate in the synonymous sense of not in conformity with existing law, then we are not really adding to calling it illegal. The moral merits of that illegal act turn on whether, all things considered, it is morally justified—whether moral reasons for that actor in that situation to conform to existing law were outweighed by moral reasons to do differently.

Behind an intentionalist intuition about legal meaning may lie a different usage of authority and legitimacy, the one for which the words first appeared, namely, a reference to the true *source* of law and government. The words *authority* and *legitimacy* come from a framework for thinking about law and lawgiving that is wholly incompatible with a conventionalist account. The old account conceived of law and government as *real* if and only if they came from persons who had moral rights to rule, moral rights to be followed. It denied the descriptions “law” and “government” to power dynamics unsupported by such moral rights. The old account saw those moral rights as preemptive—the source of the one true answer to who was lawgiver and who was not, as morally compelling of obedience and as exclusionary of reasons for doing differently as the divine command to Abraham to sacrifice Isaac.²² And, of course, if what

²¹ See generally MONTY PYTHON'S LIFE OF BRIAN (HandMade Films & Python (Monty) Pictures 1979); EMPEROR JUSTINIAN I, CORPUS JURIS CIVILIS (565 CE).

²² *Genesis* 22. See LAURENCE CLAUS, LAW'S EVOLUTION AND HUMAN UNDERSTANDING ch. 3 (2012).

made words law was the moral right of their issuer to be obeyed, then the search for their meaning could naturally be understood as a search for the issuer's intention. Alleging such moral rights to rule made sense only because of their purported pedigree, as direct delegations of property rights over humans from the creator or creators of humans. When the Enlightenment debunked divine right accounts of law and government, it left us still saddled with some of the linguistic and conceptual baggage of the discredited old idea, yet no one then or since has come up with a satisfactory substitute source of preemptive rights to rule.²³ Social contract notoriously does not fill the void, both empirically and because promise-keeping is a good of obviously only finite and relative weight, certainly not always the right thing to do. And Razian epistemic authority is neither about having rights to be followed nor a source of the reliably continuous moral guidance that the old preemptive idea was supposed to supply.²⁴ We follow law not because we owe moral duties of "allegiance" to lawgivers; we follow law because we owe moral duties to one another as people living together in community. In that moral conversation, the one we actually have now, authority and legitimacy serve no function beyond synonymy with what is truly law and government. We do sometimes encounter the word "illegitimacy" being thrown around loosely in political discourse to condemn attempts at leadership that are argued to be morally unjustified; the value in calling such attempts illegitimate, not just bad, lies in raising doubt about whether the purported leader's acts are *truly* law and government.

Joseph Raz asserts that "since the law claims to have authority it is capable of having it."²⁵ Echoing David Hume's "because every one thinks so,"²⁶ Raz observes that our legal institutional rhetoric is replete with authority claims and he rejects the possibility that those claims could be "normally insincere or based on a conceptual mistake."²⁷ Yet we have

²³ CLAUS, *supra* note 22.

²⁴ Cf. JOSEPH RAZ, THE MORALITY OF FREEDOM 80 (1986) (describing "a piece-meal approach to the question of the authority of governments").

²⁵ JOSEPH RAZ, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 210, 217 (1995).

²⁶ HUME, *supra* note 19, at 547 (for reference in other editions of A TREATISE OF HUMAN NATURE, this citation may be found in book III, part II, section VIII) ("[I]t being certain, that there is a moral obligation to submit to government, because every one thinks so; it must be as certain, that this obligation arises not from a promise, since no one, whose judgment has not been led astray by too strict adherence to a system of philosophy, has ever yet dreamt of ascribing it to that origin.").

²⁷ RAZ, *supra* note 25, at 217 ("[O]ne cannot sincerely claim that someone who is conceptually incapable of having authority has authority if one understands the nature of one's claim and of the person of whom it is made. If I say that trees have authority over people, you will know that either my grasp of the concepts of authority or of trees is deficient or that I am trying to deceive (or, of course, that I am not really stating that trees have authority but merely pretending to do so, or that I am play-acting, etc.). That is enough to show that since the law claims to have authority it is capable of having it. Since the claim is made by legal officials wherever a legal system is in force, the possibility

abundant historical evidence that they were and are. That rhetoric is a relic of a formerly pervasive but fundamentally false conception, exemplified by the *dieu et mon droit* motto that still adorns the British monarch's coat of arms. That rhetoric comes from a creationist vision of human life that we have in other respects discarded. It is no argument against evolutionary accounts of human life that we long went without them. The ubiquity of the old rhetoric is explained by the former ubiquity of the old conception, which is in turn explained by its easy assimilation within a creationist world view and by the self-interest of powerful incumbents. Our language has not caught up to our reasoning, and the defunct moral framework to which it risks misdirecting us has the potential to send us in search of something we do not always need—lawgiver intent—and to divert us from directly seeking that which is indispensable to law's success, namely, shared understanding of a public meaning.

Fallback attempts to salvage an idea of authority as source of law may frame it as a source of merely presumptive, defeasible duties to obey. Such attempts might add value if they could demarcate a zone in which lawgivers and law receivers can both know *ex ante* that lawgivers will be morally justified in issuing laws and law receivers will be morally required to follow laws. But there is no such zone. Each human action—of lawgiving and of law following—is a separate, individualized moment of all-things-considered moral judgment. From the lawgiver's perspective, doing particular acts that are likely to succeed in lawgiving may or may not be the right thing to do whether or not the lawgiver came to power in a good way. And for the rest of us, following law on particular occasions may or may not be the right thing to do whether or not the lawgiver was morally justified in doing the acts that made that law and whether or not the lawgiver came to power in a good way. What's the point of an "authority" that is not coextensive with the claimant's power, and not clear *ex ante* about its own extent, and not in itself the answer to when we should follow? Speaking of authority as the source of law also obfuscates why we should follow, and where we should look for law's meaning. Asserting a content-independent *prima facie* duty to defer to authority invokes a false correlativity to phantom lawgiver rights. The truth to which defeasible duty talk points is simply that when we live inside legal systems, we have a strong moral reason to maintain them, and that reason

that it is normally insincere or based on a conceptual mistake is ruled out. It may, of course, be sometimes insincere or based on conceptual mistakes. But at the very least in the normal case the fact that the law claims authority for itself shows that it is capable of having authority. Why cannot legal officials and institutions be conceptually confused? One answer is that while they can be occasionally they cannot be systematically confused. For given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority. It is what it is in part as a result of the claims and conceptions of legal institutions.”).

points us to following our law unless we have stronger moral reasons to do differently. So why not just say that?

Sometimes we hear it said that the *law* claims authority. That may just be shorthand for saying that lawgivers claim authority.²⁸ On any occasion that the saying involves a real retreat from lawgivers to the law itself, it is in substance to retreat from talking about authority as source of law to talking about authority as synonym for law. We might as well say that the law claims to be law. Once we acknowledge the essentially customary, conventional character of our legal systems, we can see that what makes them work is not our incanting ancient fictions, but our attending to each other. We have *law* “because every one thinks so,”²⁹ and it is an evolutionary account, not moral duties to lawgivers, that shows us how that can be. Shared expectations shape action. The way that lets us live together gives us moral reason to do as expected. What we have that moral reason to follow is the law as our community understands it. Law is real only if it succeeds in expressing to us our customs. Nothing can express to us our customs unless it has a public meaning. When we look to words for law, we are looking for their public meaning.³⁰

The word *normativity* has at its heart an ambiguity perhaps designed to bridge the gulf between moral skeptics and moral realists, an ambiguity between what is *normal* and what is *moral*. We have moral reason to care about what is normal for us in the sense of what is custom for us. That reason is one of finite and relative weight; it never morally preempts our consideration of reasons to do differently.

V. THE VALUE OF LAWGIVER INTENT

Public meaning is built into the concept of law. Without public meaning, we are without law. When a legal system calls upon its dispute resolvers to resolve real doubts about law’s meaning, the system is effectively requiring those agents to create public meaning. In doing so, dispute resolvers strive to treat the law in dispute as the product of a rational mind—coherent, not self-contradictory—where that is possible, because being such a product is necessary to fulfilling law’s function of helping us live together, not because the lawgiver was in fact rational. If the lawgiver was mentally checked out, with no actual understanding of what he was signing up to, we would still try to treat his words as the product of a rational mind. Understanding the actual workings of his mind

²⁸ *Id.* at 215–20.

²⁹ HUME, *supra* note 19, at 547 (for reference in other editions of A TREATISE OF HUMAN NATURE, this citation may be found in book III, part II, section VIII).

³⁰ See also Laurence Claus, *Law’s Evolution and Human Understanding*, 51 SAN DIEGO L. REV. 953 (2014) (responding to commentaries from conference on LAW’S EVOLUTION AND HUMAN UNDERSTANDING (2012)).

is not the primary reason we read his words—we read them not for what they tell us about him, but for what they tell us about our practices, about how our life together is going to be. Nonetheless, there may be circumstances in which dispute resolvers will have morally weighty reasons to defer to cogent evidence of lawgiver intent. One such reason may be lawgiver expertise on the issue that the law addresses. Another may be popular opinion about what the law should be, reflected in the lawmaking process.

To isolate expertise as a reason for deference, imagine a scenario where the initial lawgiver is an unelected regulation-writing official and the dispute resolver is an elected court. Let us assume that the administration in which the official operates is wholly unelected—that its members are a self-selecting elite, like some boards of trustees, and are not accountable to any elected officials other than the dispute-resolving court. In this way, we can exclude the moral significance of popular will from the analysis. When we do this, we can see that the moral significance of the initial lawgiver's intention derives only from whatever relative expertise the initial lawgiver has about what legal content would be best. The moral reason to give weight to evidence of lawgiver intention when resolving real disputes about legal meaning would only be deference to expertise. If the initial lawgiver had no greater expertise than the dispute-resolving court, then there would be no reason for the court to care about his intention at all, and the court could justifiably proceed to decide what law would be best within the zone of genuine dispute, completely heedless of evidence about the initial lawgiver's intention. And, of course, even if the initial lawgiver had morally significant expertise, that consideration would remain a reason of finite and relative weight, susceptible to being outweighed by other moral considerations.

Now let us move to a situation where the initial lawgiver was elected, or was the public at large voting in a referendum or plebiscite. Now we may see moral reasons for caring about lawgiver intention that are our reasons for valuing democracy, particularly if the lawgiver was following through on promises that recently got her elected or the public that spoke is today's public. Popular support may point to a particular meaning of law because popular support figured in and helped morally justify the act of attempting to make that law, even though popular support is neither always sufficient, nor always necessary, to justify attempts to make law, and even though what turns attempts to make law into *law* is whether We the People follow it, not whether we favor it. If we do follow, the understanding we show in our following constitutes law's meaning. If we disagree among ourselves about what law means, the fact its adoption had public support might help resolve the dispute. Dispute resolvers may conclude that cogent evidence of lawgiver intention should settle the doubt about what democratic action accomplished. The challenge in such circumstances lies

less in seeing value in lawgiver intention than in finding evidence of intention that is genuinely cogent.

In asking whether we have cogent evidence of a group intent, we cannot assume even that participants in a lawmaking act share an intent to change the *substance* of the law.³¹ It is not perverse or irrational for participants in a legislative process to intend to offset and effectively neutralize each other's initiatives, or to placate constituencies through changes in law's words that are not really intended to change what will happen on the ground. If a new post-Arab Spring national constitution in the Middle East both promises more about the applicability of Sharia law and promises more about women's rights, the net result might be a wash. Maybe some delegates, maybe even many delegates, intended to maintain the status quo; maybe not. Given the competing pressures to which legislators are subject, there may well be acts of legislation for which the actual intent of some or most or all of the legislators was to introduce a mollifying linguistic substitute that is really just another way of saying what the law always was. It would be quite wrong for an adjudicative body to infer that the change in words was necessarily intended by the legislators to produce a change in substance and that vagueness or ambiguity in the words should be resolved accordingly in favor of substantive legal change.

VI. ORIGINAL MEANING VERSUS PRECEDENT

Finding law's source in custom rather than authority clarifies not only where we should look for law's meaning, but also what counts as our current law. If a court holds that a law means something different from that law's existing public meaning, what is our law now?³² Once we see that the distinctively legal reason to care about law's meaning is the value of settled expectations, not of deference to authority, we can see that when a revolutionary reading catches on—when we are beyond the tipping point and the revolutionary reading has become the new expression of our customs—then the legal reason to care about public meaning now supports maintaining the precedent as the new existing public meaning. Arguing for a return to original public meaning in such circumstances is like arguing for a return to the Articles of Confederation because the Constitution's adoption did not conform to that existing law. An attempt to distinguish might invoke Madison's defense to claim that the Constitution's adoption was the will of the people³³ and past court decisions are not. Yet as we

³¹ *Cf. generally* RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012).

³² For a thorough survey of the existing literature on the relation of originalist theory and precedent, see Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 *CONST. COMMENT.* 451 (2018) (reviewing RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017)).

³³ "The people were in fact, the fountain of all power, and by resorting to them, all difficulties

have seen, the actual mechanism by which constitutions and court decisions become our law is exactly the same, namely, through their successful eliciting of shared expectations that they will hereafter express what is custom for us. What stories we tell ourselves to get to new customs varies, but once we have new expressions of custom, we have new law.

Revolutionary behavior may or may not be morally justified. Either way, if it is successful, we are highly likely to tell ourselves that it was justified, because it now supplies our law. Revolutionary behavior by courts is unlikely to be forthright about its revolutionary character, but it is not obvious that disingenuous claims of faithful interpretation are less morally defensible than overt disregard, which would pose greater danger of destabilizing the system. Judicial mini revolutions may release pressure for legal change that could otherwise grow to threaten the legal system much more profoundly. Of course if we think judicial precedents have changed our law to be worse, we may seek to overturn them, but they will still be our law in the meantime.

CONCLUSION: WHY WE READ

As Richard Kay observes, finding the meaning of rules cannot be disconnected from the reason we “care about those rules in the first place.”³⁴ A quest to discover meaning is a quest for understanding. A quest to understand a human communication is a quest to understand humans. But which humans? For most of our messages, the answer is, quite obviously, *the authors*. We read our love letters and work email and texts from friends to understand the people who are writing to us. Is that why we read law? It would be if lawgivers had a right to our obedience. Understanding their will for our lives would then be our reason for caring about their words. But that is not why we care about law. We care about law because it lets us live together in large communities. We care about law because it lets us live fuller and better lives than we could ever do without it. We care about law because it lets us understand each other. Law does this because it expresses the customs we share. Law does this because its sayings self-fulfill. All this, law accomplishes if, and only if, it has a public meaning that brings us together.

were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights, that first principles might be resorted to.” 2 RECORDS, *supra* note 14, at 476 (Madison’s notes recording proceedings of the Convention on August 31, 1787).

³⁴ Kay, *supra* note 1, at 714.