



3-2023

Living Recipes . . . And Constitutions

John Vlahoplus

B.A., Washington & Lee University; J.D., Harvard Law School; D.Phil., Oxford University; Member, New York State Bar.

Follow this and additional works at: https://scholarship.law.nd.edu/ndlr_online



Part of the [Law and Philosophy Commons](#), and the [Legal History Commons](#)

Recommended Citation

John Vlahoplus, *Living Recipes . . . And Constitutions*, 98 Notre Dame L. Rev. Reflection 133 ().

Available at: https://scholarship.law.nd.edu/ndlr_online/vol98/iss3/1

This Essay is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review Reflection by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

LIVING RECIPES . . . AND CONSTITUTIONS

*John Vlahoplus**

ABSTRACT

Professor Gary Lawson and Zachary Pohlman assert that we can only follow recipes and by analogy the Constitution by complying with the original public or authorial meaning of the instructions in their texts. Absent an instruction in the recipe's text authorizing changes, any departure from historical meaning amends the recipe rather than follows it.

This response uses the works of renowned chefs to sketch a competing theory. Following a recipe requires a cook to consider many of the same factors as pluralist and living constitution theories of law including text, history, purpose, current circumstances, personal experience, and individual judgment. Even extensive directions in a recipe provide only a general guide to how the recipe works. They do not dictate an exact right way to follow it. You can still follow a recipe while cooking inexact amounts of ingredients at varying temperatures for differing times. You must use your own taste, sensibilities, and experience to respond in each moment to your particular environment, equipment, and ingredients with the overarching goal of producing quality food. As one chef explains: "You are not cooking carrots in general, but specifically these carrots, in this pot, on this stove."

*The response then illustrates how a living theory of following recipes applies analogously to the Constitution. Equal protection does not involve historical understandings of equality generally. It involves this person under this law in this set of contemporary social circumstances, and we must interpret equality using our own experience and sensibilities. Historical understandings do not dictate an exact right way to follow explicit numerical provisions in the Constitution either. We may use our experience and sensibilities to determine whether offenders who have received the constitutional benefit of reduced punishment because of their low mental age have "attained to" the minimums required to serve in Congress or the Presidency. One day we might have to use our experience and sensibilities to address the question of what age astronauts like Cooper in the film *Interstellar* have "attained to" after returning to Earth from high-speed travel through high-gravity environments.*

Do cooks still follow recipes when they use their own taste, sensibilities, and experience to respond in each moment to their particular environment, equipment, and

© 2023 John Vlahoplus. Individuals and nonprofit institutions may reproduce and distribute copies of this Essay in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review Reflection*, and includes this provision in the copyright notice.

* B.A., Washington & Lee University; J.D., Harvard Law School; D.Phil., Oxford University; Member, New York State Bar.

ingredients with the overarching goal of producing quality food? Renowned chefs say yes, Lawson and Pohlman no. When it comes to cooking, I'll go with the chefs. And if the Constitution follows recipes, I'll go with living constitutionalism as well.
Bon appétit, and bonae leges.

INTRODUCTION

How might we follow recipes and, by analogy, the Constitution? Professor Gary Lawson and Zachary Pohlman offer originalist answers.¹ The only way is to comply with the original public² or authorial³ meaning of the instructions in the recipe's text. Unless the text includes an instruction authorizing changes, any departure from historical meaning amends the recipe rather than follows it.⁴

Lawson and Pohlman insist that historical meaning is a fact distinct from our evaluation of the resulting food. We cannot interpret recipes with a goal of making our food the best it can be, because “[i]nterpretation must precede evaluation, not vice versa.”⁵ Any other methodology is just not interpretation.⁶ Whether we *should* follow a recipe or instead amend or replace it is a separate and normative matter.⁷

This response uses the works of renowned chefs to sketch a

1 See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1836 (1997); Zachary B. Pohlman, *Revisiting the Fried Chicken Recipe*, 98 NOTRE DAME L. REV. REFLECTION 76, 77 (2022).

2 See Lawson, *supra* note 1, at 1826–27 (asserting the meaning is presumptively that to the general public when created, with caveats if the instructions are not “very clear and very specific”); *id.* at 1832 (discussing whether to “follow the recipe instead of one’s own best judgment”).

3 See Pohlman, *supra* note 1, at 77–78 (repeating Lawson on instructions); *id.* at 83–85 (asserting the author’s intent is determinative); *id.* at 85 (“Cooks, as readers seeking to follow that plan, should follow the plan that the chefs actually decided upon.”).

4 See Lawson, *supra* note 1, at 1830–31; Pohlman, *supra* note 1, at 79, 86. For a potential exception for implicit rules of change, which would also depend on original public meaning and rarely apply if the recipe contained an express rule of change, see Lawson, *supra* note 1, at 1831, and *infra* notes 13 and 21 and accompanying text.

5 Lawson, *supra* note 1, at 1828; see Pohlman, *supra* note 1, at 79.

6 See Lawson, *supra* note 1, at 1823–24 (distinguishing interpretation from adjudication and restricting interpretation to “a search for the meaning of the interpreted document”); Pohlman, *supra* note 1, at 85 (“[I]nterpretation ‘just is’ discovering a text’s authorially intended meaning.”).

7 See, e.g., Lawson, *supra* note 1, at 1832–33; Pohlman, *supra* note 1, at 86–87. Lawson does state that theories of constitutional interpretation can be normative. See Lawson, *supra* note 1, at 1823. But he separately denies that norms like political legitimacy can enter into the “enterprise of interpretation.” See *id.* at 1824. For a general critique of ambiguities in Lawson’s article, see Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 547–50 (2013). Berman and Toh give up on “Lawson exegesis” because they cannot understand his theory even after discussing it with him. See *id.* at 548 n.16.

competing theory of how to follow recipes and, by analogy, the Constitution. It asserts that following a recipe requires a cook to consider many of the same factors as pluralist and living constitution theories of law including text, history, purpose, current circumstances, personal experience, and individual judgment. We cannot separate following a recipe from the overarching goal of producing quality food today, whether the recipe's instructions are general or detailed. Lawson and Pohlman misunderstand recipes and the Constitution.

I. A LIVING THEORY

Edward Espe Brown eloquently describes a living theory in a preface to *The Greens Cookbook*.⁸ Brown is a renowned author and chef who helped Deborah Madison found the landmark Greens Restaurant in San Francisco,⁹ which the *New York Times* described as having established vegetarian cuisine in America.¹⁰ As Brown explains for himself and Madison:

When we give extensive directions in this book, our intention is to explain how the recipe works, not to dictate an exact, right way. You decide what you like, how to cook it, and how much time and energy you are willing to commit. Though you may refer to various clues and reference points in this book, you will sense for yourself, finally, when something is tender, when something is chewy. There is no secret outside of trusting your own sensibilities.

One thing this means is to work closely with the ingredients you have in front of you. It means to understand the equipment and the stove you have; to know, for example, whether your oven is “fast” or “slow.” You are not cooking carrots in general, but specifically *these* carrots, in *this* pot, on *this* stove. Cooking times vary according to the ingredients—their freshness, their size, how they are cut—the kind of pot, the heat from the stove, and your own taste. So although the directions give a general guide, the cook must observe what is happening in this particular instance, right now, and then respond accordingly by, for example, letting something cook longer or taking it off the stove.¹¹

8 See DEBORAH MADISON WITH EDWARD ESPE BROWN, *THE GREENS COOKBOOK* xix (1987).

9 See, e.g., *About*, PEACEFUL SEA SANGHA <https://peacefuleasangha.org/about/> [<https://perma.cc/N9NV-5DYE>]; Ann Hodgman, *Flour Power*, N.Y. TIMES MAG. (Mar. 30, 2003), <https://www.nytimes.com/2003/03/30/magazine/flour-power.html> [<https://perma.cc/F3G8-UG55>].

10 See Gregory Dicum, *Expanding the Frontiers of the Vegetarian Plate*, N.Y. TIMES (Nov. 18, 2007), <https://www.nytimes.com/2007/11/18/travel/18Choice.html> [<https://perma.cc/PV2J-SJR9>].

11 MADISON WITH BROWN, *supra* note 8, at xix.

Brown includes these principles in a preface. They represent a theory of how to follow or “read”¹² recipes, not instructions within a recipe’s text authorizing departures from its historical meaning. Brown does refer to authorial intent. But the theory does not exist because the authors of this particular cookbook recommend it. On the contrary, the authors recommend it because it is what they believe a cook should do.

Lawson concedes that a recipe might “be read to contain an implicit instruction” to “interpret” it to achieve the “overarching purpose” of producing a “good dish” of its type of food, even if that requires measures that contradict “its express terms”—but only “[i]f recipes are generally best understood, as a matter of original public meaning, to contain such a proviso.”¹³ The living theory, on the contrary, applies without any condition precedent. We may commit to it instead of the originalist competitors regardless of public meaning or the intent of the author of any particular recipe or cookbook.

II. THE THEORY IN PRACTICE

The living theory is not limited to American vegetarian cuisine.

12 See Lawson, *supra* note 1, at 1823 (“*On Reading Recipes . . . and Constitutions*”). Lawson appears to treat reading, following, and interpretation of recipes consistently. See, e.g., *id.* at 1825 (reading); *id.* at 1832 (following and interpretation). He distinguishes interpretation, which “is a search for the meaning of the interpreted document” that does not involve applying norms, from adjudication, which “is a search for the morally correct course of action.” *Id.* at 1824. Brown’s principles explain how to read, follow, or interpret recipes—by taking them as general guidelines that explain how the recipe works, “not to dictate an exact, right way.” See MADISON WITH BROWN, *supra* note 8, at xix.

13 Lawson, *supra* note 1, at 1831. This could “permit, or even require, cooks” to use different quantities of ingredients than a recipe’s express terms direct. *Id.* It is difficult to reconcile the earlier theoretical claim that interpretation must precede evaluation, *id.* at 1828, with this concession that you can “interpret” a recipe purposively as including any measures needed to produce quality food. Pohlman’s theory is susceptible to this same criticism if a recipe contains the express instruction to “use a different quantity of any of the ingredients if the result is tastier.” Cooks who follow this instruction are both interpreting (i.e., following the author’s intent) and evaluating simultaneously. Lawson and Pohlman might respond that by interpretation proper they mean the identification of the applicable directions, whether express or implied, which is a purely historical and nonnormative process. Identifying the actions required to follow those directions (e.g., how much to alter any ingredient to produce quality food) is a second and distinct step of interpretation, which can involve evaluation. Deciding whether to follow or depart from the required actions would be a third step. Alternatively, that second step might be considered the “recipeal” equivalent of legal “construction.” Cf. Berman & Toh, *supra* note 7, at 554–56 (originalist three-step legal processes generally); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1958 (2021) (defining interpretation as “the activity that discovers the linguistic meaning of the constitutional text” and construction as “the activity that determines the legal effect of the text”).

The introduction to Aristedes Pasparakis's *New Greek Cuisine* suggests frying meats and other ingredients at a lower temperature than his recipes direct while you evaluate the heat you need based on the thickness of your pan and the power of your stove.¹⁴ Nigella Lawson's website advises that you need not use the exact cup measurements in most of her recipes.¹⁵ And a general section of a popular 1787 cookbook advises readers to "always allow a longer time for the meat to roast in frosty weather."¹⁶ Cooks still follow an old recipe when they cook longer at higher altitudes even if the recipe's author and the historical public knew nothing about the science of cooking and air pressure.

Lawson asserts that "quantity terms" in recipes "are very clear and precise and do not instruct the reader (the cook) to apply individual judgment."¹⁷ That may be literally true. But the living theory explains that one still follows a recipe while cooking inexact amounts of ingredients at varying temperatures for differing times with the overarching goal of producing quality food notwithstanding the recipe's explicit numerical terms.

A. Recipes from 1787

Consider two recipes from the popular 1787 cookbook. One, for "Duck stewed," instructs the reader to "stew it gently, close covered, till tender" and "add truffles and morells, if agreeable."¹⁸ Living theories do not require you to determine what the author or public thought was tender, or whose taste they thought controls whether to add mushrooms. You can rely on your own sensibilities or those of others, like expected dinner guests, as you see fit. As Brown explains, you will know from experience "when something is tender."¹⁹

The stewed duck recipe contains an instruction giving cooks an explicit choice—"LARD it or not."²⁰ But the inclusion of an explicit choice, like one authorizing changes generally, does not implicitly foreclose departures from the historical meaning of the recipe's text.²¹

14 See ARISTEDES PASPARAKIS & BYRON AYANOGLU, *NEW GREEK CUISINE* 6 (2005).

15 See *Weights and Measures for Australia*, NIGELLA, <https://www.nigella.com/ask/weights-and-measures-for-australia/> [<https://perma.cc/5X4K-8Z49>].

16 CHARLOTTE MASON, *THE LADIES' ASSISTANT FOR REGULATING AND SUPPLYING THE TABLE* 120 (London, 6th ed. 1787).

17 Lawson, *supra* note 1, at 1827.

18 MASON, *supra* note 16, at 272.

19 MADISON WITH BROWN, *supra* note 8, at xix.

20 See MASON, *supra* note 16, at 272.

21 Contrast Lawson, who concedes the possibility of implicit rules of change but argues that an express rule of change in a recipe is almost always exclusive. See Lawson, *supra* note 1, at 1831. To read an implicit rule authorizing additional changes into the recipe,

Remember that the general section of the same cookbook separately advises readers to “always allow a longer time for the meat to roast in frosty weather.”²²

A second recipe, for “*Puff Paste*,” directs:

RUB as much butter into some flour as possible, without its feeling at all greasy; it must be rubbed in quite fine; put water to make it a nice light paste, roll it out, stick bits of butter all over it, flour it, roll it up again; do this three times. This is proper for meat pies.²³

Again, living theories allow you to rely on your own sensibilities to judge how much butter is possible, what feels greasy, and what is quite fine or nicely light.

B. *Necessary Departures*

In any event, today’s cooks necessarily depart from historical understandings of items in the text of old recipes. Our very ingredients have changed, not just our stoves, ovens, pots, and other equipment. Pork is leaner, dries out faster, and no longer threatens trichinosis.²⁴ Bran, protein, and gluten characteristics of today’s mass-produced wheat differ from the now-lost older varieties.²⁵ In many cases, “the pursuit of higher yields and industrialisation of agriculture over the past 150 years has meant these ancient varieties have been lost from our fields and all that remains of these traditional landraces is a handful of seeds . . . in gene-banks around the world.”²⁶ The protein content of flour is especially important for pastry²⁷ and thus how we might

one would have to show that the implicit rule was so taken for granted at the recipe’s origin that it “would be part of a recipe unless *expressly* excluded.” See *id.* The living theory is independent and does not require such a showing. In practice, it is highly unlikely that such a broad public understanding has ever existed regarding the living theory given that cookbook authors have had to explain it in prefaces, introductions, and websites from as early as the eighteenth century through today. Whether Pohlman’s theory allows implicit instructions is unclear, as is how a reader would identify any if the author were unavailable.

²² MASON, *supra* note 16, at 120.

²³ *Id.* at 355.

²⁴ See Sara Bir, *Safe Pork Temperature: What’s the Temperature of Cooked Pork?*, SIMPLY RECIPES (Apr. 7, 2021), <https://www.simplyrecipes.com/safe-pork-temperature-what-s-the-temperature-of-cooked-pork-5119148/> [<https://perma.cc/R6RB-6U9J>].

²⁵ See *Gluten in Wheat: What Has Changed During 120 Years of Breeding?*, SCI. DAILY (Aug. 11, 2020), <https://www.sciencedaily.com/releases/2020/08/200811120112.htm> [<https://perma.cc/6D8F-V2JM>] (protein and gluten); Steph Wetherell, *A Brief History of Wheat*, SUSTAINABLE FOOD TR. (Nov. 22, 2019), <https://sustainablefoodtrust.org/articles/a-brief-history-of-wheat/> [<https://perma.cc/6JXR-FPT7>] (bran).

²⁶ Wetherell, *supra* note 25.

²⁷ See Claire Saffitz, *What’s the Difference Between Bread Flour, All-Purpose Flour, Cake Flour, and Pastry Flour? (Phew!)*, BON APPÉTIT (Aug. 3, 2017), <https://www.bonappetit.com/story/difference-bread-all-purpose-cake-pastry-flour/> [<https://perma.cc/P2N9-MDWA>]

follow the 1787 puff pastry recipe.

Do these changes make it theoretically impossible to follow old recipes? Certainly not for followers of living theories.

C. *Limits*

Living theories allow cooks flexibility, but not unlimited flexibility. At some point their actions amend rather than follow a recipe. You cannot roll a chicken cutlet over peas and claim in good faith to be following a puff pastry recipe.

How do we determine the limits? Each living theorist must articulate and justify the limits of their theory. Does that surreptitiously give them too much flexibility? Not necessarily, and no more than originalist theories. Lawson, for example, does not provide any rules for proving claims about a recipe's historical meaning. Nor does he endorse any rules for resolving ambiguities in a recipe's text. He throws up his hands on proof—just stipulating it as X—and finds fault with every method he sketches for disambiguation.²⁸

Living theories are superior in at least one way. They transparently embrace the role of normative judgment in determining how to follow a recipe. Theories like Lawson's and Pohlman's claim to restrict normative judgment to the question whether to follow the recipe.²⁹ But their theories require rules to disambiguate, clarify, and prove the meanings of historical text as well as fallback rules to rely on when the former are inconclusive.

Yet choosing those rules requires normative judgment. No historical fact can tell us how to identify a historical fact. Consequently, normative judgments slip into originalist theories. Lawson, for example, claims that an implicit constitutional principle resolves all ambiguities involving national powers against the national government,³⁰ even though representatives of the states drafted and ratified the Constitution, and general principles resolve ambiguities against the drafter.³¹ Lawson's choice to find that principle in the Constitution is normative.

Recipes present acute issues for original public and authorial meaning theories in this context because identifying the relevant author or public is problematic. Pohlman denies that recipes speak for themselves or present themselves to readers. Instead, "certain human

(stating that pastry flour has the lowest protein content among the four).

28 See Lawson, *supra* note 1, at 1828–31.

29 See *id.* at 1832–33; Pohlman, *supra* note 1, at 87.

30 See Lawson, *supra* note 1, at 1835.

31 *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019).

beings—call them chefs—present recipes to the world of human observers. It is the chefs who are doing the speaking, not the recipes themselves.”³² Consequently, the chef’s intent controls a recipe’s communicated meaning.³³ This is critical for Pohlman’s core example, which posits multiple chefs creating a recipe together through compromises that the reader must respect as fixing its meaning.³⁴

However, chefs rarely present recipes to the world of human observers. Editors and publishers select, publish, and present them to the world over time through successive editions of cookbooks and other works, sometimes without identifying the authors.³⁵ Moreover, other editors and publishers select and publish recipes from copycat authors who include older recipes with nominal changes or even verbatim because copyright law does not protect recipes.³⁶ For example, the 1787 cookbook was the sixth edition of a work first published in 1773, purportedly from the manuscripts of an unnamed housekeeper,³⁷ which resembles a 1755 cookbook with recipes purportedly collected from persons described only as “GENTLEMEN and LADIES eminent for their good Sense and Oeconomy.”³⁸ These editors, publishers, supposed authors, and copycat authors may or may not have actually cooked any of the recipes or collaborated and come to compromises like Pohlman’s imagined chefs.

Lawson fares no better. He argues that “documents ordinarily, though not invariably, speak to an audience at the time of their creation and draw their meaning from that point.”³⁹ But instructions in a

32 Pohlman, *supra* note 1, at 81.

33 *Id.* at 84.

34 *See id.* at 80.

35 The internet gives chefs greater ability to present recipes directly to the public.

36 *See, e.g.,* Priya Krishna, *Who Owns a Recipe? A Plagiarism Claim Has Cookbook Authors Asking*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/11/29/dining/recipe-theft-cookbook-plagiarism.html> [<https://perma.cc/S8S2-BMNZ>] (“The law views a recipe merely as a factual list of ingredients and basic steps rather than as creative expression.”). For a recipe nearly identical to the *Puff Paste* recipe quoted above, see SMITH, THE FEMALE ECONOMIST 140–41 (London, 3d ed. 1810).

37 *See* THE LADY’S ASSISTANT FOR REGULATING AND SUPPLYING HER TABLE (London, 1773). The title page recites “Now First Published from the MANUSCRIPT COLLECTION of A PROFESSED HOUSEKEEPER; Who had upwards of Thirty Years Experience in Families of the First Fashion.”

38 *See* COOKERY REFORMED: OR, THE LADY’S ASSISTANT (London, Bible & Ball 1755) (title page). For variants of the puff pastry recipe, see *id.* at 93, MASON, *supra* note 16, at 355, and SMITH, *supra* note 36, at 140–41.

39 *See* Lawson, *supra* note 1, at 1826. Lawson variously refers to interpretation applying to text, instructions, recipes, and documents. *See, e.g., id.* at 1828–29 (text); *id.* at 1827 (instructions); *id.* at 1826 (recipes); *id.* at 1824 (documents). Critiquing this ambiguity’s adverse effects on Lawson’s theory is beyond the scope of this response.

recipe are not documents. Cookbooks are documents. Each edition of a cookbook is another document. Editions of copycat cookbooks are yet more documents. Editors and publishers create each of these documents at successively later dates and present them to successively different publics.

Does a recipe's meaning change over time with each new generation of readers or each new publication even if its text remains the same?⁴⁰ Which publisher's intent or general public controls the meaning of each publication? Or does a perhaps-mythical recipe founder control the meaning for all time? In that case, must readers find the first edition of their cookbook, then check all earlier cookbooks to find any from which the recipe might have been copied, and so on, until they find the first-circulated manuscript of the recipe, then research its author (not its scribe) or the public of that time? What historical facts can answer these fundamental theoretical questions?

And when can we stop all this and start cooking?

III. CONSTITUTIONAL LAW

Lawson and Pohlman describe the Constitution as a recipe for a particular form of government that we must analogously interpret like other recipes using original public or authorial meaning.⁴¹ The living theory similarly provides useful analogies for understanding the Constitution—which is unsurprising since it relies on many of the same factors as pluralist and living constitution theories of law.

A. Generally

Some analogies are readily apparent. We decide how much time and energy to commit to constitutional interpretation, as we do when creating and applying constitutional doctrines and canons.⁴² Equal protection does not involve equality generally in 1868. It involves *this*

40 Lawson admits that a recipe might be “addressed exclusively to a future audience.” See *id.* at 1826 n.14. But he does not reveal what facts determine whether future readers should interpret it using public meanings of their time or of the time it was created. Nor does he explain why exclusivity matters. If future readers can interpret recipes and constitutions addressed exclusively to them using public meanings of their time, why can they not do the same for ones addressed to both initial and future readers? Authors, editors, and publishers presumably address cookbooks to future readers for future sales. Pohlman can properly argue that the author's intent controls. See Pohlman, *supra* note 1, at 88. But Lawson cannot identify any historical facts about meaning that control.

41 See Lawson, *supra* note 1, at 1833; Pohlman, *supra* note 1, at 87–88.

42 See, e.g., Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 214 (2018) (“[D]octrinal constructions save time so that each judge does not have to reinvent the wheel . . .”).

person under *this* law in *this* set of contemporary social circumstances, and we must interpret equality using our own experience and sensibilities.

Little new can be added to existing critiques of originalism and its claim to interpretive exclusivity, including critiques of identifying the relevant author or public.⁴³ Who is the Constitution's author—those who drafted it in the federal convention (like Pohlman's chefs), those who adopted it in state conventions (like publishers), or We the People? How do you deal with the conflicting opinions of the myriad individuals in all three of those categories? Did textual changes by the Committee of Style (like subsequent editors or copycat authors) change the meanings of draft constitutional terms?⁴⁴ Can constitutional amendments alter the meanings of unamended provisions?⁴⁵ Alternatively, do the Constitution's terms take their contemporary meanings within each new state that ratifies it, like uniform laws enacted in different states at different times?⁴⁶ Historical facts cannot answer these questions.

B. *Unenumerated Doctrines and Explicit Constitutional Text*

The living theory also helps explain unenumerated constitutional doctrines and the validity of departing from historical understandings (assuming they exist) of even explicit constitutional text.

43 See, e.g., Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193–94 (2015); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). For critiques of originalism generally, and Lawson's arguments specifically, see, for example, Berman & Toh, *supra* note 7, at 547–52; Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation, and Normative Theory*, 85 GEO. L.J. 1857, 1857–63 (1997).

44 See, e.g., William Treanor, *Academic Highlight: The Framers' Intent: Gouverneur Morris, the Committee of Style and the Creation of the Federalist Constitution*, SCOTUSBLOG (Aug. 5, 2019, 10:08 AM), <https://www.scotusblog.com/2019/08/the-framers-intent-gouverneur-morris-the-committee-of-style-and-the-creation-of-the-federalist-constitution/> [https://perma.cc/5MDG-U78D] (explaining the contrasting views that the changes did not alter meaning because the Committee had no authority to change substance, and that the changes did because they fixed the adopted text which alone is the law).

45 See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2 (2011) (originalist argument that “the adoption of the Nineteenth Amendment in 1920 affected how we should read the Fourteenth Amendment's equality guarantee”).

46 Cf. *Jefferson v. Jones*, 408 A.2d 1036, 1039 (Md. 1979) (court interpreting the Uniform Commercial Code uses “the same principles of statutory construction that we would apply in determining the meaning of any other legislative enactment”). If statutory terms take their public meanings when enacted, a “uniform” law can have different meanings in different states depending on local public usage at the time of enactment.

1. Unenumerated doctrines

Recipes are not atomistic. A good cook considers experience with related ones when following others. As Brown explains, “you may refer to various clues and reference points in this book” to determine how to follow a particular recipe.⁴⁷

We might combine clues and reference points from explicit constitutional provisions and practices to identify unenumerated doctrines like reproductive privacy rights⁴⁸ and the equality of after-admitted states.⁴⁹ Similarly, we might take clues and reference points from text and current practices to conclude that the Constitution forbids imposing adult sentences on offenders who have the mental age of minors.⁵⁰

Finally, we might take a clue from text to conclude that the time of the Constitution’s adoption is generally irrelevant when determining how to follow it. The Constitution refers to the time of its adoption in one provision.⁵¹ We might conclude by negative implication that the time of adoption is irrelevant to its other provisions.

2. Explicit constitutional text

Even extensive directions do not “dictate an exact, right way” to follow a recipe.⁵² You can still follow it while cooking inexact amounts of ingredients at varying temperatures for differing times with the overarching goal of producing quality food. Consequently, the living theory supports departures from historical understandings of even explicit numerical provisions in the Constitution’s text.

One example is representation in Congress. The Constitution’s plain text entitles each state to two Senators and at least one

47 See MADISON WITH BROWN, *supra* note 8, at xix.

48 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing prior interpretations of the First, Third, Fourth, Fifth, and Ninth Amendments).

49 See, e.g., *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223, 229 (1845) (examining provisions governing the District of Columbia and the admission of new states as well as subsequent federal law and compact).

50 See *Atkins v. Virginia*, 536 U.S. 304, 310 (2002) (prohibiting the death penalty for an offender with “the mental age of a child between the ages of 9 and 12” based on constitutional text, state criminal practices, and evolving standards of decency (quoting *Atkins v. Commonwealth*, 534 S.E.2d 312, 324 (Va. 2000) (Hassell, J., concurring in part and dissenting in part))).

51 See U.S. CONST. art. II, § 1, cl. 5 (Only “a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.”).

52 MADISON WITH BROWN, *supra* note 8, at xix.

Representative.⁵³ But that did not dictate an exact right way to determine the number of members for the defeated states after the Civil War. The Reconstruction Congress did not have to consider “State,” “Congress,” “Senator,” and “Representative” generally or as understood in 1787. It considered *those* states and *their* proffered members in *that* Congress and *that* set of circumstances and recognized none.⁵⁴ As one Senator suggested at the time, “the text did not tell the whole story.”⁵⁵

Age qualifications are another example. The Constitution’s plain text provides that those who have “attained to the Age” of thirty-five may serve as President.⁵⁶ But that does not dictate an exact right way to determine eligibility either.

Science is as important for the Constitution as for recipes. We might find that someone who has just emerged from a thirty-year coma induced medically at age five is ineligible. So too offenders who have received the constitutional benefit of reduced punishment because of their lower mental age. One day we might have to address the question of what age astronauts like Cooper in the film *Interstellar*⁵⁷ have “attained to” after returning to Earth from high-speed travel through high-gravity environments: by counting the additional years shown on their wrist chronometers, or the greater number of elapsed Earth orbits of the Sun.⁵⁸ Finally, we might take these examples as clues and properly consider whether the Constitution’s age qualifications

53 See U.S. CONST. art. I, § 3, cl. 1 (senators); *id.* art. I, § 2, cl. 3 (representatives); cf. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 387 (2008) (“The plain text of the Constitution certainly seemed to support this conclusion.”).

54 See, e.g., SENATE HIST. OFF., THE SENATE’S CIVIL WAR 27–28 (2011). Congress accepted members from Tennessee shortly afterward. See Currie, *supra* note 53, at 390.

55 See Currie, *supra* note 53, at 387.

56 See U.S. CONST. art. II, § 1, cl. 5. The requirements are twenty-five and thirty for Representatives and Senators. See *id.* art. I, § 2, cl. 2 (representatives); *id.* art. I, § 3, cl. 3 (senators).

57 INTERSTELLAR (Paramount Pictures 2014).

58 *Contra* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 305 (2007) (When constitutional text like an age requirement “is relatively rule-like, concrete and specific,” we should interpret it literally and not allow underlying principles like promoting maturity to “override the textual command.”). But that rule is not concrete or specific for Cooper. May we appeal to an underlying principle of promoting maturity to apply the presidential age requirement to him? Do the combined natural-born citizenship and age requirements suggest that more than maturity is involved? See, e.g., TENCH COXE, ON THE FEDERAL GOVERNMENT, AND FIRST ON THE SAFETY OF THE PEOPLE, FROM THE RESTRAINTS IMPOSED ON THE PRESIDENT (1788), *reprinted in* 2 THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS BY HAMILTON, JAY, MADISON, AND OTHER STATESMEN OF THEIR TIME 758 (E.H. Scott ed., Chicago, Albert, Scott & Co., 1894) (“Our President must be matured by the experience of years, and being born among us, his character at thirty-five must be fully understood.”).

already refer to mental age for all candidates.

Perhaps all clear rules are only so until greater knowledge and experience reveal their latent ambiguities.

CONCLUSION

Do cooks still follow recipes when they use their own taste, sensibilities, and experience to respond in each moment to their particular environment, equipment, and ingredients with the overarching goal of producing quality food? Renowned chefs say yes, Lawson and Pohlman no. When it comes to cooking, I'll go with the chefs. And if the Constitution follows recipes, I'll go with living constitutionalism as well.

Bon appétit, and bonae leges.