

# Founding Moments in Constitutionalism

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# 4

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## I am Not Your (Founding) Father

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MIKOŁAJ BARCZENTEWICZ<sup>1</sup>

### I. Introduction

In this chapter, my focus is on an aspect of original constitutional founding moments (events that bring about a new constitutional order): the question of who made the constitution as law. Or, in other words, who was the legally authoritative agent (or author) in the making of a constitution? This question, for better or worse, plays a significant role in legal arguments about the legal content of some codified constitutions. I take no position on how significant, if at all, founding moments should be in constitutional law. I only offer a jurisprudential account of who, among the potentially many participants of a founding moment, counts as the legal authority who made the constitution (the constitution-maker).

Lawyers across the globe routinely talk about what the ‘founding fathers’ or the ‘framers’ of their constitution (or a founding treaty) meant, expected, intended and so on. The point of this chapter is that some of the founding fathers talk is confused, because it refers to people who did not make the constitution. I dispel the confusion through analysis of what it means to be an agent behind making a constitution as law: what does it mean to be a constitution-maker?

It is not only originalists who are in a habit of invoking the founding fathers. Even anti-originalists do not shy away from supporting their legal positions by reference to what the founding fathers would have wanted. For some reason, the founding fathers feel at home in any legal argument. Perhaps this reason is to be found in the sound intuition that there ought to be a connection between laws and exercises of legitimate authority that bring those laws into being. The problem with the founding fathers talk is that it tends to be at odds with this intuition. In other words, the founding fathers, or the framers, are not the ones who made the

<sup>1</sup> This chapter is partly based on an unpublished manuscript ‘Who Made the United States Constitution?’, <http://ssrn.com/abstract=2323497>. My thanks for discussion and feedback to Richard Albert, James Allan, Nicholas Aroney, Nick Barber, Katherine Brabon, Jon Crowe, Richard Ekins, Patrick Emerton, Jeffrey Goldsworthy, Richard Kay, Phil Magness, Alexander Moran, Rob Mullins, Scot Peterson and Charlotte Steinorth.

constitution in question as law. If they were not the constitution-makers, then at least an additional argument is required before one should even think of invoking them in a legal argument concerning the interpretation of a law they did not make. Such additional argument is often missing. In short, lawyers are prone to unreflectively refer to the founding fathers in their legal arguments concerning the interpretation of codified constitutions. In some cases, such references may be unjustifiable, whilst in other cases there is a glaring need for justification – a gaping hole in the legal argument.

This chapter presents a general theory of authoritative agency in constitution-making, with a particular emphasis on group action. On my general account, to be the legally relevant constitution-maker, one has to either: (1) exercise pre-existing legal authority to make the constitution in question; or (2) have one's intentional act purporting authoritatively to make the constitution as law recognised as the reason for the acceptance of the constitution as law. Some, or even many, constitutions may fail to have makers in this sense.

To clarify, I am exclusively concerned here with *original* constitution-makers. I do not investigate the sources of *current* authority of any constitution, merely the sources of authority of historical constitutional changes. Also, for the sake of simplicity, I focus on an important subset of instances of constitutional change: on cases of *constitution-making*, not merely *alteration* of an already-existing constitution (admittedly, Canada is a borderline case). With the analytical toolkit in hand, I consider the cases of Australia, Canada and the US. I identify who was the constitution-maker there and I look at some possible ways of justifying legal uses of historical materials, which constitute legally *unauthoritative* sources. I am using 'unauthoritative' here in a technical sense of being unconnected to the legal authority behind the original making of a constitution (the constitution-maker).

This is not a work on *originalism*. I am not making claims on how any materials associated with the makers of a constitution are supposed to be legally relevant. Strictly speaking, I do not even need to assume that they are of legal relevance. This may very well be a controversial, unsettled issue in a particular constitutional order – with some participants of the legal practice denying them legal relevance and some endorsing it. Also, even those who do not accept that any materials connected with the constitution-makers *constrain* or *determine* the current content of the constitutional law (anti-originalists) are likely to accept some limited, persuasive role of such materials in constitutional interpretation.

My focus is on the structure of legal arguments that are affected by the issue of the identity of constitution-makers. I reflect on one way in which such arguments may be legally invalid: when they invoke people or groups who were not the makers of the constitution in question. It may be that such arguments are legally invalid for other reasons. In particular, they may be invalid because the legal system in question does not make *any* material associated with the constitution-makers relevant for the current legal practice *in any way* (or at least not, for example, as a conclusive factor in the interpretation of a constitutional provision). Also, I do not claim that my theory is *conclusive* as to the content of the positive law in any

particular constitutional order. The content of the positive law at any given time is determined by the legal practice at that time.

## II. What Does it Mean to be a Constitution-Maker?

Constitutions tend to be drafted, debated, voted on, enacted and so forth. Hence, there may be many people (and arguably groups of people) involved, who are doing the drafting, debating, voting or enacting. Often, once a constitution is made, some of the people involved in its making begin to be referred to as ‘the founders’, ‘the founding fathers’ or ‘the framers’ of the constitution. There are various contexts in which references of this kind are made. I am exclusively interested in one such context: legal reasoning (legal arguments) as to the legal content or legal effect of a codified constitution.

### A. Some Clarifications

What counts as a valid legal argument in a given legal system at any given time is always grounded in the practice of that legal system at that time.<sup>2</sup> No philosophical, historical or sociological argument may override even the most outrageous fiction adopted as a matter of legal practice (unless, of course, the practice itself adopts a test of, for example, philosophical propriety).<sup>3</sup> True, legal theory (or jurisprudence) – just like the disciplines of history or sociology – will rarely, if ever, supply a *conclusive* legal argument. However, jurisprudence has a special relationship with particular legal practices. In some cases, jurisprudence provides a good starting point for a strictly legal inquiry into the content of the positive law.

This is so in the case of the legally relevant identity of those who made the particular constitution as law. There are good reasons to presume that this legally relevant maker is the person or the group of people jurisprudence says it is. Such presumption may be rebutted through evidence that the particular legal practice adopts a different understanding, but when such contrary evidence is lacking, a jurisprudential argument has a much better claim to guide legal reasoning than, for example, a historical one. For instance, quite plausibly it does not matter *legally* whether the best historical account of the making of the US Constitution is the one seeing it as a conspiracy of some propertied men.<sup>4</sup> It may be a fascinating and

<sup>2</sup>I adopt here a broadly Hartian jurisprudential framework; see HLA Hart, *The Concept of Law*, 3rd edn (Oxford University Press, 2012).

<sup>3</sup>Stephen E Sachs, ‘Originalism as a Theory of Legal Change’ (2015) 38 *Harvard Journal of Law and Public Policy* 817, 834.

<sup>4</sup>See, eg, Charles A Beard, ‘An Economic Interpretation of the Constitution’ in John F Manley and Kenneth M Dolbeare (eds), *The Case against the Constitution* (ME Sharpe, 1987) 49.

important account. Its (historical) truth may perhaps even be a reason to change the law. But the account itself provides no good reason to believe that the conspiracy in question was the legally relevant constitution-maker. On the other hand, the account presented here is of the kind that could plausibly be used in a legal argument about the content of positive law.

My account of identity of constitution-makers relies on the notion of legal, or at least legally recognised, authority to make a constitution as law. This is not necessarily the much-discussed *constituent power*. At least in principle, there is a distinction between the presumptive holder of the ultimate (moral, political) power to effect radical constitutional change (eg, the people) and a person or a group recognised as authority who made some particular constitution as law (eg, a monarch or some representative body). In any historical case, the former may also be the latter, but this is not a necessity. The introduction of the issue of constituent power into the discussion of legally relevant authorship of a constitution as law may obscure that distinction through the sheer immensity of the notion of sovereignty. In particular, the concept of popular sovereignty seems so enticing that some authors are unwilling to look past it and end up committing themselves to very implausible views about agency in constitution-making.<sup>5</sup> Of course, to an extent, this stems from conflating the issue of identifying the historical maker and the issue of identifying the contemporary source of authority of a constitution. As Joseph Raz has shown, it is very likely that in cases of long-lasting constitutions, the answers to the two questions will differ significantly.<sup>6</sup> Here, I am not interested in the latter problem, merely with the search for the historical maker.

Richard Fallon in his helpful discussion of constitutional legitimacy distinguished between 'legal', 'sociological' and 'moral' legitimacy.<sup>7</sup> My argument does not, strictly speaking, concern legitimacy of any constitution. However, issues of legitimacy and of legal authority to make a constitution are closely connected. Fallon's typology helps to clarify the scope of my argument. Legal legitimacy means approximately the same as lawfulness, determined within a legal system (is the action legally permitted? is it a proper exercise of a legal power?).<sup>8</sup> Sociological legitimacy means that individual members of a society accept a constitution (and constitutional institutions).<sup>9</sup> Moral legitimacy means that a constitution is morally justifiable or worthy of respect.<sup>10</sup>

<sup>5</sup> For example, by seeing the people as the maker of a given constitution as law, where the people did not act together to make the constitution as law on the best interpretation of the historical evidence combined with *any* plausible account of group agency (eg, when the members of the alleged 'people' did not see themselves as belonging to one community, where most of them were indifferent to the process of constitution-making etc).

<sup>6</sup> Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 338–52.

<sup>7</sup> Richard Fallon, 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787.

<sup>8</sup> *ibid* 1794–95.

<sup>9</sup> *ibid* 1795–96.

<sup>10</sup> *ibid* 1796.

Just like Fallon,<sup>11</sup> I adopt the framework of Hartian legal positivism. This framework entails that for a constitution to exist as law, it means that it is both legally and sociologically legitimate (at least in the social group of legal officials). In fact, legal legitimacy is necessarily grounded in sociological legitimacy among legal officials. I provide more detail of that framework in the next subsection. What is important to note now is that moral legitimacy is not a part of that picture. A constitution has to be sociologically legitimate to exist, but whether it is morally legitimate is a contingent issue. A constitution may be brought into existence, and continue to exist, even if it is morally illegitimate (and when the constitution-makers had no moral mandate to make the constitution or when they were acting immorally in doing so). Hence, my account of agency in bringing about a constitution's existence as law has two legs: one connected to legal legitimacy and one connected to sociological legitimacy. I now turn to that account.

## B. The Core Account

On my view, to be a maker of a constitution is to either:

- (1) exercise pre-existing legal authority to make the constitution; or
- (2) to have one's intentional act purporting authoritatively to make the constitution as law recognised as the reason for acceptance of the constitution as law.

I distinguish between situations where the constitution-maker is designated by the law as it is at the time of the making and where the maker is not so identified. The former may only be the case when the making of a constitution is lawful, that is, when it is either done in accordance with the rules of change – ie, through an exercise of a pre-existing legal power to change the law – or when it is merely validated by the rule of recognition as it is at the time.<sup>12</sup> The rule of recognition is a social rule, which is at the foundation of every legal system and provides the ultimate criteria of what counts as a law of that system (criteria of validity).<sup>13</sup> It could be that the rule of recognition identifies a source of law (and of a new constitution) on which the legal system in question does not already confer a legal power. In particular, the rule of recognition could so identify someone's actions not intended to make law. However, just because it is possible does not mean that it is likely. Practically speaking, we can assume that if making of a constitution is lawful, it is so because of an intentional exercise of a legal power to change the law. This provides us with an easy case of identity of the constitution-maker: it is the person or the body that has exercised its legal power.

The matters are more complicated in the second case: of those constitution-makers who are not designated by the law as it is at the time of the

<sup>11</sup>ibid 1805–06.

<sup>12</sup>On the notion of the rule of recognition, see Hart (n 2) ch 6. See also Mikolaj Barczentewicz, 'The Illuminati Problem and Rules of Recognition' (2018) 38 *OJLS* 500.

<sup>13</sup>ibid.

constitution-making. A person or a group of people may be a constitution-maker if it is for the reason of their (claimed) legal authority that the constitution is accepted as law. What comes into play here is recognition of legal authority to change the law – authority not grounded in the content of the law as it is at the time the authority is purportedly exercised.

An example from Joseph Raz provides a helpful illustration.<sup>14</sup> The Declaration of the Establishment of the State of Israel was proclaimed on 14 May 1948 by the members of the Jewish People's Council. The group of people who had issued the proclamation did not have a legal power to do so conferred on them by any previously existing legal system. And yet, they granted legislative power to themselves as the 'Provisional Council' of the new State of Israel.<sup>15</sup> Raz claims that the group that proclaimed the Declaration had a legal power to make it as law merely because it was later recognised as having such a legal power by the participants of the new Israeli legal system.<sup>16</sup> I do not want to go as far as to say that they in fact had a legal *power*, but I think that the Jewish People's Council was in this case the constitution-maker. This is so because the Declaration was accepted as law *for the reason* that it was made through a purportedly authoritative act of proclamation by the Council.

There are two sides to this coin: (1) one has to act intentionally purporting authoritatively to make a constitution as law; and (2) one's so acting has to be the reason why the constitution is accepted (one has to be a *de facto* authority). Regarding the first point, I do not claim that all exercises of legal powers are necessarily intentional or that it is impossible to comprehend an unintentional exercise of a legal power. However, exercising an authority to change the law (evenly a merely purported authority to be recognised *ex post*) requires direct intent. Without at least presuming such direct intent, one's actions are not intelligible as actions of an authority.

On the second point, for a constitution to be accepted as law means that it meets the criteria of validity from the rule of recognition.<sup>17</sup> A constitution may be a valid law because the rule of recognition identifies it directly ('*eo nomine*') or because the rule of recognition identifies the source of the constitution or the way it was made as a source of law.<sup>18</sup> A constitution-making authority figures in this picture as a reason to accept the rule of recognition (or a part of the rule of recognition) that makes it the case that the constitution is law.

HLA Hart famously banished such considerations from jurisprudence, but I think John Finnis is right that some questions about the reasons for acceptance

<sup>14</sup> Joseph Raz, 'Voluntary Obligations and Normative Powers' in Stanley L Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press, 1999) 84–85. For a more detailed background, see Yair Sagiv, ch 6 in this volume.

<sup>15</sup> 'Declaration of Establishment of State of Israel 1948', [www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx](http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx).

<sup>16</sup> Raz (n 14) 84–85.

<sup>17</sup> See above, nn 12–13 and accompanying text.

<sup>18</sup> On the idea of the rule of recognition identifying elements of the law '*eo nomine*', see HLA Hart, 'The Morality of the Law' (1965) 78 *Harvard Law Review* 1281, 1295.

of some legal rules as law are valid jurisprudential questions.<sup>19</sup> The issue of legal authority in constitution-making is a good example: it is jurisprudentially interesting that some rules of recognition are accepted for, allegedly, legal reasons. I am not saying that the rule of recognition has to change for a new constitution to become valid law. But it may be that even when the rule of recognition does not change, the reasons for its acceptance change and this is relevant for the issue of identity of the constitution-maker.

Whose acceptance counts? Strictly speaking, acceptance by legal officials is constitutive of legal systems and from a jurisprudential perspective, it does not matter what the position taken by anyone else is.<sup>20</sup> However, in relation to many historical cases of constitution-making, we do not have evidence fine-grained enough to allow us to reliably distinguish between the reasons for acceptance among the general public and those of the officials. Hence, in the applicative part of this chapter, I will not, for the most part, rely on this distinction.

In principle, it could be that on my account there is more than one constitution-maker. On one interpretation, this is what happened in Australia. The Australian Constitution was enacted by the Imperial Parliament, and this is what makes this body the constitution-maker according to my first criterion. However, it may be that the Australian people have accepted the Constitution for the reason that it was adopted in referendums in the colonies, which in turn may suggest, for example, that those who participated in the referendums also have a claim to being the original constitution-maker (on my second criterion). As I will show below, I am sceptical of this interpretation of the events, but it is consistent with my general account.<sup>21</sup>

## C. Group Agency

What kinds of entities may be constitution-makers? The simple case of a natural person acting alone as an authority does not fit any of the historical examples discussed here, but it is not unheard of (eg, constitutions enacted by monarchs) and certainly fits my model. Somewhat more controversially, I adopt the view that groups may also satisfy the criteria presented above and thus be constitution-makers. There are two kinds of groups that I will invoke later in the chapter: *institutional* and *ephemeral*. The latter term comes from Christopher Kutz's minimalist account of group agency.<sup>22</sup> Kutz defines ephemeral groups as 'groups whose identity as a group consists just in the fact that a set of persons is acting jointly

<sup>19</sup> John Finnis, 'Revolutions and Continuity of Law' in *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press, 2011) 425, 430–34.

<sup>20</sup> Hart (n 2) 117; Leslie Green, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1687, 1700–02. See also Barczentewicz (n 12) 507–27.

<sup>21</sup> See below, section IV.B.

<sup>22</sup> Christopher Kutz, 'Acting Together' (2000) 61 *Philosophy and Phenomenological Research* 1, 28.

with overlapping participatory intentions.<sup>23</sup> This means that an ephemeral group exists and acts only if all the members of the group have overlapping intentions to participate in some common project. Any ‘group’ of people that does not satisfy this requirement is a mere collection of individuals and has no capacity for group agency. Ephemeral groups may, in principle, be constitution-makers, but as I show below, in practice this is likely to be very rare. Institutional (complex) groups, on the other hand, have rules that specify what individual actions count as actions of the group and in what circumstances (eg, a constitutional convention).<sup>24</sup> If an institutional group is constituted by the law (eg, corporate bodies), then the law defines who counts as members of the group and which actions of those members constitute actions of the group.

One important feature of this account of group agency (both for ephemeral and institutional groups) is that it does not require all the members of a group to intend the achievement of the goal of the project to which they are contributing – it is enough that they ‘only know that their actions are likely to contribute to its realization’.<sup>25</sup> Hence, even if a member of a legislative body votes against the enactment of a constitution and the member is outvoted, they still contribute to the group action of making the constitution.<sup>26</sup>

For a group to have the intention required to be a constitution-maker (that this group is acting with authority to make a constitution) means that such an intention is established in a proper way for this kind of group. In the case of an ephemeral group, there needs to be an overlap of individual participatory intentions. Hence, for example, if the people of a country (taken as an ephemeral group) are to act together to make a constitution as an authority, they all need to intend to contribute to that goal or at least a vast majority of them has to have such intentions (even if some of them do not intend that a particular project of a constitution is enacted). Evidence of low popular participation in a process of constitution-making would count heavily against a hypothesis that such an ephemeral group acted. In a sense, matters are simpler with institutional groups. As long as we know what the rules of the group are, then all that needs to be seen is whether the rules are followed.

## D. Must there be a Constitution-Maker?

It may well be that some constitutions do not have makers in the sense presented here. To begin with, attributing intentions to groups is controversial and someone might object that if to be a constitution-maker is to act intentionally, then certainly no group could be a constitution-maker. It is not my purpose to defend

<sup>23</sup>ibid.

<sup>24</sup> Christian List and Philip Pettit, *Group Agency* (Oxford University Press, 2011) 76.

<sup>25</sup>Kutz (n 22) 27.

<sup>26</sup>Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 233–34.

the notion of group agency; I will only note that, irrespective of the debates in philosophy of action, acceptance of group agency works well with ordinary legal talk. Among the familiar examples of law-makers, many, if not most, are groups. My argument does not rely on the metaphysical view that groups, strictly speaking, exist. All that is needed is that for legal purposes, we can speak as if they did.

Another argument against the existence of a constitution-maker behind any specific constitution is that the constitution in question was not made law through an exercise of authority. An important example of this is the view that the US Constitution came into being as law *only* through the continuing assent of those it was supposed to govern.<sup>27</sup> In other words, the US Constitution is law because it has been treated as such and not because some authority enacted it (it has been accepted only for content-dependent reasons). In a sense, no one made the Constitution because no one may be considered responsible for it being a part of the legal system. Surely, there were people or groups causally connected with the emergence of the Constitution, but their actions could not bring about the legal validity of the Constitution.

There are two versions of this argument. One I fully endorse. According to this version, there is a special way in which a legislature is responsible for a statute becoming a law (a change in law directly due to an exercise of a normative power to change law). This kind of responsibility for something becoming a law does not take place when a constitution is made by unlawful action. In other words, there can be no normative power to directly change the rule of recognition so that it features a new constitution (unlawfully made).

The other version of the argument also denies the somewhat weaker sense of authority in the process of constitution-making with which I am concerned here. This second approach is more plausible when applied to the problem of accounting for the current legal effect of a long-standing constitution. However, it fails when applied to the period immediately following the making of a constitution. This view does not explain why a particular constitution was accepted as law instead of any alternative or why it was accepted at all. If we ask about the reasons for acceptance, then this inquiry is likely to direct it back towards some constitution-making authority.

For example, plausibly, the American people have accepted the US Constitution because they recognised the authority of those who acted claiming to have authority to make the Constitution as law. Of course, an alternative view is conceivable on which the American people are and always have been philosophical anarchists choosing to accept the Constitution for purely content-dependent reasons. Even so, why would those philosophical anarchists consider acceptance or rejection of the Constitution as law if there had been nothing significant about the pronouncement of the document as law (by someone claiming to have authority to make such a pronouncement)?

<sup>27</sup> See, eg, Larry G Simon, 'The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?' (1985) 73 *California Law Review* 1482, 1486.

As Joseph Raz suggests, the special role of the makers of a constitution may be stronger when the constitution is new: the citizens and officials are then more likely to rely on the authority of the makers as a reason to recognise the constitution as binding.<sup>28</sup> This role tends to diminish over time. It could be that, in the early days, the constitution-making power of the authors of the US Constitution provided the document with authority, but with the passage of time, the situation has changed.<sup>29</sup>

It may also be the case that views on who were ‘the founders’ of the constitutional order in question, and what their significance was, evolve over time. Simon Gilhooley in his chapter in this volume argues this took place in the US Constitution’s first decades.<sup>30</sup> I want to stress that such later views are not directly relevant to the identification of an original constitution-maker. However, they may feed into the special significance the law gives to some historical figures, as I will discuss below in section III.C.

One last clarification is in order. I do not wish to suggest that those who initially accept any constitution as law do so *only* for content-independent reasons.<sup>31</sup> Most likely, a mix of content-dependent and content-independent considerations figures in their practical reasoning. Quite plausibly, the US Constitution would not have been accepted if its content had been much less agreeable, even if the same agent had been responsible for making it as something to be accepted (for example, if the ratifying conventions were to ratify a constitution establishing a monarchy). My purpose is to look into the content-independent part of that mix, but this is not to deny the importance of the other part.

### III. Proper Legal Uses of the Sources *Unconnected* to Constitution-Makers

Historical materials directly connected to the makers of a constitution as law may appropriately be considered as, *prima facie*, *authoritative* sources for the purposes of legal reasoning, and for interpretative arguments in particular. Of course, this is so only if the law does not positively deny those materials authoritative status. Also, the law may designate some other historical materials as authoritative. The force of my argument is to provide a starting point for legal reasoning when the law is not otherwise settled. In this section, I look at legal justifications of legal uses of historical materials not created by, or otherwise not testifying to, the actions or thoughts of a constitution-maker.

<sup>28</sup> Raz (n 6) 338–52.

<sup>29</sup> See Simon (n 27) 1491–92.

<sup>30</sup> Simon Gilhooley, ch 5 in this volume.

<sup>31</sup> My thanks to Richard Kay for bringing this point to my attention.

As I do not advance any complete theory of constitutional interpretation, I do not consider systematically the problems with using sources *connected* with constitution-makers. I am also not claiming that it is always *prima facie* legally proper to rely in legal argumentation on the historical sources connected to constitution-makers. My ambition is much more limited. I only argue that if someone is to use such sources and, explicitly or implicitly, justify that by the legally authoritative role of the associated persons or groups, then it matters whether those persons or groups actually did play such a role. What follows is a discussion of ways to make such references work, even when the persons or groups invoked are not the constitution-maker.

### A. Adoption by the Constitution-Maker

Imagine a prince, Alex, who legally holds the exclusive law-making power, but does not himself bother with the hard part of legislating. He does not reflect on the law as it is, and on the reasons for its change, and does not form plans how to change the law. All this is being done by his council. The council submits draft bills to Alex and he invariably signs them into law. It is reasonable to suppose that the legislative intent of the prince is always ‘what the council intended’. In other words, his choice is to *adopt* the legislative plan prepared by someone else. Notice that the prince does not form any views on the laws he creates – the legislative plan might just as well be a secret to him.

Now, consider another prince, Roger, who differs from the first prince in that he is very inquisitive as to every plan proposed by his council. He never changes the plan, but he takes pains to understand it fully. He would be very cross if the council had a secret understanding of the plan that was not available for Roger to know (at least potentially). In other words, Alex adopts someone else’s plan, whereas Roger legislates his own plan, in which he adopts someone else’s proposal to the extent it is epistemically available to him.<sup>32</sup>

The nature of the choice made by a constitution-maker could be like the choices made by Alex or by Roger (naturally, it also may be like neither). If so, this has consequences for the sort of historical material that may be legally relevant, because of the constitution-maker’s choice. On the Alex model, even the secret history of drafting by someone who was not the constitution-maker may be made legally relevant by the choice of the constitution-maker. On the Roger model, only the evidence of the intentions or understandings, which were epistemically

<sup>32</sup>The latter option is akin to what in the American literature is sometimes referred to as the reliance-based contract argument: David McGowan, ‘Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court’ (2001) 85 *Minnesota Law Review* 755, 756; Vasan Kesavan and Michael Stokes Paulsen, ‘Interpretive Force of the Constitution’s Secret Drafting History’ (2003) 91 *Georgetown Law Journal* 1113, 1152.

available to the constitution-maker, may be legally relevant. Either way, it is the constitution-maker who makes the actions or thoughts of someone else legally relevant to the content of his plan to change the law. Evidence of such actions or thoughts is therefore also, *prima facie*, *authoritative*.<sup>33</sup>

There are good reasons to think that the particular constitution-maker did not make a choice described by any of the two models. Consider a judge who gives a judgment entirely prepared by his clerk. Uncontroversially, it does not matter if the clerk had some idiosyncratic understanding of the words he used (even if that understanding was epistemically available to the judge – he could have asked); what matters is what the judge intended to convey or at least what he managed to convey by using the words he used (though did not write). Turning back to the case at hand, a careful lawyer would need some positive evidence that the constitution-maker's choice did adopt someone else's plan, even partially. The mere fact that the constitution-maker did not introduce any textual changes (or no significant changes) to a proposal prepared by someone else is far from conclusive.

## B. Evidence of Public Meaning

Historical materials associated with the people who were not constitution-makers may also be legally relevant as evidence of *public* meaning of a constitutional text. In this sense, even secret or private documents are potentially relevant – they may even have more probative value as they are likely not to be strategic in the sense that public political speeches are.<sup>34</sup> However, this justification should not be overstated.<sup>35</sup> Drafting a provision is different from speaking in a convention or writing a private letter – the latter are often delivered hastily, without caution.<sup>36</sup> More importantly, if we are looking for the public meaning (the conventional linguistic meaning of a text), then we can only give a very low weight to any particular source (some single other text in that language) – unless, of course, that source itself reports a reliable lexicographic study, but this is unlikely to be the case. It is hard to escape the impression that those who rely on this justification still tend to have a bias favouring the 'illicit' evidence of intentions of non-constitution-makers.<sup>37</sup>

<sup>33</sup> It is beyond the scope of my argument to say with more precision in what sense that evidence is legally relevant or authoritative, as that would require a more robust account of constitutional interpretation.

<sup>34</sup> Kesavan and Paulsen (n 32) 1158, 1164.

<sup>35</sup> John F Manning, 'The Role of the Philadelphia Convention in Constitutional Adjudication' (2012) 80 *George Washington Law Review* 1753, 1770–72, 1792–93.

<sup>36</sup> *ibid* 1770.

<sup>37</sup> For criticism of such an approach in the American context, see McGowan (n 32) 835; Manning (n 35) 1772 fn 85. See also Jamal Greene, 'On the Origins of Originalism' (2009) 88 *Texas Law Review* 1, 63–64.

### C. Special Significance Given by Later Legal Practice

The first two justifications are in an important sense given by the historical event of the making of a constitution as law. However, the law may give legal significance to any sort of material and may do so even against all good reason. It could be that the law makes diaries of a particularly prominent drafter conclusive evidence as to the meaning of the constitutional text. This may be a good or a bad idea, but its goodness or badness only legally matters if the law says so. I will not say much more about this possibility. My aim here is to provide a starting point for thinking about authorities in constitution-making and the relevance of authority-derived materials for constitutional law. However, this starting point is only relevant if the law does not already provide a different answer, which may very well be. Importantly, one needs evidence that *the law* provides such a different answer, as opposed to taking it from some historical or ethical theory that fails to pay sufficient attention to the role of (legal) authority in the law.

## IV. Founders, Framers, But Not Makers: Applying the Theory

It is now time to apply the general account to the cases of Australia, Canada and the US. In this section, I identify the most plausible candidates for the makers of these constitutions. I then look at the issue of justifying the legal use of historical materials, which are not connected with the maker of the constitution in question as law.

### A. The US

The US Constitution was drafted in 1787 by a special convention (the Philadelphia Convention) of delegates of 12 American states (the thirteenth state, Rhode Island, refused to send delegates). Article VII of the Philadelphia proposal specified that a new US constitution was to be established, to become law, once ratified by state conventions in at least nine states. The ninth state to ratify, New Hampshire, did so in June 1788. The standard view among the sophisticated commentators is that the Constitution was made law by the ratifying conventions.<sup>38</sup> Those conventions,

<sup>38</sup> See, eg, Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 *Boston University Law Review* 204, 225; Henry P Monaghan, 'Our Perfect Constitution' (1981) 56 *New York University Law Review* 353, 375 fn 130; Akhil Reed Amar, 'Our Forgotten Constitution: A Bicentennial Comment' (1987) 97 *Yale Law Journal* 281, 286–87; Charles A Lofgren, 'The Original Understanding of Original Intent?' (1988) 5 *Constitutional Commentary* 77, 79; McGowan (n 32) 831; Kesavan and Paulsen (n 32) 1137–38; Pauline Maier, *Ratification* (Simon & Schuster, 2010) ix. See also Gilhooley, ch 5 in this volume.

as institutional groups, jointly satisfy the second criterion of being a constitution-maker. They do not satisfy the first condition because, in making the Constitution, they did not exercise pre-existing legal authority.<sup>39</sup>

The conventions saw themselves as having authority to approve the Constitution and thus make it law. Even though some of the delegates to the conventions received purportedly binding instructions, in the end they acted, however reluctantly, as if they were not bound by anyone's will. They considered the proposed Constitution in detail, debated over its clauses, sometimes suggesting amendments, and only after all that, they voted to accept or reject the Constitution.<sup>40</sup> Given the requirement of being a de facto authority, the strongest and the simplest argument for concluding that the Constitution had been accepted for the reason of the authority of the ratifiers is that it was not before and not after their act (ie, ratification) that the Constitution had been accepted as law.<sup>41</sup> Had acceptance happened before ratification, then that would have perhaps meant that the drafters (the members of the Philadelphia Convention) were taken as authority (a view the drafters themselves rejected). Had it happened a long time after ratification, then the view that the content-dependent reasons were decisive in acceptance of the Constitution would have more credence.

This conclusion creates a problem for interpretative arguments relying on the constitution-making authority. As Kesavan and Paulsen note in their helpful discussion of the documentary sources on the ratification:

It is not the understanding of one, two, or even three ratifying conventions that should constitute sufficient evidence of constitutional meaning, but the understanding of nine state ratifying conventions, or perhaps, all thirteen state ratifying conventions. But such evidence is, as we have seen, simply impossible to extract from the documentary record.<sup>42</sup>

The only plausible evidence of the group intent of the US constitution-maker is the public meaning of the constitutional text adopted. The most popular documentary sources on the constitution-making, *The Records of the Federal Convention* and *The Federalist*, cannot be relied on based on a Roger-type adoption argument (see section III.A above). Both documents were simply unavailable

<sup>39</sup> See, eg, Bruce Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013, 1017; Richard S Kay, 'The Illegality of the Constitution' (1987) 4 *Constitutional Commentary* 57; Bruce A Ackerman and Neal Katyal, 'Our Unconventional Founding' (1995) 62 *University of Chicago Law Review* 475, 489, 506–14. But see Akhil Reed Amar, 'The Consent of the Governed: Constitutional Amendment outside Article V' (1994) 94 *Columbia Law Review* 457, 465; Calvin H Johnson, 'Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution' (2003) 20 *Constitutional Commentary* 463.

<sup>40</sup> Eric Parnes, 'They the People: A Third-Party Beneficiary Approach to Constitutional Interpretation' (2003) 43 *Santa Clara Law Review* 495, 527–28.

<sup>41</sup> Gary Lawson and Guy Seidman, 'When Did the Constitution Become Law?' (2001) 77 *Notre Dame Law Review* 1, 1–2.

<sup>42</sup> Kesavan and Paulsen (n 32) 1162 (footnotes omitted).

for a significant number of the members of the ratifying conventions.<sup>43</sup> As to an Alex-type adoption argument, we know enough about the ratifying conventions to exclude the possibility that their choice was to adopt whatever the Philadelphia Convention (or some its subset) meant, even secretly.<sup>44</sup>

Similarly, one needs to treat with suspicion invocations of materials like the writings of James Madison as evidence for the intent of the ratifiers or for the original public meaning. As to the intent, it is clear that many individual ratifiers were not aware of Madison's views and certainly almost no one was aware of his notes or private correspondence. There is a big justificatory jump from Madison being a 'key framer' to his writings constituting reliable evidence of the group intent of the ratifying conventions.<sup>45</sup> As to the public meaning, the generic objection against relying on a single (arguably biased) data point to establish public meaning suffices (see above, section III.B).

A potentially more fruitful strategy for justifying the legal use of any founding-era materials other than the perfectly ordinary evidence of the public meaning (eg, dictionaries, newspapers, routine legal writing) is to rely not on the legal authority of the constitution-maker, but on the special significance contemporary American law happens to place on the 'founding fathers'.<sup>46</sup> What helps here is the distinction between *interpretation* and *construction* in current originalist theory, where only interpretation is grounded in the original intent or the original public meaning.<sup>47</sup> Some authors, like Balkin or Greene, argue that at the construction stage, it is legitimate to use the kind of 'intent of the founders' arguments that cannot be justified on the grounds discussed above.<sup>48</sup> Greene even considers his view as invoking a theory of 'constitutional authority', yet he does not mean the exercise of authority that was the historical reason for acceptance of the Constitution, but a more nebulous notion of 'national heritage' or 'a set of values that are offered by proponents as uniquely or especially constitutive of American identity'.<sup>49</sup> Balkin made similar claims.<sup>50</sup>

Without attempting to settle the issue, I will merely say that it could be that Greene and Balkin are correct and that the current American legal practice has a technical notion of authority that allows for uses of the founding-era materials unconnected to the constitution-maker.

<sup>43</sup> ibid 1156; Manning (n 35) 1765.

<sup>44</sup> See, eg, Manning (n 35) 1767.

<sup>45</sup> Pace William N Eskridge, Jr, 'Should the Supreme Court Read the Federalist But Not Statutory Legislative History' (1998) 66 *George Washington Law Review* 1301, 1313.

<sup>46</sup> For examples of this strategy, see McGowan (n 32); Kesavan and Paulsen (n 32); Jamal Greene, 'The Case for Original Intent' (2012) 80 *George Washington Law Review* 1683; Jack M Balkin, 'The New Originalism and the Uses of History' (2013) 82 *Fordham Law Review* 641; William Baude, 'Is Originalism Our Law?' (2015) 115 *Columbia Law Review* 2349, 2366.

<sup>47</sup> Lawrence B Solum, 'The Interpretation-Construction Distinction' (2010) 27 *Constitutional Commentary* 95.

<sup>48</sup> Greene (n 46) 1696; Balkin (n 46) 652–53.

<sup>49</sup> Greene (n 46) 1697, 1700.

<sup>50</sup> Balkin (n 46) 653.

## B. Australia

Australia is notably different from the US; it does not have the revolutionary past. Australia emerged as a new constitutional order without any unlawfulness.<sup>51</sup> The ‘Australian Constitution’ is a popular name for the Commonwealth of Australia Constitution Act 1900 (or at least for a part of the Act), a statute enacted by the Imperial Parliament at Westminster. There is broad agreement that the Australian Constitution became law through the enactment of the Imperial Parliament.<sup>52</sup> Hence, the Imperial Parliament is the historical maker of the Australian Constitution. And it is so not only on the first criterion, but arguably also on the second one – the Australian people accepted the Constitution because it had been authoritatively made by the Imperial Parliament, not because of the Australian process by which it had been drafted.<sup>53</sup>

Nevertheless, it may seem that this account fails to give justice to the constitution-making process that involved Australian conventions that drafted the Constitution, as well as constitutional referendums in Australian colonies. Peter Oliver insists that the people of Australia played a legally significant role in the constitution-making.<sup>54</sup> There are several problems with that view. First, it is clear that the Australian drafters acted within the pre-arranged framework that was to end with a request directed to the Queen for an enactment of the Australian Constitution by the Imperial Parliament.<sup>55</sup> Second, those who approved the project of the Constitution in referendums were a minority of those enrolled to vote.<sup>56</sup> This is an issue because it suggests that there was no group action (insufficient overlap of participatory intentions), unless it can be shown that the groups involved were institutional groups that may have acted even without specific participatory intentions on the part of the vast majority of their members. But even if it is possible to overcome this, it is still the case that the explicit role of the referendums was to authorise legislation to ask the Queen for imperial legislation, not to enact a constitution.<sup>57</sup> Also, unlike in the US, there is

<sup>51</sup> Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, 2005); Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing, 2015).

<sup>52</sup> John Daley, ‘The Bases for the Authority of the Australian Constitution’ (DPhil thesis, University of Oxford, 1999) ch 5; Oliver (n 50) 209, 329; BJ Spagnolo, ‘Kelsen and Raz on the Continuity of Legal Systems: Applying the Accounts in an Australian Context’ (DPhil thesis, University of Oxford, 2014) 46, 58, 294–95.

<sup>53</sup> I rely here on the account offered by Benjamin Spagnolo, who stresses the significance of the change made by the Imperial Parliament to s 74 compared to the draft Act as well as the general perception of the Imperial Parliament as the ultimate law-making authority for Australia, even after the enactment of the 1900 Act; see Spagnolo (n 52) 298–99.

<sup>54</sup> Oliver (n 51) 207–08, 268, 329–30. See also James Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323, 342–43.

<sup>55</sup> Daley (n 52) 126.

<sup>56</sup> ibid 109–13.

<sup>57</sup> ibid 126. And so Daley concludes: ‘Historically, the will of the Australian people has not been treated as conferring legal validity’ (at 127).

no strong personal ‘cult’ of any of the great men from among those who participated in the Australian constitution-making. Even those who stress the role of other agents (the people, the drafters etc) do not single out any individuals as the constitution-makers.<sup>58</sup>

As a matter of cautious constitutional theory in Australia, a version of original public meaning originalism is especially popular.<sup>59</sup> However, the issue of identity of the constitution-maker may be of relevance even for that position. Given the distance and the already-existing legal differences between Australia and England at the end of the nineteenth century, it is not surprising that the relevant public meaning of the terms used by some constitutional clauses differed between them.<sup>60</sup> Hence, identifying the Imperial Parliament as the constitution-maker could suggest that it is the English understanding that trumps. However, this is too quick a judgement to make. From the fact that the Imperial Parliament was the authority that made the Australian Constitution, it may at most follow that what is relevant to constitutional interpretation is the legislative choice made by the Imperial Parliament. It still could be that the choice had been to change the law for Australia in the way in which the colonies petitioned the imperial authority to do, that is, in accordance with the Australian understanding of the details of the legislative plan. Using the two examples introduced before, this may a case of Alex-type adoption (see above, section III.A).

Jeffrey Goldsworthy suggested that such a ‘role’ had been thrust upon the Imperial Parliament,<sup>61</sup> whereas I prefer to see this as a proper interpretation of the choice made by that Parliament (which also means that that Parliament could have made a different choice). The crucial consequence of this is that some intentions or understandings of certain other agents may be legally relevant for constitutional interpretation *due to a choice* made by the Imperial Parliament, even if the Parliament was the only constitution-maker that the Australian Constitution had.

### C. Canada

The making of the Canadian Constitution shares some similarities with the Australian case. Both the British North America Act, 1867 (now the Constitution Act, 1867) and the Constitution Act, 1982 (which formed a part of the Canada

<sup>58</sup> Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1, 25; Oliver (n 51) 268, 329–30.

<sup>59</sup> See, eg. Goldsworthy (n 58); Kirk (n 54); Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1; Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677; Lael K Weis, ‘What Comparativism Tells Us about Originalism’ (2011) 11 *International Journal of Constitutional Law* 842.

<sup>60</sup> An example of this (differing legal meaning of ‘excise’) was at issue in *Peterswald* (1904) 1 CLR 497.

<sup>61</sup> Goldsworthy (n 58) 25.

Act 1982 (UK) and amended the 1867 Act) were enacted by the Westminster Parliament. By virtue of exercising a legal power to do so, the Westminster Parliament was, in both instances, clearly the maker of the Canadian Constitution as law.<sup>62</sup> However, as the Supreme Court of Canada stated in 1998:

The proclamation of the Constitution Act, 1982 removed the last vestige of British authority over the Canadian Constitution ...

Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the Patriation Reference, had ruled was in accordance with our Constitution.<sup>63</sup>

The constitution-maker has thus removed itself from the picture, so to speak, in the very act of constitution-making. Nevertheless, it does not follow from that alone that the identity of the constitution-maker is not legally relevant. The second interesting point made by the Court is the distinction between ‘the legitimacy’ and ‘the formal legality’ of the 1982 constitutional change in Canada. I do not disagree with that point, but I want to stress the specifically legal meaning of authority (see above, section II.B). Even though the ultimate (moral, political) legitimacy of a constitution-making process comes from one body, it may very well be that the maker of the constitution as law is someone else (see above, section II.A). My claim is that the move from X’s legal authority (in constitution-making) to X’s legal relevance (in constitutional interpretation) is easier to make than the move from X’s moral or political legitimacy (in constitution-making) to X’s legal relevance.

Even though Canadian constitutional practice is considered to be hostile to originalist arguments, there is at least one respect in which it relies on considerations of historical constitution-making – ‘constitutional bargains’.<sup>64</sup> The bargains in question are the political compromises, without which the Constitution would not have had the content that it has. The following question then arises: given the Westminster Parliament’s role as the constitution-maker, what is the legal significance of anything that happened *not* in the Parliament and, especially, of the evidence of the political deals struck in Canada? Another example of reliance on the constitution-making in Canadian constitutional law is provided by judicial applications of the Charter of Rights and Freedoms, which forms a part of the Constitution Act, 1982.<sup>65</sup> Some Canadian judges rely expressly on the drafting history of the provisions. The problem is that, as we know, the drafting took place in Canada, by someone else than the constitution-maker.

<sup>62</sup> See also Richard S Kay, ‘Canada’s Constitutional Cul de Sac’ (2005) 35 *American Review of Canadian Studies* 705, 708–10.

<sup>63</sup> *Secession Reference (Reference re Secession of Quebec)* [1998] 2 SCR 217, para 467.

<sup>64</sup> Léonid Sirota and Benjamin Oliphant, ‘Originalist Reasoning in Canadian Constitutional Jurisprudence’ (2017) 50 *UBC Law Review* 505, 522.

<sup>65</sup> *ibid* 535.

One plausible way to address this concern is to show (for example, by referencing Hansard) that the Westminster Parliament in fact intended to give effect to the legislative plan prepared in Canada, including the political compromises. However, a more general argument to that effect may be available, at least regarding the 1982 Act. The adoption point made by Goldsworthy in reference to the Australian Constitution is applicable, perhaps even more forcefully, to the Canadian Constitution (see above, sections III.A and IV.B). The Queen's proclamation of the 1982 Act explicitly recognised 'the status of Canada as an independent state' and that the UK Parliament enacted the Canada Act 'at the request and with the consent of Canada'.<sup>66</sup> Hence, there are good reasons to think, even without looking at Hansard, that the constitution-maker adopted the legislative plan prepared in Canada, thus making this Canadian plan legally relevant. Nevertheless, this creates a different problem of deciding who were the authors of the original plan (the drafters).<sup>67</sup> I will not attempt to answer this question, as it requires a different framework from the one modelling authority in constitution-making (see above, section II) that I give. From my perspective, the point is that the drafters (the framers) of the 1982 Act are not the constitution-maker and hence they need another legal reason for their legal relevance.

## V. Conclusion

I proposed a general account of legal, or legally recognised, authority in constitution-making, according to which in order to be the legally relevant constitution-maker, one has to either: (1) exercise pre-existing legal authority to make the constitution in question; or (2) have one's intentional act purporting authoritatively to make the constitution as law recognised as the reason for acceptance of the constitution as law. I have also considered the ways in which historical materials unconnected to the constitution-maker of a given constitution may be properly used in a legal argument. I then applied the general account to the cases of Australia, Canada and the US showing some of the justificatory problems stemming from the problem of identity of the constitution-maker.

I did not focus on examples of incautious legal talk, where, for example, inferences are being made from the constitution-making authority of the drafters of a constitution (who clearly are not the maker). Instead, I chose to focus on potential types of justifications for legal relevance of those who participated in the making of a constitution, but were not the authority that made it as law. A general conclusion that stems from the applicative part of my chapter is that there are different bases for legal relevance of such agents in the US on the one hand and in Australia and Canada on the other. In the US, it is exclusively the subsequent legal practice

<sup>66</sup> Oliver (n 51) 182.

<sup>67</sup> Greene (n 37) 65.

that plausibly makes the non-makers relevant in legal reasoning. The practice as it emerged after the making of the US Constitution makes the non-makers legally relevant because of the important, non-legal role played by some of them.<sup>68</sup> It may even be that the US law accepts the ahistorical view, a legal fiction so to speak, that the non-makers were the makers in the sense I am using the term.

In Australia and in Canada, a different argument is available. There, it is arguable that the constitution-maker (in both cases the Parliament at Westminster) *adopted* the legislative plan prepared in Australia and in Canada, thus making that plan (and its authors) legally relevant. The question remains as to which model of adoption is applicable. Did the constitution-maker adopt even the parts of the plan that were not available to it (the ‘secret’ plan) or did it adopt the plan only to the extent that it had been presented (or at least potentially available) to the maker? Interestingly, in the American context, only the second option is considered (and, for good reasons, dismissed). However, some features of the Australian and Canadian constitution-making (in Canada this is more applicable to the 1982 Act) suggest that the Parliament’s choice had been in fact to go with the first option: whatever *your* design is for your constitution, *we* enact it as law.

<sup>68</sup> See n 46 above.