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Enduring Originalism

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INTRODUCTION

If our law requires originalism in constitutional interpretation, then that would be a good reason to be an originalist. This insight animates what many have begun to call the "positive turn" in originalism. Defenses of originalism in this vein are "positive" in that they are based on the status of the Constitution, and constitutional law, as positive law. This approach shifts focus away from abstract conceptual or normative arguments about interpretation and focuses instead on how we actually understand and apply the Constitution as law. On these grounds, originalism rests on a factual claim about the content of our law: that we regard the framers' law, and any other further lawful changes, as our law today. If we do not, originalism is not the law and perhaps should be abandoned in favor of what is.

The positive turn points in the right direction but, we argue, does not go far enough. To be sound and complete, a positive-law argument for constitutional originalism must also have firm conceptual and normative grounds. Without conceptual and normative anchors, positive-law originalism is subject to drift in a jurisprudential sea in which "whatever is, is law." An appropriately anchored

theory depends on a defensible concept of the Constitution as positive law to justify a normative conclusion about how faithful participants in our legal system ought to interpret it in developing constitutional law. This Article explains how the classical natural law tradition of legal thought, which is also the framers' tradition, supplies a solid jurisprudential foundation for constitutional originalism in our law today.

The particular type of constitutional originalism we propose understands the Constitution as enduring original law that remains fixed and authoritative until lawfully changed. Because the Constitution is law, its adoption into our legal order gave rise to new law. This original law of the Constitution consisted of all the propositions of law that became valid by virtue of the addition of the Constitution to the rest of the law then in effect. The form of constitutional originalism that we argue for, then, is a form of "original-law originalism,"[1] or what might be called enduring original-law-ism.[2]

Like the arguments supplied by positive-turn theorists Stephen Sachs and William Baude, we offer positive-law-based arguments for constitutional originalism. Unlike them, we do so by confronting, rather than by claiming, legal positivism. The result is an approach that flips on its head the conventional understanding of the contribution of natural-law reasoning to constitutionalism. In constitutional interpretation, the primary function of natural law is not to supplement positive-law reasoning. It is to underwrite the moral obligation of interpreters to treat the enacted Constitution as positive law.[3]

The starting point for the classical natural law tradition in thinking about positive law is the recognition that there are certain human goods that human positive law alone can provide. On many important questions facing our political community, practical reasoning alone underdetermines how we ought to proceed. Accordingly, there is a need for authoritative resolution to

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1. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) (defining and defending "original-law originalism").

2. When Steve Smith shifted from defending a version of original meaning originalism to what he calls "original decision originalism," Michael Rappaport commented that it reminded him of C.S. Peirce's shift from "pragmatism" to "pragmaticism." Michael Rappaport, *Between the Original Decision and Abstract Originalism: An Unbiased Approach to Original Meaning*, ONLINE LIBR. L. & LIBERTY (Dec. 8, 2014), http://www.libertylawsite.org/liberty-forum/between-the-original-decision-and-abstract-originalism-an-unbiased-approach-to-original-meaning/ [https://perma.cc/3E2E-C5QD]. Peirce made this shift to distance his approach from other pragmatist approaches by using a term that was "ugly enough to be safe from kidnappers." *See* Charles Sanders Peirce, *What Pragmatism Is*, 15 MONIST 161, 165–66 (1905) ("[T]he writer, finding his bantling 'pragmatism' so promoted, feels that it is time to kiss his child good-by [sic] and relinquish it to its higher destiny; while to serve the precise purpose of expressing the original definition, he begs to announce the birth of the word 'pragmaticism,' which is ugly enough to be safe from kidnappers."). We are not so cantankerous. In coining "original-law-ism," we aim simply to highlight a particular form of constitutional originalism that treats the Constitution as enduring original law. The term is too unwieldy to use consistently, and original-law originalism does just as well, provided it is understood in the terms set forth in this paper. We therefore only deploy it occasionally, when doing so emphasizes what might otherwise be missed if we were to use the broader term "originalism" instead.

3. *See infra* Section II.A.

proceed one way or another in bringing about certain human goods in society. Law supplies one such authoritative resolution that going forward will settle something that would otherwise have been unsettled.

Law's authoritative settlement function can provide for social coordination, facilitate cooperation, and peacefully and reasonably resolve disputes. Because of law's contribution to the common good and human flourishing, practically reasonable citizens and officials should support a reasonably just legal system and adopt a strong, presumptive moral obligation to respect the authority of positive law in a reasonably just legal system. This is so even if the structure of the system or a particular output strikes one as imperfect. Absent an obligation to honor positive law, the community and persons cannot enjoy the benefits of a reasonably just legal system.

The written Constitution of the United States, as stipulated positive law, is an authoritative settlement necessary for the common good. Its provisions, which create institutions of government and set forth norms constituting and governing those institutions, specify the framework by which our particular legal system will operate. In order for this Constitution to accomplish as positive law what it purports to do as positive law, the decisions it reflects must be durable until changed on the terms the Constitution provides or the legal system ordered by the Constitution ends. An approach to the Constitution as law that does not treat the Constitution's legal determinations as fixed and authoritative jeopardizes the benefits this particular positive law offers our community.

Thus, to grasp those legal determinations and reap the benefits of that positive law, we need to identify and apply the rules, principles, and understandings that formed and informed the Constitution's structure and provisions at their origins. This is not because our Constitution is perfectly just, nor is it because our Constitution just is. Rather, it is because the positive content of our Constitution is sufficiently just to merit our moral obligation to its authority. Practical reason underdetermines which of the many reasonable permutations of constitutional orders a polity should adopt, but once such a regime becomes positive law, we have strong reasons to understand and defer to that authoritative decision. This argument is both "positive" and "normative," in the sense that Baude and Sachs use these terms.[4] This defense of originalism, or original-law-ism, is an argument from the moral point or purposes of our written Constitution's positivity.

Constitutional originalism justified on these grounds captures what is true and valuable about the positive turn while providing the normative foundation that makes originalism worth defending. This classical understanding about the nature and purpose of a constitution is continuous with the founding generation's conceptions and with many contemporary judicial articulations of the criteria that justify particular methods of constitutional interpretation. On our

4. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2353 (2015) (describing his theory as a "positive account" of originalism); Sachs, *supra* note 1, at 823 (describing "normative" defenses of originalism).

approach, originalism stands even if many legal participants reject originalism or merely pay lip service to it. What is decisive is the point of view of the morally reasonable person toward the social fact of our stipulated positive-law Constitution—not social facts about what today's legal officials happen to believe about interpretive method. And the practically reasonable person's attitude toward our Constitution, we argue, should be originalist.

In conclusion, originalism will never die as long as the written Constitution remains understood as the kind of positive law it purports to be—an authoritative text that fixes binding rules of law for our society. This is not living originalism,[5] but enduring originalism. Our constitutional law ought to be applied in an originalist way as long as the framers' Constitution remains accepted by us as the kind of written positive law the framing generations authoritatively made in order to secure for our society the human goods that they sought to secure for theirs. If we are not applying the Constitution as positive law now as they did then, then we must face up to that fact and abandon the claim of constitutional continuity.

A brief note on the scope and aims of this Article and the nature of our project more generally. We are natural lawyers who are also originalists; more precisely, we are originalists because we are natural lawyers. We hope to introduce originalists to the promise of the natural law tradition, first by intervening in jurisprudential arguments about how to understand the Constitution as law. We argue that the natural law tradition of theorizing, with its emphasis on the moral purposes of law, provides the best framework for choosing and justifying any interpretive theory, legal or otherwise.[6] Beyond this broader methodological point, a second aim of this Article is to begin sketching a natural-law theory of originalist constitutional interpretation and identifying the possible challenges to implementing such a theory today. Overall, we argue that the classical natural law tradition itself provides the strongest theoretical scaffolding for the rule-of-law intuitions that draw many people to originalist interpretation in the first place. We also hope to emphasize to natural lawyers who are hostile to originalism that the classical tradition has much to say about the moral importance of human law's positivity and fixity, as well as the interpreter's humility when confronting such posited law.

A complete argument about how natural law theory points toward originalism would have to be more detailed than we can offer in this Article.[7] The same holds for a complete theory of constitutional adjudication. Scholarly prudence might counsel for silence on such matters until we write the separate articles they deserve, but we are forging ahead with these partial promissory notes nonetheless. The plausibility of our message to originalists and constitutional

5. *See* JACK M. BALKIN, LIVING ORIGINALISM (2011).

6. *Cf.* Richard H. Fallon Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535 (1999).

7. For such an argument in statutory interpretation, see RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012).

theorists more generally depends on seeing at least the outlines of what a more complete theory would look like. We plan to fill out the theory in future work and hope others will do so as well. For now, however, we are satisfied to lay out an agenda for a line of constitutional theory that we think can be fruitful, yet remains untilled.

The Article proceeds as follows. Part I outlines the positive turn in originalism, one of the most important and promising developments in originalist theory in recent years. After noting the approach's benefits, we offer jurisprudential objections to its foundations. Part II explains how the positive turn's appealing form of originalism is better grounded in a broader understanding of the moral point of constitutions. Far from being a musty, sectarian artifact, the classical natural law tradition of reasoning about positive law's moral purpose animated the framers' understanding of our Constitution and provides the most persuasive reason for continued adherence to that original law today. Part III addresses the difficulties that today's nonoriginalist practices present to one normatively committed to original law, while also explaining why the appeal of originalism endures in the face of those challenges.

I. THE POSITIVE TURN AND ITS DRAWBACKS

Arguments advocating originalism tend to come in normative or conceptual terms.[8] On normative grounds, many originalists claim that it is good, as a matter of political morality, for courts to be originalist. This could be because originalism reins in platonic guardians,[9] promotes popular sovereignty,[10] maximizes liberty,[11] or is good rule-consequentialism.[12] Others argue, on conceptual grounds, that a proper philosophical understanding of legal authority or interpretation entails an originalist methodology.[13] The standard debate thus suggests that one could take or leave originalism based on one's normative commitments or understanding about the nature of legal interpretation.

Normative and conceptual arguments are fraught and seemingly interminable. But what if our law told us how to understand the Constitution as law? That

8. We borrow this helpful typology (and some of the examples) from Sachs, *supra* note 1, at 822–23.

9. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY (2d ed. 1997); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

10. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 154–55 (1999); Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1444–46 (2007).

11. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–117 (2004); Ilya Somin, *How Constitutional Originalism Promotes Liberty*, ONLINE LIBR. L. & LIBERTY (June 1, 2015), http://www.libertylawsite.org/liberty-forum/how-constitutional-originalism-promotes-liberty/ [https://perma.cc/JB2Z-RPNW].

12. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013).

13. *See, e.g.*, Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013); Jeffrey Goldsworthy, *The Case for Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 42, 42–43 (Grant Huscroft & Bradley W. Miller eds., 2011).

would be a nifty thing. One of law's signal features, after all, is its promise to resolve questions that divide reasonable people.[14] So if there is law on how to understand the Constitution as law, it would be good to find and follow it. The promise of rooting originalism in the law has generated a growing body of literature in favor of a positive turn for originalism.[15] The turn is "positive" because its advocates seek to ground originalism in posited sources of law and because they embrace the legal positivism of H.L.A. Hart in understanding what counts as our law.[16]

This Part explores the positive turn's virtues and its limits. The positive turn promises a major step in the right direction but is held back by its jurisprudential baggage. The turn's emphasis on the Constitution as positive law, its focus on the arguments and internal commitments of those participating in that system, and its jurisprudential clarity are all virtues. Yet, by limiting itself to neutral description, it is unable to sort out conflicting arguments about the character of constitutional law or give any compelling reason to persist with any consensus that in fact exists. For positive law originalism to answer serious theoretical and empirical objections, it needs more robust and more conceptually normative resources than Hart's descriptive legal positivism.

A. ORIGINALISM AS THE LAW

The positive turn seeks to reorient the basic questions animating originalism. Rather than asking what the text of the Constitution originally said or meant, the positive-law originalist wants to know what the Constitution's "enactment originally *did*, as a matter of Founding-era law."[17] The answer to this latter question, it is said, will give us the best reasons to be (or not be) constitutional originalists.

Professor Stephen Sachs lays a foundation for this approach in his article *Originalism as a Theory of Legal Change*.[18] Sachs contends that originalist theorists have been putting the theoretical cart before the legal horse. It may be true that originalism restrains judges, promotes popular sovereignty, protects liberty, leads to good consequences, and advances other human goods. But, Sachs asks, even if that is so, what if the actual, historical law that our Constitution entrenched cuts against these normative goals? Originalism would

14. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 26 (2001) (Law is desirable because "a community must have a mechanism for authoritatively settling disagreements and uncertainties over what is to be done").

15. *See* William Baude, *Originalism and the Positive Turn*, ONLINE LIBR. L. & LIBERTY (Dec. 12, 2014), http://www.libertylawsite.org/liberty-forum/originalism-and-the-positive-turn/ [https://perma.cc/3X2G-JLPL].

16. *See* Baude, *supra* note 4; Sachs, *supra* note 1, at 835–36; Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253 (2014). *See generally* H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

17. Sachs, *supra* note 1, at 874.

18. Sachs, *supra* note 1.

start to resemble the law reform projects—the dreaded constitutional activism—that original originalists decried in the first place.[19] Sachs similarly challenges conceptualists who claim that a proper theory of interpretation demands originalism. Nothing precludes the Constitution as law from demanding a different approach to the document.[20]

The true originalist, on this account, treats the framers' law—the law that the Constitution established—together with lawful changes that have occurred since the Founding, as our constitutional law.[21] The framers' law includes the text of the Constitution *and* contemporaneous, accepted "'interpretative rules' . . . for converting those texts into law."[22] The shape of those interpretive keys, and the consequent, substantive constitutional law they unlock, are a matter of historical inquiry, not theoretical argument.[23] Happily for the bench and bar, it is a historical inquiry suitable for practicing lawyers: just as one today may determine the validity of title to Blackacre by applying rules of property in eighteenth century Virginia, we would seek to understand the interpretive rules of Founding Era public lawyers.[24] We may or may not like what we discover in that search, but fidelity to the law, not some judge's or philosopher's pet theory, is what the originalist enterprise is all about.

That is not to say Sachs's account is antiphilosophical. Rather, he hitches originalism to the wagon of Hart's legal positivism, which claims that identifying "the law" is a matter of identifying social facts, not moral evaluation.[25] The relevant social facts for the Hartian positivist are the beliefs of faithful participants in the legal system about which social rules count as binding law.[26] In Hartian argot, this master, second-order rule about what norms count as law is the "rule of recognition."[27] The faithful participants in the legal system need not feel a moral obligation to the rule of recognition and its results, though some

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19. *Id.* at 823–28. Neither "Old Originalists" like Robert Bork and Raoul Berger, nor "New Originalists" like Larry Solum and Keith Whittington, should be confused with The New Originals, who were an early instantiation of the fictional band Spinal Tap. *See* THIS IS SPINAL TAP (20th Century Fox 1984) ("Well, there was another group, in the east end, called the Originals and we had to rename ourselves.").

20. Sachs, *supra* note 1, at 828–35.

21. *Id.* at 874.

22. *Id.* at 875.

23. *Id.*

24. *Id.* at 887–88; *cf.* NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM 192 (1997) ("A London barrister of 1540, quick-frozen and revived in New York today, would only need a year's brush-up course at NYU School of Law to begin civil practice as a partner in a midtown or Wall Street corporate-law firm.").

25. *See* Sachs, *supra* note 1, at 825 (citing Hart's intellectual inheritors such as Leslie Green, Brian Leiter, and Scott Shapiro); Sachs, *supra* note 16, at 2261–68 (adopting a Hartian framework for his approach to constitutional theory).

26. HART, *supra* note 16, at 88–91; Sachs, *supra* note 1, at 837 ("Fully understanding the law means trying on the 'internal' perspective of a faithful participant in the system."). For a thoughtful discussion on the internal point of view in Hart's positivism, see Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167 (1999).

27. *See* HART, *supra* note 16, at 94–95.

might;[28] they need only share a social convention about which norms are valid, binding law such that compliance is a basis for public justification and departure a basis for criticism.[29] The legal theorist's job in search of the law of a particular system is identifying and describing those internal beliefs, not evaluating them.

Rephrased in Hartian terms, Sachs's originalism seeks to identify and describe the internal perspective of faithful participants in the legal system at the time of the Founding. Then we can understand, without normative argument or conceptual quibbling, what the Constitution did as a matter of law. If Hart understood his jurisprudential project as one of "descriptive sociology,"[30] then Sachs conceives of originalism as fidelity to the fruits of descriptive, doctrinal history.

Thus, an originalist seeks to understand, through the lens of Founding Era interpretive legal rules, the law the Constitution contributed to our legal system. It is possible that this originalist inquiry could discover that Founding Era law did not want interpreters to focus on original intent, public meaning, or expected application, but rather elaborate a living or common law constitution.[31] Should one do the historical spadework to unearth such a bullet, an original-law originalist would be willing to bite it.[32] The Founding Era's rule of recognition about the content of constitutional law is a social fact or practice one searches for and applies, not something for an originalist lawyer to critique.[33]

But this Hartian shift opens originalism to a deeper challenge. Much of today's constitutional doctrine and practice does not prioritize identifying and adhering to the framers' law. If so, and if social practice determines the content of positive law, then a positivist inquiry into interpretive method could refute originalism as our law today.[34] Maybe originalism once was the law, but what if our rule of recognition has changed? Cognizant of that worry, Sachs offers an argument about why it is "plausible" to conclude that practices today still point toward original-law originalism.[35] Professor William Baude's work in *Is Originalism Our Law?* offers a more exhaustive argument in defense of that

28. *See id.* at 203.

29. *See id.* at 90.

30. *Id.* at vi ("Notwithstanding its concern with analysis [*The Concept of Law*] may also be regarded as an essay in descriptive sociology . . . .").

31. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (exploring this question); *cf.* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (stating that the Fourteenth Amendment is violated if procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

32. *See* Sachs, *supra* note 1, at 880.

33. *See id.* at 858 ("Why be more 'originalist' than the Founders, or more Catholic than the Pope?").

34. *See, e.g.*, Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 193 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008).

35. Sachs, *supra* note 1, at 864–74 (describing such practices).

very proposition.[36]

Baude argues for a form of originalism that is at the heart of constitutional practice's rule of recognition. This "inclusive originalism" holds that "the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision."[37] This contrasts with an "exclusive originalism," which treats original meaning as the sole, legitimate criterion for constitutional interpretation.[38] It also contrasts with a "weak" originalism in which original meaning is a source of constitutional law, but does not sit atop the interpretive hierarchy.[39] Inclusive originalism dovetails with Sachs's original-law originalism: if the law of the Founding included, for example, respect for nonoriginalist precedent or warrant for nonoriginalist interpretation, then application of those methods would, ultimately, be originalist.

Baude argues that inclusive originalism is our law as a matter of social fact and contemporary practice.[40] As a Hartian positivist like Sachs, Baude understands that his case rises and falls on empirical facts about our rule of recognition today. He marshals two kinds of evidence to support his claim about American constitutional practice.[41] First, he points to "higher-order practices" in our legal culture that support an ultimate commitment to originalism.[42] We attribute great authority to the framers by treating the Constitution they drafted as binding law and nobody credibly claims that we have gone through an extralegal revolution since ratification.[43] Similarly, because of the Constitution's commands, we treat many questions of governing structure ("Who is the President? Who is in Congress? Who is on the Supreme Court?") as easy questions resolved by legal authority, even though as a matter of first principles they are hardly straightforward.[44]

Second, Baude sees inclusive originalism structuring "lower-order," everyday practices of courts.[45] Focusing on the Supreme Court in particular, Baude states that whenever there is a conflict between original meaning and other sources of meaning, the Court goes with original meaning.[46] When there is no such conflict, Baude continues, the Court never repudiates originalism.[47] Baude then argues that even cases in today's putatively antioriginalist canon are consistent

36. Baude, *supra* note 4.
37. *Id.*, at 2355.
38. *Id.*
39. *Id.*
40. *Id.* at 2464–65.
41. Baude, *supra* note 4, at 2365.
42. *Id.* at 2365–70.
43. *Id.* at 2365–67.
44. *Id.* at 2367–69.
45. *Id.* at 2370–86.
46. Baude, *supra* note 4, at 2372–76 (analyzing NLRB v. Noel Canning, 134 S. Ct. 2550 (2014)).
47. *Id.* at 2376–86.

with these lower level, ultimate originalist practices.[48]

But what if Baude is wrong on the facts? This is no place to quibble with his descriptive doctrinal sociology,[49] but even if the Supreme Court's contemporary legal outputs were far less consistent with inclusive originalism than Baude believes, that need not doom the positive turn. To understand this, we need a return to Hart's internal point of view as applied to constitutional law. Hart's legal positivism emphasizes that the internal commitments of relevant legal actors are the critical social facts in determining the criteria for legal validity in a system.[50] Because it is also possible for people to *act* contrary to their higher order beliefs, the particular outputs of a legal system may not always cohere with higher order structures of justification.[51]

Sachs leverages this insight to argue that, even if many contemporary decisions of the Supreme Court are inconsistent with originalism, originalism can still be our law if the shared, higher order justifications the Court invokes are in fact originalist.[52] This is because for positivists like Hart, "it matters what we tell ourselves, not just what we do on the ground."[53] The ultimate law is this set of shared legal principles, not the potentially erroneous applications of those principles in practice. Even if a stream of doctrinal results seems to place originalism "in exile," that departure is more apparent than real, so long as our overarching structures of justifying interpretive method do not repudiate original-law originalism. In that case, like Duke Vincentio in Shakespeare's *Measure for Measure*, the master has not left the city so much as hidden in plain sight.

All told, whether one calls it "original law originalism," like Sachs,[54] or "inclusive originalism," like Baude,[55] the positive turn grounds originalism in a commitment to the positive law established by the Founding and any lawful changes pursuant to that law. This originalism includes interpretive rules about how to translate constitutional text into law. Only when we grasp this original law as an empirical matter will we know what the particular forms and further goals of constitutional interpretation should be. The positive turn further argues it is plausible to understand originalism as our law today, at least at the level of second-order commitments if not the actual outputs of constitutional doctrine. As its advocates concede, positivist originalism is contingent on the social facts

48. *Id.* (analyzing Lawrence v. Texas, 539 U.S. 558 (2003), Miranda v. Arizona, 384 U.S. 436 (1996), Roe v. Wade, 410 U.S. 113 (1973), Gideon v. Wainwright, 372 U.S. 335 (1963), Brown v. Bd. of Educ., 347 U.S. 483 (1954), and Home Bldg. & Loan v. Blaisdell, 290 U.S. 398 (1934)).

49. *Cf.* HART, *supra* note 16, at vi (describing jurisprudence as "descriptive sociology").

50. *See id.* at 89 (contrasting the "internal" and "external" aspects of rules).

51. *See* Sachs, *supra* note 1, at 837–38 ("Sometimes our accepted arguments and our accepted conclusions might point in different directions.").

52. *See* Sachs, *supra* note 16, at 2261 ("Because our day-to-day practices and deeper principles can diverge, there's room for originalists and other out-of-power theorists to use the latter to critique the former.").

53. *Id.* at 2265.

54. Sachs, *supra* note 1, at 874–75.

55. Baude, *supra* note 4, at 2354–63.

concerning our law and our legal commitments. If originalism is not the law, the legal theorist has nothing to say, or at least nothing distinctively legal to say, about those facts.

This positive turn has many positives. It is good for constitutional lawyers, who are lawyers after all, to focus on the positive content of the Constitution, both with respect to its explicit text and its unwritten legal backdrops.[56] Only then can we understand what kind of positive law our constitutional order has. Some of the unease about originalism's flights of theoretical abstraction in recent years may flow from the sense that an enterprise once dedicated to finding the law has been colonized by political and linguistic philosophers.[57] The positive turn brings originalism back within the mere lawyer's bailiwick.

But our praise for the positive turn is not inspired by a yearning for simple, pretheoretical days of constitutional interpretation. Quite the contrary, constitutional law and scholarship has no shortage of theory, but it too often lacks rigor with respect to first principles. And here the positive turn is refreshing. Whether or not Sachs and Baude have a winning hand, they lay their jurisprudential cards on the table for examination: they are originalists because they are positivists and believe that, in our system, positivism points towards originalism. Others, of course, think positivism points away from originalism.[58] Others reject positivism.[59] Irrespective of this disagreement, the positive turn offers both a theory of constitutional law and a jurisprudential justification. Such clarity reduces the chance that disputants will talk past each other and it encourages interlocutors to focus on jurisprudential commitments that too often go unexamined and undefended. This theoretical development also focuses resolutely and, we think, properly on the positive law the Constitution brought into being.

B. THE LIMITS OF THE POSITIVE TURN

The positive turn heads in the right direction, but it is open to serious objections. First, one could argue that its defenders are wrong in describing our constitutional law as originalist. Second, one could concede that the positive turn tracks the Supreme Court's opinions on their face, but that the Court's expressions are insincere or mask a more complex set of nonoriginalist practices and beliefs. Third, perhaps the positive turn defines originalism too broadly: if all that counts is not being formally inconsistent with or openly repudiating original law, originalism may lose its critical bite. If *Home Building & Loan v. Blaisdell*; *Gideon v. Wainwright*; *Miranda v. Arizona*; *Lawrence v. Texas*; *Roe v. Wade*—and more recently, *Obergefell v. Hodges* and *Arizona State Legislature*—

56. *See generally* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

57. For such a worry, see Steven D. Smith, *That Old-Time Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION, *supra* note 13, at 223.

58. *See, e.g.*, Adler, *supra* note 34; Fallon, *supra* note 34.

59. *See, e.g.*, Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087 (2001).

are as originalist as *District of Columbia v. Heller*; *Crawford v. Washington*; and *Blakely v. Washington*,[60] then it is unclear whether originalism so-theorized alone does anything worth arguing over. The positive turn's conception of originalism may recall the religious apologist who modifies her conception of the divine to keep pace with discoveries of modern science.[61]

But these are not our concerns, or at least not directly. We leave these important arguments to others while focusing our criticism on the positive turn's methodology, not the results of its application. The positive turn's embrace of Hart's legal positivism opens it to serious theoretical objections that should be interesting to those who embrace or reject originalism.

To set up our objections, it helps first to recap Hart's approach to jurisprudence and its use in the positive turn in originalist theory. Hart placed at the center of his concept of law the "rule of recognition"—the master social rule or practice that determines which social rules count as valid law in a community.[62] In a functioning legal system, a critical mass of people must regard the rule of recognition as a source of internal obligation, not just something they are obliged to comply with because of threat of sanctions. In other words, Hart cares about the "internal point of view" participants in the practice have toward the rule of recognition.[63] A theorist can identify and explain these crucial legal concepts without evaluating them, hence Hart's positivist separation of law from morality.[64]

Hart asked, "What is law?" as opposed to what morality, custom, or other social norms say law *should be*. Advocates of the positive turn in originalism use Hart's method to answer the narrower question, "What is our law of constitutional interpretation?" as opposed to what ideal political theory or beliefs about the nature of interpretation say that law ought to be. Sachs and Baude thus argue that the best reason to be an originalist is if originalism is part of our system's rule of recognition.[65] Adopting Hart's positivism, they argue that originalism can be established as the law through neutral, descriptive argument about our legal practices. Just as one can identify contributory negligence as the law of Virginia without evaluating whether it is superior to comparative fault,[66] one should review our Constitution and law reports to see

60. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015); Blakely v. Washington, 542 U.S. 296 (2004); Baude, *supra* note 4, at 2376–86 (discussing Obergefell v. Hodges, 135 S. Ct. 2584 (2015), District of Columbia v. Heller, 554 U.S. 570 (2008), Crawford v. Washington, 541 U.S. 36 (2004), Lawrence v. Texas, 539 U.S. 558 (2003), Miranda v. Arizona, 384 U.S. 436 (1996), Roe v. Wade, 410 U.S. 113 (1973), Gideon v. Wainwright, 372 U.S. 335 (1963), and Home Building & Loan v. Blaisdell, 290 U.S. 398 (1934)).

61. *Cf.* C.A. COULSON, SCIENCE AND CHRISTIAN BELIEF 20 (1955) ("There is no 'God of the gaps' to take over at those strategic places where science fails; and the reason is that gaps of this sort have the unpreventable habit of shrinking.").

62. *See* HART, *supra* note 16, at 94–95.

63. *Id.* at 98–99.

64. *See id.* at 203.

65. *See supra* Section I.A.

66. *See, e.g.*, Fultz v. Delhaize Am., Inc., 677 S.E.2d 272, 275 (Va. 2009).

whether, as a matter of fact, originalism is part of the law. If it is, then originalism is the law and we should be originalists.

Our primary problem with the positive turn is its attempt, like Hart's, to separate description from evaluation in legal theory. This move is based on a flawed approach to theorizing human practices like law. At worst, it results in a partial and misleading view of a practice. At best, it can offer a normatively inert summary of how people happen to do things, but it offers no reason for why people do these things or should continue to do so, which is an unfortunate thing for an approach that seeks to justify the practice it studies.

1. Describing the Law of Interpretation Normatively

We object to the usefulness, if not impossibility, of jurisprudence that is solely descriptive. Our claim is not that it is impossible to describe aspects of something like interpretive practice in a neutral fashion. Rather it is that reportage alone cannot lead to understanding complex social phenomena, especially one that claims authority like law.[67]

There are many varieties of this objection,[68] but we will focus on one put forward by Professor John Finnis, whose philosophy of the social sciences strikes us as the most sound.[69] Even if neutral description of empirical facts alone were sufficient for seeking understanding in the natural sciences, and there is reason to believe it is not,[70] it is particularly wanting for theorizing about human practices like law. Unlike water, fruit flies, or comets, law is a human creation. This has important implications for investigation. First, it is unlikely to have the undifferentiated regularity of natural objects of study like carbon. Second, an essential part of understanding such a practice is the purpose for doing it in the first place. True, one cannot understand things like law without having seen examples of it. But a more complete understanding that

67. *Cf.* 4 JOHN FINNIS, *Describing Law Normatively*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 23 (2011).

68. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 1–44 (1986); Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 97 (Andrei Marmor ed., 1995). For more general doubts about the utility of conceptual analysis of law by Hart or anyone else, see Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 31 OXFORD J. L. STUD. 663 (2011).

69. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 3–22 (2d ed. 2011) (relying on Aristotle's and Max Weber's approaches to studies of human affairs). We reject the reductive naturalism of theorists like Leiter, *supra* note 68, and worry that deeply interpretive approaches like Dworkin's, *see, e.g.*, Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982), overstate the undoubtedly important place of judicial discourse and theory. *Cf.* Ian Shapiro & Alexander Wendt, *The Difference that Realism Makes: Social Science and the Politics of Consent*, *in* IAN SHAPIRO, THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES 19, 38–39 (2005) (stating that philosophical realists "agree with interpretivists that there is no theory-neutral observation," but "[u]nlike interpretivists, realists contend that well-established theories do refer to, and are constrained by, external reality" beyond participants' practices and discourses).

70. *See, e.g.*, ROY BHASKAR, A REALIST THEORY OF SCIENCE (Routledge 2008) (1975); MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY (corrected ed. 1962); Shapiro & Wendt, *supra* note 69, at 38–41.

draws on and extrapolates from the variety of its instantiations must be anchored in the practical point of the activity.[71]

To be more concrete, if you want to understand a social phenomenon—say "the law of constitutional interpretation"—one might tally a list of things that people label "constitutional interpretation." In any complex situation, however, one finds a motley assembly or at least gradations of difference. Justices Scalia and Breyer—not to mention members of the Executive Branch, Congress, or internet comment sections—are hardly univocal in their approaches to constitutional interpretation. Although Hartian constitutional theory properly seeks to understand a practice in light of the views of the practitioners, it does not and cannot tell us whose internal point of view is most important. Is it the corrupt or biased judge, the unreflective jurist, the advocate of active liberty, the faint-hearted originalist, the pragmatist overcoming law, the original-law originalist, or the restorer of the lost constitution? In any situation of variety, there remains the question of whose internal point of view is primary.

Accordingly, if an account of any complex social practice is to be more than a seriatim listing of usages—a glorified casebook without analytical notes—a theorist has to choose more discriminating selection criteria.[72] And, because things like law and interpretive practices are human creations, a sensible way to sort the data is to do so in light of the point of creating such things in the first place.[73] To take an extreme example, consider a judge who thinks the Constitution and Federalist papers are written in a secret code that she has unlocked.[74] A judge resolving cases in that method is *in a sense* engaging in the project of constitutional interpretation. So also, to use far less extreme examples, were the majorities in cases that make up the so-called anticanon of disfavored cases.[75] Now compare these flawed instances of interpretation with your favorite exemplars of constitutional reasoning. ("Now that's what I call constitutional interpretation!") What separates them will, in large part, turn on your understanding about the point and nature of the Constitution and the implications those

71. *See* FINNIS, *supra* note 69, at 3; Eric Voegelin, *The Theory of Legal Science: A Review*, 4 LA. L. REV. 554, 563 (1942); Grégoire Webber, *Asking Why in the Study of Human Affairs*, 60 AM. J. JURIS. 51 (2015).

72. FINNIS, *supra* note 69, at 4 (without such criteria, the legal theorist is left with "a juxtaposition of all lexicographies conjoined with all local histories").

73. *Id.* at 3; Webber, *supra* note 71, at 54 ("The study of . . . human conduct . . . is the study of the action's point, purpose, goal, value, objective . . . ."); *cf.* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998) ("We can determine the method to interpret the Constitution only if we are first clear about why the Constitution is authoritative.").

74. *Cf.* Doron Witztum, Eliyahu Rips & Yoav Rosenberg, *Equidistant Letter Sequences in the Book of Genesis*, 9 STAT. SCI. 429 (1994).

75. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (discussing Korematsu v. United States, 323 U.S. 214 (1944), Lochner v. New York, 198 U.S. 45 (1905), Plessy v. Ferguson, 163 U.S. 537 (1896), and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)). The anticanon varies by the theorist, of course, with originalists likely including cases like Roe v. Wade, 410 U.S. 3 (1973), Mapp v. Ohio, 367 U.S. 643 (1961), or Home Bldg. & Loan v. Blaisdell, 290 U.S. 398 (1934).

judgments have on the task of applying it as law.[76] And not, say, on the length of opinion or whether the decision appears in a prime-numbered volume of the United States Reports.[77]

The positive turn's ostensibly empirical defense of the claim that originalism is our law underlines the limits of description. Take the claim that *Lawrence v. Texas*[78] is consistent with originalism. There are multiple plausible ways to understand that case's interpretive approach. To nonoriginalist Laurence Tribe, it recognizes a fundamental right, even if it "dare not speak its name."[79] To common-law constitutionalist David Strauss, it represents the Court's incremental use of substantive due process to invalidate unpopular legal outliers.[80] To an originalist like Baude, it is consistent with inclusive originalism.[81] There are features of the opinion that render each interpretation of the decision plausible—the question remains which feature is critical for categorizing the opinion and why.

Description alone cannot provide the answer. Here, the question of how the Supreme Court interprets the Constitution is intertwined with questions about what a constitution is, what it is for, and what the proper role for legal interpretation is in light of the kind of law that the Constitution is. This is why everyone excludes astrology, numerology, or the litigant's eye color as salient explanations or data for understanding an opinion. This evaluative component does not disappear when we shift from the implausible to the plausible characterizations. Rather, explanations are plausible *because* they are connected to colorable theories about the point of treating the Constitution as law. Theories cannot alter the facts in the world, and facts in the world can challenge our theories.[82] But "without a preliminary conceptualization and thus a preliminary set of principles of selection and relevance drawn from some practical viewpoint," the life of the law is just one datum thing after another.[83]

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76. This also holds if you have chosen your favorite examples based on the substantive outcome. You simply believe that the primary purpose of a constitution is to do substantive justice on particular issues. We think that is an incomplete vision of constitutionalism, *see infra* Part II, but it is a cogent view.

77. Hart's theorization about the concept of law as a whole is congenial with such orientation, though he stops short of embracing evaluation. As Finnis notes, Hart's description of law "is built up by appealing, again and again, to the practical point of the components of the concept." FINNIS, *supra* note 69, at 7.

78. 539 U.S. 558 (2003).

79. Laurence H. Tribe, Lawrence v. Texas, *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

80. *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 885–87 (2009).

81. *See* Baude, *supra* note 4, at 2382 (arguing that *Obergefell v. Hodges* "seemed to pick the originalist route" to justifying a constitutional right to same-sex marriage).

82. *See* FINNIS, *supra* note 69, at 17.

83. *Id.* This is not to argue that the purpose of interpretation is the *only* relevant consideration for a theory. Other criteria for theory construction like simplicity, explanatory breadth, and congruence with other beliefs must play a part. *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L.

2. The Positive Turn and the Problem of Inertness

The positive turn cannot identify originalism as our law if there is substantial disagreement about the rule of recognition. Yet one might object that nose counting can get us further than we have let on. What if, in fact, most or all of the data supports originalism, or at least trumps competing plausible theories on nonevaluative grounds like simplicity, breadth of explanation, and consistency with other beliefs?[84] This would suggest that any exceptions are, in the words of Hart, instances of "incorrect scoring,"[85] rather than official changes to the rules of the game, and that the positive turn accurately describes our law as originalist.[86] The need for evaluative criteria for understanding our law would disappear when there is no theoretical disagreement about what the law is.

In the study of human affairs, statistical regularity alone can be misleading or incomplete.[87] By numbers alone, one would infer that making outs was the point of baseball, that introducing unpassed bills was the point of legislating, or that rejection was the point of writing law review articles. We can say the same for internal dispositions. It may be true that most people in a legal system, including officials, follow the law out of fear of sanction or because they agree with the law anyway—not out of a sense of Hartian obligation.[88] It was not obvious even to Hart, who centered his theory on the factual beliefs of a critical mass of *legal officials* rather than the population as a whole, that statistical predominance alone explained the rule of recognition and internal point of view.[89]

Yet our quarrel with the positive turn is not simply about the possibility of disagreement about theories of law within the practice, a tack Dworkin deployed against Hart's descriptive jurisprudence.[90] Rather, because we think successfully theorizing about a social phenomenon like constitutional interpretation requires grasping the point of such interpretation, a purely descriptive

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REV. 1215, 1239 (2009) (identifying "[s]implicity," "[c]onsilience," and "[c]onservatism" as "three familiar theoretical desiderata").

84. *See* Leiter, *supra* note 83, at 1239 (identifying such theoretical desiderata).

85. HART, *supra* note 16, at 144.

86. *See* Baude, *supra* note 4, at 2372 ("So has the Supreme Court repudiated the scoring rule [of originalism]? I will suggest not.").

87. *See* FINNIS, *supra* note 69, at 10 (rejecting the suggestion that "statistical frequency" is the "relevant criterion" for determining the relevant internal point of view in a legal system).

88. *See generally* FREDERICK SCHAUER, THE FORCE OF LAW (2015).

89. On this, a leading contemporary positivist agrees. *See* John Gardner, *Nearly Natural Law*, 52 AM. J. JURIS. 1, 3 (2007) ("[N]o number of supposed counterexamples can show that a proposed paradigm is not a paradigm. That is because a paradigm or central case is simply the case that shows how the other cases—including those supposed counterexamples—ought to be.").

90. *See* DWORKIN, *supra* note 68, at 1–44. Against such claims, the positivist can either refute them through empirical evidence or concede them. A proponent of the former would argue that there is, in fact, no disagreement and those who claim otherwise are mistaken or mendacious, while a member of the latter camp would admit that, in fact, it turns out there is no law on the matter of constitutional interpretation. *See* Leiter, *supra* note 83, at 1224 (offering these options to the positivist). The advocates of the positivist turn have adopted the former strategy.

account cannot give a complete explanation for theoretical *agreement*, let alone disagreement. Even if descriptive legal sociology can identify a unanimous, objective "is" about our legal practices, it offers no reason for why legal officials "ought" to maintain that practice.

Now, orthodox legal positivists say such an objection misunderstands how they are pursuing a different project, namely the neutral description of a legal system or concept of law.[91] Whether or not the "'comprehensive normative inertness' of legal positivism"[92] is enough in the rarified air of pure jurisprudence, it is hardly satisfying for the positive turn in constitutional theory. Perhaps we can understand the positive turn as a mere exercise in the contemporary history of ideas, but its partisans in fact seek to offer good reasons *why* one should be originalist or not. Positivism premised on "comprehensive normative inertness" is not an obvious starting point for such a project.

Imagine all relevant people at a given time agree that a given set of interpretive conventions is part of our rule of recognition. Imagine, then, a renegade Justice or faction decided to rebel against that set of conventions.[93] The positivist will inform those interpretive insurrectionists that, to follow the law, judges must apply other conventions instead. Should the insurrectionist reply, "I prefer not to," the descriptive positivist would have little to say in response.[94] In fact, were the insurgents to reply that on such foundational matters "all that succeeds is success,"[95] the positivist would have to agree. And, should the faction convince a critical mass to change interpretive regimes, such positivists would grant them their victory as norm entrepreneurs.

Absent something more to get from "is" to "ought," the positive turn is at best redundant and at worst depends on a non sequitur. Even if it accurately describes the legal practice, it does "no more than repeat . . . what any competent lawyer" would say counts as valid law in a system.[96] That service is worthwhile: pretheoretical beliefs can need clarification and initial description is necessary for any more complex inquiry about law. But without more, such reportage does not give *any*, let alone "the *best* reason to be an originalist" or the "*best* reason not to."[97] To be more than a history of Supreme Court attitudes

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91. *See* Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 29 (2003) (claiming evaluative jurisprudence "lambasts positivism for failing to answer a question it was never asking").

92. *Id.* (stating that such objections reflect a "misunderstanding of . . . the 'comprehensive normative intertness' of legal positivism" (quoting John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 203 (2000))). *But see* FINNIS, *supra* note 67, at 32–41 (responding to Leiter); Jeffrey A. Pojanowski, *Redrawing the Dividing Lines Between Natural Law and Positivism(s)*, 101 VA. L. REV. 1023 (2015) (identifying recent movement toward reintegrating normative evaluation within jurisprudence).

93. *Cf.* Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971 (2004) (arguing that textualists were trying to mount such a change in statutory interpretation).

94. *See* Herman Melville, *Bartleby the Scrivener: A Story of Wall Street*, *in* THE PIAZZA TALES 81, 107 (New York, Dix, Edwards, & Co. 1856) ("Ah, Bartleby! Ah, humanity!").

95. HART, *supra* note 16, at 153.

96. John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1611 (2000).

97. Sachs, *supra* note 1, at 822 (emphasis added).

and practices, the positive turn needs an account of why legal officials and citizens should treat these attitudes and resulting norms as having authoritative force on their consciences.[98]

Aware of such a worry, Baude argues that it matters that originalism is our law because of "the widely accepted judicial duty to obey the law."[99] Of course, standard legal positivism does not claim to establish even a prima facie duty to obey the law.[100] Hart is content to note that participants believe law imposes freestanding normative obligations without offering such a moral endorsement.[101] Baude seems willing to go an inch further, conceding that he offers a "normative argument," albeit one "more broadly accepted" than other normative defenses of originalism.[102] In a brief passage, Baude grounds that obligation in the judicial oath to apply the law and the claim that judicial power is justified as a matter of democratic theory only if judges have a duty to obey the law.[103]

Even then, these arguments offer an unsatisfactorily thin theory of obligation. Bracketing the notion that law has freestanding moral force, Baude's justification rests in substantial part on the requirement that judges take an oath to uphold "'this Constitution' at the time of the oath," thus rendering "the moral content of the constitutional promise" a "positive question" of fact.[104] If legal insurrectionists take liberties with the oath or depart from the rule of recognition without rebuke, the positive turn by its terms has nothing to say about the new present political practices. Such a possibility is not idle. Unless oath theorists can establish no change in interpretive practice over time, it seems any shift of interpretive method entails either (a) a violation of the oath by one or more Justices or (b) an understanding of the oath at a very high level of generality. The former is counterintuitive. The latter possibility defangs the theory, especially if the vision of the Constitution is a contested one. Furthermore, other established norms of political morality compete with the duty to follow posited law in each case. Just as *stare decisis* on high courts is not an inexorable command, the second-order considerations supporting methodological fidelity may yield to other competing concerns. Sorting out these conflicting obligations requires more than a description of one of the popular, competing norms.

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98. Finnis, *supra* note 96, at 1611 ("[Positivism] cannot explain the authoritativeness, for an official's or a private citizen's conscience . . . of these alleged and imposed requirements, nor their lack of such authority when radically unjust.").

99. Baude, *supra* note 4, at 2392.

100. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 101–02 (1986).

101. *See* Brian Bix, *On the Dividing Line Between Natural Law Theory and Legal Positivism*, 75 NOTRE DAME L. REV. 1613, 1618–19 (2000); Jeffrey A. Pojanowski, *Legal Thought in Enlightenment's Wake*, 4 JURISPRUDENCE 158, 165 (2013) (book review).

102. Baude, *supra* note 4, at 2392; *see also* Sachs, *supra* note 1, at 886 ("Following the law is what judges are supposed to do.").

103. Baude, *supra* note 4, at 2392–95. For an excellent articulation of the oath theory, see Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016).

104. Baude, *supra* note 4, at 2394.

Thus, even in the positive turn's sparse ("comprehensive[ly] . . . inert[]"?[105]) normative theory, it appears that the only thing that would succeed is success. A more satisfying theory would move beyond stipulation and explore *why* it is reasonable (or not) that many presently expect judges to honor the law. Knowing those reasons could help negotiate conflicts between rule-of-law values and other popular, higher order obligations. It will also give a full range of reasons and practical guidance to legal officials deciding whether and why to follow an existing interpretive methodology. The social facts the positive turn identifies will be crucial, even if they are not sufficient to tell a court how to interpret the Constitution. Only by connecting social facts with the practical purposes of law can one discover "the best reason to be an originalist" or the "best reason not to."[106]

Advocates of the positive turn have a choice. They can, like Hart and his heirs, limit themselves to descriptions about others' beliefs. If so, their theory gives no reason to be an originalist (or not). Or they can admit that the practical relevance of their description relies on normative considerations. In that case, there is much more work to do to ground and elaborate the nature and scope of the legal obligation that points toward (or away from) originalism.

C. THE REMAINING JURISPRUDENTIAL TASK

Notwithstanding these questions, the positive turn raises a promising possibility: that one should be an originalist because that is what our law requires. This new movement in constitutional theory has much to recommend it. It takes seriously the notion that second-order practices and commitments like interpretive rules and principles can have legal, or at least law-like, authority absent formal legislative promulgation. Like Hart, positive-turn theorists also take seriously the participants' beliefs about legal obligation, not just external patterns of behavior.

The positive turn is incomplete, however, if it is merely the *positivist* turn. It is hard to establish that originalism is in fact the master interpretive convention in a univocal rule of recognition that all relevant practitioners regard as obligatory. This is not just because the Supreme Court often does not appear to act or think in originalist fashion. It is also because social institutions like human law—especially the uncodified metalaw of interpretation—are open systems that rarely display the regularity of the laws of natural sciences.[107] A jurisprudential justification for an interpretive method needs to resolve the question of whose internal point of view matters. Positivism, by its terms, would not be able to answer that question and would have to concede there is just no law of interpretation.

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105. *Cf.* John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 203 (2000).

106. Sachs, *supra* note 1, at 822.

107. *Cf.* ANDREW SAYER, REALISM AND SOCIAL SCIENCE 3 (1999).

Even if constitutional positivists can adduce evidence of univocal originalism without evaluation, their description alone cannot tell anyone why they should be an originalist or not. Positivist jurisprudence, by its terms, seeks to tell you what the law is, but pointedly says nothing about whether, when, or why you *ought* to obey it.[108] But most constitutional positivists seem interested in speaking to lawyers and judges about how they ought to interpret the law.[109] Accordingly, a complete jurisprudential theory would give nonempirical reasons about why the empirical facts the positivists have discovered matter. It must resolve the question of why obey a rule of recognition. The positivist project seeks comprehensive normative inertness and is not interested in that question.

A jurisprudential justification for originalism as an approach to finding the law needs to not only gather the data, but make sense of it—and even critique it—through the lens of a theory. To understand the importance of *positivity*—the need for human-created law despite its imperfections—we must go beyond *positivism* in theorizing about constitutional interpretation.[110] The classical natural law tradition, misunderstood by modern constitutional theorists when it is not ignored, can answer the central questions on which positivism is deliberately mute.

II. CLASSICAL NATURAL LAW FOUNDATIONS OF POSITIVE ORIGINALISM

Like "legal positivism," the label "natural law" can confound as much as it clarifies.[111] In constitutional theory, that confusion is particularly prevalent. For instance, Professor Matthew Adler has cast Ronald Dworkin, whose relationship with the natural law tradition is complicated at best, as the primary alternative to positivist theories of constitutional interpretation.[112] His later work briefly addresses natural law in this context, albeit "in [the] simplest variant" of the approach, which "equates law and morality."[113]

We think the classical natural law approach, which predominated from the time of the Romans to the late nineteenth century and remains vital (if misunderstood) today, merits engagement beyond "its simplest variant." The classical

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108. *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfred E. Rumble ed., 1995) ("The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.").

109. *See, e.g.*, Baude, *supra* note 4, at 2353 (arguing that "originalist judging can potentially be justified on a much more straightforward and plausible normative ground—that judges have a duty to apply the law, and our current law, in this time and place, is this form of originalism").

110. *See* Maris Köpcke Tinturé, *Law Does Things Differently*, 55 AM. J. JURIS. 201, 211 (2010) (review essay) (emphasizing "the *moral* need for law's *positivity*").

111. *See* Maris Köpcke Tinturé, *Positive Law's Moral Purpose(s): Towards a New Consensus?*, 56 AM. J. JURIS. 183, 213 (2011) (review essay) ("The important and potentially fruitful common threads between 'natural law theories' and [more positivist approaches] only begin to emerge . . . once the distracting quarrels about labels are set aside.").

112. Adler, *supra* note 34, at 196 & n.13.

113. Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 WM. & MARY L. REV. 1115, 1125 (2012).

tradition, broadly stated, nests legal philosophy within the broader context of moral and political philosophy. Human law, while a distinct and important object of study and theorizing, is a practice and institution best understood and shaped in light of those higher purposes that justify its existence in the first place.[114]

A more nuanced exploration will render the tradition more plausible than the bumper sticker versions of natural law often bandied about in constitutional discussion.[115] It will also reveal substantial support for a more formal, restrained, and originalist approach to constitutional interpretation. This conclusion will seem counterintuitive to many readers. Many associate natural law with things like Justice Chase's purportedly antiformal opinion in *Calder v. Bull*.[116] By the same token, originalism's critics often identify its adherents with positivism, and even moral skepticism, but not natural law.[117] Such surprise is in part due to constitutional scholars' seeming lack of interest in going beyond familiar slogans about natural law.[118] A more careful look at this classical

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114. *See infra* Section II.A. This is in contrast with the so-called modern tradition of natural law, often associated with Lon Fuller and Ronald Dworkin, which does not offer an ethical theory with implications for law, but rather prescinds from broader considerations and "narrowly [focuses on] the nature of (positive) law." *See* Brian H. Bix, *Natural Law: The Modern Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 61, 75–76 (Jules Coleman & Scott Shapiro eds., 2002).

115. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 795 (1999) (Souter, J., dissenting) (claiming that the majority relies on "natural law" to override the original, founding law on sovereign immunity).

116. 3 U.S. (3 Dall.) 386, 388 (1798) (stating that "the general principles of law and reason" constrain legislative power). We use the modifier "purportedly" because the Court decided the case pursuant to a grant of appellate jurisdiction that limited review to certain questions of federal law. *See id.* at 392; *see also* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87. The Justices respected the limits of that jurisdictional grant by separating the constitutional question they decided from the exchange over "first principles" in dicta. *See Calder*, 3 U.S. (3 Dall.) at 388. On the constitutional merits, Justice Chase's approach to interpreting the Constitution as a type of stipulated positive law was entirely in line with his colleagues' approach and with the approach that prevailed for the next several decades. *See id.* at 391–92 (exploring the "technical" and "acquired" meaning of "ex post facto laws"); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 578–84 (2003) (describing how a course of practice fixed the meaning of "ex post facto" law to a narrower technical sense prohibiting retrospective criminal laws rather than all retrospective laws).

117. *See, e.g.*, ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 203 (1998) (stating that originalist "interpretivism has become the modern face of legal positivism"); *id.* at 267 (describing "originalism" as a "positivist reaction to the fundamental rights approach" of the Warren Court); Edward A. Purcell, Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1489 (2014) ("Edwin Meese III, President Ronald Reagan's attorney general in the 1980s, announced the official conservative embrace of positivistic originalism.").

118. For example, Richard Fallon disposes of "the natural law tradition" in a footnote after reducing it to "the claim that an unjust law is '*no law at all*.'" Fallon, *supra* note 34, at 1126 n.69 (quoting ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-I, q. 95, art. 2, objection 4, *reprinted in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE 132, 166 (2d ed. 1995)). No matter that the most prominent living natural lawyer regards this purportedly central tenet of natural law as "pure nonsense, flatly self-contradictory, or . . . a dramatization of" a more subtle point about human law falling short of its moral purpose. FINNIS, *supra* note 69, at 364; *see also id.* ("Aquinas carefully avoids saying flatly that 'an unjust law is not a law: *lex injusta non est lex*. But in the end it would have mattered little had he said just that.").

tradition reveals a more complicated picture beneath such broad brushstrokes. The tradition's appreciation of the moral value of positive law brings together empirical, normative, and conceptual considerations for a unified theory of originalist constitutional law.

A. CLASSICAL NATURAL LAW JURISPRUDENCE

Those working in the "natural law" tradition need to be specific about what they mean. The classical natural law tradition we draw on concerns "the requirements of practical reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law, and obligation."[119] This concern is far broader than a neat equation of law with morality or an incantation of the nostrum that an unjust law is no law at all. As a tradition of moral philosophy, natural law is also concerned with matters far broader than human law.[120] Here, however, we are interested in what the tradition says about justice's and morality's implications for the institution of positive law.

For our purposes, this narrowing is a good thing. People who describe themselves as "natural lawyers" disagree about the nature and source of morality and justice, as well as their particular dictates.[121] And if we define the tradition to include those who think morality and justice are matters of objective truth, not mere opinion, the tent becomes even bigger.[122] Luckily for lawyers like us, we can bracket some contentious questions big and small: "big" in that we do not need to wade into metaethical debates about whether God is necessary for morality, or how people come to learn truths about morality and justice; "small" in that our argument does not have to resolve many particular questions about morality and justice, such as whether capital punishment is unjust, the proper extent to which government should redistribute income, or whether bicameralism is a good thing. We are interested in middle-range

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A notable exception is originalist Lee Strang. *See* Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997 (2012) (offering a normative defense of originalism grounded in the insights of virtue ethics); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006) (deploying natural-law based reasoning to develop a framework for assessing precedent).

119. FINNIS, *supra* note 69, at 351.

120. *See* Bix, *supra* note 114, at 75 (noting how writers in the classical tradition of natural law focus on developing a "general ethical theory" that has "implications for law and policy").

121. Even within one of the most prominent strains of natural law—the tradition building off the work of St. Thomas Aquinas—John Finnis differs from scholars like Russell Hittinger on critical issues. *See, e.g.*, RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987) (criticizing Finnis). Other self-identified natural lawyers work outside the Thomistic tradition that scholars like Finnis, Hittinger, Jean Porter, and Alasdair MacIntyre dispute. *See, e.g.*, MICHAEL S. MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE (2000); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987); Stephen Macedo, *The Inescapability of Natural Law*, *in* 5 BENCHMARK 117 (1993).

122. *See* Bix, *supra* note 114, at 64 (noting that identifying natural law theory with the belief that "values a[re] objective and accessible to human reason . . . might exclude very little"); *cf.* Mark C. Murphy, *Was Hobbes a Legal Positivist?*, 105 ETHICS 846 (1995) (No.).

questions about why the natural law (objective morality and considerations of justice within a reasonably wide range of theories) requires human communities to develop legal systems and, given those reasons, how persons should respond to those legal norms.[123]

Accordingly, within the classical tradition there is much less disagreement about the nature, purpose, and obligation of human law than there is about other issues.[124] It is fair to say that a wide range of theorists in this tradition work roughly from the presumption that law, as Aquinas defined it, is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[125] The particular inferences we draw about constitutional interpretation from that tradition's insights on the nature and purposes of law may be controversial, but we do not think the basic framework about law from which we start is controversial. Or it is at least as uncontroversial as one can hope for in a tradition embraced by figures as diverse as Plato,[126] Aristotle,[127] Cicero,[128] Augustine,[129] Aquinas,[130] Suárez,[131] Grotius,[132] Locke, Blackstone,[133] Thomas Jefferson,[134] John Marshall,[135] Frederick

123. *Cf.* Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 645 (1995) ("[W]e need a theory concerning the enactment of positive law that will have ramifications for how we ought to view such law: how it ought to be interpreted and what authority it should have in the community.").

124. For example, Thomists like Russell Hittinger and Jean Porter disagree with so-called "New Natural Lawyers" like John Finnis on many metaethical questions, *see generally* HITTINGER, *supra* note 121, but their understandings of law's nature and purpose coheres with much of Finnis's work in legal theory, on which we will draw below. *See, e.g.*, RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD 63–91 (2003); JEAN PORTER, MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY 4–5 (2010).

125. ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-I, q. 90, art. 4, at 208 (Fathers of the English Dominican Province trans., William Benton 1952) (c. 1265–1273).

126. PLATO, THE LAWS bk. I, §§ 631c–631d (R.G. Bury trans., Harvard Univ. Press 1967–1968) (c. 348 B.C.E.).

127. ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 7, 1134b–1135a (H. Rackham trans., Harvard Univ. Press 1934) (c. 384 B.C.E.).

128. CICERO, ON THE REPUBLIC bk 3.33 (Francis Barham trans., Edmund Spettigue 1841) (c. 107–43 B.C.E.).

129. *See* Anton-Hermann Chroust, *The Fundamental Ideas in St. Augustine's Philosophy of Law*, 18 AM. J. JURIS. 57, 73–79 (1973) (collecting sources and analyzing Augustine's understanding of the relationship between human and natural law).

130. AQUINAS, *supra* note 125, pt. II-I, q. 90, art. 4, at 208.

131. FRANCISCO SUAREZ, DE LEGIBUS, AC DEO LEGISLATORE bk. 2, ch. 6, *reprinted in* 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. (James Brown Scott ed., Gladys L. Williams, Ammi Brown & John Waldron trans., Oxford: Clarendon Press 1944) (1612).

132. HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. I, ch. 1, para. X (James Brown Scott ed., Francis W. Kelsey trans., Oxford, Clarendon Press 1925) (1646).

133. 1 WILLIAM BLACKSTONE, COMMENTARIES *38.

134. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (invoking "Laws of Nature and of Nature's God").

135. *See, e.g.*, ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 47–48 (1968) (explaining that "Marshall followed his great teachers in insisting that civil society is ruled by the laws of government, not by the maxims of nature as such," but that "[g]overnment's authority to suppress the natural rights of men . . . appeared to the Chief Justice as but a regrettable necessity incidental to government's fundamental purpose: preserving the natural rights of its own society's members so far as

Douglass,[136] Jacques Maritain,[137] and (perhaps) Lon Fuller.[138]

1. Law: Reason and the Common Good

The natural law tradition recognizes law as "an ordinance of reason for the common good."[139] Put another way, thinking about human law begins with the recognition that there are certain goods that persons and communities can achieve only by having authoritative legal institutions. To flourish, persons and communities need to be able to protect the peace, coordinate their activities, and cooperate on shared projects to promote the common good. Law is not the only social institution that helps persons and communities develop their potentialities, but it can do things that solitary persons and other institutions cannot, at least in a group of any size and complexity.

Accordingly, there is a moral need for positive law—law brought into being by human choice or act. This moral need first requires antecedent, constitutional decisions about how to structure a legal system. After that, officials working within that framework must make further legislative and adjudicative choices about what kind of rules that legal system will generate. The natural law tradition, however, rejects the notion that there is some Platonic Form of a legal system or consequent legal code that reason requires of every society. That tradition, particularly as articulated by Aquinas, recognizes that practical reason underdetermines questions about a legal order in general and many particular questions to which law must speak. The natural law prohibits some legal rules and may require others, but there are many more questions for which the natural law does not dictate precise answers.[140] Even where the natural law speaks clearly, the positive law must fill in details that are underdetermined by reason. By "underdetermination," we mean that the natural law provides a framework within which people can make reasoned choices, and bounds beyond which

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possible"); *id.* at 68 (describing Marshall's views that "[i]n the deepest sense . . . it is nature as well as the legislature which controls the judiciary's function; the judicial power is one special form of that authority defined by 'natural public law'"). For a thoughtful discussion of Chief Justice Marshall's belief in natural law principles *and* his reluctance to use them to supplement the positive law of the Constitution, see Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 122–31 (2003).

136. *See* David E. Schrader, *Natural Law in the Constitutional Thought of Frederick Douglass*, *in* FREDERICK DOUGLASS: A CRITICAL READER 85 (Bill E. Lawson & Frank M. Kirklend eds., 1999).

137. *See* JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW (Doris C. Anson trans., Gordian Press, Inc. 1971) (1943).

138. *Compare* Bix, *supra* note 114, at 75–82 (treating Fuller as a "modern natural law" theorist distinct from those like Finnis who work in the classical tradition), *with* Maris Köpcke Tinturé, *Concept and Purpose in Legal Theory: How to "Reclaim" Fuller*, 58 AM. J. JURIS. 75, 77 (2013) (review essay) (arguing that Fuller embraced the classical natural law tradition's emphasis "that law is best understood by reference to its moral purpose").

139. AQUINAS, *supra* note 125, pt. II-I, q. 90, art. 4, at 208.

140. *See id.* pt. II-I, q. 95, art. 2 (stating that human law can be derived from natural law in a manner likened to arts, where "common forms are determined to something particular; thus the craftsman needs to determine the common form of a house to the shape of this or that house").

they ought not choose, but no precise algorithm for making such choices.[141] Right reason, in short, does not precisely determine the right answer in all places for all purposes. To take a simple example, even if the moral law requires a human law against murder, it does not speak directly or categorically about every element of the crime, degrees of culpability, available excuses and justifications, and particular penalties.[142]

The same holds for decisions about constitution-making. Given basic truths about human persons, there are forms of government that no practically reasonable person should choose. Given the particular context and history of a polity, some forms of government that may be acceptable in some contexts may be profoundly unreasonable in others. But there are many permutations of governing structures that fall within the range of reason and, given the imprecise nature of judgment in human affairs, there will often be no way to demonstrate with mathematical certainty that one is better than the others.[143]

But it *is* important to make reasoned choices among the available options, for the alternative of not choosing is itself unreasonable. Because unanimity is impossible in all but the smallest, most homogenous groups, a political community needs an institution to make authoritative choices and prioritize among competing but reasonable alternatives about persons' rights and the community's ends and means. Without authoritative enforcement of these legal norms, cooperation and social coordination will be impossible, and the vulnerable and the law-abiding will be subject to the stronger who reject the system.[144] The practically reasonable person—the person of good sense about the requirements of justice and morality—will therefore conclude that the polity needs a reasonably just and well-functioning legal system.[145]

2. Law: Promulgation by Those with Responsibility for the Community

The classical natural law tradition further defines law as something promulgated by those who have responsibility for the care of the community.[146] This latter half of the equation points to the importance of both authority and positivity in law. Authority and positivity, of course, are frequently contrasted with reason's pursuit of the common good.[147] A reflection on law's moral

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141. *See generally* John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (Robert P. George ed., 1996). This more modest approach contrasts with those that see natural law providing more granular imperatives on the legal system. *See, e.g.*, Kenneth L. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 UCLA L. REV. 716 (1969).

142. FINNIS, *supra* note 69, at 282–83.

143. *See generally id.*

144. These norms may be fixed by codification or by an uncodified custom and shared understanding sufficiently strong that codification is not necessary, as may well have been the case in the common law courts at the time of Coke, Hale, and Selden. *See infra* Section II.A.2.

145. *See generally* John Finnis, *The Law and What I Should Truly Decide*, 48 AM. J. JURIS. 107 (2003).

146. AQUINAS, *supra* note 125, pt. II-I, q. 90, art. 4, at 208.

147. *See, e.g.*, Lon Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

purposes and benefits, however, reveals why posited, authoritative choice is crucial for any political community.

Promulgation—the public fixing of legal rules—is central for law's moral task. At the risk of stating the obvious, if a political community is to choose among competing legal rules and priorities, its choices will be inert if citizens and officials cannot identify them. To take an earlier example, the moral injunction against murder only gets us so far without a more definite identification of elements, defenses, penalties, etc. Similarly, the wisdom of having a legislature or judiciary remains simply good advice without choices about procedures, jurisdiction, and the like. If these choices are not fixed in durable form, they simply remain good (or bad) ideas, not norms that provide guidance and resolve disputes in the future. Accordingly, promulgation—the human act that announces a chosen norm in a particular form—is critical for law to make reasoned choices in furtherance of the common good.

This does not mean all law has to be codified, though Aquinas's writings on law contemplate the model of a civilian legislator. It does, however, suggest that the "central case" of law—law that does its job best—is likely to either be positively promulgated or at least offer the benefits of promulgation. "Unwritten law," such as common law doctrine, is positive in the sense that acts of human choice—say, judicial decisions—differentiate these norms in important respects from free-floating morality.[148] Common lawyers, for their part, think unwritten law can provide much better practical guidance than the speculations of moral philosophers.[149] If positive, uncodified law can provide the underlying benefits of more formal promulgation, it can be desirable, particularly in the absence of codified law.

Authority identifies those who have responsibility to make law-determining choices for the community. Without settled rules concerning *validity*—whose say-so counts for promulgating legal rules—the community is back to square one, awash in a sea of competing normative statements.[150] Again, there can be a wide range of reasonable constitutional arrangements for creating authoritative

148. *See generally* John Gardner, *Some Types of Law*, *in* COMMON LAW THEORY 51 (Douglas Edlin ed., 2007) (identifying customary and precedential law as forms of positive law). We add the caveat "in important respects" because we do think the interaction between moral and legal norms in unwritten law is more complicated than the standard positivist description of adjudication. *See* 4 JOHN FINNIS, *Adjudication and Legal Change*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 397 (2011) ("Law has a double life. It is in force as a matter of fact . . . . But it has its force by directing the practical reasoning of those persons and groups. And [such] facts count in practical reasoning only by virtue of some further, normative premise(s) . . . .").

149. *See, e.g.*, Gerald J. Postema, *Law's System: The Necessity of System in Common Law*, 2014 N.Z. L. REV. 69, 93 (explaining that common law "reasoning is *public and practical*, so it is meant to serve the purpose of normative guidance of official and lay decisions and actions in and for a public"). Classical common lawyers contrasted the steady reason of the common law with that of "Casuists, Schoolmen, [and] Morall [sic] Philosophers," whose judgments were prone to fall into "jangling and Contradiction." *Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe* [sic], *reprinted in* 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 500, 503 (1927).

150. *See* SCHAUER, *supra* note 88, ch. 10 ("Awash in a Sea of Norms").

law: the natural law does not speak clearly or universally about parliamentary versus presidential systems, unicameralism versus bicameralism, and the like. But a polity does need to settle on a reasonable mechanism of authority for making choices to promote the common good. Those criteria need to be clear so officials and citizens can know what the law expects of them. And without these discernible tests of validity, a community cannot reap the benefits of coordination, cooperation, and dispute resolution that a reasonably just legal system can offer.

These considerations bring us to the intersection of law and morality. Law and the state are not ends in themselves. They exist to promote human flourishing and the common good. For that reason, the classical natural law tradition, unlike legal positivism, maintains that there is a defeasible *moral* obligation to follow the positively enacted laws of a reasonably just legal system. Were officials and citizens to flout the positive law of such a system, the community would lose the moral goods that law brings. Importantly, this obligation does the most work when reason underdetermines a legal question. The natural law on its own does not dictate the precise structuring of powers in a constitution or the fair rate of return for regulated utility companies. But once positive law weighs in, questions of moral indifference become matters of presumptive moral obligation. The second-order moral reasons for law explain why the legal authority of duly enacted, positive law imposes first-order moral obligations on citizens and officials.

As noted, some legal choices can be beyond the pale. The obligation to honor the positive law of a generally just legal system is only a moral presumption. The strength of that presumption, what counts as a generally just system, and how citizens and officials should act in the face of such injustice are questions we bracket for now. That said, given the wide range of reasonable disagreement on many questions and the moral benefits of authority, we think the presumptive moral obligation would often have to be a strong one, particularly for officials who maintain the legal system. Widespread, hair-trigger departures from the positive law based on individual disagreement would quickly undermine the legal system, and if the system were generally just, mass departures would thus undermine the common good.[151]

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151. In this respect, the classical natural law tradition resembles systems of so-called "ethical positivism," which are based on rule-consequentialist arguments for legal authority. *See, e.g.*, TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM (1996); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1993); Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985). This movement recalls the classical approaches to legal positivism represented by Hobbes and Bentham, who were concerned not with conceptual definition of law, but rather the normative benefits of law. *See* Dan Priel, *Toward Classical Legal Positivism*, 101 VA. L. REV. 987 (2015). The primary difference between classical positivism and the natural law tradition, in this respect, is at the level of metaphysical and moral theory: the natural law tradition rejects utilitarian or consequentialist reasoning as the *sole* measure for thinking morally about law and has a different conception of human persons and the knowledge available to them. *See* Pojanowski, *supra* note 92, at 1024–25.

3. Interpretive Implications for Constitutions

In Part I, we argued that the positive turn in originalism left unanswered two critical questions about identifying and following the law: (a) *whose* internal point of view matters in the context of legal disagreement and (b) *why* should interpreters treat as normative any existing consensus about what the law is and how to follow it. The natural law tradition's answers, and ours, to both questions focus on the central case of a legal system and the central case of the practically reasonable person.

The natural law tradition tells constitutional framers and interpreters that a community of persons needs a well-functioning legal system to flourish, and that such a system needs ground rules for operating: a constitution. This moral conclusion animates the work of practically reasonable framers and interpreters alike. It instructs framers to make choices always informed by, but often not definitely resolved by, moral reasoning about how to pursue the common good through government. Further, the tradition's emphasis on promulgation suggests that a written constitution supplemented by reasonably determinate unwritten decisional rules is closer to the central case of law than entirely uncodified conventions. A constitution's framers have a wide range of morally reasonable choices available to them, but it is unreasonable for them not to choose and not to convey those choices to the governed in the form of positive law.

A practically reasonable interpreter seeks to understand the reasoned choices the framers made when enacting the positive law that constitutes the frame of government.[152] Because of the second-order moral benefits of a functioning legal system, the practically reasonable interpreter has a (strong) presumptive moral duty to treat as authoritative and enduring the posited law of a reasonably just legal system. This obligation holds for all within a jurisdiction, but it is especially strong for those whose office requires them to maintain the governing structure. Given the wide range of morally acceptable constitutional regimes available to *framers* of a constitution, in many legal regimes there will be few, if any, instances in which first-order moral reasons will trump an *interpreter's* second-order obligation to enforce the positive law. This is so even if the framers' choice is not one the interpreters would have made themselves.

While the previous discussion's abstraction is necessary to identify what an ideal type of constitutional interpretation ought to look like, it is unmoored from reality in important respects. This first cut of constitutional theory says nothing in detail about how interpreters are to locate and derive the law of the Constitution, what to do in the face of constitutional silence, vagueness, or ambiguity, or

152. For a similar argument in connection with statutory interpretation, see EKINS, *supra* note 7, at 244–45 ("[I]n the central case of interpreting a statute interpreters will aim to infer and understand the legislature's lawmaking intention, which intention (as expressed in the enactment) changes the existing law in some way, a change which persists until it expires on its own terms or is amended or repealed by a subsequent legislature.").

what to do with incorrect, preexisting interpretations of the constitution. Moving from ideal type to concrete practice is not easy at all.

But even before we get to any of those complications, we first must explore our actual, historical, posited Constitution. An argument like ours, which emphasizes the particularity of a polity's enacted law, must explore the connection between the positivity of *our* Constitution and the classical natural law tradition. Accordingly, we turn from the classical natural law foundations for written constitutionalism in general to the classical natural law foundations for the Constitution of the United States.

B. CLASSICAL NATURAL LAW FOUNDATIONS OF THE CONSTITUTION OF THE UNITED STATES

The framers practiced what classical natural law theory preaches. The basic framework that we have sketched out to this point coheres with how our framers thought about the positivity of our Constitution. Our recourse to the classical natural law framework does not impose a theoretical import on our law, but reintroduces our predecessors' framework for positive law to their posterity.

Evidence from the Founding and early practice under the Constitution reveals that the Constitution was designed to be, and was understood to serve as, the kind of stipulated positive law that classical natural law theory identifies as the central case of positive law. It was made to be a fixed and authoritative legal settlement of certain matters contributing to the common good of a complete political community. The idea of American constitutional law as customary positive law under a "living Constitution" did not emerge until the mid-to-late nineteenth century. Before then, the positivity of our written Constitution was prominently contrasted with the "unwritten," customary law English constitution.[153]

This Section reviews some of the most prominent evidence for the intended fixity of the Constitution's authoritative legal settlements from the first several decades. It begins with the Declaration of Independence, continues through the Articles of Confederation and the framing of the Constitution, turns to arguments over ratification, and concludes with evidence from early cases and commentaries. It is not, and is not intended to be, a comprehensive survey. Such a project would be more exhausting than illuminating with respect to the simple claim that the Constitution was designed to be fixed and authoritative fundamental law.

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153. *See, e.g.*, ST. GEORGE TUCKER, *View of the Constitution of the United States*, *in* VIEW OF THE CONSTITUTION OF THE UNITED STATES, WITH SELECTED WRITINGS 91, 104–05 (Indianapolis, Liberty Fund 1999) (1803); *see also* Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795) (Patterson, J.) (jury charge) ("[I]n England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.").

1. The Declaration, the Articles, and the Constitution

We begin with first principles. The Constitution of the United States is a human artifact; it was made and ratified by particular human beings over a particular time to govern a particular political community. Over a decade before the Constitution's ratification, the same political community purported to speak in one voice in the Declaration of Independence. By means of the Declaration, representatives acting "in the Name, and by Authority of the good people of these Colonies" formally dissolved "all political connection between them and the State of Great Britain," and formally assumed "among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them."[154] This Declaration was an explanation of why it had become "necessary for one People to dissolve the Political Bands which have connected them with another."[155]

While the *people* were one at this time, their *governments* were not.[156] As "Free and Independent States," each of "the united States of America" claimed "full power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[157] Over the course of the next decade or so, the people of each state wrote and ratified state constitutions for their own states.[158] The Articles of Confederation provided a confederate government.[159] But each state in this confederacy retained "its sovereignty, freedom, and independence, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

The framers designed the Constitution of the United States to remedy the defects of government under the Articles. Although separated from the nation's birth by over a decade, the Constitution's making proceeded from the same classical natural law premises articulated in the Declaration of Independence: that "Governments are instituted among Men" to secure their natural rights, "deriving their just powers from the consent of the governed."[160]

In these simple premises alone, one can already discern the positive-law foundations of our constitutionalism. The Constitution of the United States, as a human institution, would be granting powers to the new government it constituted. For those powers to derive from the consent of the governed, it would be necessary for them to be understood; to be understood, the powers would need

154. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

155. *Id.*

156. *See id.* ("When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another . . . ."); *cf.* JACQUES MARITAIN, MAN AND THE STATE 1–27 (1951) (distinguishing "the People" from "the State").

157. THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

158. *See* TUCKER, *supra* note 153, at 104.

159. Article I of the Articles of Confederation provided that "The Stile of this Confederacy shall be 'The United States of America.'" ARTICLES OF CONFEDERATION of 1781, art. I. Many of the self-imposed limitations of State power are listed in Article VI. *Id.* art. VI.

160. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

to be promulgated; to be promulgated, the powers would need to be specified and communicated using language; and there would need to be some act or acts of the people as the constituent authority signifying consent to the promulgated powers.[161]

The instrument the framers chose for securing the people's rights and conferring the government's powers was a written Constitution that was to be legally authoritative for future generations by remaining fixed until annulled or changed in the proper way. This was the same kind of instrument that each of the states chose in the wake of the Declaration of Independence.[162] Among the objects designated by the Preamble of the Constitution is to "secure the Blessings of Liberty to ourselves *and our Posterity*."[163] The document declares "This Constitution" to be the "supreme Law of the Land," and commands that those who hold state and federal legislative, executive, and judicial office "be bound by Oath or Affirmation, to support this Constitution."[164]

2. Publius & Brutus on Interpretation, Precedent, and Liquidation

Arguments about the Constitution during the ratification process reveal a shared presupposition about the fixed nature of the proposed enactment. Writing as Publius, Alexander Hamilton in Federalist No. 78 explained the legally binding nature of the Constitution as fixed until solemnly and authoritatively changed: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually: and no presumption, or even knowledge of their

161. This summary is summary. For a more detailed elaboration, see GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 225–51 (2010).

162. *See, e.g.*, Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795) (Patterson, J.) (jury charge describing Pennsylvania's Constitution) ("What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.").

163. U.S. CONST. pmbl. (emphasis added).

164. *Id.* art. VI. For a comprehensive argument about the interpretive significance of "This Constitution," see Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009); *see also* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127 (2003) (contending that the Supremacy Clause "establishes the text of the document—'this Constitution,' a written document—as that which purports to be authoritative").

sentiments, can warrant their representatives in a departure from it, prior to such an act."[165]

Putting the Constitution in writing was one of the ways in which the law of the Constitution was to be fixed. But while fixing words in place gets one closer to fixing law in place, fixing words is not always enough because words need to be interpreted, and interpretations can vary. Even with the text of the Constitution fixed, constitutional law would remain subject to variation as long as constitutional text was subject to variable interpretation.

Nobody thought that the Constitution answered every question about its own interpretation or that the government it constituted could spring into operation without the need for various adjustments and resolutions of unclear constitutional matters. The general understanding was that there would be a process of constitutional maturation and liquidation, as well as possible amendment, during which the powers of the government, in all its parts and in their relationships with each other, would be clarified and worked out.[166] As Hamilton explained in Federalist No. 82:

> The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; . . . Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.[167]

But maturation and liquidation were understood as distinct from amendment, in that those processes would not change the Constitution itself; constitutional amendments, by contrast, would.

Brutus, one of the proposed Constitution's most perceptive and farsighted critics, seized on the recognized limitations of linguistic precision in law to forecast dire predictions about how judicial interpretations of the Constitution would extend the powers of the federal government and reduce the states to insignificance. There are many strands to Brutus's powerful arguments. But our focus at present hones in on his arguments about interpretive law and principles.

Brutus argued that the Constitution would be subject to both legal and equitable interpretation.[168] Legal interpretation would proceed according to the known and generally uncontroversial rules for textual interpretation that prevailed in the courts of law.[169] Equitable interpretation, by contrast, would follow

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165. Alexander Hamilton, *No. 78*, *in* THE FEDERALIST 401, 406 (George W. Carey & James McLellan eds., 2001) (1777–1778).

166. *See* Nelson, *supra* note 116, at 549–53 (describing the concept of constitutional liquidation with reference to the Founding); Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1806–08 (same).

167. Alexander Hamilton, *No. 82*, *in* THE FEDERALIST, *supra* note 165, at 426.

168. Brutus, ESSAY XI (Jan. 31, 1788), *reprinted in* THE ESSENTIAL ANTIFEDERALIST 185, 187 (W.B. Allen & Gordon Lloyd eds., 2002).

169. *Id.*

the principles of courts of equity, which gave greater latitude to judicial interpreters to roam beyond legal text and decide according to the spirit of a legal instrument.[170] Courts construing the Constitution, Brutus contended, would deploy equitable interpretation.[171] Given that one decision would become a precedent for the next, expansive interpretations of federal powers would beget further expansion, as both Congress and later judicial interpreters would join in a process of gradual expansion. In this way, equitable interpretation plus precedent would aggrandize the federal government and subvert the state governments.

Publius responded that "there is not a syllable in the plan, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution."[172] But Publius did not deny that the law courts would make use of precedent. Indeed, one of Publius's arguments for the security of judicial salaries and judicial tenure during good behavior rested on the need for judges to use an ever-growing corpus of precedent.[173]

It is less important at this point to figure out who was right than to recognize the importance of what they were fighting about. The legal meaning of the Constitution, Brutus and Publius recognized, depended not just on the text of the Constitution but also on the law of its interpretation. And for them, there *was* law of interpretation. They disagreed about which bodies of this law of interpretation governed. But this, too, was a matter of legal disagreement to be resolved by legal reasoning and argument.

More broadly, not just Brutus and Publius, but all opponents and proponents of ratification realized the derivative importance of the law of interpretation behind the constitutional text. That is why they argued about the powers and structure established by the text. Even though opponents of ratification sought to prevent the Constitution from going into effect until it was changed, they also viewed textual amendments (or a different text altogether) as the right kind of change for the various defects they saw in the plan.

3. *Marbury v. Madison* and Early Constitutional Commentaries

In early constitutional disputes resolved by the Supreme Court, the Constitution's writtenness underwrote the Court's obligation to treat the Constitution as fixed law—indeed, as *a* law. Chief Justice Marshall's opinion for the Court in *Marbury v. Madison*[174] is the now-canonical account of this relationship. In it, Marshall describes a written constitution as "the greatest improvement on political institutions," and he links the Constitution's writtenness to its capacity to bind in the future:

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170. *Id.*

171. *Id.* at 188–90.

172. Alexander Hamilton, *No. 81*, *in* THE FEDERALIST, *supra* note 165, at 418.

173. Hamilton, *supra* note 165, at 407. This precedent would be about all manner of law. Publius does not single out constitutional law.

174. 5 U.S. (1 Cranch) 137 (1803).

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?[175]

In describing the kind of law that the Constitution is, Chief Justice Marshall posited that the Constitution is "either a superior, paramount law, *unchangeable by ordinary means*, or . . . on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it."[176] In endorsing the former, Marshall appealed to the intention of "all those who have framed written constitutions" to make "the fundamental and paramount law of the nation," and he declared that "the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."[177] This "theory," said Marshall, "is *essentially attached to a written constitution*, and is consequently to be considered, by this court, as one of the fundamental principles of our society."[178]

Only after this statement of fundamental principles did Marshall turn to the "peculiar expression[] of the constitution of the United States," that is, to the particular language of the Constitution itself rather than fundamental principles attached to all written constitutions.[179] And he concluded that review of the Constitution's language, as well as the opinion itself, by observing that "the particular phraseology of the constitution of the United States *confirms and strengthens the principle, supposed to be essential to all written constitutions*, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."[180]

Marshall's views on the Constitution were not shared by everyone in his time. This is particularly so regarding Marshall's understanding of the scope of the national government's powers as set forth in later cases like *McCulloch v. Maryland*.[181] But Marshall's understanding of the Constitution's positivity and fixity was widely shared.[182] Whatever the particular substantive disagreements among first and second generation constitutionalists, their shared agreement about the positive-law character of the Constitution is what matters for our purposes.

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175. *Id.* at 176, 178.
176. *Id.* at 177 (emphasis added).
177. *Id.*
178. 5 U.S. (1 Cranch) at 177 (emphasis added).
179. *Id.* at 178.
180. *Id.* at 180 (first emphasis added).
181. 17 U.S. (4 Wheat.) 316 (1819).
182. *See* MCDOWELL, *supra* note 161, at 250 (describing "general agreement among the founding generation that when it came to interpreting their new constitution there had to be rules . . . [making it] the duty of the judge to find the original intention of the lawgiver or the constitutional framer").

Marshall's opinion in *McCulloch* has often been mistakenly marshaled against the idea of a fixed Constitution.[183] In the course of sustaining congressional power to charter the Second Bank of the United States, Marshall famously wrote that "we must never forget that it is a *constitution* we are expounding."[184] Against those who would demand express and minute specifications of every legislative power for the federal government, Marshall explained that the Constitution's nature required "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."[185] Later interpreters have taken Marshall's statement about the level of specificity to expect from the Constitution's enumeration of legislative powers to stand instead for the idea that the Constitution itself changes.[186] Understanding Marshall's statement in this way, however, is unfaithful to his opinion, which explains that the Necessary and Proper Clause should be given a meaning that would enable the government to deal with dimly seen or entirely unforeseen exigencies.[187] As Justice Scalia explained, "[t]his argument rests entirely upon the premise that the interpretation given today must be adhered to. Otherwise, there would be no need to bear in mind the 'exigencies of the future'—which could be met by saying, . . . 'Well, our notions of what the Constitution permits have changed.'"[188]

This misunderstanding of *McCulloch* is not new. Some critics of *McCulloch* when it was handed down charged the Marshall Court not only with adopting an overly broad understanding of federal power, but also with treating the Constitution like a "mere thing of wax," and twisting it into a shape that was not intended.[189] While rejecting the charge of having disfigured the Constitution, Marshall recognized that the criticism of treating the Constitution as judicially changeable was serious—a criticism that, if accurate, would be devastating. His pseudonymous newspaper defenses of *McCulloch*, accordingly, defended not only the decision itself, but also the Supreme Court's right to authoritatively decide questions of constitutional law.[190] And he did so by resting this right to

183. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 595–96 (1989–1990).

184. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

185. *Id.*

186. *See* Scalia, *supra* note 183, at 594 ("[T]his old chestnut . . . is often trotted out, nowadays, to make the point that the Constitution does not have a fixed meaning—that it must be given different content, from generation to generation, retaining the 'flexibility' needed to keep up with the times.").

187. *McCulloch*, 17 U.S. (4 Wheat.) at 415 ("This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers . . . would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.").

188. Scalia, *supra* note 183, at 596.

189. *See* Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 140, 141 (Paul Leicester Ford ed., 1899).

190. John Marshall, *A Friend of the Constitution, Letter IX* (July 14, 1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 207, 209 (Gerald Gunther ed., 1969).

decide on the permanency and writtenness of the Constitution, declaring this "great American principle, the judicial right to decide on the supremacy of the constitution, a right which is inseparable from the idea of a paramount law, a written constitution."[191]

Early treatise and commentary writers made a similar move in describing the Constitution as fixed and authoritative fundamental law.[192] Writing in 1803, St. George Tucker, a Jeffersonian Republican with views contrary to positions the Marshall Court later adopted, linked the Constitution's writtenness with its fixity. By means of a written constitution, Tucker wrote, "government was reduced to its elements; its object was defined, its principles ascertained; its powers limited, and fixed; its structure organized; and the functions of every part of the machine so clearly designated, as to prevent any interference, so long as the limits of each were observed."[193] The American Revolution, according to Tucker, gave birth to the phenomenon of written constitutionalism as a way of rendering "familiar to every intelligent mind" the distinction between sovereignty (which resided in the people) and government.[194] He contrasted our written constitution with England's unwritten constitution: "The boasted constitution of England, has nothing of this visible form about it; being purely constructive, and established upon precedents or compulsory concessions betwixt parties at variance."[195]

In 1822, Pennsylvania lawyer Thomas Sergeant completed his project of "reducing to system, the principles and practice of our National Jurisprudence, of tracing them up to their constitutional source, and of exhibiting in a succinct manner, the general origin, and uniform harmony, of the whole."[196] Sergeant wrote in this commentary that the "basis of the government is, that the people

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191. *Id.*

192. In using the phrase "fundamental law," we do not mean here to adopt or take any position on the claim that the Constitution is not "ordinary law" like the rest of law that courts deal with in nonconstitutional cases. *See, e.g.*, Sylvia Snowiss, *The* Marbury *of 1803 and the Modern* Marbury, 20 CONST. COMMENT. 231, 232–33 (2003) (describing this distinction). That claim bears on how and by whom the Constitution is to be authoritatively interpreted. As proponents of this distinction acknowledge, practice under the Constitution led to the assimilation of the Constitution into judicially enforceable law. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 163–64 (2001) (describing "a change from viewing constitutions as a special kind of fundamental law outside the regular legal system to seeing them as a species of ordinary law subject to conventional rules of legal interpretation and precedent").

193. TUCKER, *supra* note 153, at 104.

194. *Id.* ("The American revolution seems to have given birth to this new political phenomenon: in every state a written constitution was framed, and adopted by the people, both in their individual and sovereign capacity, and character. By this means . . . government was reduced to its elements; its object was defined, its principles ascertained; its powers limited, and fixed; its structure organized; and the functions of every part of the machine so clearly designated, as to prevent any interference, so long as the limits of each were observed. The same reasons operated in behalf of similar restrictions in the federal constitution.").

195. *Id.* at 105.

196. THOMAS SERGEANT, *Preface* to CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES, AND OF CONSTITUTIONAL POINTS DECIDED (2d ed. 1830).

have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."[197] "These principles," Sergeant asserted, "are fundamental and designed to be permanent."[198]

Writing a few years later, William Rawle linked the "fixed and settled" nature of the Constitution to the judicial authority to declare a law unconstitutional. "Where there is not a fixed and settled constitution, whether written or unwritten, which cannot be altered by the legislature, the judiciary has no power to declare a law unconstitutional."[199] Rawle described this feature of judicial authority as an essential aspect of the Constitution's appeal to "the minds of freemen, to whom was submitted the consideration of a scheme of government, professing to contain those principles by which a future legislature and executive were to be regulated."[200]

In his *Commentaries on American Law*, published in the same decade, Chancellor Kent linked the authority of the judicial department to rule on the constitutionality of a statute to the Constitution's status as paramount and permanent. "The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance," wrote Kent, "and . . . every act of the legislative power contrary to the true intent and meaning of the constitution, is absolutely null and void."[201] Kent praised an independent judiciary as "peculiarly fitted for the exalted duty of expounding the Constitution," thereby protecting "every part of the government and every member of the community from undue and destructive innovations upon their chartered rights."[202]

Consolidating the Marshall Court's legacy in his 1833 *Commentaries on the Constitution*, Justice Joseph Story set forth rules of constitutional interpretation drawn from general principles and from the course of constitutional adjudication over the past few decades.[203] Among other things, Story rejected arguments from "policy" or "convenience" on the ground that such arguments would subject the law to fluctuating meanings.[204] Such fluctuations were unsuitable for the kind of law that the Constitution is, Story wrote: "It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever."[205]

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197. *Id.* at 266.

198. *Id.*

199. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 274 (2d ed. 1829).

200. *Id.* at 275.

201. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 449 (John M. Gould ed., 14th ed. 1896).

202. *Id.* at 450.

203. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Melville M. Bigelow ed., William S. Hein & Co., Inc., 5th ed. 1994) (1891).

204. *Id.* at 326.

205. *Id.*

We could multiply authorities and evidence, but to what end? The idea that the written Constitution's legal settlements—whatever *else* they were—were fixed until properly changed was itself a fixed point around which constitutional contestation occurred. The deep substantive disagreements among the Constitution's interpreters over the Constitution's first several decades were contained within a broader shared agreement that the written Constitution sets forth fixed, supreme law binding all subject to it.

The most significant conceptual change in American constitutionalism from then to now has been the rise of the idea that ours is a living Constitution. This living Constitution has not killed the dead Constitution, but the two existing side by side has led to great confusion and variety in today's legal culture. As the next Section explains, we live in a time of constitutional eclecticism. The manner in which the Supreme Court now develops constitutional law is compatible to varying degrees both with the idea of the Constitution as stipulated, written positive law (the right way of thinking about it) and also with the idea of the Constitution as customary, unwritten positive law (the wrong way of thinking about it). But these foundational understandings of the Constitution are not compatible with each other as master concepts for the kind of positive law that the Constitution is.[206]

C. CONSTITUTIONAL ECLECTICISM WITH CONSTITUTIONAL LAW AS CUSTOMARY LAW

Interpretive eclecticism is ascendant in contemporary constitutional case law, and has been for some time now. This eclecticism arose as originalism collapsed, for no architectonic idea of constitutional law has since ruled alone. Originalism has been replaced not by a new idea but by an institution. Nothing symbolizes this transformation better than the Supreme Court building itself. Completed in 1935, this temple to justice under law opened just as the old orthodoxy of originalism appeared almost obsolete. And the guiding principles issuing forth from the Supreme Court have been anything but consistent or clear.

The originalism that collapsed was not as theoretically refined as originalisms are today because originalism then was to constitutional law what water is to fish. Whatever their particular disagreements, lawyers and jurists generally agreed on the kind of law that the Constitution is: "a discrete act of lawmaking by discernible lawmakers."[207] Contrast this understanding of constitutional law with that implicit in the case method by which constitutional law is taught today. Students learn to understand constitutional law as the product of discrete acts of lawmaking that take place when Supreme Court Justices vote and write

206. *See* Waldron, *supra* note 123, at 650 ("There is a massive difference—in substance, ethos and rhetoric—between a positivist jurisprudence dominated by an image of customary law and a positivist jurisprudence dominated by an image of legislator's law.").

207. Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 192 (1997).

opinions to explain those votes. In this sense, originalism has not collapsed as much as it has migrated from originalism about the Constitution to originalism about Supreme Court case law.

The eclecticism in constitutional case law is evident from an examination of any handful of constitutional law cases in the U.S. Reports. If there were some deeper unity to be found beneath the pluralistic surface, one would expect that law school courses in constitutional law would help one identify and understand an accepted way of elucidating what is really going on. Yet that is not to be found. The standard course in constitutional law consists largely of serial study of Supreme Court decisions. Students learn how to carry on with constitutional interpretation by observing how the Supreme Court carries on. And this experience of oracular observation is unedifying. Some formalism; some functionalism. Which do you think is right? Some originalism; some living constitutionalism. Which makes more sense to you? Some *stare decisis*, and then some more, except when not. What gives? And thus this pedagogy cultivates cynicism as students see constitutional law change with public opinion and the composition of the Court. Some scholars tell us this is exactly as it is and, perhaps, as it should be.[208] For students, Judge Posner's observation resonates: "If changing judges changes law, it is not even clear what law is."[209]

It was not always this way. The case method was not widely used in law schools until the late nineteenth and early twentieth centuries.[210] The first "Constitutional Law" casebook did not arrive until 1895.[211] Before then, the predominant way students learned constitutional law was through treatises and lectures based on those treatises.[212] Commentators aiming for comprehensiveness could not avoid matters of first principle, such as what kind of law the Constitution was. This was both virtue and vice. For first principles matter, and there were deep disagreements about some of the most fundamental. Is the Constitution a compact among the states?[213] How to determine the existence

208. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (using history and political science in an attempt to dissolve the so-called countermajoritarian difficulty); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 179–83 (2012) (examining the normative implications of judicial review that is more representative of majority will than the political branches).

209. RICHARD A. POSNER, HOW JUDGES THINK 1 (2008).

210. *See generally* Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547 (1997).

211. JAMES B. THAYER, CASES ON CONSTITUTIONAL LAW (1895); *see also* Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5–7 (1993) (describing Thayer's constitutional law casebook as the first).

212. Even though academic legal settings were not the principal means of educating new lawyers until the twentieth century, the point stands. Novice lawyers who learned by "reading law" would still have largely received their exposure to constitutional law through treatises and digests rather than through reading cases.

213. *Compare, e.g.*, TUCKER, *supra* note 153, at 104, *with* RAWLE, *supra* note 199, at 295–97.

and scope of implied powers?[214] These were among the many basic questions that divided early commentators.

By the late nineteenth century, appeal to an unwritten constitution had emerged as a way of dealing with these complexities. Mechanical imagery gave way to organic, and change was seen as evolutionary adaptation rather than corruption.[215] One might not be able to trace principles back from the cases to the Constitution through legal reasoning, but one could nevertheless see their emergence and evolution by using "the *genetic* method."[216] Hence the study of cases as the primary materials for understanding constitutional law.

Treatises remain available to students today, and often end up being more relied-upon instructors of students than their casebooks. Students widely regard Chemerinsky's work as the best single-volume treatment of constitutional law to accompany them in their studies.[217] As a collection of local histories for dozens of doctrines, Dean Chemerinsky's tome is hard to top. But if familiarity with Supreme Court doctrine has not bred contempt, something else has fueled deep dissatisfaction. Dean Chemerinsky's latest book is *The Case Against the Supreme Court*, in which he argues that "[t]he Supreme Court has largely failed throughout American history at its most important tasks and at the most important times."[218]

And then there is Professor Laurence Tribe. The treatise tradition in American constitutional law reached a symbolic end of sorts with Tribe's decision not to complete the second volume of the third edition of *American Constitutional Law*.[219] His self-professed inability to make full sense of contemporary constitutional law in the treatise format reflects the pluralism of the subject matter more than the analytic and synthetic capacities of the author. The first volume of the third edition identified seven different models of the Constitution and spelled out the cases contributing to two such models over the course of almost 1,400 pages.[220] One can only wonder at how extensive an exposition would have been required to fill out the remaining five models. But in the presence of plural starting and ending points and ways of moving there and back, over and over and over, what else would a treatise writer attempting not only to guide, but also to describe, constitutional law be expected to do?

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214. *Compare, e.g.*, STORY, *supra* note 203, bk. III, ch. 5, *with* ABEL P. UPSHUR, A BRIEF ENQUIRY INTO THE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT: BEING A REVIEW OF JUDGE STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 101–02 (Alethes Press 2007) (1840).

215. *See generally* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 65–96 (1992) (explaining the latter part of the nineteenth century as the age of the unwritten constitution).

216. 1 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW, at v (Cambridge, Charles W. Sever, 1895).

217. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (4th ed. 2011).

218. Erwin Chemerinsky, *A Supreme Failure*, POLITICO (Sept. 29, 2014), http://www.politico.com/magazine/story/2014/09/the-supreme-court-has-failed-111450 [https://perma.cc/839J-94J2].

219. *See* Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291 (2005).

220. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000).

And so we trudge on with our edited cases and answerless queries, typically leaving for a separate "constitutional theory" course consideration of jurisprudential foundations (or their absence). In today's constitutional law classroom, the idea of a right way of thinking about the Constitution as law is quaint. There is only better and worse for various purposes. The conclusion of almost all constitutional arguments contains premises adopted as a matter of instrumental choice or ideological preference among rationally underdetermined alternatives.

In the meantime, constitutional law remains assimilated jurisprudentially into the category of customary positive law, as it has been since the latter part of the nineteenth century. One gets along by adopting the habits of the natives, including their habits about arguing about what their practices ought to be. Constitutional law is not so much made as it is the byproduct of these argumentative practices. And while the Supreme Court lurches from case to case, the rest of us struggle to stave off cynicism and constructively engage the bloated corpus of constitutional law.[221]

To understand the Constitution as law, one needs a theory of the lawfulness of constitutional law. Simple acceptance is not enough; acceptance precisely as law is necessary. The classical natural law foundations of our Constitution provide one such account. The next Part explains in more detail what acceptance of the Constitution as stipulated positive law built on such foundations would look like.

III. TOWARD ENDURING ORIGINAL-LAW-ISM

Having reviewed the natural law foundations for positive law generally (Section II.A), the classical natural law foundations of our positive-law Constitution in its origin and early development (Section II.B), and the constitutional eclecticism of the present (Section II.C), we now look forward. In particular, we explain how the classical natural-law tradition supplies the jurisprudential foundation for original-law originalism or original-law-ism as an account of our law of the Constitution today.

There are three parts. First, we explain how the original law of the Constitution relates to interpretive conventions appropriate for the kind of law that it is. Second, we explain why original-law-ism will endure for as long as the concept of our Constitution as stipulated positive law endures. And third, we explain why original-law-ism remains attractive as long as the ongoing judicial and popular revolution against it remains unresolved.

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221. *Cf.* Steven D. Smith, *What Does Constitutional Interpretation Interpret?*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 21, 37 (Grant Huscroft ed., 2008) ("[I]t seems undeniable, first, that there is no consensus about *what* we are interpreting when we do constitutional interpretation and, second, that the practice of constitutional interpretation rolls along anyway—rolls along exuberantly, confidently, and sometimes with exalting or devastating consequences for the various institutions and individuals who find or place themselves in its path.").

A. THE LEGAL CONSTRUCTION OF ORIGINAL-LAW-ISM

The previous Part draws on the classical natural law tradition to explain and justify a conception of a constitution as *posited* law that merits *moral* obligation. To recap briefly, we argued that tradition grounds individual obligation to the law of a polity in the moral need for positive law—law brought into being by human choice or act.[222] Promulgation—the human act that chooses and announces a norm in particular form—is critical for law to effectuate reasoned choices in furtherance of the common good.[223] Moral agreement and custom will not be sufficient for coordination, cooperation, or dispute resolution in a society of any complexity. Positive law that is fixed until changed by agreed-upon procedures is necessary to facilitate individual and communal flourishing.

Authority identifies those who have responsibility to make law-determining choices for the community. Without settled rules concerning *validity*—whose say-so is efficacious for promulgating legal rules—the community is back to square one, awash in a sea of competing normative statements.[224] Because of the second-order moral benefits of a functioning legal system, the practically reasonable interpreter has a (strong) presumptive moral duty to treat as authoritative and enduring the positive law of a reasonably just legal system.[225] A practically reasonable interpreter therefore seeks to understand and respect the reasoned choices the framers made when enacting the positive law that constitutes the frame of government.

The first order of business, then, is specifying just what the positive law of our Constitution is—what exactly an interpreter seeks to understand and respect. We begin with the original law of the Constitution as a function of the text and interpretive conventions appropriate for the kind of stipulated positive law that the Constitution is. We then turn to more detailed consideration of the legal obligation to liquidate and settle the legal meaning of the Constitution in order to achieve legal fixation that endures over time.

1. Text as Law, and Law as a Function of Text

The text of the Constitution is law, but the law of the Constitution is more than the text. It is a function of the text together with other law, as well as all other conventions through which the text of a written legal instrument of this sort would have communicated legal meaning at the time of enactment. As with any other enacted law, the law of the Constitution—its rules, directives, and other principles—is not mere statements found in its text, but the *propositions* which are true, as a matter of law, by reason (a) of the authoritative utterance of those statements taken with (b) the bearing on those utterances and statements (and on the propositions those utterances were intended to make valid law) of

222. *See supra* Section II.A.1.
223. *See supra* Section II.A.2.
224. *See supra* Section II.A.2.
225. *See supra* Section II.A.3.

the legal system's other, already valid propositions.[226]

The Constitution's ratification originated a new government for the United States—in fact, a new *kind* of government.[227] Rather than inaugurating a legal Year Zero for all purposes, however, the Constitution emerged out of, and maintained substantial elements of continuity with, an existing legal system.[228] The Constitution introduced significant changes, such that straightforward application of preexisting legal backdrops will not always be possible. Yet that preexisting legal system provides the coherence-giving context for understanding the Constitution as foundational for the new law and the new institutions of the government it created. The Constitution, moreover, was written in a particular language, such that its legal meaning, which is a particular kind of conventional meaning, also depended on the linguistic conventions of the time.

2. How to Interpret a Legal Instrument Like Our Constitution

Because the original law of the written Constitution was a function of the text together with interpretive conventions (both legal and linguistic), the content of this original law depended on what those conventions were. And immediately we run into a difficulty: which conventions made the original law of the Constitution what it was?

As Caleb Nelson has documented, there were some conventions that all seeking the original law of the Constitution would use, whereas others were the subject of legal disagreement.[229] The law provided different sets of interpretive conventions for different kinds of legal instruments.[230] For instance, statutes were to be interpreted one way, contracts another, and treaties yet another way.

So what kind of legal instrument was the Constitution? "[T]he world had never before encountered a written constitution for a federal system based on

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226. *See* 4 JOHN FINNIS, PHILOSOPHY OF LAW: COLLECTED ESSAYS 18–19 (2011).

227. *See* Kurt T. Lash, *Originalism All The Way Down?*, 30 CONST. COMMENT. 149, 161 (2015) (book review) (arguing that the Constitution "brought forth something new under the sun").

228. The Constitution contrasts with the Napoleonic Code, which purported to abolish all preexisting law. *See* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 14 (2d ed. 1977) (describing this aspiration); Sachs, *supra* note 56, at 1821 ("[T]he Founders didn't declare a legal Year Zero, nor did they repeal and replace all prior law. Compare this to the work of the codifiers in post-Revolution France: the Code Napoleon effected a general abrogation of ancient laws, in which any rules remaining outside the Code would provide no basis for overturning a judgment." (internal citations omitted)). The signature page of the Constitution as an instrument proposed by the constitutional convention, by contrast, not only includes conventional dating from the birth of Christ but also from the Declaration of Independence. *See* U.S. CONST. attestation cl. ("Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth.").

229. Nelson, *supra* note 116, at 555 ("[C]ertain kinds of linguistic and legal conventions unquestionably bear on what all originalists think of as the Constitution's 'original meaning.' Even within that core, though, members of the founding generation could reasonably disagree about exactly which interpretive conventions the Constitution triggered.").

230. *Id.*

the American concept of popular sovereignty."[231] Even if an off-the-rack set of interpretive conventions were part of the original law of the Constitution, which set was it? And why assume that just one set should be used? Did different parts of the Constitution call for different interpretive conventions? Was it necessary to develop new conventions? "Could special canons of construction, not applicable to any ordinary legal documents, be derived from the Constitution's unique context and purpose? If so, what were those canons? The answers to these questions were far from clear, and members of the founding generation expressed a variety of different views."[232]

Deep disagreement over what belonged in the set of interpretive conventions for the Constitution directly related to deep disagreement over the nature of the Constitution as a legal instrument. But in this direct relationship there was, and still should be, an important area of agreement: how to identify the positive law of the Constitution depends on what kind of legal instrument the Constitution is.

Agreement on this relationship explains why, for example, Joseph Story's *Commentaries on the Constitution* are organized as they are.[233] The rules for interpretation that he set forth were founded on the concept of the Constitution as a legal instrument that he defended.

Story's *Commentaries* begin with a history of the colonies and an account of the revolution and the confederation, before turning to the Constitution of the United States.[234] The first two chapters on the Constitution concern the adoption of the Constitution and objections to it.[235] Story then examines the "[n]ature of the Constitution,—[w]hether a [c]ompact," using his reasoning and conclusions from that portion to explain why the Supreme Court of the United States is the final judge or interpreter in constitutional controversies.[236] Only at this point is Story finally in a position to set forth "[r]ules of [i]nterpretation" of the Constitution.[237] In seeking to explain how to interpret the Constitution as law, Story needed to argue from an account of what kind of law the Constitution is.

Our point here is not to say Story captured and arranged the existing conventions with precision, although he is a central source. Our critique of purely descriptive approaches entails that normative argument must enter the picture, either to sort out conflicting positions or to give reasons for continuing with any coherent practice we find.[238] But Story's *Commentaries* provide more than just credible data points. His approach is emblematic of the kind of argument that can lead to reasoned agreement about interpretive conventions. If,

231. *Id.*; *see also* Lash, *supra* note 227, at 161.
232. Nelson, *supra* note 116, at 556.
233. *See* STORY, *supra* note 203.
234. *Id.* bk. I–III.
235. *Id.* bk. III, ch. 1–2.
236. *Id.* bk. III, ch. 3–4.
237. *Id.* bk. III, ch. 5.
238. *See supra* Section I.B.

as we have argued,[239] the Constitution is the kind of law that is supposed to be fixed and enduring, then it needs to be interpreted using conventions that lead to fixed and enduring law.

As long as disagreement about the nature of the Constitution as a legal instrument persists, a shared understanding of what to argue about in arguing for a particular set of interpretive conventions is not enough to enable identification of a full set of interpretive conventions for the Constitution. There will be no normative lens through which to filter conflicts between interpretive conventions. But insofar as there is agreement on some of this legal instrument's legal qualities, there can be agreement on some of the interpretive conventions appropriate to it.

3. Fidelity to Original Law, Lawful Liquidation, and Interpretive Conventions Revisited

A Constitution is only as fixed and enduring as the legal conventions and mechanisms sustaining it. Insofar as the original law of the Constitution resolves legal questions within its domain, a legal convention requiring adherence to that meaning until lawfully changed suffices to make the law fixed and enduring.[240] But insofar as the original law of the Constitution underdetermines legal questions within its domain, the system needs legal conventions for rendering the law sufficiently determinate.

The framers' law of the written Constitution provided one such device, namely the idea of "liquidation." Liquidation is a process by which judges or other government officials settle practically underdeterminate new law by adopting one permissible interpretation rather than another.[241] A lawful liquidation satisfies two conditions. First, the preliquidation law of the Constitution must be underdetermined; liquidation cannot unsettle that which was already established. Second, the postliquidation determination of the law of the Constitution must be within the range of permissible preliquidation underdeterminacy that exists after application of other appropriate interpretive conventions.[242]

A lawful liquidation is a lawful change in the law of the Constitution. Even though liquidation of the Constitution changes the law of the Constitution, such changes are consistent with—indeed, necessitated by—the concept of the Constitution as fixed, authoritative, and enduring until lawfully changed. Once liquidated, a legal meaning that was previously just one possible legal meaning

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239. *See supra* Section II.B.

240. Other features of the legal system, such as *stare decisis*, may require an interpreter to adhere not to the original law, but to an entrenched unauthorized departure from original law. We will discuss that possibility below. *See infra* Section III.B.2.

241. *See supra* note 166.

242. *Cf.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5–8 (2001) (analogizing between *Chevron*'s recognition of reasonable uncertainty in statutory provisions and the interpretation of unclear constitutional text).

among many becomes fixed in the law of the Constitution.[243]

Constitutional liquidation is not a matter of conceptual necessity or a logical entailment of any written constitution. One could imagine a constitutional regime in which all indeterminacies remain zones of unfixed legal discretion, open to revision in the way modern administrative law considers interpretive gaps in statutory regimes or the way some common law courts consider precedent. That kind of constitutional regime might reject liquidation as an interpretive convention.[244]

But our enacted constitution, with its particular features of fixity and endurance, favors liquidation. Lawful liquidation improves the Constitution as the kind of law that it is by authoritatively settling something previously unsettled. Liquidation is continuous with the kind of constitution we have as a matter of original law *and* for reasons the framers had for conceiving of our Constitution as that kind of legal instrument in the first place. Just as an original constitution framer makes choices inspired by, but largely not determined by, the natural law, a subsequent, liquidating interpreter works within the confines of settled constitutional law to make more determinate the matters that legal frame raises but does not settle. And just as a polity can only reap the moral benefits of that posited constitutional framework when it is enduring, so must lawful liquidations be as enduring as the original, determinate law.

The same moral benefits of law's positivity that animated the enactment of our Constitution as a whole point toward permanent legal fixation of unresolved parts. The framers' law of the written Constitution included the idea of liquidation. Accordingly, to the extent liquidation was a contested convention, a practically reasonable interpreter of the Constitution and its historical context should come down in favor of lawful liquidation. And, to the extent that liquidation was an uncontroversial matter at the Founding, liquidation's coherence with our Constitution and its underlying justifications gives the practically reasonable interpreter strong reasons to continue to respect the practice and its addition to our original constitutional law.

Admitting liquidation into the interpretive fold does more than provide for settlement with respect to uncertain provisions of the Constitution. Liquidation offers defenders of original-law originalism means for resolving uncertainty about interpretive conventions. As Nelson has noted, liquidation "can be applied to disagreements about interpretive conventions no less than to disagreements about the meaning of individual words."[245] As the law unfolded, this process of liquidation did take place. By the 1830s, the Supreme Court had largely arrived

243. Here the analogy to *Chevron*, as traditionally conceived, *see supra* note 242 and accompanying text, breaks down. Whereas an agency may have discretion to later reverse its resolution of statutory uncertainty, *see, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009), fixation of constitutional law through liquidation is enduring.

244. That said, given the moral benefits of positive law, we would counsel interpreters to embrace liquidation in the gaps to the extent the constitutional settlement permits it.

245. Nelson, *supra* note 116, at 556.

at a set of interpretive conventions, which can be seen in Story's *Commentaries*.[246] But our constitutional culture had not fully settled on a single complete set of interpretive conventions. After all, compact theory was alive and well until the end of the Civil War.[247]

Yet we should not underestimate the amount of agreement, either. "From the time of the founding throughout the nineteenth century, there was a consensus in court opinions and legal treatises that judges were obligated to interpret the Constitution on the basis of the original meaning of constitutional provisions."[248] The interpretive conventions that became applicable to the Constitution were more similar to those applicable to a statute than to a treaty or a contract or a will, but also included some that were distinctive to the Constitution. And although the Marshall Court expounded the Constitution in a manner that provided for greater federal power than compact theory would have allowed, everyone agreed that the Constitution should be interpreted based on its original meaning as "a discrete act of lawmaking by discernible lawmakers."[249]

Nelson argues that a commitment to originalism does not entail a commitment to liquidation; whether an originalist should understand liquidation as legally required depends on one's normative reasons for being an originalist.[250] Still, this framing oversimplifies matters by describing liquidation as a technique that one adopts for normative reasons external to the law. To be sure, our adherence to the Constitution's original law flows from the classical natural law tradition's emphasis on positive law's moral benefits. That commitment, however, requires us to honor the kind of constitution the framers and ratifiers enacted. Favoring interpretive conventions that resolve and fix uncertainty is internal to the logic of a document that (reasonably) was framed to be fixed and durable. In that respect, all of the interpretive conventions that make the Constitution the kind of stipulated positive law that it was are themselves legally required.[251] Liquidation is one such convention.

4. Original Law, Liquidated Law, and the Rest of Constitutional Law

What about the rest of constitutional law? Our analysis so far identifies two categories of law that comprise the law of the Constitution: original law and liquidated law. The original law of the written Constitution is a function of the text together with interpretive conventions, both legal and linguistic. Liquidated law is the authoritative resolution of questions within the scope of the original law, but not clearly answered by that same law. A lawful liquidation selects an

246. *See* STORY, *supra* note 204.

247. "Compact theory" refers to the collection of ideas surrounding the understanding of the Constitution as a compact with the states as the contracting parties.

248. Gillman, *supra* note 7, at 192.

249. *Id.* at 192–93.

250. Nelson, *supra* note 116, at 549–50.

251. Just as, for example, the interpretive convention of construing a contract to effect the intention of the parties is legally required in contract law as we understand it.

answer within the range of interpretive reasonableness and, once fixed, is as entrenched as the original law of our written Constitution.

We can consider original law and liquidated law as the "Law of the Constitution." But the Law of the Constitution does not exhaust constitutional law. There is a category of legal propositions that are not directly derived from the Law of the Constitution which, for lack of a better term, we will refer to as "Other Constitutional Law." This category has three components. First, there are *authorized developments* of doctrine that are consistent with the fixed Law of the Constitution, even though they are not required by or derived directly from its legal content. Second, there are *unauthorized developments* of doctrine, which seek to implement the Law of the Constitution as the type of fixed, positive law it is, but happen to get that law wrong. Third, and most worrisome, are *unauthorized departures*. These are legal propositions that arise from, and seek to instantiate, an understanding of the Constitution as a different kind of legal instrument than the stipulated positive law that it is.

We examine these categories below, but the following figure clarifies our explanatory scheme.

Figure 1: Constitutional Law

Constitutional Law				
The Law of the Constitution		Other Constitutional Law		
Text and Conventions	Liquidated Law	Authorized Developments	Unauthorized Developments	Unauthorized Departures

Depending on one's other commitments, this category of Other Constitutional Law may include constitutional constructions (as described by Keith Whittington,[252] Randy Barnett,[253] Lawrence Solum,[254] and others), implementing doctrines (as described by Richard Fallon[255]), decision rules (as described by Mitch Berman[256]), and other categories of doctrine for enforcing the Constitution as law. Unless one is a thoroughgoing judicial supremacist, according to which the Law of the Constitution just is whatever the Supreme Court says it is, there will always be some divergence between Other Constitutional Law and the Law of the Constitution.

Without diving deeply into the details of any particular doctrine, it is not possible to determine which propositions in this Other category fall into which

252. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

253. *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. PUB. POL'Y 65 (2011).

254. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

255. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

256. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

slot. That said, examples of propositions of constitutional law that are not the Law of the Constitution are: the rule that content-based speech restrictions are generally subject to strict scrutiny; rational basis review of economic regulation; intermediate scrutiny for gender classifications; the undue burden test for abortion restrictions; the rule that allows for aggregating effects of economic regulation in review of legislation purportedly authorized by the Commerce Clause and Necessary and Proper Clause; the *Dole* test for conditional spending legislation; and so on.

All of these doctrines are judge-made law for implementing the Constitution.[257] Yet it is difficult to understand any of them as interpretations of the constitutional text even though they are traceable in some way to textual interpretation. In this respect, authorized implementing doctrines are different from liquidated law.[258]

A full account of authorized implementing doctrines rests on an understanding of "[t]he judicial power of the United States"[259] vested in the federal judiciary and a theory of constitutional adjudication. From the perspective of the classical natural law tradition, the manner of justifying a theory of constitutional adjudication is similar to the one that we use for justifying the Law of the Constitution. But the analysis pertains not only to the text of the Constitution positing the "judicial power of the United States," but also to jurisdictional grants and all other positive law that defines and bounds the judicial power.

We do not offer here a theory of constitutional adjudication. But our account of the Law of the Constitution and the classical natural law foundations for positive-law originalism has important implications for such a theory. The most obvious are those that follow from distinguishing between the Law of the Constitution and the rest of constitutional law. The moral and legal authority not only of the outputs of constitutional adjudication, but also of the doctrinal inputs of much constitutional law require distinct and additional justification from that offered for the Law of the Constitution.

5. Unauthorized Departures from the Law of the Constitution

Although we do not here offer a full account of what justifies authorized developments of doctrine, our account of the Law of the Constitution can identify at least some unauthorized developments and departures. That is to say, our account of the Law of the Constitution leaves much of constitutional law unjustified on its own, but it opens up into justifications for much of the rest of

257. *See* FALLON, *supra* note 255, at ix (focusing "attention on the role of Supreme Court Justices as practical lawyers, charged with implementing the Constitution" by "developing . . . workable doctrinal structure[s]" that give legal effect to constitutional meaning but are not fully determined by it).

258. *Cf., e.g.*, Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39 (2010) (distinguishing legal interpretation from the construction of decision rules).

259. U.S. CONST. art. III, § 1.

today's constitutional law and condemns other aspects of today's constitutional law as unjustified.

The aspects of today's constitutional law our account most strongly condemns are unauthorized departures—legal propositions justified by appeal to the Constitution as a different kind of law than the stipulated positive-law legal instrument that it is. This category of unauthorized departures includes legal propositions following from interpretive approaches that treat the Constitution as customary positive law. The law emerging from custom and the law emerging from an enactment are both forms of positive law, but the interpretive conventions appropriate to deciding cases on the basis of each are different. Treating positive law that renders constitutional questions determinate via stipulation as an evolving matter of judicial custom unmoors the resulting law from the jurisprudential framework within which it was justified.

It is important to identify this legal category of unauthorized departures as resting on a changed master concept of the Constitution as law. For some years now, our culture of constitutional interpretation has included many who believe (and act) as if "there's no realistic alternative to a living constitution."[260] Professor David Strauss, a leading academic proponent of "the living Constitution," explicitly contrasts its purported "common law" workings with a system built "on an authoritative, foundational, quasi-sacred text like the Constitution."[261] For the common law living constitutionalist, "provisions of the text of the Constitution are, to a first approximation, treated in more or less the same way as precedents in a common law system."[262] The "characteristic" move of constitutional adjudication in such a system is "extending precedent in the direction that seems to make more sense as a matter of morality or good policy," even when this means that textual provisions only "function[] as sources of inspiration."[263]

A stopped clock is right twice a day, and constitutional reasoning premised on a defective concept of the Constitution as law may yield legal propositions that happen to square with the Law of the Constitution. One cannot refute a conclusion of constitutional reasoning simply by identifying its link with a defective master concept of the Constitution. But unauthorized departures should put the practically reasonable interpreter on high alert. Unless and until justified by reference to the Law of the Constitution, doctrines of constitutional law that rest on unauthorized departures do not possess the same moral or legal authority as doctrines developed on a foundation of the Constitution as fixed, authoritative, stipulated positive law. Pedigree matters.

It can sometimes be difficult in practice to distinguish between unauthorized departures and authorized developments of doctrine. It is the rare federal judge,

260. DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010).

261. *Id.* at 3.

262. David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4–5 (2015).

263. *Id.* at 6–7.

after all, who asserts that "[t]he notion that the twenty-first century can be ruled by documents authored in the eighteenth and mid-nineteenth centuries is nonsense."[264] That "nonsense" is our law. And judicial opinions almost always keep up appearances.

Even so, it is not difficult to recognize that much constitutional law today is developed without regard for whether it is authorized by the Law of the Constitution. "In the modal Supreme Court constitutional decision," Strauss notes, "the text of the Constitution plays no real role at all."[265] The text of the Constitution serves a "ceremonial role, bows out, and the serious analysis focuses on the precedents."[266] Rather than treat the Constitution as stipulated positive law and apply the interpretive conventions appropriate to the kind of legal instrument that the Constitution is, judges and other officials rely on "precedents and policy arguments to reach a conclusion that may or may not be the most straightforward reading of the text."[267]

In this context, the distinction between unauthorized departures and authorized developments of doctrine serves two important functions even when the line between the two categories is unclear. One is to explain why the "ceremonial role" of the constitutional text persists. Judges and others who claim to speak for the Constitution must go through the ceremony of purporting to interpret the constitutional text to at least preserve the appearance of authorization by the Law of the Constitution.

A second function of this distinction is prescriptive. Observers can often distinguish between opinions that "rea[d] the text in the single best way" and those that "read the text in a way that accommodate[s] [a particular] result."[268] The distinction between authorized developments and unauthorized departures explains why the best reading of the text beats—or should beat—the result-accommodating reading. The best reading of the text is that which supplies the Law of the Constitution; conformity with the Law of the Constitution is what authorizes constitutional law.

Unauthorized departures are not the only way that constitutional law can go wrong. There are unauthorized developments—doctrines that start from the premise that the Constitution is fixed, authoritative, stipulated positive law, but just get the law wrong. We focus on unauthorized departures here, though, because a defective master concept of our Constitution as customary positive law influences much of today's constitutional law. That influence is a key reason why our taxonomy of constitutional law matters. It provides an orientation for choosing among internal points of view by highlighting the relationship

264. Richard A. Posner, *Eighteen Years On: A Re-Review*, 125 YALE L.J. 533, 541 (2015) (reviewing WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)).

265. Strauss, *supra* note 262, at 8.

266. *Id.*

267. *Id.* at 10.

268. *Id.* at 11.

between the *what* of the Constitution and the *how* of its interpretation and implementation. The practically reasonable interpreter should adopt the internal point of view appropriate to the kind of legal instrument that the Constitution is.

B. CONSTITUTIONAL CONTINUITY AND ENDURING ORIGINALISM

Our analysis so far has focused on originalism as a theory of law rather than as a theory of legal epistemology or adjudication. By setting the Constitution's positivity on firmer foundations than casual, nontechnical positivism, our account explains how the Law of the Constitution endures even while it undergoes some lawful changes. This is a distinctive contribution of our explication of the classical natural law foundations of our positive-law Constitution.

The prior Section explained that *how* one understands the positive law of the Constitution depends on *what kind* of positive law the Constitution is. This Section builds on that insight by explaining the relationship between our account of the Constitution's positivity and the continuity of our constitutional order. This explanation provides an anchor against the drift that threatens to carry away advances made by other theorists of the positive turn in originalism. And it grounds an explanation for the persistence of other originalisms as well.

The best explanation for the endurance of originalism in practice, we contend, is the endurance of the idea of the written Constitution as fixed, stipulated positive law. Some version of constitutional originalism will always be attractive for interpreters as long as the Constitution is widely enough understood as the kind of legal instrument that it was designed to be—superior law authoritatively fixed until lawfully changed. This recognition is a second payoff of understanding the classical natural law foundations of our positive-law Constitution.

1. Enduring Original Law

The distinction between the Law of the Constitution, unauthorized departures, and authorized developments of doctrine secures the relative permanency of the Law of the Constitution. To maintain continuity with the original law of the Constitution, lawful changes in the Law of the Constitution must be consistent with fixed, authoritative, and enduring law, like the original Law of the Constitution was designed to be.

As long as this conception of the Law of the Constitution endures, legal actors have available a potentially winning argument based on it. This argument could take the form of restoring the Law of the Constitution after there has been an unauthorized departure. Or it could take the form of bringing an authorized development of doctrine into closer alignment with the Law of the Constitution. In one sense, both kinds of arguments are for law reform. But in another sense, they are arguments for making constitutional practice better align with what the law already is.

To grasp this point, consider an "easy case" of getting the Constitution wrong. The Constitution requires the President to be at least thirty-five years

old.[269] To simplify, let us assume that there are just two possible legal meanings of this provision. One is "chronological age": Anybody who has been around fewer than thirty-five years since birth is ineligible to be President. The other is "mental age": Anyone with the maturity of an average thirty-five-year-old is eligible to be President despite a chronological age lower than thirty-five.[270] Let us further suppose that the correct legal meaning fixed as an original matter is "chronological age." That is the law.

Now suppose the Supreme Court interprets the age requirement to mean "mental age" instead of "chronological age." What's the law then? Can those made newly eligible by this ruling legally be President?

"Mental age" is the law if even erroneous interpretations of the Constitution give rise to law of a certain sort. And they do, although the precise nature of this law is a matter of some dispute.[271] According to the standard view of vertical *stare decisis*, Supreme Court decisions on questions of federal law bind lower federal courts and state courts deciding questions of federal law.[272] Like it or not, then, these courts are stuck with "mental age" until the Supreme Court changes its mind. Supreme Court decisions also carry some legal weight through the doctrine of horizontal *stare decisis*. Again, the way this works is a matter of some dispute.[273] But it is enough for present purposes that a Supreme Court decision adopting "mental age" gives rise to law of a certain sort. The Supreme Court can alter that law by a later decision. But unless and until the Supreme Court changes course, those newly eligible under the "mental age" approach can legally be President as far as the federal courts are concerned.

The example is not done yet, though. For "chronological age" is *also* the law even while "mental age" is the law that will be applied in federal courts. The fixed meaning of the written Constitution remains law of a certain kind even if

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269. U.S. CONST. art. II, § 1. Theorists familiar with the literature attacking the very idea of the so-called "easy case of the under-aged President" may worry, "Here we go again." *See, e.g.*, Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1990). But have no fear. Nothing in our analysis takes issue with Michael Moore's conclusion that "there are no easy applications of rules to facts, and hence, no easy cases." Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 292 (1981). Our analysis is only about identification of the law.

270. More details are unimportant. Whatever the precise meaning, it is enough for the example that the set of eligible people under "mental age" has at least some different members than the set of eligible people under "chronological age."

271. *See, e.g.*, John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 505 (2000) (describing the law created by precedent as a species of federal common law).

272. *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824–25 (1994); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 203 (2014).

273. *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843 (2013) (discussing the relationship between precedent and theories of constitutional interpretation).

the Supreme Court ignores it or casts it aside. This persistence as positive law of a sort may seem counterintuitive, but it is real. If the Supreme Court were to overrule its "mental age" case and go back to "chronological age," one could accurately speak of the Court as having returned the law to what the law was all along. The decision bringing "chronological age" back to the federal courts brought the case law back in line with the enacted law.[274]

To say that "mental age" and "chronological age" are *both* the law when one is the law in constitutional practice and the other is the law in the Constitution itself is not to indulge a flight from constitutional positivity. When Supreme Court case law deviates from the enacted law of the written Constitution, there are two kinds of positive law in play. The enacted law of the written Constitution remains positive law of a sort even when dormant as a matter of Supreme Court case law.

True, the enacted law of the written Constitution is not "the law" insofar as it deviates from Supreme Court case law . . . if by "the law" we mean just the law that should be applied in courts until the Supreme Court changes its tune. But why use "the law" in such a narrow sense? This way of thinking is certainly useful in some contexts and for some purposes—maybe even most of the time and for most purposes. But there is more constitutional law in our constitutional universe than in the U.S. Reports. This remains true even when two propositions of law claim to occupy the same constitutional space. Indeed, our law not only includes conceptual resources for recognizing the coexistence of inconsistent constitutional rules, but it also has a rule of formal priority: the Constitution is superior law to what the Supreme Court (or anyone else, for that matter) says about the Constitution.[275]

By analogy to property law, the enacted law of the written Constitution has superior title even when the case law of the Supreme Court is in possession. This is not to say that enacted law always trumps case law in formulating rules of decision. Formal priority does not always dictate preeminence in practice. Just as a party with superior title cannot always regain possession, the enacted law does not always fully occupy the case law. But a mismatch between superior title and actual possession is not reason to collapse the concepts into each other. Neither does our constitutional order collapse the Constitution into what the Supreme Court (or Franklin D. Roosevelt, or any other individual or institution) says. There is no adverse possession in constitutional law.

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274. In contrast, if "mental age" had first become law via textual amendment, and then a later textual amendment changed it back to "chronological age," we could not accurately describe the restorative amendment as one that brought back what the law really was all along. That would be crazy talk.

275. U.S. CONST. art. VI, cl. 2 ("*This Constitution* . . . shall be the supreme Law of the Land . . . ." (emphasis added)).

2. Constitutional Continuity While Restoring the Law of the Constitution

Constitutional law today includes unauthorized departures from the Law of the Constitution and regularly develops based on considerations other than the law of the written Constitution. But our constitutional order maintains fundamental continuity as long as there remains some fidelity to the concept of the Constitution as stipulated, fixed positive law that interpreters should approach with interpretive conventions proper to such a document.

This foundation for constitutional continuity sets our account apart from Baude's positive-law argument for originalism. Baude grounds continuity in official practices of acceptance, but without explaining his choice among internal points of view. Consider, for example, the *Noel Canning* decision.[276] Even though parts of Justice Breyer's opinion "read like a contentious victory of pragmatism over originalism," Baude observes that the opinion only emphasized practice after finding the text to be "ambiguous."[277] In this important respect, Baude explains, the *Noel Canning* majority refused to adopt the litigating position advanced by the Obama Administration's Solicitor General, who argued that longstanding practice can prevail even over clear text.[278] This Administration view, Baude says, apparently is not the law.[279]

But what if a majority of the Supreme Court had not only acted as if longstanding practice could be decisive, but also explicitly said in *Noel Canning* that longstanding practice can prevail over clear text to the contrary? Baude's casual positivism lacks the conceptual resources to label such a departure unauthorized as long as the departure is officially accepted. If pragmatism explicitly triumphs over originalism at the Supreme Court, then pragmatism is the law. In our view, however, the internal point of view of even a Court majority that would allow practice to prevail over clear text is defective in comparison with an internal point of view committed to the preservation of the Constitution as the kind of fixed, authoritative, and enduring stipulated positive law that it was designed to be. That is the original central case of the internal point of view for our constitutional order.

The continued availability of this internal point of view grounds the continuity of our constitutional order. This internal point of view enables one to argue that when (and insofar as) the Law of the Constitution is not the law in practice, the Law of the Constitution should be taken off the shelf, returned from exile, substituted in from the sidelines, or whatever you like. That law is still our law in theory, even if not in practice, and the jurisprudential role of a fixed, authoritative, enduring, stipulated positive-law Constitution in our legal system authorizes an interpreter to say "so much the worse for practice."[280]

276. Baude, *supra* note 4, at 2372–74 (citing NLRB v. Noel Canning, 134 S. Ct. 2550 (2014)).
277. *Id.* at 2372–73.
278. *Id.* at 2374.
279. *Id.*
280. Sachs, *supra* note 16, at 2254.

Sachs has explained how shared higher order legal principles can overcome erroneous applications of those shared principles in practice, such that originalism can be the law even when it is in exile.[281] But Sachs also ultimately rests the continued availability of originalism in our law on "facts about our society today."[282] He argues that "if it *is* true, the claim that we adhere to the Founders' law is the best reason to be an originalist—and, if it's false, the best reason not to."[283]

We agree that the case for originalism is contingent on continued adherence to the concept of our Constitution to which it is attached. But that continued adherence depends on choice and cannot be resolved by reference to social facts alone. In our constitutional order, a fixed, authoritative, enduring, stipulated positive-law Constitution is not the only official story on offer. The question remains whether the practically reasonable interpreter today should continue to adhere to the original central case of the internal point of view for our constitutional order.

C. THE PROBLEM OF ENDURING ORIGINAL LAW

Thus far we have provided an account of what the Law of the Constitution is and how it relates to our constitutional law. The taxonomy we have offered provides a powerful, normatively charged, legally grounded account of our constitutional law. Although this taxonomy provides a hierarchy of law that is helpful for resolving particular questions of constitutional law as they present themselves today, it does not provide an algorithm. Nor do we proceed to offer one here.

Some may view this as a cop-out. It is not. Consider a powerful objection to our account based along the following lines: "Your account of constitutional law is interesting, and it might even be persuasive if we were living in the 1790s. But the ship of state has sailed and we've been out to sea for so long that the Law of the Constitution cannot be our navigation chart any more. Everyone knows this, including the Justices of the Supreme Court. That is why they, and we, accept the reality of constitutional change outside of Article V's amendment process. You should too."

To answer this challenge based on acceptance of change over time, we need to put aside enduring originalism as a theory of what our constitutional law is (for better or worse) and focus instead on enduring originalism as a superior theory for identifying valid, controlling, and fully binding constitutional law today. Should the practically reasonable interpreter of our Constitution endure as an original-law originalist today? That is a hard question, and we begin by rejecting two easy answers.

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281. *See id.* at 2256.
282. Sachs, *supra* note 1, at 829.
283. *Id.* at 822.

The first easy answer is: "Yes. The practically reasonable interpreter should follow the law. Because the Law of the Constitution is the original law of the Constitution plus any lawful changes since then, the way to identify the law is to be an original-law originalist."

Unfortunately, it is not that easy. Today there is more constitutional law than the original law of the Constitution plus any subsequent lawful changes. Consider nonoriginalist precedent. This precedent, at least on the conventional account that we do not question here, binds lower court judges, is a permissible source of law for Supreme Court Justices, and is a framework for everyone else to order their affairs. This nonoriginalist constitutional law is not a lawful change to the Law of the Constitution, but it is law nonetheless. When the Law of the Constitution and the law in nonoriginalist precedent are *both* law, the practically reasonable interpreter whose only guidance is "follow the law" will be at a loss.

Often, however, there is even more law to consider and that law frequently points toward nonoriginalist precedent. *Stare decisis* principles, the law of remedies, and preclusion doctrine are all part of our law. And this law can require or at least make it more practically reasonable to follow bad constitutional law instead of good. The effect varies among practically reasonable interpreters. A lower court judge is more constrained than a Supreme Court Justice. A government official subject to an almost immediate injunction if she flouts an erroneous Supreme Court precedent is more constrained than the author of a law review article that criticizes that precedent. And so on.

To the question of whether to endure as an original-law originalist, then, the next easy answer is: "No. Just be a pragmatic conventionalist. Follow whatever the law happens to be in a nontechnical, casual positivist sense. When this points in different directions, do whatever makes the most sense, all things considered. Do not be seduced by cosmic constitutional theory."

Without further specification, however, this is no counsel at all. To know "what makes the most sense, all things considered," one needs an account of what our constitutional law is and what makes that law the best it can be. And on the best account, there very well may be no single best choice in "hard cases." If that is the case, then any theory purporting to provide a method for getting the one right answer is wrong.

Given the variety and complexity of our law, the real question facing the practically reasonable interpreter who recognizes original-law originalism as a way of identifying the law is not whether to follow original law plus any lawful changes, but how and when. Whatever original-law originalism picks out as law is law, but it is not the only law. Because the output of original-law originalism is law, it may be available for adoption as the law to govern a particular case. Whether it is depends on what other law may be on point.

Even though our defense of enduring original-law-ism does not provide granular guidance in particular cases, the perspective it offers is theoretically valuable. And the decision whether to adopt that perspective is practically

significant. Consider by analogy a natural law argument against the American Revolution. One could make the case that, given the positive goods that a reasonably just government offers, violent rebellion against the British Crown was practically unreasonable.[284] But that interesting and arguably correct argument became beside the point once the new settlement was conclusively established. You can reject the nostrum that one must break eggs to make omelets while still concluding that sometimes eggs, once broken, cannot be unscrambled. Similarly, one could argue that even if the departure from original-law originalism was practically unreasonable, it is our settlement now. And the moral benefits of positive law requires us, as natural lawyers, to defend that reasonably just, if imperfect, Constitution.

But while our constitutional order roils with conflicting interpretive currents, it has not yet reached a sea change. Sophisticated theorists of the living Constitution and of moral readings of the Constitution are correct to identify ways in which the constitutional order has fundamentally transformed. And they are correct that these transformations are discontinuities from the original-law originalism so prevalent in the first century of our constitutional order. But the last time scholars tried to write originalism's obituary, it took on new life. The Court in *United States v. Lopez*[285] and *National Federation of Independent Business v. Sebelius*[286] brought the limits of the Commerce Clause closer to the Constitution's original law without overruling a single case. Originalist readings of the Second Amendment, Confrontation Clause, and the Jury Clause claim fidelity to the original law, even if that meant modifying doctrine.[287]

Originalism—understood as fidelity to the Constitution as stipulated positive law—is not yet dead. It is not as ascendant as advocates of the positive turn claim, but its legal force is nonetheless real. Accordingly, the interpretive revolution that seeks to depart from the understanding of the Constitution as stipulated positive law is not complete. This contested state of affairs still offers a live choice between original-law-ism and living constitutionalism. Unlike the case with 1776 Revolution, it is not idle to argue the Tory side. But, like the case with the 1776 Revolution, ordinary legal argument can only press the case for positive constitutional continuity so far.

At the risk of being tarred and feathered, we maintain that the practically reasonable legal interpreter should hold onto the stipulated positive law the Constitution introduced into our system, except as changed by means that same law provided. The burden to justify departing from settled, positive constitutional law is a heavy one because of the moral benefits of positive law. And we are not convinced that the original law posited at the time of the Founding is so

284. *Cf.* John Keown, *America's War for Independence: Just or Unjust?*, 6 J. CATH. SOC. THOUGHT 277 (2009) (unjust).

285. 514 U.S. 549 (1995).

286. 132 S. Ct. 2566 (2012).

287. *See* District of Columbia v. Heller, 554 U.S. 570 (2008); Crawford v. Washington, 541 U.S. 36 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

unreasonable as to merit noncompliance.[288]

The legal alternative to original-law-ism is not no-law-ism. There will continue to be constitutional law without enduring original-law-ism, primarily in the form of judicial decisions. These decisions will in some sense be inspired by the Constitution and its "values," and will be responsive to contemporary needs and values. The model of the "living constitution" authorizes ongoing, usually incremental, judicial constitutional lawmaking and reframing. But in framing constitutional rules and structures, as we've argued, there is frequently no geometrically correct answer from the perspective of first-order political morality. So if there is to be constitutional *law*, as opposed to an ongoing, uncertain, and often cacophonous judicial seminar on constitutional structure and individual rights, subsequent interpreters will have to treat *those* decisions as settled. One substitutes original-law-ism for subsequent-law-ism.

Even if you are not going to be originalist about the original Constitution, you end up being an originalist about *something*—here, subsequent decisions developing Constitution-inspired common law. A moment's reflection on the general dissatisfaction with the Court's unstable, unclear, and sometimes incoherent constitutional doctrine points to the challenges of promulgating a constitution primarily through adjudication. The wide range of governing arrangements that reasonable interpreters and framers can and do disagree on, the multiple modalities of interpretation ever on offer, the mysteries of identifying "the law" via the common law method, and the uncertain threshold about when to revisit what law one has found all suggest that the fault for uninspiring constitutional law lies not as much with the Justices' abilities as with the nature of the task to which the Justices have applied them. Adherence to original law, when available, can provide a clearer metric for deciding which interpretations are better than others.

Put another way, the choice between originalism and living constitutionalism is a referendum on the framers' and ratifiers' (codified, settled, and reasonable) choice in favor of a written constitution with explicit and implicit closure rules over something more closely resembling the inherited British practice of unwritten constitutionalism. As a first-order matter, the classical natural law tradition's focus on promulgation suggests a preference for fixing constitutional law in canonical, reasoned, and systematic text.[289] Thus, even if it is legitimate to rethink our constitutional order, the practically reasonable (re)framer should hesitate before moving our foundational law further away from the focal case of constitutional law. No posited constitution can resolve all questions, but the impossibility of an ideal type hardly justifies further steps to depart from it.

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288. To be sure, the present interpretive pluralism undermines the benefits of settlement, but allowing *that* form of uncertainty to change the balance loads the dice in favor of those seeking to destabilize continuity.

289. *Cf.* EKINS, *supra* note 7, at 125 ("Public promulgation and canonical formulation [in legislation] make the legal change easier to locate and grasp than that found in unwritten custom or in the best understanding of a line of cases.").

And it is important to be clear about the stakes of abandoning the Constitution as the original law its positors understood it to be. Perhaps, contrary to our argument, we should abandon treating the original Constitution as stipulated positive law and regard it as inspirational material for law that develops through adjudication to meet contemporary needs and values. If so, the official expositors of our new constitutional order need to be as honest about this practical, legal discontinuity as its academic advocates. Such honesty might make it more difficult for our new framers to invoke the original Constitution's settlement—and to cloak themselves in its majestic mantle—while saying a new kind of dynamic constitution *now* resolves vexed disputes about individual rights or the common good. Reflection on the goods of positive law, moreover, demands that advocates of living constitutionalism face up to the *moral* burden of ensuring a clear and durable framework for social coordination and cooperation. Having studied and taught the Court's efforts to develop such a framework outside and beyond the original law, we wish them luck. Or, rather, we wish they would instead devote their energy and ingenuity to identifying and applying whatever original constitutional law there is on such matters.

CONCLUSION

Our original Constitution still matters. This Constitution was made, not born. It is a legal artifact posited by particular people, enacted into law over a particular period, and amended at particular times. Amendments aside, its text has remained unchanged even while the very concept of the Constitution as fixed, authoritative, enduring, stipulated positive law has faced sustained assaults in the past hundred years.

A constitution of customary positive law is different in kind from a constitution of stipulated positive law. Whether one calls this customary constitution a living constitution or something else is unimportant. But if one is to accept that framing, as some of its champions advocate, the biggest problem that opponents should have with living constitutionalism is not that it treats the Constitution as living. The real problem is that living constitutionalism switches the soul of our Constitution from one that approaches immortality to another that dies and is reborn every day. The Constitution is dead, they say; long live the Constitution!

In classical thought that runs from Aristotle through Aquinas, the soul is the form of the body. As its form, the soul animates the body and makes it the kind of thing that it is. Keep the body and switch the soul, and you have a different creature entirely. This soul-swap is what proponents of a living Constitution have been trying to accomplish with the Constitution of the United States of America. For over a century now, living constitutionalists have aimed to infuse the body of the Constitution—its written text—with a new animating principle.

By revealing the relationship between the Constitution's jurisprudential soul and its textual body, we show how this soul-swap transforms the Constitution so

fundamentally as to make it no longer the kind of law that it was at the origin. Maybe the living Constitution is better than the written Constitution; maybe not. But they are different creatures.

There are some who say now, as some have been saying for a generation, that originalism is dead or dying. But originalism is not dead. What looks like originalism dying is better understood as the Constitution losing its soul. Originalism will not die, but will endure, as long the Constitution keeps its soul. And nonoriginalists will have to keep enduring originalism.