Our Principled Constitution

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OUR PRINCIPLED CONSTITUTION

ABSTRACT

Suppose that one of us contends, and the other denies, that transgender persons have constitutional rights to be treated in accord with their gender identity. It appears that we are disagreeing about “what the law is.” And, most probably, we disagree about what the law is on this matter because we disagree about what generally makes it the case that our constitutional law is this rather than that.

Constitutional theory should provide guidance. Theorists should try to explain what gives our constitutional rules the contents that they have, or what makes true constitutional propositions true; they should aim to provide what I will call a “constitutive theory” of constitutional law. It is obvious that we do not all share a constitutive theory. It is less obvious, and strikingly underappreciated, that we have precious few candidates to choose from. Few of our many prescriptive theories regarding how judges should exercise the power of judicial review have straightforward constitutive implications.

This Article presents an original constitutive theory of American constitutional law (and of law generally). It starts by distinguishing two types of constitutional norms: “principles” and “rules.” It then argues: first, that rules are determined by the interaction of principles, which produce rules on the model of force addition; and second, that the principles are “grounded” in mental states, speech-acts, and behaviors of persons who make up the constitutional community, much as rules of fashion or of card games are grounded in behaviors of persons who make up their normative communities. In short: social facts determine constitutional principles, and constitutional principles determine constitutional rules. I call the account “principled positivism.” It is positivist, pluralist, and inescapably dynamic.

Principled positivism maintains that we come to know our constitutional rules by discerning the contents, contours, and weights of our constitutional principles. Accordingly, the Article offers a preliminary and partial inventory of our constitutional principles—principles concerning the legal significance of what the enacted text says and what its authors intended; principles about the force of judicial precedents and of extra-judicial practices; principles of popular sovereignty, the distribution of governing power, and the demands of liberty and equality. It then puts the principles to work, illustrating how they operate in constitutional controversies ranging from same-sex marriage to the scope of Congress’s commerce power.
OUR PRINCIPLED CONSTITUTION

Mitchell N. Berman*
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INTRODUCTION

What do we disagree about when we disagree about constitutional law? Suppose that I think that competent adults have a constitutional right to the personal use and consumption of marijuana for recreational purposes, and you think they don’t. Or you say that Congress has constitutional power to prohibit the taking of endangered wildlife even on private land, and I say that it doesn’t. If surface appearances are to be credited, we are disagreeing about “what the law is,” as Chief Justice Marshall put it.\(^1\) We are agreeing that there is constitutional law, and are disagreeing about some of its contents.

And what explains these disagreements? Sometimes we disagree about what the law is because we disagree about some non-legal fact. We may disagree about what some historical practice was, or about what some persons intended, or about what some court said, or about what justice requires. Perhaps more frequently, though, we disagree about what the

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\(^1\) Marbury v. Madison, 5 U.S. 137, 177 (1803).
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Constitutional law is because we disagree about the legal significance of some non-legal fact. We disagree about whether or how much it matters, legally speaking, that historical practice has been what it was, or that the text’s authors intended what they did, or that a court said what it said, or that some given practice will or won’t promote justice. That is, many of our disagreements about constitutional law, and especially our most heated disagreements, concern what makes it the case that our constitutional rights and duties, power and permissions are what they are. It might seem to follow that a central ambition of constitutional theory—possibly the central ambition—should be to explain what does make it the case. It should be to identify what Ronald Dworkin called “the grounds” of our constitutional law, and to explain how those grounds interact or combine to make it the case, when it is the case, that people have a constitutional right to φ, or that Congress has constitutional power to ψ, and so on.

It will prove convenient to have a term for accounts of a general and theoretical nature that explain how constitutional “norms”—rights, powers, rules, prohibitions, and the like—gain the contents they have. Let’s call any such account a “constitutive theory” of constitutional law. What are the grounds of constitutional norms? What makes out the law? What makes it the case that the law is this rather than that? What are the fundamental determinants of true constitutional norms? How does our constitutional law gain the content that it has? In virtue of what is the law what it is? What are the truthmakers for true legal propositions? These are many different ways of asking what I am taking to be more or less the same question. (They are not all reformulations of the exact same question, just close enough for present purposes.) What I am calling a “constitutive theory” is an attempt to answer it.

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4 Some readers may object that to characterize the type of account or theory we should want as “constitutive” presupposes a controversial cognitivist and realist picture. I acknowledge that the term has those connotations. I use it nonetheless both because I believe that constitutional theorists and scholars overwhelmingly do accept or presuppose cognitive and realist premises about law and legal discourse, and because it is not clear that we have available to us an alternative terminology that would be viewed as entirely neutral among competing metanormative pictures. In any event, let me try to cancel the implication. Whatever talk of “constitutive theory” may suggest or imply, I mean to be as ecumenical as possible at the outset. I hope and expect that the basics of my argument could be congenial to expressivists who substitute a different term—maybe “explanatory”—for “constitutive.”
To a certain ear, all that I have said in the last paragraph may sound like so much mumbo jumbo. From the perspective that I have in mind, the question “What is or determines the constitutional law?” provokes a simple answer: “The constitutional text is the law!” Scholars and theorists of all jurisprudential and ideological stripes have said just this. But it is an incautious statement that, while likely to be harmless in most contexts, will produce confusion if taken literally, for text and law are different types of thing. Roughly: text is an arrangement of signs and symbols, while law is the set of norms—rights, duties, powers, permissions—that a legal system delivers or comprises.

Consider the following hypothetical statutes from separate jurisdictions. One reads “hunting permitted October, November, and December”; the other reads “hunting prohibited January through September.” The texts are plainly different: they share only a word in common. Yet it is at least possible—and, to some people, obvious—that they give rise to identical law. Therefore, text cannot be the same as law. Or consider that legislatures sometimes amend a statute, not to change the law, but to make clearer what the law is. That such a maneuver at least occasionally succeeds establishes again that identical legal norms can correspond to non-identical text.

In short, and strictly speaking, the constitutional text is the law is false. The point is both modest and profound. It is modest in casting no

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7 Those who do think it obvious that the jurisdictions have the same law might be reasoning that (a) the law is what the text says, and (b) the two texts say the same thing. I’ll be arguing later that (a) is too quick. It’s worth flagging now that (b) is too quick too, for the “dictionary meanings” of the texts differ. The first text identifies several months in which hunting is allowed; it says nothing about the other nine months. The second text says that hunting is prohibited during those other nine, but omits mention of the remaining three. So there’s a sense in which the two texts do not “say the same thing.” Of course, there’s also a sense in which they do: each text implies what the other text says, and therefore (let us suppose) they communicate the same thing.” In technical terms, the texts contain different “semantic content” but the same “communicative content.” For now, treat this observation as merely a nit. I’ll pick it back up later when it will have matured into a louse. Infra note 78.
doubt on the commonsensical assumption that, in a legal system that boasts authoritative formally promulgated legal texts (statutes, ordinances, constitutions, etc.) the relationship between such texts and the law will be very close, even intimate. The point is profound, however, in underwriting the demand for a constitutive theory. It is precisely because the constitutional law is not—indeed, cannot be—the constitutional text, that we should find it urgent to understand just what the relationship between constitutional law and constitutional text is.

This Article offers an original constitutive theory of American constitutional law. The account is positivist, pluralist, and “evolutionary,” by which I mean inescapably dynamic. I motivate and introduce the theory, and display its workings, over four parts.

Part I motivates the search for a constitutive theory by reviewing the literature and concluding that we have a surprising dearth of candidates to choose from. Many of the most influential theories in the vicinity—including John Hart Ely’s “representation-reinforcement,” Philip Bobbitt’s “multiple modalities,” and David Strauss’s “common law constitutionalism”—do not even purport to provide constitutive accounts. Instead, they are (as I will call them) “prescriptive” accounts of how judges should (and largely do) exercise the power of judicial review. Other theorists, particularly Dworkin and Justice Antonin Scalia, along with their respective followers, have offered constitutive theories. But each line confronts formidable difficulties. Accordingly, Part I aims to persuade the reader of two claims: first, that one thing contemporary constitutional jurists should want—not the only thing, but one extremely important thing—is a constitutive theory of our constitutional law; and second, that the cupboard is surprisingly bare.

Part II introduces and sketches my original account, what I will call “principled positivism.” The heart of the account is the more-or-less familiar distinction between two kinds of legal norms: “rules” and “principles.” The

8 JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
11 I term these theories “prescriptive,” not (as you might have anticipated) “normative,” because all types of constitutional theory are normative insofar as they concern constitutional law and law is normative by nature. A constitutive theory, after all, aims to explain how constitutional norms are constituted. The prescriptive/constitutive distinction roughly tracks the more familiar jurisprudential distinction between theories of “law” and of “adjudication.” See Mitchell N. Berman & Kevin Toh, On What Distinguishes New Originalism from Old: A Jurisprudential Take, 82 FORDHAM L. REV. 545, 552 (2013).
distinction is only “more or less” familiar because, although the terms are in common usage, and many commentators agree that there is some distinction to be drawn here, the precise nature of that distinction is, at turns, controversial or murky. I’ll put off definitions for later and work for now with examples.

By “principle,” I mean what I think Chief Justice John Marshall meant when expounding in *McCulloch*, on “the great principle” that federal laws “control the constitution and laws of the respective states, and cannot be controlled by them.” Or what the first Justice John Marshall Harlan had in mind when referencing “those principles of civil liberty and constitutional protection which have become established in our system of laws.” I’m thinking of Justice William Brennan’s contention that the “informing principle of [the Fourth and Fifth] Amendments is nothing less than a comprehensive right of personal liberty in the face of governmental intrusion,” and of Chief Justice William Rehnquist’s invocation of “the principles of federalism inherent in the Constitution's division of power between the States and the Federal Government.” As a start, I mean by “principle” what these Justices—associated with varied jurisprudential philosophies and extending across nearly our entire constitutional history—meant by “principle.”

Contrast this batch of constitutional norms: Legally enforced racial segregation in public education is unconstitutional. Congress may abrogate state sovereign immunity when legislating pursuant to its section five enforcement power. Criminal defendants have the right to a speedy and public trial. The state may not compel pregnant women to undergo an abortion. State legislative districts must be equipopulous. Government is obligated to furnish counsel for indigent criminal defendants. They’re all “constitutional rules.”

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12 Complexities are explored in HUMBERTO ÁVILA, THEORY OF LEGAL PRINCIPLES (2007).
14 *Chicago, B& Q.R. Co. v. City of Chicago*, 166 U.S. 226, 240 (1897) (quoting Cooley) (and contrasting the general principles with “the rules that pertain to forms of procedure merely”).
17 I caution that not everything that would be described as a “constitutional rule” by a court or in a hornbook is what I will mean by the term. Consider the canonical tiers of scrutiny in equal protection jurisprudence, or the *Miranda* warnings, or the pre-*Lopez* Commerce Clause doctrine with its heavy rationality deference. All of these rules, and literally countless like
Paradigmatically, rules and principles differ in two respects. First, rules are sufficiently determinate to adequately serve the system’s core conduct-guidance function, whereas principles do not purport to determine action but rather, as Dworkin put it, have a dimension of weight. Second, rules are normatively “derivative”—they usually depend upon what a constitutional provision says or what a court has held—whereas principles are normatively “fundamental.” The normative fundamentality of principles explains Marshall’s likening of his “great principle” to “an axiom.” It also makes sense of Brennan’s observation that principles “inform” the amendments, and Rehnquist’s description of federalism principles as “inherent.”

Those who embrace a distinction between rules and principles often present them as two distinct sets of norms. Dworkin once characterized his debate with Hart as concerning whether principles are part of the law, just like rules, or outside of it. I agree with Dworkin (and so did Hart) that principles and rules are both part of the law. But on my account, rules and principles serve different legal functions. Whereas rules guide, prohibit, or authorize conduct, principles guide conduct only at a remove. Their role is to participate in the determination of the constitutional rules. Thus, principles don’t sit alongside the rules in normative space; they sit underneath the rules (so to speak) bringing them into being by their interaction.

Principles can serve their rule-determination function because legal norms—“principles” and “rules,” alike—are, or can be analogized to, forces. Principles combine to create rules in the same way, then, that forces combine. Their interaction can be modeled as vector addition. So that is how the constitutional rules are constituted: they are constituted by the constitutional principles. And the principles—how are they constituted? Constitutional principles themselves are “grounded in” social and psychological facts—

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18 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ch. 2 (1977).

19 McCulloch, 4 Wheat. 316, 426 (1819).

20 See infra note 124.
facts about what persons who make up the legal community say and do and believe. Principles exist in virtue of being “taken up” in certain ways by certain people.

This is “principled positivism” in a nutshell: legal rules are constituted by the interaction of legal principles, and legal principles are grounded in social facts that make up a complex social practice. Of course, much more must be said about the grounding of principles in social facts and about the interaction of principles conceived as forces. That’s the sketch. Part II elaborates, while situating the account within the broader universe of positivist, pluralist, and evolutionary constitutional theory.

If principled positivism is a sound general jurisprudential account of how legal norms are determined or constituted, then we come to know our constitutional rules by gaining knowledge of our constitutional principles (along with whatever facts the principles make legally relevant). Advert back to an example with which we started: we disagree, or are uncertain about, whether competent adults have a constitutional right to smoke marijuana for recreational purposes or, in other words, whether it’s a rule that some such restrictions on marijuana use are unconstitutional. The answer depends upon the contents and weights of our constitutional principles. So that’s what we must next explore. We do so by attending closely to the principles that judges, other legal and political elites, and “the people” actually invoke, and forswear, when reasoning about constitutional issues.

Our exploration starts in Part III, where I offer up a grab bag of ten principles—more aptly, ten “clusters” or “constellations” of principles—that strike me as reasonable candidates for the sorts of norms that are operating at the ground floor of our constitutional order today. Among the principles I identify are: a principle of authority of the text (what the text says has legal force); a principle of judicial authority (the holdings of Supreme Court opinions have legal force); a principle of historical practice (exercises of power that have proven workable and accepted have legal force); a principle of national regulatory power (the national government has lawful regulatory

21 More generally, as Section II.A. explains, the central features of my account—that rules are determined by principles, and that principles are normatively fundamental and inescapably dynamic—are true not only of legal systems but of many artificial systems of practical normativity. Legal rules are determined by legal principles, etiquette rules are determined by etiquette principles, baseball rules are determined by baseball principles, etc.

22 Suppose that a principle maintains that historical practices matter. For us to know how this principle bears on what our rules are, we need to know what our historical practices have been: those historical facts are made relevant by the legal principle. I’ll often say that principles determine rules, omitting for simplicity the facts that the principles make relevant.
authority sufficient to meet the needs of a nation state in its geopolitical and
global economic circumstances); a principle of human dignity (government
at all levels must respect the inherent equal dignity of each person within its
jurisdiction); and many others.

Part IV shows the account at work. Combining the principles adduced
in Part III with the apparatus introduced in Part II, it analyzes a handful of
actual constitutional controversies across doctrinal domains, involving both
structure and rights. The analyses are intended to be suggestive, not decisive.
At this initial stage of theory presentation, the goal is not to resolve concrete
disputes so much as to bolster the plausibility of principled positivism as a
general constitutive theory of our law, and to illustrate its operation.

The Article covers a lot of ground, and (apologetically) at
commensurate length. I try to situate the reader throughout. As you will
anticipate, the analysis is not of uniform depth. It plumbs more deeply here,
and necessarily skates more thinly there. At bottom, the Article consists of
a proposal motivated by an observation. The observation is that we have a
surprising dearth of promising accounts of what gives our constitutional
norms their contents, or what makes constitutional propositions true. The
proposal takes the form of a roughly drawn picture of our normative
architecture and its associated mechanics that assigns “constitutional
principles”—a ubiquitously invoked but hazily understood norm-type—a
distinct and critical constitutive role to play in the determination of our
constitutional law. It asks: how about if we try looking at things this way?

If we do look at things this way, the case studies offered in Part IV
suggest that we will reach both conservative and liberal conclusions. That is
not incidental. Critics of constitutional theory routinely deride its
practitioners as shills, seeking only “theoretical cover for prescribed and
often partisan results.”23 The scorn is overblown but not baseless. It is
a problem if a theory of constitutional law delivers results that consistently
accord with the theorist’s political preferences or ideological commitments.
The problem is not chiefly one of public relations. It is more fundamental.
We disagree about many constitutional questions, and many of those
disagreements run deep. Unless one “side” to our debates is mired in an utter
sea of confusion, a sound constitutional theory should yield at least some
surprises and disappointments, even to its proponents. Principled positivism

does. That’s a feature, not a bug. Our “principled” constitution is not a “perfect” one.24

I. A VERY BRIEF HISTORY OF AMERICAN CONSTITUTIONAL THEORY

Most of us believe that there is law. One way to put the point is to imagine you were inventorying everything in the universe. That would make for a long list. It would include tangible things like molecules, rocks, trees, you, me, physical copies of the constitutional text, and (for the time being) elephants. It would also include intangible and abstract things, such as Schubert’s Sonata in C minor, roller derby, the tale of Little Red Riding Hood, and the square root of 12. To believe that “there is law” is to believe that legal norms belong on that list. Just as there exist automobiles, there exist laws. Just as there exists my 2003 Honda Odyssey minivan, there exists a legal rule that prohibits raising goats in New York City. Another way of saying nearly the same thing, and employing a bit of philosophical jargon, is that most of us believe that propositions of law (e.g., “a will in this jurisdiction is legally valid only if signed by two witnesses”; “it is legally prohibited to park in front of a fire hydrant”) are “truth-apt”—that is, capable of being true or false—and that at least some of them are true.

Importantly, the widespread belief in law extends to the constitutional domain. Most of us believe that there is constitutional law and that even some disputed propositions of constitutional law are true. Many people believed that the Supreme Court should have ruled for the plaintiffs in Obergefell precisely because “people have a constitutional right to legal recognition of their same-sex unions.” At the same time, many (other?) people believed that the Supreme Court should have ruled for the plaintiff in Fisher precisely because “people have a constitutional right that states not discriminate against them on account of their race.” These examples suggest that we believe that constitutional rules can preexist judicial decisions that recognize them.

The remainder of this Article provisionally accepts the foregoing bit of common wisdom: there is constitutional law, and some propositions of constitutional law are true. Of course, if our constitutional rights, powers, duties, immunities, and the like appear in a full accounting of what exists, none is ontologically fundamental. If there is a constitutional right to φ, that’s not a fundamental fact about the universe, such as the facts that the speed of light is 186,000 miles per second. Rather, it must be explained by other facts or norms that are more fundamental. So if we disagree, or are uncertain,

about our constitutional rights and powers—as we do and are—then we should want an account of what those more fundamental facts or norms are and how they produce constitutional norms. We should want, as I will call it, a “constitutive theory” of our constitutional law. If we can explain what gives our constitutional rules their contents, then we are well on the way to grasping what their contents are.

A constitutive theory of constitutional law is not all that those of us interested in constitutional adjudication should want. A comprehensive theory of constitutional law and adjudication would also have space for theses about when, if at all, courts should refrain from reaching the constitutional merits entirely,25 or should under-enforce constitutional rules,26 or should craft doctrine to administer or implement constitutional rules in a fashion that is sensitive to institutional limitations,27 or should make rules when existing constitutional rules are under-determined or undiscoverable. But a constitutive theory is, at least, one thing we should want.

This Part surveys the existing theoretical landscape. It argues that plausible constitutive theories are one thing that we have precious little of: the most plausible theories are not constitutive, and the constitutive theories are not very plausible. Section II.A provides an overview. It shows that many of the most influential theories do not provide constitutive theories, but instead address themselves to adjacent questions. The next two sections discuss the two most prominent counter-examples to the generalization that constitutional theory has been largely free of constitutive ambitions. Section II.B briefly discusses Dworkin’s theory of “law as integrity.” Section II.C assesses at greater length a strand of contemporary originalism, associated most prominently with Justice Scalia and his followers, that maintains that the constitutional law is fully constituted or determined by the original public meaning of the constitutional text. I argue that both accounts, Scalia’s especially, confront forbidding challenges. Section II.D concludes.


A. Non-constitutive Theories: a Whirlwind Tour

By common scholarly consensus, James Bradley Thayer’s 1893 essay, “The Origin and Scope of the American Doctrine of Constitutional Law,” marks the birth of American academic constitutional theory.\(^{28}\) Famously, Thayer argued that courts should not hold an act of Congress unconstitutional unless certain of its unconstitutionality beyond reasonable doubt. Such a deferential approach, he reasoned, would best promote public happiness, preserve judicial independence, and encourage (or at least not discourage) elected representatives and the people themselves to exercise their own constitutional judgment in mature and responsible fashion.

Thayer’s account is often described as an approach to, or theory of, “constitutional interpretation.”\(^{29}\) But if constitutional interpretation is understood as the activity of trying to figure out either what the text of the Constitution means, or what the law to which it gives rise provides,\(^{30}\) then Thayer’s is not a theory of this sort. He is merely offering, and defending, a standard of review. By itself, the instruction that a judge should not invalidate an act of Congress unless fully persuaded of its unconstitutionality tells the judge no more about how to figure out what the constitution “means,” requires, or provides than the instruction to a juror that she must not convict a defendant unless persuaded of his guilt beyond a reasonable doubt tells her what substantive legal rules determine whether he is guilty.\(^{31}\) Instead of offering a theory of constitutional interpretation, Thayer simply presupposed one—and not a much of a “theory” at that. As Dean Larry Kramer explains, Thayer, like everybody else at the time, “essentially believed that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshalling (as applicable, and in a relatively unstructured manner)

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\(^{30}\) On the difference between these two understandings of the goal of “constitutional interpretation,” and an argument in favor of the latter conception, see Berman & Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, supra note __.

arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion.”

This eclectic approach to constitutional interpretation should look familiar. Herbert Wechsler assumed much the same over six decades later when insisting that, because judges exercising judicial review appropriately consider and weigh considerations of text, precedent, policy, and history, all in pursuit of justice, they must apply the principles they invoke in neutral fashion. And Philip Bobbitt’s influential work from a generation ago sought both to demonstrate that the Supreme Court has throughout our constitutional experience, invoked six “modalities of constitutional argument”—what he termed historical, textual, structural, doctrinal, ethical, and prudential—and to provide theoretical backing for precisely this argumentative pluralism. Pluralism remains, to this day, the dominant judicial approach to constitutional interpretation, and the one both assumed and accepted by a substantial majority of constitutional scholars.

Indeed, most other “schools” of constitutional theory can be understood as accepting this interpretive pluralism in broad strokes and as urging greater attention to one or another argumentative strand. John Hart Ely’s “representation-reinforcement” theory emphasizes democratic values, capaciously conceived. A band of other theorists, often claiming inspiration from Ronald Dworkin or Justice William Brennan, urge judges to concentrate on advancing other moral values, such as dignity, equality, or justice. Pragmatists including Judge Richard Posner, Justice Stephen


35 See, e.g., STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 148 (1996) (describing pluralism as “the best descriptive-explanatory account of constitutional interpretation”); Curtis A. Bradley & Neil S. Siegel, Constructed Constraint and the Constitutional Text, 64 DUKE L.J. 1213, 1241-42 (2015) (claiming interpreters rely on multiple modalities both in interpreting ambiguous constitutional text and determining whether text is ambiguous); Dorf, supra note __, at 1794 (“Our constitutional practices require interpreters to look to text, structure, history, precedent, and morality.”).

36 ELY, supra note __.

Breyer, and Cass Sunstein stress the importance of judicial attention to long-term systemic consequences. Common law constitutionalists, most notably David Strauss, argue that judicial doctrines and case law should drive much judicial decision making in constitutional disputes.

None of the theorists just referenced (with the exception of Dworkin, whom I discuss briefly in the next section) addressed the constitutive question of what the law is. Several (including Thayer, Wechsler, Ely, and Bobbitt) take themselves to be explaining what makes judicial review legitimate in a democracy given its “counter-majoritarian” features. Others (including Posner, Strauss, and Sager) seem mostly to assume that the legitimacy of the practice has been resolved, and to focus more squarely on the question of how judges should best perform their tasks.

If constitutive theses do not appear on the face of these diverse constitutional theories, it is even more significant that constitutional implications cannot be teased out with only a modicum of pulling, prodding, and reshaping.

Take Posner, for example. Understand that Posner does not believe that there is no law. He is not what he has called a “nihilist.” He accepts that there is law that courts are called upon to apply, and that they are to engage in lawmaking only when there is no law on a particular point (or they are unable to discover what the law is). As he routinely puts his claim: judicial lawmaking legitimately begins in the “open area” where “orthodox legal materials run out.”[39] So, we are invited to wonder, what are the orthodox materials? Enacted texts and judicial decisions at a minimum, of course. What else? Surely our orthodox legal “materials” are not limited to the material. Do we include practices of the political branches that have proven workable and have won acceptance? Purposes and intentions of a

Dworkin-inspired “moral reading or philosophic approach”); Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice 9 (2004) (“Constitutional judges . . . are expected to do much of the heavy normative lifting in the course of bringing detail to the abstract generalities of the liberty-bearing portions of the Constitution . . . . The domain of constitutional justice . . . includes at least a minimal insistence on the opportunity to secure a materially decent life.”); William J. Brennan, Jr., J., Speech to the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), in Originalism: A Quarter-Century of Debate 55, 63 (Steven G. Calabresi ed., 2007) (“[The Constitution] is a sparkling vision of the supremacy of the human dignity of every individual.”).


text’s authors or ratifiers? Widespread traditions of longstanding? And how and when do they “run out”? When they do not all “point in the same direction”? When each of the materials is independently under-determinate? When the consensus among legal officials does not yield a lexically ordered hierarchy of the materials sufficient to dictate a unique result? Obviously, participants to the theoretical disputes do not agree on what those materials are, how they combine, or when they run out. A constitutive theory aims to resolve these puzzlements, and is precisely what Posner conspicuously fails to supply.40

Broadly similar observations could be made about Ely. His theory is concerned wholly with how judges should behave given the worry that they will, when invalidating legislative action, be motivated by their individual substantive value commitments, and not at all with what persons who are not judges—including ordinary citizens and conscientious legislators and executives—could rightly conclude are our constitutional requirements.41 It is no accident that his subtitle is “A Theory of Judicial Review” and not, say, “A Theory of Constitutional Law.” And Bobbitt denies categorically that his multi-modal theory of constitutional argumentation has any constitutive implications. It cannot. For law, on Bobbitt’s account, “is something we do, not something we have as a consequence of something we do.”42

B. Constitutive Theory—Take 1: Dworkin

Mere paragraphs ago, I identified Ronald Dworkin as the champion of a pluralist prescriptive theory of constitutional interpretation that places special weight on the pursuit of justice and equality. I also said that Dworkin, nearly alone among pluralist constitutional theorists, offers a constitutive theory. The goal of this section is to introduce and to assess—critically but

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40 I have argued elsewhere that Posner does not address this question because he assumes, unselfconsciously, that the story of how law gains its contents, or of what existing legal norms are, is simple. And I draw attention to the irony that, by indulging such an assumption, he ends up exempting the metaphysics of law from the theme of his book, which is that the world is complex. Mitchell N. Berman, Judge Posner’s Simple Law, 113 MICH. L. REV. 777 (2015).

41 See, e.g., Ely, supra note __, at 41 (explaining that his theory is an attempt to provide “a principled approach to judicial enforcement of the Constitution’s open-ended provisions”); id. at 181 (concluding that his “general theory is one that bounds judicial review under the Constitution’s open-ended provisions by insisting that it can appropriately concern itself only with questions of participation”).

42 BOBBITT, CONSTITUTIONAL INTERPRETATION, supra note __, at 24
briefly—that constitutive account. I will reach Dworkin’s constitutive account via his prescriptive one, both because that account is of independent interest to constitutional lawyers and to guard against the tendency to impose a possibly artificial consistency or coherence upon his views. To my eyes, Dworkin is less a hedgehog than a cuttlefish: flamboyantly brilliant but maddeningly elusive.

As a theorist, Dworkin wore many hats, writing in general jurisprudence, moral and political philosophy, and constitutional theory.\textsuperscript{43} Wearing the third hat in \textit{Freedom’s Law}, Dworkin presented his theory of constitutional interpretation as advocating “[a] particular way of reading and enforcing a political constitution, which I call the \textit{moral} reading.” The moral reading, Dworkin explained, “proposes that we all—judges, lawyers, citizens—interpret and apply [abstract rights-bearing] clauses on the understanding that they invoke moral principles about political decency and justice.”\textsuperscript{44}

The moral reading is, on its face, a prescriptive theory. It’s a claim about what judges and lawyers should \textit{do}: they should “treat the Constitution as expressing abstract moral requirements,”\textsuperscript{45} trying “to find the best conception of constitutional moral principles . . . that fits the broad story of America’s historical record.”\textsuperscript{46} Far from a metaphysical thesis, it is “a strategy for lawyers and judges acting in good faith.”\textsuperscript{47} As James Fleming, a self-described “moral reader,” put it, the approach views “constitutional interpretation as a self-critical quest for truth about (or the best understanding of) the Constitution which . . . can only mean an interpretation of the Constitution that tries to vindicate its expressed claim to be an instrument of justice, the general welfare, and the other goods listed in the Preamble.”\textsuperscript{48}

What grounds or justifies the moral reading? Why do American judges “have no real option” but to be moral readers?\textsuperscript{49} Dworkin can be read

\textsuperscript{43} As an avowed hedgehog, though, Dworkin might insist that these seemingly many hats are all one. \textsc{Ronald Dworkin}, \textit{Justice for Hedgehogs} (2011).

\textsuperscript{44} \textsc{Dworkin}, \textit{Freedom’s Law}, \textit{supra} note __, at 2.

\textsuperscript{45} \textit{Id.} at 3.

\textsuperscript{46} \textit{Id.} at 11.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textsc{Fleming}, \textit{supra} note __, at 75.

\textsuperscript{49} \textsc{Dworkin}, \textit{Freedom’s Law}, \textit{supra} note __, at 3.
to provide two answers. The answers are not obviously compatible with each other, and only one is clearly rooted in a constitutive account.

Dworkin’s first answer is that we should read the abstract, rights-bearing provisions of a written constitution as setting forth moral principles because the text’s authors and ratifiers intended that we do so. Had they intended not to enact a general moral principle, but had instead intended to prohibit or require a circumscribed set of practices, then, and to that extent, a moral reading would not be called for. And, in fact, “the moral reading is not appropriate to everything a constitution contains.” For example, “the Third Amendment is not itself a moral principle: its content is not a general principle of privacy.”

This way to justify the supposed obligation of pursuing a moral reading looks originalist—though a “‘semantic’ originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say” rather than an “‘expectation’ originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have.” “If we read the abstract clauses of the Bill of Rights . . . to say what their authors intended them to say”—if, that is, we embrace semantic originalism—“then judges must treat these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they really require.”

This “semantic originalist” defense of a highly moralized approach to constitutional interpretation confronts two chief difficulties. The first is that the extent to which a moral reading is appropriate is contingent on the framers’ having intended to say, state, or announce general moral principles, and that claim is far dicier than Dworkin lets on. The second is that, to the extent that the moral-reading obligation follows, contingently, from semantic originalism, the account just sketched does not explain why one should accept semantic originalism (as opposed to any of the myriad forms of non-originalism) in the first place.

Thus do we reach Dworkin’s second defense of the moral reading, a defense pressed more clearly in his jurisprudential writings than in his

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50 For an astute analysis see Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 CONST. COMMENT. 49 (2000).

51 *DWORKIN, FREEDOM’S LAW*, *supra* note __, at 8.


53 *Id.* at 126.
distinctly constitutional ones. According to the theory of “law as integrity” that Dworkin advances in Law’s Empire, law is the set of norms that flow from the principles of personal and political morality that best fit and justify the institutional history of the legal regime.54 Put another way, “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”55 This is, in my terms, a constitutive account, not a prescriptive one: it seeks to explain what gives legal norms their contents, or what makes true legal propositions true. On this account, the propriety of a moral reading of our written constitution does not depend upon what anyone living in 1789 or 1791 or 1868 intended, but follows instead from the nature of law. Because law is an “interpretive concept,” and because we engage with interpretive concepts by trying to make them the best they can be, “[i]t is in the nature of legal interpretation”—in general, and not only when applied to written constitutions that sport abstract, rights-bearing clauses—“to aim at happy endings.”56

This cannot be the place for a detailed critique of Dworkin’s constitutive theory of law. Two points suffice for our purposes. First, although Dworkin has advanced a prescriptive theory of constitutional interpretation that reads as an aggressively moralized living constitutionalism

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54 This is only a first cut. It invites all manner of quibbles. For example, some Dworkin exegetes argue that fit and justification are not actually separate dimensions but that the principle that Dworkin dubs “integrity” ensures that justification must be attentive to fit, so that fit is in a sense internal to justification. Additionally, there is some uncertainty or dispute regarding whether the principles that justify the institutional history are better conceived as moral or legal. See, e.g., Larry Alexander & Ken Kress, Against Legal Principles, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279, __ (Andrei Marmor ed., 1995) (explaining that on Dworkin’s account “legal principles will not be moral principles but will deviate from them because of morally infelicitous legal materials with which they must cohere”). This is complicated. Perhaps it would be fairest to describe Dworkian “legal principles” as suboptimal or distorted “moral principles.” The critical point, though, is that morality grounds the law. DWORKIN, LAW’S EMPIRE, supra note __, at 96 (explaining that “rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification”); cf. Ronald A. Dworkin, “Natural” Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982) (arguing that “judges should decide hard cases . . . by trying to find the best justification they can find, in principles of political morality, for the structure as a whole”) (emphasis omitted).

55 DWORKIN, LAW’S EMPIRE, supra note __, at 225.

56 DWORKIN, FREEDOM’S LAW, supra note __, at 38 (citing Law’s Empire).
in intentionalist dress, he is also the author of a constitutive account of law that is markedly anti-intentionalist and anti-originalist.

Second, Dworkin’s constitutive theory rests upon highly demanding premises. In particular, it rests on the claims that law is an interpretive concept, and that its function is to morally justify the state’s use of coercive force against persons.57 These are not trivial claims, and they have far from modest upshots. Dworkin would himself conclude toward the end of his life that they lead to a “one-system picture” of our normative landscape in which law is just a branch of morality,58 and our legal obligations and moral obligations can never conflict. Now, some of today’s leading philosophers of law embrace this account,59 and I cannot rebut it in this space.60 But they are bracingly heterodox claims, not likely to prove acceptable to most constitutional lawyers.

C. Constitutive Theory—Take 2: “Public Meaning” Originalism

Section II.A omitted originalism entirely; Section II.B introduced the notion, but only (and almost perversely) in the person of Ronald Dworkin. I discuss originalism separately here, not because all originalists have understood their core claims in constitutive terms—they haven’t—but because a great many originalists working today do. Indeed, as I will try to demonstrate, if understood as a reasonably coherent school or family of theories, originalism embodies a transition from prescriptive to constitutive theory—a shift that is as significant as it is little-noticed, even by its proponents. The first two subsections sketch what I present as a change in originalists’ focus. The third and fourth critically assesses the most prominent constitutive version of originalism, the “original public meaning” originalism closely associated with the late Justice Antonin Scalia. I conclude that, when cast in constitutive terms, public-meaning originalism is highly implausible.

1. Prescriptive originalism. Robert Bork, the acknowledged father of modern originalism, took Wechsler’s neutral principles as his point of departure. Wechsler was right as far as he went, said Bork, but he did not go

57 See generally DWORKIN, LAW’S EMPIRE, supra note __, at ch. 3.

58 DWORKIN, JUSTICE FOR HEDGEHOGS, supra note __, at ch. 19.


60 I raise worries in Berman, Of Law and Other Artificial Normative Systems, supra note __.
far enough. It’s not sufficient that judges be neutral “in the application of principles. If judges are to avoid imposing their own values upon the rest of us . . . , they must be neutral as well in the definition and the derivation of principles.”\(^61\) To satisfy this requirement, Bork exhorted, “[t]he judge should stick close to the text and the [constitutional] history, and their fair implications.”\(^62\) This language is unambiguously prescriptive. Ed Meese, President Reagan’s Attorney General, spoke in the same tenor when announcing his “belief that only the sense in which the Constitution was accepted and ratified by the nation, and only the sense in which laws were drafted and passed, provide a solid foundation for adjudication.”\(^63\) The claim would be a constitutive one had it asserted that only the sense in which the Constitution was ratified “constitutes the law.” But it doesn’t say that or anything equivalent: “solid” is not a near-synonym for “lawful.” As written, the thesis appears to be prescriptive, focused only on how judges should act.

Around the same time, Justice Scalia defended originalism as a “lesser evil” than “nonoriginalism” because it is “more compatible with the nature and purpose of the Constitution in a democratic system” and because its “practical defects” are less damning.\(^64\) This is not an account of the content of law. Nobody who believes that the law is the OPM of the text would be prone to describe a theory that admonishes judges to discover and enforce that meaning as “the lesser evil.” In a similarly prescriptive spirit, Michael McConnell, the scholar-judge whom Keith Whittington has called “undoubtedly the most prominent new originalist,”\(^65\) justified “the various constraints on judicial discretion”—text, original understanding, judicial precedent, practice, and the presumption of constitutionality—“as means of tempering judicial arrogance by forcing judges to confront, and take into account, the opinions of others.”\(^66\) This is a theory of how judges should decide cases, about what they should “confront, and take into account.” It


\(^{62}\) *Id.*, at 8.


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does not appear even to approximate an account of the metaphysical determinants of constitutional norms. In short, early originalists, much like their nonoriginalist opponents, offer what I have dubbed a prescriptive theory, not a constitutive one.

2. The constitutive turn. On the standard telling of originalism’s history, Scalia played a pivotal role in shifting originalists’ principal focus from the framers’ intentions, where Bork had put it, to the public meaning originally encoded in the text. That is a fair observation, but Bork came around fast. And when he did, he couched his claims in terms that spoke as much to what the law is (a constitutive thesis) as to what judges should do (a prescriptive thesis). A judge “is bound by the only thing that can be called law,” he argued in The Tempting of America: “the principles of the text, whether Constitution or statute, as generally understood at the enactment.”

Other originalists followed in the same vein. For example, the prominent originalists Steven Calabresi and Saikrishna Prakash declared: “Originalists do not give priority to the plain dictionary meaning of the Constitution’s text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.” And Scalia himself would later argue that “we are governed not by unexpressed or inadequately expressed ‘legislative goals’ but by the law”; that “the true law is” what an enacted text “states”; and that “it is the text’s meaning . . . that binds us as law.” In Randy Barnett’s terms: “the original meaning of the

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69 Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 551-52 (1994).

70 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 383, 397 & 398 (2012) (internal quotation omitted). Although these passages strongly indicate that Scalia had come to understand originalism as a constitutive thesis, he was never entirely consistent about this. Other passages in the same book have a much clearer prescriptive flavor, as when he and Garner insist that the textual-originalist approach they advocate is “unapologetically normative, prescribing what . . . courts ought to do with operative language.” Id. at 9. For further reflections on the ambiguity in Scalia’s work regarding whether his claims are prescriptive, constitutive, or both, see Mitchell N. Berman, Judge Posner’s Simple Law, 113 MICH. L. REV. 777 (2015).
I understand all of these passages to reflect a constitutive thesis that is both monist and originalist. A first-cut encapsulation is: the constitutional law is fully constituted by the original public meaning ("OPM") of the constitutional text. On this view, to know what the constitutional text means is thereby to know what the constitutional law is. I will call this thesis (or anything in the near vicinity) "Scalian constitutive originalism," sometimes dropping one or another modifier when the context allows.

I do not claim that older originalists were uniformly prescriptivists whereas current originalists are uniformly constitutivists. Some first-generation originalists spoke in a constitutive register, while some originalists writing today forswear any claims about "what the law is." I am painting with a broad brush. I am claiming that there has been a noticeable increase in the explicitness, salience, and frequency of constitutive language in originalist writings, even though originalists have not themselves drawn attention to the shift in emphasis. Moreover, those marching under the constitutive banner include not only (in Bork and Scalia) the two titans of modern originalism, but also (in Calabresi) the Chairman and co-Founder of the Federalist Society, and (in Barnett) perhaps originalism's leading scholar-litigator. Appropriately enough, then, many observers believe that this

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72 As a January 2017 white paper defending then-President-elect Donald Trump from conflict-of-interest charges audaciously asserted: "The scope of any constitutional provision is determined by the original public meaning of the Constitution’s text." Morgan Lewis, Conflicts of Interest and the President 4 (Jan. 11, 2017). I call the contention audacious not because it is obviously wrong (though, for reasons I will explain, I do believe it is wrong), but because it is obviously controversial, yet was supported by citations to only two sources—both authored by Justice Scalia—without acknowledging a hint of opposing authority.

73 See, e.g., Lino A. Graglia, Constitutional Interpretation, 44 Syracuse L. Rev. 631 (1993).

74 John McGinnis and Michael Rappaport's "original methods" originalism looks this way in places, for they argue that judges should interpret the constitutional text in accordance with the interpretive methods in use at the time of ratification on the combined grounds that doing so is likely to be welfare-maximizing, and that judges, like all people, should try to maximize aggregate welfare. John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013). They are careful to acknowledge that their twin premises (empirical and moral) about welfare-maximization do not underwrite a conclusion that the original meaning of the text therefore constitutes our law. Id. at 4. Larry Solum's version of "new originalism" is also a prescriptive account. See, e.g., Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 524-36 (2013).
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constitutive theory, or something very close to it, represents the center of gravity of contemporary originalism.\footnote{See, e.g., Steven D. Smith, \textit{Reply to Koppelman: Originalism and the (Merely) Human Constitution}, 27 CONST. COMMENT. 189, 193 (2010) ("[O]riginalism insists (with some arguable lapses . . .) that what counts as law—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be.").}

3. Constitutive originalism and the “originalism-challengers.” Many people, not only originalists, find the thesis that the law is whatever the constitutional text means quite intuitive. Mark Greenberg aptly calls such a view of law generally (and not only about constitutional law) “the standard picture.”\footnote{Mark Greenberg, \textit{The Standard Picture and Its Discontents}, 1 OXFORD STUD. PHIL. L. 39 (2011).} But many intuitive propositions prove false on inspection. It’s intuitive that heavy objects fall faster than lighter ones; Galileo showed that they don’t. It’s intuitive that you have no reason to switch doors in the Monty Hall problem; Marilyn vos Savant explained that you do. So we shouldn’t be too quick to accept the standard picture. And it appears that we have ample reason to doubt it.

The most notable of those reasons are the very many constitutional judgments that strike many of us as correct, even on reflection and apart from any force of stare decisis, but that would be false if Scalian constitutive originalism were true. Here are examples:\footnote{This is well-trod ground. Useful surveys on which I draw include David A. Strauss, \textit{The Supreme Court 2014 Term—Foreword: Does the Constitution Mean What it Says?}, 129 HARV. L. REV. 1 (2015); Richard Primus, \textit{Unbundling Constitutionality}, 80 U. CHI. L. REV. 1079 (2013); Stephen A. Siegel, \textit{Textualism on Trial: Article III’s Jury Trial Provision, the “Petty Offense” Exception, and Other Departures from Clear Constitutional Text}, 51 HOUS. L. REV. 89 (2013).}

- The Fourteenth Amendment prohibits the states from treating its citizens unequally even with respect to the provision of benefits. (Yet the text provides only that states not deny to any person equal “protection.”)

- It would be unconstitutional for a state to disenfranchise gay people. (Yet the Fourteenth Amendment does not prohibit discrimination with respect to the right to vote, and other Amendments that do govern the franchise prohibit voting discrimination only with respect to race, sex, or age.)
The Federal Government is subject to equality-based constraints identical, or broadly similar, to those that the states face. (Yet the Equal Protection Clause, by its terms, applies only to “states,” and no seemingly similar provision purports to govern the federal government.)

All three branches of the federal government are constitutionally prohibited from abridging the freedom of speech. (Yet the First Amendment purports only to bind “Congress.”)

Congress may not criminalize blasphemy or false criticisms of the government. (Yet the original public meaning of “freedom of speech” probably did not encompass blasphemy or seditious libel.)

States are constitutionally prohibited from establishing churches. (Yet, again, the First Amendment speaks only of “Congress,” and a ban on religious establishment is foreign to the original public meaning of any portion of the Fourteenth Amendment.)

By and large, municipalities and other political subdivisions must respect the same constitutional rights as states do. (Yet the most relevant amendments—e.g., the Fourteenth, Fifteenth, and Nineteenth—speak only of “States,” and cities and counties, for example, are not states.)

States and the federal government are required to provide indigent criminal defendants with free defense counsel. (Yet the original public meaning of the Sixth Amendment’s invocation of a “right . . . to have the assistance of counsel” was only that a defendant who can secure counsel not be deprived of that assistance.)

States are immune from suit in federal court even on actions brought by their own citizens invoking federal causes of action. (Yet Article III provides that the federal “judicial power shall extend to all cases” arising under federal law, and the Eleventh Amendment carves out only suits against a state brought “by citizens of another state” or of a foreign state.)
Federal criminal defendants may waive their right to a jury trial, choosing to be tried by the trial judge. (Yet Article III provides that “the Trial of All Crimes . . . shall be by jury.”)

No state may secede from the Union without the consent of the other states. (Yet no portion of the constitutional text says so.)

Residents of the District of Columbia may invoke the federal courts’ diversity jurisdiction in suits against citizens of states such as Maryland and Virginia. (Yet Article III extends diversity jurisdiction to suits between “citizens of different states” and Washington, DC is not a state.)

Possibly, no reader will believe that all the foregoing propositions (“originalism-challengers,” as I will call them) are true. But I venture that most will believe that many are. Because originalism is inconsistent with many constitutional judgments that many expert observers believe to be true, we have reason to be skeptical of that general theory.78

It’s easy to misunderstand the use I’m making of the originalism-challengers, so let me underscore. A prescriptivist might argue that we should not adopt a particular approach to constitutional interpretation or implementation because it would yield a set of consequences (e.g., that sex discrimination by the state is constitutionally permissible) that are undesirable by reference to some set of extra-legal values. The thought

78 One way to erase the doubts would be to rebut the premise that our intuitions are inconsistent with what originalism delivers. This approach would aim to show that the supposed originalism-challengers—or at least those whose legal correctness is hardest to give up—are consistent with the constitutional text’s OPM in point of historical fact. This is legal-history work. I will skip past this way of engaging the originalism-challengers simply because there’s not much to say in the abstract; all depends upon the details of the historical arguments, case-by-case. But I offer one caution.

The notion of original public meaning is far from transparent. I have already drawn attention to the difference between “semantic” and “communicative” content. See supra note 7. Yet that distinction only scratches the surface. As Greenberg has explained, there are many things a text communicates, and many different types of communicative content, and experts in the relevant discipline do not accord any one type privileged status. Mark Greenberg, Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication, in THE PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2013). This fact has two consequences. First, an originalist who selects any one type of communicative content as the critical one would seem to be making an interpretive choice that requires defense. Second, whatever choice is made, originalists who strive to tame the originalism-challengers must take care not to shift opportunistically among different types of fixed communicative contents of the text.
would be that we like or want some particular results, and are objecting that originalism won’t let us have them. That is not how I’m using the examples. I am invoking them to cast doubt on the constitutive thesis. My suggestion is not that Scalian constitutive originalism won’t let us have what we desire, but that it would render false what we believe to be true.

This use of the originalism-challengers invites the question: how can we have any beliefs about retail constitutional propositions—or repose any confidence in those that we do have—without first having command of a constitutive theory? To reason from beliefs about what is or is not constitutional to judgments about what is or is not the right constitutive theory might seem to get things backwards. But coherentist theories of epistemic justification, and the associated method of reflective equilibrium, counsel against thinking in terms of “forwards” and “backwards.”

The method of reflective equilibrium is predicated on the idea that we best justify our beliefs in a range of domains, not by reasoning forward from premises accepted as foundational, but by continually revisiting and adjusting our judgments about diverse propositions in an effort to produce a coherent and mutually supporting network of beliefs. When applied to ethical judgments, for example, reflective equilibrium counsels that we seek coherence among our considered judgments about the rightness or wrongness of particular act-tokens and act-types (e.g., it’s permissible to turn the trolley), mid-level rules or principles (e.g., it’s wrong to intentionally cause the death of an innocent person), and the even more abstract or general theoretical considerations or commitments that shape, determine, or constitute the rules and principles (e.g., utilitarianism). Of critical importance, no class of judgments is categorically epistemically privileged over another class of judgments: judgments, say, that “this is wrong” and that “one should act only in accordance with that maxim that one may will that it become a universal law” are, in principle, revisable in light of each other, and in light of all other judgments the agent has or may come to have.

The originalism-challengers have epistemic force on the assumption that this model applies to reasoning about constitutional matters too. On this view, it is a mistake to believe that we can properly reason only in one direction—from constitutive accounts of our constitutional norms, to judgments about the constitutionally correct outcomes of particular controversies. While the legally correct resolution of concrete constitutional

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disputes will be a function of the actual mechanics of our constitutional law (a subject of our constitutional theories), it is essential to remember that we don’t yet know what the mechanics are; we don’t know what the correct general theory is. That’s what we’re trying to figure out.\(^8^0\) Coherentism, and the method of reflective equilibrium in particular, counsels that the judgments we reach on that question—the question of what is the correct constitutional theory—are themselves answerable to and informed by any considered judgments we may have about the legally correct resolution of concrete constitutional disputes.\(^8^1\) Thus, if our constitutional law would be P if it is true that the original public meaning of the text fully determines the law, and if we strongly believe that our constitutional law is ~P, then we have some reason to doubt that the original public meaning of the text does fully determine the law, as constitutive originalism claims.

4. Constitutive originalism and general jurisprudence. The previous subsection is designed to soften the grip that constitutive originalism may have on some readers by identifying some of the costs the general theory incurs in the coin of “plausibility points” (in David Enoch’s felicitous phrase).\(^8^2\) But because some constitutional theorists are skeptical that the use I make of reflective equilibrium is epistemically warranted,\(^8^3\) I should emphasize that the softening I have aimed at, although helpful, is unnecessary. Regardless of whether widely shared considered judgments of the form “Congress has constitutional authority to φ,” or “states have a constitutional duty not to ψ” are the least bit trustworthy when unsupported by a well-developed “constitutional theory,” nobody believes that Scalian originalists may rely upon a mere stipulation that the law is the OPM of the

\(^8^0\) Although a skeptic of some uses of reflective equilibrium, Stephen Sachs acknowledges that use of reflective equilibrium as a means toward developing a constitutional theory (or, in his terms, as a means toward figuring out what our “higher-level practices” are) can be epistemically warranted. See Stephen E. Sachs, The “Constitution in Exile” as a Problem for Legal Theory, 89 NOTRE DAME L. REV. 2253, 2273 (2014). He specifically disavows any disagreement with coherentists who use intuitions about derivative constitutional propositions in the limited way that I had advocated previously, see id. at 2276 & n.148, and that I advocate here. To reiterate, the originalism-challengers do not cast doubt on the proposition that if the law is fully determined or constituted by the OPM of the constitutional text, then any purported legal judgments that are inconsistent with the text’s OPM are legally mistaken, no matter what any of us might believe. The originalism-challengers bear only on the truth of the antecedent.


\(^8^2\) See DAVID ENOCH, TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM (2011).

\(^8^3\) I address this worry more squarely in Section II.C.1, infra.
constituent text. So coherently to one side, they still need to provide
good reason to conclude that the OPM of the constitutional text fully
determines our constitutional law. And it’s very doubtful that they have what
they need.84

To begin with, many of the most familiar arguments for prescriptive
originalism are of questionable relevance, or much weaker force, when
offered in support of a constitutive thesis.85 Take Scalia’s fundamental
premise that an originalist interpretive posture would better serve democratic
values than would any realistic alternative. That fact, if true, is clearly a
reason (albeit not a conclusive reason) for judges to interpret and enforce the
constitutional text according to its OPM just so long as promoting democracy
is worthwhile. But many more dots would have to be connected to explain
why a fact about which judicial behavior would be desirable also tells us
something about what the grounds of our law actually are. This is one reason
to distinguish prescriptive from constitutive theses. The truth of the
constitutive thesis would be a weighty reason in favor of the prescriptive
thesis. But few arguments for the prescriptive thesis that do not already
contain the truth of the constitutive thesis as a premise will weigh heavily in
favor of the constitutive thesis itself.

The most persuasive arguments for the constitutive thesis will have to
connect closely, I think, to general jurisprudential claims about the nature of
law, broadly understood. An account of how American constitutional law is
constituted or determined must depend upon, or at least mesh with, a general
account of how legal norms are constituted. If it is a general truth about law
that legal norms are constituted in thus-and-such fashion, or have thus-and-
such feature, then those elements must be true of American constitutional law
too. Consistent with this general truth, originalists could defend the law is the OPM of the text as either a universal thesis or a parochial one.86 But, as
I’ll explain, neither route looks very promising.


85 It bears emphasis that constitutive originalism is a legal thesis, not a linguistic one. It is
not a question that philosophers of language can shed much light on from within their
discipline. This is a central thesis of Greenberg, Legislation as Communication, supra note
__.

86 See RAZ, BETWEEN AUTHORITY AND INTERPRETATION, supra note __, at 92. The universal/parochial distinction roughly tracks the Austinian distinction between “general”
and “particular” jurisprudence. Although that latter distinction is familiar, it is also
ambiguous, See William Twining, General Jurisprudence, 15 U. Miami Int’l & Comp. L.
Rev. 1, 16-20 (2007), which is why I prefer my less familiar terms.
As a universal thesis, the law is the OPM of the text maintains, roughly, that it is a general truth about law that, in any legal system that contains authoritative legal texts, the law is fully determined or constituted by the OPM of those texts. This is a claim about law at what Greenberg has usefully described as its “most fundamental level.”

Such a claim is hard to swallow. First, the apparent empirical counterexamples now explode in number. A defender of this thesis must explain away all putatively correct legal propositions from every legal system, anyplace and anytime, that depart from the OPM of an applicable authoritative legal text. Second, although the “standard picture” may be part of the implicit package of beliefs for most of us, including for many legal scholars and elites, it gains no support from any well-developed general jurisprudential theory I know of, with the possible exception of John Austin’s command theory, nearly universally discredited. For both these reasons, the universal approach is exceedingly doubtful.

It is more charitable, then, to construe the law is the OPM of the text as a parochial thesis. On this construal, the thesis would be true of our constitutional law (even if not true of some other legal systems) not because it is a legal truth at the most fundamental level, but because it is made true by whatever is true at the most fundamental level married to the contingent facts about our constitutional order that the fundamental level makes relevant. To take a cartoon illustration, suppose that it is a universal jurisprudential truth that the law of a community consists of whatever set of norms would best promote aggregate community utility. That would be a truth about law “at its most fundamental level.” If it were also true that, in our legal system, legal norms that corresponded to the OPM of the constitutional text best promote aggregate community utility, then the law is the OPM of the text would be true of our constitutional order, at a contingent and derivative level. That, as I say, is a fanciful example designed only to illustrate the structure of the argument. The question is whether a non-fanciful argument to the same conclusion is in the cards.

Proponents of constitutive public-meaning originalism would have to think so, but they frequently underestimate the steepness of the argumentative

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87 Mark Greenberg, The Moral Impact Theory, the Dependence View, and Natural Law (forthcoming), p.3

88 See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832). H.L.A. Hart criticized Austin’s command theory, see HART, THE CONCEPT OF LAW chs. 2-4, on grounds that are widely viewed as decisive. Fred Schauer’s recent effort to rehabilitate the Austonian idea that coercion is central to the concept or nature of law, see FREDERICK SCHAUER, THE FORCE OF LAW (2015) is not to the contrary. As a Hartian, Schauer does not maintain that the law is just what an authoritative text says.
hill they must climb. Very probably, the dominant view in the American legal academy is broadly Hartian. On the standard reading of H.L.A. Hart’s theory of law, the law is the set of norms that are ultimately grounded in a convergent practice of legal officials, especially judges. On that view of law at its most fundamental level, the law is the OPM of the text is true of our constitutional system if and only if American judges converge on a practice of recognizing that as so. But that is patently false. Opinions that reach results inconsistent with the OPM number beyond counting. Even Scalia acknowledged that we have never had a consistently originalist judiciary. Not surprisingly, then, most commentators who have expressly addressed the issue have concluded that the U.S. rule of recognition is non-originalist.

Of course, Hart is not the only jurisprudential game in town. Conceivably, a constitutive form of originalism could be shown to cohere with other general accounts of the nature of law. Though I cannot address those possibilities in this Article, it’s fair to say that no such case is recognized as having been made. In sum, if the law is the OPM of the text

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89 See generally H.L.A. HART, THE CONCEPT OF LAW, supra note __. For the view that this common reading of Hart gets him wrong, see Kevin Toh, Hart’s Expressedivism and His Benthamite Project, 11 LEGAL THEORY 75 (2005).

90 The originalism-challengers listed earlier are only the tip of the iceberg. I’m speaking in the text of the countless non-originalist decisions that courts have reached regardless of the extent to which they jibe with your or my pre-theoretical intuitions.

91 See Scalia, Originalism: The Lesser Evil, supra note __, at 852.

92 See the chapters, especially those by Kent Greenawalt and Richard Fallon, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew Adler & Kenneth Einar Himma eds., 2009). Will Baude has recently issued a dissent, arguing that “our current constitutional practices demonstrate a commitment to” a form of originalism—what he dubs “inclusive originalism”—according to which “the original meaning of the Constitution is the ultimate criterion for constitutional law, including the validity of other methods of interpretation or decision.” William Baude, Is Originalism Our Law?, 115 COLUM. L. REV. 2349, 2355 (2015). Consistent with our practice, Baude argues, “judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them.” Id. (emphasis added). I do not believe that many readers have been persuaded that Baude’s “inclusive originalism” accurately describes our current practices. With others, I believe that Baude is too quick to accept judicial rhetoric as judicial reasoning. Accord Richard Primus, Is Theocracy Our Politics? Thoughts on William Baude’s ‘Is Originalism Our Law?’., 116 COLUM. L. REV. SIDEBAR 44 (2016); Charles L. Barzun, The Positive U-Turn, 69 STAN. L. REV. (forthcoming 2017); Richard A. Posner & Eric J. Segall, Faux Originalism, 20 GREEN BAG 2d 109 (2016).

93 For a very recent effort of the sort I have in mind, see Jeffrey A. Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 GEO. L.J. 97 (2016) (purporting to derive a form of originalism from John Finnis’s version of natural law theory).
is a truth about the determinants of our constitutional norms, we are vastly far from having it established.

**D. Summary**

Most theoretical arguments that are classified as belonging to “constitutional theory” or to “theories of constitutional interpretation” do not have constitutive ambitions and have implications for constitutive theory that range from nonexistent to attenuated. This is largely because they are pluralist. When, for example, Justice Brennan declared that “the Constitution is a sublime oration on the dignity of man,”\(^94\) he did not mean that dignity was the hammer that could dispose of *every* constitutional nail. (Presumably, for example, Brennan agreed that it wouldn’t have a lot to say about many or most horizontal separation of powers disputes.) Similarly, as we have seen, that great champion of judicial pragmatism, Richard Posner, does not believe that long-term systemic consequences furnish the sole touchstone for all constitutional decision-making. Like all (or virtually all) non-originalists, Brennan and Posner recognize a variety of appropriate constitutional arguments or considerations; their ambition is to alter, or to reinforce, points of emphasis. The pluralism of most theories conduce toward prescriptive packaging, for pluralism seems like a natural answer to the question of how judges should reason, while looking much less promising as an answer to the distinct question of what grounds or determines or constitutes the law.

Early originalist contributions fit comfortably within the prescriptive tenor of their times. Indeed, it was not always clear of such contributions whether, as prescriptive theories, they advocated that judges should attend *only* to some original unchanging interpretive object (“meaning” or “intent”) or, rather, accepted some measure of interpretive pluralism while maintaining that one factor or consideration (e.g., framers’ intent, original public meaning) is especially forceful or somehow privileged. Over time, the monistic aspirations or commitments of originalism became clearer. (That is why, as we will see, originalists came increasingly to view judicial precedents as posing a thorny problem.) And monism paved the way for a shift from a wholly prescriptive theory to a prescriptive theory that piggybacks on a constitutive one. That is, originalism increasingly morphed into the claim that judges should enforce the original public meaning of the constitutional text *because that original meaning constitutes the law*. In short, originalism

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\(^94\) Brennan, *supra* note __, at 62.
has been most responsible for shining a light on a question to which constitutional theorists had previously paid scant attention: “what is the law?”

I believe this is a salutary shift in orientation. But whether salutary or not, it is unduckable. A question that few theorists in our constitutional tradition had carefully investigated is now squarely on the table. Once there, it cannot be easily blinked away. It calls for some sort of answer, even if (as I emphasized at the start of this Part) it’s not the only question that constitutional theorists should care about, and possibly not the most important one. Yet, although originalists are largely responsible for changing or reorienting the subject (in ways that, for the most part, neither they nor their opponents have adequately appreciated) the dominant answer that they supply—the answer associated with Scalia, Bork, Calabresi, and Barnett—is immensely implausible. We are left with a question that we had previously overlooked—what makes it the case that our constitutional law is this rather than that?—but remain without a satisfactory answer.

II. PRINCIPLED POSITIVISM

I have argued in Part I that what we want, but do not have, is a sound constitutive theory of American constitutional law. Maybe, though, we don’t have it because we can’t have it, and we can’t because there is no law. This was Bobbitt’s position; in places it appears to be Strauss’s too. I don’t rule it out. But it is a marginal view among philosophers of law, and even more heterodox among constitutional theorists. We should look harder for genuinely constitutive accounts of our constitutional law—accounts that would vindicate the commonsensical notion that among the things the Supreme Court should do is to enforce already existing constitutional law—before abandoning the effort as impossible.

This Part presents the rudiments of my account. Its point of departure is last Part’s teaching that a constitutive theory of American constitutional law will have to cohere with a general constitutive theory of law. An account of how our constitutional norms gain their contents must fit with a more general account of how legal norms ever gain their contents. Accordingly,

95 See, e.g., Strauss, Foreword: Does the Constitution Mean What it Says?, supra note __, at 61 (characterizing his theory as an account of “how we do constitutional law”). I believe, however, that that is not quite his view. See, e.g., id. at 53 (observing that “there is room for good faith differences in judgment about what the law is”).

96 In this, I echo Owen Fiss’s position from a generation ago. See Owen Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982).
the latter is what I offer here: a general and abstract account of what legal norms are and how they come to be what they are. For convenience, I will call my account “principled positivism.”

Section II.A presents the idea. To demonstrate its generality (and for other reasons), I illustrate the account with an example drawn not from constitutional law, and not even from law, but from a game: the famous 1983 “pine tar incident” in Major League Baseball. Section II.B foregrounds some of the implications this general account of law has for American constitutional theory. It particularly emphasizes some of the many ways that principled positivism, understood as a position within general jurisprudence, gains support from, and in turn supports or illuminates, various salient features of American constitutional theorizing. As before, my dialectical approach reflects my coherentism. Rather than trying to establish the truth of principled positivism from “first principles” (whatever they may be), I’m hoping to gain the account plausibility points by showing how it fits with, and makes sense of, other robust (if not uncontroversial) strands of constitutional theory. Section II.C addresses three objections.

A. The Account in Brief

We live enmeshed among a rich multiplicity of artificial systems of practical normativity: etiquette, fashion, games, sports, prescriptive grammar, religious ritual and observance, and so forth. These systems are “normative” because of the way that they traffic in normative concepts such as ought, rule, right, duty, permission, power, good, reason, and the like. They are systems of “practical” normativity because they are designed to create and sustain norms that have the capacity to effectively guide people’s conduct. They are “artificial” because, in an important and intuitive fashion that is hard to specify, they are the product of human action, unlike prudence and (on many tellings) interpersonal morality. Legal systems are artificial systems of practical normativity.99

97 See, e.g., Philippa Foot, Morality as a System of Hypothetical Imperatives, 81 PHIL. REV. 305 (1972).

98 To say that a system of normativity is artificial is not to say that its existence is accidental or a matter of chance. Many artificial systems may be inevitable for beings constituted as we are. But even if all people everywhere have, say, games and etiquette, the contents of their rules depends upon choices and behaviors of actual human beings.

99 I present a sustained argument for the importance of situating legal systems within the larger class of artificial normative systems in Mitchell N. Berman, Of Law and Other Artificial Normative Systems, in DIMENSIONS OF NORMATIVITY (David Plunkett, Scott
Principled positivism is a constitutive theory, not only of American constitutional law, and not only of law, but of the norms of all artificial normative systems. This section sketches the theory in Section II.A.1. It illustrates and elaborates in Section II.A.2.

1. Of rules, principles, and grounding. Let us not start with law. Think of the simplest normative systems you can call to mind—fashion, say, or the rules of a common card game. How are the norms of these systems constituted? Suppose that it is a rule of fashion that you ought not to wear linen after Labor Day. Or that it is a rule of grammar that you ought not to split an infinitive. Everybody is a positivist on these questions. We believe that these artificial systems, and the norms that each system comprises, have social origins: They depend upon psychological and social facts (collectively “social facts,” for short) involving people’s beliefs, intentions, and actions. A rule of fashion is produced by the way that certain people “take it up” by believing and stating that it is normative, by using it as a guide for their own conduct, by criticizing themselves and others for deviance, and so on.

How does this work? How does it happen that behaviors of “taking up” a norm make it normative? I will say that the norms of simple artificial systems exist “in virtue of,” or are “grounded in,” social facts. These are “idioms of metaphysical determination and dependence.” To say that social facts ground the norms of fashion is to say that the former are metaphysically more fundamental than the latter, and participate in making the latter the case.

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101 A grounding relationship is therefore more than supervenience. Supervenience is merely asymmetric covariance. “A set of properties A supervenes upon another set B just in case no two things can differ with respect to A-properties without also differing with respect to their B-properties. In slogan form, ‘there cannot be an A-difference without a B-difference’.” *Supervenience, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Nov. 2, 2011).
Let me be clear: to say that social facts ground the norms of fashion (and of grammar, and so on) is not to explain the nature of the determination relationship. Grounding is not a mechanism. It is closer to a label or a gesture. But that’s good enough for now. We don’t need to know how social facts ground the rules of most artificial normative systems, to have confidence that social facts ground the rules of simple normative systems. Mental phenomena, such as beliefs, intentions, and consciousness itself, are grounded in physical brain states. Chemical and mechanical properties (e.g., solvency, hardness, conductivity) are grounded in micro-physical facts or properties. We are entitled to believe that these relationships of metaphysical determination obtain even without command of the details.

Now consider more complex artificial normative systems. I will resist the temptation to offer a definition. Complex systems are characterized by such features as the breadth and variety of behaviors that they regulate, the existence of institutional structures and roles, and the presence of formal norm-promulgating texts. Contemporary legal systems are complex if any normative systems are.

How are the norms of complex systems constituted? In simple systems, norms are grounded “directly” in social facts without normative intermediaries. (That is not a substantive claim, but only a stipulated definition of simple systems.) Speaking metaphorically, the norms of simple systems (of which etiquette, fashion and grammar may or may not prove to be good examples) sit directly on top of social facts. But the norms of complex systems cannot all be explained in this simple and direct way. Social facts about actual “taking-up” behaviors by English speakers might make out a fully satisfactory explanation for the fact that grammar prohibits splitting an infinitive. In contrast, a fully satisfactory explanation for the fact that New York law prohibits owning a goat must make reference to statutes, ordinances, judicial decisions, or the like, and not only to the psychological and behavioral facts that amount to “taking-up” norms. It could be against

https://plato.stanford.edu/entries/supervenience/. Supervenience does not posit a relationship of metaphysical dependence between its properties.

102 When speaking of etiquette as an artificial system, I’m referencing that portion of the domain that involves its arbitrary and “symbolic” rules, and not that portion that codifies requirements of morality known as “manners.” See generally Judith Martin & Gunther S. Stent, I Think; Therefore I Thank: A Philosophy of Etiquette, 59 AM. SCHOLAR 237 (1990). Perhaps there are no simple systems. I think there are, but my argument wouldn’t be imperiled if there weren’t. I am relying upon them only as a heuristic to lend support to the widespread notion that norms may be grounded in social facts without normative intermediation.
the law to own a goat in Manhattan even if nobody on the island were aware of that fact. Complex normative systems possess complex normative architectures.

When trying to conceptualize that architecture, it is natural to suppose that low-level or “fundamental” norms that are directly grounded in social facts somehow participate in the determination of other, higher-level or “derivative” norms. Indeed, Hart’s rule of recognition describes one way that this could work: all norms of the system trace back, by one long chain of deductions, to a single complex norm that is directly grounded in the taking-up behaviors of legal elites.

That’s one way to explain how low-level norms help determine higher-level norms, but not the only way. I will offer a different one. On my proposal, the norms of complex systems do not trace to a single norm that, like the norms of simple systems, is grounded directly in social facts. Rather, complex systems consist of (at least) two types of norms: norms that have the relative determinacy sufficient to serve the system’s basic conduct-guidance function, and other norms that serve an intermediating role between the social facts that ultimately ground the system and the norms that it is the function of the artificial system to generate.\footnote{It is not strictly true that social facts “ultimately” ground any of a system’s norms, for social facts are not metaphysically fundamental but are themselves grounded in physical facts. On the assumption that grounding is transitive (an assumption that is probably true in this context, if not universally), then the norms of artificial systems, if grounded in social facts, are ultimately grounded in physical facts. Thus, it would be more accurate to say that the norms of an artificial system are “proximately” grounded in social facts. But that could be confusing because, on my account, it is natural to say that legal rules are proximately grounded in legal principles. So I will continue to say that the rules of a complex system are ultimately grounded in social facts in order to distinguish that grounding relationship from the more proximate grounding relationship between rules and principles, with the understanding that the locution is subject to the caveat in this note.} I will call the fundamental norms that are grounded directly in social facts “principles,” and the derivative norms that the fundamental norms combine (in some fashion) to produce “rules.” Complex systems are (I’m stipulating again) normative systems that consist both of principles and of rules.

Principled positivism maintains that the norms that are sufficiently determinate and general to adequately serve the system’s conduct-guidance mission are determined by—they gain the contents they have “in virtue of”—the interaction of other more fundamental norms of the system whose function is not to guide conduct, but rather to participate in the production of the norms whose production and maintenance furnish the system’s raison
d’être. In broad conformity with prevailing usage, I am calling upper-level, fairly determinate, norms “rules,” and lower-level, rule-determining, norms “principles.” (As I explain in the margin, the conformity with prevailing usage is not perfect.) In short: rules are grounded in principles, and principles are grounded in social facts. In complex systems, the principles sit directly on top of the grounding social facts, while the rules sit on top of the principles. Thus, the norms of simple systems serve (roughly) the same conduct-guidance functions as do the rules of complex systems, but are grounded in (roughly) the same fashion as are the principles of complex systems—namely, they are grounded directly in social facts.

How do social facts ground the principles of a complex normative system? I have little to add beyond what I have said already about the norms of simple normative systems. Principles arise by their being “taken up” by the right participants in the system in the right ways. Who the right participants are and what the right ways are will vary across systems. Very generally, though, the grounding facts involve the ways that those who subscribe to the system govern and justify their own judgments and behaviors, and the ways they critically assess those of others. We already believe, even without the benefit of supporting detail, that the norms of

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104 Notice that I attribute two characteristics to principles—they are fundamental and “weighty”—and two to rules—they are derivative and determinate. This vocabulary does not accommodate the two other possibilities that these twin binary distinctions allow for: norms that are (a) fundamental-yet-determinate, or (b) derivative-yet-weighty.

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<th>Weighty</th>
<th>Determinate</th>
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<tr>
<td>Fundamental</td>
<td>Principles</td>
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<tr>
<td>Derivative</td>
<td>Rules</td>
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Yet these are not empty categories. If secession is unconstitutional, the norm that prohibits it is, I presume, legally fundamental yet determinate. Conversely, a statute that provides that “no person shall profit from her own wrongdoing,” might succeed in creating a norm that is derivative yet weighty. Are these norms “rules” or “principles”? Well, the first is rulish in function and principled in derivation, the second functions as a principle but emerges as a rule. Which characteristic matters more to us will depend on the discursive context. To simplify exposition, I will focus whenever possible on paradigmatic cases, those that reside in the northwest and southeast cells. Beyond that, I won’t try to tidy up. Keeping things a little messy helps us keep in mind that a simple rule/principle dichotomy, however drawn, is bound to radically oversimplify. Indeed, these two dimensions are not unrelated. One way that norms gain greater determinacy is by emerging through longer chains of determination: they are more determinate in virtue of being more determined.
simple systems are grounded in social facts. I am claiming merely that the principles of complex systems are grounded in the same way.

And how do the principles of a complex normative system ground or determine the rules? Now we’re in new territory. The grounding of a simple system’s rules in social facts does not provide a close analogy. But if the grounding relationship between rules and principles is different in kind from the grounding relationship between principles and social facts, we nonetheless have reason to believe that there is such a relationship. The reason is that both rules and principles are types of norms; norms are kinds of forces or, at a minimum, can be fruitfully analogized to forces (they push or press or weigh or favor); and forces can combine or interact to produce other forces that are non-identical to any of the forces that serve as determinants. Frequently and most simply, we model the combination of forces as vector addition. Because principles, as we will see, push or press “in different directions”—that is, toward different normative upshots—vector addition serves as a promising model for the grounding of rules by principles as well.105

105 In current constitutional theory, the rules/principles distinction is most closely associated with the work of Jack Balkin. It might be instructive to contrast my picture with his. Here’s his theory, framework originalism, in brief:

we have a written Constitution that is also enforceable law. We treat the Constitution as law by viewing its rules, standards, and principles as legal rules, standards, and principles. If the text states a determinate rule, we must apply the rule because this is what the text provides. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.

BALKIN, LIVING ORIGINALISM, supra note __, at 14. Three features warrant emphasis. First, the account is prescriptive on its face, not constitutive: it purports to explain what “we must” do. Second, on Balkin’s account, whatever the precise difference between rules and principles may be, they are alike in that both issue from, or are encoded in, the constitutional text. Principles, just like rules, are norm-types that “the text enacts.” Id. Third, what makes it the case that we “must apply” textual rules as rules and textual principles as principles is that a legal obligation with that content is entailed by our adopting a posture of treating the Constitution as law. Principled positivism differs on all three points.

In current analytic jurisprudence, the rules/principles distinction has been developed most fully by Robert Alexy. See, e.g., Robert Alexy, On the Structure of Legal Principles, 13 RATIO JURIS 294 (2000); ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., Oxford Univ. Press ed. 2002). My account of the distinction shares much in common with Alexy’s. The most important distinctions are that Alexy’s account is facially prescriptive, whereas “principled positivism” is constitutive, and that Alexy regiments the interaction of the principles in ways that strike me as overly programmatic. Of the analyses of principles that I have read, my account is closest to that
That’s the idea in capsule form. In a moment, I’ll flesh it out with the aid of a concrete example. The aim of the case study will be to show how principles determine rules, not how social facts determine principles. If the general idea that principles of a system determine the rules of that system seems promising, then, given that we already have reason to accept that social facts determine or ground legal principles, we should be open to the thesis that our constitutional rules rest upon our constitutional principles, which rest upon the unavoidably dynamic ground of social facts. We could then turn toward the long, collaborative, inevitably controversial work of drawing to the surface the principles that populate our system of constitutional law today.

2. An illustration of determination of rules by principles. If legal systems and sports both belong to the family of artificial normative systems, we should expect similar analyses to apply in both contexts. I’ll offer an example from sports: the famous 1983 “pine tar game” between American League rivals, the New York Yankees and the Kansas City Royals. I turn to sports not out of whimsy but for the same reasons that motivate other comparative investigations: unfamiliar phenomena allow us to see similar but familiar phenomena in new ways. Furthermore, sports provide especially fertile territory for comparative jurisprudence because sports systems are usually simpler than legal systems and therefore more tractable, and because the judgments we draw in the sports domain are less likely to be infected by motivated reasoning and similar epistemic defects.¹⁰⁶

Here’s a summary of the incident, as reported in an opinion issued a month after the event by American League President Lee MacPhail:

With two out in the ninth inning of the game of July 24th, Kansas City at New York, George Brett hit a home run with a man on to put the Royals ahead by a score of 5-4. [Yankees’] Manager [Billy] Martin objected, claiming that the pine tar on Brett’s bat extended beyond the permissible 18 inches from the handle. [The umpires conferred.] The portion of the bat covered with pine tar was measured and found to be

well over 18 inches. Brett was therefore called out ending the game and giving New York a 4-3 victory.

The umpires cite Official Playing Rule 6.06(a) which states "that a batter is out for illegal action when he hits an illegally batted ball." They state that Rule 1.10(b) provides that a ball hit with a bat "treated with any material (including pine tar) ... which extends past the 18 inch limitation ... shall cause the bat to be removed from the game;" and is therefore an illegally batted ball. They ruled that since the bat used by Brett was illegal under Rule 1.10(b) and since Rule 6.06(a) provides that a batter hitting an illegally batted ball is out, Brett must therefore be called out and the home run nullified.

The Royals protested the ruling. As MacPhail would explain, the gist of the Royals’ argument was that the umpires misunderstood the rule. He would end up agreeing, concluding that “the rules do not provide that a hitter be called out for excessive use of pine tar. The rules provide instead that the bat be removed from the game.” That is the question for us to investigate: did the rules of MLB at the relevant time provide that a batter is out for using excessive pine tar, or did they not? What was “the rule”? Notice that MacPhail seems to have the same commonsensical view about baseball that most readers of this Article will have about law: we believe there are rules of law, he believes there are rules of baseball. Resolving the dispute requires in the baseball context, as it does in the legal one, a constitutive theory—in MacPhail’s case, a constitutive theory of the rules of baseball. On the “principled positivist” account I have sketched, the answer depends upon what the principles of MLB were at the relevant time, and how forcefully they weighed.

I am in no position to offer a confident and comprehensive inventory of the principles of baseball. But we can fudge here because I introduce the case only to illustrate the workings of principled positivism by mobilizing some plausible surmises. I’m not aiming to produce a faithful report of the rules of baseball as they actually existed in 1983.

What might the principles plausibly have been? Here’s an obvious one for starters: what the provisions in the official MLB rulebook say have great force. Let’s call this the principle of textual meaning. A baseball “textualist,” we might imagine, would maintain that this was the only principle of the system. Were that so, then the MLB rules would be, in all cases, just what the rulebook says. The Royals’ protest would, accordingly, have been meritless, because sections 1.10(b) and 6.06(a), when read
together, seem to state that a batter who hits a ball with a bat treated with pine tar more than 18 inches from the knob is out. What made this a difficult case at the time, or at least a controversial one, still discussed 35 years later, is that most observers, MacPhail among them, have believed that the *principle of textual meaning*, however weighty it may be, was not the system’s only principle. There were (and are) others.

Two additional principles that plainly moved MacPhail will not surprise lawyers. The *principle of legal intentions* maintains that the legal rules that the rulemakers intended to produce by means of enacting a given text have force. This principle weighed for the Royals on the plausible assumption, later endorsed by MacPhail, that the rulemakers, not quite appreciating the interaction of these separate provisions, had intended that a batter would be out for hitting a ball with a bat that had been altered to gain a competitive advantage (such as by filing or hollowing the barrel), but that a batter who uses excessive pine tar (which is prohibited only because it dirties the balls and requires that they be replaced more quickly) would only face removal of his bat. The *principle of precedent* maintains that previous interpretive decisions by league officials have force. It too weighed for the Royals because previous decisions of the League Office had held or suggested that excessive use of pine tar would not result in an “illegally batted ball” within the meaning of section 6.06(a).  

But that’s not all. The philosopher of sport J.S. Russell has persuasively argued that the normative system that is baseball (including the variant that is Major League Baseball) also contains a principle to the effect that “the excellences embodied in achieving” the sport’s goals are to be maintained, fostered, and rewarded. I’ll call that the *principle of athletic excellence*. It weighed for Kansas City on the ground that to hit a home run is to excel at a central athletic challenge that the sport of baseball is designed to present, and that use of excessive pine tar does not lessen the accomplishment. The core athletic excellences of the sport would be denigrated or disregarded if Brett and the Royals were denied the fruits of his display of baseball-relevant skills.

Fifth and last, one might distill, as something of a counterpart to the principle of athletic excellence, a *principle of wily gamesmanship*. One

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excellence the sport of baseball embodies is the wily manipulation and exploitation of the plain language of the formally promulgated rules for competitive advantage.\textsuperscript{109} (This is not true of all sports. A principle of respect for guile does not operate in the normative system of golf, as it does in baseball.) This principle cut, in this case, in the opposite direction as its sibling. The Yankees, who had noticed previously that Brett used too much pine tar but waited to voice the objection at the opportune moment, had a claim to the fruits of their crafty gamesmanship.\textsuperscript{110}

In all, I am proposing that the MLB normative system (the normative system that governs play of the game and adjacent matters) contained exactly five principles potentially relevant to this dispute, that three weighed in favor of the Royals’ preferred rule, and that two weighed against. (Where do these principles “come from”? Why, they emerge—in some fashion—from social practices. How else?) Assuming arguendo that these principles did operate at the ground floor of the normative system that is Major League Baseball, and that principles combine in a manner that can at least be approximated by the model of vector addition, we need to know two things: the relative weight, significance, or forcefulness of each principle, and the degree to which each applies or “is activated” given the factual context.

The following illustration aims to depict the determination of baseball rules by baseball principles. In the model, the width (i.e., height) of a vector arrow signals that principle’s general importance or weight within the system, and its length captures the extent to which the principle is implicated or activated under the circumstances. Notice, for instance, that the principle of textual meaning (what the provisions of the rulebook say have great force) is represented as the widest of the vector arrows. That indicates that it is the most important, most forceful principle in the system. The arrow’s relatively long length suggests that the semantic content of the provisions is fairly clear. But it’s not as long as it could be. Suppose that a single provision read “a batter is out if he hits a ball using a bat with pine tar more than 18 inches from the knob.” If that were the text, then the weighty principle concerning the force of the text’s meanings would be activated even more forcefully in favor of the putative rule that a player in Brett’s situation is out; the arrow would be depicted as longer. The principle of athletic excellence is shown to be a weaker principle than the principle of textual meaning, but its long length signals that it is very fully activated under the circumstances. The total force


a principle exerts is a function of both its width and its length, its weight or magnitude and the extent of its activation.

This picture is not intended to represent how various considerations weighed in favor of MacPhail’s resolving the dispute one way or the other. It is a picture of the operation of the fundamental forces of the system and the rule that they collectively determine. It is a picture of what the rule is, not what the ruling should be (although the former will usually have substantial implications for the latter).

Well, then, what was the rule? This figure suggests that it’s a close question. So if the goal of this exercise were to answer MacPhail’s question, we might reasonably count it a failure. But I’m not trying to resolve the question of what the rule was, or who should have prevailed, the Yankees or the Royals. I’m trying to make principled positivism both intelligible and plausible. For that purpose, it doesn’t much matter whether you end up agreeing that the question was close (as the figure depicts), or conclude that it really wasn’t very close at all. I’d modestly prefer the former. But all that’s

As it happens, I’m a lifelong Mets fan and confirmed Yankees hater, yet my analysis of the case is friendlier to the Bronx Bombers than is the standard educated view. Take this as one datum to support my earlier speculation that worries about whose ox is being gored may be less likely to infect reasoning about jurisprudential matters when they arise in sporting contexts than in ordinary legal contexts.
important is that any views you may have about what the rule was cohere with your views about the principles too. For example, if you think that the umpires got the rules right in the first place, I’d hope and expect that you also believe, say, that the meaning of the text was even clearer than the figure represents (longer arrow), or that the rulemakers’ legal intentions were less clear (shorter arrow) or matter less (thinner arrow).

All that is straightforward. Let me emphasize three takeaways that will gain importance once attention turns from baseball to constitutional law.

First, insofar as we do disagree about the principles, we should be able to reason through our disagreements productively. That’s not to say that we’ll all eventually agree. It’s to say only that we should be drawing inferences from ordinary and available facts—facts about what players, coaches, umpires, and league officials have done and have said—and that there is no reason to doubt that we can change one another’s minds by reasoning about these matters collectively. For example, you could come to be persuaded that the principle of wily gamesmanship is a genuine baseball principle, even if you had initially doubted it, by being shown how it has been “taken up” by baseball participants. Moreover, you can reach that conclusion even if you think that gamesmanship, wily or otherwise, is a vice without moral merit or value. The principles that give principled positivism its name are principles of the artificial system of normativity at issue; they are not, as they were for Dworkin, moral principles. We should be able to have principles at the normative foundation of a normative system without presupposing a single system of value.

Second, decisions under color of the baseball rules made by certain persons do not merely reflect the agent’s judgments about the state of the principles at decision time. They can also strengthen or alter the principles. Suppose that in concluding that “the rules do not provide that a hitter be called out for excessive use of pine tar,” MacPhail specifically relied upon the principle of athletic excellence. Because actions by a league president are part of the grounding of the baseball principles, MacPhail’s action would strengthen the principle that he invokes. This is one reason why decisions by judges in legal systems have a partially self-fulfilling character.

Third, the fact that these two candidate rules are depicted as enjoying nearly equal support from the principles does not imply that rules are

\[112\) See supra note 54.

generally underdetermined. Nothing about the basic model suggests that under-determination, either ontic or epistemic, is the usual case. Principles can yield rules determinately. Suppose that a batter swings and misses at a pitch on a count of two balls and two strikes. This would be his third strike and the umpire would call him out. Imagine, however, that the batter contends that a strikeout is realized only when the pitcher records three consecutive strikes, uninterrupted by a ball. Is this a correct statement of the baseball rules? Of course it isn’t. As the figure below shows, the model I am proposing has no difficulty accounting for, and supporting, that conclusion.\footnote{I reject the thought that there is a “rule” of a system only in the limiting case in which all of the activated principles favor the rule and none favors its contrary. To the extent that that’s what the model conveys to you, that is an imperfection of the model, not an upshot I mean to endorse. It is worth remembering that any model for principled positivism will be an imperfect way of representing the reality.}

**B. Select Implications for Constitutional Law**

It is no trick to translate principled positivism as a general constitutive theory of artificial normative systems thesis into a constitutive theory of American constitutional law: relatively determinate constitutional norms (“constitutional rules”) derive from the interaction of less determinate constitutional norms (“constitutional principles”) that are grounded in social facts. The move here from the universal to the parochial is so slight that it doesn’t even warrant a different label. I’ll use “principled positivism” as the
name both for the general jurisprudential account and for the constitutive theory of American constitutional law.

Plainly, at this level of generality, the account is much too underspecified to deliver what I originally said we wanted from a constitutive theory. The general theory is a framework for understanding our law. To know what our constitutional rules are, we will need to know, in addition, what our principles are, a matter that the general account cannot on its own disclose.115

The next Part explores, at least preliminarily, what our constitutional principles are. Even before we enter the forest, though, most readers will have some sense of what to expect, for we won’t be embarking on this journey as constitutional innocents. Any remotely competent constitutional scholar, lawyer, judge or student, will already have internalized at least some of our constitutional principles, at least in rough strokes.

Obviously, for example, the constitutional text matters a great deal. Now, we have already seen that it can be hard to state precisely how it matters: the commonplace that “the text is the law” represents a category mistake (see the Introduction); and the familiar originalist contention that the original public meaning of the text fully determines the law is highly implausible (see Section I.C.). But, for all that, ordinary meanings of the constitutional text surely do matter. And their means of mattering is not solely evidential: they matter in the sense of bearing constitutively on what the constitutional rules are. So if the ground floor of our system of constitutional law consists of principles, one principle—or, better, one cluster of principles—must render legally significant what the constitutional text says or communicates. What the Supreme Court has ruled also matters. Again, a principle (or principles) must direct how it does, or what constitutional significance Supreme Court opinions and decision bear. And almost everybody seems to recognize principles under the labels “popular sovereignty,” “federalism,” “separation of powers,” and “individual liberty.”

The next Part (Part III) elaborates on this first nod toward our constitutional principles. The rest of this Part highlights some implications that follow just from the scaffolding of principled positivism, pretty much regardless of the regime-specific detail yet to be filled in. A theory may elicit either of two unwelcome verdicts: that it’s trite or that it’s false. I anticipate both. The next section speaks primarily to those wielding concrete

115 We’ll need to know even more than that. See infra note 160.
objections; the remainder of this section has mostly in mind those who think they’ve heard all this before.

While I naturally reject a strong version of this charge, I cheerfully grant a weaker version: you’ve seen aspects of it. I claim this as a virtue. Even if previous accounts haven’t seen everything clearly (ditto my own, of course), it would be extraordinary if they did not, in the aggregate, advance many significant insights. Unless our existing understanding is in truly bad order, a good theory won’t be made of wholly new cloth, but should reflect features that many of us accept or are disposed toward at the start.

1. Pluralism. The overwhelming majority of extant constitutional theories are pluralistic. Indeed, originalism is as striking for its monism as for its, well, originalism.\textsuperscript{116} Principled positivism yields a pluralistic account of our constitutional practice. Furthermore, the plural principles it identifies may approximate (and may not) the considerations or factors emphasized in previous accounts. My account differs from other pluralistic theories in that, whereas they had been prescriptive (that is, addressing themselves to how judges should resolve cases), mine is explicitly constitutive: it aims to explain what the law is. It shows how the dominant view of our constitutional law—a pluralistic approach to constitutional interpretation—need not be abandoned, but can be massaged and arranged to meet the challenge that constitutive originalism raises for non-originalist theories.

2. Judicial precedent. Originalists have a problem with precedent. Dozens of articles have been written on the topic.\textsuperscript{117} Judicial precedents present a difficulty for originalist prescriptive theories of interpretation and for originalist constitutive theories of law precisely, of course, because theories of both types are originalist. But that’s not the only reason: monism is the other. Precedent is a problem for any monist theory that does not treat judicial decisions as the sole basis for interpretation or the sole ground of law. Assuming that all theories of constitutional interpretation must be monist,

\textsuperscript{116} We may believe that originalism and monism go hand in hand, but they don’t. There are many different objects or targets of inquiry that plausibly count as originalist: the original legal intentions of the drafters, the original legal expectations of the ratifiers, the original publicly accessible meaning of the text, and so on. A theory that gives effect to several of these, but not to others, would be originalist and pluralist. Most or all actual versions of originalism treat one of the possible targets as authoritative (even if the monistic thrust is muted by emphasizing that other targets are good evidence of the authoritative one, or that they frequently coincide, etc.).

\textsuperscript{117} For a start, see Can Originalism Be Reconciled with Precedent? A Symposium on Stare Decisis, 22 Const. Comment. 257 (2005).
Scalia was therefore led to insist that stare decisis must be an exception to any theory of constitutional interpretation, not only to originalism.\textsuperscript{118}

That is a tendentious claim. I think that many jurists will resist it. Principled positivism explain why they are right to do so. If constitutional interpretation is conceived as the effort to discern what the law is,\textsuperscript{119} and if the law is constituted or determined by the interplay of many principles, including some that give legal force to judicial precedents, then the requirement that judges should (often) follow precedents—even precedents that they consider initially wrongly decided—follows straightforwardly from their duty to “enforce the law,” as it is.

3.\textit{ Unwritten constitutionalism.} The “unwritten Constitution” is a trope of longstanding. It extends back to Christopher Tiedeman’s work in the late nineteenth century, was incisively revived by Thomas Grey in the twentieth, and has been expanded and augmented in recent years by such heavyweights of constitutional theory as Laurence Tribe and Akhil Amar.\textsuperscript{120} Many readers will already have discerned that principled positivism falls within this long tradition. Persons who are sympathetic to such accounts will count that as a plus. Persons unsympathetic to claims of “unwritten” or “invisible” constitutions will count it a minus. As one critical reviewer of Amar’s book railed: “[T]here is no such thing as ‘America's Unwritten Constitution.’ It is a misnomer, a hoax, a charade, a deception, a farce, a snare, a delusion, a lawyer's trick, a pickpocket's sleight of hand, a canard, to say that there is.”\textsuperscript{121}

In my judgment, many or most prior invocations of the notion of an unwritten idea are suggestive but also elusive. They are often hard to parse. I am confident that one reviewer who confessed to finding Tribe’s development of the idea “obscure,” was not expressing an idiosyncratic

\begin{small}
\textsuperscript{118}\textsc{Scalia, A Matter of Interpretation, supra note __, at 139.}

\textsuperscript{119}Recall the different objects of constitutional interpretation: meaning, or law. See supra note 30.


\textsuperscript{121}Michael Stokes Paulsen, \textit{The Text, the Whole Text, and Nothing But the Text, So Help me God: Unwriting America’s Unwritten Constitution}, 81 U. Chi. L. Rev. 1385 (2014).
\end{small}
reaction. Still, the notion’s persistence suggests there might well be something there, and that the joint separating the written and unwritten just hasn’t yet been found or clearly described. Let me explain how my carving differs from the standard cut.

The picture commonly held by those who defend some form of “unwritten” or “invisible” constitution posits two sets of norms: “textual” norms that correspond to or are brought into being by the text, and “non-textual” or “extra-textual” norms that inhabit a domain at a significantly greater remove from the text. The rules/principles distinction may then be superimposed upon this textual/non-textual distinction: textual norms are “rules,” and their non-textual siblings are “principles.” In response, critics object that if the text delivers us rules, then what need have we for non-textual principles too, and what license have judges to entertain and enforce them?

This is a reasonable challenge. Principled positivism meets it by denying its premise: the text does not deliver rules all by itself. Principles (unwritten, invisible) do not reside alongside, or in parallel to, rules (written, visible). Rather, principles help constitute the rules. There are no rules wholly apart from the principles that constitute them. Principles and rules are different, but they are not alternatives. Unwritten principles interact with

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122 Eric J. Segall, *Lost in Space: Laurence Tribe’s Invisible Constitution*, N.W. L. Rev. Colloquy (“Where his writing is transparent, Professor Tribe’s descriptive account of constitutional law, doctrine, and history fails to break new ground. Where he fashions new ideas to support his descriptive account, Tribe’s reasoning is often obscure.”).

123 *See, e.g.*, Ely, Democracy and Distrust, at 1 (“A long-standing dispute in constitutional theory has gone under different names at different times. . . . Today we are likely to call the contending sides ‘interpretivism’ and ‘noninterpretivism’—the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that court should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.”).

124 *See, e.g.*, Ronald Dworkin, *Taking Rights Seriously* 29 (1977) (identifying “two very different” ways of understanding the “principles”—as legally binding, just as “rules” are, or as “extra-legal”).

the written text to make the rules what they are. The relationship between principles and rules is thus less like that between oxygen and hydrogen and more like that between oxygen and water. When conceived in this fashion, the “unwritten constitution” is inescapable.

4. Popular constitutionalism. Much like appeals to an “unwritten constitution,” recent scholarly defenses of “popular constitutionalism” strike many readers as both compelling and hard to pin down. Principled positivism offers one way to accommodate some of the literature’s insights.

Recall that positivism maintains that the norms of all normative systems are grounded in social facts. On my brand of positivism, the principles will depend in large measure on what actual human beings believe and say and do. So who those human beings are will affect the contents and weights of the principles, and therefore the contents of the normative system’s rules. The set of people whose mental states and actions ground a system’s principles need not be identical to the set of people who are subject to, or who subscribe to, the system’s normative outputs. The norms of fashion might be grounded in behaviors only of the fashion elites, even though many others subscribe to them. The principles of baseball may be grounded in behaviors of players, umpires, and coaches. The principles of the common law are grounded largely, if not exclusively, in behaviors of judges. One highly plausible lesson of popular constitutionalism, in my view, is that the people whose judgments and actions underwrite the principles of our constitutional system is not nearly so limited.

On this picture, it’s not that constitutional rulings reached by a majority of the people override contrary rulings reached by the Supreme Court, but that popular beliefs, intentions, and actions have a large role to play in making out what our constitutional principles are—and thus, indirectly, in making out our constitutional rules too. David Cole captures this idea nicely when observing that

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Supreme Court justices are less likely to change constitutional law on their own accord than to recognize that it has changed, through shifts in the country’s constitutional understanding, as manifested in public opinion, state and federal statutes, state constitutions, the writings of scholars, and the opinions of the press, Congress, and the president.¹²⁸

Popular “constitutional understandings” partly determine our constitutional principles, which in turn help shape our constitutional rules.¹²⁹ If this is a somewhat domesticated variety of popular constitutionalism, it is nonetheless one variety that we have.¹³⁰

5. Living constitutionalism and constitutional moments. If legal rules are determined by legal principles and if legal principles are grounded in social facts, it follows that legal rules are inescapably dynamic. They may change a lot, or a little, but either way, they are incapable of being fixed by purposive human action. Principled positivism thus ensures some version of “living constitutionalism”: constitutional rules change without formal amendment of the constitutional text.

That claim will strike some readers as mysterious or dubious at first blush. Scalia ridicules the notion that what “the Constitution [required] yesterday, it does not necessarily [require] today.”¹³¹ But the gibe loses its


¹²⁹ It is also true, as Robert Post and Reva Siegel have emphasized and illustrated, that judicial announcement and deployment of rules helps shape popular constitutional understandings. See Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. CIV. RIGHTS CIV. LIB. L. REV. 373 (2007). I gloss over such feedback mechanisms in this article, not because I think they are of marginal importance, but because I believe that judicial decisions have a causal effect on the social facts that ground principles, and I’m most interested in clarifying constitutive relationships. For a concise elaboration of the difference, see Brian Epstein, A Framework for Social Ontology, 46 PHIL. SOC. SCIENCE 147, 151-55 (2016).

¹³⁰ I’m not contending that that’s our only variety of popular constitutionalism, that our system lacks any more robust features associated with the idea. In particular, it may be that popular judgments of some sort are not only the social grounds of our principles but are also given legal force by one or more of the principles themselves. Maybe it is a principle of our constitutional law that what a supermajority of citizens believes to be constitutionally required or permitted has legal force. I’m not affirming or denying that our constitutional order contains a principle along these lines, merely noting the possibility.

¹³¹ A MATTER OF INTERPRETATION, at 39-40. I have replaced “meant” and “mean” with “required” and “require” to shift the focus where, for persons who believe in the existence of constitutional law, it belongs: on legal norms rather than textual meaning. A like
The document discusses the distinction between abrupt or purposive change and gradual, organic, or evolutionary change. Principled positivism reveals that law changes in an organic or evolutionary way. Most social phenomena change in an organic or evolutionary way, such as mores, fashion, the use of money, market prices, word meanings, rules of prescriptive grammar, etiquette, games, and religion—all are “the result of human action, but not of human design. They are \textit{evolutionary} phenomena, in the original meaning of the word—they unfold.”\footnote{To suppose that law changes in a similar way is hardly audacious. Many people think it obviously true of the common law.\footnotemark} 

I am claiming merely that the introduction of formally promulgated authoritative texts does not radically alter the most fundamental dynamics. Rather, when enacted texts are in play, the inherently dynamic legal principles serve to determine what the legal significance of those texts will be. This was the second Justice John Marshall Harlan’s view: constitutional rules “are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.”\footnote{If principled positivism teaches one unequivocal and non-vacuous lesson, this may be it: our constitutional rules change substitution responds to Jeffrey Goldsworthy’s complaint that the nonoriginalist view “that the meaning of a constitution can evolve without the judges (or anyone else) deliberately changing it . . . in response to external social and political developments” is “very odd.” Jeffrey Goldsworthy, \textit{The Case for Originalism, in The Challenge of Originalism, supra}, at 52. It is the \textit{law} that changes in this fashion, not “meaning.”}

Obviously, the rules can change abruptly and purposively because the enactment of an authoritative text is a purposive and datable event. But they \textit{also} change organically because their underlying determinants—the principles—are determined by facts about human behavior that are always in flux. Principles are thus much like trails: “They continually change—widen or narrow, schism or merge—depending on how, or whether, their followers elect to use them.”\footnote{If principled positivism teaches one unequivocal and non-vacuous lesson, this may be it: our constitutional rules change substitution responds to Jeffrey Goldsworthy’s complaint that the nonoriginalist view “that the meaning of a constitution can evolve without the judges (or anyone else) deliberately changing it . . . in response to external social and political developments” is “very odd.” Jeffrey Goldsworthy, \textit{The Case for Originalism, in The Challenge of Originalism, supra}, at 52. It is the \textit{law} that changes in this fashion, not “meaning.”}

\footnotetext{\textit{Matt Ridley, The Evolution of Everything} 4 (2015).}

\footnotetext{\textit{Accord Strauss, The Living Constitution} 37 (“The early common lawyers saw the common law as a species of custom. The law was a particular set of customs, and it emerged in the way that customs often emerge in a society. . . . [The common law] can develop over time, not at a single moment; it can be the evolutionary product of many people, in many generations.”).}

\footnotetext{See Desist v. U.S., 394 U.S. 244, 263 (Harlan, J., dissenting).}

\footnotetext{\textit{Robert Moor, On Trails: An Exploration} 17 (2016). And the Justices of our Supreme Court are like the matriarchs of an elephant herd. \textit{See id.} at 106-07.}
organically because our underlying principles do. They can’t help it, and we can’t stop it.

In saying that the principles change in evolutionary fashion, I do not, however, intend to take on all characteristics usually associated with evolution. In particular, it’s important to disavow that the creation, demise, and modification of principles must always be gradual. I see no reason to believe that is so. Usually, in a stable society, beliefs, intentions, and actions of large numbers of people change slowly, not quickly. But not always, as Bruce Ackerman’s exploration of “constitutional moments” has taught.136

Ackerman erred, in my view, by treating successful constitutional moments as equivalent to formal amendments of the constitutional text, and by attempting to regiment too precisely the conditions that make out a “constitutional moment” in which abrupt change occurs. These features of his account have attracted substantial criticism.137 But they were unnecessary. At genuine “constitutional moments,” our constitutional rules change not because the text has changed but because the principles have.

6. Hardier than Hart. On the standard reading of Hart, the law is the set of norms that are validated by an ultimate norm that is constituted by a convergent practice among legal officials that Hart dubs a “rule of recognition.”138 As noted earlier, many constitutional scholars accept this theory. But many others are doubtful. A principal obstacle is that Hart’s account seems to entail that there is much less constitutional law than seems correct to us, even on reflection.

I’d venture that just about every reader of this paper has had the experience of simultaneously harboring two beliefs: (a) that thus-and-such is a constitutional right or power or duty, and (b) that legal officials, or federal judges, or Supreme Court Justices do not all accept one or another legal premise that serves as essential support for (a). For example, you might strongly believe today that people have a constitutional right to smoke marijuana or to state recognition of their plural marriages, even though you recognize both that your conclusion rests upon certain premises concerning the constitutional significance of liberty or equality interests, and that


138 HART, supra note __, at ch. 6.
officials have not converged on those premises. Or you might be confident that Printz was correctly decided, even though you understand that your conclusion depends upon views about the constitutionally mandated federal-state balance that you know some or many legal officials did not, and do not, share.

If Hart’s account of law is correct, then your belief in (b) should always cause you to abandon your belief in (a). But very few of us internalize that lesson. We think, at least in some cases, that (a) and (b) can both be true. By application of modus tollens, that last judgment—that some legal propositions are true even though the legal premises that make them true are controversial among judges and other legal officials—undermines Hart’s theory. Some constitutional theorists have sought to bolster Hart’s account against this challenge by trying to establish that officials are closer to a consensus on many interpretive or constitutional issues than observers assume.\(^\text{139}\) Yet these efforts have not won many converts. Many scholars continue to believe that Hart’s account does not allow for us as much constitutional law as there is.\(^\text{140}\)

One might reasonably worry that the same problem bedevils principled positivism too. And it would if what I am calling a “constitutional principle” exists only if it has garnered support, endorsement, or acceptance similar in character and magnitude to what is required to make out the Hartian rule of recognition. But that is not so, for reasons that have to do with the different ways that a rule of recognition and constitutional principles determine constitutional rules and, in consequence, the different demands that they make on the underlying social facts. A rule of recognition is claimed to validate putative norms as norms of the system, whereas I maintain that principles combine to constitute derivative norms (“rules”). In order to provide validation, a rule of recognition must be both complete and determinate, attributes that are difficult to secure given the inevitable noisiness of the social facts that provide grounding. Principles do not require comparable precision and therefore can arise more readily from social beliefs and practices that are messy and dynamic.


C. Objections

I expect that principled positivism will provoke a host of objections. Here I anticipate only three. Call them the epistemology problem, the combinability problem, and the normativity problem. The third, at a minimum, should interest even relatively undisquieted readers.

1. The epistemology problem. Recall the use I made of reflective equilibrium earlier when introducing the “originalism-challengers.” As I noted then, some scholars reject that we can learn anything at all from any supposed intuitions about true constitutional propositions—propositions like “States and the federal government are required to provide indigent criminal defendants with free defense counsel.” Among constitutional theorists, Larry Alexander has pressed this argument most squarely, denying “that one does or can have constitutional or legal intuitions that pre-exist and provide the grist for building our theory of legal interpretation.” Whether pre-theoretical judgments about the contents of our constitutional law can contribute constructively to our development of a general constitutive theory is a question of substantial importance—not just for assessing constitutive originalism, but for evaluating any claims in constitutional theory. So it will be worth our while to engage Alexander’s arguments directly.

Alexander’s denial “that one does or can have constitutional or legal intuitions that pre-exist and provide the grist for building our theory of legal interpretation” can be read in (at least) two ways. First, Alexander might be maintaining, as an empirical matter, that no one “does or can” have intuitions

141 See supra Section I.C.3.
142 Larry Alexander, Simple-Minded Originalism, in The Challenge of Originalism 87, 97 (Grant Huscroft & Bradley W. Miller eds., 2011).

Stephen Sachs has also raised cautions about the use of reflective equilibrium in this context. See Sachs, “Constitution in Exile,” supra note __, at 2272-78. But, as I explained earlier, these really are only “cautions,” not objections. See supra note 80. Nothing in Sachs’s article causes trouble for what I argue in this Article. Furthermore, nothing in this Article is inconsistent with what I take to be Sachs’s central claim—namely, that some types of “global error” about law are possible and, therefore, that there is some good sense to be made of claims of a “constitution in exile.” To the contrary, I take my analysis to support his core claim. As I’d put it, people can be mistaken about the contents of our constitutional principles. (Because Sachs is more Hartian than I am, he puts the same fundamental point in terms of “higher-level practices.”) When a majority of the Court systematically ignores or devalues principles that are active and have a claim on the Court’s recognition and deployment, we can fairly describe those principles as “in exile.” My disagreement with Sachs is therefore quite limited: it’s over whether the output of a coherentist investigation supports the hypothesis that any form of monistic originalism describes either our principles (my terms) or our higher-level practices (Sachs’s).
about the content of the law that pre-exist embrace of any “theory of legal interpretation.” This is a claim about legal psychology. It is barely credible. It contradicts dozens or scores of first-person accounts by judges, dating at least to Cardozo. I assume that Alexander would disown this claim if pressed.

More charitably, then, we could interpret Alexander as insisting only that, even though people, including judges and constitutional scholars, can and do have intuitions about constitutional rules and casuistic constitutional judgments that are prior to a theory of constitutional interpretation, such intuitions can be of no help in building or inferring the correct theory. This would be to claim, in effect, that we’d do a better job of discovering the correct constitutive theory of law by disregarding any pre-theoretical constitutional intuitions we may have. Whereas any claim about judgments that people do or can have is a claim about (legal) psychology, I am now construing Alexander’s contention as advancing a claim about (legal) epistemology.

Alexander is thrifty with arguments for this strong thesis, but here’s the context. In a previous article, I had observed that many legal elites are more confident that persons like John McCain and Ted Cruz (both born outside the territorial United States, to U.S. citizen parents) are eligible to be president, than they are about the original public meaning of the Natural Born Citizen Clause. I particularly noted that even self-described originalists invoke reasons for the conclusion that originalism would seem to rule out as entirely irrelevant. I said that we should take these intuitions seriously in building our constitutional theories. Here, in rebuttal, is Alexander: “Did or did not the framers put the specific language regarding ‘natural born Citizen’ in Article II? That question . . . is not resolved by reflective

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143 For valuable scholarly discussions that include citations to much of the judicial literature, see R. George Wright, The Role of Intuition in Judicial Decisionmaking, 42 Hous. L. Rev. 1381, 1384 (2006) (concluding that “intuition is invariably central—whether overtly so or not—to the process of arriving at a judicial outcome by any standard recognized means”); Dan Simon, A Psychological Model of Judicial Decision Making, 30 Rutgers L.J. 1 (1998). Indeed, given how few judges would seem to have grasp of anything approaching a “theory of legal interpretation,” Alexander’s assertion would seem to entail that hardly any judges actually have intuitions about what the law requires.

equilibrium any more than is the question how high in feet is New Zealand’s Mt. Cook.”

This argument misunderstands the claim under consideration. The question we are trying to resolve is not: Did the framers put this or that language in the text? Coherentists do not claim that reflective equilibrium sheds light on that question. The question is: Given the fact that the framers put thus-and-such language into the text, and given as well a host of other facts that would strike a person already well-socialized into the law as at least potentially constitutionally relevant, what is the law? Those are very different questions because, recall, text and law are different types of thing.

Once the issue is rightly formulated, Alexander gives us no reason to believe that his epistemological claim is true. Worse, the contrast that he offers between law and Mt. Cook suggests the opposite. First, it is part of the nature of law that its contents are rationally accessible to its subjects. That fact supplies some reason, if defeasible, to suppose that we can learn something about law’s contents by consulting our beliefs about its contents. It is no part of the nature of mountains that their heights be accessible to humans. More importantly, people’s beliefs plainly play no constitutive role in the topography of the earth. In contrast, they are part of the grounds of law. “[T]he critical point,” as Raz has stressed, is “that the way a culture understands its own practices and institutions is not separate from what they are.” Because people’s beliefs about the law partly make out what the law is, people can gain some knowledge about the law through their knowledge of their own beliefs—and others’ beliefs—about the law. In sum, Alexander has not provided reason to doubt the coherentist premise that to the (perhaps limited) extent that we do invest substantial credence in particular retail constitutional judgments (judgments of the form “this is unconstitutional” or “our constitutional law prohibits φing”), such judgments can provide grist for building our constitutive theories of constitutional law.

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145 Alexander, Simple-Minded Originalism, supra note __, at 97.

146 Indeed, his conclusion that “reflective equilibrium is not a coherent method of constitutional interpretation,” id. at 98, suggests that he might not fully grasp the claim. See supra note 80; Berman, Reflective Equilibrium, supra note __, at 268 n.49.

147 Obviously, beliefs can and do play a causal role in shaping the earth’s topography because human beliefs cause human actions, and such actions can affect the topography (think of surface mining).

148 JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 96 (2009). In contrast, what a culture believes about the height in feet of Mt. Cook is separate from what the mountain’s height in feet is.
That said, coherentism is sound in this domain only if our constitutional law actually is constituted in a fashion such that persons—legal elites, at a minimum—could gain reliable (if imperfect) beliefs about constitutional propositions without first grasping the correct constitutive account. Put another way, coherentism depends upon it being the case that constitutional facts are epistemically accessible to us in a way that does not depend upon their derivation from a set of theses that make up a “constitutional theory.” Principled positivism satisfies that desideratum easily. The “taking-up” behaviors that indirectly ground legal rules, by grounding legal principles, are visible to legal elites, even if we don’t have an explicit, conscious account of what they are, or how they produce principles, or how principles produce rules.

2. The combinability problem. Although pluralism is the dominant approach to constitutional interpretation, some scholars have argued that it is inherently unstable, if not downright incoherent or impossible, because it is difficult or even impossible to combine different types of considerations. Kevin Toh and I have previously dubbed this challenge to pluralism the “combinability problem.” It is not a very forceful objection to expressly prescriptivist forms of pluralism, for we should all readily appreciate that considerations of disparate, even incommensurable, character enter into our deliberations regarding what we ought to do. In contrast, combinability may well seem, at least at first blush, to threaten pluralist accounts that have constitutive ambitions. Larry Alexander is the combinability problem’s most energetic champion and thus, again, my foil. As he puts it in one representative formulation of his objection: “Any non-lexical ‘combining’ of text and intentions, text and justice, and so forth is just incoherent, like

\[149\] See, e.g., Fallon, A Constructivist Coherence Story, supra note __, at 1191 (proposing that the challenge for pluralists “is to show how arguments of all of these various kinds fit together in a single, coherent constitutional calculus”). Cf. Gene R. Nichol, Constitutional Judgment, 91 Mich. L. Rev. 1107, 1111 (1993) (“Despite the clear power of Constitutional Fate, critics identified [some] substantial shortcomings. . . . Perhaps most troubling, Constitutional Fate presented no methodology for decisionmaking when conflicts between the various modes of argument arise. It was, therefore, massively indeterminate.”).

\[150\] For a much lengthier response, see Mitchell N. Berman & Kevin Toh, Pluralistic Nonoriginalism, 91 Texas L. Rev 1739 (2013)

Our Principled Constitution

combining $\pi$, green, and the Civil War. There is no process of reasoning that can derive [law] from such combinations.”

The entirety of Section II.A is, in effect, my response to this challenge: it is an attempt to explain, and to depict, how principles of superficially disparate content interact to produce more determinate norms. For any readers who continue to worry that a pluralistic principled positivism of the type I have described must depend upon ontologically illicit combinations, let me take a stab at unpacking the argument a little more formally.

(1) It is a function of artificial systems of practical normativity (“normative systems”) to generate conduct-guiding norms that we can call “rules.”

(2) In simple normative systems, rules are directly grounded in social facts without normative intermediaries. Call this type of grounding relationship, whatever it is, $G_1$.

(3) Complex normative systems contain, in addition to rules, other system-specific norms that we can call “principles.”

(4) Principles are grounded in social facts by $G_1$.

(5) In complex systems, principles ground rules. Call this type of grounding relationship, whatever it is, $G_2$.153

(6) American constitutional law is a complex artificial system of practical normativity. In American constitutional law, constitutional rules are grounded in constitutional principles by $G_2$, and constitutional principles are grounded in social facts by $G_1$.

Because principles can concern, involve, or operate upon different types of facts (e.g., semantic facts, historical facts, moral facts, physical

\footnote{Larry Alexander, The Banality of Legal Reasoning, 73 Notre Dame L. Rev. 517, 521 (1998) (footnotes omitted). The quoted passage says “meaning” where I have substituted “law.” Cf. supra note ___ (discussing other originalists who misdescribe nonoriginalist views about the law as views about a text’s communicative contents). If Alexander would disavow the claim, as revised, then he and I may have no disagreement. But because others might worry that pluralistic determination of law (and not only of meaning) is problematic, I offer the following summary for their benefit.}

\footnote{$G_2$ is a form of grounding that we may call “normative determination.” I take it to satisfy the demands of what Mark Greenberg has termed “the rational-relation doctrine”—to wit, that “the content of the law is in principle accessible to a rational creature who is aware of the relevant law practices.” Greenberg, supra note __, at 237.}
facts), there may be a sense in which these disparate facts participate, or appear to participate, in the determination of the rules. Just how that works will depend upon the details of G2, and I have not explicated those details. But the challenge on the table does not target any particular version of a pluralistic constitutive theory of American constitutional law. Alexander’s version of the combinability problem appears to maintain that we are presently warranted in having confidence that this chain of grounding is metaphysically untenable. That is a bracingly ambitious claim. In order to establish it, one would have to show that one or both of the grounding relationships I invoke cannot obtain. But G1, although it grounds norms in facts, seems secure so long as we accept positivism about simple artificial systems of practical normativity. And G2 grounds one type of norm in another type of norm, a relationship that involves no blending of ontological categories. Yes, we do not yet understand just how either determination relationship works. But we have plenty of reason to believe that they do.

Nobody understood how gravity works until Einstein proposed his general

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154 Although I haven’t said much, do note that I have described the facts that the principles make relevant as determining the extent of a principle’s “activation.” So, on my picture, while facts shape the operation of individual principles, rules are determined solely by the interaction of the principles (as activated) and not by a blending of norm and fact. Compare the following three forces: F1 = 3 (π), 90 deg; F2 = 2 (international hex code for green), 180 deg; F3 = 4 (years since end of Civil War), 270 deg. There is no difficulty in summing them: F1 + F2 + F3 = 1.6011e+4, 182.14 deg. In this example, it’s not that π, green, and the Civil War are themselves combining to produce something of a different ontological category, but that they determine the magnitude of distinct forces which combine to create a new force. That’s the analogy I aim to exploit.

155 I am accepting that grounding can relate entities of different ontological categories—here, facts and norms—against Rosen’s claim that grounding must relate facts. Compare, e.g., Jaegwon Kim, Explanatory Knowledge and Metaphysical Dependence, 5 PHIL. ISSUES 51 (1994), and Jonathan Schaffer, On What Grounds What, in METAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 347 (David Chalmers et al. eds, 2009) (defending “dimensioned” theories of grounding), with Rosen, supra note __, and Paul Audi, A Clarification and Defense of the Notion of Grounding, in METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY 101 (Fabrice Correia & Benjamin Schnieder eds. 2012). See Michael J. Clark & David Liggins, Recent Work on Grounding, 72 ANALYSIS 812 (2012). But I also believe that this is largely a terminological disagreement. If we restrict grounding to a relationship between facts, then I need only invoke some other term of metaphysical determination for what I am calling the grounding relationship of G1. Perhaps we will conclude that this relationship is better described by “determination,” or “emergence,” for example. The important claim is only that principles of complex normative systems are determined by social facts in a manner akin to the manner that rules are determined by social facts in a simple normative systems, whatever that manner may be. The grounding relation G2 relates entities of the same ontological category, and thus is cognizable even on the more restrictive “flat” accounts preferred by Rosen and Audi.
theory of relativity; all the same, nobody feared we’d go floating off the earth’s surface.

3. The normativity problem. I have said that normative systems, and the norms that they comprise and output, are grounded in social facts. This claim will strike some readers as violating Hume’s law that we can’t derive an ought from an is. But it all depends on what type of normativity we’re talking about.156

Theorists frequently distinguish between “real” or “genuine” normativity on the one hand and “ostensible” or “formal” normativity on the other: the norms of some systems may be genuinely or truly binding upon us regardless of our desires and beliefs whereas the norms of other systems only purport to bind their addressees.157 Real normativity is what morality supplies, if morality is as moral realists understand it. Rationality and prudence are other candidates of systems that furnish “real” norms—norms that bear on their addressees truly and non-contingently. In contrast, the norms of artificial normative systems are only ostensibly or thinly normative. When presented with a merely ostensible norm, it is always sensible for an agent to respond: “yes, I see what the norm provides; but what does it matter to me?” A similar thought uttered about a real or genuine norm would strike many observers as confused or self-contradictory.

It is essential to the principled-positivist picture that whether there are artificial normative systems and, if so, whether we really ought to comply with the norms they generate are distinct questions. Some jurisprudentially minded scholars believe or assume that if a putative norm does not carry real normative force then it is not a norm. On this view, real normative force figures into the existence conditions for norms, an approach that underwrites such conclusions as that etiquette is not normative.158 I have been assuming a different understanding of what it is to be normative. On the notion of normativity that I have been employing, etiquette, baseball and law are normative by definition.

156 See Berman, Of Law and Other Artificial Normative Systems, supra note __.

157 For an overview, see Tristram McPherson, Against Quietist Normative Realism, 154 Phil. Stud. 223 (2011).

158 See, e.g., Jonathan Way, Two Accounts of the Normativity of Rationality, JOURNAL OF ETHICS & SOCIAL PHILOSOPHY, Dec. 2009, at 1, 1, www.jesp.org/articles/download/TwoAccountsOfTheNormativityOfRationality.pdf (“[O]ther systems of requirements seem not to be normative. For example, if you fail to do something that etiquette requires of you, or that freemasonry requires of you, you may not have failed in a serious way.”).
Actual human communities can and do use the ostensible norms of artificial normative systems in just the same way that they can and do use the real norms of natural normative systems (assuming that there are any). They use them as guides to, and standards of, behavior. I have not been assuming that the norms that these disparate normative systems output are “really” binding upon us. It is closer to accurate to say that I have been assuming only that people treat some things as sources of content-independent, non-instrumental reason, and that these sources are, by and large, normative systems.

We could stipulate that putative normative systems that do not generate real normativity do not rightly qualify as normative systems at all and that their outputs are not norms. That would be a highly revisionary bit of linguistic or conceptual legislation. More importantly, it would make no substantive difference. It would only create a need for a new name for what I am calling artificial normative systems (systems that I concede generate only ostensible normativity). Call them, if you’d prefer, “shnormative systems.” Everything that I want to ask and claim about “artificial normative systems” could be asked and claimed in just the same way about “shnormative systems.” Most notably, the central jurisprudential task would not be substantively different: it would be to explain how legal shnorms gain the contents that they have. Because legal shnorms, concededly, are not really normative—that is, they do not exert real normative force—the premise that they are grounded in social facts does not contradict the maxim that we can’t get a real ought from an is.\footnote{My assumption that legal norms are products of artificial systems and carry only ostensible force shows the error behind Larry Alexander and Ken Kress’s well-known argument to the effect that legal principles do not exist. As they summarize:}

> Our case against legal principles is primarily a normative case. Legal principles are either normatively unattractive or superfluous. If legal principles dictate outcomes different from what moral principles and legal rules dictate, they are normatively unattractive. If, on the other hand, they dictate the same outcomes that legal rules and moral principles dictate, they are normatively superfluous. If normative unattractiveness or superfluity counts against the metaphysical existence of a norm, then the case we make against legal principles is a case against their existence.

Alexander & Kress, supra note __, at 303 n.96. My response: the fact that a principle, P, of normative system S is unattractive or superfluous from the perspective of another normative system Q does not (absent some further, contingent story) count against the metaphysical existence of P as a norm of S. And this is so even if Q is “morality” or the system of “ought sans phrase,” or any other system that generates “real” normativity.
III. OUR CONSTITUTIONAL PRINCIPLES

Part I maintained that, so long as we believe that there are such things as constitutional norms (rules, rights, duties, powers, and the like), or that some propositions of constitutional law (including some disputed propositions) are true, we have reason to want an account that explains, in a general and informative way, what the contents of those norms are, and what makes the true constitutional provisions true. I called any account that aims to deliver these explanations a “constitutive theory” and I argued that we have remarkably few plausible ones to choose from.

Because a constitutive theory of American constitutional law must fit with a constitutive theory of law generally, and because I find none of the most prominent general constitutive theories of law satisfactory, I offered, in Part II, the outlines of a distinct and original general constitutive theory of law. On that theory of law (what I dubbed “principled positivism”), the type of legal norm that we are usually inquiring after—norms of the form “individuals have a constitutional right to plural marriage,” or “Congress lacks power to require states to administer a federal regulatory scheme,” or “prior restraints on expression are prohibited”—are derivative norms that we may call, simply, “rules,” and that are the product of a smaller set of fundamental norms that we may call “principles.” If this is right, then to know what our constitutional rules are, we need to know what our constitutional principles are. We need to know, that is, their contents, contours and weights.

That’s not all that we need. We also need to know the extent to which particular principles are activated in particular contexts, which depends upon the non-legal facts that the principles make relevant.

Furthermore, we need a better grasp on the mechanics of determination of rules by principles. I have modeled that interaction as vector addition because that is probably the most intuitive way to understand how forces can interact to produce new forces, and because we need only one plausible picture to license belief, even confidence, that determination of rules by principles is possible. But force addition may be a highly simplifying construct. The actual dynamics by which low-level norms that are directly grounded in social facts determine higher-level norms may be vastly more complicated. Perhaps, for example, principles combine not by addition, but my multiplication, or perhaps some principles are adders and some are multipliers. As recent work in the structure of practical reasoning suggests, principles might defeat, enable, or preempt. See, e.g., JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES ch. 3 (2004).

A very important lesson follows. If principled positivism were to become accepted as a general constitutive account of law, many of our current debates within constitutional theory could be recast as debates, not only about the contents of our constitutional principles at the moment, but about the actual structure and dynamics of their normative interaction.
Easier said than done! Given the complexity and dynamism of our constitutional order, we can be sure that nobody will ever obtain mastery of our principles, let alone that the community of legal elites will ever reach complete agreement. But that does not mean that we can’t make progress. I think we can, though I don’t warrant that we’ll make great progress here. Because even a moderately serious first stab at the project would require a book of its own, this Part can offer little more than a first quick glimpse at the landscape. I start, in Section III.A, by ruminating on how we go about inferring what our principles are. Section III.B reports on some early fruits of the type of exploration that the first section recommends. It is a very preliminary and partial catalogue of our constitutional provisions, circa 2017.

A. A Musing on Method

How do we discover what our constitutional principles are? Discovering the principles of any legal system is a matter of a posteriori reasoning, not a priori theorizing. We could deduce them if we knew details of the grounding relationship between social facts and a normative system’s fundamental norms, and if we knew all the relevant social facts. But we don’t know those things. The alternative is to proceed more impressionistically. We reason from the full panoply of decisions and judgments of constitutional character or status reached by constitutionally relevant actors—Supreme Court Justice and lower court judges, constitutional litigators and scholars, elected officials and leaders of social movements, journalists and ordinary citizens. We attend to the arguments these actors make when reasoning about constitutional issues, the arguments they forgo, and the evaluative judgments they reach about the reasoning and results approved by others. We reflect on the principles that would contribute to explaining and justifying constitutional rules and casuistic judgments, actual and hypothetical, in which we have high confidence. Some actors and classes of actors matter

For example, originalists might argue not only that some fixed object of inquiry—say, original communicative contents, or legal intentions at enactment—is particularly forceful in our system, but also that it operates to defeat or preempt some or all other principles of our system. And although I’m quite skeptical, nothing I have argued in this Article demonstrates that they’d be wrong. I emphasize, though, that whether they are right depends upon our actual practices, not about conclusions supposedly derived from the nature of law or the nature of democracy, and the like. Furthermore, not everything about our current debates could survive transposition to intramural disagreement within the frame of principled positivism. Principled positivism insists that the fundamental norms of our constitutional order are pluralistic and dynamic. Those features are baked into the nature of law.
more than others, and some actions and classes of actions matter more too. I have no hard-and-fast rules of inference to propose or arcana to reveal.

Luckily, I think we don’t need any. Don’t get me wrong: more detailed and nuanced guidance would certainly be useful. But we can get started in the meantime. That is a coherentist lesson once again. We already know a lot more about our principled constitution than the lack of an explicit, broadly accepted theoretical framework might have led us to suppose.

In the absence of well-defined rules of inference, you might worry that principles are easy to pronounce but hard to prove. Agreed: they are. The question is whether that fair observation licenses a leap to the cynical conclusion that the inquiry must be a farce or doomed to failure at the get-go. I deny it. My project presupposes that our existing, largely inchoate, methods for divining our constitutional principles are not hopelessly inadequate to the task, and that the commitments of political morality that each of us brings to the interpretive table need not determine (though they will surely influence) the set of constitutional principles that we end up discerning. It could be that all our ostensible disagreements over the scope of the principles reduce to “I like Rawls, you prefer Nozick,” but I see no reason to think that it must be. I believe, in short, that the notion of interpretive “good faith” is not empty.

None of this is an argument. It’s a declaration of my beliefs, born of my experience. You can assess whether they are yours too by introspecting on whether you recognize a difference between what you believe to be the shape, content, or force of a constitutional principle, and what you believe to best comport with your commitments of political morality. It feels that way to me. The enterprise assumes that there is a difference and that we are capable of respecting it, albeit imperfectly. It is this possibility that prevents principled positivism from collapsing into Dworkinianism.

B. A First Stab, Partial and Preliminary

A list of candidate principles follows. In my view, many of these are both secure as principles of our constitutional system and weighty; some are secure but fairly weak; and a few may be less secure, more contestable. No matter. This is a partial and suggestive picture of how things might be, not a committed claim that it’s how they are. Consistent with that modest

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161 See Ely, Democracy and Distrust, supra note __, at 58.

162 For a predecessor to this list see Berman & Toh, Pluralistic Nonoriginalism, supra note __, at 1754-55 (2013).
ambition, I’ll be terse, elaborating only where the idea is not familiar. Furthermore, because, often, “incomplete and necessarily misleading citation of sources is worse than none at all,” I will offer little documentation. I will frequently say that thus-and-such “matters” or “has force.” Although some readers will understandably hunger for more precision or concreteness, I am unaware of other locutions that, to my ear, better capture what it means for thus-and-such to be a principle.

1. Meanings of the text matter. Everybody agrees that meanings encoded in, or assignable to, the constitutional text matter. To start, what the text “plainly says” has great force. It is natural to observe, for example, that “The President must be at least 35 years old” is a rule of constitutional law because that’s what the text says. And even if that way of putting things simplifies just a bit, it’s certainly not far off.

But there are many types of textual meaning, and it is not at all obvious which meanings matter how much. For example: How forceful is what the text implies, or what it communicates rather than merely says? What is the significance of original meanings that are discoverable but not patent? And what constitutional force, if any, attaches to meanings that contemporary readers would reasonably attribute to the text but that depart from the meanings that authors or ratifiers intended to encode? Some theorists have views on at least some of these questions. I can’t run them down here. It’s enough now to recognize that a constitutional principle, or a cluster of them, concern the legal significance of communicative contents belonging or attributable to the constitutional text, but that a great deal will need to be said regarding their contours and weights.

2. Enactment intentions matter. The Framers drafted the constitutional text, the Continental Congress proposed it, and the state ratifying conventions ratified it, not because these individuals and collective agents wanted to say something, but because they wanted to do something—or, rather, they wanted to do very many things. Speaking very generally, framers and ratifiers (collectively “constitutional authors”) wanted to do two different types of things by means of ratifying a constitutional text.

163 Grey, Unwritten Constitution, supra note __, at 715 n.49.
164 See infra Section IV.A.2.
165 For very recent examinations of the many nuances in this area, see Strauss, Foreword, supra note __; Richard H. Fallon, Jr., The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235 (2015).
166 See supra notes 7 & 78.
First and more directly, they wanted to affect the content of the law, either by making changes to the corpus juris (e.g., to constitute a Supreme Court, to prohibit the manufacture and sale of intoxicating liquors) or by preserving some aspects. Second and more ultimately, they wanted, by means of changing the law, to effectuate changes in the world (e.g., to facilitate the peaceful and efficient resolution of disputes, to improve the health and moral character of the citizenry). These are distinct objects of intention: the first is an intent to do something; the second is an intent to cause some outcomes in consequence of what one does. We can capture the difference with some terms of art. Let us say that when authoring and enacting constitutional texts (whether Articles or Amendments), agents act both with “legal intentions” and with “worldly purposes.”

In debates over statutory (as distinct from constitutional) interpretation, suggestions that courts should try to give effect to an enacting legislature’s legal intentions or worldly purposes provoke a variety of difficulties and objections—metaphysical, epistemic, and political or ideological. I don’t want to pooh-pooh any of these worries. Nonetheless, it is part of our constitutional tradition that the legal intentions and worldly purposes that lay behind and animated the ratification of provisions have legal force—and wholly apart from what those provisions “mean” in the senses captured by the principle or principles that reside under the heading, meanings matter.

Sovereign immunity doctrine exemplifies the importance of legal intentions. For well over a century, majorities of the Court have announced rules of immunity more robust than what any plausible meanings of Article III or the Eleventh Amendment would warrant, largely on the basis of the belief that the framers and ratifiers of one or the other provision intended that

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167 And purposes can also be distinguished from another mental state or object that we could call “motive,” where a motive is a value or desire that explains the formation and pursuit of a purpose. For example, in 1962 the Jackson, Mississippi city council enacted an ordinance with the legal intention of instructing the parks department to close the municipal pools, for the purpose that black people would not swim with white people, with motives of racial animus and hostility. See Palmer v. Thompson, 403 U.S. 217 (1971).

168 Unfortunately, although judges and scholars frequently mark a distinction between what they call “intention” and “purpose,” they routinely fail to distinguish in a clear or consistent way what I am here calling “legal intentions” and “worldly purposes.” See Mitchell N. Berman & Jonah B. Gelbach, Legal Intention: Between Text and Purpose (unpublished manuscript).
states should enjoy broad immunity from suit.\textsuperscript{169} Similarly, Chief Justice Marshall invoked principles of legal intention in \textit{Gibbons v. Ogden} when explaining that “The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.” On this view, Congress has power to regulate navigation in part because framers and ratifiers intended that it would have this power. Likewise, prior to the Fourteenth Amendment, the Bill of Rights applied only to the federal government because that was the legal intention of those who authored, proposed, and ratified it, and not because that’s what the text says or meant.

Similarly, when interpreters of the Fourteenth Amendment appeal to the (purported) fact that “The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.,”\textsuperscript{170} they are invoking the principle of legal intentions: in this context, “to eliminate” is equivalent to “to make unlawful; to prohibit.” In subtle contrast, interpreters sometimes attribute to the authors of the Reconstruction Amendments an intent that the eradication of de jure discrimination against black people would facilitate an end to their social subordination—that black Americans would be freed “from the oppressions” exerted even by private agents of white supremacy;\textsuperscript{171} that they would come to realize “equality in the enjoyment” of the legal rights that would be distributed in a formally equal manner.\textsuperscript{172} If enactment intentions of this sort have legal force it is by dint of the neighboring principle of worldly purposes.

3. Judicial decisions have force. Let’s start with the simplest principle in this cluster: \textit{what the Supreme Court has recently held has great force}. Indeed, Supreme Court decisions are so forceful that it is tempting even to say that what the Supreme Court has recently held “is the law.” That’s too strong, though only marginally.\textsuperscript{173} Beyond that, though, the


\textsuperscript{170} Loving v. Virginia, 388 U.S. 1, 10 (1967). See also, e.g., Washington v. Davis, 426 U.S. 229, 239 (1976) (“the central purpose of the Equal Protection Clause” was to forbid “official conduct discriminating on the basis of race”).

\textsuperscript{171} Slaughter-House Cases, 83 U.S. 36 (1873).

\textsuperscript{172} Shelley v. Kramer, 334 U.S. 1, 23 (1948) (“Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.”).

\textsuperscript{173} Commenting on the Supreme Court’s decision in \textit{Dred Scott}, Lincoln observed that “judicial decisions are of greater or less authority as precedents, according to circumstances,”
contours of the principle of case law—or the contents of the countless many subprinciples that make up this cluster—are matters of immense complexity. Holdings aren’t the only outputs of judicial decisions that matter; reasoning and dicta matters too. And not all decisions matter equally. Their significance can depend upon their age, the extent to which they have been followed, the size of the majority that issued them and the status of an opinion’s author. Concerences and even dissents can gain force too, as can decisions and opinions of state courts and lower federal courts. As was true of meanings matter, most of us are certain that judicial decisions have great force in determining our constitutional rules, even while the details are contested or remain to be filled out.174

4. Historical practices matter. That we all know. But—to repeat a refrain—which practices matter how much under what circumstances are much tougher questions. Original meanings, enactment intentions, and judicial holdings are themselves all matters of historical fact. But historical practices matter in other ways too, even putting aside their relevance as evidence of something else, such as legal intentions and worldly purposes. Here’s one respect in which history matters: exercises of power that have proven workable and accepted have force. This is the clear and consistent lesson of McCulloch, Youngstown, and, more recently, Noel Canning.175

5. Power must not be unduly concentrated. The constitutional regime establishes a system of distributed powers in which no single branch of the government can concentrate upon itself political or military powers.176

6. The national government has power adequate to the nation’s needs. The national government has regulatory authority sufficient to meet the needs of a nation state in its changing geopolitical and economic circumstances.

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174 One way to understand the debate between textualists and common law constitutionalists is as a disagreement over which principle weighs more heavily in our system—meanings matter or judicial decisions have force. See, e.g., Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 HARV. L. REV. 26 (2000). But that’s a somewhat misleading way of putting things if those putative principles really comprise clusters.

175 For discussion, see, e.g., William Baude, “Constitutional Liquidation” (unpublished manuscript, Jan. 29, 2017); Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 HARV. L. REV. 411 (2012).

176 See, e.g., Federalist 51.
This principle has deep historical roots in the Marshall Court, and the Philadelphia Convention. The principle was given short shrift through the 1930s but was re-secured as a legacy of the New Deal.

7. States matter. States possess regulatory authority and immunity from national power sufficient to enable them both to serve as bulwarks against excessive concentration of power in the national government, and to satisfy material and other needs of their citizens that can be met more effectively by subnational governments. This is a principle that stands on its own bottom, not a report about what some portion of the constitutional text says. As the Court, per Justice Kennedy, expressed it in Alden, “our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.” A corollary is that national regulatory power is limited: The national government lacks authority to regulate everything; there are limits on its regulatory power. Cases acknowledging this principle are legion.

8. The people of the United States are sovereign. Ours, famously, is a “government of the people, by the people, for the people.” As Lincoln’s triplet suggests, an investigation into this general space will reveal a constellation of principles, not a single one. I’ll disambiguate two: the principle of popular sovereignty and the principle that majoritarian preferences count.

The principle of popular sovereignty is the more fundamental of the two. It holds that citizens’ ability to exercise their sovereign power should not be hobbled by laws that unreasonably entrench or augment the influence of powerful factions, or that make the intelligent exercise of sovereign power unreasonably difficult. It is a “fundamental principle of our representative democracy that the people should choose whom they please to govern

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177 The sixth of the Virginia Resolutions provided, in part, that Congress shall have lawful authority to “to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.” Although approved by the Constitutional Convention on July 17, the language didn’t make it into the constitutional text, as the Committee on Detail replaced it with an enumeration of specific powers that ended up becoming the 18 clauses of Article I, Section 8. See Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 Mich. L. Rev. 554, 556 (1995) (concluding that “there is no reason to think the Committee of Detail was rejecting the spirit of the Resolution when they replaced it with an enumeration”).

them.”

The “accountability principle” birthed in the first anti-commandeering decision, *New York v. United States*, is an implication of the more general *principle of popular sovereignty*.

The principle that *majoritarian preferences count* maintains, loosely, that the people’s policy preferences are to be respected. Although it is no simple matter to prise these two principles apart, the former is mostly procedural and the latter mostly substantive. The latter attaches to discrete policy questions; the former concerns the structures that serve to transmit popular will into outcomes. The *principle of popular sovereignty* maintains that effective sovereignty resides in the people, not elsewhere; *majoritarian preferences count* provides that the people should get their way.

Very possibly, more constitutional disputes implicate the principle of *majoritarian preferences* than the principle of *popular sovereignty*. But *popular sovereignty* is the weightier principle for the simple reason that, in a rights-respecting constitutional order, limits on what “the people” get to do are hardwired into the system.

9. **Government must respect individual liberty.** Here’s a large and ragged cluster for you! No two people will conceptualize the elements that make up this cluster in just the same way. But nor are the raw materials for our investigation simply an inkblot. We all recognize a *principle of bodily integrity* (self-explanatory). Few would deny something approximating a *principle of natural liberty* (people are generally free to conduct themselves as would be permitted in a pre-political condition). I think we can make out a broader *principle of pursuit of happiness* (the constitutional order recognizes and respects the equal right of every citizen to pursue happiness as he or she conceives of it, free from arbitrary constraints or unnecessary demands for conformity to majoritarian norms). There is much room for reasonable disagreement here, but also much reason to suspect that anybody who claims to see no general principles of liberty isn’t really looking.

10. **Government must respect the dignity and equality of persons.** What I said about principles of liberty applies to principles of equality and

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180 The phrase “the people” is not a throw-away. The principle of *majoritarian preferences* does not weigh in favor of everything that exits the law-making machinery. It is common to assert that every statute reflects “majority will,” but that is silly talk. Consider the extremes: the ordinary piece of complex legislation or regulation does not implicate *majoritarian preferences count*; a state constitutional amendment adopted by referendum surely does. Cf. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting). Sorting things out in the vast middle ground will require work.
dignity too: that there are such principles should elicit broader agreement than will most claims about their precise contents. But here’s a reasonable working hypothesis offered in the spirit of lumping: the state must respect the inherent equal dignity of each person within its jurisdiction, and must not demean or stigmatize people.

This is a good place to emphasize a critical respect in which principled positivism differs from more text-centric views. Principled positivism claims that principles of liberty and equality (like principles of federalism, for that matter) can stand on their own normative bottoms. Scholars such as William Baude and Stephen Sachs view the principles only as interpretations of the text. Put in my terms, they might say that text matters is the principle that’s doing the real work here, not any supposedly independent principles such as liberty matters or equality matters. Certainly, there is a sense of “principles” in which they can be products of the text in this way. Principled positivism insists only that they’re not all like that. The textualist or originalist picture risks overlooking the difference between causal and constitutive explanations. The contents of our principles at t₃ are causal products of, among other things, what texts have been enacted at t₁ and what some persons at t₂ believed those texts to mean. But the principles are constitutively independent at t₃ if and when our taking-up behaviors make it so.

Do they? Do our taking-up behaviors confer normative independence on any principles of equality? Consider this supposed constitutional principle: “racial caste systems are impermissible.” A principled positivist is apt to believe that this is a principle of our order and that it stands on its bottom. One way to tell if this is so, says Sachs,

is to consider what would happen if we repealed the Fourteenth Amendment. . . . Suppose that a new amendment provided only that “because we have too many amendments, the President shall spin a roulette wheel numbered from 1 to 27, and whichever space the ball lands on, that Amendment is hereby repealed.” Many Americans, lawyers as well as ordinary citizens, would vociferously oppose that amendment precisely because it threatened to undermine important features of our constitutional order—including, if the ball landed on 14, the rule in Brown. But if that’s true, then Brown [and the no-racial-caste principle] doesn’t really

181 See supra note 104.
Our Principled Constitution

stand on its own bottom; it stands on the Fourteenth Amendment instead.¹⁸²

Frankly, this hypothetical is a little too fantastic for me to get a hold of. I do not know how much of what I believe about this legal world transfers to a legal world in which we randomly repeal amendments “because we have too many.” I assume that proponents of this amendment had something to say, during ratification debates, about what the legal effects of automatic repeal would be. Those statements would reveal enactment legal intentions that I’m certain would influence my judgment.

So consider instead a different hypothetical that is less unrealistic and perhaps more revealing. Suppose that we learn that, due to a “technical” defect, the Fourteenth Amendment wasn’t properly ratified. In my view, principles of equality survive. Or suppose we learn that, in 1791, it was very widely believed, by elites and citizens alike, that “the freedom of speech” referred only to the right not to be subject to prior restraints on speech. In my view, our broader principles of expressive freedom survive. That’s what it means to say that they stand on their own normative bottoms today regardless of what facts might have caused them to be what they are.

¹¹. Beyond the top ten. The preceding list is far from exhaustive. I am certain that our constitutional order contains a wealth of additional principles at its normative foundation. Here are some candidates: secular purpose (state action must be supported by a legitimate non-religious reason or purpose); colorblindness (the state should not make distinctions based on race or color);¹⁸³ minimum welfare (government should strive to ensure the basic material needs of its citizens); traditional values (traditional norms and


¹⁸³ Two quick observations about colorblindness. First, if you strongly believe in a constitutional principle of colorblindness, then originalism is not for you. Welcome to living constitutionalism! We’re glad to have you. Second, insofar as colorblindness is (now) a principle of our constitutional order, it’s a principle, not a rule, and therefore does not apply in the wooden and near-absolute manner that recent majorities of the current Supreme Court have favored. Compare, e.g., Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (applying strict scrutiny to, and invalidating, a school choice plan that sought to promote rather than retard a school’s racial diversity when acting on a student’s request to transfer to a non-neighborhood school) with Comfort v. Lynn School Committee, 418 F.3d 1, 29 (1st Cir. 2005) (Boudin, J., concurring) (“If the plan were patently offensive to core equal protection principles, this would be an easy case. But the Lynn plan is far from the original evils at which the Fourteenth Amendment was addressed. The Fourteenth Amendment sought to forbid the oppression of one race by another. . . . This is not a case in which, against the background of core principles, all doubts should be resolved against constitutionality.”).
practices of a community that help give its communal life value are due respect). As these examples suggest, I’m not pretending that we’ll all see our principles the same way. Interpreters’ own value commitments will inevitably color what principles they see when they look at our practices. Good faith disagreements will remain, but not everything that we wish to see can be made to appear.

IV. OUR PRINCIPLES AT WORK

Part II sketched my general account of how rules of law gain the contents that they have. This general account, when filled in with regime-specific detail, explains what makes it the case, when it is the case, that Congress possesses this or that legal power or that you and I have this or that constitutional right. That general account was arrestingly simple: Rules are constituted by lower-level normative entities that we familiarly term “principles.” The principles are not themselves explained by anything else of a legal character; they are the ultimate normative matter in any given normative system, and are grounded in facts about human behavior. They constitute rules by a process that can be analogized to force addition. Part III then offered a preliminary and partial sketch of some of the weightiest principles in our constitutional system today.

It’s now time to put the account to work. Section IV.A illustrates the theory’s operation by analyzing a handful of genuine constitutional controversies, across diverse doctrinal contexts, implicating questions of governmental power and of individual rights. And I do mean “illustrate.” For reasons that I will explain, the analyses will rely heavily on figures modeled on those introduced in our discussion of the pine tar game (Section II.A.2). Section IV.B draws forth some observations.

A. A Small, Unsystematic Set of Illustrations

Of course, I hope that some readers will find the analyses to follow, gestural though they surely are, persuasive on their own terms. I am, after all, conveying my genuine views, sometimes confident sometimes tentative, about what some of our constitutional rules are and about how some concrete controversies should have been resolved. But persuading anyone of the correctness of my particularistic conclusions about rules and cases is gravy. The paramount ambition of this Part is to lend plausibility to principled pluralism as a constitutive account of our constitutional law. Naturally, I claim plausibility points whenever the general account, together with plausible formulations of our parochial principles, makes sense of particularistic legal judgments that many of us share at the outset or come to
accept. But even disagreements with my judgments over this or that “bottom-line” constitutional question support the general account so long as such disagreements can be explained by reference to disagreements over the identity, shape, or weight of the legally more fundamental principles. Those are precisely the disagreements we should be having.\footnote{Again, though, those are not the only disagreements that principled positivism invites. \textit{See supra} note 160.}

Put another way, \textit{inter}-personal agreements about this or that rule are nice but—at this early stage—not essential. A legal system’s existence depends upon sufficient agreement, at least among those who are held out as its officials, regarding what the rules are. Surely Hart was right about that. But what most matters now is \textit{intra}-personal agreement, or coherence, between one’s views about this or that rule and about the shape and force of the underlying principles that, I am contending, constitutes the rules. I hope that the figures will facilitate one’s ability to see what would be required to achieve that type of coherence. Here is guidance on how to read them.

As before, principles are depicted by arrows that point in favor of one candidate rule or its alternative. The width (height) of the arrow depicts its relative weightiness or power within our system of constitutional law. The length depicts the extent to which the principle is activated given the facts relative to the particular rule dispute. For example, if the constitutional text says \(p\) very plainly, then the principle \textit{meanings matter} will activate very forcefully in direction of \(p\); if a particular rule \(q\) would substantially threaten the ability of the states to exercise independent and substantively meaningful regulatory authority, the principle \textit{states matter} will press forcefully against \(q\), which is to say, toward \(\sim q\). The total force that any given principle exerts in favor of a rule is some function of its power and the extent of its activation. Shading of the principles loosely reflects the total force that the principle is exerting. That is, shading does not add new information, but serves to depict more clearly information that the length and width, combined, already contain. The relative size and intensity of shading of the contending rules communicate the relative net impact of the principles.\footnote{Each figure depicts the principles as pushing either left or right in one-dimensional normative space that is defined by a particular candidate rule and its negation. (The length and width of the arrow do not reflect two distinct dimensions; rather, the product of an arrow’s length and width determines the magnitude of the vector in that single dimension.) Of course, this is a massive simplification. The space is better conceptualized (though impossible to depict) as constituted by all possible constitutional-normative facts, in much the same way as Borges’s Library of Babel contains all possible books, and Dennett’s Library of Mendel contains all possible genetic sequences. \textit{See Daniel C. Dennett, Darwin’s...}}
This way of representing the rules threatens to imply that rulishness is necessarily only a matter of degree—that, in the interests of accuracy, assertions of the form “the rule is φ” should always be replaced with claims of the form “the rule is more φ than ψ.” As noted earlier, I expressly disavow that implication of the figures. If it helps, think of the underlying metaphysics as involving tipping points. Finally, it hardly needs saying that the figures (just like the discursive analyses) are massively oversimplified. This is a schematic representation of a normative reality that is surely of vastly greater complexity. Among other things, I’ll routinely leave out principles that may have some bearing on the rule-determination at issue in order to reduce visual clutter and to better focus the reader’s attention on the principles that, in my judgment, are doing most of the work.

1. Anti-commandeering. Does Congress have constitutional power to require state executive or administrative agents to enforce or help to administer a federal regulatory scheme? There are many possible answers: Congress has no power to command states in this fashion. Congress has power to command compliance just so long as the use of such means to accomplish national objectives are “reasonable” and “appropriate” within the meaning of *McCulloch*. Congress has power to command state officials if and only if the national need in the particular case clearly outweighs any burdens imposed upon a state. Which, if any, of these possibilities was the constitutional rule when, in *Printz v. United States*, the Court addressed itself to the issue two decades ago?

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*DANGEROUS IDEA* 107-13 (1995); Jorge Luis Borges, *The Library of Babel, in LABYRINTHS* (James E. Irby trans. 1962). For example, a tiny neighborhood of constitutional-normative space (a neighborhood that plays home to debates over constitutional marriage equality) consists of potential constitutional facts such as the following: A state may selectively exclude same-sex couples from the institution of marriage; a state may not selectively exclude same-sex couples from the institution of marriage; a state must selectively exclude same-sex couples from the institution of marriage; a state may prohibit inter-sibling marriage; a state must permit plural marriage. And on, and on. The normative space is unimaginably vast and multi-dimensional.

Principles operate within this space. Imagine each principle as exerting pressure in favor or against any of these normative facts, to varying degrees of forcefulness, or as having no bearing at all. The normative facts that actualize are those that are brought into being by the net force of the principles. A “rule” is a description of a stretch of constitutional facts that are activated by the principles. (I am grateful to Guha Krishnamurthi and Megan Stevenson for pressing me on this point.)

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186 See supra note 114.

Justice Souter found it a close question.\textsuperscript{188} I think so too. It’s close because a large number of our principles are implicated, but the bearing or activation of each is reasonably contested. Judicial precedents cut in different directions.\textsuperscript{189} Some important framers intended that the federal government would possess some commandeering power, but others intended otherwise or had no views on the subject. An unfettered power of commandeering is hostile to state independence, but the total absence of any such power threatens to impede Congress’s ability to accomplish important national ends. To the (limited) extent that such power augments presidential power at the expense of Congress, the principle of non-concentration of power weighs against. There are historical precedents for federal commandeering of state agents, but nothing resembling a lengthy and settled practice. All told, the picture can be approximated by the following snapshot:

![Diagram](image)

Not everybody will view the issue as comparably close. But disagreements in both directions are readily explained by different views

\textsuperscript{188} \textit{Id.} at 971 (Souter, J., dissenting).

\textsuperscript{189} \textit{Compare} New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not require state legislative action), \textit{with} Testa v. Katt, 330 U.S. 386 (1947) (holding that Congress may require state courts to entertain federal causes of action).
regarding the weights of the principles that are implicated, and regarding the extent to which they are activated. One who sides with the Printz majority is apt to believe, say, that commandeering poses a greater threat to the independence and autonomy of the states than this figure represents (i.e., the “states matter” arrow should be depicted as driving even further westward). One who sides with the dissent may agree that the legal intentions of the framers was that Congress should have this power, but believe that this principle is a weightier one than shown above (i.e., the eastward-pointing “authors’ legal intentions” arrow should be depicted as wider). These are the types of disagreement that express endorsement of principled positivism can help make salient.

2. A 34-year-old president? A serious candidate for the presidency will have turned thirty-four weeks before the presidential election. The constitutional text provides that “No person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty-five Years.” Is the 34-year-old candidate eligible to be President? What is the constitutional rule? Almost everybody considers this an easy case. As the figure below represents, I share that judgment.

190 U.S. CONST. Art. II, § 1, cl. 5.
Originalists sometimes charge that constitutional theories that are pluralist and living-constitutionalist cannot deliver the confident judgment that persons under 35 years of age are ineligible to serve as President. And it is true that a pluralistic dynamic understanding of our constitutional underpinnings does lend a smidgeon of support to the contrary conclusion. I suppose that a principle of equality weighs at least minimally in favor of a less rigid eligibility restriction. More interesting is the force of the principle that framers’ and ratifiers’ worldly purposes matter. For whatever purposes moved the framers to include this eligibility provision (helping to ensure that the President is sufficiently experienced and mature, imposing an obstacle to de facto dynastic succession), those purposes would be served just as well by the particular contending rule on the table—and could be served even better. (Suppose that a public health catastrophe has killed off a large percentage of our nation’s seniors.) The example therefore illustrates how legal intentions and worldly purposes are distinct and can come apart. Nonetheless, this remains a very easy case on principled positivism. That is the chief lesson of this example.

At the same time, the example also highlights a difference between constitutive and prescriptive constitutional theories. We have been inquiring into what the law is. That question, the answer to which depends upon the right constitutive account, is entirely intelligible even without assuming that the dispute is or should be justiciable.

3. Partisan gerrymandering. Does the Constitution place any limits on the extent to which a state legislature may pursue partisan advantage when establishing voting districts? The long historical pedigree behind the practice of extreme partisan gerrymanders suggests not. And no passage in the constitutional text strongly suggests any limits. Advocates of constitutional restraints will cite the Guarantee Clause, but that is a slender reed. When the Court took up the question a dozen years ago, in Vieth v. Jubelirer, some of its precedents had recognized limits, but other decisions and opinions had expressed doubts. And yet, most commentators were and are confident that extreme partisan gerrymanders are unconstitutional. That’s thanks to the influence of the principle of popular sovereignty. So I see things this way:

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As it turned out, that’s what all nine Justices ended up concluding in Vieth: “excessive” partisanship in redistricting is unconstitutional.\(^{193}\) Now, how much partisanship is too much presents a thorny problem. It’s not obvious even how to conceptualize magnitudes of partisanship, let alone how to measure it.\(^{194}\) For this reason, four Justices announced that they would hold claims of unconstitutionally partisan redistricting nonjusticiable, while a fifth (Justice Kennedy) proclaimed himself not yet persuaded one way or the other. For our purposes, what is most revealing about the case is that the Justices were unanimous in their judgment that our Constitution does not give state legislators a free pass to pursue partisan advantage when redistricting even though text, history, and case law provide scant support for the conclusion. It is plain that (invisible) principles are doing the real constitutional work. As the Court would announce a decade after Vieth, it is

\(^{193}\) See Vieth, 124 S. Ct. at 1785 (plurality opinion); 124 S. Ct. at 1793 (Kennedy, J., concurring); 124 S. Ct. at 1810 (Stevens, J., dissenting); 124 S. Ct. at 1815 (Souter, J., dissenting joined by Ginsburg, J.); 124 S. Ct. at 1824-25 (Breyer, J., dissenting).

\(^{194}\) On the problems of conceptualization, along with a suggested analytical frame for constructing judicially manageable standards, see Mitchell N. Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005).
a “core principle of republican government . . . that the voters should choose their representatives, not the other way around.”\footnote{Arizona State Legislature v. Arizona Independent Redistricting Com’n, 135 S. Ct. 2652, 2677 (2015) (quoting Berman, Managing Gerrymandering, supra).}

4. National regulatory power. What is the scope of Congress’s regulatory authority? We’ll compare two statutes: the Gun-Free School Zone Act, struck down in United States v. Lopez, and the individual mandate provision of the Affordable Care Act, held to exceed Congress’s regulatory authority in NFIB v. Sebelius. I believe that the Court was right in Lopez and wrong in NFIB. I’ll try to explain how this pair of judgments emerges from a nuanced appreciation of the role and contents of the constellation of constitutional principles that govern our federalism.

Start with Lopez. Did Congress, circa 1995, possess constitutional authority to criminalize possession of handguns near schools across the country? Supreme Court doctrine (as contrasted with concrete holdings) offered some support. Other principles—those related to textual meanings, enactment intentions and purposes, and historical practice—weighed at least modestly the other way. All told, though, what makes the question relatively easy, in my view, is the force of the federalism principle that national power is limited, for if there is or was such a principle, it was forcefully activated on the facts of this case. If Congress could criminalize possession of handguns near schools, it is hard to fathom what Congress could not accomplish. The dissent labored to explain that unfettered possession of handguns in and around schools could, in the aggregate, have a nontrivial impact on the national economy. This is true. But its efforts to address what our principles establish as the pivotal question—if Congress has power to do this, what can it not do?—were conclusory and unpersuasive.\footnote{See 514 U.S. at 624 (Breyer, J., dissenting) (asserting that “[i]t must surely be the rare case . . . that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce”).}

A critic of Lopez might be disposed, then, to frontal challenge the premise that national power is limited is or remains a genuine principle of our system. Maybe, all things considered, we’d be better off were that principle jettisoned. Maybe not. But principled positivism seeks to vindicate the commonsensical idea that there is constitutional law; it does so by insisting that what our legal principles are at any moment is a separate question from what it would be good for them to be. And it’s hard to doubt that, in 1995, national power is limited remained a secure and robust principle
of our legal order. Even decisions that reach nationalist results frequently acknowledged it. Take *Garcia v. SAMTA*, in which the Court held, 5-4, that, presumptively, courts would not exempt states from generally applicable national regulatory law. The dissenters insisted that: “The operative language of these [Tenth Amendment] cases varies, but the underlying principle is consistent: state autonomy is a relevant factor in assessing the means by which Congress exercises its powers.” Revealingly, the majority did not disagree. Rather, it acknowledged “that the States occupy a special position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position.” That is, the nationalists did not deny the principle that states matter; they doubted the ability of the courts to effectively enforce it. Given the force of that constitutional principle, the GFSZA exceeded congressional power.

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198 *Garcia*, 469 U.S. at 586 (O’Connor, dissenting).
199 *Garcia*, 469 U.S. at 547.
200 Whether the Court should have invalidated the statute, though, presents a slightly different question. Notice the following comparison to the problem of partisan gerrymandering. The question we are asking about the Gun-Free School Zone Act is highly particularistic. It is close to: “is this statute within Congress’s regulatory power?” The counterpart to that question, when posed in the context of a claim of an unconstitutionally partisan gerrymander, would be: “is this legislative redistricting scheme within the bounds of the legislature’s constitutional authority?” But the *Vieth* Court refused to undertake casuistic inquiries of that sort. It sought a rule that could provide guidance for future cases; without such a rule, five Justices refused to invalidate the plan before it. That’s not unreasonable. By analogy, however, the same move is plausible in the Commerce Clause context too. In keeping with the majority’s approach to partisan gerrymandering, a Justice sitting in *Lopez* might have reasoned that, although the GFSZA does lie beyond Congress’s constitutional authority, we should not strike it down without a judicially manageable standard to govern other similar disputes. To their discredit, the *Lopez* dissenters did not reason that way. They nudged closer to spelling out that position when they dissented again in the next case in the Commerce Clause line, *United States v. Morrison*, 529 U.S. 598 (2000).
Contrast the individual mandate of the ACA. There are several constitutionally relevant differences between the two statutes. The ACA might enjoy stronger support from the text’s communicative contents, given the more natural fit between health care purchases and “commerce . . . among the states.” Also, the Raich decision, announced between Lopez and NFIB, offered stronger precedential support for the ACA, thanks to its extended gloss and endorsement of the “undercutting” theory.\(^\text{201}\) At the same time, but

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\(^\text{201}\) In Gonzales v. Raich, 545 U.S. 1 (2005), the Court rejected a constitutional challenge to the Controlled Substances Act, as applied to the personal use and possession of marijuana for medicinal purposes as permitted by state law. Explaining that it had “no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA,” the majority therefore “refuse[d] to excise individual components of that larger scheme.” 545 U.S. at 22. Justice Scalia, concurring, emphasized that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” 545 U.S. at 37 (Scalia, J., concurring) (citation omitted). Because, famously, “[t]he word ‘necessary’ . . . has not a fixed character,” McCulloch v. Maryland, 17 U.S. 316, 414 (1819), Scalia clarified that “[t]he relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.” 545 U.S. at 37 (citation omitted).

The holding and reasoning of Raich seemed to support the constitutionality of the ACA’s individual mandate, and, not surprisingly, the government relied most heavily on
When litigating NFIB. Five justices, in two separate opinions deemed the government’s reliance on Raich misplaced. The Chief Justice distinguished it in precisely two sentences: “Raich . . . did not involve the exercise of any ‘great substantive and independent power,’ of the sort at issue here. Instead, it concerned only the constitutionality of ‘individual applications of a concededly valid statutory scheme.’” NFIB, 132 S. Ct. at 2593 (Roberts, C.J.). This was not his finest hour as a lawyer. Not only would one think that the decision on which the government “relies primarily” would warrant more fulsome treatment, but Roberts’s contention that the individual mandate involved the exercise of a “great substantive and independent power” was both conclusory and unpersuasive. The quoted passage comes from McCulloch, where Chief Justice Marshall observed that “[t]he power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.” 4 Wheat. at 411. To each his own, I guess, though the contention that the power to require that folks buy health insurance is greater than the power to create a corporation, and more akin to the powers to make war, levy taxes, and regulate commerce, is surely a bit of a head-scratcher.

Justices Scalia, Kennedy, Thomas and Alito echoed Roberts when asserting that the CSA, unlike the ACA, “did not represent the expansion of the federal power to direct into a broad new field.” 132 S. Ct. at 2646 (joint opinion). But they didn’t stop there. “Moreover,” the joint opinion explained, Raich is far different from the Individual Mandate in another respect. The Court’s opinion in Raich pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced . . . . With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme’s goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved.

Id. at 2647 (citing Raich, 545 U.S. at 22). This second attempt to distinguish Raich is even worse than the first. Every constitutional lawyer knows that the justices in the Raich majority, including its author, Justice Stevens, were strongly committed to rationality deference in Commerce Clause doctrine. It would have been remarkable had they contended that bans on growing and possession marijuana “were the only practicable way” to achieve anything. And sure enough, they didn’t. As the Raich Court explained on the very page that the NFIB joint opinion cites:

In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding.

545 U.S. at 22; see also id. at 37 (Scalia, J., concurring) (“The relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.”) (internal citation omitted). It is a mystery how one could travel from this language to the characterization of Raich offered in the joint opinion.
pointing in the opposite direction, different subprinciples of liberty were implicated here than in *Lopez*, because the individual mandate imposed a positive legal obligation (buy health insurance) rather than a negative one (don’t carry a gun near school). But I mention these several differences only to relegate them to the sidelines. The constitutionality of the ACA’s individual mandate, like that of the GFSZA’s ban on handgun possession near schools, really depended upon the force of the relevant principles that directly concern the scope of federal regulatory authority.

And as far as those principles are concerned, the GFSZA and the ACA are near-inverses of each other. In the former case, defenders of national authority had no good response to the question “if this, then what not?” Opponents of the ACA raised the very same objection. But in the latter case, genuine responses were available and forthcoming. At the same time, the principle that *national regulatory power must be effective to meet national needs* pressed forcefully in favor of the individual mandate as it had not with respect to the GFSZA. To call a fig a fig, the GFSZA was little more than political grandstanding. Gun possession in and near schools is a problem. But it’s one that the states, acting separately, are competent to address, and one that the GFSZA was not truly calculated to significantly ameliorate. In conspicuous contrast, the cost of health care, and the limited availability of affordable health insurance, are very significant national problems that cannot be adequately addressed by state action and are precisely the sort of challenge that nation states tackle at the national level in the 21st century. It would be remarkable if our constitutional principles were too brute to recognize these differences. I think that they are not. In short, the full constellation of our principles dictated different rules in these cases: the GFSZA exceeded congressional power; the ACA did not.


203 See NFIB, 132 S. Ct. at 2623-25 (Ginsburg, J., dissenting) (explaining why the causal story linking purchase of health insurance to outcomes that Congress is constitutionally authorized to seek to produce is stronger and tighter than would be true in the hypothetical cases, such as the “broccoli horrible,” that those wielding *national power is limited* envision). The joint dissent purports to respond to this portion of Justice Ginsburg’s dissent, but mischaracterizes the proposition that it is offered to establish. See NFIB, 132 S. Ct. at 2650 (joint opinion) (arguing that the dissent’s argument does not establish “that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can “regulate”).
That, in any event, is how I see the case. It is largely how the principal
dissent saw it too, for Justice Ginsburg emphasized the principle of *adequate
national power* much as principled positivism would recommend.\(^\text{204}\) The
Justices in the majority on this particular question viewed things differently.
That’s fine: disagreements are to be expected. What is disconcerting is that
they gave this principle no heed whatsoever, even while conspicuously
declaring that “the proposition that the Federal Government cannot do
everything is a fundamental precept.”\(^\text{205}\) That is an affirmation of the
principle that *national power is limited*, in language that principled positivists
would heartily endorse. To play this game fairly requires that judges give a
serious hearing to all (non-frivolous) claims about the shape and contents of
our (unwritten) principles, not only to those they find ideologically congenial.

\(^{204}\) NFIB, 132 S. Ct. at 2615 (Ginsburg, J., dissenting) (contending that Congress has
authority to legislate for the “general interests of the Union”). For recent scholarship broadly
supportive of Ginsburg’s approach, see Neil S. Siegel & Robert D. Cooter, *Collective Action
Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Richard
Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers,*

\(^{205}\) NFIB, 132 S. Ct. at 2647 (joint opinion of Scalia, Kennedy, Thomas, Alito, JJ.)
5. Liberty and equality. The previous subsection examined a pair of controversies that together cast light on the scope of national regulatory authority. I close this section by examining another duo, one that implicates principles concerning liberty, equality, and human dignity. The first question is whether states may exclude same-sex couples from the institution of legally recognized marriage. The second asks whether states or localities may impose a near-total ban on the possession of handguns by private citizens. I will argue that the answer is the same in both cases: they may not.

Take same-sex marriage first. Principles of text, enactment intentions, and case law are not the major drivers in this dispute. Yes, laws that limit legal recognition of marriage to opposite-sex sex couples are patently “unequal” in commonsensical ways, but it is not obvious that they strongly implicate inequality with respect to “protection” of the laws. Such laws do not violate any “legal intentions” of the framers (nobody in the 1860s intended that the Fourteenth Amendment would invalidate state laws limiting marriage to a man and a woman), but do run afoul of any “worldly purposes” there may have been to ameliorate the subordination of marginalized groups. The Court had in 1972 rejected a claim that bans on same-sex marriage are unconstitutional, but that was a one-sentence summary dismissal (entitled to little weight on standard case law principles), and is counterbalanced by a series of more recent Supreme Court decisions that had been much friendlier to same-sex couples’ constitutional claims.

It does not follow that the constitutionality of excluding same-sex couples from the institution of legally recognized marriage presented a hard or close question in 2015, when the Court confronted the issue in Obergefell v. Hodges. And, in my eyes, the question was neither hard nor close, thanks to the combined force of the constitutional principles that I have labeled pursuit of happiness and equality and dignity. First, the ability to enter into the legal institution of marriage with one’s life partner is a matter of tremendous instrumental value: it facilitates the ability of adults to accumulate and control material wealth, of parents to direct the upbringing of their children, and of persons who may become ill or incompetent to ensure that a trusted intimate has legal power to make decisions for their welfare. Second, the exclusion of same-sex couples from the important and highly salient legal institution demeans, degrades, and insults gays and lesbians.

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In Obergefell, five Justices saw things this way. Is Justice Kennedy’s majority opinion hard to parse? Yes. Is it a model of judicial craftsmanship? Probably not. But he got the crux of the matter exactly right. First, “marriage is ‘one of the vital personal rights essential to the orderly pursuit of happiness by free men.’”  

Second, the exclusion of same-sex couples from the marriage right “is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes” gays and lesbians, and “serves to disrespect and subordinate them.” In sum, the unconstitutionality of limiting legal recognition of marriage to opposite-sex couples is driven by the “interrelation of the two principles” of liberty and equality.

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208 Obergefell, 135 S. Ct at 2598 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).

209 135 S. Ct. at 2602, 2604.

210 135 S. Ct. at 2603. In four separate opinions, the dissenters raised a number of counter-arguments that I cannot adequately address in this space. I’ll limit myself to two observations.

First, the dissenters were unduly dismissive of the principle of our law that the state may not act to demean or stigmatize classes of persons. It is true, as Chief Justice Roberts
As gay rights are to the left, gun rights are to the right. May states or municipalities prohibit all possession of handguns by private citizens, even in the home? The Supreme Court addressed the question in *McDonald v. City of Chicago*, two years after having held, in *District of Columbia v. Heller*, that the Second Amendment protects a personal right to keep and bear arms against restriction by the federal government. Because *Heller* was itself highly controversial, and because a careful assessment of it would require a deep dive into pre-revolutionary British and American history, I will assume that precedent away for present purposes. Imagine that *McDonald* arose before *Heller* had been decided. What result?

The *McDonald* Justices who affirmed, or expressed sympathy for, a constitutional right, valid against the states, to possess a firearm disagreed over the right’s textual home. The majority, per Justice Alito, viewed the notes, that there is no “‘Nobility and Dignity’ Clause in the Constitution.” 125 S. Ct. at 2616 (Roberts, C.J., dissenting). But there is no “Bodily Integrity” Clause, “State Sovereign Immunity” Clause, “Historical Practices Matter” Clause, or “Colorblindness” Clause either. Our law is the product of non-textual principles that evolve and lie underneath the text. It’s one thing to conclude that, all things considered, the exclusion of same-sex couples from legally recognized marriage is constitutional, but quite another to deny that the fact that a legal scheme stigmatizes, demeans, or disparages persons is of constitutional moment. Roberts’s insistence that “the majority’s approach has no basis in principle or tradition,” 135 S. Ct. at 2616 (Roberts, C.J., dissenting), cannot be credited.

Even more outrageous is Justice Thomas’s dismissal of plaintiffs’ dignity-based claims, on the ground that “the government [is] incapable of bestowing dignity.” 135 S. Ct. at 2639 (Thomas, J., dissenting). While it is strictly true that “those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits,” id. (emphasis added), that’s not the issue. The issue is whether selective denial of the benefit of legally recognized marriage offends constitutional principles by failing to respect the dignity of gays and lesbians, and for communicating insult and disparagement. Thomas is plenty able to appreciate the constitutional magnitude of that form of injury when racial classifications are involved. See *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., dissenting) (contending that racial admissions preferences are unconstitutional because "every time the government . . . makes race relevant to the provision of burdens or benefits, it demeans us all").

Second, the best argument for the state is not that marriage discrimination against same-sex couples is constitutional, but that courts should under-enforce constitutional requirements in this context for prudential and institutional reasons. Indeed, the most plausible portions of the dissenting opinions press this line. see, e.g., id. at 2616, 2618 (noting “obvious concerns about the judicial role” and “the need for judicial self-restraint”), though without clearly distinguishing (as the prescriptive/constitutive distinction recommends) questions of what the courts should do from questions about what the law permits or requires.

211 561 U.S. 742 (2010).

right as conferred by the Second Amendment and incorporated against the states by the Fourteenth Amendment’s Due Process Clause. Justice Thomas deemed the right to bear arms a “privilege or immunity” of national citizenship. Justice Stevens thought the right best understood as a fundamental liberty protected under “substantive due process.”

I wouldn’t obsess too much over the clauses precisely because what the text says only partly determines what the law is. Here, as so often, what really does the work are principles that, though related to the text, are normatively freestanding. This is a case about our constitutional principles of liberty. What carries the day for me is the subprinciple I earlier called natural liberty. While many restrictions on gun ownership and use are permissible, the natural liberty interest in defending oneself against an assailant exerts sufficient force to render a total ban unconstitutional.

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213 561 U.S. at 791.

214 561 U.S. at 806 (Thomas, J., concurring).

215 561 U.S. at 861 (Stevens, J., dissenting).

216 Scalia’s opinion for the Heller Court was roundly criticized for approving “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” 554 U.S. at 626, without explaining how such restrictions are consistent with the opinion’s avowed originalism. Exceptions of this sort are no embarrassment for principled positivism: jagged, exception-filled rules arise because small changes in facts can significantly affect the force of one or more principles. Whether they are an embarrassment for the anti-coherentist denial “that one does or can have constitutional or legal intuitions that pre-exist and provide the grist for building our theory of legal interpretation,” Alexander, Simple-Minded Originalism, supra note ___, at 97, I leave for the reader to decide.
B. Three Concluding Observations

What can we glean from the preceding analyses, taken as a whole? Many things, I hope. Here are three headliners.

1. Everybody loves principles. Everybody deploys constitutional principles—norms that stand on their own legal-normative bottoms—in their constitutional reasoning. And everybody uses them in essentially the same way: as bearing constitutively on the contents of more determinate constitutional norms (i.e., “rules}). Some will say that they don’t. But they do.

2. Principled positivism is nonpartisan. Principled positivism is politically neutral. To be sure, given its recognition that the normative fundamentals of any legal regime (its “principles”) are inescapably dynamic, the account repudiates any form of conservatism that insists that our constitutional rules are fixed against organic change. A core thrust of this Article is that that’s just not the way normative systems operate, or can operate. But beyond that spare metaphysical commitment, principled positivism contains no baked-in ideological or political bias. A good faith investigation into our constitutional principles as they exist and apply at any slice of time will yield at least some conclusions about the contents of our
constitutional rules that will appeal to persons occupying almost any space in the American political spectrum.

Significantly, I’m not talking about tossing token bones in the direction of one or another party to secure a patina of even-handedness. To simplify the point for succinctness: liberals are right on some matters of constitutional fundamentals; conservatives are right on some others. Of course, given the system’s inherent dynamism, just what one side or another is right about, and just how right it is, are subject to gradual, undirected change.

3. Principled positivism has explanatory power. A good constitutive account should be able to explain the varied panoply of our constitutional judgments. It should be able to explain not only why and when we disagree about results, but also why we sometimes honestly disagree about which questions are easy and which are hard.

Principled positivism is markedly successful on this score. It explains all of the following patterns: (1) When our principles weigh heavily on net in support of any one legal conclusion, we will agree and think the case easy (e.g., age eligibility for the presidency). (2) When many principles bear on the question, but weigh in opposed directions, we will often agree that the issue is hard and disagree about the outcome (e.g., Printz). (3) When one group of interpreters believes that one or another principle is nearly decisive in resolving the dispute, while a second group rejects, overlooks, or substantially slights that principle, the opposing sides may agree that the case is easy, even while reaching diametrically opposed conclusions (e.g., Lopez; Obergefell). In addition, principled positivism explains why we will sometimes broadly agree about the scope or content of a constitutional rule even when the more tangible of oft-discussed “sources” of our law—text, judicial precedent, historical practice, enactment intentions—do not explain the shared judgment we reach (e.g., Vieth; Brown).

CONCLUSION

Ordinary constitutional discourse suggests that participants in the practice believe that there is constitutional law—that some constitutional propositions are true; that it is sometimes the case that people have a constitutional right to φ, that Congress has constitutional power to ψ, or that states are forbidden to σ. This way of speaking could be thoroughly confused, misleading, or erroneous. But we should be slow to assume so. Before concluding that our patterns of thought and speech cannot be vindicated, we should work overtime to develop sound constitutive accounts of how
constitutional norms gain the contents that they have. Yet, I have argued, we have remarkably few robust candidates to choose from. The most plausible constitutional theories in the general vicinity are accounts of proper judicial decision-making, not explanations of what gives our law its contents or what makes true constitutional propositions true; and the most notable truly constitutive accounts on offer (Dworkinian and Scalian) face significant plausibility deficits.

This Article offers a new constitutive account of our constitutional law. After distinguishing two types of constitutional norms—“principles” and “rules”—the account maintains: first, that rules are determined by the interaction of principles, which produce rules on the model of force addition; and second, that the principles are “grounded” in mental states, speech-acts, and behaviors of persons who make up the constitutional community, much as rules of fashion or of card games are grounded in behaviors of persons who make up their normative communities. In short: social facts determine constitutional principles, and constitutional principles determine constitutional rules. I call the account “principled positivism.” It is an account not only of American constitutional law, but of all legal systems, and not only of legal systems, but of all artificial systems of practical normativity. Legal rules are determined by legal principles, baseball rules are determined by baseball principles, and so forth.

Although I have claimed that principled positivism is “new,” it is also familiar in a great many respects. It draws on both Hart and Dworkin, resonates with Fuller and Alexy. It bears resemblances to Bobbitt, Grey, and Strauss. I take the account to derive as much strength from its familiarity as from its originality. Surely the truth of how our vast, two-centuries-old constitutional order gains its contents, and what that means, is complex beyond individual comprehension. Those who labor to better understand and communicate that truth are like the blind men trying to describe an elephant. Each account that improves our understanding should also reveal more clearly what had already been true of predecessor accounts, and not entail that most had missed their target entirely.

Of course, in order to improve our understanding, an account must be informative, and it is true that principled positivism does not resolve what our principles are. Although I have started the ball rolling, in large measure the principles remain to be discovered and argued about. And it is further true that, even in good faith, interpreters will, to some extent, see what they want and expect to see. Originalists, moral readers, pragmatists, and common law constitutionalists will honestly disagree about the contents, shapes, and weights of our constitutional principles, about the meta-principles that govern
their interaction, and about the extent to which our principles collectively deliver determinate resolutions in the disputes that reach the appellate courts. Debates of this sort will always be with us. Principled positivism structures and shapes those debates by teaching that the messy, pluralist, evolutionary approaches to constitutional adjudication that dominate our landscape are in basically good philosophical order—and in far better order than any monist or static alternatives. If true, that alone is a lesson worth learning well.