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OUR PRINCIPLED CONSTITUTION

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Suppose that we disagree about a matter of constitutional law. Say that one of us contends, and the other denies, that transgender persons have constitutional rights to

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be treated in accord with their gender identity. It appears that we disagree 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), founded on the familiar distinction between two types of constitutional norms: “principles” and “rules.” It argues: first, that rules are determined by the interaction of principles, in a manner that can be loosely modeled as 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 billiards 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 dynamic.

Principled positivism maintains that we can 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 diverse constitutional controversies, from same-sex marriage to the scope of Congress’s commerce power.

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INTRODUCTION

Suppose that you and I disagree about some matter of constitutional law. You believe, let us imagine, that transgender persons have the constitutional right to use public restrooms that accord with their gender identity. I maintain that they don't. Or I contend that the Constitution prohibits excessive partisanship in redistricting, while you say that partisan gerrymandering, no matter how extreme, is constitutionally permitted. Disagreements of this sort are entirely common. What, in such cases, do we disagree about?

Let us start by clarifying what we are *not* disagreeing about—or at least needn't be. First, we needn't be disagreeing about the dictates of morality or justice. For example, even while denying that transgender persons have the *constitutional* rights that you claim they do, I could fully accept your account of the relevant *moral* rights. We could well agree, say, that justice or decency requires states to allow transgender persons to use the public restrooms they feel comfortable with, differing only on whether the Constitution requires that too. Second, we needn't be disagreeing about what the courts should do. Though I think (as you do not) that extreme partisan gerrymandering is unconstitutional, I might, after bemoaning the lack of “judicially manageable standards” in this neighborhood of the political thicket, believe (as you do) that courts shouldn't intervene.

So we needn't be disagreeing about morality or about what judges should do. 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.

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 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, powers and

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

permissions are what they are. They concern what Ronald Dworkin called “the grounds” of our constitutional law.²

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—have the contents they do. Let’s call any such account a “constitutive theory” of constitutional law. What are the grounds of constitutional norms (and what is the nature of the function that maps the grounds to the law)? What makes out the law? What makes it the case that the constitutional 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.³

Anyone who finds herself in a constitutional disagreement has reason to want a good constitutive theory of constitutional law. To be sure, a constitutive theory is not *all* that those of us interested in constitutional adjudication should want. We should also want to know when, if at all, courts may or should: refrain from reaching the constitutional merits entirely,⁴ or underenforce constitutional rules,⁵ or craft doctrine to administer or implement constitutional rules in a fashion that is sensitive to institutional

2 RONALD DWORKIN, *LAW’S EMPIRE* 4 (1986). Yet more significantly, we need to know, in addition to the grounds themselves, how those grounds combine to determine the law. We need to know something of the mapping function. See Mark Greenberg, *How Facts Make Law*, 10 *LEGAL THEORY* 157 (2004), revised and reprinted in *EXPLORING LAW’S EMPIRE* 232 (Scott Hershovitz ed., 2006) (“There are indefinitely many possible mappings, from complete sets of law practices to legal content (to complete sets of legal propositions).”). Later citations to this paper will reference the revised version.

3 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 of the domain. Although I acknowledge those connotations, I use the term 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.”

4 See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-12 (1962).

5 See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212, 1213 (1978).

limitations,⁶ or make rules when existing constitutional rules are underdetermined or undiscoverable.⁷ A comprehensive theory of constitutional law and adjudication would have space for theses about these varied topics. But constitutive theories are surely among the important things we should want. And we should reasonably expect constitutional theorists to supply them. If not constitutional theorists, then who?

Happily, the theoretical literature on American constitutional law is vast. Unhappily, the vast literature has delivered strikingly few constitutive theories to choose from. Contemporary scholarly fashions distinguish two broad schools of constitutional thought, two competing camps of “constitutional interpretation”: originalism and nonoriginalism. Many of the most prominent originalists do indeed offer a constitutive theory, I will argue, but one that’s extremely implausible. Many nonoriginalists, in contrast, offer plausible prescriptions regarding how judges should reason in constitutional cases, but not a constitutive theory. In short, insofar as we’re seeking a constitutive theory, originalists proffer the wrong answer to the right question, while nonoriginalists simply change the subject.

This Article offers an original constitutive theory of American constitutional law. The account is positivist, pluralist, and inherently dynamic. Here’s the summary.

Start with the more-or-less familiar distinction between two kinds of legal norms: “rules” and “principles.” I deem the distinction only “more or less” familiar because, although the terms are in wide usage, and many commentators agree that they mark *some* distinction of importance, the precise nature or location of that distinction remains, in the words of the German legal theorist Robert Alexy, “dogged by confusion and controversy.”⁸ For our purposes, rules and principles differ in just a single respect: rules are sufficiently determinate to adequately serve the system’s core conduct-guidance function, whereas principles do not purport to determine action but rather have, as Dworkin famously emphasized, a dimension of weight.⁹ They may “bear on” the proper legal characterization or treatment of a dispute without purporting to deliver decisive resolution.

Consider a representative sampling of constitutional norms: Legally enforced racial segregation in public education is unconstitutional. Nonconsenting states are immune from suit brought by private individuals; Congress, however, may abrogate state immunity when legislating pursuant

⁶ See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37-38 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

⁷ See generally Richard Posner, year after year.

⁸ ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 45 (Julian Rivers trans., Oxford Univ. Press 2002).

⁹ See generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ch. 2 (1977).

to its section five enforcement power. Criminal defendants have the right to a speedy and public trial. State legislative districts must be equipopulous. These norms differ in many respects—in their subject matter, their Hohfeldian character (claim-rights, powers, immunities), their distance from the constitutional text. But each is what I will call a “constitutional rule.”¹⁰ By and large, a “constitutional rule” could be stated as an affirmative or negative answer to a well-formulated constitutional question on appeal or certiorari. Question: “Does the denial by a state court of a request by an indigent defendant for the appointment of counsel to assist him at a trial for a serious criminal offense constitute a deprivation of the defendant’s rights in violation of the Fourteenth Amendment?”¹¹ Answer: yes, (it is a constitutional rule that) a state court is required, if requested, to appoint counsel to assist an indigent defendant charged with a serious criminal offense.

Principles will often be harder or more controversial to identify and formulate. Dworkin considered their lack of canonical formulation a defining characteristic.¹² But paradigmatic and little-disputed examples wear their status *as* principles on their sleeves. We don’t merely *invoke* principles of separation of powers, federalism, sovereign immunity, personal liberty, stare decisis, and so on; we *call* them “principles” when doing so.

My account turns this mostly familiar distinction into a two-level explanation. Constitutional rules are determined by the interactions of our constitutional principles. In turn, constitutional principles are grounded in social and psychological facts—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. I will call this view “principled positivism”: 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.

Recall our imagined constitutional disagreements. Suppose you’re right that people are constitutionally entitled to use public restrooms that accord with their gender identity. We can redescribe that right or entitlement as a “constitutional rule.” And if there is such a rule, it will exist in virtue of

¹⁰ 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 rationality deference. All of these rules, and countless like them, are plainly the product of judicial engineering—“implementing rules” in Richard Fallon’s terminology, “constitutional common law” in Henry Monaghan’s, or “decision rules” in my own. *See supra* note 6. There is no difficulty in explaining how *these* rules come about or have the contents they have: they are crafted and announced by judges. By “constitutional rule,” I will mean the norms that “decision rules” are designed (even if implicitly) to “implement.” I’m interested in the rules that a judge might plausibly (if not unproblematically) view herself as *discovering*, not those that she understands herself to *construct*.

¹¹ Brief for Petitioner at 6, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

¹² DWORKIN, *supra* note 9, at 25 (suggesting principles “are not, even in theory, subject to enumeration”).

constitutional principles—very likely, principles concerning liberty or equality or dignity. Similarly, if I'm right that excessive partisanship in redistricting is prohibited, that constitutional rule might itself be determined, in large measure, by constitutional principles involving popular sovereignty.

Of course, much more must be said about the grounding of principles in social facts and about the determination relationship that obtains between principles on the one hand and rules on the other. That's just the sketch. I motivate and introduce the theory, and display its workings, over five 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—from James Bradley Thayer's "clear error rule,"¹³ to John Hart Ely's "representation-reinforcement,"¹⁴ and Philip Bobbitt's "multiple modalities,"¹⁵—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.¹⁶ Other theorists, particularly Dworkin and Justice Antonin Scalia, *have* offered constitutive accounts. But their respective theories confront 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 is a methodological interlude that makes explicit the coherentist epistemology that I assume throughout this project, and defends it against an objection that its deployment in Part I has provoked. This discussion is brief, but it's also skippable by those who already accept that coherentism furnishes the most appropriate standards and method (reflective equilibrium) for evaluating constitutional theories.

Part III introduces my original account, "principled positivism." As the very name suggests, the account is not limited in its scope to American constitutional law. What I am billing as a constitutive theory of American constitutional law

¹³ See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing a legislative act should be "disregard[ed]" only when the legislature "made a very clear" mistake).

¹⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).

¹⁵ PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982).

¹⁶ I term these theories "prescriptive," not "normative," because all types of constitutional theory are normative insofar as they concern constitutional law and law is normative by nature. See *infra* Section III.A (maintaining that law is an artificial normative system). 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 generally Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545, 552 (2013).

concerns its ostensible subject matter only derivatively. The rules of American constitutional law are determined by American constitutional principles because the rules of *any* legal system are determined by the principles that are fundamental to that system; constitutional principles are grounded in social facts because legal principles generally are grounded in social facts. “Principled positivism” is not a parochial theory of American constitutional law, it is a general theory of law. Indeed, the account is one degree more general still. The central features of my account—that rules are determined by principles, and that principles are normatively fundamental, plural, and dynamic—hold true not only of legal systems but of all systems belonging to the yet more encompassing class that we may term “artificial systems of practical normativity.” Legal rules are determined by legal principles, baseball rules are determined by baseball principles, rules of religious ritual and practice are determined by principles integral to their domains, and so forth.

Part IV turns from theory back to our constitutional order. If principled positivism is a sound general account of how the norms of artificial normative systems are determined or constituted, then we can come to know our constitutional rules by gaining knowledge of the contents, contours, and weights of our constitutional principles (along with whatever facts the principles make legally relevant).¹⁷ I said a few paragraphs ago that, if excessive partisanship in redistricting is unconstitutional, that rule is likely the upshot or consequence of constitutional principles concerning popular sovereignty. Are such principles part of our law? If so, what are their contents and weights?

If time, space, and attention were unlimited, this Part would distill a comprehensive catalogue of our constitutional principles 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. Given actual constraints, this Article offers only a preliminary and partial stab, offering 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 matter); a principle of *national regulatory power* (the national government has regulatory authority sufficient to meet the needs of a nation state in its

¹⁷ 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.

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 V shows the account at work. Combining the principles adduced in Part IV with the apparatus introduced in Part III, it analyzes a handful of actual constitutional controversies across doctrinal domains, from the federal Gun-Free School Zone Act to same-sex marriage. 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 an observation that drives a proposal. 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 picture 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. I am inviting readers to try looking at things this way, before I even purport to connect all the dots.

The case studies offered in Part V suggest that those who take up the invitation are apt to 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.”¹⁸ 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 constitution is principled, not perfect.¹⁹

¹⁸ J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 4 (2012).

¹⁹ Cf. Henry Paul Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 396 (1981).

I. A 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. Much as there exist automobiles, there exist laws. Much as there exists my 2003 Honda Odyssey minivan, there exists a legal rule that prohibits raising goats in Philadelphia. 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*²⁰ 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 II*²¹ 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 (formulated here in terms of "rights") can (but need not always) 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. I will call this thesis "constitutional realism,"²² but with a pronounced caution: *this* "realism" is close to that belonging to "moral realism," nearly the opposite of the version found in "legal realism."

In particular, I have in mind what Mark van Roojen has helpfully termed "minimal realism."²³ An account of constitutional law is "minimally realist" if it maintains that "there really are ways that things might be [constitutionally]

²⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²¹ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

²² *Accord* Connie S. Rosati, *Constitutional Realism*, in DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE (David Plunkett, Scott Shapiro & Kevin Toh eds.) (forthcoming) [hereinafter DIMENSIONS OF NORMATIVITY].

²³ MARK VAN ROOJEN, METAETHICS: A CONTEMPORARY INTRODUCTION 9 (2015).

speaking and that our thoughts and sentences do sometimes correctly represent that reality.”²⁴ Minimal constitutional realism is a “metaphysically unambitious” thesis that builds in only those “assumptions needed to treat [constitutional] language as representational in the same way that talk of redness and roundness is representational.”²⁵ Two aspects of its minimalism are especially noteworthy. First, it does not maintain that the truths must be “mind-independent” or not “of our own making.” Second, it entails no view regarding *how many* disputed constitutional propositions are true. Minimal constitutional realism as such is as compatible with Dworkin’s right-answer thesis as with the highly skeptical claim that nearly all constitutional questions that reach the appellate courts are metaphysically underdetermined. (My own view, which I won’t defend, is someplace in the middle.)

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 fact 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 any theory that claims resources sufficient to vindicate an account of constitutional law that is at least minimally realist.

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 few constitutive theories are not very plausible. Section I.A is a leading-landmarks tour of a century of nonoriginalism. The upshot is that many of the most influential theories lack constitutive ambitions and, even more surprisingly, constitutive implications as well. Section I.B carries longer over originalism, focusing on 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. Section I.C turns from domestic constitutional theories to general jurisprudence. It identifies grounds to be skeptical that either Hart or Dworkin supplies what constitutional lawyers should want. Section I.D summarizes.

²⁴ *Id.* at 14.

²⁵ *Id.* at 9-10.

A. *Prescriptive Pluralism: 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.²⁶ Literature on the topic since then could fill a library: you might reasonably expect a long menu of constitutive theories to choose from. Yet you'd be mistaken if you did. Almost every prominent contribution features two qualities. First, the theory, on its face, offers not a "constitutive" account of the determinants of our law, but rather a "prescriptive" account of how judges should exercise their power of judicial review. Second, the theory's prescriptivism is not *merely* superficial: not only do constitutive theses not appear on the face of these diverse constitutional theories, constitutive implications cannot be teased out with only a modicum of pulling, prodding, and reshaping.

Thayer's own "clear error" theory of judicial review clearly illustrates. Thayer famously 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. This is not an account of correct judgments about constitutional law. It is simply 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.²⁷

Remarkably, the constitutive opacity of Thayer's theory also characterizes nearly all of the most influential theories that followed—Herbert Wechsler's "neutral principles,"²⁸ Alexander Bickel's "passive virtues,"²⁹ John Hart Ely's "representation-reinforc[ement],"³⁰ Philip Bobbitt's "modalities of

²⁶ Thayer, *supra* note 13.

²⁷ This is my paraphrase of Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 544 (2012) ("Not in Holmes, nor in Thayer, Brandeis, Frankfurter, or Bickel, can one find a theory of how to decide whether a statute is unconstitutional.").

²⁸ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16-19 (1959).

²⁹ BICKEL, *supra* note 4, at 201.

³⁰ ELY, *supra* note 14, at 87.

constitutional argument,”³¹ Cass Sunstein’s constitutional “minimalism,”³² Richard Posner’s “pragmatic adjudication,”³³ David Strauss’s “common law constitutionalism,”³⁴ and others.

Take Ely’s admonition that courts should invalidate legislation “under the Constitution’s open-ended provisions” only to reduce barriers to democratic participation.³⁵ This theory is motivated entirely by the worry that judges will be overly influenced by their individual substantive value commitments, and not by bona fide judgments of law, when adjudicating constitutional challenges. It is not concerned *at all* with what persons who are *not* judges—including ordinary citizens and conscientious legislators and executives—could rightly conclude are our constitutional requirements. It is no accident that Ely’s subtitle is “A Theory of Judicial Review” and not, say, “A Theory of Constitutional Law.”

And consider Posner. Posner does not believe that there is no law. He is not what he calls a “nihilist”³⁶ or what I’d call an “anti-realist.” 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 of decision run out.”³⁷ 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 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 underdeterminate? 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

31 PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 22 (1991); *see also* BOBBITT, *supra* note 15, at 7 (discussing the multiple “archetypes” of “constitutional arguments”).

32 CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix (1999).

33 RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240-42 (1999).

34 *See* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); *see also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884-91 (1996) (“Properly understood, then, the common law provides the best model for both understanding and justifying how we interpret the Constitution.”).

35 *See, e.g.*, ELY, *supra* note 14, 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”).

36 POSNER, *supra* note 33, at ix.

37 RICHARD A. POSNER, *HOW JUDGES THINK* 15, 324 (2008).

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.³⁸

Or turn to Posner's long-time Chicago colleagues, Cass Sunstein and David Strauss. Although both are far less enamored of forward-looking judicial instrumentalism than is Posner, and are more apt to extol "judicial humility," their accounts, too, are avowedly prescriptive. Sunstein bills his "minimalism"—narrow in scope, and shallow in justificatory and explanatory ambitions—as a "distinctive form of judicial decision-making."³⁹ Strauss's theory—what he christens "the common law approach"⁴⁰—is likewise an account of "how we *do* constitutional law."⁴¹ It is a living constitutionalist theory of how judges should do their job—how they should reason, or how they should decide cases. And what is that approach? It's best understood, Strauss explains, as a decisional practice "governed by a set of attitudes" that, "taken together, make up a kind of ideology."⁴²

These examples are not cherry-picked. Viewing things from Britain forty years ago, H.L.A. Hart was struck by the overwhelmingly prescriptive ambitions of American constitutional theory, astutely but ruefully describing "American speculative thought about the general nature of law" as "marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason, in deciding particular cases."⁴³ The American constitutional theorists didn't address the question that engaged Hart because they had a different theoretical ambition. Thayer, Wechsler, Bickel, Ely, Bobbitt, and their interlocutors, were not trying to understand the nature of law, but to defend the legitimacy of judicial review in a democracy, given the institution's "counter-majoritarian" features.

³⁸ 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 his overarching claim that the world is complex. Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 778 (2015).

³⁹ SUNSTEIN, *supra* note 32.

⁴⁰ The choice of noun is noteworthy, both because it emphasizes the activity of judicial decisionmaking so much more strongly than would other possibilities (e.g., "theory," "account"), and because it is so consistently Strauss's preferred term. See Strauss, *supra* note 34, at 879, 888-90, 893-97, 905-06, 909, 916, 925-32, 935 (using the literal phrase "common law approach" each time).

⁴¹ David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 61 (2015) (emphasis added).

⁴² STRAUSS, *supra* note 34, at 40. While prescriptivism is plainly Strauss's dominant key, his account bears far more constitutive implications than do almost any prescriptive alternatives. See, e.g., *id.* at 38 (asserting that "[t]he content of the law is determined by the evolutionary process"). Principled positivism can be read, in part, as an effort to develop Strauss's "common law approach"—one that I find highly instructive—in the most plausible constitutive direction.

⁴³ H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969 (1977).

B. Originalism and the Constitutive Turn

A standard narrative of modern originalism distinguishes two main periods: a first generation, led by Robert Bork and Raoul Berger, that focused on original intentions, followed by a second, headed by Scalia, concerned with original meaning.⁴⁴ Many scholars have questioned how significant the intention/meaning distinction is. This Section spins a revisionist narrative that surfaces a different distinction in originalist thought, one that has been almost entirely overlooked.

1. Prescriptive Originalism

Early originalists, like the scholars already mentioned, were (at least nominally) prescriptive. 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 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."⁴⁵ To satisfy this requirement, Bork exhorted, "The judge must stick close to the text and the [constitutional] history, and their fair implications."⁴⁶ 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."⁴⁷ 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

⁴⁴ See, e.g., John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83-89 (2003) (recounting this standard account of originalism's evolution); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003) (same).

⁴⁵ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971) (emphasis omitted).

⁴⁶ *Id.* at 8.

⁴⁷ Edwin Meese III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 54 (Steven G. Calabresi ed., 2007) (internal quotation omitted).

less damning.⁴⁸ This is not an account of the content of law. Nobody who believes that the law is the original public meaning 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 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.”⁴⁹ This is a theory of how judges should decide cases, about what they should “confront, and take into account.” It 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 Turn

But there is one crucial difference. Nonoriginalist prescriptivists were (and are) invariably *pluralists*. Thayer himself, Dean Larry Kramer explains, believed, like everybody else at the time,

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) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion.⁵⁰

Six decades later, Wechsler also assumed pluralism when advancing his famous argument for “neutral principles.”⁵¹ Judges’ duty to apply the reasons and principles they invoke in neutral fashion is made urgent, he explained, precisely by the fact that the appropriate considerations that inform constitutional interpretation are so diverse, encompassing text, precedent, policy, history, and the demands of justice.⁵²

If previous theorists had merely assumed pluralism, Philip Bobbitt, writing a generation after Wechsler, wholeheartedly embraced it. His influential analysis of the “modalities of constitutional argument” had two aims: to demonstrate that the Supreme Court has throughout our constitutional experience invoked six types of constitutional argument—historical, textual, structural, doctrinal, ethical, and prudential—and to argue that this

48 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989).

49 Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997).

50 Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 624 (2012).

51 See Wechsler, *supra* note 28, at 16.

52 *Id.* at 16-17.

argumentative pluralism supplied the only form of legitimacy that we could reasonably demand.⁵³ Today, as many commentators have noted,⁵⁴ the overwhelming majority of constitutional theorists are “pluralist” or “eclectic,” differing largely on matters of emphasis—“pragmatists” highlighting forward-looking policy considerations, “common law constitutionalists” emphasizing judicial precedent, “moral readers” focusing on justice, and so on.⁵⁵

Although pluralism is the dominant approach to constitutional interpretation, it is not obvious how a multiplicity of considerations that seem to be made of diverse stuff (meanings encoded in a text, legal intentions of a text’s authors or ratifiers, judicial precedents, nonjudicial historical practices, prudential considerations, moral values, etc.) can combine to determine not only what somebody should do (which is familiar enough), but what is already in fact the case. Some scholars have gone further, contending that the combinability of these diverse considerations is not a puzzle waiting to be solved, but a flat impossibility. As the originalist Larry Alexander puts the objection, “Any non-lexical ‘combining’ of text and intentions, text and justice, and so forth is just incoherent, like combining *pi*, green, and the Civil War. There is no process of reasoning that can derive [law] from such combinations.”⁵⁶

However troubling this “combinability challenge” should be to pluralists,⁵⁷ the originalists were monists (or nearly so). They maintained that judges should follow some original fixed feature of the constitutionally enacted text, increasingly described as its “original public meaning.” And *this* prescriptive thesis *did* plausibly imply a constitutive one. Soon Bork was couching 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

53 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 31.

54 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); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1794 (1997) (“Our constitutional practices require interpreters to look to text, structure, history, precedent, and morality.”).

55 See Mitchell N. Berman, *Constitutional Interpretation: Non-originalism*, 6 PHIL. COMPASS 408, 414-16 (2011) (making this point).

56 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” because that, after all, is what the constitutive question is inquiring after—what the law is, and not what the text means. That the latter fully determines the former is a substantive thesis to be addressed momentarily.

57 Not very, is my answer. Our social world contains countless entities that are constituted by radically diverse determinants—people, ideas, practices, physical artifacts, locations in physical space, et cetera. Think of a government, or a university, or a tennis tournament. It is not at all clear why these combinations are licit but legal systems and the norms they comprise are not. More pointedly, see *infra* note 166.

“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.”⁵⁸

Other originalists followed suit (if often downplaying the role of “principles”). Four years later, the prominent originalists Steven Calabresi and Saikrishna Prakash would declare that: “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.”⁵⁹ 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 “state[s],”⁶⁰ and that “it is the *text’s* meaning . . . that binds us as law.”⁶¹ In Randy Barnett’s terms: “the original meaning of the text provides the law that legal decisionmakers are bound by.”⁶²

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 meaning of the constitutional text*. On this view, to know what the constitutional *text means* is thereby to know what the constitutional *law is*.⁶³ I will call this thesis (or anything in the near vicinity) “Scalian constitutive originalism,” sometimes dropping one modifier or the other. It is ecumenical among the many ways of conceptualizing or defining that “original meaning”—from the “plain dictionary meaning” that Calabresi

⁵⁸ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5 (1990).

⁵⁹ Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 552 (1994).

⁶⁰ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 383, 397-98 (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 (emphasis added). For further reflections on the ambiguity in Scalia’s work regarding whether his claims are prescriptive, constitutive, or both, see Berman, *supra* note 38, at 798-807.

⁶¹ SCALIA & GARNER, *supra* note 60, at 398 (quoting Laurence H. Tribe, Comment, *in* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 66 (1997)).

⁶² Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 417 (2013). The claim in text is not inconsistent with Barnett’s view that “constitutional construction” is required when the text’s meaning is, for example, ambiguous or self-contradictory. *Id.* at 419.

⁶³ 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.” White Paper, Morgan Lewis & Bockius LLP, *Conflicts of Interest and the President* (Jan. 11, 2017) (on file with author). I call the contention audacious *not* because it is obviously wrong (though, for reasons I will explain, I do believe it is wrong, see *infra* subsection I.B.3), 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. *Id.*

and Prakash reference, to the meaning that legal elites would extract when decoding the text by application of a potentially large and complex array of original interpretive methods.⁶⁴

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,⁶⁵ while some originalists writing today forswear any claims about “what the law is.”⁶⁶ I’m 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 rarely themselves drawn attention to the shift in emphasis.⁶⁷ 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 the leading litigation strategist among originalist theorists. Appropriately enough, then, many observers believe that this constitutive thesis, or something very close to it, represents the center of gravity of contemporary originalism.⁶⁸

3. Difficulties

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.”⁶⁹ But many intuitive propositions prove false on inspection. It’s

⁶⁴ See generally JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

⁶⁵ See, e.g., Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 631-35 (1993) (contending that true constitutional norms are all and only what the constitutional text “was intended to mean by those who made it authoritative”).

⁶⁶ 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. MCGINNIS & RAPPAPORT, *supra* note 64, at 2, 116. 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. See *id.* at 4. Larry Solum’s version of “new originalism” is also a prescriptive account. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 524-36 (2013) (speaking in terms of what judges should do in interpreting textual provisions).

⁶⁷ But see *infra* note 98 (discussing work from Baude and Sachs on the “positive turn” in originalist theory).

⁶⁸ See, e.g., Steven D. Smith, *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.”).

⁶⁹ Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 39 (Leslie Green & Brian Leiter eds., 2011).

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 why you do.⁷⁰ So we shouldn't be too quick to accept the standard picture, either generally or as applied to American constitutional law. And reflection supplies ample reason to doubt it.

Prominent among those reasons are the numerous constitutional judgments that strike many of us as correct, on reflection, even apart from any force of *stare decisis*, and without regard for their consistency with the text's original meaning. To start, of course, there's *Brown*.⁷¹ Most scholars and historians think it doubtful that the average actual or hypothetical member of any appropriate segment of the 1868 American public would have paraphrased the Fourteenth Amendment's text in terms that would have entailed (even if unbeknownst to them) the unconstitutionality of racially segregated public schools. Yes, there are scholarly dissenters.⁷² To my eyes, however, originalists who labor to show the consistency of that decision with the "original meaning" of the Fourteenth Amendment's text, or the intentions of its authors, miss something important: the *non-contingent* character of widespread beliefs about *Brown*'s correctness. Many of us don't think that new historical research about beliefs or intentions held by persons in the 1860s could establish that legally-mandated racial segregation in public schools was constitutionally permissible a century later.

But *Brown*, if more than the tip of the iceberg, is far from the end of the story. Consider a handful of similar examples:⁷³ (1) The Fourteenth Amendment prohibits each state from treating its citizens unequally even with respect to the provision of benefits (such as university admittance). Yet the text provides only that states not deny to any person equal "protection." (2) 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. (3) The

⁷⁰ See John Tierney, *Behind Monty Hall's Doors: Puzzle, Debate and Answer?*, N.Y. TIMES (July 21, 1991), <http://www.nytimes.com/1991/07/21/us/behind-monty-hall-s-doors-puzzle-debate-and-answer.html?pagewanted=all> [<https://perma.cc/3YNG-MQPB>] (describing vos Savant's explanation of the puzzle in the pages of *Parade* magazine).

⁷¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷² See Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 72-73, 129 (2013) (arguing that colorblindness might have been part of the original public meaning of the Fourteenth Amendment); cf. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (arguing that congressional authors of the Amendment might have intended to prohibit state action that effectuates racial subordination).

⁷³ This is well-trod ground. Useful surveys on which I draw include Strauss, *supra* note 41; Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013); Stephen A. Siegel, *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).

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. (4) Congress may not criminalize blasphemy or false criticisms of the government. Yet historians agree that the original public meaning of “freedom of speech” probably did not encompass blasphemy or seditious libel. (5) 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. (6) No state may secede from the Union without the consent of the other states. Yet no portion of the constitutional text says so.

Possibly, few readers will believe that all the foregoing propositions (“originalism-challengers,” as I will call them) are true. But I anticipate that most will believe that many are. Because originalism is inconsistent with many constitutional judgments that many expert observers believe to be true,⁷⁴ we have reason to be skeptical of that general theory.

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 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.

⁷⁴ Of course, one way to resist this conclusion is 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 original meaning 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 reminder for those who propose or assess any such demonstrations.

The very notion of original public meaning is far from transparent. As Mark 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. See Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 220-21 (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 target is 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 from one challenger to the next.

The originalism-challengers are far from decisive.⁷⁵ I introduced them, recall, just to loosen the pull that many people intuitively feel toward the standard picture.⁷⁶ They remind us that originalists cannot rely on a mere *stipulation* that the meaning of the text constitutes the law, but must provide adequate arguments. And that's the bigger problem. Because constitutive originalism is a constitutive theory of American constitutional law, it must cohere with some reasonably respected *general* constitutive theory of law. Yet constitutive originalism does not jibe well with any widely entertained general theory of law. Certainly, ever since Hart demolished John Austin's "command theory of law" more than half a century ago,⁷⁷ no significant legal philosopher has suggested that it is a *general* truth about law that legal norms are fully determined by what an authoritative text says, means, or asserts. And Hart's own influential theory of law provides no support. On Hart's account, law is the set of norms that are "conclusively identified" or "validated" by tests that legal officials, especially judges, converge in following and accepting from the "internal point of view."⁷⁸ It is incontrovertible that judges have not collectively accepted the original meaning of the text as the sole determinant of constitutional norms. "The original meaning is the law" is not, in Hart's terms, our "rule of recognition."⁷⁹ Opinions that reach results inconsistent with the original meaning number beyond counting. Even Scalia acknowledged that we have never had a consistently originalist judiciary.⁸⁰

Needless to say, 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

⁷⁵ Some scholars think that, far from *decisive*, these objections aren't even *relevant*. Larry Alexander, most notably, denies "that one does or can have constitutional or legal intuitions that pre-exist and provide the grist for building our theory of legal interpretation." Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM* 87, 97 (Grant Huscroft & Bradley W. Miller eds., 2011). Part II is my response.

⁷⁶ For a nice demonstration of ways in which the standard picture reflects an impoverished understanding of the use of language in legal and extralegal contexts, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079, 1088-92 (2017). For additional criticisms of my own, see Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 *MICH. L. REV.* 783, 791 (2017).

⁷⁷ See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832). H.L.A. Hart criticized Austin's command theory, on grounds that are widely viewed as decisive. See H.L.A. HART, *THE CONCEPT OF LAW* chs. 2-4 (1961).

⁷⁸ HART, *supra* note 77, at 116. For the view that this common reading of Hart gets him wrong, see Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 *LEGAL THEORY* 75, 77 (2005).

⁷⁹ See HART, *supra* note 77, at 94.

⁸⁰ See Scalia, *supra* note 48, at 852 ("[I]t will surely not surprise . . . lawyers . . . to learn that originalism is not, and had perhaps never been, the sole method of constitutional exegesis.").

having been made.⁸¹ We lack reasons drawn either from our existing legal practices or from general philosophical inquiry into the nature of law, to believe that our constitutional norms are fully determined or constituted by what the text says or means, even when those notions are generously construed.

C. *A Dip Into Jurisprudence: Hart and Dworkin*

I have focused thus far on theorists of American constitutional law. I have also just emphasized that a constitutive account must fit with general accounts of the content of law. And that is a perennial topic in general legal philosophy. The main contending camps in contemporary Anglophone legal philosophy are, broadly speaking, Hartian and Dworkinian. So a few words are owed to identify each theory's implications for a constitutive theory of American constitutional law, and to flag some hurdles they face.

1. Hartians and the Problem of "Too Little Law"

Three paragraphs ago, I invoked Hart's rule of recognition to cause trouble for constitutive originalism. But that account can also be put to an affirmative use: our constitutional norms are whatever falls out from our rule of recognition. That could be. The principal worry is one that Dworkin flagged long ago: given widespread debates over the proper standards of "constitutional interpretation," Hart's account seems to entail that there is much less (constitutional) law than appears correct to us, even on reflection.⁸²

I'd venture that virtually every student or practitioner of constitutional law 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 that your conclusions rest on certain premises concerning the constitutional significance of liberty or equality interests upon which officials have not converged. Or you

⁸¹ For a recent effort of the sort I have in mind, purporting to derive a form of originalism from John Finnis's version of natural law theory, see Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 110 (2016).

⁸² See generally DWORKIN, *supra* note 2, at 1-44. As Dworkin would later put it, perhaps hyperbolically, on the Hartian account, "it would follow that there is actually almost no law in the United States." Ronald Dworkin, *Hart's Posthumous Reply*, 130 HARV. L. REV. 2096, 2116 (2017). For elaboration arguing that this objection has force against Hart's account, see Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 29 (Arthur Ripstein ed., 2007); Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 273-77 (Matthew Adler & Kenneth Einar Himma eds., 2009) [hereinafter RULE OF RECOGNITION].

might be confident that *Printz v. United States*⁸³ or *District of Columbia v. Heller*⁸⁴ were correctly decided, even though you understand that your conclusion depends upon views, respectively, about the constitutionally mandated federal–state balance or about the relevance of original meaning 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. Those judgments combine with a Hartian theory of law to yield three premises that can be approximated as follows:

- (1) Constitutional judgments are legally correct only if they are validated by a test that consists of criteria established by a near-consensus among legal officials, especially judges;
- (2) Very few constitutional disputes that reach the U.S. Supreme Court (and the federal appellate courts more generally) are determinately resolved by criteria that enjoy near-consensus judicial recognition;⁸⁵ and
- (3) There are legally correct answers to a significant percentage of constitutional disputes that reach the U.S. Supreme Court (and the federal appellate courts more generally).

The problem is that these premises are mutually incompatible.

Most Hartians maintain that we should abandon premise (3). Brian Leiter, for example, has argued that those who avow premise (3) are, if not lying,

simply in *error*: they honestly think there is a fact of the matter about what the grounds of law are, and thus what the law is, in the context of their disagreement, but they are mistaken, because in truth there is no fact of the matter about the grounds of law in this instance precisely because there is no convergent practice of behavior among officials constituting a Rule of Recognition on this point.⁸⁶

A few constitutional scholars who lean Hartian challenge premise (2). Most recently, William Baude has contended that judges have converged on

⁸³ 521 U.S. 898 (1997).

⁸⁴ 554 U.S. 570 (2008).

⁸⁵ The best known and most thorough study to reach that conclusion is Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987), reprinted in RULE OF RECOGNITION, *supra* note 82, at ch.1.

⁸⁶ Brian Leiter, *Explaining Theoretical Disagreement*, 75 U. CHI. L. REV. 1215, 1224 (2009).

a complex test that yields determinate legal judgments in a nontrivial percentage of “hard cases” that are litigated to the appellate courts.⁸⁷

I cannot in this space evaluate these possibilities; doing so would require a deep dive, not a dip. The hard-to-dispute empirical fact is that many constitutional scholars at least claim still to believe, despite Hart and Leiter, that there is law in many hard cases. And few have been persuaded by the revisionist accounts that claim to show that judges (or Supreme Court Justices) have come much closer to converging on many interpretive or constitutional issues than appears at first (and second) blush.⁸⁸ That leaves the third possibility: to reject premise (1), the Hartian account of law.

2. Dworkin and the Problem of “Too Much Morality”

The originalists are constitutional theorists who have paid slight attention to writings in legal philosophy. Hart was a legal philosopher who attended little to U.S. constitutional law. Dworkin was both a legal philosopher and an American constitutional theorist. He is, therefore, a promising source for a constitutive theory of law that makes sense of the American constitutional experience. Unfortunately, although Dworkin styles himself a hedgehog,⁸⁹ the cuttlefish is a more apposite image: flamboyantly brilliant but maddeningly elusive. I can hardly describe his views, let alone critique them, without adding qualifications and clarifications that would consume far too many pages.

For simplicity, then, let’s distinguish only two Dworkins: Dworkin the American constitutional theorist, and Dworkin the philosopher of general jurisprudence. The first Dworkin has advocated “a particular way of reading and enforcing a political constitution” that he dubbed “the *moral* reading.”⁹⁰ The moral reading, he 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.”⁹¹ It is construed most straightforwardly as a prescriptive theory. It’s a claim about what judges and lawyers should *do*: they should employ a

⁸⁷ See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (arguing that “our current constitutional practices demonstrate a commitment to” a form of originalism—what Baude dubs “inclusive originalism”—according to which “the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision”).

⁸⁸ Criticisms of Baude’s Hartian defense of a form of originalism include Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1340-41 (2017); Richard A. Posner & Eric J. Segall, *Faux Originalism*, 20 GREEN BAG 2D 109, 110 (2016); Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 44 (2016).

⁸⁹ See generally RONALD DWORIN, JUSTICE FOR HEDGEHOGS (2011).

⁹⁰ RONALD DWORIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

⁹¹ *Id.*

“strategy” of “treat[ing] the Constitution as expressing abstract moral requirements,”⁹² trying “to find the best conception of constitutional moral principles . . . that fits the broad story of America’s historical record.”⁹³

The second Dworkin (the philosopher of law) has defended a theory that, however reconcilable with “the moral reading,” sports a different moniker: “law as integrity.”⁹⁴ According to that theory, developed 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.⁹⁵ 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.”⁹⁶ 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.

Like others,⁹⁷ I’m skeptical that Dworkin’s prescriptive theory of American constitutional practice fits comfortably with his general constitutive theory of legal content.⁹⁸ So I will put aside the former and consider only the latter.

⁹² *Id.* at 3.

⁹³ *Id.* at 11. The most prominent Dworkinian constitutional theorists are palpably prescriptivist. See generally JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS (2015); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

⁹⁴ DWORKIN, *supra* note 2, at 96-98.

⁹⁵ 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. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 555 & n.15 (2010). 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, *The Method of Text and ?*: Jack Balkin’s Originalism With No Regrets, 2012 U. ILL. L. REV. 611, 619 (2012) (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 Dworkinian “legal principles” as suboptimal or distorted “moral principles.” The critical point, though, is that morality grounds the law. See DWORKIN, *supra* note 2, 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)).

⁹⁶ DWORKIN, *supra* note 2, at 225.

⁹⁷ For an incisive analysis see Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 CONST. COMMENT. 49, 49 (2000).

⁹⁸ Why should we read the abstract, rights-bearing provisions of a written constitution as setting forth moral principles? What grounds or justifies the moral reading? Why do American judges “have no real option” but to be moral readers? DWORKIN, *supra* note 90, at 3. Dworkin’s most direct answer is: *because* that’s what the text’s authors and ratifiers *intended*. Had they intended not

Again, I can't attempt a detailed critique in this long Article. Here's the crux. "Law as integrity" rests on the claims that law is an "interpretive concept"—i.e., a concept that we engage and refine to make it the best it can be—and that its function is to morally justify the state's use of coercive force.⁹⁹ These are not premises that those of a positivist sensibility will find congenial. In the Postscript to *The Concept of Law* (published posthumously in the 1994 second edition), Hart flatly rejected Dworkin's claim about law's function, observing that positivist theories generally "make[] no claim to identify the point or purpose of law and legal practices as such."¹⁰⁰ The reason they don't is that to endorse partisan or ideological claims about law's purpose threatens to open the door wide to law's colonization by morality. And, sure enough, Dworkin would himself conclude toward the end of his life that the theory he had advanced in *Law's Empire* inevitably leads to a "one-system picture" of our normative landscape in which law is just a branch of morality,¹⁰¹ and our legal obligations and moral obligations can never conflict. These are bracingly heterodox claims, not likely to prove acceptable to most constitutional lawyers.¹⁰² The gist of the central objection to Dworkin, accordingly, is nearly

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." *Id.* at 8.

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." Ronald Dworkin, *Comment*, in SCALIA, *supra* note 61, at 115, 119. "[I]f 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." *Id.* at 126.

One difficulty with this "semantic originalist" defense of a highly moralized approach to constitutional interpretation 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. A second and more profound difficulty 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 nonoriginalism) in the first place. And it's far from obvious that that obligation follows from law as integrity construed as a constitutive theory.

⁹⁹ DWORKIN, *supra* note 2, at 87.

¹⁰⁰ See HART, *supra* note 77, at 248-49 (deeming it "quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct").

¹⁰¹ See DWORKIN, *supra* note 90, at 405-09 ("[W]e now treat law as a part of political morality").

¹⁰² Do not equate "heterodox" with "wrong." To reiterate, I'm trying only to convey a sense of the obstacles that the Dworkinian account faces, not to establish that he, or others carrying his baton, can't surmount them. For recent expansions on Dworkinian themes, see Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014). For my criticisms, see generally Mitchell N. Berman, *Of Law and Other Artificial Normative Systems*, in DIMENSIONS OF NORMATIVITY, *supra* note 22.

an inverse of the standard criticism of Hart: where Hart leaves us with too little law, Dworkin assumes too much morality.

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,”¹⁰³ 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 decisionmaking. Like all (or virtually all) nonoriginalists, 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 conduces toward prescriptive packaging, for pluralism is a reasonably 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. And monism paved the way for a shift from a wholly prescriptive theory to a prescriptive theory that piggybacks on a constitutive one: judges should enforce the original public meaning of the constitutional text *because that original meaning constitutes the law*. As a consequence, it 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

¹⁰³ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

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—has many highly doubtful implications and lacks the grounding in philosophically respectable accounts of law that a constitutive theory ultimately requires.¹⁰⁴ Hart's and Dworkin's accounts face their own difficulties, much-discussed. 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. AN EVEN BRIEFER METHODOLOGICAL INTERLUDE

Notice the form that some arguments have taken in Part I. The “originalism challengers” cause trouble for Scalian originalism by casting doubt on relatively

¹⁰⁴ This “dominant” form of constitutive originalism is not the only one. Most notably, Will Baude and Steve Sachs, writing separately and together, are spearheading what Baude terms a “positive turn” in originalist theory, one that is far more nuanced than monist versions. *See* Baude, *supra* note 87, at 2351. Their work is replete with insights, and a pleasure to read. But I think that it does not provide a constitutive theory, so much as it assumes one—namely, Hart's.

A constitutive theory aims to explain the content of the law in terms of facts or relationships that are in some sense more basic or better understood. That's not exactly what Baude and Sachs are seeking. Insofar as they, like me, are trying to figure out “what the law is,” they are inquiring into the “legal rules” that govern the judicial activities often denominated “legal interpretation.” They are trying to explicate the rules that judges are legally directed to follow when engaged in “statutory interpretation” or “constitutional interpretation.” *See generally* Baude & Sachs, *supra* note 76, at 1140-44. And they conclude that there are many such rules: rules that direct judges to attend to what the text says, or to what the authors intended, closure rules, rules of policy, and more.

But what makes these putative rules actual legal rules? Their answer: the Hartian rule of recognition. *See id.* at 1116 (acknowledging that fundamental questions they bracket must be answered, “in the end, by the appropriate theory of jurisprudence,” and that they assume “something like Hartian positivism”). Yet that answer runs headlong into the too-little-law objection (subsection I.C.1): judicial agreement about the relevant standards and the circumstances of their correct application, is too partial and checkered to underwrite “valid legal norms” on orthodox Hartian suppositions.

In my view, most or much of what Baude and Sachs describe as interpretive “rules” are what I'd call “principles.” The words don't matter. What matters is that the considerations that I'm designating “principles” serve a constitutive function, not only practical or epistemic functions, and that, as I will argue in Part III, they produce derivative legal norms by aggregation or interaction, and not by rule-like lexical ordering. To be sure, Baude and Sachs grant that the rules established by higher-level practices can be “defeasible.” *Id.* at 1101. But that won't get them what I think they need. “The gravest sin in normative taxonomy is to confuse defeasibility with weightedness.” Errol Lord & Barry Maguire, *An Opinionated Guide to the Weight of Reasons*, in *WEIGHING REASONS* 3, 8 (Errol Lord & Barry Maguire eds. 2016).

particularistic judgments that the theory yields. I problematized Hart's theory of law in part by observing that it delivers less law than practitioners intuit exist. This form of reasoning invites a methodological worry—that we can't 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. 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.”¹⁰⁵ I address that objection here. I do so partly to defend the analyses in Part I, but even more to set terms and expectations for the remainder of this Article.

Consistent with this interlude's promised brevity, the response to Alexander's objection will traverse just two short steps. First: coherentist theories of epistemic justification counsel against thinking in terms of “forwards” and “backwards.” The coherentist “method of reflective equilibrium” in particular 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.¹⁰⁶ To the extent that coherentism is the name of the game, then 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. Nelson Goodman, a progenitor of reflective equilibrium, expressed the idea in a canonical early formulation: “A rule is amended if it

¹⁰⁵ Alexander, *supra* note 75, at 97. Steve Sachs has also raised cautions about the use of reflective equilibrium in this context. See generally Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2272-78 (2014).

¹⁰⁶ 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 wrongful” 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. For a careful explanation of the method, and of the criticisms it has attracted, see Norman Daniels, *Reflective Equilibrium*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Oct. 14, 2016), <https://plato.stanford.edu/entries/reflective-equilibrium/> [https://perma.cc/KA8R-32JF].

yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend.”¹⁰⁷

Second, coherentism of one sort or another *is* the right epistemic approach to the questions of legal theory with which we are interested. To start, suppose as Thomas Kelly and Sarah McGrath have persuasively argued, that reflective equilibrium is not “enough” in a domain that “contains truths that are not in any interesting sense of our own making.”¹⁰⁸ Many people would conclude that law is not such a domain. As Joseph Raz has stressed, “the way a culture understands its own practices and institutions is not separate from what they are.”¹⁰⁹

But even when reflective equilibrium isn’t enough, that doesn’t mean that coherentism goes out the door. What it means, Kelly and McGrath urge, is that reflective equilibrium should start from the set of judgments that an agent “is justified in holding at that time,” or that enjoy “initial, rational credibility.”¹¹⁰ The difficulty, as they acknowledge, is that we need criteria external to the method to establish what makes a belief justified, or rationally credible, or the like. So critics of the coherentist approach I pursue owe an account of why judgments of the form “constitutional law consists of all and only the norms that the constitutional text says or states” (as public meaning originalists would have it), or “constitutional law consists of all and only the norms that the authors of the constitutional text intended to enact by means of ratifying the constitutional text” (as a legal-intentionalist such as Alexander might prefer), are, say, “rationally credible,” whereas judgments of the form “legally mandated racial segregation in public education is constitutional” aren’t. Critics such as Alexander have provided no basis for this conclusion.¹¹¹

¹⁰⁷ Nelson Goodman, *The New Riddle of Induction*, in *FACT, FICTION, AND FORECAST* 63, 67 (1953) (emphasis omitted).

¹⁰⁸ Thomas Kelly & Sarah McGrath, *Is Reflective Equilibrium Enough?*, 24 *PHIL. PERSP.* 325, 325 (2010).

¹⁰⁹ JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 96 (2009).

¹¹⁰ Kelly & McGrath, *supra* note 108, at 348, 350.

¹¹¹ One stumbling block is that Alexander mischaracterizes precisely what is at issue. In an earlier article about the legal significance of the Natural Born Citizenship Clause, U.S. CONST. art. II, § 1, cl. 5, I had suggested that we should take seriously widespread and confident elite judgments that all citizens at birth are eligible to the presidency (so long as they also satisfy age and residency requirements) when trying to work out a constitutive theory of our law. Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural Born Citizenship Clause*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* 246 (Grant Huscroft & Bradley W. Miller eds., 2011). Alexander disagrees. Here’s his punchline: “Did or did not the framers put the specific language regarding ‘natural born Citizen’ in Article II? That question . . . is not resolved by reflective equilibrium any more than is the question how high in feet is New Zealand’s Mt. Cook.” Alexander, *supra* note 75, at 97.

This response reflects a misunderstanding of the claim under consideration. The question I was addressing was not: Did the framers put this or that language in the text? Coherentists need 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 any other facts that strike persons already well-socialized into the law as at least potentially constitutionally relevant, what is

At the same time, there is no great mystery about how people *could* acquire warranted beliefs about legal propositions unmediated by possession of a general legal theory. The supposition doesn't require that we posit some mysterious *sui generis* faculty of intuition. If people's beliefs about the law (and other cognitive or conative states and attitudes) even partly make out what the law is, then they can gain warranted beliefs about what the law is by dint of their warranted beliefs about their own legal beliefs and attitudes, along with their beliefs about the beliefs and attitudes of others. This is so even if we lack conscious access to an articulable theory of the way beliefs and other social and psychological facts do bear constitutively on the content of our law—at least so long as the function that maps the observable social facts to legal facts is not so opaque or recondite as to elude capture by our natural, well-developed inferential capacities.

This explains why the originalism-challengers, for example, have epistemic force. While the legally correct resolution of concrete constitutional 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.¹¹² 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 considered judgments we may have about the legally correct resolution of

the law? Those are very different questions because text and law are different types of thing. *See infra* notes 187–89 and accompanying text. We rely on ordinary empirical methods of inquiry to determine physical facts about the world. But facts about “how facts make law” (in Greenberg's apt phrase) are not the type of facts that empirical methods can resolve. *See Greenberg, supra* note 2.

112 It is instructive that Sachs, although skeptical of *some* uses of reflective equilibrium, 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-order practices” are) can be epistemically warranted. Sachs, *supra* note 105, at 2273. He specifically disavows any disagreement with coherentists who use intuitions about derivative constitutional propositions in the limited way that I advocate here. *See id.* at 2276 n.148 (referencing Berman, *supra* note 111). To reiterate, the originalism-challengers do not cast doubt on the conditional proposition that *if* the law is fully determined or constituted by the original meaning of the constitutional text, then any purported legal judgments that are inconsistent with the text's original meaning are legally mistaken, no matter what any of us might believe. The originalism-challengers do cast doubt on the truth of the antecedent.

Just as nothing in Sachs's article causes trouble for what I argue here, 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.” *Id.* at 2268. 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. 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.”

concrete constitutional disputes.¹¹³ Thus, if our constitutional law would be *p* if it is true that the original meaning of the text fully determines the law, and if we strongly believe that our constitutional law is $\neg p$, then we have some reason to doubt that the original meaning of the text does fully determine the law, as constitutive originalism claims.

More importantly, and looking forward, the coherentist approach explains the mutually reinforcing character of the remainder of this Article. Insofar as principled positivism emerges from Part III as a plausible account of legal content, it supports particular judgments about individual cases reached in Part V. And insofar as judgments about cases in Part V, and observations about principles in Part IV, are independently plausible, they bolster the plausibility of the general account in Part III. Comparative assessments of competing constitutive theories of law all come down to comparative tallies of net “plausibility points” (in David Enoch’s felicitous phrase).¹¹⁴ There’s no plausible alternative.¹¹⁵

III. 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. Bobbitt thought so, famously insisting that law “is something we do, not something we have as a consequence of something we do.”¹¹⁶ And it’s nearly a core commitment of many writers in the legal realist and critical traditions. I don’t rule it out. But it is a distinctly minority view among philosophers of law and 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.¹¹⁷

This Part presents such an account, in three steps. Section III.A introduces the theory—“principled positivism”—in fairly rudimentary strokes. Its point of

¹¹³ Accord Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 594 (1999) (“By the time anyone has occasion to think about constitutional theory, she will likely have views about a fairly wide range of constitutional issues. At that point, choosing a constitutional theory is a matter of finding one that fits these views.”).

¹¹⁴ DAVID ENOCH, *TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM* 14-15 (2011).

¹¹⁵ See also Rosati, *supra* note 22, at 9-10 (“We come to understand the nature of facts in a particular normative domain by studying the judgments we are inclined to make in that domain, along with the claims we treat as truistic and the cases we regard as paradigmatic.”).

¹¹⁶ BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 31, at 24; see also, e.g., Dennis Patterson, *Law’s Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937, 940 (1990) (contending that “law is an activity and not a thing”).

¹¹⁷ Accord Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740-41 (1982) (rejecting as “unwarranted and unsound” a “nihilism” that maintains “[a]ll law is masked power”).

departure is Part I'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, that's what the first Section sketches: a general and abstract account of what legal norms are and how they come to be what they are.

Section III.B illustrates principled positivism, but with an example drawn far from American constitutional law: the famous 1983 "pine tar incident" in Major League Baseball. I turn to sports not out of whimsy but for reasons that commonly motivate comparative investigations. Most generally, 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.¹¹⁸ And finally, broadening the account's scope buys it increased plausibility by dint of consilience: "We prefer more comprehensive explanations—explanations that make sense of more different kinds of things—to explanations that seem too narrowly tailored to one kind of datum."¹¹⁹

Section III.C 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 strength from, and in turn supports or illuminates, various salient features of American constitutional theorizing, including living constitutionalism, unwritten constitutionalism, and popular constitutionalism. This is coherentism on display: 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, diverse strands of constitutional theory that, while hardly uncontroversial, have attracted many thinkers over many years.

¹¹⁸ I advocate comparative analyses of sports and law in Mitchell N. Berman, "Let 'em Play": *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1331 (2011). See also, e.g., Mitchell N. Berman, *Replay*, 99 CAL. L. REV. 1683, 1730-42 (2011) (arguing that aspects of the National Football League's system of reviewing on-field calls with instant replay technology has implications for the structure of criminal adjudication).

¹¹⁹ Leiter, *supra* note 86, at 1239 (emphasis omitted).

A. *The Account Introduced*

We inhabit a normative landscape of staggering complexity. We are—or we take ourselves to be—subject to norms of many and diverse types.¹²⁰ People are morally obligated to keep their promises. It is a principle of law that voluntary agreements will be respected. You should floss after every meal. In basketball, a defender has a right to maintain his position. Children ought not to address their elders unless spoken to. If you and an epistemic peer disagree, you should both adjust your credences downward. It is wrong to turn the trolley. The rules of Monopoly permit players to trade properties. Only an ordained teaching elder has authority to solemnize a marriage.

The propositions of constitutional law in which we've been interested—say, extreme partisan gerrymandering is constitutionally prohibited—fit comfortably on this heterogeneous list. The strategy I recommend here is to approach our ultimate target in steps. I'll aim to harness an elementary constitutive account of simple social norms to generate the outline of a constitutive account of constitutional law.

1. Three Cuts at the Normative Landscape

We can impose a modicum of order on our unruly normative terrain with the aid of three distinctions. I'll distinguish: “natural” from “artificial” norms; “thin” from “robust” normativity; and “standalone” norms from norms generated and maintained by a normative system.

Take the natural/artificial distinction first. Though a good definition might prove elusive, the rough idea is highly intuitive: norms are “artificial” if they are “products of our own making,” and “natural” if they aren't.¹²¹ Prudence, logic and rationality are obvious candidates for natural norms. Morality too, on most accounts, though not all. Norms of fashion, grammar, and games are artificial.

Now, many people think it a hallmark of artificial norms that they are not “really,” or “genuinely,” or “inescapably” normative. They're not normative in the same way that morality, for example, is often thought to be. Many (non-minimalist) moral realists think that one who agrees that “morality requires that I keep my promises” and then asks, “but do I really have reason to keep my promises?” betrays

¹²⁰ Normativity concerns what people ought to do, believe, feel, and so on. Its central notions include *ought*, *obligation*, *permission*, *power*, *right*, *wrong*, *rule*, *reason*, and *good*. Everything else about normativity—and perhaps even that much—is disputed.

¹²¹ Kevin Toh, *Artificial Norms and Interstitial Reasoning*, (Oct. 2011) (unpublished manuscript) (on file with author). Of course, 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 depend constitutively upon choices and behaviors of actual human beings.

something close to conceptual confusion.¹²² But similar questions are perfectly sensible when artificial norms are examined. You may believe that some act of photocopying, say, violates both the law and your employer's policies, yet think, unproblematically, "what's that to me?" Hence a second distinction that roughly tracks the first: artificial norms possess only "thin," "formal," or "ostensible" normativity,¹²³ whereas natural norms (or some subset of them) possess "real" or "robust" normativity (if there is any such thing).¹²⁴

The last of our three cuts distinguishes one-off or discrete norms from norms that belong to a system of norms and that owe their existence to their membership within that system. I'll call these "standalone" and "systemic" norms, respectively, not worrying too much about whether the distinction that I'm marking represents a spectrum more than a dichotomy. Plausible examples of standalone artificial norms, plucked at random, include the norm in Western societies that you should wear black at a funeral, and the norm in parts of Southern India that daughters should be wed before puberty. Many or most of the artificial norms studied by theorists of "social norms" are, in this stipulated vocabulary, standalone artificial norms. But many or most artificial norms appear to belong to *systems* of norms, a system being (to a first pass) a set of interconnected component parts that collectively form a complex whole. More significantly, these systemic norms gain their contents and their normative character—the fact that they *are* norms and bear (even "thinly") on what agents ought to do—from the normative system, not vice versa. In a sense, the system is *prior* to its norms.¹²⁵ A religious dietary rule

¹²² See, e.g., Stephen Darwall, *Making the "Hard" Problem of Moral Normativity Easier*, in WEIGHING REASONS, *supra* note 104, at 257 (exploring why some such person may or may not be "conceptually confused"); VAN ROOJEN, *supra* note 23, at 54-72 (discussing morals/reasons internalism).

¹²³ I have in mind, more or less, the picture famously drawn in Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 PHIL. REV. 305, 309-10 (1972).

¹²⁴ For various takes on the distinction, see, e.g., Berman, *supra* note 102; Tristram McPherson, *Against Quietist Normative Realism*, 154 PHIL. STUD. 223, 224-25 (2011); David Plunkett, *Robust Normativity, Morality, and Legal Positivism*, in DIMENSIONS OF NORMATIVITY, *supra* note 22.

Some philosophers who work in ethics or practical reasoning resist this distinction, believing or assuming 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. To accommodate such concerns, 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 revisionary bit of linguistic or conceptual legislation, and 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). We could call them "shnormative systems." Everything that I want to ask and claim about "artificial normative systems" could be asked and claimed about "shnormative systems" in the same way. The central jurisprudential task would be to explain how legal shnorms gain the contents that they have.

¹²⁵ Hart himself felt that "the idea of rules valid by reason of their source" was in some sense the "key" to his account of law. NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 227 (2004).

only makes sense within a system of rules of ritual and observance; a rule governing game play is intelligible only within the entire normative system that the game defines. Like sports and religions, law too is an artificial system that generates norms that possess only thin or ostensible normative force.¹²⁶

2. The Social-Factual Grounds of Standalone Artificial Norms

It is reasonable to suppose that a constitutive account of the norms belonging to artificial systems will be more complicated than a constitutive account of standalone artificial norms. Let's start simple.

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. Although philosophers of social science debate the details, they largely agree on the basics: These simple artificial norms have social origins. They depend upon or are brought into existence by the beliefs, intentions, and actions of some community of persons. A recent study by theorists working out of the Australian National University, for instance, draws on Hart's account of the "internal point of view" to explain standalone norms in terms of the "normative attitudes" of some relevant community.¹²⁷ Consider,

¹²⁶ I say more in favor of a picture of the normative landscape that situates legal systems within the larger class of artificial normative systems in Berman, *supra* note 102. I acknowledge, though, that this Article assumes this positivist picture of law without directly defending it. Whether our concept of law is positivist is a separate question from what determines the contents of legal norms when they are conceptualized within a positivist frame. *Cf.* BRIAN EPSTEIN, *THE ANT TRAP*, 74-87 (2015) (positing anchoring and grounding as distinct relationships of metaphysical dependence); Plunkett, *supra* note 124 (distinguishing the first-order explanatory question of what grounds legal facts from the "second-order" explanatory question of what grounds the fact that the first-order grounds are what they are). This Article concerns the latter question, not the former. Still, it defends positivism *indirectly* to the extent that antipositivist theories of law draw strength from internal difficulties that positivist theories supposedly confront (such as their purported inability to explain phenomena that we believe require explanation).

If law and sports comprise separate genera within the larger family of artificial normative systems, what distinguishes them? We have already seen both Dworkin's answer (law serves to justify the exercise of coercion) and Hart's rejection of it. *See supra* Section I.B. According to his counter-proposal, "the distinctive features of law are the provision it makes by secondary rules for the identification, change, and enforcement of its standards and the general claim it makes to priority over other standards." HART, *supra* note 77, at 249. But this is unpromising, for the first feature is common to all or most formalized artificial normative systems. Sports leagues, for example, generate primary rules of conduct and also maintain secondary rules governing change and enforcement. The better answer, I think, is that "legal systems are artificial normative systems established and maintained by political communities and designed to serve a potentially limitless range of functions, characteristically including those of resolving disputes between community members, and preserving public order and punishing breaches." Berman, *supra* note 102, at 18-19.

¹²⁷ GEOFFREY BRENNAN, LINA ERIKSSON, ROBERT E. GOODIN & NICHOLAS SOUTHWOOD, *EXPLAINING NORMS* 15 (2013).

for example, “the normative principle that requires women to wear headscarves.”¹²⁸ For this to be a norm of Saudi Arabia, they explain,

is for a significant proportion of Saudi Arabians to have certain normative attitudes. For example, perhaps Saudi Arabians judge that women *must* wear headscarves; perhaps they are disposed to *disapprove* of women who don’t wear headscarves; perhaps they judge that it is *appropriate* to disapprove of women who don’t wear headscarves; and so on.¹²⁹

To repeat, other philosophers offer differing analyses. Cristina Bicchieri, for example, explains norms in terms of people’s “expectations and preferences.”¹³⁰ But the details in dispute shouldn’t distract us. The important and largely uncontroversial claim is that (standalone) “social norms” exist in virtue of facts about people’s behaviors, beliefs, intentions, and attitudes—what legal theorists are apt to call “social and psychological facts.”

I propose to regiment this common account with two terms of art. First, I will dub the types of social facts that constitute or explain social norms “taking up” behaviors or practices.¹³¹ The locution is intended to be somewhat more suggestive than the blander “social and psychological facts.” At the same time, because I remain agnostic about the particular kinds of behaviors or mental or dispositional states that most matter, it is less committal than the Australian or Bicchierian accounts (or others). Second, I will put a name to the relation that obtains between taking-up behaviors and the social norms they constitute or determine. I will say that taking-up practices “ground” norms, and, correlatively, that norms are “grounded in” the taking-up practices. Thus: the norm that Americans ought to wear black at a funeral is grounded in the ways that (at least some) Americans “take it up” by believing and stating that this standard is normative, by using it as a guide for their own conduct, by criticizing themselves and others for deviance, and so on.

Grounding is an “idiom[] of metaphysical determination and dependence.”¹³² It stands for a certain type of (“non-causal”) relationship by which facts in a higher-level domain are explicable by reference to facts

¹²⁸ *Id.* at 29.

¹²⁹ *Id.*

¹³⁰ CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS* 2 (2006).

¹³¹ See Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 166 (2002) (arguing that, for “common lawyers . . . , the law in its fundament was understood to be not so much ‘made’ or ‘posited’—something ‘laid down’ by will or nature—but rather, something ‘taken up,’ that is, used by judges and others in subsequent practical deliberation”).

¹³² Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109, 109 (Bob Hale & Aviv Hoffmann eds., 2010).

belonging to a lower-level domain.¹³³ Grounding is a hot topic in metaphysics, hedged by uncertainty and dissensus;¹³⁴ I do not intend, by invoking the term, to commit myself to any especially contested propositions. I mean only to assert that grounding facts (the taking-up practices) are metaphysically more fundamental than the grounded facts (standalone artificial norms), and participate in making the latter the case.¹³⁵ Compare: 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 microphysical facts or properties.

Lest it be thought that I am trying to gain argumentative advantages to which the vocabulary does not entitle me, 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 well-defined mechanism. For our purposes, 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 simple social norms, to have fair confidence *that* social facts ground simple social norms. Moreover, it's wise to guard against the "premature specification bias"¹³⁶—a tendency to demand more precision, of ourselves and others, than the current state of understanding can reasonably deliver. I'm using "ground" as a label for the determination relationship that explains social norms in terms of social facts, whatever that relationship turns out to be.

3. From Standalone Norms to Systemic Norms

Turn now from standalone norms to the norms belonging to artificial systems, notably including, but not limited to, law. Insofar as these normative systems are artificial, we should expect that they and their norms are also grounded in, or constituted by, social facts. But the norms of artificial systems cannot all be explained in this simple and direct way that artificial standalone norms are explained. Actual "taking-up" behaviors by Oxford dons might

¹³³ Fabrice Correia & Benjamin Schnieder, *Grounding: An Opinionated Introduction*, in METAPHYSICAL GROUNDING: UNDERSTANDING THE STRUCTURE OF REALITY 29 (Fabrice Correia & Benjamin Schnieder eds., 2012).

¹³⁴ See generally METAPHYSICAL GROUNDING, *supra* note 133; Michael J. Clark & David Liggins, *Recent Work on Grounding*, 72 ANALYSIS 812-14 (2012).

¹³⁵ Grounding is more than supervenience. "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*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Nov. 2, 2011), <https://plato.stanford.edu/entries/supervenience/> [<https://perma.cc/92WU-7DE6>]. Supervenience does not posit an explanatory or "priority" relationship. For example, the volume of a perfect sphere supervenes on its surface area, and vice versa, but neither property is prior to the other, hence grounds it.

¹³⁶ The term is Richard Falk's, though I've taken the liberty of converting it from a "fallacy" to a "bias." I am grateful to Chuck Beitz (personal conversation) for introducing me to the nifty phrase.

make out a fully satisfactory explanation for the local norms directing that port be passed to the left.¹³⁷ In contrast, a fully satisfactory explanation for the fact that it is legally prohibited to raise goats within the City of Philadelphia 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. Indeed, it could be against the law to raise a goat in Philadelphia even if nobody in the city were aware of that fact. And this is the critical general point: an artificial system could deliver a norm—say it prohibits ϕ ing—even if that norm is *itself* unsupported by any taking-up behaviors. A standalone artificial norm ceases to exist when not (or no longer) taken up. Not so a systemic artificial norm.

How can that be? It’s natural to surmise that, when it comes to normative systems, (“fundamental”) norms that are directly grounded in social facts—more or less as standalone artificial norms are—somehow participate in the determination of other (“derivative”) norms. For example, if relevant taking-up behaviors of relevant people grounded a legal norm to the effect that “whatever norms the Philadelphia City Council enacts are law,” then we can leverage the relatively small number of norms that are directly grounded in social facts into a (vastly) larger number of derivative norms. Hart’s rule of recognition (at least as it is generally understood by American constitutional theorists) is an elaboration of this simple model: all norms of the system trace back, by one long chain of deductions, to a single complex rule that is directly grounded in taking-up behaviors of legal elites.¹³⁸

That’s one way to explain how “fundamental” norms (norms that sit closer to the social facts that ground them) help determine “derivative” norms (norms that lie at a greater remove from the grounding social facts). But it births a difficulty that we have already witnessed. Whenever the relevant officials (paradigmatically judges) fail to converge on some putative “criterion of validity,” or whenever they agree that some criterion “counts” but fail to converge on where it fits within the rule of recognition’s overall logic, to that extent the rule is unable to perform its validating function. Unfortunately, in mature legal systems we are most familiar with, these failures of convergence are likely to be common. Indeed, as we have noted, many constitutional scholars believe that such failures and gaps are thoroughly characteristic of American constitutional practice. So arises the too-little-law critique of Hart.

I will offer an alternative possibility that may ameliorate (but not eliminate) this difficulty. In lieu of a “rule of recognition” that mediates

¹³⁷ See BRENNAN ET AL., *supra* note 127, at 3.

¹³⁸ To repeat a point from Part I: If those behaviors converged on an agreement to treat as law all and only those norms encoded in the constitutional text, as ratified and formally amended, then Scalian constitutive originalism would be true of our law. But they don’t, so (on Hart’s account) it isn’t.

between the social facts that ground it and the myriad legal norms that a legal system is designed to output by picking out a set of necessary and sufficient conditions to which any derivative legal norm must trace,¹³⁹ suppose that mediation is furnished by a multiplicity of fundamental norms that vary in their weight or importance and determine derivative norms by aggregation (or the like), not by “validation.”¹⁴⁰ Call the fundamental norms that are grounded in behaviors and practices “principles,” and the derivative norms that the fundamental norms combine to produce “rules.” Normative systems, then, consist both of rules and of principles—respectively, 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 ground the system and the norms that it is the function of the artificial system to generate.¹⁴¹ On this alternative, we need agreement or convergence among judges (or relevant others) sufficient to ground the principles (including their rough weights),¹⁴² but we do *not* need agreement on how those principles stitch together to form a conclusive test of legal validity. Insofar as this model of multiple principles demands less of the

¹³⁹ See, e.g., Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *RULE OF RECOGNITION*, *supra* note 82, at 96 (asserting that “every conceptual theorist has assumed” that the criteria that validate legal norms comprise a set of “necessary and sufficient conditions”).

¹⁴⁰ Compare the difference between “classical concepts,” defined by a set of necessary and sufficient conditions, with “cluster concepts” that are governed by multiple criteria that “count towards” proper application in a given case, without any subset of the relevant criteria constituting a set of necessary conditions. See, e.g., Thomas Adajian, *The Definition of Art*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Oct 9, 2012), <https://plato.stanford.edu/entries/art-definition/> [<https://perma.cc/2UXA-PS3G>]; Eric Margolis & Stephen Laurence, *Concepts*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., May 17, 2011), <https://plato.stanford.edu/entries/concepts/> [<https://perma.cc/3WSU-RJXF>]. In Berys Gaut’s controversial cluster account of art, for example, ten criteria bear on whether an artifact is a work of art—that it “possess[es] positive aesthetic qualities” such as beauty, that it is “expressive of emotion,” that it “exhibit[s] an individual point of view,” and so on—none of which is individually necessary. See Berys Gaut, *The Cluster Account of Art Defended*, 45 *BRIT. J. AESTHETICS* 273, 274 (2005).

¹⁴¹ As already noted, a rules/principles distinction of one form or another plays a significant role in the work of many contemporary constitutional and legal theorists. See *supra* notes 8-9 and accompanying text. It is not possible here to compare and contrast my picture with the very many and diverse extant contributions. (For a nice overview that concentrates on continental and Latin American thought, see HUMBERTO ÁVILA, *THEORY OF LEGAL PRINCIPLES* (2007).) See also *infra* subsection IV.C.3 (commenting on the work of Jack Balkin).

¹⁴² Larry Alexander and Ken Kress, the foremost skeptics of legal principles, have assumed that principles could arise only if underwritten by near-universal agreement among legal participants. See Larry Alexander & Ken Kress, *Against Legal Principles*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 279 (Andrei Marmor ed., Oxford: Clarendon Press 1995), *reprinted* in 82 *IOWA L. REV.* 739 (1997). I reject that contention as insufficiently motivated in Mitchell N. Berman, *For Legal Principles*, in *MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER* (Heidi Hurd ed.) (forthcoming 2019).

grounding social facts than does Hart's model, it can deliver more law when the relevant taking-up behaviors are messy and dynamic.

How do legal "principles" (legal norms with variable weights, grounded directly in practices of legal participants) combine to constitute or determine legal "rules" (determinate legal norms not directly grounded in taking-up practices) if *not* by collectively constituting a set of necessary and sufficient conditions? 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.

Assuredly, this is a simplification. A system's principles might combine to determine its rules in a fashion that is not helpfully analogized to vector addition.¹⁴³ And even if this model is basically sound, the interaction could be much more complicated than simple aggregation. Philosophers of practical reasoning increasingly accept that reasons do not only aggregate, but can interact in more complex ways. A reason (or combination of reasons) can enable or disable other reasons, or can serve to intensify or attenuate.¹⁴⁴ The

¹⁴³ Here's a very partially baked idea: (1) Artificial normative systems can be analogized to normative fields. (2) Normative fields are created and sustained by a convergent practice among participants or "subscribers" in more or less the way described by Hart's rule of recognition. (3) Principles are constituted by the taking-up behaviors of the system's subscribers (or of some subset). (4) Principles operate within the normative field much as masses do within a gravitational field. (5) Rules are articulable descriptions of stretches of the curvature of the normative field that the principles effect. I'm not owning either this model or the model discussed in text. I'm offering analogies to license optimism in the general idea that fundamental norms can collectively determine derivative norms.

¹⁴⁴ Joseph Raz inaugurated this very promising line of inquiry over forty years ago when positing what he called "exclusionary reasons." See JOSEPH RAZ, PRACTICAL REASON AND NORMS § 1.2 (1975). For the state of the art, see generally WEIGHING REASONS, *supra* note 104; JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES ch. 3 (2004).

An 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. 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.

same may be true of legal principles.¹⁴⁵ I'll employ the model of vector addition in the remainder of this Article not because I think it the most accurate representation, but as a simplification that is both tractable and, I hope, close enough. What would make this model "close enough"? It's close enough insofar as it genuinely illuminates matters that want for illumination.

4. Summary and Clarification

Principled positivism converts the relatively straightforward determination story that philosophers tell about "standalone" social norms into a two-level account for artificial normative systems. 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 relatively determinate norms that it is the system's central task to output and maintain. The fundamental norms, in turn, arise by their being "taken up" by the right participants in the system in the right ways.¹⁴⁶ 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 a fully developed or generally accepted account, that ordinary social norms are grounded in social facts. I am claiming merely that the fundamental and weighty norms of complex systems are grounded in (roughly) the same way.

In broad if imperfect conformity with prevailing usage, I am calling derivative, fairly determinate, norms "rules," and fundamental, rule-determining, norms "principles." Rules are determined by principles, and principles are grounded in social facts. Speaking metaphorically, the principles sit directly on top of the grounding social facts, while the rules sit on top of the principles. The weights (or strengths) of principles, like their contents or contours, are brought about by members of the legal community taking them up and deploying them in legal reasoning and decisionmaking. Weights are relative to one another, and are given by what members of the legal community say about them and how they use them. They are also conferred, as it were, by battle—by the rules that are adjudged victorious, and thus made so, when principles press in opposing directions.

¹⁴⁵ I believe that principles are not equivalent to reasons, though I cannot defend that judgment here. *See also infra* note 198 (noting the close relationship between principles and values).

¹⁴⁶ *See supra* note 131 and accompanying text.

That's the idea in capsule form. I'll close this Section by emphasizing two points.

First, my distinction between rules and principles has trafficked in ideal types that should now be clarified. Recall that I have attributed two characteristics to principles—they are fundamental and weighty—and two to rules—they are derivative and determinate. But the interaction of these two binary distinctions generates four conceptual possibilities, and the proffered vocabulary does not clearly accommodate two of them: norms that are (a) fundamental-yet-determinate, or (b) derivative-yet-weighty. I do not insist that these are empty categories. If secession is unconstitutional, the norm that so provides is, I presume, legally fundamental yet determinate. Conversely, a statute that provides that “no person shall profit from her own wrongdoing,” or “undertakers are due special regard” might succeed in creating norms that are derivative yet weighty (though it wouldn't succeed in *fixing* their contents or strengths). Are these norms “rules” or “principles”?

In my view, the critical feature that distinguishes principles from rules is, as Dworkin insisted,¹⁴⁷ their possession of the dimension of weight or magnitude. So, there can be fundamental and derivative principles, and fundamental and derivative rules. That said, it is not accidental that fundamental legal norms tend to have weight, and that determinate norms tend to be derivative.¹⁴⁸ Accordingly, to simplify analysis and exposition, I will concentrate in this Article on the ideal types,¹⁴⁹ those occupying the northeast and southwest cells in the following two-by-two matrix.

	Weighty	Determinate
Fundamental	Principles (proper)	(fundamental rules)
Derivative	(derivative principles)	Rules (proper)

Second, the discussion of Part II suggested that coherentists should want our constitutional law to be 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, whether untheorized legal intuitions or judgments earn epistemic credentials 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

¹⁴⁷ See DWORKIN, *supra* note 9, at 22-28.

¹⁴⁸ 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.

¹⁴⁹ *But see infra* subsection IV.C.3 (revisiting the status of derivative principles).

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.¹⁵⁰

B. *How Principles Make Rules: An Illustration*

If law and sports comprise distinct genera within a single family of artificial normative systems, we should expect explanatory accounts of their contents to be similar (when rendered at the appropriate level of generality). 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.¹⁵¹ 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 fundamental artificial norms, 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 slog of drawing to the surface the principles that populate our system of constitutional law today.

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

¹⁵⁰ For much the same reasons, principled positivism satisfies Greenberg’s demand for an account in which social facts “rationally determine” the law, by rendering “intelligible” the relation between taking-up behaviors and determinate norms. *See generally* Greenberg, *supra* note 2. At least that is true so long as the manner by which principles determine rules is not too recondite or opaque. But this claim, like many, is a promissory note that would require some elaboration to cash.

¹⁵¹ *See generally* Bruce Slutsky, *July 24, 1983: The Pine Tar Game*, SOC’Y FOR AM. BASEBALL RESEARCH, <http://sabr.org/gamesproj/game/july-24-1983-george-brett-pine-tar-game> [https://perma.cc/H9WX-G7XM].

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.¹⁵²

The Royals protested the ruling, arguing that the umpires misunderstood the rule.¹⁵³ MacPhail 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.”¹⁵⁴ 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, “minimally realist,” 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. 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 eighteen inches from the knob is out. What made this a difficult case at the time, or at least a controversial one, still discussed thirty-five 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.

¹⁵² *Test of League President’s Ruling in Brett Bat Case*, N.Y. TIMES (July 29, 1983), <https://www.nytimes.com/1983/07/29/sports/text-of-league-president-s-ruling-in-brett-bat-case.html> [<https://perma.cc/R48B-BGAM>].

¹⁵³ *Id.*

¹⁵⁴ *Id.*

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 to effectuate two distinct outcomes: (1) 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 (2) 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 face only removal of his bat, and not be called out.¹⁵⁵ 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).¹⁵⁶

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.¹⁵⁷ 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 excellence the sport of baseball embodies is the crafty manipulation and exploitation of the plain language of the formally promulgated rules for competitive advantage.¹⁵⁸ (This is not true of all sports. A principle of respect for craftiness does not operate in the normative system of golf, as it does in baseball.) This principle cut, here, 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 guile.¹⁵⁹

In all, I am proposing that the MLB normative system (the normative system that governs play of the game and adjacent matters) contained (at

¹⁵⁵ See *supra* text accompanying note 152.

¹⁵⁶ For a review of the precedents, see Shane Tourtellote, *The Pine Tar Games*, *HARDBALL TIMES* (July 18, 2012), <http://www.hardballtimes.com/main/article/the-pine-tar-games/> [<https://perma.cc/H7N2-KQJ8>].

¹⁵⁷ J.S. Russell, *Are Rules All an Umpire Has to Work With?*, 26 *J. PHIL. SPORT* 27, 35, 37 (1999). Russell formulated this principle of athletic excellence as an adjudicatory or prescriptive principle. See *id.* I reconfigure it here as, in addition, a constitutive principle.

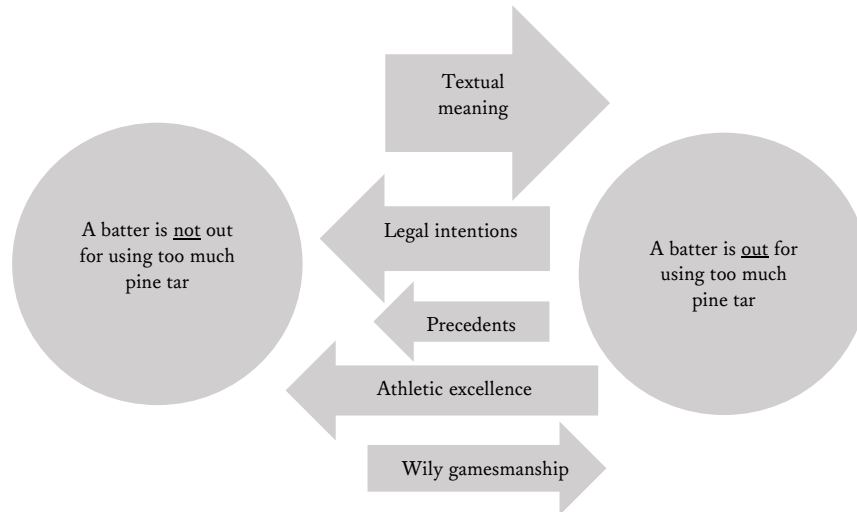
¹⁵⁸ See generally Leslie A. Howe, *Gamesmanship*, 31 *J. PHIL. SPORT* 212, 212-14 (2004).

¹⁵⁹ See Mitchell N. Berman, *On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence*, 38 *J. PHIL. SPORT* 177, 180-81, 186-88 (2011).

least) 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 the model of vector addition can approximate, 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 Figure aims to depict the determination of baseball rules by baseball principles. In the Figure, 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 eighteen 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.

Figure 1: The Pine Tar Rule



This Figure 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, presumptively, the former will bear significantly on the latter).

Well, then, what was the rule? This Figure suggests that it's a close question. That's okay; I'm not trying to resolve the question of what the rule was, or who should have prevailed, the Yankees or the Royals.¹⁶⁰ 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 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).

¹⁶⁰ 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.

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.¹⁶¹ 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 under color of his office are part of the grounding of the baseball principles, MacPhail's ruling would *strengthen* the principles that he invokes, not merely *report* them. The implications for Supreme Court decisions and opinions are both obvious (in broad strokes) and profound.¹⁶²

Third, the fact that these two candidate rules are depicted as enjoying nearly equal support from the principles does not imply that rules are generally underdetermined. For one thing, the relevant principles will in many cases bear *uniformly* in one direction or the other. (Is a batter out if he takes a called third strike?) Moreover, even when they don't, the activation of some principles might possibly serve to cancel, disable, or silence the force of others.¹⁶³ And, finally, I assume that rules can exist well beyond the limiting case in which all of the activated (non-disabled) principles favor the rule and none favors its contrary. I haven't represented thresholds in the model, but

¹⁶¹ See *supra* note 95 and accompanying text.

¹⁶² Cf. Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1651 (2005) (discussing a related but distinct respect in which decisions by judges in legal systems have a partially self-fulfilling character).

¹⁶³ See *supra* note 144 and accompanying text.

you should imagine that they exist. Remember that any model for principled positivism will represent the reality only imperfectly.

C. *Principled Positivism and Constitutional Theory*

It is no trick to translate principled positivism as a general constitutive theory of artificial normative systems 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, the account as such is insufficient 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.¹⁶⁴

The next Part offers a preliminary and partial distillation of our constitutional principles; Part V offers snapshots of the principles at work. This Section is a final pause before we reenter the constitutional forest. Just from the scaffolding of principled positivism, pretty much regardless of the regime-specific detail yet to be filled in, readers familiar with current constitutional theory will have recognized that principled positivism instantiates a riot of ‘ism’s: positivism, pluralism, popular constitutionalism, unwritten constitutionalism, and living constitutionalism (perhaps among others). Section III.A has explained how principled positivism differs from orthodox Hartian positivism. This Section explains what makes principled positivism a member of each of these latter four families of theories, and what distinguishes it from other members of the same family.

There are at least two reasons to address these issues now. Most importantly, we gain understanding of a theory in many ways—by grasping its elements and arguments, by being shown how it works, by having it situated within an existing theoretical landscape, etc. Sections III.A and III.B have taken on the first two tasks; this Section pursues the third, explaining how principled positivism is alike, and how it differs from, other constitutional theories of which many readers already have some grasp.

¹⁶⁴ We’ll need to know even more than that. We need to know the facts that the principles make relevant and we may need to know additional details of the determination relationship. *See supra* note 144.

Second, I aim to anticipate and address one form of skeptical reaction: “I’ve heard all this before.” While I naturally reject a strong version of the charge, I cheerfully grant a weaker one: 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 monistic character as for its originalist focus.¹⁶⁵ 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 a fashion that I have been emphasizing: whereas they had been prescriptive (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 nonoriginalist theories.¹⁶⁶

One central virtue of pluralism is that a plurality of fundamental principles can make sense of judicial precedents, as originalism has difficulty doing.¹⁶⁷ If constitutional interpretation is conceived as the effort to discern what the law is,¹⁶⁸ and if the law is constituted or determined by the interplay of many principles, including some that give legal force to judicial precedents,

¹⁶⁵ Although originalism and monism often go hand in hand, they could be pulled apart. A theory that gives constitutive effect to several of the possible originalist targets (e.g., original legal intentions of the drafters, the original legal expectations of the ratifiers, the original publicly accessible meaning of the text), but to no others, would be originalist and pluralist. A monist “current meaning” theory wouldn’t be originalist.

¹⁶⁶ I have not squarely explained how this pluralist constitutivism meets Alexander’s non-combinability objection. See *supra* note 57 and accompanying text. A short answer is that legal principles *alone* determine legal rules, and that facts determine the relative extent to which each principle is *activated*. A longer answer is Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1764-72 (2013).

¹⁶⁷ For a collection of articles illustrating this difficulty, see *Can Originalism Be Reconciled with Precedent? A Symposium on Stare Decisis*, 22 CONST. COMMENT. 257 (2005).

¹⁶⁸ See Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 563-70 (2013) (explaining that contributors to the literature differ regarding whether to conceive constitutional interpretation as the activity of trying to determine (1) what the constitutional text means, or (2) what the constitutional law is, and advocating the latter conception); see also discussion accompanying *supra* note 56.

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.

2. Unwritten Constitutionalism

The “unwritten Constitution” is a trope of longstanding. It extends from Christopher Tiedeman in the late nineteenth century, through Thomas Grey in the twentieth, and to Laurence Tribe and Akhil Amar today.¹⁶⁹ Many readers will have discerned that principled positivism falls within this long tradition. Persons sympathetic to accounts of “unwritten” or “invisible” constitutions will count that as a plus. The less sympathetic may think it disqualifying. 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.”¹⁷⁰

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 reaction.¹⁷¹ 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.¹⁷² (The rules/principles distinction may then be superimposed upon this

¹⁶⁹ See generally AKHIL AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); WILLIAM BENNETT MUNRO, *THE MAKERS OF THE UNWRITTEN CONSTITUTION* 11 (1930); CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 43 (1880); LAURENCE TRIBE, *THE INVISIBLE CONSTITUTION* 25 (2008); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 893 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 715-17 (1975) [hereinafter Grey, *Do We Have an Unwritten Constitution?*].

¹⁷⁰ Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing But the Text, So Help me God: Un-Writing America’s Unwritten Constitution*, 81 *U. CHI. L. REV.* 1385, 1387 (2014).

¹⁷¹ Eric J. Segall, *Lost in Space: Laurence Tribe’s Invisible Constitution*, *NW. U. L. REV. COLLOQUY*, 434, 435 (2009), https://scholarlycommons.law.northwestern.edu/nulr_online/165 [<https://perma.cc/3PFZ-YVP7>] (“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.”).

¹⁷² See, e.g., ELY, *supra* note 14, 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

textual/non-textual distinction: textual norms are “rules,” and their non-textual siblings are “principles.”¹⁷³) In response, critics object that if the text delivers us textual law (rules), then what need have we for non-textual law (principles) too, and what license have judges to entertain and enforce them?¹⁷⁴

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 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 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.

3. Popular Constitutionalism

Much like appeals to an “unwritten constitution,” recent scholarly defenses of “popular constitutionalism”¹⁷⁵ strike many readers as both compelling and hard to pin down.¹⁷⁶ 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

‘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.”)

¹⁷³ See, e.g., DWORKIN, *supra* note 9, at 29 (identifying “two very different” ways of understanding the “principles”—as legally binding, just as “rules” are, or as “extra-legal”).

¹⁷⁴ See, e.g., Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 MICH. L. REV. 1081, 1083-86 (2015) (arguing that Amar’s reliance on extra-textual principles to guide constitutional interpretation gives judges unfettered discretion to craft bad doctrine); Paulsen, *supra* note 170, at 1431-41 (criticizing Amar’s approach for ignoring determinate rules in the constitutional text); William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700-04 (1976) (warning that, by seeking extraconstitutional principles and failing to respect the constitutional text, judges have license to issue decisions like *Lochner* and *Dred Scott*).

¹⁷⁵ See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (championing an overthrow of judicial supremacy and a return to an era of greater deference to the American people’s understanding of their constitution); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (rejecting judicial review and proposing a system in which political process interprets and enforces the Constitution).

¹⁷⁶ For the latter sentiment, see Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005); L.A. Powe, Jr., *Are “The People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005).

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 principles of baseball may be grounded in behaviors of players, umpires, and coaches, but not fans. The norms of fashion might be grounded principally in behaviors of the fashion elites, but partially in behavior of those who subscribe to them. 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—that “the people” count (nontrivially) in the social-factual grounding base.¹⁷⁷

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

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.¹⁷⁸

Popular “constitutional understandings” partly ground our constitutional principles, which in turn help determine our constitutional rules.¹⁷⁹ Maybe

¹⁷⁷ Consider two stylized pictures of how groups of people can ground constitutional principles by their taking-up behaviors. On one, the groups are arrayed in concentric circles with those toward the center (say, Supreme Court Justices) having greater influence on the principles, and those toward the outer rim (say, “the people”) having less. On the second, distinct and overlapping “recognition communities” ground distinct and overlapping legal systems. Matt Adler proposes an account along the latter lines in Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006). I am preferring the former view, though I haven't mounted an argument here against the “group-relative” picture.

¹⁷⁸ DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 12 (2016).

¹⁷⁹ I say “partly” because Cole's account, to my eyes, understates the extent to which Supreme Court Justices do in fact change constitutional principles in a more proactive than reactive way. Furthermore, it is surely 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. C.R.-C.L. L. REV. 373 (2007). So even insofar as popular understandings do play a *constitutive* role in the grounding of principles, judicial decisions play a *causal* role in generating those popular understandings. For a concise elaboration of the difference between causal and constitutive relationships, see Brian Epstein, *A Framework for Social Ontology*, 46 PHIL. SOC. SCI. 147, 151-55 (2016).

our popular constitutionalism takes additional forms.¹⁸⁰ I'm agnostic at present. But this is one variety we have, and nothing to sneeze at.

4. Living Constitutionalism

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.”¹⁸¹ But incredulity issues from a (too-common) failure to distinguish abrupt or purposive change from gradual, organic, or evolutionary change. Principled positivism reveals that law changes in an organic or evolutionary way. That is how most social phenomena change. Mores, fashion, the use of money, market prices, word meanings, rules of prescriptive grammar, etiquette, games, religion—all are “the result of human action, but not of human design. They are *evolutionary* phenomena, in the original meaning of the word—they unfold.”¹⁸² To suppose that law changes in a similar way is hardly audacious. Many people think it obviously true of the common law.¹⁸³

I am claiming merely that the introduction of formally promulgated authoritative texts does not radically alter the most fundamental dynamics.

¹⁸⁰ I'm not contending that that's our only variety of popular constitutionalism, or 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.

¹⁸¹ SCALIA, *supra* note 61, 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 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, *The Case for Originalism*, in *THE CHALLENGE OF ORIGINALISM* 52 (Grant Huscroft & Bradley W. Miller eds., 2011). It is the *law* that changes in this fashion, not “meaning.”

¹⁸² MATT RIDLEY, *THE EVOLUTION OF EVERYTHING* 4 (2015).

¹⁸³ See, e.g., STRAUSS, *supra* note 34, at 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.”).

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."¹⁸⁴

Obviously, the rules *can* change abruptly and purposively because the enactment of an authoritative text is a purposive and datable event. But they *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."¹⁸⁵ If principled positivism teaches one unequivocal and non-vacuous lesson, this may be it: our constitutional rules change 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.¹⁸⁶ Ackerman has been criticized for attempting to regiment too precisely the conditions that make out a "constitutional moment" in which abrupt change occurs.¹⁸⁷ But you can see why he thought he had to: because he treated successful constitutional moments as *equivalent* to formal amendments of the

¹⁸⁴ *Desist v. U.S.*, 394 U.S. 244, 263 (Harlan, J., dissenting).

¹⁸⁵ ROBERT MOOR, *ON TRAILS: AN EXPLORATION* 17 (2016). And the Justices of our Supreme Court are like the matriarchs of an elephant herd—the great trail-makers of the animal kingdom. *See id.* at 106-07.

¹⁸⁶ *See generally* BRUCE ACKERMAN, *WE THE PEOPLE, VOL. 1: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE, VOL. 2: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

¹⁸⁷ *See, e.g.*, Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 933 (1992) (reviewing ACKERMAN, *FOUNDATIONS*, *supra* note 186) (suggesting that Ackerman's case would be more convincing if he situated normal politics and constitutional politics on a continuum, rather than setting strict criteria to distinguish constitutional moments); *see also, e.g.*, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 770-73 (1992) (reviewing ACKERMAN, *FOUNDATIONS*, *supra* note 186) (observing that the strict criteria Ackerman uses to define constitutional moments can lead to counterintuitive results and send contradictory messages to the judiciary).

constitutional text.¹⁸⁸ The better view is that, at genuine “constitutional moments,” our constitutional rules change not because the text has changed but because the principles have.

IV. 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 III, the outlines of a distinct and original general constitutive theory of law. On that theory of law (“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 the interactive bearing 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 our principles—their contents, contours and relative weights.¹⁸⁹

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 promise that we’ll advance very far 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 IV.A, by ruminating on how we go about inferring what

¹⁸⁸ See ACKERMAN, *TRANSFORMATIONS*, *supra* note 186, at 410 (arguing that when a “constitutional moment” leads to amendments approved according to his criteria, rather than in accordance with Article Five of the Constitution, those amendments “should be added to the Constitution”).

¹⁸⁹ Weight or magnitude is a relevant property of principles insofar as the function that maps principles to rules is significantly aggregative (and thus intelligibly modeled as vector addition). I have already emphasized that this is a simplification. See *supra* discussion in subsection III.A.3. To the extent that it proves an *over*-simplification, we will also need to know more about that function. See *infra* note 227 and accompanying text.

our principles are. Section IV.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 2018. Section IV.C makes two concluding observations.

A. Preliminaries

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 Justices 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 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.¹⁹⁰

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. 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. This is so, in part, for a reason already highlighted: because the social facts that ground legal principles prominently include public speech acts, we can gain epistemic access to our principles by attending directly to those speech acts.¹⁹¹

Obviously, for example, the constitutional text matters a great deal. Now, stating precisely *how* it matters is no mean feat. Scholars and theorists of varied jurisprudential and ideological stripes often proclaim that "the constitutional text is the law."¹⁹² But, that's a category mistake that, however harmless in most

¹⁹⁰ It's easy to imagine that sufficiently comprehensive network analyses could shed light on these issues, though they'd have to be executed and interpreted with great care.

¹⁹¹ See *supra* subsection III.A.4.

¹⁹² See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 55 (2011); SCALIA, *supra* note 61, at 22 ("The text is the law."); STRAUSS, *supra* note 34, at 25 ("[T]he text continues in force today because

contexts, can breed confusion if taken literally.¹⁹³ 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.¹⁹⁴ And the familiar originalist contention that the original public meaning of the text fully determines the law is, we have seen in subsection I.B.3, highly implausible.

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 decisions bear. And almost everybody seems to recognize principles under the labels “popular sovereignty,” “federalism,” “separation of powers,” and “individual liberty.”

Nonetheless, 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

it is law.”); Dorf, *supra* note 54, at 1769 (“[C]onstitutional text is binding law.”); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 544 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS (1996)) (“When we accept some text as law, we necessarily concede that the law binds us as a society.”).

¹⁹³ See Berman, *supra* note 76 at 786-87 (explicating “text” and “law” as analytically distinct concepts); see also JOHN GARDNER, LAW AS A LEAP OF FAITH 56-59 (2012). I do not mean to reject categorically a conception of *text* that is individuated by semantic content rather than syntactic features. But a syntactic conception of *text* is necessary in the present context to make sense of the prominent role, in American constitutional law and practice, of debates over “what the text means.” (I am grateful to Daniel Wodak and John Mikhail for pressing me on this point.)

¹⁹⁴ 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 shows that identical legal norms can correspond to non-identical text. Or 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 one word in common. Yet it is at least possible—and, to some people, obvious—that they give rise to identical law. Therefore, again, text cannot be the same as law.

Notice, incidentally, that *if* these jurisdictions do have the same law (on this point), then the law cannot be determined fully by the bare semantic (“dictionary”) meaning of a statutory text (the texts don’t “say” the same thing), but must include at least some elements of “pragmatic enrichment.” And the task for a textualist or originalist is to identify what aspects of a text’s communicative content that lie outside its bare semantic content determine or constitute the law, under what circumstances. See *supra* note 74.

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 “We like Rawls, you like Nozick,”¹⁹⁵ 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.

This is not 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. *Ten Clusters: A First Bid*

A list of candidate principles follows.¹⁹⁶ 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. As the bullet-point format aims to reinforce, this is a highly abbreviated first pass at 30,000 feet. I am certain that long articles could be (and have been) written working out the force and nuances of any one of these proposed principle clusters, and many others in addition. Furthermore, following Tom Grey’s wise counsel that “incomplete and necessarily misleading citation of sources is worse than none at all,”¹⁹⁷ I will eschew quotations or citations to judicial precedent, and limit myself in the footnotes to minimal elaboration, and no defense. Several of these principles will reappear, in the same or similar guise, in the next Part’s case studies. I’ll have occasion then to say a little more in support or explanation. Finally, I will frequently say that thus-and-such “matters” or “has force.”¹⁹⁸ 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. (Now and again I attach short captions to individual principles. There are principles that govern when I do so, but no rules.)

1. *Principles of text.*

- What the text meant to those who ratified it has great force.
- What the text originally implied has force.

¹⁹⁵ See ELY, *supra* note 14, at 58.

¹⁹⁶ For a predecessor to this list see Berman & Toh, *supra* note 166, at 1754-55.

¹⁹⁷ Grey, *Do We Have an Unwritten Constitution?*, *supra* note 169, at 715 n.49.

¹⁹⁸ “Thus-and-such matters” itself suggests “thus-and-such has value.” I do not presently pursue the relationship between principles and value; I think the relationship is close, but not an identity.

- What the text means or implies to an ordinary contemporary reader, untutored in arcane or mostly forgotten meanings, matters.¹⁹⁹
2. *Principles of enactment intentions and purposes.*
 - The legal intentions of drafters and ratifiers have force.
 - The “worldly” purposes of drafters and ratifiers matter.²⁰⁰
 3. *Principles of judicial precedent.*
 - What the Supreme Court has held possesses great legal force.²⁰¹
 - The Supreme Court itself should adhere to the holdings and reasoning of previous decisions, except when it oughtn’t.²⁰²
 4. *Principles of historical practice.*
 - Exercises of power that have been accepted and proven workable have force. (*settled practice*)

¹⁹⁹ On this last principle in particular, see Strauss, *supra* note 41, at 5; Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1239 (2015). A more general takeaway is that the text’s legal significance is not governed by a *single* principle.

²⁰⁰ The key here is to disambiguate two things that judges and scholars routinely run together. Legal actors (constitutional drafters and ratifiers, legislators) enact authoritative texts not to *say* something, but to *do* something(s). By enacting the text, they aim to *change the law*. And they want, by means of changing the law, to *cause results* in the world. Call the first type of intent a “legal intention”; call the second an “extra-legal purpose.” Whatever you call them, they are distinct and can pull apart. See Berman, *supra* note 76, at 796-99 (introducing the distinction in the context of statutory law). Legal intentions and extra-legal purposes are both distinct from a third “mental” 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, animated by *motives* sounding in racial animus and hostility. See *Palmer v. Thompson*, 403 U.S. 217, 218-20 (1971).

²⁰¹ This principle does not concern the Supreme Court’s obligations with respect to *stare decisis*. That’s next. This one concerns the extent to which a Supreme Court holding that *p* makes it the case that the law is *p*. The extent is great enough that one is tempted simply to say that “what the Supreme Court has held is the law.” I’m suggesting that that’s too strong, though only marginally. Commenting on the Supreme Court’s decision in *Dred Scott*, Abraham Lincoln observed that “judicial decisions are of greater or less authority as precedents, according to circumstances,” such as whether the decision was unanimous, whether it has been reaffirmed, whether consistent with “legal public expectation,” and so forth. Abraham Lincoln, Speech on the Dred Scott Decision at Springfield, Illinois (June 28, 1857), *reprinted in* ABRAHAM LINCOLN, SELECTED SPEECHES AND WRITINGS 117 (Don E. Fehrenbacher ed., 1992). These nuances aren’t part of our official story today, but they haven’t disappeared.

²⁰² This is a little tongue-in-cheek. Not a few readers will believe, based on highly salient recent decisions and opinions, that there simply aren’t any principles governing constitutional *stare decisis*, at least if any such principle must be grounded, as principled positivism claims, in facts about the practice. I grant that that’s a reasonable inference. At the same time, I’m not persuaded it’s correct. So this is a placeholder for what principles might obtain, not only a modestly wry commentary.

- Traditional norms and practices of a community that help give its communal life value are due respect. (*traditional values*)²⁰³
5. *Principles of distribution of governing power.*
 - Power must not be unduly concentrated. (*dispersal of power*)
 - The national government has regulatory authority sufficient to meet the changing needs of a nation state. (*national efficacy*)
 - 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. (*states matter*)
 6. *Principles of democracy and popular sovereignty.*
 - 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.
 - Policy preferences of a majority of the people are to be respected.²⁰⁴
 7. *Principles of thought and expression.*²⁰⁵
 - "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."²⁰⁶
 - We have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."²⁰⁷
 - "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle

²⁰³ What about white supremacy?! What about patriarchy?! Those were traditional values! True enough. That's why *traditional values* shouldn't be cast as a *rule*; but those observations don't compel doubt that it exists as a *principle*.

²⁰⁴ Although it is no simple matter to prise these two principles apart, you might think of the former ("*popular sovereignty*") as "procedural," and the latter ("*majoritarianism*") as "substantive," with the understanding that the procedural matters more. *Popular sovereignty* maintains that effective sovereignty resides in the people, not elsewhere; *majoritarianism* provides that the people should get their way. *Popular sovereignty* is the weightier principle because, in a constitutional order that protects rights and employs complex structures of representation, limits on what "the people" get to do are hardwired.

²⁰⁵ I'm cheating on this one. Although I had promised to avoid quotations, this cluster displays nothing but. Supreme Court opinions are suffused with principles-talk. These few examples are intended to convey something of the flavor.

²⁰⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (Brennan, J.).

²⁰⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Brennan, J.).

of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”²⁰⁸

8. *Principles of liberty and autonomy.*²⁰⁹

- Government must respect the bodily integrity of persons.
- Each person may pursue happiness as they conceive of it, free from arbitrary constraints or unnecessary demands for conformity to majoritarian norms. (*pursuit of happiness*)

9. *Principles of equality and dignity.*

- Government must respect the inherent equal dignity of each person within its jurisdiction, and must not demean or stigmatize people.
- Government must treat all people fairly, without prejudice or favoritism.
- Government should not make distinctions based on race or color. (*colorblindness*)²¹⁰
- Government owes special obligations to descendants of the people we enslaved, and to those who suffer current injury traceable to our history of chattel slavery.²¹¹

10. *Principles of legality.*

- Changes in law should operate prospectively.²¹²

²⁰⁸ United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

²⁰⁹ Here’s a ragged cluster for you! No two people will conceptualize the elements that make up this cluster in just the same way. But if there is much room for reasonable disagreement here, there’s also much reason to suspect that anybody who claims to see *no* general principles of liberty isn’t really looking.

²¹⁰ Both this principle and the next specifically concern race. Each is controversial. But, because they are principles, they are not incompatible. I, for one, am disposed to believe that both are true. Be that as it may, two words about colorblindness. First, if you strongly believe in a constitutional principle of colorblindness, then living constitutionalism may be a more congenial home than originalism. Second insofar as colorblindness has become “constitutionalized,” it’s a *principle*, not a *rule*, and therefore does not apply in the wooden, near-absolutist manner that recent Supreme Court majorities have favored. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11 (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).

²¹¹ Notice that I have not offered a pithy label for this principle, as I had done for its sibling (*colorblindness*) or for several others (e.g., *settled practice*, *states matter*). A very natural suggestion might have been: *black lives matter*. I think that’s not incidental. Because *black lives matter* is a principle of our constitutional law (if it is), it’s not equivalent or reducible to *all lives matter* (though that is an uncontroversial principle of morality). Nor is it incompatible with, e.g., *native lives matter*, which may well be another constitutional principle.

²¹² The principles within this cluster are offered less for their own sake than to highlight that many of the principles that comprise Lon Fuller’s “internal morality of law” could be principles of *our* constitutional order even if they aren’t integral to the “nature of law” (beyond the fairly minimal extent they are demanded of artificial normative systems of *any* type (including, e.g., games) if they

- Law should be general.
- Legal disputes should be resolved impartially and conform to the appearance of justice.
- There is a legal remedy for the violation of a legal right.

C. Observations

The preceding list is the start of a start. Three reflections:

1. Principles as Clusters

I have found it useful to think of principles as clusters. Doing so makes salient that other clusters remain to be identified, and helpfully focuses inquiry on just how given clusters are filled out. The cluster image also predicts that canonical formulations of principles within clusters will be rare and hard to come by. And it might suggest the difficulty in separating “interpretive” from “substantive” principles (how would historical principles be classified?), a distinction that my account ignores.

2. Principles Sought and Principles Lost

I do not pretend that we’ll all see our principles the same way. Interpreters’ own value commitments will inevitably color what principles they see when examining our practices. Good faith disagreements will remain, but not everything that we wish to see can be made to appear. You might favor the principle *animals matter*. It’s not a principle of our law. Nor is *economic equality* or *anti-retributivism* or *veritas*.

Some principles that aren’t now part of our order once were. The list plausibly includes: *isolationism*, *white supremacy*, *Christian nation*, and *anti-oligarchy*. Joey Fishkin and Willy Forbath argue in recent and forthcoming work that the last was a robust part of our constitutional order through the New Deal, and has since dissolved or disappeared.²¹³ They urge its revival. Maybe they—and like-minded others—will successfully reestablish it; maybe not.

are to successfully perform their conduct-guidance functions). See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

²¹³ JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming); Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, & the Constitution of Opportunity*, *NOMOS* (forthcoming) (manuscript at 2) (on file with author) (“[T]ogether, [the principles of anti-oligarchy, a broad and open middle class, and inclusion] add up to a distinctive tradition of American constitutional argument, which we will call the *democracy of opportunity tradition*.”).

3. Fundamental and Derivative Principles Revisited

Principled positivism claims that our principles can stand on their own normative bottoms. Many other scholars friendly to constitutional principles view them solely as interpretations of the text. Jack Balkin, the American constitutional theorist who, after Dworkin, has exploited the rule/principle distinction to greatest advantage, exemplifies. Here's Balkin's theory, *framework originalism*, in brief:

[W]e 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 that 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.²¹⁴

For Balkin, all constitutional principles are, as I put it earlier, in passing, "derivative," not "fundamental."²¹⁵ He and other textualists might say that *text matters* is the principle that does all the real work here, not any supposedly *independent* principles such as *liberty matters* or *equality matters*.²¹⁶

Principled positivism does not reject the possibility of derivative principles. It does insist that not all principles are derivative. Many of our principles have no clear home in the constitutional text. Furthermore, even those principles that are *associated with* a particular constitutional provision do not *depend on* it. The alternative textualist or originalist picture risks overlooking the difference between causal and constitutive explanations. The

²¹⁴ BALKIN, *supra* note 192, at 14. On this 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.* As the discussion in text explains, I deny that claim. But two other features of "framework originalism" also warrant mention. First, the account is prescriptive on its face, not constitutive: it purports to explain what "we must" do. Second, 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 those points as well.

²¹⁵ See *supra* subsection III.A.4.

²¹⁶ Justice Scalia strikingly illustrates this type of view in his *Boumediene* dissent:

The 'fundamental separation-of-powers principles' that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth. Only by considering them one-by-one does the full shape of the *Constitution's* separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general 'separation-of-powers principles' dreamed up by the Court. Rather, they must be interpreted to mean what they were understood to mean when the people ratified them.

Boumediene v. Bush, 553 U.S. 723, 833 (2008) (Scalia, J., dissenting).

contents of our principles at t_3 are often causal products of, among other things, what texts have been enacted at t_1 and what some persons at t_2 believed those texts to mean. But the principles are constitutively independent at t_3 if and when our taking-up behaviors make it so.

Do they? Do our taking-up behaviors confer normative independence on our “substantive” principles, such as 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 (legally speaking). Steve Sachs denies this. One way to test the hypothesis, he suggests,

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 [v. Board of Education]*, 347 U.S. 483 (1954)]. But if that’s true, then *Brown* [and the no-racial-caste principle] doesn’t really stand on its own bottom; it stands on the Fourteenth Amendment instead.²¹⁷

Frankly, this hypothetical is a little too fantastic for me to get 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 evince enactment legal intentions that I’m certain would influence my judgment about the repeal’s legal significance.

Consider a less unrealistic example. Suppose we learn that, due to a “technical” defect, the Fourteenth Amendment wasn’t properly ratified.²¹⁸ 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. I doubt that would extinguish the broader principles of expressive freedom that we have taken up. That’s what it means to say that these principles stand on their own normative bottoms *today* regardless of what facts might have contributed toward causing the taking-up facts that ground them.

²¹⁷ Sachs, *supra* note 105, at 2277.

²¹⁸ This would not be a revelation. See generally ACKERMAN, *TRANSFORMATIONS*, *supra* note 186, ch. 4.

V. OUR PRINCIPLES AT WORK

Part III 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 an interactive process that can be modeled (in simplified form) as force addition. Part IV then offered a preliminary and partial sketch of some of the weightiest principles in our constitutional system today.

It’s finally time to put the account to work. Section V.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 graphical representations of the sort introduced in our discussion of the pine tar game (in Section III.B). Section V.B draws forth three observations.

A. Illustrations

Of course, I hope that many 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 largely the disagreements we should be having.

Put another way, *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 *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 *what the text says matters* 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 *states matter* will press forcefully against *q*, which is to say, toward $\neg q$. The total force that any given principle exerts in favor of a rule is some function of its potential force and the extent of its activation, in much the same way that the gravitational force that a celestial body exerts on an object is a function of both the body's mass and its distance. 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.²¹⁹

²¹⁹ Each figure depicts the principles as pushing either left or right in one-dimensional space that appears to be 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.) This way of representing the dynamic can be misleading, though, because it renders obscure the dimension in which the principles, conceived as vector forces, operate. (I am grateful to Guha Krishnamurthi and Megan Stevenson for pressing me on this point.)

Let's try something different. Imagine a (constitutional) normative field defined by poles such as prohibited/permitted or power/no-power. Imagine that every (relevant) actual or possible act-token exists within that normative field. Imagine the principles operating within this field, exerting pressure on each act-token in one or another normative direction (or as having no bearing at all). The normative status of each act-token (prohibited, permitted, required, valid, etc.) is a product of the net force the principles exert upon that act-token. A "rule" is a description of a stretch of contiguous act-tokens that share a normative status. I submit that displaying principles as pushing toward either a candidate rule (*R*) or its negation ($\neg R$) is functionally equivalent to displaying them as pushing the fact patterns that fall under *R* toward one pole in normative space or *its* negation. Therefore, I believe that the models employed are faithful to the logic of vector addition, while conveying the ideas in a manner that many readers will find more intuitive.

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 ϕ .” As noted earlier,²²⁰ I expressly disavow that implication of the figures. I see no reason why the underlying metaphysics cannot involve thresholds or functional equivalents. Finally, it hardly needs saying that the figures (just like the discursive analyses) massively simplify. 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*.²²¹ 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*,²²² the Court addressed itself to the issue two decades ago?

Justice Souter found it a close question.²²³ 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.²²⁴ 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

²²⁰ See *supra* Section III.B.

²²¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

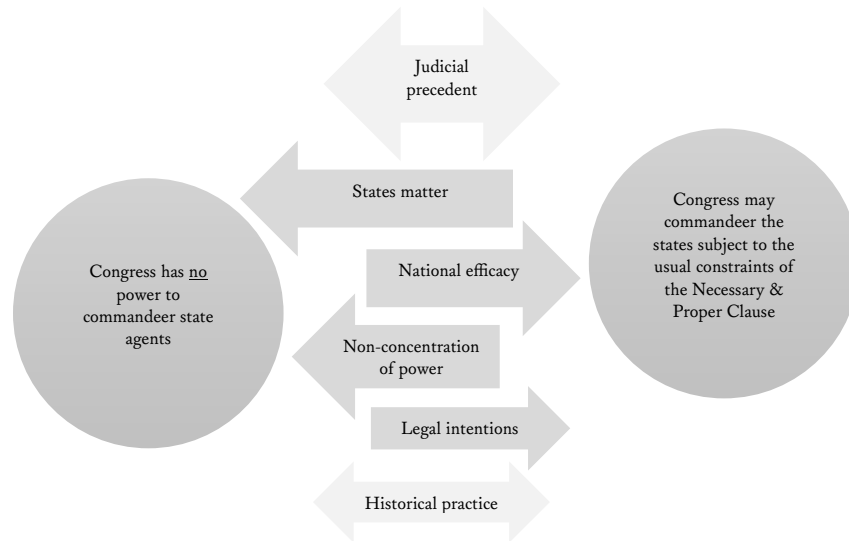
²²² 521 U.S. 898 (1997).

²²³ *Id.* at 971 (Souter, J., dissenting).

²²⁴ Compare *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress may not require state legislative action), with *Testa v. Katt*, 330 U.S. 386, 392 (1947) (holding that Congress may require state courts to entertain federal causes of action).

agents, but nothing resembling a lengthy and settled practice. All told, the picture can be approximated by the following snapshot:

Figure 2: Commandeering



Not everybody will view the issue as comparably close. But disagreements in both directions are readily explained by different views regarding both the weights of the principles that are implicated, and 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 “legal intentions” arrow should be depicted as wider). These are the types of disagreement that express endorsement of principled positivism can help make salient.

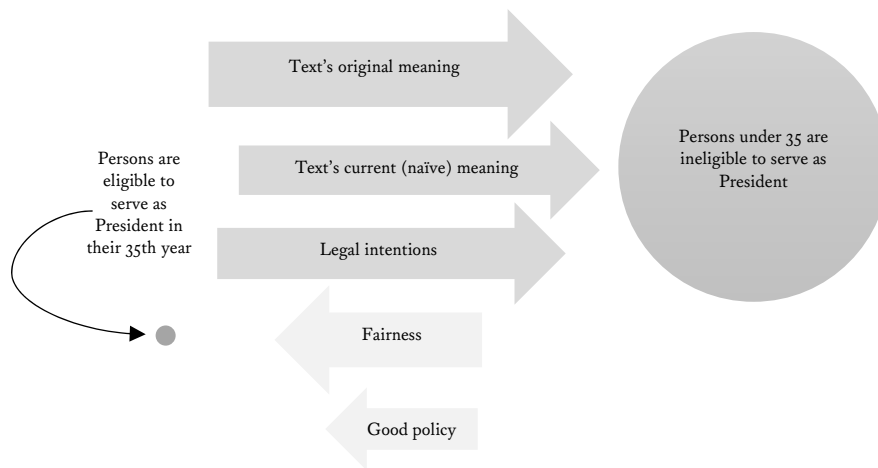
2. A Thirty-Four-Year-Old President?

A serious candidate for the presidency will have turned thirty-four just 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”²²⁵ Is the thirty-four-year-old candidate eligible to be President? What is the constitutional rule? Almost everybody considers this an easy case: persons under thirty-five years of age are ineligible to serve as President. Yet originalists sometimes charge that constitutional theories that are pluralist and living-constitutionalist cannot deliver that judgment with confidence.²²⁶

That’s silly. As the Figure below represents, principled positivism has no difficulty supplying the commonsensical conclusion.

Figure 3: Age Eligibility for the Presidency



Two features of the case are striking: legal intention, current (naïve) meaning, and original meaning are all strongly activated, and they align in the same direction (against eligibility). Even if other principles of the system might press in the opposite direction, it seems clear that the first three, in combination, strongly outweigh the others. So there remain very easy cases on principled positivism. That’s the chief lesson from this example.

Perhaps, though, the trio does *more* than outweigh. When I first proposed to model the interaction of principles as vector addition, I cautioned that the interaction could be more complex, and specifically mentioned possible

²²⁵ U.S. CONST. art. II, § 1, cl. 5.

²²⁶ See, e.g., Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 219-20 (1996) (arguing that, given changes in life expectancy, the minimum age for presidential eligibility must be greater than thirty-five “if one grants the premise, integral to so much of constitutional law these days, that ours is a ‘living Constitution,’ with language capable of growth, and whose meaning must constantly be reinterpreted in light of changing conditions”).

complications in the form of enablers, disablers, and multipliers.²²⁷ This case presents a conceivable illustration. Perhaps, say, when original meaning, contemporary meaning, and legal intentions align, other principles (or *some* other principles) are thereby “disabled” or “silenced”—that is, rendered inoperative or inert. (Recent Supreme Court decisions might operate similarly.) I am unsure whether this is so. I’m putting the possibility on the table, neither endorsing nor rejecting it.²²⁸ That’s a second function of this example.

A third function is to highlight 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.²²⁹

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 variously cite the Guarantee Clause, the Equal Protection Clause, and the First Amendment,²³⁰ but, as the diversity of textual hooks suggest, none is a close fit. When the Court took up the question a dozen years ago, in *Vieth v. Jubelerir*,²³¹ 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.²³² In my view, that’s thanks to the influence of the principle of *popular sovereignty*. As the Court

²²⁷ See *supra* note 144 and accompanying text. That initial thread has run through subsequent notes. See *supra* notes 189, 231. Here’s where I pick it back up.

²²⁸ I do think it clear that no principle of text or principle of legal intention *alone* disables all (or most) other principles. That is not our practice.

²²⁹ I am assuming against the Diceyan account in which a norm belongs to constitutional law only if it is enforced by the courts (and that it amounts merely to a “constitutional convention” otherwise). See A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 277 (8th ed. 1915). I criticize this view in Mitchell N. Berman, *Constitutional Law*, in CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW (John Tasioulas ed.) (forthcoming 2018).

²³⁰ See, e.g., Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 6 (2008).

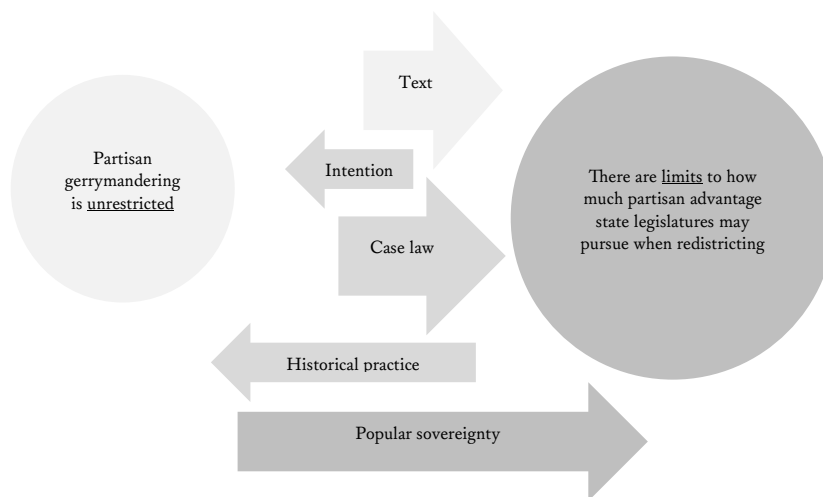
²³¹ 541 U.S. 267 (2004).

²³² See, e.g., Alexander & Prakash, *supra* note 230, at 4 (contending that “a scholarly consensus has emerged that excessive gerrymandering is unconstitutional”).

has declared: It is a “fundamental principle of our representative democracy . . . ‘that the people should choose whom they please to govern them.’”²³³

I see things this way:

Figure 4: Partisan Gerrymandering



As it turned out, that’s what all nine Justices ended up concluding in *Vieth*: “excessive” partisanship in redistricting is unconstitutional.²³⁴ 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.²³⁵ For this reason, in *Vieth*, 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.²³⁶ For purposes of investigating what the law permits, as distinct from what the courts

²³³ *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., 1876)); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783, 791 (1995) (discussing the principle of popular sovereignty and how it sets no limits on who can hold political office). The “accountability principle” birthed in the first anti-commandeering decision, *New York v. United States*, is also derived from the more general popular sovereignty principle. 505 U.S. 144, 168 (1992).

²³⁴ See *Vieth*, 541 U.S. at 293 (plurality opinion); *id.* at 306-07 (Kennedy, J., concurring); *id.* at 335-36 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 358-59 (Breyer, J., dissenting).

²³⁵ On the problems of conceptualization, along with a suggested analytical frame for constructing judicially manageable standards, see Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005).

²³⁶ *Vieth*, 541 U.S. at 306 (plurality opinion); *id.* (Kennedy, J., concurring).

should do,²³⁷ 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 a “core principle of republican government . . . that the voters should choose their representatives, not the other way around.”²³⁸

4. National Regulatory Power

What is the scope of Congress’s regulatory authority? Compare two statutes: the Gun-Free School Zone Act (GFSZA), struck down in *United States v. Lopez*,²³⁹ and the individual mandate provision of the Affordable Care Act (ACA), held to exceed Congress’s regulatory authority in *NFIB v. Sebelius*.²⁴⁰ 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, historical practice, enactment intentions and purposes—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.²⁴¹

A critic of *Lopez* might be disposed, then, to frontally challenge the premise that *national power is limited* is or remains a genuine principle of our

²³⁷ At the time of this writing, the Court is revisiting this latter question in *Gill v. Whitford*, a case challenging an extreme partisan gerrymander out of Wisconsin.

²³⁸ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015) (quoting Berman, *supra* note 235, at 781).

²³⁹ 514 U.S. 549 (1995).

²⁴⁰ *Nat’l Fed’n of Indep. Buss. v. Sebelius (NFIB v. Sebelius)*, 132 S. Ct. 2566 (2012).

²⁴¹ See *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting) (“It 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.”).

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. San Antonio Metropolitan Transit Authority*, in which the Court held, 5–4, that, presumptively, courts would not exempt states from generally applicable national regulatory law.²⁴² 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.”²⁴³ 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.”²⁴⁴ 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.²⁴⁵

²⁴² *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985).

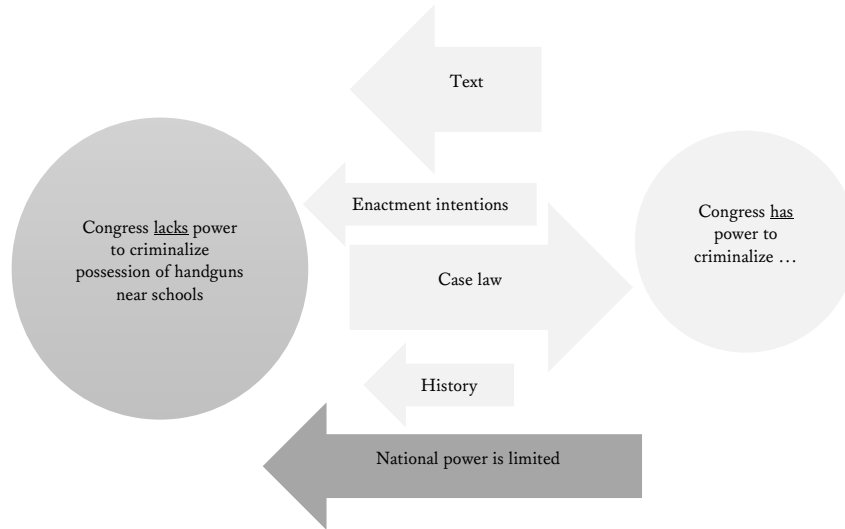
²⁴³ *Id.* at 586 (O'Connor, J., dissenting).

²⁴⁴ *Id.* at 547.

²⁴⁵ Whether the Court should have invalidated the statute, though, presents a different question, as the following comparison suggests. 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?” The *Vieth* Court refused to entertain the question posed to such a particularist degree. It sought a rule that could explain the result in this case and also provide guidance for future cases; without such a rule, five Justices refused to invalidate the plan before it.

By analogy, the *Lopez* dissenters might have argued with some plausibility that, even if the GFSZA does lie beyond Congress’s constitutional authority, the Court should not strike it down without a judicially manageable standard to govern other similar disputes—something that Justice O’Connor’s concurrence, joined by Kennedy, seemed to concede the majority lacked. The *Lopez* dissenters did not reason that way, choosing instead to argue (less plausibly) that the GFSZA fell on the good side of a genuinely toothful line. They nudged closer to spelling out the more plausible position when they dissented again in the next case in the Commerce Clause line, *United States v. Morrison*. 529 U.S. 598, 655–56 (2000) (Breyer, J., dissenting) (affirming “the importance of the Constitution’s federalist principles,” but arguing that limits on national power should be underenforced by the judiciary given “the difficulty of finding” manageable standards “that courts might use to impose some meaningful limit, but not too great a limit” upon Congress’s commerce power).

Figure 5: The Gun-Free School Zone Act



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.”²⁴⁶ Also, the *Gonzales v. 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.²⁴⁷ At the same

²⁴⁶ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2585 (2012).

²⁴⁷ In *Gonzales v. Raich*, 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. 545 U.S. 1, 5 (2005). 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.” *Id.* 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.” *Id.* at 37 (Scalia, J., concurring) (citation omitted). Because, famously, “The word ‘necessary’ . . . has not a fixed character,” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 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.” *Raich*, 545 U.S. at 37 (Scalia, J., concurring) (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 *Raich* 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 v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) (Roberts, C.J.) (quoting *McCulloch*, 17 U.S.

time, but 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

(4 Wheat.) at 411; *Raich*, 545 U.S. at 23). 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 dubious. *NFIB*, 132 S. Ct. at 2592-93. The quoted passage comes from *McCulloch*, where Chief Justice Marshall observed that, “The 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.” 17 U.S. (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.” *NFIB*, 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 2647-48 (citing *Raich*, 545 U.S. at 22). This second attempt to distinguish *Raich* is as bad as the first. Any decent 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 of 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.

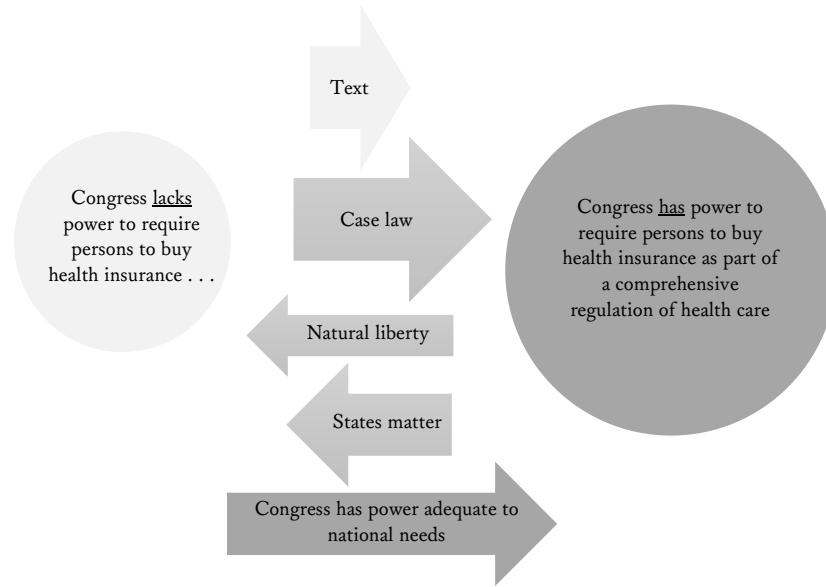
545 U.S. at 22 (citation omitted); *see also id.* at 37 (Scalia, J., concurring) (“The relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.” (citation omitted)). It is a mystery how one could travel from this language to the characterization of *Raich* offered in the *NFIB* joint opinion.

authority had no good response to the question “if this, then what not?”²⁴⁸ Opponents of the ACA raised the very same objection. But in the latter case, genuine responses were available and forthcoming.²⁴⁹ 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 twenty-first 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.

²⁴⁸ See, e.g., Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1066 (2015) (noting that even the Solicitor General was “dumbfounded by Justice O’Connor’s question in *Lopez* about whether there [was] anything left that Congress can’t regulate.”).

²⁴⁹ 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 *id.* 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’”).

Figure 6: The Affordable Care Act Individual Mandate



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.²⁵⁰ 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

²⁵⁰ *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 generally John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1067 (2015) ("Reasonably construed, the Constitution protects fundamental human rights and vests the government of the United States with all the legitimate authority it needs to provide for the common defense, promote the general welfare, and fulfill the other ends for which that government was established."); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 621-22 (2014) ("The idea [behind enumeration] was that Congress should have the ability to do what the nation needs done, but it should neither deny individual rights nor imperil local decision making. Enumeration was a means to those ends."); Neil S. Siegel & Robert D. Cooter, *Collective Action Federalism: A General Theory of Article 1, Section 8*, 63 STAN. L. REV. 115, 135 (2010) (arguing that using "formal distinctions to divide federal and state powers in Article I, Section 8" will "fail to advance the general welfare when applied to federalism problems"). See also 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 [Virginia] Resolution when they replaced it with an enumeration").

everything is a fundamental precept.”²⁵¹ 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.

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. My 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 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,²⁵² 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.²⁵³

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.*

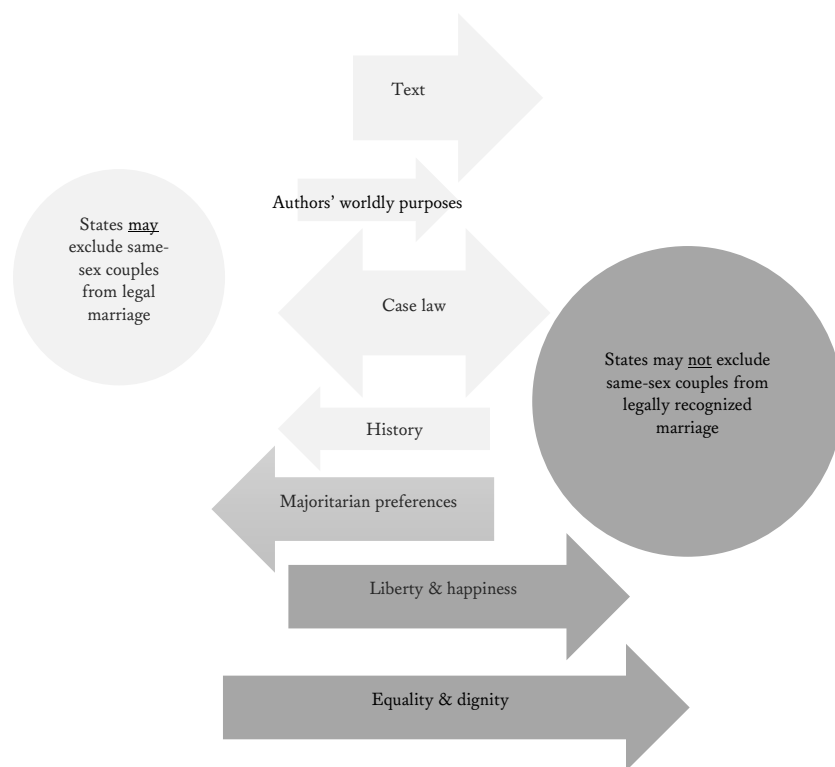
²⁵¹ *NFIB*, 132 S. Ct. at 2647 (joint opinion).

²⁵² *Baker v. Nelson*, 409 U.S. 810 (1972).

²⁵³ *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) (holding that the Defense of Marriage Act’s interpretation of marriage as applying to only heterosexual couples was invalid under the Due Process Clause of the Fifth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding unconstitutional under the Fourteenth Amendment a Texas anti-sodomy statute that criminalized same-sex sexual conduct as deviant sexual behavior); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a Colorado state constitutional amendment by referendum barring any and all legislative, executive, and judicial protection for homosexual status failed rational basis review as an act “inexplicable by anything but animus towards the class” of homosexuals).

Hodges.²⁵⁴ And, in my eyes, the question was neither hard nor close, thanks to the combined force of constitutional principles concerning liberty and 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.

Figure 7: Same-sex Marriage



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

²⁵⁴ 135 S. Ct 2584 (2015).

is ‘one of the vital personal rights essential to the orderly pursuit of happiness by free men.’”²⁵⁵ 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.”²⁵⁶ 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.²⁵⁷

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*,²⁵⁸ two years after having held, in *District of Columbia v. Heller*,²⁵⁹ that the Second Amendment protects a personal right to keep and bear arms against restriction by the federal government. Because *Heller* was itself highly

²⁵⁵ *Id.* at 2598 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

²⁵⁶ *Id.* at 2602, 2604.

²⁵⁷ *Id.* 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 notes, that there is no “Nobility and Dignity” Clause in the Constitution.” 135 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,” *id.* at 2616, 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, 353 (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”). Remarkably, Thomas repeats this line in *Fisher*, one year after he had pretended, in *Obergefell*, that such arguments are constitutionally noncognizable. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2215 (2016).

Second, the best argument for the state is not that marriage discrimination against same-sex couples is constitutional, but that courts should underenforce constitutional requirements in this context for prudential and institutional reasons. Indeed, the most plausible portions of the dissenting opinions press this line, 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. *See, e.g., Obergefell*, 135 S. Ct. at 2616, 2618 (noting “obvious concerns about the judicial role” and “the need for ‘judicial self-restraint’” (citation omitted)).

²⁵⁸ 561 U.S. 742 (2010).

²⁵⁹ 554 U.S. 570 (2008).

controversial, and because a careful assessment of it would require an investigation 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 right as conferred by the Second Amendment and incorporated against the states by the Fourteenth Amendment's Due Process Clause.²⁶⁰ Justice Thomas deemed the right to bear arms a "privilege or immunity" of national citizenship.²⁶¹ Justice Stevens thought the right best understood as a fundamental liberty protected under "substantive due process."²⁶²

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. While many restrictions on gun ownership and use are permissible,²⁶³ the *natural liberty* interest in defending oneself against an assailant exerts sufficient force to render a total ban unconstitutional.

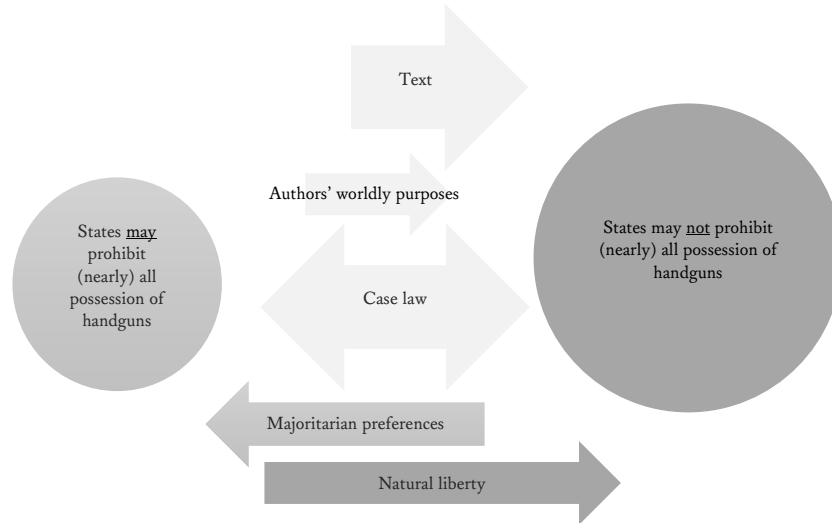
²⁶⁰ *McDonald*, 561 U.S. at 791.

²⁶¹ *Id.* at 806 (Thomas, J., concurring).

²⁶² *Id.* at 861 (Stevens, J., dissenting).

²⁶³ 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," without explaining how such restrictions are consistent with the opinion's avowed originalism. 554 U.S. at 626. 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," I leave for the reader to decide. Alexander, *supra* note 75, at 97.

Figure 8: Bans on Handgun Possession



B. 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.²⁶⁴

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

²⁶⁴ Justice Kennedy is a particular fan. I examine the extent to which Kennedy’s constitutional decisionmaking comports with principled positivism in Mitchell N. Berman & David Peters, Anthony Kennedy: A Most Principled Justice (unpublished manuscript) (on file with author).

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 evenhandedness. 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., presidential eligibility requirements). (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 (4) 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 decisionmaking, 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 (Scalian and Dworkinian) 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 in a manner that could be (loosely) modeled as force addition; and second, that the (fundamental) 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 marries Dworkin’s key insight that our law contains norms of distinct logical types—norms that are determinate (“rules”) and norms that have weight (“principles”)—to Hart’s positivist insistence that they are all grounded in social practices. It unites Bobbitt’s pluralism, the originalists’ realism, and the organicism that undergirds all main variants of common law constitutionalism, living constitutionalism, popular constitutionalism, and unwritten constitutionalism. 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. That alone is a lesson worth learning well.

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