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Evan D. Bernick

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EVAN D. BERNICK*

INTRODUCTION

On December 18, 2019, the House of Representatives approved two articles of impeachment against President Donald Trump.[1] These articles generated a steady stream of constitutional commentary prior to Trump's acquittal in the Senate.[2] The commentary covered a range of topics, including whether an "abuse of power" of sufficient gravity can constitute an impeachable "high crime [or] misdemeanor";[3] whether Trump's abuse of power was sufficiently grave;[4] and whether Trump had in fact been impeached prior to the submission of the articles to the Senate.[5]

But one constitutional topic that cried out for analysis largely escaped notice. In the first paragraph of both articles of impeachment, the House charged Trump with "violat[ing] . . . his constitutional oath faithfully to

*Visiting Professor of Law, Georgetown University Law Center; Executive Director, Georgetown Center for the Constitution. My thanks to Chris Green and Will Baude—Chris for his foundational work on the Article VI Oath, Will for suggesting that I turn my attention to the Presidential Oath Clause. Thanks also to Brian McCarty for helpful conversations.

1. H.R. Res. 755, 116th Cong. (2019).

2. *See*, *e.g.*, Catherine Kim, *Is the President's Abuse of Power an Impeachable Offense?*, VOX (Jan. 19, 2020, 5:41 PM), https://www.vox.com/policy-and-politics/2020/1/19/21073145/impeachment-trial-abuse-power-dershowitz-graham-schiff; Adam Liptak, *A Law Professor's Provocative Argument: Trump Has Not Yet Been Impeached*, THE NEW YORK TIMES (Dec. 30, 2019), https://www.nytimes.com/2019/12/20/us/trump-feldman-impeach.html; David G. Savage, *Trump's actions with Ukraine epitomize framers' idea of impeachable offense, scholars say*, LOS ANGELES TIMES (Sept. 25, 2019, 1:26 PM), https://www.latimes.com/politics/story/2019-09-25/trump-ukraine-impeachment-scholars.

3. *See* Kim, *supra* note 2.

4. *See* Savage, *supra* note 2.

5. *See* Liptak, *supra* note 2.

execute the office of the President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States . . . ."[6] The language was not chosen casually—nearly identical language appears in the Presidential Oath Clause of Article II, Section One, Clause 8 of the Constitution of the United States.[7] The Presidential Oath Clause provides:

> Before [the President] enter on the Execution of the Office, he shall take the following Oath or Affirmation: —I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States.[8]

The House's references to the presidential oath are undertheorized.[9] There is no discussion of what, exactly, the oath means. It is also not obvious what the accusation of oath-violation added to the case against Trump.[10] Imagine that the Constitution did not require the President to take any oath, that Trump never took any oath, and that Trump did everything else that the House charged him with doing. Should anyone have assessed the merits of the case for impeachment differently?

Oath-related questions of this sort are not specific to the impeachment of President Trump.[11] They might be asked of any contemporary invocation of the presidential oath. They might be asked of the Presidential Oath Clause itself. *What does it mean? And why should we care?* And yet, those who framed and ratified the Constitution considered the oath meaningful enough to specify it word-for-word, Presidents continue to take the oath, and our constitutional culture continues to treat the oath as if it matters.[12] Americans deem the oath to be important enough that when Chief Justice John Roberts recited *one* word of the oath's 35 words out of order during President Barack Obama's inauguration,[13] the ensuing controversy[14] led to another swearing-

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6. *See* H.R. Res. 755.
7. U.S. CONST., art. II, § 1, cl. 8.
8. *Id.*
9. *See infra* Part IV.
10. *See* H. Res. 755 art. II.
11. Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Tensions*, 103 NW. U. L. REV. 259 (2009).
12. *Id.* at 259-261.
13. *See* BBC, *Barack Obama Oath of Office / Sworn In – President Obama: The Inauguration – BBC News*, YOUTUBE (Jan. 20, 2009), https://www.youtube.com/watch?v=m1Yff-_9MZs (Displaying video of inaugural oath on January 20, 2009. The Chief Justice mistakenly put the word "faithfully" after "Office of the President of the United States" rather than before "execute.").
14. *See* Joan Biskupic, *Oath gives Justice Roberts and Obama some pauses,* USA TODAY, Jan. 21, 2009, at 6A.

in-ceremony the following day.[15] It is doubtful that Americans would tolerate a President who simply refused to take the oath.

To borrow from Paul Horwitz, we "cannot shrink from grappling with the meaning of the Presidential Oath Clause," any more than can the President.[16] This Article argues that the oath imposes a moral obligation on the President to fulfill a set of legal obligations.[17] A President who takes an oath makes a promise that carries moral weight.[18] And because that promise includes compliance with and support of the law of the Constitution, the President's first-order moral duty underwrites second-order legal duties.[19]

Before we consider what oath-related moral obligations the President might have, we need to specify what sort of thing "the Constitution of the United States" is. That is, we need a constitutional ontology. Is "the Constitution of the United States" the text of a written document? An aggregation of mental states—say, the intentions or expectations of the framers or ratifiers of that document? A set of moral concepts? A collection of doctrines laid down by the Supreme Court? All of the above? Only once we have a constitutional ontology will we be in any position to identify the moral obligations that attach to the President's promise to "preserve, protect, and defend the Constitution of the United States"—whatever that Constitution is.

Part I contextualizes this project by summarizing a suite of candidate constitutional ontologies.[20] Part II argues that one ontological candidate is more consonant than are the others with the design function of the Presidential Oath Clause and with our constitutional discourse.[21] Part III will cash out the moral implications of this conclusion.[22] The key takeaway is this: The President has defeasible moral obligations to (1) follow the linguistic content that was conveyed by the text of what will henceforth be referred to as the "Document"[23] when its provisions were ratified into law; and (2) resist departures from or additions to the Constitution that are not authorized by that linguistic content.[24] Finally, Part IV will discuss the

15. *See* CBS, *Obama Sworn In Again*, YOUTUBE (Jan. 22, 2009), https://www.youtube.com/watch?v=SIDH33i1-Vs. As Richard Primus has detailed, *Obama* deviated from the text of the Constitution during the second ceremony. Obama inserted his full name after "I." Richard A. Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 93 (2010).

16. Horwitz, *supra* note 11, at 262.

17. *See infra* Part III.

18. *See infra* Part III.A.

19. *See infra* Part IV.A.

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part III.

23. So as not to stack the rhetorical deck in favor of one ontological candidate.

24. *See infra* Part III.

implementation of the oath and address the question of when, if ever, a President may be morally justified in breaking his oath.[25]

I. WHAT IS "THE CONSTITUTION OF THE UNITED STATES"?

"[T]he Constitution of the United States" is currently in operation and people disagree about what it means. These propositions are uncontroversial.[26] One might initially think that such a consensus implies agreement concerning what the Constitution of the United States *is*—what makes it the Constitution of the United States and not some other thing.

But that is not necessarily so. It would be easy to establish a broad consensus among Americans that "liberty is good" and "people disagree about what liberty means," but we could hardly assume that every contributor to the consensus agreed about what liberty *is*. One American's "liberty" may have no more to do with another's "liberty" than a financial institution has to do with the land sloping down to a river—even though both of the latter entities are in some sense "banks." For *those* Americans, agreement concerning whether "liberty is good" would not actually be agreement at all, nor would it be disagreement—those Americans would be affirming different things, *about* different things.

Because the Presidential Oath Clause refers to "the Constitution of the United States," we need to pin down what *that* Constitution is before we can make any progress concerning the significance of any promise to follow that Constitution.[27] There are a number of candidate accounts of the Constitution's ontology, albeit few that explore the ontology of the Presidential Oath Clause. This Part will provide an overview of those accounts.[28] I will separate them into three categories: nontextual, textual, and plural.[29] Nontextual ontologies hold that the Constitution does not consist in

25. *See infra* Part IV.

26. *See, e.g.,* LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 11 (2012) ("The American Constitution is the oldest currently in force in the world."); CASS SUNSTEIN, THE SECOND BILL OF RIGHTS 105 (2006) (describing the Constitution as "the oldest in force in the world."); Richard H. Pildes, *Political Parties and Constitutionalism* in COMPARATIVE CONSTITUTIONAL LAW 254 (Tom Ginsburg & Rosalind Dixon, eds., 2011) (American Constitution is "the oldest one"); Steven Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1453-54 (2019) (stating that "[t]he 1780s produced the world's first constitutional democracy, the world's shortest constitution, and the world's oldest constitution"); Jeremy Waldron, *Never Mind the Constitution*, 127 HARV. L. REV. 1147, 1148 (2014) (observing that "Americans . . . pride themselves . . . on having the oldest constitution currently in force in the world.").

27. U.S. CONST., Art. II, § 1, cl. 8.

28. Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 207 (2015).

29. *See infra* Part I.A-C.

an authoritative textual expression;[30] textual ontologies hold that it does[31]; plural ontologies hold that the Constitution's content is partly textual, partly nontextual.[32]

A. NONTEXTUAL CONSTITUTIONAL ONTOLOGIES

1. Supreme Court Decisions

One constitutional ontology holds that the Constitution is what the Supreme Court says it is.[33] The Court seemed to identify the Constitution with its decisions in a remarkable 1958 per curiam opinion.[34] In *Cooper v. Aaron,*[35] the Court held that public officials in Little Rock, Arkansas were required to implement a desegregation plan in compliance with the Court's prior decision in *Brown v. Board of Education*.[36] In so doing, the Court "recall[ed] some basic constitutional propositions which are settled doctrine":

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison, 1 Cranch 137, 177,* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator

30. *See, e.g*., Eric J. Segall, *The Constitution Means What the Supreme Court Says it Means*, 129 HARV. L. REV. F. 176, 187 (2015).

31. *See* Sunstein, *supra* note 28, at 211.

32. *See* Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1071-72 (1987).

33. *See, e.g.,* H. Jefferson Powell, *Constitutional Law Though the Constitution Mattered*, 1986 DUKE L. J. 915, 925 (1986) (describing this viewpoint as "the most common viewpoint of all" regarding the "real 'Constitution'"); Eric J. Segall, *The Constitution Means What the Supreme Court Says it Means*, 129 HARV. L. REV. F. 176 (2015) ("[I]n constitutional litigation . . . the Constitution means what judges say it means"). Prior to his elevation to the Supreme Court, then-Governor Charles Evans Hughes famously made this claim. *See* C. HUGHES, ADDRESSES 139 (1908) (stating that "[w]e live under a Constitution, but the Constitution is what the Supreme Court says it is.").

34. Cooper v. Aaron, 358 U.S. 1 (1958).

35. *Id.*

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

> and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution."[37]

The Court states that "the interpretation of the Fourteenth Amendment enunciated . . . in the *Brown* case is the supreme law of the land" and claims that all public officials are bound by their oath to follow the Constitution to follow *Brown*.[38] So, the Constitution and the Court's interpretation of the Constitution are equally "the Supreme Law of the Land."[39] If there is any space between what the Constitution *is* and what the Court *decides*, it is difficult to discern.

The Court in *Cooper* did not really describe "settled doctrine."[40] *Marbury v. Madison*[41] did not identify the Constitution with the Court's constitutional decisions.[42] Writing for the Court in *Marbury*, Chief Justice John Marshall described "that instrument [the Constitution] as a rule for the government of courts, as well as of the legislature."[43] A Constitution that was identical to what the Supreme Court said about the Constitution could hardly serve as a rule *for* the Supreme Court—the Court would be the rule-maker for all other institutions.[44] Similarly, it could not be said that "courts, as well as other departments are bound by" such a Constitution.[45] Marshall's inclusion of "the Constitution" in the category of "written constitutions" makes the constitutional-ontological difference between *Cooper* and *Marbury* yet more obvious.[46]

A number of scholars have argued that the other branches of government should generally follow the Supreme Court's constitutional reasoning, not just obey its judgments in particular cases, because deference by other public officials to the Court's constitutional reasoning can serve valuable

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37. *Cooper*, 358 U.S. at 18.

38. *Id.*

39. *Id.*

40. *See* Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 GEO. L. J. 1135, 1189 (2019) (explaining that the Court had "[]never before . . . asserted the novel power to define the 'supreme Law of the Land' and to instantly bind government officials everywhere."); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 n.155 (1964) (contrasting *Cooper*'s position with *Marbury*'s position); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2707-08 (2003) (arguing that "the power of judicial review was never understood by proponents and defenders of the Constitution as a power of judicial supremacy over the other branches, must less one of judicial exclusivity in constitutional interpretation").

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

42. *See* Paulsen, *supra* note 40, at 2709.

43. *Marbury*, 5 U.S. (1 Cranch) at 179-80.

44. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000).

45. *Marbury*, 5 U.S. (1 Cranch) at 180.

46. *Id.* at 178.

coordination and settlement functions.[47] These arguments do not presuppose a Court-based ontology.[48] They hold only that it is normatively better if other public officials generally acquiesce in what the Court says about the Constitution, even when the Court misdescribes the Constitution's properties.[49]

2. Original Expectations

One of the pioneers of originalism, Raoul Berger, advocated a constitutional ontology that few, if any, modern originalists accept: The Constitution *is* what the Framers of its provisions *expected* that those provisions would do.[50] Whereas modern originalists distinguish between the objective meaning of constitutional text and subjective expectations[51] about how that text would resolve questions about things such as racial segregation in public education,[52] Berger was adamant that the Framers' expectations *are* the law of the land.[53] Any departure from those expectations was, in Berger's view, a modification of the Constitution.[54] Accordingly, he considered the expectations of the Framers of the Fourteenth Amendment, as expressed during debates in the 39th Congress, to be constitutionally conclusive of the

47. *E.g.*, Alexander & Schauer, *supra* note 44; Daniel Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 361 (2003). I sketched such an argument in Evan Bernick, *Cooper v. Aaron and Judicial Authority: Lessons from Little Rock*, HUFFINGTON POST (last updated Oct. 2, 2016), https://www.huffpost.com/entry/cooper-v-aaron-and-judici_b_8233796.

48. *E.g.,* Daniel Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 361 (2003).

49. *Id.*

50. *See, e.g.,* Raoul Berger, *Ronald Dworkin's The Moral Reading of the Constitution: A Critique*, 72 IND. L. J. 1099, 1107 (1998).

51. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007) (distinguishing between "the expected application of constitutional texts, which is not binding law, and the original meaning, which is"); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS L.J. 555, 558 (2006) (deploying Gottlob Frege's influential distinction between the a word's "sense"—that is, the cognitive content that determines the conditions for the truth of a sentence in which a word occurs—and its referents—that is, the objects and events to which a word points, to distinguish between meaning of a word or phrase and expectations about what particular things in the world the word picks out); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998) (distinguishing between "original meaning" and "original practices").

52. Green, *supra* note 51, at 598 (contending that "the historical sense of the Fourteenth Amendment, when combined with the actual facts, would prohibit segregation in public schools").

53. *See, e.g.,* Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 BYU L. REV. 715 (1994) (quotations omitted) (expressing incredulity at Paul Brest's argument that the Founders signed off on "constitutional guarantees" that "defeat their own expectations"); *see* Berger, *supra* note 50, at 1106-07 (quotations omitted) (rejecting Ronald Dworkin's "fine-spun distinction" between "what the Framers intended to say" and "what the Framers 'expected their language to do'"); *accord* Robert H. Bork, *Neutral Principles and Some First Amendment Problem*s, 47 IND. L.J. 1, 13 (1971) (stating that "If the legislative history [of the Fourteenth Amendment] revealed a consensus about segregation in schooling . . . I do not see how the Court could escape the choices revealed . . . even though the words are general and conditions have changed.").

54. RAOUL BERGER, GOVERNMENT BY JUDICIARY 18 (2d ed. 1997).

Amendment's meaning and described both the Congressional Globe and the Constitution as "a transcript of [the Framers'] minds."[55]

The treatment of original expectations as constitutionally conclusive is not merely a relic of our interpretive-theoretical past.[56] It is arguably part of our Establishment Clause law.[57] Chief Justice Warren Burger's opinion for the Court in *Marsh v. Chambers*[58] considered it conclusive of the constitutionality of legislative prayer that "[m]embers of the First Congress voted to appoint and to pay a Chaplain for each House *and* also voted to approve the draft of the First Amendment for submission to the States."[59] It was *unthinkable* to Burger that the Framers "intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."[60] More recently, in *Town of Greece v. Galloway*[61] the Court stated that the decision of the First Congress to "provid[e] for the appointment of chaplains only days after approving language for the First Amendment demonstrate[d] that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[62]

It is worth noting that treating expectations as constitutive of the Constitution is *not* the same as treating them as *evidence* of what a constitutional provision would have been taken to mean by an ordinary user of the English language when the provision was ratified.[63] Such epistemic use of expected applications is consistent with the premise that the Constitution ontologically is a textual expression, the meaning of which can be inferred from how those who ratified it believed that particular words and phrases would apply to things in the world.[64] One might even *presume*, consistently with a textual ontology, that people who apply words and phrases to particular things contemporaneously with the enactment of those words and phrases into law do so correctly, because such people generally knew

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55. *Id.* at 410.
56. Town of Greece v. Galloway, 134 S.Ct. 1811, 1819 (2014).
57. Marsh v. Chambers, 463 U.S. 784, 790 (1983).
58. *Id.*
59. *Id.* at 790.
60. *Id.*
61. *Town of Greece*, 134 S.Ct. at 1811.
62. *Id.* at 1819.
63. *See* John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378 (2007); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923-981 (2009).
64. *See* Larry Alexander, *Was Dworkin an Originalist?*, 103 NW. U. L. REV. 923 (2009) ("Originalists do cite authorially-expected applications, but . . . only as evidence—and frequently strong evidence—of authorially intended meaning"); *see* McGinnis & Rappaport, *supra* note 63, at 378 (arguing that expectations are "often . . . the best evidence of what . . . meaning is."); *see* Solum, *supra* note 63, at 935 ("Expected applications of a text may offer evidence about its meanings, even if these applications are neither decisive evidence of meaning nor meaning itself.").

better than interpreters who are centuries removed whether legislative prayer satisfies whatever conceptual criteria made for an establishment of religion.[65]

3. Original Intentions

Those who hold that the original intentions of the framers or ratifiers of the Constitution should control constitutional decision-making generally hold one of two different kinds of constitutional ontologies.[66] According to the first ontology, the Constitution is a centuries-old text, but the meaning of the text is constituted by the intentions of those who framed or ratified it.[67] That first position will be described in the second section of this Part. According to the second ontology, the Constitution *is* the intentions of those who framed or ratified it, and a centuries-old text is merely the best evidence we have of those intentions.[68] It is the second ontology that I will describe here.

The identification of the law with the intentions of the lawgiver is perhaps the oldest of the ontologies canvassed in this Article.[69] Robert Natelson has documented its sterling pedigree within Anglo-American law.[70] The norm in Anglo-American law leading up to the Founding was to seek "the intent of the makers" in interpreting legal instruments—whether charters, wills, letters of attorney, contracts, or statutes.[71] Although judges began their pursuit of the makers' intent with the words of the statute, they did not always stop there.[72] Indeed, a judge would sometimes extend an enactment beyond the conventional meaning of its words, if evidence of textually unexpressed legislative intent was strong enough.[73]

A number of distinguished scholars defend an intentional ontology.[74] Originalist and textualist Caleb Nelson contends that textualists agree with intentionalists that text is evidence of the law, not identical to the law.[75] He

65. *See* Marc DeGirolami, *First Amendment Traditionalism*, 97 Wash. U. L. Rev. 1653, 1657-58 (2020) (advocating this approach).

66. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 115 (2005).

67. *Id.*

68. Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L. J. 1239, 1257 (2007).

69. *Id.* at 1249.

70. *See generally id.* at 1245-46.

71. *Id.* at 1257.

72. *Id.* at 1250.

73. *See* Natelson, *supra* note 68, at 1253-54 (adducing evidence that "[a]s between words and intent, intent was said to be more important.").

74. BREYER, *supra* note 66, at 115.

75. *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 353 (2005) (arguing that "debates about the fundamental goals of statutory interpretation are superfluous to the divide between judges whom we consider textualists and judges whom we consider intentionalists."). *But see* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 450 (2005) (arguing in response that textualists hold assumptions about the "untidy and opaque" character of the legislative process that makes textualism

argues that several canons of statutory construction that textualists use are difficult to defend except on the premise that intentions constitute the law.[76] One example is the scrivener's error, which textualists use to "correct" obvious typos, erroneous cross-references, and other drafting mistakes by acting as if the text included the words that the enacting legislative coalition most likely intended to include.[77] Similarly, Richard Ekins claims that "[l]legislative intent is not . . . one more source of evidence for the meaning of a statute, but is instead the basic object of interpretive reflection."[78]

In what way are the intentional ontologies of Nelson and Ekins different from the expectational ontology of Berger? The cognitive content that a person or group intends to convey can extend beyond their expectations. Imagine that the Framers of the Fourth Amendment sought to express through the term "search[]" a concept that could be accurately defined thus: "[L]ooking over or through for the purpose of finding something."[79] The Framers did not expect that police officers would use thermal-imaging technology more than two centuries later to measure relative levels of heat within a home, but such use would still be a "search" in light of the content of their intentions.[80] Or consider segregation in public schools.[81] On Berger's account, the Republicans who framed the Fourteenth Amendment expected that the Amendment would *not* outlaw segregation in public schools.[82] But if Republicans intended to express a norm that forbade second-class citizenship and public education was at the time or later became central to American citizenship, those intentions could trump their expectations.[83]

4. Purposes

The last nontextual ontology identifies the Constitution with purposes that can be inferred from the constitutional text.[84] Its leading judicial proponent is Justice Stephen Breyer, who has written that "individual constitutional provisions . . . embody[] certain basic purposes often expressed

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"qualitatively different from the classical intentionalist . . . approach."); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PENN. L. REV. 117, 131-134 (2009) (arguing that textualists characteristically "believe that the text . . . *is* the law.").

76. Nelson, *supra* note 75, at 355-56.

77. *Id.* at 356.

78. RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT xxviii (2012).

79. *See* Kyllo v. United States, 533 U.S. 27, 31 n.1 (2001) (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (1828) (reprint 6th ed. 1989)).

80. *Id.* at 31.

81. *Brown*, 347 U.S. at 487.

82. *See generally* Raoul Berger, *The "Original Intent"—As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242 (1996).

83. *Id.*

84. BREYER, *supra* note 66, at 115.

in highly general terms."[85] Breyer interprets constitutional provisions, like the Establishment Clause, "to implement the basic value that the Framers wrote the clause to protect."[86] Even ardent textualists acknowledge that the original purpose of a legal provision may be probative evidence of the meaning of the law and incorporate purpose into interpretation.[87] Breyer's language, however, suggests that the identification and application of original purpose is the end of constitutional interpretation, not a means.[88]

Of the nontextual ontologies discussed in this Article, the purposive ontology is the most unusual. Modern purposivists tend to argue for the more-modest position that purpose has an important epistemic role to play in the interpretation of the law, rather than contending that purpose *is* the law or even that it is *part of* the law.[89] Still, besides Breyer, one other Justice has seemingly identified the Framers' purposes with the law—Arthur Goldberg, claiming that oathtaking officials are found to follow those purposes —so the position is worth acknowledging.[90]

B. TEXTUAL CONSTITUTIONAL ONTOLOGIES

Textual constitutional ontologies all hold that the Constitution is a text—a written document, consisting of words, phrases, and symbols.[91] But this overlapping consensus is thin. Scratching the surface exposes very different ontologies.

1. Marks on Parchment

In "There is Nothing That Interpretation Just Is" Cass Sunstein identifies the Constitution as "the founding document" and contends that no interpretive conclusions follow from the Constitution's ontology.[92] He

85. *Id.*

86. *Id.* at 124.

87. *See* Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) (affirming that "[k]nowing the purpose behind a rule may help a court decode an ambiguous text"); Antonin Scalia, *Response*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 144 (Amy Gutmann ed., 1997) [hereinafter ANTONIN SCALIA] (stating that "what the text would reasonably be understood to mean" and "what it was intended to mean" are concepts that "chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003) ("Textualism does not purport to exclude all consideration of purpose or policy from statutory interpretation.").

88. BREYER, supra note 66, at 115.

89. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L. J. 1275, 1288 (2020).

90. Bell v. State of Md., 378 U.S. 226, 288-89 (1964) (Goldberg, J., concurring) ("Our sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purposes of the Framers.").

91. Vesan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 113, 1132 (2004).

92. Sunstein, *supra* note 28, at 207.

argues that one can "firmly respect the document's text"[93] while taking any of a number of interpretive approaches—one giving effect to the Framers' original intentions, another following the original meaning that members of the ratifying public would have attached to the constitutional text, yet another implementing the best moral readings of the text.[94] All of these approaches, as well as several others, are compatible with Sunstein's account of what the Constitution *is*.[95]

Sunstein is careful to say that "[s]ome approaches cannot qualify as interpretation at all[,]" and offers the example of "substitut[ing] the best imaginable constitution for our own constitution."[96] But it is not clear from his analysis how *the text of the Constitution* rules out the latter possibility. What prevents a judge from claiming fidelity to the Constitution as "authoritative text[]" if he uses the text as a jumping-off point for moral reflection about what the best imaginable constitution would require in a given case?[97] Sunstein might reply that in contemporary legal culture such an approach just would not be accepted *as* an "interpretation" of the Constitution's text.[98] But then it would be the current meaning of "interpretation," not the Constitution's text itself, that would exclude the best-imaginable-constitution approach.[99] The text appears to be just a collection of marks on parchment—it does not mean anything in particular.[100]

2. Original Linguistic Content

Constitutional originalists generally agree that the content conveyed by the Constitution's language is the law.[101] There is disagreement, however, on

93. *Id.* at 211.
94. *Id.* at 194-97.
95. *Id.* at 197-98.
96. *Id.* at 202-04.
97. Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 16-17 (2015).
98. *Id.* at 17.
99. *See id.* at 16 (arguing that "what 'the text' is" on Sunstein's account is "unexplained" and that, accordingly, "the proposition that it grounds interpretation that does not follow the text is hardly the articulation of a discernible limit.").
100. *Id.*
101. *See* Lawrence B. Solum, *Originalist Methodology,* 84 U. CHI. L. REV. 269 (2017) (identifying two core ideas to which originalist theories are committed: "First, the communicative content of the constitutional text is fixed at the time each provision is framed and ratified . . . Second, constitutional practice should be constrained by that communicative content of the text."). I opt for "linguistic content" rather than "communicative content" because the latter might be taken to assume a widely accepted but not uncontroversial linguistic premise—namely, that meaning is a function of communicative intentions. *Id.* at 271 (defining "communicative content" as "the content that the drafter intended to convey to the audience at which the text was aimed."). Solum holds a neo-Gricean understanding of linguistic meaning, and many but not all originalists are neo-Griceans. For an overview of Paul Grice's influence on the philosophy of language and a summary of the core themes in his work, *see* Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 LINGUISTICS & PHILOSOPHY 509 (1992). Originalist Christopher Green is a neo-Fregean, *see* Green, *supra* note 51. Judge Easterbrook is a "Kripkensteinian," *see* In re Erickson,

the details. Some originalists hold that Constitution's linguistic content consists in the communicative intentions of the Framers.[102] Others maintain that this content consists in the meaning that members of the ratifying public would have reasonably associated with the Constitution's text in context.[103] Still others contend that the Constitution is written in the "language of the law" and that a set of "original methods"—Founding-era rules of legal interpretation— must be applied in order to produce its meaning.[104]

There may not be much of a practical difference between how original-intentions originalists and public-meaning originalists interpret constitutional text.[105] Lawrence Solum argues that because "the relevant [Framers'] intentions are . . . directed to the public," the meaning of their words is "the meaning the Framers intended the public to grasp on the basis of the public's recognition of the Framers' . . . intentions."[106] Unless the Framers were "radically mistaken about the linguistic beliefs and competences of the[ir] intended audience" or sought to deceive the public about their intentions, Solum maintains, intentions and public meaning are likely to converge.[107] Some intentionalists, including Gary Lawson and Jeffrey Goldsworthy, seek to ascertain original intentions by investigating original public meaning.[108]

Still, a speaker's communicative intentions may differ from an audience's uptake of a speaker's words.[109] We've all had the experience of misspeaking—of failing to express our intentions in a way that enables others

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815 F.2d 1090, 1092 (7th Cir. 1987) (citing SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982) for the proposition that a general term denotes a "class of things that share some important feature" and that "[w]hich feature is important depends on the function of the designation and how it will be interpreted by the audience to whom the word is addressed.").

102. *See, e.g.,* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 971 (2004); Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 646 (2015); Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493 (2005); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009).

103. *See, e.g.,* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013); Kesavan & Paulsen, *supra* note 91, at 1113.

104. See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM & MARY L. REV. 1321 (2017).

105. Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1136 (2015).

106. *See* LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 44 (2019) (arguing that "the Framers intended the Constitution to mean the original public meaning"); Solum, *supra* note 105.

107. Solum, *supra* note 105.

108. *See* Jeffrey Goldsworthy, "The Case for Originalism," *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (Grant Huscroft & Bradley Miller, eds., 2011); GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

109. Solum, *supra* note 105.

to grasp those intentions. It is possible that the Framers "misspoke"—that they subjectively intended particular words or phrases to communicate cognitive content that a member of their target audience would not reasonably associate with those words or phrases on the basis of then-prevalent linguistic conventions.[110] In such circumstances an original-intentions originalist would still maintain that the communicative intention, although badly expressed, determines the meaning of the text, even if he might for normative reasons urge that that meaning should not be followed.[111] A public-meaning originalist, on the other hand, would hold that the meaning of the text *just is* the content that it would convey to a reasonable reader, regardless of the Framers' intentions.[112]

Even within public-meaning originalism, there is ontological diversity.[113] Solum's account of public meaning holds that public meaning is ultimately constituted by speaker intentions, if only by those intentions that a reasonable member of the speaker's audience would infer from the speaker's words in context.[114] By contrast, Judge Frank Easterbrook's account categorically denies the contribution of speaker intentions to public meaning.[115]

Finally, some originalists identify the Constitution's linguistic content with its *legal* content.[116] John McGinnis and Michael Rappaport argue that the meaning of the Constitution's text is a function of the legal rules that were

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110. *See* Sunstein, *supra* note 28, at 195-96.

111. *See generally* STRANG, *supra* note 106, at 44.

112. *See id*. Lee Strang claims that intentionalism, public-meaning originalism, and original-methods originalism "are not substantively distinct" because "original intent (the Constitution means what its authors intended it to mean) is the same as original meaning (the Constitution means the public meaning of its text, when it was ratified) and original methods (the Constitution means the meaning produced by the original methods)." *Id.* More specifically, Strang argues that "(1) the Framers intended the Constitution to mean the original public meaning, (2) the Ratifiers understood and intended the Constitution to mean the original meaning, and (3) governmental officials and Americans understood it as its original meaning, and (4) the communicating parties utilized the original methods to ascertain that meaning." *Id.* If claims (1)-(4) are correct, intentionalism, public-meaning originalism, and original-methods originalism should not yield divergent constitutional outcomes. But that would be a function of contingent historical events—it is easy to imagine three different constitutional objects emerging from these originalisms. The Framers might have intended that the public follow their subjective intentions; they might have intended the text to be understood as ordinary readers would understand it, not lawyers; and so forth. This is not the place to pass judgment on Strang's historical claims. It is enough to say that they have not yet met with universal acceptance and that multiple originalist ontologies are on offer.

113. *See generally* Solum, *supra* note 105, at 275-76.

114. *Id.*

115. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (denying that collective bodies like legislatures "have 'intents' or 'designs'"); Frank H. Easterbrook, *Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 60, 61 (1988) (praising Justice Oliver Wendell Holmes, Jr. the view that "original intent, as opposed to . . . original meaning" did not matter and stating that "[m]eaning comes from the ring the words would have had to a skilled user of words . . . .").

116. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J. L. & PUB. POL'Y 817, 878-79 (2015).

associated with instruments of a particular kind when the Constitution was ratified.[117] Similarly, Stephen Sachs seeks "the Constitution's original legal content" and contends that we ought to consult the interpretive rules that were around [at the Founding] in order to determine "how the enactment of the Constitution's text affected the law at the Founding."[118] Sachs and William Baude maintain that our law today "treat[s] the Constitution as a piece of enacted law that was adopted a long time ago" but which is "subject to various de jure alterations or amendments made since."[119]

An original-linguistic-content-based ontology does not preclude constitutional change by nontextual means.[120] The linguistic content of the Constitution might authorize nontextual constitutional change.[121] Baude and Sachs, for instance, propose that "explaining how a legal rule enjoys good title today means explaining how it lawfully arose out of the government established at the Founding."[122] What "lawfully arose out of the government established at the Founding" turns on the content of Constitution, which may permit nontextual change.[123] As Baude has documented, James Madison appears to have believed that the Constitution *did* admit of such change through liquidation-by-institutional-practice of constitutional vagueness and ambiguity.[124]

3. Moral Concepts

Yet another textual ontology holds that the text of the Document expresses abstract moral concepts or principles that every generation of interpreters must reflect upon and apply for themselves, albeit in a manner sensitive to how previous generations have reflected upon and applied them.[125] The most influential exponent of this theory was Ronald Dworkin, who famously distinguished between "moral concepts," such as "cruel," which he took to be binding upon interpreters, and "particular conceptions" historically held by the Constitution's Framers, such as whether the death penalty was *in moral fact* cruel, which he took to be contestable.[126]

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117. *See* McGinnis & Rappaport, *supra* note 116.

118. Sachs, *supra* note 116, at 878-79.

119. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019).

120. *Id.* at 1457-58.

121. *Id.* at 1457.

122. *Id.*

123. *Id.*

124. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

125. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 30 (2007).

126. Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, *supra* note 87, at 120. *See also* Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 54 FORDHAM L. REV. 2087, 2092 (2000) (making a similar argument).

At first glance, Dworkin's concept-conceptions distinction appears consistent with the distinction that modern originalists have drawn between original meaning and expectations about how that meaning would be applied to particular facts.[127] But whereas modern originalists treat the question whether constitutional language expresses a concept or a set of historically situated conceptions as an empirical one, contingent upon historical facts about language use, Dworkin undertook no empirical inquiry.[128] Responding to Laurence Tribe's description of Dworkin's approach as one that presupposed "right answers to questions of principle that we can be sure the Constitution's authors and/or ratifiers actually put to us ages ago," Dworkin affirmed his "long-standing opposition to any form of originalism."[129] He outright denied "that constitutional interpretation depends on retrieving . . . empirical facts."[130]

Sotirios Barber and James Fleming defend a similar ontology.[131] They argue that the Constitution itself "require[s] that its interpreters think self-critically for themselves about the meaning of controversial constitutional provisions embodying general concepts."[132] How do we know that those provisions embody general concepts? Because, Barber and Fleming assert, they are "*written as* general concepts."[133] In support of this proposition, Barber and Fleming borrow the following intuition pump from Dworkin:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.[134]

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127. *Id.* at 120.

128. *See* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1258 (1997).

129. *See id.* at 1258 n.18.

130. *Id.* at 1258.

131. BARBER & FLEMING, *supra* note 125 at 29.

132. *Id.* at 30.

133. *Id.* at 28.

134. *Id.* at 28 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977)).

This intuition pump can only serve as the starting point of an argument if the general-moral-conceptual nature of a phrase like "equal protection" or "due process" can be assumed.[135] If one holds to an original-content-based ontology, it cannot be assumed, and the pump proves defective—it elicits intuitive convictions about the wrong kind of thing.[136]

Why so? Originalist Keith Whittington points out that even if equal protection and due process exist in moral reality, it does not follow that the Document's content delegates to future interpreters the determination of which understanding of those moral concepts is most accurate and empowers them to apply that understanding.[137] The Framers may have intended to communicate, or chosen language that conventionally referred, to a particular *conception* of equal protection or due process.[138] They may have done so because they had more epistemic confidence in themselves than they had in future interpreters; they may have done so because they recognized that people then, and likely in the future, would disagree about the best conception of the relevant moral concepts, leading to instability in the law.[139] We do not know, and we must find out, whether a phrase such as "cruel and unusual punishments" expresses an abstract concept or a concrete conception. We also must figure out whether, if it expresses a concept, whether that concept is a moral concept. Finally, we must determine whether, if "cruel and unusual punishments" expresses a moral concept, that concept binds us to a historically situated understanding of what (say) it is for something to be "cruel" or instead to the most accurate-in-moral-fact understanding of "cruel," regardless of whether that understanding was held by anyone when the Eighth Amendment was ratified. For an original ontologist, these are empirical inquiries into the use of language circa ratification and they must be made on a retail, rather than wholesale, basis.[140]

4. Contemporary Public Meaning

Finally, the Constitution's text may mean what the American public currently believe that it means.[141] As original public meaning is a function of what a reasonable reader of the constitutional text would take the text to mean in context at the time of its ratification into law, contemporary public meaning is a function of what a reasonable reader of the constitutional text would take

135. *Id.* at 32.

136. *See* Keith E. Whittington, *Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 217 (2000).

137. *Id.*

138. *Id.* at 217, 221.

139. *Id.* at 222.

140. *Id.*

141. Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 306-07 (2016).

the text to mean in context today.[142] The relevant context might include seminal Supreme Court precedents, longstanding political-institutional practices, and public argumentation about the Constitution by members of social movements.[143]

David Strauss's conventionalism offers an illustrative example of a contemporary-public-meaning-based account of the Constitution's text.[144] Strauss maintains that "allegiance to the text of the Constitution [is] justified as a way of avoiding costly and risky disputes and of expressing respect for fellow citizens."[145] This "allegiance" requires a judge to "show that her interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text."[146] The meaning of the text, in turn, is shaped by "a complicated set of background understandings shared in the culture (both the legal culture and the popular culture)."[147] Those background understandings may be entirely unmoored from history but are no less contributors to the text's conventional meaning for that.[148]

Strauss offers the example of *Gideon v. Wainwright*,[149] in which the Court held that the Sixth Amendment's guarantee to a criminal defendant of "Assistance of Counsel for his defence" required that an indigent defendant be provided with a publicly funded lawyer.[150] Only by virtue of a linguistic "coincidence[,]" argues Strauss, does *Gideon* fit with the Constitution's text.[151] But Strauss says that *Gideon* can still be considered an "interpretation of the Constitution" that is "supported by the language of the Sixth Amendment."[152]

As we will see shortly, Strauss's constitutional ontology is not exhausted by the Constitution's contemporary public meaning—he takes other entities to be part of "the Constitution."[153] Richard Re, on the other hand, offers a wholly contemporary-public-meaning-based constitutional ontology in his work on the Article VI Oath.[154]

Re identifies "the Constitution" that officials promise to follow as a "document" and describes the act of promising as "a personal moral

142. *Id.* at 327; Solum, *supra* note 105, at 275.
143. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).
144. *See generally id.* at 907, 909-12.
145. *Id.* at 911.
146. *Id.* at 920.
147. *Id.* at 911.
148. Strauss, *supra* note 143, at 912-13.
149. Gideon v. Wainwright, 372 U.S. 335 (1963).
150. Strauss, *supra* note 143, at 919-20.
151. *Id.*
152. *Id.*
153. David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4 (2015) [hereinafter *Mean What It Says?*].
154. Re, *supra* note 141, at 304.

commitment to adhere to a shared understanding of something."[155] He goes on to argue that "the relevant shared meaning" is "the Constitution's contemporaneous public meaning" and that "to the extent there is consensus on the meaning of 'the Constitution,' that consensus view becomes the moral duty of every oath-taker."[156] If the consensus changes, so, too does "the Constitution"—and so does the content of the oath-taker's moral obligations.[157] Thus, "the Constitution" that Justice Elena Kagan promised to follow in 2010 differed from "the Constitution" that Justice Neil Gorsuch promised to follow in 2019, even though no text was added or subtracted from the document in the meantime.[158] And so too did the specifics of the Justices' oath-based obligations differ.

Under a contemporary-public-meaning-based ontology, the Constitution's text is not meaningless.[159] The text always conveys *some* cognitive content.[160] And while that content changes over time, it is not the case that anything goes. Language drifts slowly, and dramatic changes in the context in which people read the Constitution take place infrequently.[161] But the Constitution's content is determined at a different time, in different ways, than it is under ontologies that identify the Constitution with the concepts *originally conveyed* by its language.[162] Most importantly, that content can change through means that are not authorized by the content originally conveyed by the Constitution's text.[163]

C. PLURAL CONSTITUTIONAL ONTOLOGIES

The Constitution might not be just one kind of thing—it might be an aggregation of different kinds of things.[164] Plural ontologies are common in constitutional interpretation, particularly although not exclusively in

155. *Id.* at 306-07.
156. *Id.* at 321, 327.
157. *Id.* at 327.
158. *Id.*
159. Re, *supra* note 141, at 303.
160. Strauss, *supra* note 143, at 880-81.
161. *Id.* at 924.
162. *Id.*
163. Evan D. Bernick & Christopher R. Green, *What is the Object of the Constitutional Oath?*, SSRN at 21-22 (Sept. 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441234.
164. *See* Levinson, *supra* note 32, at 1071-72 ("One might . . . define the Constitution as only beginning with the parchment ratified in 1788 . . . one might include not only key decisions of the Supreme Court but also fundamental documents such as the Declaration of Independence, the Gettysburg Address, and, beyond that, aspects of the American experience that cannot be reduced to a text at all.").

nonoriginalist circles.[165] Most plural ontologies consider the text to be part of the Constitution.[166] Beyond the text, however, these ontologies diverge.[167]

1. Text and Underlying Principles

The Constitution might consist of text *and* textually unexpressed principles.[168] Jack Balkin has advocated such an ontology from an originalist standpoint; Mitch Berman has advanced one from a nonoriginalist standpoint.[169]

Balkin considers the original meaning of the Constitution's text to be binding law.[170] But he does not consider original meaning to be exhaustive of the Constitution.[171] He maintains that our "basic law . . . leaves to each generation the task of how to make sense of the Constitution's words *and* principles."[172] The latter "underlying principles" are not set forth in the text and they cannot override textual commands—text must be followed when it is clear.[173] Principles, however, must be applied "when the text uses relatively abstract and general concepts[,]" to the end that constitutional interpretation is "faithful to the Constitution's purposes."[174] So, we cannot use a non-textual principle of maturity to dispense with the textual requirement that the President must be 35 years of age;[175] but we *must* use a non-textual anti-caste principle to implement the Fourteenth Amendment's textual guarantee that the privileges and immunities of citizens of the United States shall not be abridged.[176]

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165. *See* Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1763 (2012) ("[N]onoriginalists typically include psychological, historical, structural, doctrinal, and normative considerations . . . that are legitimate grounds of constitutional interpretation."). Larry Alexander has objected that certain kinds of plural ontologies are incomprehensible. *See* Larry Alexander, *Practical Reason and Statutory Interpretation*, 12 LAW & PHIL. 319, 322 (1993) (asking, rhetorically, "[W]hy isn't the metaphysical mixing of norm and fact—of, say, what is just and what someone said or thought at a particular time or place—incomprehensible, somewhat like mixing 'pi, green, and the Civil War?'"). This objection seems overstated. As Berman and Toh point out, many concepts blend the factual and normative—a "weed" has a certain "biological makeup" (fact) and it is "undesirable in gardens" (norm). Berman & Toh, *supra* note 165, at 1767. It's not even very difficult to comprehend a blend of pi, green, and the Civil War—"[i]magine a Civil War monument that consists of a sculpture in the middle of a circular green field." Berman & Toh, *supra* note 165, at 1768.

166. Berman & Toh, *supra* note 165, at 1739.

167. *Id.* at 1750.

168. *Id.* at 1751.

169. Balkin, *supra* note 51; Berman & Toh, *supra* note 165, at 1751.

170. Balkin, *supra* note 51.

171. *Id.*

172. *Id.*

173. JACK M. BALKIN, LIVING ORIGINALISM 14 (2011).

174. *Id.*

175. *See* U.S. CONST. art. II, §1, cl. 5.

176. *See* U.S. CONST. amend. 14, §1.

Balkin does specify that the anti-caste principle is a constitutional construction—an "aid[] or heuristic[] that help[s] explain or flesh out the textual commitment[,]" not part of the Constitution's original meaning.[177] Still, he talks about some principles—the "key structural principles underlying" specific provisions"—as if they are part of the Constitution.[178] Balkin describes them as "the actual requirements of the constitutional framework" and claims that they "give us a perspective outside of doctrine that we can use to evaluate it."[179]

Mitch Berman's constitutional ontology is unambiguously plural. Writing with Kevin Toh, he refers interchangeably to "[t]he Constitution *or* the constitutional law,"[180] and defends the coherence of the position that the Constitution "consists of multiple kinds of facts or considerations, including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence."[181] In separate work, he elaborates an account of our constitutional law termed "principled positivism."[182] According to principled positivism, "social facts" consisting of "mental states, speech-acts, and behaviors of persons who make up the constitutional community" determine the content of "constitutional principles,"[183] including the principles of following text, case law, history, popular sovereignty, and other principles that might be implicated by a particular controversy.[184] The interaction of those principles in turn generate "constitutional rules," such as the rule that Congress cannot require state executive or administrative agents to enforce or help to administer federal programs.[185] The Constitution is thus contingently and partially text—or, as Berman might put it, the Constitution's text is rendered legally significant by one set of socially determined constitutional principles that is currently operative in our constitutional law.[186]

177. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 493 (2007).

178. *Id.* at 143.

179. *Id.* at 143, 233.

180. Berman & Toh, *supra* note 165, at 1744 (emphasis added).

181. *Id.* at 1751.

182. *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2017).

183. *Id.* at 1326.

184. *See id.* at 1386-90 (identifying ten clusters of candidate constitutional principles, some weightier than others.).

185. *Id.* at 1331, 1395-96.

186. *Id.* at 1385.

2. Document and Doctrine

Akhil Amar argues that we have a partially written and partially unwritten Constitution.[187] The former is the Document; the latter takes shape through "the actual practice of American government—in particular, the practice of Article III judges."[188] He claims that the federal judiciary acts "as a kind of continuous constitutional convention."[189]

The doctrine formulated by the Supreme Court is only part of Amar's unwritten Constitution.[190] The latter also includes other "texts that bear on constitutional questions, adjoin the written Constitution in some sense, and occupy a special niche in American constitutional discourse[,]" including the Declaration of Independence, *The Federalist*, and Dr. Martin Luther King, Jr.'s "I Have a Dream Speech."[191] It includes politically entrenched statutory guarantees.[192] So, too, does it include constitutional contestation by members of influential social movements.[193] From these practices, precedents, and developments, Amar infers principles, rules, and values that operate to fill the gaps in the document.[194]

As Balkin insists that principles cannot be invoked to override text, Amar maintains that doctrine cannot trump Document.[195] He insists that the unwritten Constitution "supplements but does not supplant" the written Constitution.[196] But he describes it "roughly on par or somehow akin to the canonical text[,]" and labels it with a capital C, suggesting that both Document and doctrine are parts of a constitutional whole.[197]

We have seen that David Strauss's conventionalism relies upon a contemporary-public-meaning-based account of the Constitution's text.[198] There is more to Strauss's constitutional ontology: text is at most only part of the Constitution, and under certain circumstances, it may be "cancelled out" in constitutional practice through a common-law process.[199]

Take the text of the First Amendment. Strauss acknowledges that the "First Amendment . . . singles out Congress" and states that "[i]f we focus

187. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY xi (2012).
188. *Id.* at 231.
189. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).
190. AMAR, *supra* note 187, at 247.
191. *Id.*
192. *Id.* at 410.
193. *Id.* at 248.
194. *Id.*
195. AMAR, *supra* note 187, at 273.
196. *Id.*
197. *Id.* at 479.
198. *See generally* Strauss, *supra* note 143, at 907, 912.
199. *See generally Mean What It Says?, supra* note 153, at 41.

just on the text, the case for protecting free speech against government infringement generally is actually somewhat weak."[200] Because, however, "nontextual constitutional principles have been developed over time by judicial and nonjudicial precedents" it seems downright odd to suggest that the First Amendment might allow the President to violate someone's First Amendment rights.[201] Strauss finds that constitutional text is often overridden by practice—he identifies Establishment Clause,[202] Fourth Amendment,[203] Equal Protection,[204] and Due Process jurisprudence[205] as areas of law that are "inconsistent with the text."[206]

For Strauss, it is *good* that constitutional common law sometimes "sweeps aside the text" when common-law principles so require.[207] Strauss does sometimes refer to the Constitution as a "document,"[208] but in his view, constitutional law both is and ought to be a mixed system of "text and common law."[209] That mixed system, he argues, accommodates essential institutional interests in sovereignty, adaptation, and settlement.[210]

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We cannot exclude any of these constitutional candidates from consideration on the ground that a promise to follow them would commit the President to what we regard as a normatively unattractive entity.[211] Nor can we exclude any of them on the ground that they do not cohere with our best understanding of what a constitution is.[212] "The Constitution of the United States" might be normatively unattractive; it might not even *be* a constitution within the meaning that the best-informed contemporary political scientists and legal philosophers attach to the term "constitution."[213] But it would still be what it is, and before criticism, there must come understanding. Specifically, there must come understanding *of oaths*—their place in the Constitution, and their place in contemporary political culture.

200. DAVID A. STRAUSS, THE LIVING CONSTITUTION 56 (2010).
201. *Mean What It Says?*, *supra* note 153, at 34.
202. *Id.*
203. *Id.* at 36.
204. *Id.* at 41.
205. *Id.* at 43.
206. *Mean What It Says?*, *supra* note 153, at 4.
207. *Id.* at 22.
208. *Id.* at 14.
209. *Id.* at 13.
210. *Id.* at 13.
211. *Mean What It Says?*, *supra* note 153, at 15.
212. *Id.* at 17.
213. Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAPMAN L. REV. 269, 273 (2013).

E. ONTOLOGY AND OATHS

Both the Article VI Oath Clause, which requires that all public officials promise to "support this Constitution," and the Presidential Oath Clause, which requires a promise to "preserve, protect, and defend the Constitution of the United States," refer to *a* Constitution.[214] As of this writing, three substantial theories of oath-ontology have been offered.[215] One was discussed briefly above—Richard Re's contemporary-public-meaning ontology.[216] The other two theories endorse an original-content ontology.[217] All theories are based primarily on the Article VI Oath Clause; the Article II Oath is mentioned by all theorists, but it does not make any substantial contribution to their ontological claims.[218]

1. From Oaths to Original Linguistic Content

It is sometimes said that the Constitution does not—and perhaps could not—identify its own nature, much less prescribe any rules for its own interpretation.[219] There is no provision that specifies that:

> [t]his Constitution consists in the original intentions of the members of the Philadelphia Convention who drafted it in 1787 and all federal

214. U.S. CONST. art. 11 § 1, cl. 8.

215. This should not be taken to be an exhaustive summary of scholarship on constitutional oaths. Important contributions to the literature include, e.g., *see generally* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); STEPHEN MICHAEL SHEPPARD, I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS (2009); Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UKMC L. REV. 1 (2004); Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387 (2003); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L. J. 1 (2009); Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN. ST. L. REV. (2009). Accounts of what "the Constitution of the United States" *is*, however, are few and far between. *See, e.g.,* LEVINSON, *supra* note 215, at 36 (raising but not answering the question of "what counts as 'the Constitution'").

216. Re, *supra* note 141 at 299.

217. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 859 (2009) [hereinafter *Own Interpretation*].

218. STEPHEN MITCHELL SHEPPARD, *I DO SOLEMNLY SWEAR* 105 (2009); Blomquist, *supra* note 215, at 2.

219. *See, e.g.,* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 6 (2008) ("[N]othing in the visible text can tell us that what we are reading really *is* the Constitution, rather than an incomplete or otherwise inaccurate facsimile, or even a complete hoax."); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) ("[A] document cannot achieve the status of law, let alone supreme law, merely by its own assertion."); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 51 (1994) ("[I]t would be misleading even to suggest that something in the Constitution could tell us to what 'this Constitution' refers.").

> and state officials shall be bound to interpret this Constitution in accordance with those original intentions.

But perhaps appearances deceive. Michael Paulsen reads the Constitution's references to "this Constitution" to determine a constitutional ontology, from which interpretive obligations follow.[220] Paulsen's basic argument runs as follows:

> (1) In the text of the 1788 document, "This Constitution" always means the written document.[221]
>
> (2) Article VI, Clause 2 states that "this Constitution" is "supreme Law of the Land."[222]
>
> (3) All government officials are bound by oath to support "this Constitution" as "Supreme Law of the Land."[223]
>
> (4) The 1788 document was addressed to the ratifying public.[224]
>
> Therefore,
>
> (5) Government officials are bound to apply some form of public-meaning originalism.[225]

Paulsen acknowledges that writtenness does not seem at first to entail originalism of any kind.[226] "[W]hat if we, the people, *now* understand the meaning of the document's words differently than we once did?"[227] But he considers it inconsistent with Article V's amendment process to permit the evolution of language to change the meaning of the Constitution.[228] He points out that Article V twice refers to "this Constitution" and claims that "Article V makes clear that to change the content of the supreme law—to change whatever 'this Constitution' refers to involves changing the words of the text."[229] He further claims that "[b]y implication, the meaning of 'this

220. *Own Interpretation*, *supra* note 217.
221. *Id.* at 866.
222. *Id.*
223. *Id.* at 868.
224. *Id.* at 875.
225. *Own Interpretation*, *supra* note 217, at 875.
226. *Id.* at 882.
227. *Id.* at 875.
228. *Id.* at 876.
229. *Id.*

Constitution' cannot change otherwise."[230] Accordingly, he concludes "this Constitution" *must be* the original public meaning of the 1788 document.[231]

Christopher Green finds unpersuasive Paulsen's reliance on the term "this" to establish that the Constitution refers to a textual entity with fixed meaning.[232] He observes that the Document elsewhere uses "this" to refer to nontextual entities that can be altered without changing anything essential to their identity.[233] For example, under Article IV, Section 3, "[n]ew States may be admitted by the Congress into this Union."[234] "This Union" retains its this-ness, even if it is altered.[235] Accordingly, "this Constitution" might be susceptible to change through judicial doctrine, institutional practices, or other means without ceasing to be what it essentially is.[236]

Green therefore canvasses similar language in state constitutions and other indexical language[237]—not only "this," but "here" and "now"— in the text of the 1788 document. He ultimately concludes that "this Constitution" is indeed a text. His evidence includes:

- State constitutions that refer to "this," "the preceding," and "the following" constitution, clearly referring to a text.[238]

- The Preamble to the federal Constitution, which distinguishes between "We the People" and "our posterity" and identifies the former as those who "ordain and establish this Constitution"—thus implying that the meaning which the former attach to the Constitution's text should be assigned priority.[239]

- Article I, Section 9's reference to "[t]he Migration or Importation of such Persons as any of the States *now existing*[,]" which suggests that the text ought to be read as if the time is "now" 1788.[240]

- Language in subsequent amendments that situate the amendments at the time of ratification—for instance, the Eighteenth

230. *Own Interpretation*, *supra* note 217, at 876.
231. *Id.* at 918.
232. Christopher R. Green, "*This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1642 (2009) [hereinafter *This Constitution*].
233. *Id.*
234. U.S. CONST. art IV, § 3, cl. 1.
235. *This Constitution*, *supra* note 232, at 1642.
236. Bell, *supra* note 213, at 283.
237. An indexical is a linguistic expression whose reference—the thing or things in the world it picks out—can shift from context to context. Paradigmatic examples include 'those,' 'me', 'you', 'that', 'he', 'later', and 'last week.' David Braun, *Indexicals*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (January 16, 2015), https://plato.stanford.edu/entries/indexicals/.
238. *This* Constitution, *supra* note 232, at 1658-61.
239. *Id.* at 1658.
240. *Id.* at 1662.

> Amendment's provision that it "shall be inoperative" unless it is ratified "within seven years from the date of the submission hereof to the States by Congress."[241]

It might be argued that we cannot just accept what the Document tells us that the Constitution is without presuming in favor of one side of the ontological debate—namely, the textual side. But there is more than text to support an original-content-based constitutional ontology.[242] There is also the Philadelphia Convention's resolution submitting the Document to Congress.[243] The resolution begins: "That the preceding Constitution be laid before the United States in Congress assembled."[244] It goes on to state that "as soon as the Conventions of nine States shall have ratified this Constitution," Congress should fix a day on which states should appoint electors to vote for the President; a day on which the electors should assemble to vote for the President; and "the time and place for commencing Proceedings under this Constitution."[245] After the President is chosen, he is, together with Congress, to "without Delay, proceed to execute this Constitution."[246] The "preceding Constitution" could not *but be* set forth in the Document to which the resolution was attached, and it would be absurd to read the other references to "this Constitution" as indicating some other thing.[247]

Ratification statements by the states evince the same ontology in this representative sample:

> • "Whereas the General Convention which met in Philadelphia, in pursuance of a recommendation of Congress, did recommend to the citizens of the United States a Constitution or form of government in the following words, namely," [there followed a recitation of the Document][248]
>
> • "We the Delegates of the People of the State of Rhode-Island . . . having maturely considered the Constitution of the United States of America, agreed to on the seventeenth day of September, in the year one thousand seven hundred and eighty seven, by the Convention the

241. U.S. CONST. amend. XVIII, §3.
242. *See*, *e.g.*, *Own Interpretation*, *supra* note 217, at 876.
243. 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 501 (Roscoe R. Hill ed., 1936).
244. *See id.*
245. *Id.*
246. *Id.*
247. *This Constitution*, *supra* note 232, at 1649.
248. 22 THE STATE RECORDS OF NORTH CAROLINA 47 (Walker Clark ed., 1895-1905).

> assembled at Philadelphia, in the Commonwealth of Pennsylvania" (a Copy whereof precedes these presents).[249]
>
> • "We the said Delegates in the name and in behalf of the People of Virginia do by these presents assent to and ratify the Constitution recommended on the seventeenth day of September one thousand seven hundred and eighty seven by the Federal Convention for the Government of the United States hereby announcing to all those whom it may concern that the said Constitution is binding upon the said People according to an authentic Copy hereto annexed in the Words following."[250]

These are unambiguous references to a meaning-conveying text. The Constitution was agreed to on a particular date.[251] It consists of "words"—meaningful elements of language.[252] What would a "Copy" of a Constitution of original applications or intentions or other nonspatial entities even look like?

Of course, contemporary public officials might believe that they are bound by oath to "this Constitution" but understand "this Constitution" to consist in the contemporary public meaning of the text.[253] Green and I have explored this possibility.[254] We found little evidence to support it. Instead, we found that those who take the Article VI oath consistently state that officials throughout history have taken the same oath, to the same Constitution.[255]

It is true that different oath-takers disagree about the Constitution's properties—constitutional disagreement is ubiquitous in American constitutional practice.[256] But such disagreement presupposes a common object *about which* to disagree.[257] If I claim that my dog, Leo, is golden and you claim that he is brown, we do not disagree unless we are both talking about the same member of the canine species. So, too, with the Constitution; to disagree about whether the Second Amendment to the Constitution guarantees an individual right to bear arms requires an agreement that we are both talking about the same Constitution and the same Second

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249. *Ratification of the Constitution by the State of Rhode Island*, YALE L. SCH.: AVALON PROJECT (May 29, 1790), https://avalon.law.yale.edu/18th_century/ratri.asp.

250. *Ratification of the Constitution by the State of Virginia*, YALE L. SCH.: AVALON PROJECT (June 26, 1788), https://avalon.law.yale.edu/18th_century/ratva.asp.

251. U.S. CONST. art. 7.

252. *This Constitution*, *supra* note 232, at 1610.

253. Bernick & Green, *supra* note 163, at 4.

254. *Id.* at 1.

255. *See generally id.* at 9.

256. *Id.* at 6.

257. *Id.*

Amendment.[258] Green and I found that our constitutional culture describes these controversies *as* disagreements about a property of a common object.[259]

Green and I do not claim that officeholders are in virtue of longstanding, convergent oath-related discourse bound by oath to use *originalism* to decide whether to ban semiautomatic weapons, limit second-trimester abortions, or enact a wealth tax.[260] If the original content conveyed by the historically situated text permits its amendment outside of Article V, "this Constitution" has always been "living" and a non-textualist theory of interpretation might best equip officeholders to ascertain and implement the Constitution's content.[261] On the other hand, if Article V is the exclusive means of authorized constitutional change, a textualist theory might be preferable.

2. From Oaths to Contemporary Public Meaning

Richard Re does not dispute that "this Constitution" is "the historical document known by that name."[262] He asserts, however, that "[n]o document—no matter how old—can authoritatively dictate how it ought to be read."[263] And because he believes that "the content of any promise, depends in large part on the contemporaneous meaning of its terms," he regards the contemporary meaning of "the Constitution" as the most plausible object of an official's oath and thus the most plausible object of an official's oath-based moral obligation.[264]

Re's ontological and moral claims are contingent upon an empirical claim: People today take the Article VI oath to convey a promise to follow the contemporary public meaning of the Constitution at the time of the oath.[265] "Because the oath is a promise to the public, the relevant shared meaning is the public meaning."[266] Re recognizes that neither an oath-taking official nor most members of the public may grasp every feature of the contemporary-public-meaning Constitution but notes that "[a] promise can be both created and fulfilled without either party ever learning the promise's incorporated content."[267] As a novice chess player who makes a promise to

258. Bernick & Green, *supra* note 163, at 39.
259. *Id.* at 21.
260. *Id.* at 5.
261. *Id.* at 43.
262. Re, *supra* note 141 at 323.
263. *Id.* at 326.
264. *Id.* at 304. *Accord* Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," *in* HART'S POSTSCRIPT 1, 16-17 (Jules Coleman ed., 2001) ("The criteria that govern people's use of language are simply the criteria generally relied on in their language community for the use of those terms . . . . The correct criteria are those that people who think they understand the concept or term generally share . . . .").
265. Re, *supra* note 141 at 299.
266. *Id.* at 312.
267. *Id.* at 320, n.77.

follow the rules of chess is understood to bind himself to comply with even unknown rules, so, too, on Re's account should an official who makes a promise to follow the Constitution's contemporary public meaning be understood to bind himself to comply with as-yet-unknown-to-him constitutional rules that are presently in effect.[268] Re contends, however, that an official's promise carries more-than-usual moral weight because of the considerable power that is entrusted to him on the basis of his promise.[269]

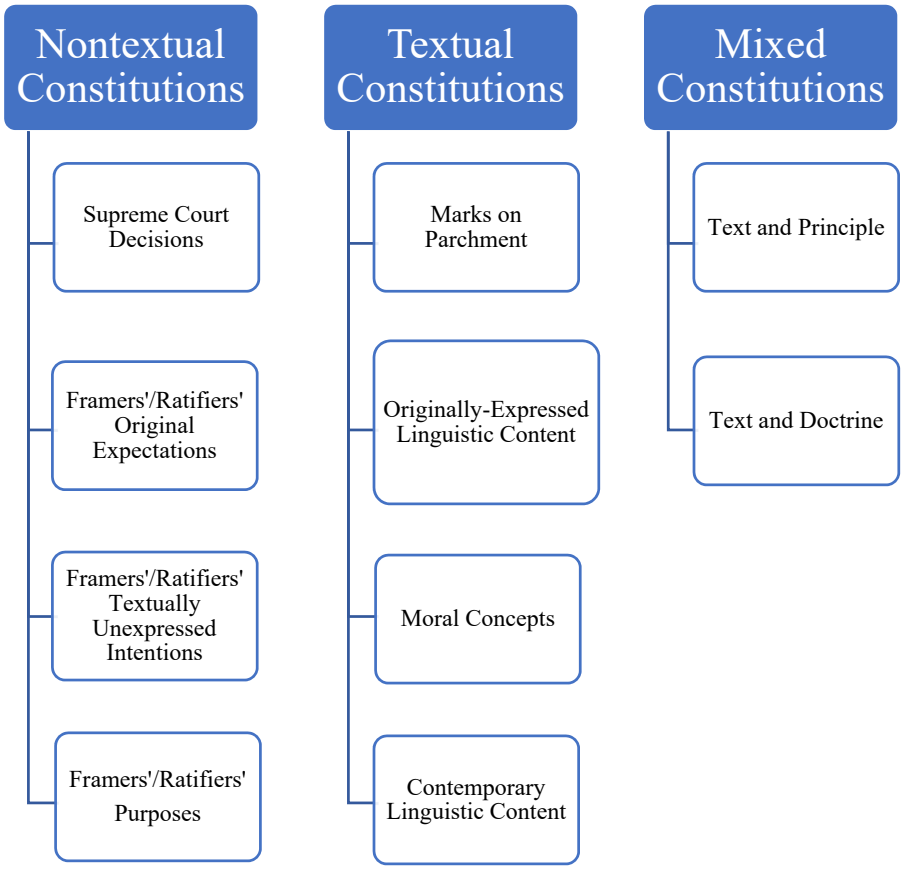
Following Re's reasoning, if people today *do not* take the Article VI oath to convey a commitment to follow the Constitution's contemporary public meaning, that meaning *cannot* be the object of the promise and any moral obligation to follow it would have to come from some other source.[270] Green and I have offered evidence that this is in fact the case.[271]

Perhaps, however, the oath taken by the President is understood differently. As Re points out, the Presidential Oath Clause contains different language than the Article VI Oath Clause—in particular, it refers to "the Constitution of the United States" rather than "this Constitution."[272] It is difficult to imagine why "this Constitution" would require the President to promise to follow a *different* object.[273] It is therefore unsurprising that no scholar has argued that the Document contains two constitutional ontologies. But the possibility should at least be considered.

II. "THE CONSTITUTION OF THE UNITED STATES" AS ORIGINAL LINGUISTIC CONTENT

To review, we have *ten* candidate ontologies for "the Constitution" that can be categorized under one of three headings.[274] I have organized them in a table below:

268. *Id.* at 304.
269. *Id.* at 312.
270. Re, *supra* note 141, at 304, 327.
271. *See* Bernick & Green, *supra* note 163, 40-41.
272. *Id.* at 7. It of course does not follow that the phrases refer to different objects. Two phrases with different semantic content that convey different meanings may nonetheless refer to the same object. "The evening star" refers to the same object as "the morning star." *See also* DAVID FOSTER WALLACE, INFINITE JEST 1018 (1996) (in a dystopian future, describing a heavily polluted area that is called the "Great Convexity" by Canadians because the area appears as a convex curve in America's border and the "Great Concavity" by Americans because it appears as a concave curve in Canada's border).
273. U.S. CONST. art. VI. § 1, cl. 3.
274. *See infra* Part II.



We can easily exclude from consideration the first of the nontextual ontologies. If "the Constitution" is *whatever* the Supreme Court says it is, it would follow that the Supreme Court could never err in its interpretation of the Constitution. One suspects that even the most casual Court-watcher would find this to be wildly counterintuitive and respond by identifying constitutional decisions that they believe to be clearly wrong. It would also follow that the Constitution did not authorize or forbid anything until the Court weighed in on the relevant subject. This is incoherent; how could the Constitution establish the Court in the first place if it had no content before the Court provided that content? And this ontology is also inconsistent with Founding-era constitutional discourse, which included heated debates over the meaning of "the freedom of speech" despite the absence of any major

Supreme Court decisions on the subject.[275] *Cooper*, notwithstanding a Court-constructed constitutional ontology, is inconsistent with the Court's own discourse.[276] We've seen that *Marbury* does not identify the Constitution with the Supreme Court's decisions.[277] And the Supreme Court speaks of overruled constitutional decisions as "wrong the day [they] w[ere] decided"—incoherently, if its decisions constitute the Constitution.[278] We should move on.

The first of the textual ontologies is also implausible.[279] A promise to follow a Constitution that is just a collection of marks on parchment would not bind one to follow anything in particular.[280] Only if the marks mean something—if they convey some content—can could the promise constrain the promisor.[281] Accordingly, we should dismiss this ontology as well.

Of the remaining candidate ontologies, several appear vulnerable in light of the ontology of the Article VI Oath.[282] But this Part will not presume the accuracy of any account of the presidential oath's ontology.[283] It will begin by exploring whether the text of the Constitution, as well as Founding-era discourse and institutional practice, support an ontological identity across oaths.[284] It will then explore the design function of the Presidential Oath Clause and seek to determine whether that function has ontological implications.[285] After concluding that the case for a particular ontology is robust, it will question whether presidential-oath-related practice might have altered that ontology in the public mind.[286]

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275. *See, e.g.,* J. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES, 136 (1956); Geoffrey R. Stone, *The Story of the Sedition Act of 1798: "The Reign of Witches,"* in FIRST AMENDMENT STORIES 17 (Richard W. Garnett & Andrew Koppelman eds., 2012); Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 110.

276. *Cooper*, 358 U.S. at 18.

277. Paulsen, *supra* note 40, at 2709.

278. *E.g.,* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2019) (describing Korematsu v. United States, 323 U.S. 214 (1944)); United States v. O'Brien, 560 U.S. 218, 237 (2010) (Stevens, J., concurring) (describing McMillan v. Pennsylvania, 477 U.S. 79 (1986)); Lawrence v. Texas, 539 US 558, 578 (2003) (describing Bowers v. Hardwick, 478 U.S. 186 (1986)); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 863 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (describing Plessy v. Ferguson, 163 U.S. 537 (1896)).

279. *See supra* Part II, Figure 1.

280. *See supra* Parts I.B.1, II, Figure 1.

281. *See supra* discussion Part I.B.1.

282. See *supra* Part II, Figure 1.

283. *See infra* Part II.

284. *See infra* Part II.A.

285. *See infra* Part II.B.1.

286. *See infra* Part II.C.

A. THE IDENTITY OF "THIS CONSTITUTION" AND "THE CONSTITUTION OF THE UNITED STATES"

The Presidential Oath Clause refers to "the Constitution of the United States" rather than to "[t]his Constitution."[287] But there are compelling reasons to believe that these phrases refer to the same entity.[288]

Start with the fact that Article VI's requirement that public officials promise to follow "this Constitution" has been implemented through a promise to follow "the Constitution of the United States" since 1789.[289] The first Oath Act of June 1, 1789 provided:

> [T]he oath or affirmation required by the sixth article of the Constitution of the United States, shall be administered in the form following, to wit: "I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.[290]

To interpret "the Constitution" to refer to something other than the content that was originally conveyed by a historically situated document, we would have to indulge the hypotheses that (1) several months after the ratification of "this Constitution," Congress required public officials to promise to follow some other entity; and (2) nobody noticed or objected.[291] It is conceivable that (1) and (2) are true—to posit that they are both true does not yield a contradiction—but it seems extraordinarily unlikely.

The identity of "this Constitution" with "the Constitution of the United States" is further reinforced by congressional action prior to the ratification of what we now call "the Bill of Rights."[292] When in 1789 Congress proposed to the state legislatures twelve new amendments to the Constitution, it referred to "Amendments to the Constitution of the United States, all or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution."[293] That "the Constitution of the United States" and "said Constitution" are the same Constitution is clear.[294] From "valid to all intents and purposes" on, the language of the proposal is almost identical to the language of Article V, save that Article V refers to "this Constitution."[295] There is no reason to doubt that

287. U.S. CONST. art. 2, § 1, cl. 8.
288. An Act to Regulate the Time and Manner of Administering Certain Oaths, ch. 1, 1 Stat. 1 (June 1, 1789).
289. *Id.*
290. *Id.*
291. *Compare id. with* U.S. CONST. pmbl., bill of rights.
292. *Id.*
293. U.S. CONST. pmbl., bill of rights.
294. *See id.*
295. U.S. CONST. pmbl., art. V.

"the Constitution of the United States"; "said Constitution"; and "this Constitution" are the *same* Constitution.[296]

The case for ontological identity across oaths is robust. But those who are not persuaded that the Article VI Oath has an original-content-based ontology should also not be persuaded by the above evidence that the Presidential Oath Clause shares that ontology.[297] The following Section will argue for the attribution of an original-content-based ontology to the Presidential Oath Clause without relying upon any ontological premise about the Article VI Oath—although it will draw upon Article-VI-Oath-related evidence.[298] It will do so by situating the text of the Presidential Oath Clause in the context of centuries of oath-taking leading up to the Founding era and arguing that one ontology is most consistent with the function that the Clause was designed to fulfill.[299]

A word on the motivation for looking to the Clause's design function to identify its likely ontology: It is commonly accepted[300] by legal theorists that law is an artifact—a "human-made, non-natural entity[] . . . causally created by humans."[301] The question of what determines an artifact's identity remains a subject of debate.[302] But it is common ground that functions are important to the identity of artifacts that are deliberately constructed.[303] It follows that we may be able to glean insight into the ontology of the Presidential Oath Clause by exploring its design function.[304]

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296. *Id.*

297. U.S. CONST. pmbl. arts. II, §1, art VI.

298. *See infra* Part II.B.1.

299. *Id.*

300. LAW AS AN ARTIFACT 1 (Luka Burazin et. Al, eds, 2018) (reporting that "the idea that law is an artifact" is commonly accepted among legal theorists.).

301. *See* Luka Burazin, "Legal Systems as Abstract Institutional Artifacts," in *id.* at 112.

302. *See, e.g.,* Lynne Rudder Baker, *The Ontology of Artifacts*, 7 PHIL. EXPLORATIONS 99 (2004) (emphasizing functions); Randall Dipert, *Some Issues in the Theory of Artifacts: Defining 'Artifact' and Related Notions*, 78 MONIST 119 (1995) (emphasizing historical development); Risto Hilpinen, *Authors and Artifacts*, 93 PROC. ARISTOTELIAN SOC'Y 155 (1993) (emphasizing designer/creator intentions to instantiate a particular concept, having certain properties). Concerning deliberately designed artifacts, my sympathies are functionalist. *See* Baker, *supra* note 302, at 6 ("What proper function an artifact has determines what the artifact most fundamentally is . . . And what proper function an artifact has is determined by the intentions of its designer and/or producer."). But not all human-made, non-natural entities causally created by humans *are* deliberately constructed—think of the norms of etiquette, prices, or the common law. *See* Brian Leiter, "Legal Positivism about the Artifact Law: A Retrospective Assessment," *in* LAW AS AN ARTIFACT, *supra* note 300, at 10.

303. Massamiliano Carrara & Daria Mingardo, *Artifact Categorization: Trends and Problems*, 4 REV. PHIL. & PSYCH. 351-52 (2013). Of course, an artifact's function can change over time. *See* DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA 465 (1995) (warning against "the mistake of inferring current function or meaning from ancestral function or meaning."). We will return to the question of whether the Presidential Oath can perform its original function today.

304. Textualists who are skeptical of whether group intentions/purposes/goals are ontologically real things in the material world need not get off board at this point. The attribution of intentions/purposes/goals to groups, just as to individuals, pervades law, the social sciences, and social life in general. Even textualists who have qualms about the ontology group intentions/purposes/goals deploy

B. THE CONSTITUTIONAL ONTOLOGY OF THE PRESIDENTIAL OATH CLAUSE

1. The Archeology of the Oath

Generations of scholars have traced the institution of oath-taking to a magico-religious past and argued that oaths have from the beginning been informed by supernatural premises.[305] Utah Senator Mitt Romney's explanation for his vote to convict President Trump shows that supernatural premises still structure public officials' understandings of their oath-based obligations:

> [M]y promise before God to apply impartial justice required that I put my personal feelings and political biases aside. Were I to ignore the evidence that has been presented, and disregard what I believe my oath and the Constitution demands of me for the sake of a partisan end, it would, I fear, expose my character to history's rebuke and the censure of my own conscience.[306]

As Giorgio Agamben has shown, however, the oath-as-institution has not always *depended* upon magic or threats of divine punishment and reward.[307] Take Roman juridical culture. In *De Officiis,* Cicero outright dismissed the possibility that oaths derived significance from the "fear [of] the wrath of

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canons of construction that make little sense except on assumptions of group agency. *See* Nelson, *supra* notes 76-77; sources cited *supra* note 87. In my view, group agency is no less real than voices and centers of gravity—other "real patterns" that may not themselves be identifiable with any discrete set of material entities but which help us interpret and predict material phenomena. *See* Daniel C. Dennett, *Real Patterns*, 88 JOURNAL OF PHILOSOPHY 27, 29 (1991) (coining "real patterns" and defending the reality of abstract objects that give us "enormous predictive leverage"). If one wants to consider it merely a useful fiction, however, that is fine for present purposes. For a fictionalist defense of recourse to legislative intention, see Ryan Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979 (2017).

305. *See, e.g.,* JAMES ENDELL TYLER, OATHS: THEIR ORIGIN, NATURE, AND HISTORY 95-96 (1834) (tracing the oath back to the Hebrew scriptures); 5 THE OXFORD ENCYCLOPEDIA OF ANCIENT GREECE AND ROME 83 (Michael Gagarin & Elaine Fantham, eds., 2010) ("An oath is, in effect, a conditional self-curse . . ."); Frederick B. Johannsen, *Kiss the Book You're President: So Help Me God and Kissing the Book in the Presidential Oath of Office*, 20 WM. & MARY BILL RTS. J. 853, 899 (2012) ("The oath is an artifact from a pre-religious animistic past . . . When human culture developed belief in supernatural or divine beings, the oath . . . relied on the gods to exact vengeance for perjury or faithlessness to the oath"); Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 51 AM. L. REG. 374-75 (1903) (claiming that "all we know concerning the origin of 'oaths'" tells us that they were from the beginning "taken in the name of the being which, as he thought, inspired the most awe in the breast of the swearer", namely, "some god or supernatural being"); Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1330 (1958) (tracing the courtroom oath "to a pre-religious, indeed, pre-animistic period of culture" and stating that the oath served as a "curse" that was thought to "kill as effectively as physical force").

306. *See Full text: Mitt Romney's remarks on impeachment vote*, POLITICO (Feb. 5, 2010, 2:25 PM E.T.), https://www.politico.com/news/2020/02/05/mitt-romney-impeachment-vote-speech-transcript-110849.

307. *See* GIORGIO AGAMBEN, THE SACRAMENT OF LANGUAGE: THE ARCHEOLOGY OF THE OATH 23 (2011).

Jove" because "all the philosophers say that the gods do not become angry at or harm men."[308] Oaths were instead obligatory as matters of "justice and good faith."[309] Cicero wrote: "Whoever, therefore, violates his oath violates trust."[310]

Agamben explained that "trust," *fides*, was in Roman culture a critically important social norm that "regulate[d] relations among men as much as those between peoples and cities."[311] Those to whom one could not comfortably give any power over oneself—paradigmatically, pirates, "common foe[s] of all"—were owed no oath-based obligations.[312] Within this culture, the obligation of the oath was a function of the importance of correspondence between language and actions to the public good.[313] The gods guaranteed the correspondence, but it was not for *their* sake that oaths were taken.[314]

Further, even though divine reward and punishment can motivate oath compliance, that fact tells us little about what oaths are *for*.[315] Promises of divine reward and threats of divine punishment can be used to inspire people to take any number of actions, for the sake of any number of ends deemed valuable by oath-imposers.[316] From the earliest available sources on, we find a consistent account of the function of the oath: Assuring other human beings that one's words will match one's future deeds.[317]

In the first century C.E., Philo of Alexandria wrote that "men have recourse to oaths to win belief, when others deem them untrustworthy."[318] More than a millennium-and-a-half later, German jurist Samuel Pufendorf began his discussion of the oath within European law thus:

> We proceed to examine and state the nature of an oath, which is judged to add great strength and confirmation to our discourse and to all our acts which have any dependence upon speech . . . the custom of swearing is used for the establishment and security not only of covenants, but of language itself.[319]

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308. CICERO, III DE OFFICIIS 102 (Walter Miller trans., 1913).
309. *Id.* at 104.
310. *Id.* at 105.
311. AGAMBEN, *supra* note 307, at 23.
312. *Id.;* CICERO, *supra* note 308, at 107.
313. CICERO, *supra* note 308, at 101-02.
314. *Id.* at 102.
315. *Id.* at 36.
316. *Id.* at 100, 102.
317. *See* PHILO OF ALEXANDRIA, THE SACRIFICES OF CAIN AND ABEL 93.
318. Lasha Matiashvili, *Non-Apophantic Logos as Model Ontology*, 1 EUROPEAN SCI. J. 259, 265 (spec. ed. 2016) (quoting PHILO OF ALEXANDRIA, THE SACRIFICES OF CAIN AND ABEL 93).
319. GIORGIA AGAMBEN, THE OMNIBUS HOMO SACER 304 (2017) (quoting SAMUEL PUFENDORF, THE LAWS OF NATURE AND OF NATIONS 326).

Skepticism about whether oaths are *effective* in guaranteeing to others the correspondence between word and future deed is almost as ancient as are oaths.[320] We learn from Homer that Autolykos, Odysseus's grandfather on his mother's side, excelled at the "art of the oath"—that is, perjury.[321] In Plato's *Laws*, the Athenian Stranger argues for the abolition of oaths sworn by each side in lawsuits because "[f]or truly it is a horrible thing to know full well that, inasmuch as lawsuits are frequent in a State, well-nigh half the citizens are perjurers."[322] According to oath-critic Jeremy Bentham, perjury was so common in nineteenth-century England that a demonstration of the oath's inefficiency "when employed by itself, and without either punishment or shame for its support . . . would, for the completion of it, require more room than c[ould] here be spared."[323]

During the sixteenth and seventeenth centuries, an influential theory of promissory obligation propounded by leading Jesuits undermined the efficacy of the oath in assuring others of word-deed correspondence.[324] This theory, which held that the object of an oath was the "animus jurantis," or the mind of the one swearing, enabled a swearer to issue mental reservations that changed the object of his promise.[325] In effect, a promisor could oblige himself to follow, not what his words would have been taken to have meant by a person who heard him, but what he secretly thought when saying them.[326]

The subjective theory was dealt fatal political and intellectual blows in the early-to-mid seventeenth century, first by association with Guy Fawkes's 1605 Gunpowder Plot—which led to the execution of subjective-object-theory proponent (and Superior of the Jesuits in England) Henry Garnett[327]—and then by Blaise Pascal's devastating 1656 attack on the Jesuits in his *Provincial Letters*.[328] It was replaced with an objective theory that, consistent

320. *See* HOMER, THE ODYSSEY 394-95.

321. *Id.*

322. PLATO, 12 THE LAWS § 948d (R.G. Bury trans. 1967).

323. JEREMY BENTHAM, "SWEAR NOT AT ALL": CONTAINING AN EXPOSURE OF THE NEEDLESSNESS AND MISCHIEVIOUSNESS, AS WELL AS ANTICHRISTIANITY OF THE CEREMONY OF THE OATH 11 (1817).

324. HENRY HALLAM, INTRODUCTION TO THE LITERATURE OF EUROPE: IN THE FIFTEENTH, SIXTEENTH, AND SEVENTEENTH CENTURIES 121-22 (1868).

325. Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. OF INT. & COMP. LAW 307, 316 (1996).

326. *Id.*

327. *See* Mark Nicholls, *Strategy and Motivation in the Gunpowder Plot*, 50 HIST. J. 787, 798-99, 802 (2007).

328. *See* BLAISE PASCAL, PROVINCIAL LETTERS xii (George Pearce trans.) (1850). On the influence of Pascal, *see* PERET ZAGORIN, WAYS OF LYING 155 (1990) (describing Pascal's "enduring success in convincing the world").

with the historic function of the oath of providing security to others, stressed the "animus imponentis," or the mind of the one imposing the oath.[329]

Different kinds of oaths were used to guarantee correspondence between different kinds of words and deeds.[330] The most salient distinction emerged between assertory oaths, which confirmed future assertions of fact about the present or past, and promissory oaths, which confirmed future courses of action.[331] A witness to a murder who swears to tell the truth prior to testifying takes an assertory oath; a doctor who swears that he will do no harm in the course of his medical practice takes a promissory oath.[332] An oath by a prospective public official to conduct themselves in a particular way upon entering their office falls into the second category.[333]

Promissory oaths were critical to feudal relations. A feudal superior—a king, lord, knight, abbot, or other landowner—promised protection to a feudal inferior in return for the latter's loyalty, military service, and economic product.[334] Following the Norman Conquest in 1066, William the Conqueror and his successors introduced the promissory oath into English public life.[335] At their investitures, they took a coronation oath, consisting in a "threefold promise to preserve the peace and protect the church, to maintain good laws and abolish bad, [and] to dispense justice to all."[336] The earliest records we have of oaths sworn by those in the English king's service are dated 1257.[337] The earliest legislative prescriptions of oath of office were enacted in 1346, during the reign of Edward III.[338] Eventually, the bonds of feudal fealty were frayed, but the promissory oath survived, thanks in large part to Henry VIII's infamous marital problems.[339]

When Pope Clement VII hesitated to annul Henry's marriage to Catherine of Aragon, Henry persuaded Parliament in 1534 to enact the Act of Supremacy and thereby establish Henry as the supreme head of the Church

329. *See, e.g.*, WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 116 (Liberty Fund, Inc. 2002) ("As oaths are designed for the security of the imposer, it is manifest that they must be *interpreted* and performed in the sense in which the imposer intends them; otherwise, they afford no security to *him*. And this is the meaning of the rule, 'jurare in animum imponentis'. . .").

330. *Id.* at 111.

331. MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH 117 (1993).

332. *See id.*

333. *Id.*

334. *See* FRANCOIS LOUIS GANSHOF, FEUDALISM 46-50 (1964).

335. Graham McBain, *Modernising the Law on Oaths & Affirmations*, 9 INT'L L. RES. 1, 6 (2020).

336. H.G. Richardson, *The English Coronation Oath*, 23 TRANSACTIONS ROYAL HIST. SOC'Y 129 (1941).

337. Enid Campbell, *Oaths and Affirmations of Public Office Under English Law: An Historical Retrospect*, 21 J. LEGAL HIST. 1, 3 (2000).

338. *Id.* at 5.

339. *Id.* at 7.

of England.[340] Besides enabling him to retroactively confirm the annulment of his marriage to Catherine and ratify his (second) marriage to Anne Boleyn, the Act required the King's subjects to acknowledge him as not only the head of state but the head of an independent Church.[341] Subsequent Parliamentary enactments imposed a series of oaths that were designed to secure acknowledgment of the King's spiritual and temporal supremacy.[342] In 1536 Parliament passed the last of these oath-requirements—a requirement "by which all in the King's service acknowledge his spiritual and temporal supremacy and renounce the jurisdiction within the King's realm of all prelates of the Church of Rome."[343] The last of these oath-requirements served as a template for future parliamentary enactments that conditioned public office upon acknowledgment of the current monarch's supremacy and repudiation of other religious authorities.[344]

For centuries leading up to the Founding era, the British government required promissory oaths of its subjects.[345] The precise content of those oaths was a multifactorial determined by who presently occupied the throne, whether the Crown or Parliament currently had the upper hand in a power struggle, and which religious denominations were ascendant at the time.[346] The result: Conflicting oaths, swearing under duress, a steady stream of theological and moral commentary on how to resolve dilemmas of conscience, and cynicism about the practice of oath-taking in general.[347] Despite periodic calls for reform, oaths that effectively excluded Roman Catholics from public office endured into the early nineteenth century.[348] They were entrenched in the common law—those who would not swear an oath because of religious objections were not allowed to testify in court and could be fined.[349] They were pervasive in English public life—Blackstone in his *Commentaries* catalogued and defended restrictive laws that effectively

340. Hans J. Hillebrand, *Acts of Supremacy*, OXFORD REFERENCE: OXFORD ENCYCLOPEDIA OF THE REFORMATION (2005), https://www.oxfordreference.com/view/10.1093/acref/9780195064933.001.0001/acref-9780195064933-e-0006.

341. *Id.*

342. *Id.*

343. Campbell, *supra* note 337, at 6.

344. *Id.* at 7.

345. *Id.* at 7, 9-10.

346. *Id.* at 7, 9-10, 13-14.

347. *See* Lewis D. Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEGAL HIST. 97, 102 (1969); Campbell, *supra* note 337, at 16, 18, 21.

348. Specifically, until The Catholic Relief Act of 1829, 10 Geo. 4 c. 7, which repealed all existing statutes (other than those pertaining to the monarch) that required declarations against transubstantiation. Campbell, *supra* note 337, at 20.

349. Milhizer, *supra* note 215, at 26-28. *See also* Benjamin P. Moore, *The Passing of the Oath*, 37 AM. L. REV. 554, 556 (1903) ("In England, especially [oaths] were greatly multiplied, and perjury became frightfully common . . . . The fact is that many of them were obsolete, and . . . violated . . . almost as soon as taken.").

excluded non-Anglicans from many public offices.[350] And oaths played a role in structuring the American Revolution.[351]

Americans enforced boycotts of British goods with oaths, and enforced the oaths with social, economic, and physical punishment.[352] The Continental Congress required all officers of the national government to "renounce, refuse and abjure any allegiance or obedience to [George III] and to swear "to the utmost of my power, [to] support, maintain, and defend" the United States.[353] By 1778, every state had created a loyalty oath for all its residents to swear.[354] Shortly after the Declaration of Independence, then-General Washington called for civilian loyalty oaths, arguing that "[a]n oath is the only substitute that can be adopted to supply the defect of principle";[355] after the Revolution, Thomas Jefferson supported loyalty oaths as a means of controlling Tories, whom he described as "traitor[s] in thought, but not in deed."[356]

We can infer from the widespread use of oaths during the Founding era that oaths were believed to be in some sense effective.[357] But their limitations were widely acknowledged as well, as was their tendency to produce "oath martyrs" who refused to commit themselves to a course of action that was incompatible with their most deeply held convictions.[358] Indeed, Americans who fought and died in the Revolutionary War were in some sense oath-martyrs—among the grounds for the Continental Congress's May 15, 1776 resolutions advising the colonies to establish their own constitutions was that it "appear[ed] absolutely irreconcilable to reason and good conscience for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the Crown of Great Britain."[359] When

350. John Mikhail, *Emoluments and President Trump*, 53 VAL. U. L. REV. 631, 677 (2019) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF England (1760)) (stating that the king was "bound . . . to protect the established church; and, if this can be better effected by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do").

351. HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 61 (1960).

352. *Id.* at 62.

353. *Id.* at 82-83.

354. *See* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 53 (2008); HYMAN, *supra* note 351, at 83.

355. GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES: WITH NOTICES OF ITS PRINCIPAL FRAMERS 109 (1854).

356. FELDMAN, *supra* note 354.

357. *See* U.S. CONST. art. VI, art. VII.

358. *See generally* Virgil Wiebe, *Oath Martyrs*, 2 BRIT. J. AM. LEG 205, 205, 208, 221 (2013) (recounting the history of conscientious refusals to take oaths, with a special focus on the Anglo-American tradition).

359. BEN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1329 (1878).

Americans framed their own constitutions, they did so with the oath's strengths, weaknesses, and blood-drenched history in mind.[360]

2. Oaths at the Founding

Almost every one of the original state constitutions contained oath requirements for public office.[361] The relevant provisions of each of these constitutions are set forth below:

Maryland:

> That every person, appointed to any office of profit or trust, shall, before he enters on the execution thereof, take the following oath; to wit : "I, A. B., do swear, that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful, and bear true allegiance to the State of Maryland;" and shall also subscribe a declaration of his belief in the Christian religion.[362]

Delaware:

> Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit:
>
> "I, A B. will bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wittingly whereby the freedom thereof may be prejudiced."
>
> And also make and subscribe the following declaration, to wit:
>
> "I, A B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament

360. *See* U.S. House of Representatives: History, Art & Archives, *Oath of Office: The Form of the Oath*, https://history.house.gov/Institution/Origins-Development/Oath-of-Office/ (last visited Oct. 11, 2020).

361. *See* discussion *infra* Part II.B.2; DEL. CONST. art. 22, YALE L. SCH.: AVALON PROJECT (1776), https://avalon.law.yale.edu/18th_century/de02.asp; MD. CONST. art. LV, YALE L. SCH.: AVALON PROJECT (1776), https://avalon.law.yale.edu/17th_century/ma02.asp; N.C. CONST. XII, YALE L. SCH.: AVALON PROJECT (1776), https://avalon.law.yale.edu/18th_century/nc07.asp PA. CONST. § 10, YALE L. SCH.: AVALON PROJECT (1776), https://avalon.law.yale.edu/18th_century/pa08.asp; PA CONST. § 14, YALE L. SCH.: AVALON PROJECT (1776), https://avalon.law.yale.edu/18th_century/pa08.asp.

362. MD. CONST. art. LV.

to be given by divine inspiration." And all officers shall also take an oath of office.[363]

Pennsylvania:

Sec. 10. A quorum of the house of representatives shall consist of two-thirds of the whole number of members elected; and having met and chosen their speaker, shall each of them before they proceed to business take and subscribe, as well the oath or affirmation of fidelity and allegiance hereinafter directed, as the following oath or affirmation, viz:

I do swear (or affirm) that as a member of this assembly, I will not propose or assent to any bill, vote, or resolution, which stall appear to free injurious to the people; nor do or consent to any act or thing whatever, that shall have a tendency to lessen or abridge their rights and privileges, as declared in the constitution of this state; but will in all things conduct myself as a faithful honest representative and guardian of the people, according to the best of only judgment and abilities.

And each member, before he takes his seat, shall make and subscribe the following declaration, viz:

I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.

And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State.[364]

Sect. 40. Every officer, whether judicial, executive or military, in authority under this commonwealth, shall take the following oath or affirmation of allegiance, and general oath of office before he enters on the execution of his office.

I do swear (or affirm) that I will be true and faithful to the commonwealth of Pennsylvania: And that I will not directly or indirectly do any act or thing prejudicial or injurious to the constitution or government thereof, as established by the-convention.

363. DEL. CONST. art. 22.
364. PA. CONST. § 10.

I do swear (or affirm) that I will faithfully execute the office of [] and will do equal right and justice to all men, to the best of my judgment and abilities, according to law.[365]

North Carolina:

That every person, who shall be chosen a member of the Senate or House of Commons, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take an oath to the State; and all officers shall also take an oath of office.[366]

New Jersey:

That every person, who shall be elected as aforesaid to be a member of the Legislative Council, or House of Assembly, shall, previous to his taking his seat in Council or Assembly, take the following oath or affirmation, viz:

"I, A. B., do solemnly declare, that, as a member of the Legislative Council, [or Assembly, as the case may be,] of the Colony of New-Jersey, I will not assent to any law, vote or proceeding, which shall appear to me injurious to the public welfare of said Colony, nor that shall annul or repeal that part of the third section in the Charter of this Colony, which establishes, that the elections of members of the Legislative Council and Assembly shall be annual; nor that part of the twenty-second section in said Charter, respecting the trial by jury, nor that shall annul, repeal, or alter any part or parts of the eighteenth or nineteenth sections of the same."[367]

Georgia:

Art. XV. Any five of the representatives elected, as before directed, being met, shall have power to administer the following oath to each other; and they, or any other member, being so sworn, shall, in the house, administer the oath to all other members that attend, in order to qualify them to take their seats, viz:

"I, A B. do solemnly swear that I will bear true allegiance to the State of Georgia, and will truly perform the trusts reposed in me; and that

365. *Id.* § 40.
366. N.C. CONST. art. XII.
367. N.J. CONST. art. XXIII, YALE L. SCH.: AVALON PROJECT (1776), https://avalon.law.yale.edu/18th_century/nj15.asp.

> I will execute the same to the best of my knowledge, for the benefit of this State, and the support of the constitution thereof, and that I have obtained my election without fraud or bribe whatever; so help me God."[368]
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> Art. XXIV. The governor's oath:
>
> "I, A B, elected governor of the State of Georgia, by the representatives thereof, do solemnly promise and swear that I will, during the term of my appointment, to the best of my skill and judgment, execute the said office faithfully and conscientiously, according to law, without favor, affection, or partiality; that I will, to the utmost of my power, support, maintain, and defend the State of Georgia, and the constitution of the same; and use my utmost endeavors to protect the people thereof in the secure enjoyment of all their rights, franchises, and privileges; and that the laws and ordinances of the State be duly observed, and that law and justice in mercy be executed in all judgments. And I do further solemnly promise and swear that I will peaceably and quietly resign the government to which I have been elected at the period to which my continuance in the said office is limited by the constitution. And, lastly, I do solemnly swear that I have not accepted of the government whereunto I am elected contrary to the articles of this constitution; so help me God."[369]
>
> *New York:*
>
> "That every elector, before he is admitted to vote, shall, if required by the returning-officer or either of the inspectors, take an oath, or, if of the people called Quakers, an affirmation, of allegiance to the State."[370]

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368. GA. CONST. art. XV, YALE L. SCH.: AVALON PROJECT (1777), https://avalon.law.yale.edu/18th_century/ga02.asp.

369. *Id.* at art. XXIV.

370. N.Y. CONST. VIII, YALE L. SCH.: AVALON PROJECT (1777), https://avalon.law.yale.edu/18th_century/ny01.asp. New York also provided that the governor, before taking office, take an oath "in the presence of that Almighty and eternal" to "in all things, to the best of my knowledge and ability, faithfully perform the trust, so as aforesaid reposed in me, by executing the laws, and maintaining the peace, freedom, honour and independence of [New York], in conformity to the powers unto me delegated by the Constitution."). *Plan for Organizing the Government*, *in* 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNSEL OF SAFETY OF THE STATE OF NEW YORK, 1775-1776-1777 at 916-17 (1842). *See also An Act Requiring All Persons Holding Offices or Places Under the Government of this State, to Take the Oaths, Therein Described and Directed*, ch. 7, § 2 (Mar. 5, 1778), *in* LAWS OF THE STATE OF NEW YORK, COMMENCING WITH THE FIRST SESSION OF THE SENATE AND ASSEMBLY AFTER THE DECLARATION OF INDEPENDENCY 9 (1782) (requiring officials to

South Carolina:

That all persons who shall be chosen and appointed to any office or to any place of trust, civil or military, before entering upon the execution of office, shall take the following oath: "I, A. B., do acknowledge the State of South Carolina to be as free, sovereign, and independent State, and that the people thereof owe no allegiance or obedience to George the Third, King of Great Britain, and I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear [or affirm, as the case may be] that I will, to the utmost of my power, support, maintain, and defend the said State against the said King George the Third, and his heirs and successors, and his or their abettors, assistants, and adherents, and will serve the said State, in the office of , with fidelity and honor, and according to the best of my skill and understanding: So help me God."[371]

Massachusetts:

Article I. Any person chosen Governor, Lieutenant-Governor, Counsellor, Senator, or Representative, and accepting the trust, shall, before he proceed to execute the duties of his place or office, make and subscribe the following declaration, viz:

"I, A.B., do declare that I believe the Christian religion, and have a firm persuasion of its truth; and that I am seized and possessed, in my own right, of the property required by the constitution, as one qualification for the office or place to which I am elected."

And every person chosen to either of the places or offices aforesaid, as also any persons appointed or commissioned to any judicial, executive, military, or other office under the government, shall, before he enters on the discharge of the business of his place or office, take and subscribe the following declaration and oaths or affirmations, viz:

"I, A.B., do truly and sincerely acknowledge, profess, testify, and declare that the commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State, and I do swear

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swear to "faithfully perform the Trust reposed in me, as [office named,] by executing the Laws, and maintaining the Peace, Freedom and Independence of [New York], in conformity unto the Powers delegated unto me by the Constitution of [New York]. So help me God.").

371. S.C. CONST. XXXVI, YALE L. SCH.: AVALON PROJECT (1778), https://avalon.law.yale.edu/18th_century/sc02.asp.

> that I will bear true faith and allegiance to the said commonwealth, and that I will defend the same against traitorous conspiracies and all hostile attempts whatsoever; and that I do renounce and abjure all allegiance, subjection, and obedience to the King, Queen, or government of Great Britain, (as the case may be,) and every other foreign power whatsoever; and that no foreign prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, superiority, preeminence, authority, dispensing or other power, in any matter, civil, ecclesiastical, or spiritual, within this commonwealth; except the authority and power which is or may be vested by their constituents in the Congress of the United States; and I do further testify and declare that no man, or body of men, hath, or can have, any right to absolve or discharge me from the obligation of this oath, declaration, or affirmation; and that I do make this acknowledgment, profession, testimony, declaration, denial, renunciation, and abjuration heartily and truly, according to the common meaning and acceptation of the foregoing words, without any equivocation, mental evasion, or secret reservation whatsoever: So help me, GOD [sic]."
>
> "I, A.B., do solemnly swear and affirm that I will faithfully and impartially discharge and perform all the duties incumbent on me as [], according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of the commonwealth: So help me, God."
>
> Provided always, That when any person, chosen and appointed as aforesaid, shall be of the denomination of people called Quakers, and shall decline taking the said oaths, he shall make his affirmation in the foregoing form, and subscribe the same, omitting the words, "I do swear," "and abjure," "oath or," "and abjuration," in the first oath; and in the second oath, the words, "swear and," and in each of them the words, "So help me, God;" subjoining instead thereof, "This I do under the pains and penalties of perjury."[372]

These oaths share some common features.[373] Four of them expressly require a commitment to the Christian faith.[374] Three invoke God as a

372. MASS. CONST. pt. 2, ch. VI, U. CHI. PRESS (1778), http://press-pubs.uchicago.edu/founders/print_documents/v1ch1s6.html.

373. *See e.g.*, DEL. CONST. art. 22; GA. CONST. art. XV; MD. CONST. art. LV; MASS. CONST. pt. 2, ch. VI; N.J. CONST. XXIII; N.Y. CONST. VIII; N.C. CONST. XII; S.C. CONST. XXXVI.

374. *See* DEL. CONST. art. 22; MD. CONST. art. LV; N.C. CONST. XXXII; S.C. CONST. XXXVIII.

witness.[375] Four require a commitment to the state's constitution and laws.[376] Two compel oath-takers to reject the authority of Great Britain.[377] Six provide the option of an affirmation in place of an oath, and three of these specify the reason—the presence in the political community of people who are "conscientiously scrupulous of taking an oath", namely, Quakers.[378] Seven require that officeholders conduct themselves in a particular way—"faithfully," "impartially," "to the best of my ability," "to the best of my knowledge," "according to the best of my skill and understanding."[379] Five states prescribed a verbal formula for their oaths; but none of the verbal formula were identical.[380] Finally, Georgia, South Carolina, Massachusetts all require a promise to defend a particular *state*.[381]

Given the prevalence of oath requirements, it is unsurprising that the plan presented in May 1787 at the outset of the Philadelphia Convention by the Virginia Delegation included an oath resolution.[382] The resolution required "that the Legislative Executive & Judiciary powers within the several States . . . be bound by oath to support the articles of Union."[383] Elbridge Gerry moved successfully to amend the resolution so as to require that federal officials also support the national government.[384]

The resolution was somewhat controversial.[385] James Wilson questioned the efficacy of oaths.[386] He also worried that oaths would commit officers too strongly to the existing Constitution and discourage amendment.[387] Nathaniel Gorham conceded that oaths might be ineffective but dismissed the concern that they would discourage amendment, reasoning that a constitutional alteration of the Constitution would never be regarded as a breach of the Constitution and therefore would not inspire any oath-based

375. *See* GA. CONST. art. XV; MASS. CONST. pt. 2, ch. VI; S.C. CONST. XXXVI.

376. *See* DEL. CONST. art. 22; GA. CONST. art. XIV; MASS. CONST. pt. 2, ch. VI; N.Y. CONST. VIII.

377. *See* MASS. CONST. pt. 2, ch. VI; S.C. CONST. XXXVI.

378. *See* DEL. CONST. art. 22; GA. CONST. art. XIV; MD. CONST. art. XXXVI (mentions Quakers specifically); MASS. CONST. pt. 2, ch. VI (mentions Quakers specifically); N.J. CONST. XXIII; N.Y. CONST. VIII (mentions Quakers specifically); S.C. CONST. XXXVI.

379. *See generally* MD. CONST. art. (faithful); MASS. CONST. pt. 2, ch. VI (faithfully, impartially); GA. CONST. art. XV, art. XXIV (faithfully, to the best of my knowledge); N.Y. CONST. art. XIX, art. XXXIII (faithfully, impartially, to the best of my ability); S.C. CONST. art. XXXVI (according to the best of my skill and understanding).

380. *See generally* DEL. CONST. art. 22; GA. CONST. art. XV; MD. CONST. art. LV; MASS. CONST. pt. 2, ch. VI; N.J. CONST. XXIII; N.Y. CONST. VIII; S.C. CONST. XXXVI.

381. *See generally*, GA. CONST. art. XV; S.C. CONST. XXXVI; MASS. CONST. pt. 2, ch. VI.

382. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 122 (Max Farrand ed. 1911) [hereinafter FARRAND'S RECORDS].

383. James Madison, *Notes on the Constitutional Convention* (May 29, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 22 (Max Farrand ed. 1911).

384. FARRAND'S RECORDS, *supra* note 382, at 203.

385. *See Oath of Office*, *supra* note 360.

386. *Id.*

387. FARRAND'S RECORDS, *supra* note 382, at 86.

resistance.[388] Elbridge Gerry agreed with Gorham and observed as well that requiring state officials to take an oath to the federal Constitution would discourage those officials from giving preference to their states and thereby impeding the operation of the federal system.[389] The "ayes" had it, and the resolution passed.[390]

In late July, a Committee of Detail chaired by John Rutledge and including Edmund Randolph, Oliver Ellsworth, Wilson, and Gorham convened to draft a constitution on the basis of prior Convention votes and discussions.[391] The draft included a presidential oath of office: "Before he shall enter on the Duties of his Department, he shall take the following Oath or Affirmation, "I—solemnly swear, — or affirm, — that I will faithfully execute the Office of President of the United States of America."[392]

On the motion of James Madison and George Mason, the oath was amended to continue: "and will to the best of my judgment and power preserve, protect and defend the Constitution of the United States."[393] Wilson opined that the general official oath already agreed to made a separate oath unnecessary, but again, his position did not carry the day.[394]

In early September, a Committee of Style comprised of Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouverneur Morris issued a draft containing the following language:

> Before he enter on the execution of his office, he shall take the following oath or affirmation: "I—, do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my judgment and power, preserve, protect and defend the constitution of the United States."[395]

The language of the Presidential Oath Clause would be changed again, to replace "the best of my judgment and power" with "the best of my ability."[396] There are no records that speak to the reasons for the change.[397]

Andrew Kent, Ethan Leib, and Jed Shugerman have shown that "preserve, protect, and defend" does not have a clear antecedent that would

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388. Re, *supra* note 141, at 352.
389. FARRAND'S RECORDS, *supra* note 382, at 57, 203.
390. *Id.* at 194.
391. EDWARD JAYNE, OLIVER ELLSWORTH HIS CENTRAL ROLE IN THE ESTABLISHMENT OF FEDERAL SOVEREIGNTY 6 (2013).
392. William M. Meigs, *Growth of the Constitution*, *in* THE CONSTITUTION AND THE COURTS 209 (1924).
393. Blomquist, *supra* note 215, at 5-6.
394. *Id.* at 6.
395. *Id.*
396. *Id.*
397. *See generally, id.*

enable us to pin down why this language in particular was chosen.[398] Looking to the state constitutions canvassed above, however, we can draw upon this language to identify the Presidential Oath Clause's distinctive properties.[399]

The Presidential Oath Clause commits the President to preserving, protecting, and defending *the Constitution*, and *only* the Constitution.[400] Not all state constitutions required such commitments to their fundamental law.[401] Maryland, New Jersey, and North Carolina, among other states, committed officials to their respective states as entities.[402] Further, unlike oaths in some state constitutions, the Presidential Oath Clause does not require a promise to defend a government or state.[403] It is thus uniquely concerned with *constitutional* compliance and maintenance.[404] Indeed, it became more concerned with constitutional compliance over the course of the drafting process—we went from a promise of faithful execution of the presidential office to a promise of faithful execution *and* a promise of constitutional preservation, support, and defense.[405]

Keeping in mind the theoretical backdrop against which the Presidential Oath Clause took shape, we can also identify those whose interests the oath was designed to secure: Those who imposed the oath.[406] Founding-era Americans were aware of, and repudiated, mental reservationism in their oaths of allegiance to their states.[407] It is probable that they agreed with English polymath William Paley's 1785 summary of the received doctrine concerning oaths: "As oaths are designed for the security of the imposer, it is manifest that they must be interpreted and performed in the sense in which the imposer intends them; otherwise, they afford no security to him."[408]

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398. Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2140 (2019). Considered separately, the terms "preserve," "protect," and "defend" appear to have meant in 1788 roughly what they mean today. *See* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE D E F, P R E, P R O (1773) (defining "preserve" as "to save, keep") (defining "protect" as "to defend, to save, to shield") (defining "defend" as "[t]o stand in defence of; to protect; to support").

399. *See supra* Part II.B.2.

400. *See* Horwitz, *supra* note 11, at 1069.

401. *Compare* DEL. CONST. art. 22; GA. CONST. art. XIV; MASS. CONST. pt. 2, ch. VI; N.Y. CONST. VIII (all requiring an oath of commitment to the State's laws) *with* MD. CONST. art. XXXVI; N.J. CONST. art. XXIII; N.C. CONST. art. XII.

402. MD. CONST. art. LV; N.J. CONST. XXIII; N.Y. CONST. XXXI.

403. Horwitz, *supra* note 11, at 1069.

404. *Id.*

405. *Id.*

406. Blomquist, *supra* note 215, at 51.

407. *See, e.g.,* MASS. CONST. ch. 6, art. I ("I do make this acknowledgment, profession, testimony, declaration, denial, renunciation, and abjuration, heartily and truly, according to the common meaning and acceptation of the foregoing words, without any equivocation, mental evasion, or secret reservation whatsoever"); Alexander Hamilton, *Oath of Allegiance*, FOUNDERS ONLINE (1783), https://founders.archives.gov/documents/Hamilton/01-03-02-0297 ("I do solemnly, without any mental reservation or equivocation whatsoever . . . .").

408. PALEY, *supra* note 329, at 166.

Who were the "imposer[s]"? Paley did not say, but subsequent commentators identified as oath-imposers those lawmakers who were empowered to make an oath legally effective.[409] Anglican priest Charles Valentine Le Grice wrote that the "imposer" of the oath required of clergy to subscribe to the 39 Articles of Religion was the Parliament that in 1571 enacted the subscription oath into law.[410] English barrister Charles Thomas Lane wrote of the 1688 coronation oath that "[t]he Oath was imposed by the Legislature."[411] Significantly, he added that "the language employed by the Legislature is to be taken in the sense in which it was used, for otherwise the Law itself would be varying with the mutations of language."[412] He then asked, rhetorically:

> Would that be uniform of which the substance and essential qualities were susceptible of change? that which might be moulded to suit the views of expediency entertained by opposite parties as they successively attained power? Are we to be told that an uniformity of sound would satisfy the intention of the imposer?[413]

On this account, the oath fixes correspondence between *the original linguistic content of words* and future deeds.[414] By so doing it ensures that future swearers do not end up promising to do very different things because of background linguistic change.[415] And by so doing it protects the interests of particular lawmakers at a particular time, to include any interests those lawmakers have that future generations live under the same fundamental law.[416]

The imposers of the Article VI and Article II Oaths are the same: "We the People of the United States."[417] It is "We the People" who "ordain and establish this Constitution"; create the office of the President; and require would-be occupants of the office to make a particular twofold promise.[418] But who are "We the People"?

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409. *See The House of Commons*, 1 THE MONTHLY LAW MAGAZINE AND POLITICAL REVIEW 176 (1838).

410. CHARLES VALENTINE LE GRICE, ANALYSIS OF PALEY'S PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 16 (5th ed. 1807). Le Grice also referred to the "animus imponentis"—that is, the intention of the imposer. *Id.*

411. CHARLES THOMAS LANE, THE CORONATION OATH, CONSIDERED WITH REFERENCE TO THE PRINCIPLES OF THE REVOLUTION OF 1688, 10 (1828).

412. *Id.* at 11-12.

413. *Id.* at 13.

414. *Id.* at 11-12.

415. *See generally id.*

416. *See* Horwitz, *supra* note 11, at 1069.

417. U.S. CONST. pmbl.

418. *Id.* art. II.

"We the People" might be the people currently living under the Constitution at any given point in time.[419] If so, oaths would bind officials to the consensus popular understanding of the Document's terms at a given time.[420] Or "We the People" might be *just* the people who established the institution of constitutional oath-taking in 1788. On the former account, the original imposers have much less security against fundamental changes in what they take the Constitution to be—if language does not change overnight, it does change over the course of generations.[421] It was for this reason that James Madison rejected as absurd the notion that the Constitution ought to be given its contemporary public meaning:

> If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced to the code of law if all its ancient phraseology would be taken in its modern sense![422]

The case for an intergenerational imposer is weak.[423] The Document's Preamble distinguishes between "We the People" and "our posterity," which does not fit intergenerational authorship—as Green points out, the latter would already be included in "We the People" if the author was intergenerational.[424] Also within the Preamble, "We the People" "establish this Constitution."[425] The language of establishment turns up again in Article VII, which provides that "[t]he ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same."[426] Subsequent generations were not present at those ratifying conventions and thus could not have been responsible for the "establishment of this Constitution" within the meaning of Article VII. Thus if "We the People" are intergenerational, it follows that the Document

419. *See, e.g.,* BREYER, *supra* note 66, at 25 ("The words are not 'we the people of 1787.'"); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 18 (1965) ("In those words it is agreed, and with every passing moment it is reagreed, that the people of the United States shall be self-governed."); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1146 (1995) ("[T]he idea of an inter-general 'people' is well known to American constitutional thought. The Constitution seems to claim such a people as its author.").

420. *See* BREYER, *supra* note 66, at 25.

421. *This Constitution*, *supra* note 232, at 1627.

422. *Letter from James Madison to Henry Lee* (June 25, 1824), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 442 (1867).

423. *This Constitution*, *supra* note 232, at 1658.

424. *Id.*

425. U.S. CONST. pmbl.

426. *Id.* art VII.

provides for the Constitution's establishment by different sets of people in different provisions. This seems deeply implausible.

Bringing together the developmental history of the oath; its unique properties; and its likely design function, we can identify one constitutional ontology that appears more probable than the others: The original linguistic content of the Document, to include any constitutional changes authorized by that content.[427] That excludes all nontextual constitutional ontologies and any textual ontologies that are not grounded in cognitive content conveyed at the time of the ratification of the constitutional text.[428] As Paley and Madison's remarks make plain, it was understood that language changed dramatically over time and that constitutions fixed the law within defined bounds across time.[429] And an original-content-based ontology ensures that the law to which the President is bound doesn't change with language and its content is fixed until changed through legally authorized means.[430]

The "legally authorized means" part is worth emphasizing. A change in an object's properties does not necessarily change its identity. Adding a patio to one's house does not make it any less one's house. And the Constitution stipulates that changes in its content do not necessarily change its identity. Article V provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.[431]

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427. *This Constitution*, *supra* note 232, at 1613.

428. That includes amended text—for instance, the original linguistic content of the Fourteenth Amendment was conveyed in 1868. *The Constitution: Amendments 11-27*, NATIONAL ARCHIVES, https://www.archives.gov/founding-docs/amendments-11-27.

429. *See also* JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 144-45 (Rep. James Iredell) ("[T]here is a material difference between an article *fixed in* the Constitution and a regulation by law. An article in the Constitution, however inconvenient it may prove by experience, can only be altered by altering the Constitution itself, which manifestly is a thing that ought not be done often." (emphasis added)); THE FEDERALIST NO. 34 (Alexander Hamilton) ("In framing a government for posterity as well as ourselves, we ought, in those provisions which are designed to be permanent, to calculate, not on temporary, but on permanent causes of expense.").

430. *This Constitution*, *supra* note 232, at 1609.

431. U.S. CONST. art. V.

Amendments that are generated through the prescribed process are "valid to all Intents and Purposes, as Part of this Constitution."[432] That is a claim of ontological identity between amended content and 1788 content.[433] The 1788 Document and subsequent amendments are part of the same *thing*: "this Constitution."[434]

Of course it does not follow that the Constitution cannot be supplemented in other ways that also do not change its object-identity.[435] Plural ontologies are not categorically excluded.[436] But if the Constitution's content today consists of anything other than original linguistic content, it must do so because the latter content itself permits such supplementation.[437] If we have a Document-and-doctrine Constitution in 2020, it must be because the 1788 Document authorizes constitutional change through doctrine.[438]

But what if contemporary Presidents, and the contemporary public, understand the oath to refer to a different constitutional object? If "the Constitution of the United States" is today understood to refer to the Document-as-glossed-by-200-years-of-constitutional-decisionmaking—even if the Document does not authorize change except through Article V amendment—it seems counterintuitive to regard a President who follows the contemporary public meaning of the Document's text as having broken a promise.[439] The next section will engage the possibility that this substitution has taken place.[440]

C. THE PRESIDENTIAL OATH AS THE "SAME OATH"

Christopher Green and I have amassed a body of evidence, collected from diverse sources, of a contemporary public understanding that constitutional oaths across oath-takers and across time have had essentially the same object.[441] We found no examples of a public official affirming that a modern-day President swears a different oath, to an essentially different Constitution, than did George Washington.[442] I have included a sampling of our evidence below, as well as additional evidence that I have uncovered since:

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432. *Id.*
433. *This Constitution*, *supra* note 232, at 1640 (quoting RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 109 (2004)).
434. *See generally*, U.S. CONST.
435. Roberto Loss, *Composition, Identity and Plural Ontology*, SYNTHESE 1 (2020).
436. *Id.*
437. U.S. CONST. art. V.
438. *Id.*
439. *This Constitution*, *supra* note 232, at 1616.
440. See i*nfra* Part II.C.
441. *See generally* Bernick & Green, *supra* note 163.
442. *Id.* at 6.

> *Senator Martin Heinrich*: Throughout our history, the defense of our Nation has depended on the leadership of men whose names we now remember when we visit their memorials, names like Lincoln and Washington and Roosevelt. These men all swore the same oath that President Trump did when they assumed our nation's most powerful office. Our presidents swear to 'faithfully execute the Office of President of the United States'' and to 'preserve, protect, and defend the Constitution of the United States.' President Trump has violated that oath.[443]
>
> *Representative William Keating*: President Trump irreparably violated his oath to preserve—to protect—and to defend—the Constitution of the United States of America. It is with a heavy heart, and a deep reverence to that same oath that I refuse to abandon mine.[444]
>
> *Senator Roy Blunt*: President George Washington took this exact same oath, miraculous because we have done it every four years since 1789 . . . .[445]
>
> *Representative Trent Franks*: I am told you [President Obama] are the first to request to be sworn in with your hand on the same Bible used by Abraham Lincoln when he took the same oath.[446]
>
> *President Barack Obama*: Forty-four Americans have now taken the presidential oath. The words have been spoken during rising tides of prosperity and the still waters of peace. Yet, every so often the oath is taken amidst gathering clouds and raging storms. At these moments, America has carried on not simply because of the skill or vision of those in high office, but because We the People have remained faithful to the ideals of our forbearers, and true to our founding documents.[447]

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443. *Heinrich Delivers Speech Ahead of Final Impeachment Vote*, MARTIN HEINRICH, UNITED STATES SENATOR FOR NEW MEXICO (Feb. 4, 2020), https://www.heinrich.senate.gov/press-releases/heinrich-delivers-speech-ahead-of-final-impeachment-vote-.

444. John Weller, *"This is not a moment to celebrate": What the Mass. Delegation is saying about Trump's impeachment*, BOSTON GLOBE MEDIA PARTNERS (Dec. 18, 2019), https://www.boston.com/news/politics/2019/12/18/massachusetts-trump-impeachment.

445. 163 CONG. REC. S363 (Jan. 20, 2017).

446. 163 CONG. REC. H388 (Jan. 11, 2017).

447. *Transcript: Barack Obama's Inaugural Address*, NPR (Jan. 20, 2009, 12:21 AM), https://www.npr.org/2010/1 2/02/99590481/transcript-barack-obama-s-inaugural-address.

> *President George H.W. Bush*: I have just repeated word for word the oath taken by George Washington 200 years ago, and the Bible on which I placed my hand is the Bible on which he placed his.[448]
>
> *President Gerald Ford*: The oath that I have taken is the same oath that was taken by George Washington and by every President under the Constitution.[449]
>
> *President Lyndon Johnson*: On the thirtieth day of April, in the year Seventeen Hundred and Eighty-Nine, on the balcony of the Federal Hall in New York City, George Washington took the oath as the first President of the United States of America. In the one hundred and seventy-five years since that occasion, thirty-five other Americans have sworn that same office to discharge in seamless continuity the duties prescribed by the Constitution.[450]

The Congressional Record is barren of contradictions of these types of statements.[451] Modern American public officials appear to have an unbroken tradition of affirming the same constitutional ontology.[452]

One could argue that this is just rhetoric and that it should not be understood to affirm any considered ontological propositions.[453] But as discussed above, one can express a commitment to something without understanding all of the properties of that thing.[454] And those who would claim that the ontology of the constitutional oath has changed since the Founding because of longstanding practice ought to be able to explain how they know that that change has taken place, despite consistent, uncontested representations to the contrary by oath-taking constitutional decision makers.[455] Until then, we are justified in positing an agreement between the ratifying public and the contemporary public concerning an original-content-based ontology of "the Constitution of the United States."[456]

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448. 2 MY FELLOW CITIZENS: THE INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 161 (2009) [hereinafter Inaugural Addresses].

449. *Gerald R. Ford's Remarks Upon Taking the Oath of Office as President*, GERALD R. FORD PRESIDENTIAL LIBRARY & MUSEUM, http://www.fordlibrarymuseum.gov/library/speeches/740001.asp (last visited Oct. 11, 2020) [hereinafter *Ford's Remarks*].

450. 29 Fed. Reg. 5937 (Apr. 30, 1964).

451. *Oath of Office*, *supra* note 360.

452. *See Ford's Remarks*, *supra* note 449.

453. *See*, *Aristotle: Logic*, THE INTERNET ENCYCLOPEDIA OF PHIL. (2020), https://iep.utm.edu/aris-log/.

454. Re, *supra* note 141, at 321.

455. *See supra* Part II.C.

456. S*ee generally* Andre LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. JUR. REV. 2, 263 (2015).

III. THE MORAL OBLIGATIONS OF THE PRESIDENTIAL OATH

If the foregoing analysis is correct, presidents are required by the Presidential Oath Clause to, and are today understood to, promise to uphold a particular Constitution—the original content conveyed by an amended text, together with any output of textually authorized processes for changing the Constitution's content.[457] So what? Why should the President keep his promise?

The question at first seems obtuse. Of course, the President should keep his promise. Everyone ought to keep their promises.[458] We might excuse someone from an obligation that they have taken on—your friend promised to walk your dog but his child has come down with an unknown illness—and there are promises that we do not think anyone is obliged to keep, ever—a promise to commit murder, or a promise made at gunpoint. All things being equal, though, we think that promises should be kept.[459] And surely the President is obliged, like the rest of us, to obey the law.[460]

But the President's promise is not an ordinary promise.[461] Upon giving it, the President is entrusted with a tremendous amount of discretion over the resources of millions of people for several years.[462] His compliance with his promise is extraordinarily difficult to monitor, and an individual member of the public is limited in his capacity to exit the agreement.[463] Our promise-related intuitions might misfire because they are calibrated to relatively low-stakes exchanges, involving less discretion, and in which the costs of monitoring compliance and exiting the bargain are lower. We need to reckon with these differences. We also need to confront the question of whether there *is* a general moral obligation to follow the law—the answer is not as straightforward as it may seem.[464]

A. THE MORAL FORCE OF OFFICIAL PROMISES

Philosophers, political scientists, and legal scholars generally agree that people have a moral obligation to obey the law.[465] It is also conventional to

457. U.S. CONST. art. II, § 1.

458. D.W. Hamlyn, *The Obligation to Keep a Promise*, 62 PROC. ARISTOTELIAN SOC'Y 62, X (1962).

459. *Id.* at x.

460. *See, e.g.*, U.S. CONST. art. II. § 4.

461. *See*, *id.* § 2.

462. *Id.*

463. WENDY GINSBERG, ET. AL., CONG. RESEARCH SERV., R42817, GOVERNMENT TRANSPARENCY AND SECRECY: AN EXAMINATION OF MEANING AND ITS USE IN THE EXECUTIVE BRANCH (2012).

464. William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEGAL THEORY 215, 216 (2004).

465. For a useful survey of the field, *see generally id.* at 215. I do not engage here the vexed question of whether the fact that X is law provides a reason to follow X that is not ultimately contingent upon non-legal moral reasons. It may be the case that "X is law" only means that the balance of non-legal moral

insist that the obligation to obey arises only under certain conditions[466] and is defeasible—that there are circumstances under which the obligation gives way.[467]

The conventional arguments for a general obligation to obey the law are very vulnerable.[468] One such argument is consent-based—someone who has consented to follow the law is obliged to do so.[469] This argument is vulnerable because countless people have never actually consented to follow the law of any given state.[470] And proxies for consent—continuing to live in a particular state, making use of tax-payer-funded institutions, voting—seem too imperfect to carry the moral weight that we might attribute to an agreement between two parties to an ordinary arms-length contract.[471]

Another argument is based on fairness.[472] If other people are working to sustain a net-beneficial scheme of social cooperation, I am arguably being unfair to them if I fail to contribute to the operation of the scheme and still enjoy its benefits.[473] This argument is vulnerable because there are certain benefits that I have no choice about whether to receive from the state and even my involuntary reception of benefits that no reasonable person would refuse to receive wouldn't underwrite a general obligation to obey all laws.[474] A legal system may consist in both net-beneficial and net-detrimental laws, and it is not obvious why an obligation to sustain net-beneficial laws would underwrite an obligation to sustain *all* laws.

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reasons generally favors following X—say, if obeying the law generally increases aggregate welfare and it is morally good to increase aggregate welfare. Still, if that's right, I might be obliged to factor X's status as law into my moral decision-making—even to give it dispositive weight. If so, I have an obligation to obey the law in the sense with which the ensuing discussion is concerned. For a contrary view, see Alexander, *supra* note 165.

466. Leslie Green, *Legal Obligation and Authority*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY 3 (Edward N. Zalta, ed., Spring 2004) (describing general agreement that a "threshold condition of justice" must be met).

467. David Lyons, *Reason, Morality, and Constitutional Compliance*, 93 B.U. L. REV. 1381, 1383 (2013) (explaining that "political theorists who endorse political obligation as well as theorists who reject it *agree* that a duty to comply with the law is *not* absolute.").

468. Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 1-3 (1985).

469. *See* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 57 (1979) (defining "consent theory" as "any theory of political obligation which maintains that the political obligations of citizens are grounded in their personal performance of a voluntary act which is the deliberate undertaking of an obligation."). Each of the theories articulated here appears in embryonic form in Plato's "Crito." *See* J. Peter Euben, *Philosophy and Politics in Plato's Crito,* 6 POLITICAL THEORY 2, 152, 164 (1978).

470. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 30 (1999) (observing that "native-born citizens do not typically have to take an oath to uphold the Constitution").

471. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (criticizing the use of such proxies); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1797 n.30 (2005) (noting that "tacit consent" is generally deemed to be an insufficient basis for political obligation).

472. PHILIP SOPER, THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS 141 (2002).

473. *See id.*

474. ABNER GREENE, AGAINST OBLIGATION 6 (2013); A. John Simmons, "Political Obligation and Authority," *in* SOCIAL AND POLITICAL PHILOSOPHY 34 (Robert L. Simon ed., 2002).

Third, there is a rule-consequentialist argument grounded in the systemic effects of disobedience to the law.[475] If everyone picked and chose which laws to obey, a net-beneficial legal system would collapse because no legal system will always make everyone happy.[476] This argument is vulnerable because it does not provide a reason for any *individual* not to disobey the law.[477] My disobedience or picking and choosing *will not* bring down the system, and whether I will lead by example is a retail, empirical question, the answer to which could not underwrite a wholesale moral obligation of obedience for everyone.[478]

But we need not resolve the question of whether *all Americans* have a general moral obligation to assess whether the Presidential Oath Clause imposes such an obligation on the President. Separate moral considerations counsel in favor of official obedience.[479] The consent argument that has such difficulty even getting off the ground for ordinary members of the public has real normative bite for those who voluntarily seek an office and make public promises as a condition of elevation to that office.[480] One need not rely upon dubious theories of tacit or implicit consent—here is *actual* consent.[481]

Or so it would seem. A skeptic might, however, compare the promise by an official who cannot negotiate its specific terms to an objectionable contract of adhesion, the terms of which are dictated by the offeror to an indeterminate number of offerees.[482] Richard Fallon claims: "Not everyone agreed, or would have agreed, to be bound by the Constitution at the time of its ratification. No one alive today has ever been asked to agree to its unglossed original meaning as part of a fair, uncoerced bargain."[483]

To say that it is *unfair* to require someone to agree to something analogous to a form contract before they are elevated to public office invites the question: Unfair *to whom*? Does an aspiring public official have a claim

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475. *See* Brad Hooker, *Is Rule-Consequentialism a Rubber Duck?*, 54 ANALYSIS 92 (1994) (summarizing rule-consequentialism as "the view that an act is morally permissible if and only if it is allowed by a code of rules whose general acceptance would (or could reasonably be expected to) produce the best consequences, judged impartially (or produce consequences at least as good as would result from the general acceptance of any other code of rules we can identify).").

476. *See* John Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115, 120 (1984) ("The law presents itself as a seamless web. Its subjects are not [morally] permitted to pick and choose . . . .").

477. Hooker, *supra* note 475, at 96.

478. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 102 (1986) (arguing that "it is a melodramatic exaggeration to suppose that every breach of [the] law" will endanger a just system of laws).

479. *Id.*

480. *Id.* at 103-04.

481. U.S. CONST. art. II, § 1.

482. *See* Fredrich Kessler, *Contracts of Adhesion — Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

483. Richard F. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1143 (2008).

of right to make use of institutions that were designed by other people on his own terms, rather than on theirs? That are offered to him by the contemporary public on those same terms? It seems, rather, that any concerns about unfairness should be redirected towards the designers of the institutions and those who have maintained them over the years. We should ask whether it would be unfair *to them* to hold the President to his word.

It is awkward at first to think about unfairness to members of the Founding generation who are not around to perceive any injury from contemporary actions. But we commonly label as unfair actions that are not *perceived* as unfair by their victims. For example, it is unfair for a college admissions officer to reject an otherwise-qualified person's application because of a personal grudge against her cousin, even if the applicant gets into a better school and never experiences any disappointment because of the rejection.

James Madison's less-famous response to Thomas Jefferson's famous observation that "the earth belongs to the living, and not to the dead" eloquently describes how the obligations of intergenerational equity runs in both directions—to the past and to the future:

> The *improvements* made by the dead form a debt against the living, who take the benefit of them. This debt cannot be otherwise discharged than by a proportionate obedience to the will of the Authors of the improvements.
>
> But a case less liable to be controverted may perhaps be stated. Debts may be incurred with a direct view to the interests the unborn as well as the living. Such are debts for repelling a Conquest, the evils of which descend through many generations. Debts may even be incurred principally for the benefit of posterity: Such perhaps is the debt incurred by the U. States. In these instances the debts might not be dischargeable within the term of 19 years.
>
> There seems, then, to be a foundation in the nature of things; in the relation which one generation bears to another, for the *descent* of obligations from one to another. Equity may require it.[484]

Following this reasoning, not only the ratifiers of the 1788 Constitution but those who improved it through subsequent amendments—amendments made possible through the tireless efforts, in many cases unto death, of countless people—have a debt against a President who seeks to operate

484. 5 THE WRITINGS OF JAMES MADISON 1787-1790 438-39 (Gaillard Hunt ed., 1906). *See generally* ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017).

institutions that others built and to which the President has no claim of right to operate except on their terms.[485] Equity counsels that the President discharge the debt by fulfilling those terms.[486]

It would also be unfair to any *living* Americans who have worked to preserve institutions that the Founders constructed and subsequent generations improved, not to hold the President to his word.[487] An isolated act of free-riding may not ordinarily vitiate a cooperative scheme, but the scope of the modern presidency is such that a free-riding chief executive can do a great deal of institutional damage very quickly.[488] Even if a free-riding President does not do significant institutional damage, his actions are unfair to those who desire that he deliver on his public commitment and who reasonably rely upon that commitment in structuring their own expectations about how he will exercise his powers.[489]

The vast extent of the President's powers, the corresponding difficulty of monitoring their exercise, and the inability of ordinary Americans to exit the agreement except by removing themselves to a different country or seeking to remove the President through highly costly and uncertain means, heightens the dependency of Americans on the President's commitment to fulfilling the promise and thus increases its moral weight.[490] If the President does not *really* mean what we understand him to say, there is not very much that we can do about it in the short term, and the consequences may be both grave and difficult for us to discover until it is too late.[491]

It might be objected to that all of us do not in fact rely upon the President's promise—that not all of us accept his proposition that he will "faithfully execute" to be true and either act or refrain from acting because of it. But reliance is not required for a promise to carry moral weight.[492] If I tell you an embarrassing secret about my past on the condition that you promise not to reveal it, it seems like you take on a moral obligation not to reveal it, even if I never learn about whether you keep your promise and don't structure

485. *How a National Tragedy Led to the Passing of the 25th Amendment*, NATIONAL CONSTITUTION CENTER (Feb. 10, 2020), https://constitutioncenter.org/blog/how-jfks-assassination-led-to-a-constitutional-amendment-2.

486. JAMES MADISON, THE WRITINGS OF JAMES MADISON 439 (Gaillard Hunt ed., 1904).

487. *See, e.g.*, U.S. CONST. amend. XIX.

488. *See e.g.*, Russell L. Riley, *Bill Clinton: Impact and Legacy*, UVA MILLER CENTER, https://millercenter.org/president/clinton/impact-and-legacy (last visited Oct. 11, 2020).

489. Stephen Hess, *Jimmy Carter: Why He Failed*, BROOKINGS INST. (Jan. 21, 2000), https://www.brookings.edu/opinions/jimmy-carter-why-he-failed/.

490. *See supra* Part III.A. *See also* U.S. CONST. art. II.

491. Leslie Gray & Wynell Burrough Schamel, *Constitutional Issues: Watergate and the Constitution*, NATIONAL ARCHIVES, https://www.archives.gov/education/lessons/watergate-constitution (last visited Oct. 11, 2020).

492. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 302 (1998).

my expectations around it.[493] A private citizen may never learn about whether the President has violated his oath and may not go about his days any differently because of it, but he may still receive some assurance from the promise that future events about which he is worried may not come to pass.

The case for a promissory obligation on the President's part to fulfill the terms of his oath appears to be strong.[494] But recall that not all promises give rise to moral obligations, and that even those that do can be overcome in certain circumstances.[495] Neither the voluntary pursuit of an official position under the Nazi regime, nor equitable consideration for those who drafted the Nuremberg Laws or a public that generally approved of them, strike us as persuasive moral reasons to enforce evil laws.[496] Closer to our constitutional home, abolitionists vigorously debated whether a would-be public official could in conscience swear an oath to the antebellum Constitution, given the existence of the Fugitive Slave Clause.[497] Might "the Constitution of the United States," even in its amended form, be sufficiently bad that no obligations attach to the President's promise? And even if the Constitution is sufficiently good to give rise to promissory obligations, might the effect of discharging them in particular circumstances be sufficiently bad that the obligations are defeated? The next Section considers the first of those questions.[498]

B. MORAL LEGITIMACY

Richard Fallon has usefully distinguished between three concepts of legitimacy:

> • *Sociological Legitimacy*. A constitutional regime, governmental institution, of official decision possesses social legitimacy insofar as the relevant public regards it as justified for reasons beyond fear of sanctions or hope for personal reward.[499]

493. *Id.* at 302-03.

494. *See infra* Part IV.A.

495. SCANLON, *supra* note 492.

496. *See* WENDELL PHILLIPS, THE ANTI-SLAVERY EXAMINER: CAN ABOLITIONISTS VOTE OR TAKE OFFICE UNDER THE UNITED STATES CONSTITUTION? 15, LIBRARY OF CONGRESS (1845), http://www.loc.gov/resource/rbaapc.23000/?sp=15.

497. *See* Re, *supra* note 141, at 316 (citing Phillips, *supra* note 496). For a brief overview of the intra-abolitionist controversy concerning whether taking the oath was tantamount to an alliance with slavery, *see* PHILLIPS, *supra* note 496.

498. *See infra* Part IV.A.

499. Fallon, *supra* note 471, at 1795.

- *Legal Legitimacy*. A regime, institution, or official decision possesses legal legitimacy if it conforms with norms that are widely accepted within the legal community.[500]

- *Moral Legitimacy*. A regime, institution, or official decision possesses moral legitimacy if it is morally justified.[501]

This Article is not the place to articulate a comprehensive theory of political morality and assess whether the original linguistic content of the amended Constitution of the United States measures up to it. I will stipulate here to Fallon's own conditions for good-enough-to-be-enforced *minimal* moral legitimacy: A constitution that is far short of ideal and is unjust in significant respects is normatively good enough to justify officials in enforcing the law if the constitution is (1) better than anarchy and (2) there are no better, realistically attainable alternatives.[502]

These are not very demanding conditions, and Fallon opines that the constitutions of "nearly every nation state" satisfy them.[503] Louis Michael Seidman, however, argues that the Constitution does not meet one of them.[504] In *On Constitutional Disobedience*,[505] and in subsequent essays clarifying his position, Seidman maintains that nobody has any moral duty to obey the Constitution and that public officials are not morally bound to fulfill their oaths of office.[506] He does not claim that the Constitution is thoroughly evil, only that some pernicious provisions that are hard-wired into its structure foreclose the exploration of better political possibilities.[507] So, minimal-moral-legitimacy condition two is not met because there are better, realistic alternatives to the Constitution—namely, parliamentary debates about "how to solve real, modern problems"[508] and "what will produce the best country."[509]

Seidman does not engage in enough comparative institutional analysis to make persuasive his claim that an alternative system would operate better

500. *Id.* at 1794.
501. *Id.* at 1796.
502. *Id.* at 1798.
503. *Id.* at 1813.
504. Louis Michael Seidman, *Political and Constitutional Obligation*, 93 B.U.L. REV. 1257, 1271 (2013).
505. *See generally* LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012).
506. *Compare* Hugh Baxter, *Critical Reflections on Seidman's On Constitutional Disobedience*, 93 B.U. L. REV. 1373 (2013) (claiming that Seidman's book "is not best understood as a manifesto urging government officials to violate their oaths and abandon support for the Constitution.") *with* Seidman, *supra* note 507, at 1275 ("I'm afraid . . . my book is . . . such a manifesto.").
507. Seidman, *supra* note 504, at 1276.
508. SEIDMAN, *supra* note 505, at 59.
509. *Id.* at 91.

than our constitutional regime.[510] Adam Shinar points out that although under the parliamentary systems of the United Kingdom, Germany, and Israel, a majority that exercises de facto control over the introduction and enactment of legislation "has an easier time ignoring the opposition and will consequently be less likely to search for common solutions or genuine consensus," Seidman does not consider the possibility that such problems would arise in the United States.[511] And Seidman adduces no substantial evidence that the quality of American political decision-making is better—more constructive, less polarized—in areas where constitutional discourse is not regularly invoked.[512] If we are to incur the certain costs of a revolution, we are entitled to ask for more than speculative benefits. Seidman's criticisms of the status quo are cogent and well-taken, but dissatisfaction with the current state of affairs alone cannot underwrite regime change.[513]

It is much more plausible that our minimally-morally-legitimate Constitution does sometimes permit terrible injustices.[514] This would not defeat a general moral obligation to follow the Constitution—it could, however, defeat that obligation and indeed even impose a counter-obligation *not* to follow the Constitution, or not to follow a constitutionally authorized law, regulation, or other government action, in certain cases. The morality of oath-breaking will be considered below.[515]

IV. IMPLEMENTING THE PRESIDENTIAL OATH

The reader may be wondering what the cash value of the preceding discussion is. Concretely, what should the President *do*, given the constitutional ontology of the oath and given that the oath is morally binding? What does it mean to faithfully execute the Office of the President and support, protect, and defend the original linguistic content of the Constitution? Does the oath in fact have any practical bite? How much bite *should* it have? This Part will specify the legal duties that follow from the President's moral obligation to keep his promise; interrogate the oath's efficacy; and sketch a theory of morally legitimate oath-breaking.

510. Adam Shinar, *The End of Constitutional Law?*, 29 CONST. COMMENT. 181, 199 (2013) (book review).
511. *Id.* at 199-200.
512. *Id.* at 205.
513. *Id.* at 183-84.
514. *See Plessy*, 163 U.S. at 552.
515. *See infra* Part IV.C.

A. OATH-BASED DUTIES

Article VI requires that every public official promise to "support this Constitution."[516] But Article II's specification that the President promise to the best of his ability, "preserve, protect, and defend the Constitution" suggests a uniquely strong promissory obligation on the part of the President to engage in Constitution-supportive activity.[517] And several of America's transformational Presidents have so understood it.[518]

What kind of activity does the Presidential Oath Clause oblige a President to engage in? Perhaps the broadest conception of constitutional support was articulated by Abraham Lincoln. In his first inaugural address, Lincoln told secessionists:

> Such of you as are now dissatisfied, still have the old Constitution unimpaired, and, on the sensitive point, the laws of your own framing under it; while the new administration will have no immediate power, if it would, to change either. If it were admitted that you who are dissatisfied hold the right side in the dispute, there still is no single good reason for precipitate action. Intelligence, patriotism, Christianity, and a firm reliance on Him who has never yet forsaken this favored land, are still competent to adjust in the best way all our present difficulty.
>
> In YOUR hands, my dissatisfied fellow-countrymen, and not in MINE, is the momentous issue of civil war. The government will not assail YOU. You can have no conflict without being yourselves the aggressors. YOU have no oath registered in heaven to destroy the government, while *I* shall have the most solemn one to "preserve, protect, and defend" it.[519]

In the last sentence, Lincoln seems to identify *the national government* as the object of the oath, or to imply that defending the Constitution entails

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516. U.S. CONST. art. VI, cl 3.

517. But *see* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 190-91 (Da Capo Press 1970) (2nd ed. 1829) (arguing that *every* public official is bound by oath "not only to abstain from opposition to the Constitution, but to give it his firm and active assistance."); EDWIN P. WHIPPLE, THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 384 (Fred B. Rothman & Co. 1993) (1879) (denying that "the duty of defending the integrity of the Constitution is, in any peculiar sense, confided to the President").

518. *See* PAULEY, *supra* note 331, at 189 (attributing this view to Lincoln, Andrew Jackson, and Thomas Jefferson).

519. Abraham Lincoln, *First Inaugural Address* (May 4, 1861), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865 223-224 (Don E. Fehrenbacher, ed., 1989) [hereinafter LINCOLN, SPEECHES AND WRITINGS].

preserving the national government.[520] He did precede this statement with an argument that secessionists had no legitimate grievance under the "old Constitution," so it is plausible that he meant only that his oath to the Constitution obliged him to use constitutional means to defend the national government against unconstitutional attacks.[521] But any doubts about whether Lincoln's considered position was that constitutional defense entailed national preservation are dispelled by the justification he offered for his decision to issue the Emancipation Proclamation:

> [M]y oath to preserve the constitution to the best of my ability, impose[s] upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I fe[el] that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.[522]

Michael Paulsen and Luke Paulsen summarize Lincoln's theory of the oath thus: "[H]is duty to preserve the Constitution required him to preserve the nation constituted by that Constitution."[523] We can go further—Lincoln apparently believed that his duty to preserve the Constitution required him to take *otherwise unconstitutional* actions if necessary to save the nation *constituted by* that Constitution.[524] He did not concede that he had acted unconstitutionally in the course of prosecuting the Civil War, but he argued in the alternative that *even if he did act unconstitutionally*, he was bound by oath to do so.[525]

Lincoln's theory of the oath was flawed. There is little evidence that anything in the original content of the Constitution confers upon the President a prerogative power to hack off constitutional limbs to save the Constitution's "life."[526] The Presidential Oath Clause cannot reasonably be read to confer

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520. *Id.* at 224.

521. *Id.* at 223.

522. Letter from Abraham Lincoln, President of the United States, to Albert G. Hodges, U.S. Senator (April 4, 1864), *in id.* at 585.

523. MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 174 (2015).

524. *Id.* at 174-75.

525. *Id.* at 175 (citing Letter from Abraham Lincoln, President of the United States, to Albert G. Hodges, U.S. Senator (Apr. 4,1864), *in* LINCOLN, SPEECHES AND WRITINGS, *supra* note 522, at 585).

526. Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1301 (2003); Kent et. al, *supr*a note 398, at 2184.

any power—as Michael Paulsen acknowledges, it is a duty-imposing provision, not a power-granting provision.[527] And unlike some state constitutional oaths,[528] the Presidential Oath Clause doesn't expressly commit the President to protecting, preserving, or defending a *government*.[529] Finally, the President's required promise to preserve, protect, and defend the Constitution does not imply a presidential entitlement to all the power and resources he requires to do so, any more than the current form of the Article VI Oath implies that all federal officials are personally entitled to the necessary power and resources to "defend the Constitution of the United States against all enemies, foreign and domestic."[530] Both are promises to do one's part in constitutional defense, with whatever power and resources one does lawfully have at one's disposal.

But Lincoln's sense that he had a unique responsibility to the Constitution was well-founded.[531] Because the Constitution puts more power and resources at the President's disposal, the President *is* morally obliged by his oath to do more than other public officials to defend the Constitution.[532] "To the best of [his] ability," he must not only follow the Constitution—he must protect the Constitution and its legitimate outputs against damage, whether from his own subordinates or from members of other branches of government.[533]

Concretely, we can specify four decision points at which the President's protective obligations are triggered. This list is not exhaustive:

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527. Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2003) [hereinafter *Constitution of Necessity*]. *See also* ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION 282 (Liberty Fund 1999) (1803) (stating that it is the "*duty* of the President" to "'preserve, protect, and defend the constitution of the United States.'") (emphasis added); *Statement of James Bowdoin in Massachusetts Ratifying Convention* (Jan. 23, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1322 (John P. Kaminski et al. eds., 2000) [hereinafter DOCUMENTARY HISTORY] (including the presidential oath among the "great checks" against "abuse of power"); *A Jerseyman, To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, *in* 3 DOCUMENTARY HISTORY, *supra* note 527, at 149 ("The power of the President is still guarded further by the oath which he is bound to take before he enters on the execution of his office"); *Observations upon the Proposed Plan of Federal Government,* Apr. 2, 1788, *in* 9 DOCUMENTARY HISTORY, *supra* note 527, at 680-81 (calling the oath "[an] additional check upon the President."). Perhaps the most striking contemporary statement about the oath's constraining power was made by Massachusetts lawyer and future governor James Sullivan, who said of the oath: Thus we see, that instead of the president's being vested with all the powers of a monarch, as has been asserted, that he is under the immediate control of the constitution, which if he should presume to deviate from, he would be immediately arrested in his career and summoned to answer for his conduct before a federal court, where strict justice and equity would undoubtedly preside. Cassius VI, *To the Inhabitants of this State*, MASS. GAZETTE, Dec. 21, 1787, *in* 5 DOCUMENTARY HISTORY, supra note 527*,* at 500.

528. *See e.g.*, CAL. CONST. art. XX, § 3.

529. *See* U.S. CONST. art. II, § 1, cl. 8.

530. 5 U.S.C. § 3331.

531. *See* PAULSEN & PAULSEN, *supra* note 523, at 174.

532. *See* i*d*. at 175.

533. U.S. CONST. art. II, § 1, cl. 8.

- The President must choose whether to sign proposed legislation into law or else veto it.[534]

- The President must choose whether to use federal resources to enforce enacted legislation.[535]

- The President must fill judicial vacancies, including vacancies on the Supreme Court.[536]

- The President must choose whether to comment on constitutional decision-making by other institutions.[537]

The obligation that attaches at the first of these decision points is easiest to articulate: The President is obliged to consider the constitutionality of any proposed legislation and to veto legislation that he believes is more likely than not unconstitutional.[538]

A President might apply a hefty presumption in favor of the constitutionality of proposed legislation in recognition of his own constitutional fallibility. But any such presumption would have to be informed by an assessment of Congress's own constitutional fallibility. After the fallibility of all concerned is considered, the President cannot, consistently with his oath, sign proposed legislation if he believes that it probably violates "the Constitution of the United States."[539]

This does not mean that a President who signs unconstitutional legislation into law *necessarily* violates his oath.[540] "[T]o the best of [his] ability" requires not perfection but best efforts, given competing, also-constitutionally-salient claims on the President's attention.[541] Nor does it mean that the President may never be morally justified in signing legislation into law despite its probable unconstitutionality.[542] It means only that *the promissory obligations triggered by the oath* requires a President to make such efforts as are within his capacity under the circumstances to reflect upon the constitutionality of proposed legislation and to veto it if he believes that it is probably unconstitutional.[543]

534. *Id.* art. I, § 7, cl. 2.
535. *Id.* art. II, § 3.
536. *Id.* § 2, cl. 2.
537. *Id.* cl. 1.
538. *See* U.S. CONST. art. I, § 7.
539. *Id.* art. II, § 1, cl. 8.
540. *See* Saikrishna Prakash, *The Executive's Duty,* 96 GEO. L.J. 1613, 1616.
541. PRAKASH, *supra* note 526, at 1316.
542. *Id.*
543. *See* PAULSEN & PAULSEN, *supra* note 523, at 174.

The President's oath-based obligations at the second of these decision points seem at first to be more complicated. The United States Code is packed with statutes that have been executed by federal agencies for decades, even centuries. The Code of Federal Regulations is chock-full of regulations that have been issued under the authority of those statutes.[544] The question of how many federal laws are currently on the books is an empirical one but it is a practically unanswerable one.[545] No one should imagine that an incoming President could engage in a comprehensive review of the legality of every one of these statutes and regulations.

But again, the content of the obligation is straightforward: The President must make a good-faith effort to avoid enforcing unconstitutional laws.[546] He might start by focusing his attention on laws about which constitutional concerns had been raised prior to his taking office, as President Thomas Jefferson did with the Sedition Act of 1789.[547] He should not, however, consider himself bound by any previously reached constitutional conclusions—an incoming President will have access to legal expertise that was unavailable to him as a private citizen, and should be prepared to revisit any prior constitutional reasoning.[548]

What if a statute that is enacted over a constitutional veto that the President issued after making use of the legal expertise available to him? In *Lear Sigler, Inc., Energy Products Div. v. Lehman*,[549] a panel of the Ninth Circuit took the view that President Ronald Reagan's one and only opportunity to stop the execution of a statute that he believed to be unconstitutional was to veto it instead of signing it into law.[550] The court upheld the district court's bad-faith attorney's fee award against the federal government for "the executive branch's willful and deliberate refusal to comply with a presumptively valid law."[551]

This view lacks constitutional support. The Take Care Clause requires that a President faithfully execute "the Laws of the United States," and I have shown elsewhere that the "the Laws of the United States" include only statutes that are authorized by "this Constitution."[552] Before and after the

544. *See generally*, C.F.R.

545. *See* Erwin C. Surrency, *The Publication of Federal Laws: A Short History*, 79 LAW. LIBR. J. 469 (1987) (illustrating the development of publications and the overwhelming volume).

546. *See* Prakash, *supra* note 540, at 1616.

547. Saikrishna Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1617 (2003) (recounting how Jefferson decided to "pardon[] those convicted of [violating the Sedition Act]" and halted "Sedition Act prosecutions").

548. *Id.* at 1619 n.21.

549. 842 F.2d 1102 (9th Cir. 1988).

550. *Id.* at 1124.

551. *Id.* at 1121.

552. *See* Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 32-33 (2019) [hereinafter *Faithful Execution*].

President issues his veto, an unconstitutional statute remains an unconstitutional statute, and he is obliged not to execute things that are not "Laws of the United States."[553]

Judicial nominations are among the most constitutionally consequential decisions that a President may make.[554] It follows that a President must nominate people whom he believes to be committed to exercising their judicial power consistently with their own constitutional duty to "say what the law is" and to be competent to do so.[555] Conversely, he must not nominate people whom he believes will systematically misinterpret "the Constitution of the United States."[556]

Does this mean that the President must nominate originalists to the Supreme Court, where constitutional interpretation is most frequent and significant? No. Consider a pair of appellate judges, one of whom believes that original linguistic content of the constitutional text is always dispositive, one of whom considers original content to be one of many things to consider when deciding constitutional cases. Both judges exceed a threshold level of legal competence, but the non-originalist is marginally better at deciding constitutional cases that are governed by doctrines that do not *contradict* the Constitution's original content but are not *required* by it. The latter writes more clearly; is more sensitive to salient factual nuances; and works better with her colleagues. Moreover, the latter judge is actually more skilled at discerning original content than the former, despite attaching less weight to that content. The originalist, we will suppose, is more likely than she to find original content to be clear when it is in fact vague or ambiguous. Let us also suppose that these judges are the President's two best options.

The President should clearly nominate the non-originalist. Not every Supreme Court case is a constitutional case; not every constitutional case puts original content in play; interpretive-theoretical commitment doesn't always translate into skill in applying interpretive theory; and collegiality should matter to a President who is concerned about the constitutional outputs of a multimember Court.

Finally, the President should comment upon, and, if appropriate, criticize constitutionally salient decisions by other branches of government, including the judiciary. A major Supreme Court decision about, say, the First Amendment should receive the President's attention. He need not read all the way through the opinion of the Court and any separate opinions for his officers to provide him with an informed gist of the issue and its resolution.

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553. *Id.*

554. *See* Joel K. Goldstein, *Choosing Justices: How Presidents Decide*, 26 J. L. & POLITICS 425, 425-26 (2011).

555. *Marbury*, 5 U.S. (1 Cranch) at 177.

556. *Faithful Execution, supra* note 552, at 33.

He may conclude that the Court's judgment is clearly right; he may conclude that it's clearly wrong; he may conclude that, even after making his best efforts to understand the issue and listening to his officers' analysis, he's just not sure enough to form a definite opinion. If he does conclude that the Court's judgment is clearly wrong, his oath obliges him to consider weighing in, in the interest of discouraging further constitutional damage.[557] Thus did President Obama in his 2010 State of the Union Address:

> With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests — including foreign corporations — to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities.[558]

Obama was not obliged by his oath to object in this precise way.[559] He might have decided that criticizing the Court with the Justices present would generate resentment and make it less likely that the Justices would change constitutional course. He might have decided to hold a press conference at another time. But if he believed in good faith that this criticism would have a positive effect on the Court's future constitutional deliberations about "the Constitution of the United States," he fulfilled his oath.[560]

One might worry that presidential criticism of the courts might inform or inspire disobedience of court judgments. Paradigm cases include: (1) Andrew Jackson's support of Georgia Governor George Gilmer's disregard of a Supreme Court order, following the Court's decision in *Worcester v. Georgia*,[561] that Gilmer release two missionaries from prison and Gilmer's decision to execute a Cherokee named Corn Tassel when his appeal was pending before the Court;[562] (2) Lincoln's decision to leave John Merryman in prison, despite Chief Justice Taney's order to release him;[563] and (3) Franklin Delano Roosevelt's declaration, conveyed by the Supreme Court by Attorney General Francis Biddle that he "wo[uldn't] give . . . up" eight alleged Nazi saboteurs whom he intended to try by military commission.[564]

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557. *Remarks By the President in State of the Union Address*, THE WHITE HOUSE (Jan. 27, 2010, 9:11 PM), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address.

558. *Id.*

559. *See* U.S. CONST. art. II, § 1, cl. 8.

560. *Id.*

561. Worcester v. the State of Georgia, 31 U.S. (6 Pet.) 515 (1832).

562. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 494 (2018).

563. *Id.* at 492.

564. Carlos M. Vazquez, *"Not a Happy Precedent": The Story of* Ex Parte Quirin, *in* FEDERAL COURTS STORIES 219-220, 227 (Vicki C. Jackson & Judith Resnik eds., 2010).

The norm of executive enforcement of judgments may be more fragile than initial appearances suggest.[565]

Those who would argue for a causal relationship between presidential criticism of the courts and refusal by the executive to obey court judgments, however, have their work cut out for them.[566] Even the paradigm cases do not support such a relationship.[567] Jackson may have encouraged Gilmer's actions, but he certainly didn't cause them—Jackson's commentary came after Gilmer's actions, and Jackson did not directly comment on their constitutional merits.[568] Lincoln did not directly criticize the Court's decision in *Merryman* at all.[569] Nor did Roosevelt publicly criticize the Court in connection with the trial of the saboteurs.[570] The possibility that presidential criticism of the courts even marginally increases the likelihood of executive disobedience of their judgments seems unsubstantiated. It should not discourage a President from protesting judicial deviations from the Constitution that he has sworn to protect.

B. THE EFFICACY OF THE PRESIDENTIAL OATH

The institution of the oath has for centuries included the invocation of a deity.[571] The connection between the oath and religious faith came up during the ratification process.[572] There were clamors for an expressly religious test for public office, as well as responses that the Constitution's oath requirements effectively guaranteed officeholders' religiosity.[573] Such

565. A case for fragility is made in Grove, *supra* note 562, at 272.

566. *Id.* at 499.

567. *Id.* at 490.

568. *Id.* at 495 n.162.

569. *Id.* at 492.

570. Vazquez, *supra* note 564, at 219.

571. *See* Frederick B. Jonassen, *Kiss the Book . . . you're President . . . : "So Help Me God" and Kissing the Book in the Presidential Oath of Office*, 20 WM. & MARY BILL OF RTS. J. 853, 858 (2012) (noting the practice began with the inauguration of George Washington).

572. 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 198 (2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

573. *See, e.g., id.* (Rep. James Iredell) ("[I]t has been universally considered that, in administering an oath, it is . . . necessary to inquire if the person who is to take it, believes in a Supreme Being, and in a future state of rewards and punishments . . . otherwise there would be nothing to bind his conscience that could be relied on"); 2 ELLIOT'S DEBATES, *supra* note 572, at 202 (Rep. Oliver Wolcott) (stating that a religious test was unnecessary because the Constitution's oath requirements constitute "a direct appeal to that God who is the avenger of perjury."); *id.* at 90 (Rev. Theophilius Parsons) ("Will an unprincipled man be entangled by an oath? Will an atheist or pagan dread the vengeance of the Christian's God, a being, in his opinion, the creature of fancy and credulity? It is a solecism in expression."); *Letter from Edmund Pendleton to James Madison*, Oct. 8, 1787, *in* 10 DOCUMENTARY HISTORY, supra note 527, at 1774 (Edmund Pendleton) (arguing that "a belief of a Future State of Rewards & Punishments, can alone give conscientious Obligation to Observe an Oath"); TUCKER, *supra* note 527, at 282 (stating that while "[a] due sense of religion" is preserved "oaths may operate in support of the constitution . . . but no longer."); *id.* at 375 ("Atheism destroys the sacredness and obligation of an oath."); JAMES BAYARD, BRIEF

Founding-era discourse suggests a widely shared belief that oaths depended for their force on religious belief.[574]

Even during the Founding era, however, the oath's efficacy was questioned. Recall James Wilson's skepticism.[575] And according to a 2019 Pew Forum poll, today 26 percent of Americans describe their religious affiliation as "nothing in particular."[576] Supposing that the Presidential Oath Clause once did provide a measure of constitutional security, we must consider whether it can still do so.

It is true that America's religious landscape is rapidly changing.[577] But the religiously unaffiliated 26 percent are still a minority.[578] Atheism is still a point of concern for American voters, with 40 percent of Americans who participated in a 2019 Gallup Poll indicating that they would not vote for an atheist, even if he were otherwise well-qualified.[579] Accordingly, even if it were the case that the oath's efficacy turned on religious faith, the oath could still provide some security if an incoming President is more likely than not to be a person of faith.[580] We can expect that that conditional will be satisfied for at least the near future. But let us assume that the conditional is not satisfied. Why might the oath be effective in constraining the actions of a nonbeliever? It will not do to refer to the argument for the moral force of the oath that was elaborated above, nor to observe that it does not depend upon religious premises.[581] People often do not appreciate their moral obligations, let alone comply with them.[582]

EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 106 (1840) (President's oath "adds the sanction of religious obligation to the duty already incurred by the acceptance of the office.").

574. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1467 (1989) (claiming that "[a]t a time when perjury prosecutions were unusual, extratemporal sanctions . . . were thought indispensable to civil society.").

575. *See also* TUCKER, *supra* note 527, at 282 (observing that "[t]he obligation of oaths upon the consciences of ambitious men has always been very slight, as the general history of mankind but too clearly evinces.").

576. *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RESEARCH CENTER (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/.

577. *Id.*

578. *Id.*

579. Justin McCarthy, *Less Than Half in U.S. Would Vote for a Socialist as President*, GALLUP (May 9, 2019), https://news.gallup.com/poll/254120/less-half-vote-socialist-president.aspx.

580. BAYARD, *supra* note 573, at 106.

581. *See supra*, Part III.A.

582. *Compare Dred Scott v. Sandford*, 60 U.S. 393, 410 (1857) (baldly asserting that the authors of the Declaration of Independence were "incapable of asserting principles inconsistent with those on which they were acting"), *with* Abraham Lincoln, *Speech on the Dred Scott Decision*, *in* LINCOLN, SPEECHES AND WRITINGS, *supra* note 522, at 396 (affirming that "[t]hey did not mean to assert the obvious untruth, that all were then actually enjoying . . . equality . . . They meant to set up a standard maxim for free society, which should be familiar to all: . . . constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximat[ing]"). *See also* JAMES BALDWIN, THE FIRE NEXT TIME 23 (The Dial Press 1993) (observing that "people find it very difficult to act on what they know" because "[t]o act is to be committed, and to be committed is to be in danger.").

An answer is suggested by our first President's second inaugural address.[583] It is still the shortest of any presidential inaugural, and the oath is the subject of three of Washington's six sentences:

> I am again called upon by the voice of my country to execute the functions of its Chief Magistrate. When the occasion proper for it shall arrive, I shall endeavor to express the high sense I entertain of this distinguished honor, and of the confidence which has been reposed in me by the people of united America. Previous to the execution of any official act of the President the Constitution requires an oath of office. This oath I am now about to take, and in your presence: That if it shall be found during my administration of the Government I have in any instance violated willingly or knowingly the injunctions thereof, I may besides incurring constitutional punishment, be subject to the upbraidings of all who are now witnesses of the present solemn ceremony.[584]

Washington identifies two negative consequences of oath-breaking, neither of which would be salient only for a believer.[585] The first, described in a parenthetical, is "constitutional punishment." The second is "the upbraidings of all who are now witnesses."[586]

We can presume that by "constitutional punishment" Washington means impeachment.[587] As of this writing, three Presidents have been impeached.[588] No President has been removed from office following an impeachment, and it seems extraordinarily unlikely that any President will be, given increasing political polarization and the requirement that two-thirds of the Senate vote to convict a President.[589] A President might nevertheless be deterred from oath-breaking by what amounts to a fat-tailed political risk. Impeachment probably will not follow oath-breaking, and it almost certainly will not result in removal, but impeachment might be very damaging to a President's

583. *See* INAUGURAL ADDRESSES, *supra* note 448.

584. *Id.* at 5-6.

585. *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 688 (Carolina Academic Press 1987) (stating that "[o]aths have a solemn obligation upon the minds of all reflecting men").

586. INAUGURAL ADDRESSES, *supra* note 448, at 6.

587. *Id.*

588. James Pasley, et al., *Here Are All the US Presidents Who Have Been Impeached*, BUSINESS INSIDER, (Feb. 26, 2020, 8:39 AM), https://www.businessinsider.com/list-of-impeached-us-presidents-2019-12.

589. *Id.*

legacy.[590] And it is uncontroversial that modern Presidents are concerned about their legacies.[591]

Still more promising as a mechanism for oath-efficacy is the prospect of "the upbraidings of all"—public dishonor.[592] Washington was unusually concerned with maintaining his honor, even by the high standards of an era in which public virtue was of paramount importance.[593] The esteem in which Washington was held by others was central to his identity, and he cultivated a favorable opinion of his character through speech, action, dress, and demeanor.[594] But if Washington prized a kind of favorable opinion that has less political market value today, concern about unfavorable opinion, albeit differently defined, remains highly salient today.[595] And as Re writes: "In the United States, there are those who readily declare themselves to be democrats, capitalists, anarchists, socialists, Marxists, and most everything else—but few would proudly call themselves promise-breakers."[596] A President may or may not believe in a deity, but if he cares about how he is regarded by his fellow human beings, who in turn care about promise-keeping, that ought to discourage him from oath-breaking.[597]

Finally, for the Presidential Oath Clause to be effective, it need *not* motivate a President to comply with the Constitution.[598] Assume an oath-indifferent President, and the overlapping consensus around the oath's importance still makes the oath a potent discursive tool for opposing a President who disregards his constitutional duties.[599] Courts can enforce the oath indirectly by holding void the President's unconstitutional actions.[600] Congress can enforce the oath by censuring faithless execution of the presidential office.[601] Executive-branch officials who are bound by their own oaths to the same Constitution can enforce the President's oath through various means, from selective prioritization to slow-walking to

590. Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 854 (1999).

591. *Id.*

592. INAUGURAL ADDRESSES, *supra* note 448, at 6.

593. *See* JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 284 (2002) ("The political elite in the early republic wielded their reputations as their most formidable weapons; they were individual men of honor, in league with like-minded men, perhaps, but individually responsible for their words and actions . . .").

594. *Id.* at 43 (describing Washington's efforts to "embody the new government's dignity and authority without rising to monarchical excess[,]" and commenting on the "republican symbolism" of Washington's inaugural suit).

595. Moe & Howell, *supra* note 590, at 860.

596. Re, *supra* note 141, at 310.

597. *Id.* at 310.

598. *Constitution of Necessity*, *supra* note 527, at 1261.

599. *Id.* at 1291-92.

600. *Id.* at 1293.

601. *Id.* at 1291-93.

whistleblowing to defiance to resignation.[602] A President who doesn't care about his oath and doesn't consider himself bound by its obligations can be made to fulfill those obligations by other decisionmakers who do care that the President does as he has promised.[603]

C. SHOULD THE PRESIDENT EVER BREAK HIS OATH?

It was argued above that President Lincoln was probably wrong to take the view that his oath obliged him to violate the Constitution in order to save the country.[604] And yet that view seems somehow right—whether because Lincoln's actions *do* seem to have been necessary to save the country or because they were undertaken in the service of an otherwise-just cause.[605] What does this mean for the moral force of the oath?

What it means is that the oath's moral force can be overcome by countervailing moral forces.[606] This does not mean that the oath *lacks* moral force. We are all familiar with more mundane circumstances in which a promise properly gives way to competing priorities.[607] That even a promise as weighty as a President's oath might give way in the face of priorities as pressing than those that informed Lincoln's judgment ought not be shocking.[608]

Still, the all-things-considered correctness of what we believe was Lincoln's knowing constitutional violation is concerning.[609] To allow that Lincoln did the right thing by violating the Constitution in the service of national defense might seem to provide Presidents with a "loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[610] At the same time, we do not want a President to fail to do what Lincoln did because of concern about violating his oath.[611] Let's consider some possible approaches to oath-breaking.

602. For a preliminary sketch of the moral implications of "civil servant disobedience," see Jennifer Nou, *Civil Servant Disobedience,* 94 CHI.-KENT L. REV. 349 (2019). Nou only touches briefly upon "whether there is a legitimate basis for bureaucrats to disobey morally repugnant edits from superiors, even if they comply with duly-passed laws." *Id.* at 377. I plan to address this question in a future work.

603. *Constitution of Necessity*, *supra* note 527, at 1292.

604. PAULSEN & PAULSEN, *supra* note 523, at 175.

605. Prakash, *supra* note 526, at 1302.

606. *Id.* at 1309 (arguing that Lincoln's violation of the Constitution and his presidential oath was excusable given his duty to preserve the Union.).

607. *See* Lyons, *supra* note 467, at 1383 (arguing that "few, if any, of our moral obligations are 'absolute' in the sense that they are capable of overriding all other moral considerations.").

608. Prakash, *supra* note 526, at 1309.

609. *Id.*

610. *Korematsu*, 323 U.S. at 246.

611. Prakash, *supra* note 526, at 1309.

1. The President Should Never Break His Oath

This approach is the most straightforward. It could be defended on the basis of a theory of role morality—a theory that holds that a person's office defines his moral obligations and that the common-sense morality that is generally held by other Americans should not affect his moral judgment.[612] Perhaps the President's office consists of exercising his constitutional powers, discharging his constitutional duties, and nothing else. If so, the President might need to execute the laws, even in the teeth of common-sense morality.[613]

This role-morality argument does not work because of the obvious moral correctness of counterexamples. We do not believe Lincoln was wrong to violate the Constitution by issuing the Emancipation Proclamation because he did so in the reasonable belief that it was necessary under the circumstances.[614] Nor do we believe that if the reasoning of the Court in *Dred Scott v. Sandford*[615] was correct and Blacks could never be U.S. citizens under the antebellum Constitution, Lincoln would have been wrong to issue passports to Blacks.[616]

One might also defend a categorical prohibition on oath-breaking on rule-consequentialist grounds.[617] Even if the President *should* sometimes knowingly violate his oath, it might be a bad idea to *say* so.[618] A President like Lincoln will do what is right in morally urgent circumstances because of his own sound moral reasoning, despite a categorical prohibition on oath-breaking.[619] But other Presidents might not respond rightly, and they might perceive the need for oath-breaking in morally inappropriate situations.[620]

This rule-consequentialist argument is unconvincing because it lacks an account of why the moral benefits of reducing false positives—that is, morally *un*justified oath-breaking decisions—would exceed the costs of reducing true positives—that is, morally *justified* oath-breaking decisions.[621] A morally astute President who takes his oath more seriously *for good moral reasons* is less likely to break his oath than a morally obtuse President would,

612. For an overview of role morality, *see generally* Judith Andre, *Role Morality as a Complex Instance of Ordinary Morality*, 28 AM. PHIL. Q. 73 (1991).

613. *See id.* at 73.

614. Prakash, *supra* note 526, at 1309.

615. 60 U.S. 393 (1857).

616. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 212 (2004).

617. Hooker, *supra* note 475, at 92.

618. Prakash, *supra* note 526, at 1305.

619. *Id.* at 1304-05.

620. *Id.* at 1305.

621. Hooker, *supra* note 475, at 95.

and he would probably be more respectful of a no-oath-breaking norm.[622] A no-oath-breaking norm may not discourage a moral paragon like Lincoln from morally justified oath-breaking, but it might discourage slightly-less-than-Lincolns from doing so, in an overabundance of caution.[623] Meanwhile, very-far-from-Lincolns may not be swayed by the oath or the norm at all and thus break their oaths at morally inappropriate times.[624]

2. The President Should Break His Oath When the Moral Benefits Exceed the Costs

This approach resembles Jeffrey Brand-Ballard's prescription to judges.[625] Brand-Ballard argues that judges who possess sound moral and practical judgment should identify legal results that are morally suboptimal, take into account the likely systemic effects of deviating from the law, and deviate if they conclude after that the moral benefits of deviation will exceed the costs.[626] So, too a President might decide whether to deviate from the Constitution on a retail basis after taking systemic effects into account. And he could surreptitiously do so in cases where the moral benefits exceed the moral costs.[627]

Assume every President to be a Lincoln, and this position might be attractive. But the specter of a much lesser President pondering exactly how many covert, self-justifiable lawbreaking activities he can get away with ought to scare us away from it.[628] It is plausible that judges who adopt the Brand-Ballard strategy will have long time horizons, given their tenure during good behavior.[629] Accordingly, they may consider systemic effects, including the possibility of retaliation for any detected judicial deviations from the law, years down the road.[630] But a President's tenure is limited, and his time horizon liable to be shorter. It is thus more doubtful that even a President who strives in good faith to deviate from the law for only the best moral reasons will accurately determine whether his deviations will have net-harmful systemic effects.[631]

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622. *See generally* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 28 FORDHAM L. REV. 71 (2009) (arguing that the Executive Branch should be limited to a duty-based approach of power so that a President adopts a disinterested approach to executive decisions rather than a politically charged one.).

623. Re, *supra* note 141, at 313-14.

624. *Id.* at 334, 344.

625. JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING 239 (2010).

626. *Id.*

627. *Id.* at 271.

628. Frederick Schauer, *Ambivalence about the Law*, 49 ARIZ. L. REV. 11, 22 (2007).

629. BRAND-BALLARD, *supra* note 625, at 271.

630. Schauer, *supra* note 628, at 23.

631. *Id.*

3. The President Should Break His Oath to Prevent Extreme Injustice

This is a variation on Paul Butler's prescription to judges.[632] Butler argues that judges are justified in consciously subverting the law—lying about its content—in order to prevent "extreme injustices," specifically, state violations of "bedrock principles of international law" from which states are not permitted to derogate.[633] These jus cogens norms include norms that prohibit prolonged arbitrary detention, systematic racial discrimination, slavery, and consistent violation of internationally recognized human rights.[634]

A President might take a similar approach to enforcing legislation. He might distinguish between reasonably debatable policy and statutes that implicate fundamental moral principles. He might pay no moral attention to the former and only consider nonenforcement of the latter if he were convinced that a statute was extremely unjust—and therefore requiring an extreme tactic, namely, nonenforcement-despite-constitutionality.[635]

This approach sounds in threshold deontology—the view we should not consider the moral consequences of adhering to a moral norm (here, oath-keeping) unless the moral stakes are very high, at which point the moral costs of adherence should be weighed against the moral benefits.[636] It promises to navigate between the Scylla of the unattractive, categorical rule-following approach and the Charybdis of the unattractive selection between which laws to follow.[637]

We do not want a President who will never break his oath, any more than we want a sibling who will never lie, even if an ax-wielding stranger arrives at our door and asks if we are home. And it is plausible that, the less controversial the moral norm that the President must invoke and the clearer it is to him that the norm has been violated, the more likely he is to be justified if he does choose to break his oath.[638] It is also plausible that the President will be less likely to generate net-morally-bad systemic effects through his oath-breaking than he would be under a variant of Brand-Ballard's approach, since he will break his oath more rarely.[639]

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632. Paul Butler, *When Judges Lie (And When They Should)*, 91 MINN. L. REV. 1785, 1820 (2007).
633. *Id.*
634. *Id.*
635. Schauer, *supra* note 628, at 49.
636. *See* Michael S. Moore, *Torture and the Balance of Evils* , 23 ISRAEL L. REV. 280 (1989); Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law,* 96 CALIF. L. REV. 323, 343-47 (2008); Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 12, 2012), https://plato.stanford.edu/entries/ethics-deontological/.
637. Butler, *supra* note 632, at 1823.
638. Schauer, *supra* note 628, at 13.
639. BRAND-BALLARD, *supra* note 625, at 239.

Still, the level of abstraction at which Butler describes the norms that he thinks can justify judicial deviation from the law is somewhat troubling.[640] Consider that the Constitution currently contains provisions that are designed to prevent arbitrary detention, systematic racial discrimination, and slavery.[641] It is not obvious that a President who directly appeals to norms prohibiting the latter, even if only in high-moral-stakes cases, is more likely to arrive at morally correct decisions than a President who straightforwardly follows rules that implement those norms indirectly. Might not he overvalue his own moral wisdom and undervalue the wisdom embodied in the rules?

This is an optimization problem rather than an insuperable obstacle to the threshold-deontological approach.[642] If we agree that we do not want the President to abdicate his moral judgment, the optimal amount of oath-breaking cannot be zero. If we specify that the presumption of oath-compliance is very strong and tether the oath to the Constitution's minimally-morally-legitimate original content, we can maximize the moral mileage that the President can get out of simply following the law, consistent with our judgment that we do not always want him to do so.[643]

There is also the question of social legitimacy. Do Americans believe it is proper for a President to violate the law for the sake of alleviating extreme injustice? If the answer is "no," Americans may be morally obtuse, but that moral obtuseness is a social fact with morally salient consequences for presidential oath-breaking.[644] A President who breaks his oath for good moral reasons may see his agenda obstructed and may be punished at the polls.[645] These political consequences may discourage future Presidents from breaking their oaths for good moral reasons; the result of the President's behavior might be net-morally-bad.[646]

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640. *See* Butler, *supra* note 632, at 1820 (suggesting that judges may justifiably overturn laws when they violate basic human rights.).

641. *Id.*

642. Schauer, *supra* note 628, at 24, 28.

643. *Id.* at 21.

644. A strict non-consequentialist might deny the relevance of the consequences of oath breaking. *See* Philip Pettit, *Consequentialism*, *in* A COMPANION TO ETHICS 231 (Peter Singer, ed., 1991) ("Consequentalists see the relation between values and agents as an instrumental one: agents are required to produce whatever actions have the property of promoting a designated value . . . Opponents of consequentialism see the relation between values and agents as a non-instrumental one: agents are required or at least allowed to let their actions exemplify a designated value, even if this makes for a lesser realization of the value overall."). *See also* Immanuel Kant, *On a Supposed Right to Lie from Philanthropy*, *in* IMMANUEL KANT: PRACTICAL PHILOSOPHY (M. Gregor, ed., 1996) (denying that it is morally permissible to lie to a would-be murderer about the location of his would-be victim). I do not believe that strict non-consequentialism is a good fit for moral decision making by members of public institutions that are "designed to serve purposes larger than those of particular individuals or families," see THOMAS NAGEL, MORTAL QUESTIONS 83 (1979), but cannot rigorously defend that position here.

645. Schauer, *supra* note 628, at 22.

646. Butler, *supra* note 632, at 1823.

The history of presidential illegality suggests that there is a *form* of oath-breaking that is socially legitimate, as well as a way to keep a President within the bounds of socially legitimate oath-breaking.[647] This form of oath-breaking is tied to the morally salient functions of the law of the land. We should therefore specify that the moral norms to which the President is permitted to have recourse when the moral stakes are high are those that the Constitution was designed to instantiate.[648]

We have already discussed Lincoln's defense of his actions during the Civil War.[649] The "preservation of the nation" might not be the object of the President's oath, but it describes one of the primary functions of the President's office.[650] The President is "Commander-in-Chief of the Army and Navy, and of the Militia of the several States";[651] he is the executor of the nation's laws; his oath requires him to preserve, protect, and defend the Constitution with the powers available to him; and it is indeed doubtful that it is "possible to lose the nation, and yet preserve the constitution."[652]

In defending the Louisiana Purchase despite his doubts about its constitutionality, Thomas Jefferson similarly framed his moral arguments within the context of the functions of the governing law:

> To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. When, in the battle of Germantown, General Washington's army was annoyed from Chew's house, he did not hesitate to plant his cannon against it, although the property of a citizen. When he besieged Yorktown, he leveled the suburbs, feeling that the laws of property must be postponed to the safety of the nation. While the army was before York, the Governor of Virginia took horses, carriages, provisions and even men by force, to enable that army to stay together till it could master the public enemy; and he was justified. A ship at sea in distress for provisions, meets another having abundance, yet refusing a supply; the law of self-preservation authorizes the distressed to take a supply by force. In all these cases,

647. *See Constitution of Necessity*, *supra* note 527, at 1265 (noting that President Lincoln rightly believed that his duty to preserve the United States as a nation outweighed his duty to follow the Constitution.).

648. Schauer, *supra* note 628, at 21-22.

649. *Constitution of Necessity*, *supra* note 527, at 1265.

650. LINCOLN, SPEECHES AND WRITINGS, *supra* note 519, at 585.

651. U.S. CONST. art. II, § 2, cl. 1.

652. LINCOLN, SPEECHES AND WRITINGS, *supra* note 519, at 585.

> the unwritten laws of necessity, of self-preservation, and of the public safety, control the written laws of *meum* and *tuum*.
>
> . . .
>
> From these examples and principles you may see what I think on the question proposed. They do not go to the case of persons charged with petty duties, where consequences are trifling, and time allowed for a legal course, nor to authorize them to take such cases out of the written law. In this the example of overleaping the law is of greater evil than a strict adherence to its imperfect provisions. It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake.[653]

Jefferson made plain that it is the "end" of the "written law" that justifies its violation, and only in extreme circumstances—when "time" is scarce, where "the safety of the nation, or some of its very high interests are at stake," is at stake.[654] He also cautioned that the nature of an office and the kinds of cases before it should be considered—if "persons charged with petty duties" and "consequences are trifling[,]" the written law should govern.[655] But "those . . . who accept of great charges" are not merely permitted but required—it is "incumbent" upon them—"to risk themselves on great occasions."[656]

History should make us wary of appeals to necessity. A paraphrase of Justice Robert Jackson's dissent in *Terminiello v. Chicago*[657] is a popular cliché: "The Constitution is not a suicide pact."[658] Officials invoke the Constitution to justify, among other things, the internment of American citizens in concentration camps during World War II,[659] the torture of those suspected of terrorism,[660] and the suspension of ordinary constitutional liberties in the service of the "war on drugs."[661] It is, however, an enduring

653. *Thomas Jefferson to John B. Colvin* (Sept. 20, 1810), *in* 11 WORKS OF THOMAS JEFFERSON 146-47, 149 (Paul Leicester Ford, ed., 1904).

654. *Id.* at 146, 149.

655. *Id.* at 149.

656. *Id.*

657. 337 U.S. 1 (1949).

658. *See Terminiello*, 337 U.S. at 37 (Jackson, J., dissenting) (warning that "if the Court does not temper its doctrinaire [free speech] logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

659. *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 50 (2006).

660. *See* ALAN DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11, 78 (2008).

661. *See* Douglas Jehl, *Bennett Would Limit Rights in War on Drugs*, L.A. TIMES, (Mar. 3, 1989), § 1, at 1 (reporting on Director of the Office of National Drug Control Policy William Bennett's testimony in his nomination hearings, in which Bennett stated that he favored limiting constitutional rights if there

cliché, and its endurance suggests that presidential oath-breaking, if confined to extreme cases in which following the letter of the law would clearly contravene its spirit, does not present a social legitimacy problem.[662]

The President should *not* make a decision whether to break his oath alone, nor should he rely entirely upon the human resources within his administration that he uses to determine what the law required in the first place.[663] There is no reason to believe that the Department of Justice's Office of Legal Counsel has an institutional monopoly on moral reasoning. The President should reach out to people within his administration in whose moral judgment he has reason for confidence.[664] Because the consequences of a decision within a particular subject-matter area—say, environmental policy or bank regulation—are likely to be better appreciated by specialists in that subject-matter area, the President should make sure to seek advice from specialists and, all else being equal, give their judgments more weight than nonspecialists.[665] In order that the gravity of what he is doing be recognized, he should frankly acknowledge what he is contemplating—the breach of a solemn promise. He should explain that he has striven to the best of his ability to determine what the law is, that the law requires X, and that he is considering not-X. He should listen. He should decide. And he should "throw himself on the justice of his country and the rectitude of his motives."[666]

CONCLUSION

It is a commonplace in moral philosophy that one cannot infer a normative "ought" from a factual "is."[667] Establishing that the identity of "the Constitution of the United States" is a function of the original linguistic content conveyed by a historically situated text may not itself underwrite any moral obligation on the part of the President.[668] We might need something more to support our intuition that the President has such an obligation.

We have something more: The presidential oath. We have the institution of the oath, an unbroken constitutional tradition of taking the oath, and an

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were "compelling reasons" to do so in furtherance of drug control and added that the "Constitution is not a suicide pact").

662. *Terminiello*, 337 U.S. at 37.

663. Moe & Howell, *supra* note 590, at 852-53.

664. Driesen, *supra* note 622, at 92.

665. *Id.*

666. WORKS OF THOMAS JEFFERSON, *supra* note 653, at 149.

667. David Hume introduced the is-ought division into moral philosophy. *See* II A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS 177-78 (1962). The basic idea is that normative conclusions require at least one normative premise.

668. Kay, *supra* note 102, at 238.

unbroken constitutional tradition of affirming that the presidential oath obliges the nation's chief executive to a particular thing—an entity constructed in 1788, supplemented since, and minimally morally legitimate today. The President's promise may not be necessary to underwrite a moral obligation on the President's part to follow and maintain the Constitution—such moral obligation might attach for other normative reasons—but it is sufficient to do so.[669]

The moral obligation of the presidential oath is, however, limited and contingent.[670] It is limited because the moral force of any promise is limited—there are more important things than word-deed correspondence. It is contingent because a promise does not carry any moral force at all unless it is made under reasonably just background conditions and has reasonably just content.[671] We cannot depend upon the President's promise to justify his own exercise of power; we must do our own part to make sure that the Constitution that he has promised is good enough for him to preserve, protect, and defend. And we must work to ensure that any prospective President who does not understand the significance of that promise or will not care to keep it is not elevated to office.[672] Failing that, we must use any constitutional[673] resources at our disposal to ensure that his deeds match his words—disinclined though he may be to keep them.

669. Schauer, *supra* note 628, at 20.
670. Re, *supra* note 141, at 344-45.
671. *Id.* at 345.
672. Schauer, *supra* note 628, at 28.
673. Whether we are permitted or required under certain conditions to use *unlawful* means to do so is a question for another time. For a defense of a duty to resist the execution of unjust laws, *see* CANDICE DELMAS, A DUTY TO RESIST: WHEN DISOBEDIENCE SHOULD BE UNCIVIL (2018).