Originalism as a Theory of Legal Change

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[[Abstract.]]

INTRODUCTION

Originalism is usually understood as a claim about interpretation. An originalist reads legal texts, and particularly the text of the Constitution, according to their original meaning (whatever that might be).

This paper argues for a different understanding. Originalism is better understood as a claim about law. On this view, an originalist understands the rules of our legal system, and particularly our constitutional law, to have their original legal content (whatever that might be).

The core of this view is a principle we might call “continuity”: that the law stays the same until it’s been validly changed. A statute like the Federal Employers’ Liability Act may be more than a century old, but it’s part of the law today because it was validly enacted and has never been repealed. What originalism adds is a further, distinctive thesis, which we might call “continuity with the Founding,” or the “continuity thesis” for short. According to that thesis, what’s true of old statutes is also true of our old Constitution, and indeed of our old law generally: whatever rules of law we had back at the Founding, we still have now, unless something legally relevant occurred to change them. Our law today consists of their law, the Founders’ law, plus any valid changes. Preserving the meaning of the Founders’ words, though important, isn’t an end in itself; it’s just a means to preserving the content of the Founders’ law.

To say that our system is legally continuous with the Founding is to refuse to recognize legal discontinuities since then. If confronted with a claim that the law was X at the Founding but is Y today, the originalist will ask what happened in between—and, in particular, why whatever

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1 Ch. 149, § 1, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51).
happened was a *legally valid* means of accomplishing that change. We don’t make that demand of events that came before the Constitution (the colonization of North America, the colonies’ throwing off the British yoke, the States’ abandoning the Articles of Confederation), but we do make it of events that came after. As a matter of history, of course, the past two hundred years have seen plenty of attempts to change the law without obeying preexisting legal constraints—by Congress, the President, the Supreme Court, and others. But as a matter of law, those events didn’t necessarily succeed in changing the rules—or might have succeeded only in virtue of other legal rules, like stare decisis or the de facto officer doctrine, that have independently good title to being valid themselves.

This view of originalism as continuity with the Founding isn’t offered as a definition, in the lexicographer’s sense. People use “originalism” to mean lots of different things, many of which are inconsistent with the view offered here. Instead, this paper tries to present a plausible and informative version of originalism, one that preserves some common intuitions and avoids some common pitfalls, and that may be a useful model to originalists and nonoriginalists alike.

The argument proceeds as follows. The paper first identifies the typical conceptual and normative defenses of originalism, and shows why a specifically legal defense of the doctrine is necessary. It then outlines what a legal defense of originalism might look like, examining the concept of continuity with the Founding and identifying reasons why that concept might be a feature of our law. Next, it demonstrates that the continuity thesis, if true, entails a particular form of “original methods” originalism—and may in fact be a particularly plausible grounding for originalism, at least as compared to the alternatives. Finally, the paper examines the consequences of the continuity thesis for the relationship between law and history.

This paper isn’t intended as a full defense of the continuity thesis, much less originalism as a whole. Instead, it tries to clear away some of the theoretical underbrush, clarifying different grounds one might have for taking a position on the issue—and hopefully pushing scholars toward more productive areas of debate. American law today might be originalist in nature, but then again it might not. Which view is right depends on facts about our society’s current legal commitments, not about the law two hundred years ago. This paper merely argues that, if it *is* true, continuity with the Founding is the best reason to be an originalist—and, if it is false, the best reason not to.
I. ORIGINALISM AND THE LAW

Originalism is usually defended in one of two ways. Some people present it as a conceptual claim about the right way to read legal texts, or even written texts in general. If a written text means whatever its author intended it to mean (or, at least, conveys whatever instructions its author intended to convey), then the same is true of the Constitution—and any other reading is just mistaken. Others defend originalism for broadly normative reasons, based on values such as popular sovereignty, liberty, or public welfare. If enforcing the Constitution’s original meaning would better serve these values as compared to the alternatives, then we should do it.

Neither of these defenses, though, is fully persuasive. Both depend on claims that aren’t really about meaning or values, but about the content of our law. Whatever our theory of interpretation, we still need to know whether (and to what extent) the document we’re interpreting is legally authoritative. And whatever method we might normatively prefer on a blank slate, here the slate isn’t blank: judges and officials usually have to act in light of their existing obligations under the law.

In other words, both conceptual and normative arguments for originalism depend on certain implicit assumptions about the content of American law. Making those assumptions explicit, and realizing that we have to deal with the content of the law anyway, then raises a further possibility—that originalism itself might be better conceptualized

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as a legal claim, capable of being advanced or rejected based on other commitments we have about our particular system of law.

A. Conceptual Arguments for Originalism

Some of the most familiar defenses of originalism are what we might call “conceptual.” They make philosophical claims about the nature of meaning or interpretation in general, and then apply those claims to the Constitution in particular. If the meaning of a text always and everywhere depends on facts contemporaneous with its creation—what its author intended it to mean, what a reasonable reader in that historical context would take it to mean, what a reasonable member of the audience intended by the Framers (or a reasonable Framer addressing that intended audience) would understand it to mean, and so on—then the Constitution’s meaning will depend on those “original” facts too. But this argument moves too fast, because constitutional law can include more than just the meaning of the text. The real disputes over constitutional “interpretation” aren’t actually interpretive at all, but concern the sources and content of U.S. law. Those, in turn, depend on facts about American society today, not just at the Founding. And no matter how good our philosophical arguments might be, the rules of interpretation we use might themselves depend on our socially contingent rules of law.

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6 See sources cited supra note 2.
8 See Jeffrey Goldsworthy, The Case for Originalism, in THE CHALLENGE OF ORIGINALISM, supra note 2, at 42, 48 (describing “utterance meaning” as depending on “what the speaker’s meaning appears to be, given evidence that is readily available to his or her intended audience”).
9 See Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. PA. J. CONST. L. 155, 183 (2006) (defining “original meaning” as “the meaning that (i) the framers would have reasonably expected (ii) the audience to whom the Constitution is addressed (ratifiers, contemporary interpreters) (iii) to attribute to the framers, (iv) based on the evidence (public record) that was publicly available”).
1. What Interpretation Can’t Do

It’s a commonplace critique of the conceptual defense that there are many contradictory candidates for the One True Meaning of a legal text (speaker’s meaning, readers’ understandings, etc.). But even assuming that one method eventually triumphs over the others, that still leaves us with a problem. No matter what interpretive method we use, that method can be rendered irrelevant—obsoleted, so to speak—depending on what else is in the law.

Suppose that, according to your favorite interpretive method, you read the original Constitution to say X. Someone like Bruce Ackerman might still say, “Sure, the original Constitution said X, but we changed it to Y during Reconstruction, the New Deal, and/or the Civil Rights Era.” You might protest that those changes go beyond the (original) limits of Article V. But that’s not a problem for Ackerman, who can just say that our legal system happens to permit certain kinds of informal or extraconstitutional changes; Article V is one way of making them, but there are others too.

Similarly, someone like Philip Bobbitt (or David Strauss, or Richard Fallon, or Mitch Berman and Kevin Toh) might say, “Sure, the original Constitution said X, but the text isn’t the exclusive source of constitutional law. Constitutional law also comes from judicial precedents, common-law understandings, longstanding traditions and practices, the ethos of America, norms of prudence, and maybe some other things too.” How are these nonoriginalist critics to be answered?

We normally talk about disputes like these as disputes over “constitutional interpretation”: some people think that precedent matters for interpretation, say, and others don’t. But that language causes confu-

12 See Ackerman, Transformations, supra note 11, at 15–17; Ackerman, The Living Constitution, supra note 11, at 1775.
“Interpretation,” in the sense that conceptual defenses typically use it, is about the proper way to read something; it “comes into play when there is a possibility of argument as to the [text’s] meaning.” 14 Once we know the communicative content of a text well enough—once “there is no question as to how a person is to be understood”—then the activity of interpretation is over. 15 Yet once we’re done figuring out the text, we still need to determine the law. We can’t rule out extratextual sources of legal authority—precedent, longstanding tradition, the American ethos—just by interpreting the text correctly. The whole point is that those sources are extratextual: they have to be defended or rejected on other grounds.

As an example, think of constitutional disputes in Britain, which doesn’t have a written constitution. Whether the United Kingdom has really become part of the European Union, such that E.U. law trumps U.K. law regardless of what the Queen-in-Parliament says, can’t be settled just by interpreting various acts of Parliament. (The British Parliament could say that it’s supreme, but the European Parliament could disagree!) Likewise, whether the current Parliament can bind a future Parliament—the traditional answer is no 16—isn’t a question that legislation can settle; new statutes could be written taking either side, and we’d still need to decide who’s right. One might say that these fights are about “interpretation” of legal practices writ large, but that’s a non-standard and unhelpful use of the term. What should be clear is that these aren’t just fights about how to read particular texts, but about the legal authority that those texts can wield.

In fact, most of the time, no one actually disagrees about interpretation anyway. Most everyone accepts that original meaning contributes to the law in some way; the only live disputes are how much it contributes, and whether and when other sources can validly come into play. 17

15 Id. at 121. But see Kent Greenawalt, Constitutional and Statutory Interpretation, in The Oxford Handbook of Jurisprudence and Philosophy of Law 268, 274 (Jules Coleman & Scott Shapiro eds., 2002) (cautioning against a narrow philosophical understanding of “meaning” that diverges from how lawyers would apply it in practice).
16 See 1 William Blackstone, Commentaries *90 (“Acts of parliament derogatory from the power of subsequent parliaments bind not.”).
Only a vanishingly small group of scholars really argue (for theoretical reasons or for practical ones) that we’re bound by the contemporary meaning of the words in the constitutional text, whatever their original meaning might have been.18 Arguments that we should use judicial precedents, traditions, or the American ethos as grounds to depart from original meaning are only rarely intended as serious claims about the meaning of language. (How could a judicial decision or shifting normative considerations change the communicative content of a written document? Why don’t other written documents, including ancient written constitutions that are no longer in force, change in this way?19) Instead, these claims about precedent and tradition are usually intended as claims about different sources of law, or different factors that ought to be considered by official decisionmakers—or, if not so intended, could be redescribed that way without loss of generality.

To put it more generally, knowing how to read the Constitution’s text doesn’t tell us why we care what it says. Whatever the right interpretive method might be, we can apply it to all sorts of documents—an old newspaper article,20 a restaurant order,21 a recipe for fried chicken22—without any of them being part of our law. That’s one of the attractions of conceptual defenses, that they use everyday methods ap-

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18 See, e.g., ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 6–7 (1960) (asking “what do we mean when we utter” the First Amendment, and noting that this meaning need not be “what it has been in the past” (emphasis added)); Tom W. Bell, The Constitution As If Consent Mattered, 16 CHAP. L. REV. 269, 271 (2013) (seeking “the plain, present, public meaning of the Constitution” to respond “to the understandings of living people”); Martin H. Redish & Matthew B. Arnould, Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative, 64 FLA. L. REV. 1485 (2012) (preferring contemporary meaning in order to control judicial discretion).


20 See id. at 487.

21 See Alexander & Prakash, supra note 2, at 975.

appropriate to many different types of documents. But that’s also why the conceptual defense depends on further premises—that the Constitution is authoritative for us; that it serves as the preeminent or even the exclusive source of our supreme law. And in defense of these premises, the conceptual defense has nothing to say.

2. Interpretation and Theories of Jurisprudence

To make the move from constitutional text to constitutional law, we need not only interpretive commitments, but also what we might call “jurisprudential” ones—that is, commitments about the sources and content of our law. These commitments might support originalist theories, but then again they might not—and philosophical reasoning can’t supply the answer.

Our jurisprudential commitments depend on our theory of jurisprudence: where the law comes from, how we find out what it is, and so on. To a legal positivist, for example, law depends on social facts. What the law is in a given time and place depends on various conventions, beliefs, customs, norms, etc., held by people who live there. Exactly which social facts those are—which people’s beliefs matter, for instance—and exactly how the law depends on them are matters of live philosophical dispute, on which this paper tries to remain largely agnostic. But without having solved all of jurisprudence, it’s enough to say—within the broadly positivist framework this paper assumes—that facts about society supply some kind of answer to these questions.

Thinking of the problem like this gives us at least a first-cut way of understanding constitutional disputes: the conceptual originalist and the partisan of alternative sources of law simply disagree on which

23 See Prakash, supra note 19, at 487–89.
24 See Alexander, Simple-Minded Originalism, supra note 2, at 94.
27 Compare, e.g., id. with Hart, supra note 25, and Scott J. Shapiro, Legality (2011).
sources of law matter. To date, this disagreement has been mostly implicit, and it’s not obvious how to resolve it. But it’s still possible that social facts ultimately provide the answer, and that this answer might be originalist in nature. (For example, maybe we do intuitively treat the Constitution’s text as having a form of exclusive authority, which is why those other sources—precedent, tradition, etc.—have sought the cachet of “interpretation” for so long.) Sophisticated conceptual originalists have long defended their views based not only on a theory of meaning, but also a theory of legal authority. To commission some people to enact a Constitution, the argument goes, is to take their instructions as authoritative; so when we interpret their work, we ought to be searching for the instructions they meant to convey.

Phrasing the conceptual argument in these terms, though, also raises new problems. If the conceptual defenses of originalism themselves depend on contingent features of U.S. law—if they’re not just the product of philosophical reasoning about language—then they can be undone by those same contingent features of law. Even putting alternative sources of law (like precedent) to one side, the correct method of interpreting a constitutional text might itself be determined by our contingent legal rules.

Suppose, for example, that the French legal system were fully committed to nonoriginalist interpretation of the French Constitution—committed “all the way down,” in principle as well as in practice. An originalist might criticize that choice on policy grounds, or perhaps on conceptual grounds (they’re just “reading it wrong”), but not on legal grounds, at least not without renouncing positivism. How could the entire society be getting its own law wrong, all the way down?


30 See Alexander, Originalism, the Why and the What, supra note 2, at 539–41.

31 In forthcoming work, I defend the concept of “global error” in law, at least in limited circumstances. See Stephen E. Sachs, The “Constitution in Exile” as a Problem for Legal Theory, 89 N.D. L. REV. (forthcoming 2014) (manuscript at __). If French law incorporates standards from other fields in which global error is possible, then the French might all be confused about those standards, and thus about what their law
Even if the French are suffering from some kind of conceptual error, that’s basically of no relevance to a student of French law. All sorts of laws are based on mistaken reasoning of one kind or another—tobacco subsidies, rent control, etc.—but that doesn’t stop them from being law. As Judge Easterbrook put it, believing in nonoriginalist interpretation is like believing in infant baptism: “Hell yes, I’ve seen it done!”

Given that a great many legal systems read their written constitutions in nonoriginalist ways, the claim that originalism is necessarily or conceptually required by a written constitution is hard to credit. And if originalism depends on social facts in other countries, then presumably it also depends on social facts here too. How do we know that America isn’t actually like France? That’s an empirical question, which can’t be settled by conceptual ruminations about interpreting texts. And even if American law is originalist in nature, it might be the wrong kind of originalist; it might focus on the reader’s understanding rather than the speaker’s intent, or vice versa. In the end, discovering the One True Meaning won’t get us very far; any actual defense of originalism has to rest on other grounds.

B. Normative Arguments for Originalism

The other common technique for defending originalism is on normative grounds. Originalism might be the best way of respecting popular sovereignty, or individual liberty, or public welfare generally. To the extent we value these things, we ought to be originalists. This is a perfectly good form of argument, though some doubt that there really

ultimately requires. Id. at __. The assumption here, though, is that the French aren’t incorporating philosophically correct methods of interpretation, but consciously rejecting them—in which case global error seems implausible.


33 See generally David Fontana, Comparative Originalism, 88 TEX. L. REV. see also 189 (2010).


35 See WHITTINGTON, supra note 3; Lash, supra note 3.

36 See BARNETT, supra note 4.

37 See McGinnis & Rappaport, supra note 5.
are any good normative defenses on offer.\footnote{See, e.g., Berman, \textit{supra} note 10, at 63–82.} For the purposes of this paper, though, we can assume that there are plenty.

The real problem with these arguments is something else: that they undercut many of the intuitions on which originalists commonly rely. There are good normative arguments for plenty of things, like reforming the tax code. Originalism is supposed to operate on a different plane. Originalists don’t usually describe themselves as doing law reform, or as one more interest group seeking to implement its policy agenda through the courts. (If anything, the opposite seems true: it’s a staple of originalist rhetoric to condemn “legislating from the bench.”) But without knowing whether originalism is consistent with our current system of law, we can’t tell whether these normative arguments really are proposals for legal change—and, if so, to whom they ought to be addressed. And because departing from current law itself carries its own normative costs, we can’t even tell whether adopting originalism—assuming that our law isn’t originalist right now—is still a good idea.

1. \textit{Originalism as Law Reform}

Originalism is typically presented as a restorative project, one that rescues the true law from subsequent mistakes that have obscured it. That might mean reversing the occasional mistaken precedent, but only in order to apply the actual law of the United States in place of a mistake. This view presupposes, if it doesn’t actually argue, that the best understanding of American law is actually an originalist one—that, despite appearances, there’s still something there to vindicate. In this context, normative arguments show why the issue matters, providing reasons to devote one’s energies to the work of restoration.

On the other hand, if current American law is nonoriginalist—like the law of France, in the hypothetical presented above—then those normative arguments are arguments for law reform, and not for enforcing the law as it is. If our constitutional law really has changed since the Founding, over and above any valid amendments, then the call to return to the original understanding (plus amendments) is a call to depart from current American law, not to apply it. The fact that the departure happens to involve returning to some prior state of affairs doesn’t make it any less of a departure. A latter-day Tory seeking to
restore the Crown, no matter how good his normative reasons for doing so, would clearly be proposing a change to U.S. law, not just its proper enforcement.

None of this means that the normative arguments are wrong, such as they are. Originalism might be a departure from current law, but a departure we ought to make. Maybe the Founders’ law (plus amendments) is substantively terrific; maybe Article V constrains judges or generates good consequences in the future; maybe the whole thing is required by theories of political liberty or popular sovereignty; and so on. But in some ways, these arguments prove too much. We could also encourage judges and officials to depart from current law for other reasons, whether substantive (modernizing the government, protecting our environment, preventing war) or more theoretical (universal human rights, natural law, the categorical imperative), none of which have anything to do with originalism. If the Supreme Court could achieve your favorite normative end by nonoriginalist means—declaring nuclear weapons unconstitutional, creating a rights-respecting libertarian paradise by decree—why should originalism stand in its way? As priorities go, it’s hardly clear where originalism stacks up, even assuming that its normative defenses succeed on their own terms.

More fundamentally, most originalists tend to object to such departures regardless of the substantive merits of the cause in question—and without stooping to argue over which causes are more worthwhile than others. Originalists don’t want to be known as just one more interest group trying to enshrine their preferred policies in constitutional law, no matter how good those policies may be. They want to claim that judges and officials are bound to follow originalist views of the law. That makes it harder to believe that originalism is itself intended as a departure from present law, even if there are also some excellent normative arguments in its favor.

2. Originalism and Legal Duties

A second problem with normative defenses of originalism concerns their audience. Normative claims are usually addressed to political decisionmakers (executives, legislators, judges) as an argument to use their political power in particular ways. But an argument that one method of interpretation is normatively better than the others, all else being equal, doesn’t prove that actual officers in real life—where all else isn’t equal—should use it.
Many people hold that government officials have at least a prima facie duty to follow the law. (This might include lawyers, who act as officers of the court.) This duty isn’t absolute, and American history is full of reasons—e.g., slavery—why officials might properly try to evade it. Yet most of the time, people expect their officials to carry out the law.

If, however, contemporary American law is not fully originalist right now, then knowing that originalism is (normatively) the best method of constitutional interpretation isn’t enough. To tell officials considering these normative arguments what to do, you first have to identify the interpretive method that’s required by current law, and then see if the various advantages of originalism would justify those officials in departing from that required method. Knowing that originalism is normatively preferable to the alternatives is like knowing that tax rates ought to be lower than they are; it doesn’t prove that judges can legitimately impose the better rule by fiat.

Now, maybe the normative defenses of originalism are aimed at officials who have unfettered discretion to change the rules—the Justices of the Supreme Court, say. Or maybe they’re aimed at the people at large, who can work to change the law in their capacity as ordinary citizens, at which point the officials will have to follow along. But both of these approaches require some account of what the law is, right now—and without that account, a normative defense of originalism will be incomplete.

### 3. What Normative Arguments Leave Out

Normative arguments for originalism rarely engage the question of whether originalism is already our law. Some people see that failure as evidence of originalists’ bad faith, or of confusion about the nature of their own originalist project. How can they criticize judges who legislate from the bench, when they themselves want to impose a new policy platform?39

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39 See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 546, 560 (2006) (“It is evident, however, that the political practice of originalism seeks to change the meaning of the Constitution by mobilizing the political energy necessary to limit the precedents of the Warren Court and align them with a conservative vision of the American polity.”).
That reading is more uncharitable than necessary. As Matt Adler notes, both originalists and nonoriginalists often fail to make these kinds of views explicit.\textsuperscript{40} Moreover, none of the arguments above show that there’s anything inherently \textit{wrong} with normative cases for originalism. Some of them might fail on their own terms, but others might not. If it turns out that originalism is a good idea, then it’s a good idea, and that’s a useful thing to know.

But it’s not the only thing we want to know. Many people (officials, judges, lawyers, conscientious citizens) want to know what the law \textit{is}, not just what it ought to be—and not just what first-order practical reasoning might tell us to do, in the absence of any particular legal constraints.\textsuperscript{41} If normative justifications for originalism have nothing to say to such people, then that’s a problem with the justifications, and we should consider looking for something better.

\section*{II. CONTINUITY WITH THE FOUNDING}

If originalism is really a theory of the content of our law, then what theory is it? This paper suggests the continuity thesis, or “continuity with the Founding”—that originalism is really a claim of continued adherence to the Founders’ law. Whatever was part of the law at the Founding is still law today, unless it’s been validly changed in between.

This Part tries to explicate three things: what this paper means by “continuity”; what it means for a legal system to be continuous “with the Founding”; and why the continuity thesis might plausibly be a feature of our law.

\textbf{A. What Continuity Means}

Continuity is just another word for continued adherence to the same law. That means adhering not only to the substantive rules of a legal system, but also to its rules governing how the law can change. While the same rules might produce different outcomes when applied to different facts, you can’t change the outcomes while keeping the rel-

\textsuperscript{40} See Adler, \textit{Interpretive Contestation}, supra note 29.

\textsuperscript{41} \textit{Cf.} Frederick Schauer, \textit{Formalism}, 97 \textit{Yale L.J.} 509, 510 (1988) (“[R]ules achieve their ‘ruleness’ precisely by . . . screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”).
evant facts the same—at least, not without changing the rules, and de-
ciding whether those changes are legally valid.

1. Legal Systems and Rules of Change

Most legal systems, if not all, contain rules of two different kinds. Some rules are substantive, like “don’t steal” or “don’t murder.” But others are rules of change, which allow for alterations or amendments to the system’s rules (including its rules of change). These alterations might occur in explicit ways, like enacting legislation or amending the Constitution, or in less explicit ways, like trends in judicial decisions or gradual shifts in custom. Until one of those special events occurs, though, the preexisting rules stay in place. That’s what it means to have rules of change: if the rules aren’t satisfied, there’s no change.

When it comes to statute law, this picture is largely uncontroversial. As H.L.A. Hart puts it, “Victorian statutes and those passed by the Queen in Parliament today surely have precisely the same legal status in present-day England,” namely that both are law until properly re-
pealed. Hart offers the “picturesque example” of a woman who, in 1944, “was prosecuted in England and convicted for telling fortunes in violation of the Witchcraft Act, 1735.” Though most examples aren’t this extreme, a statute that’s still on the books is normally assumed to be part of the law, whether it was passed a century ago or in the last legislative session. Section 1 of the Sherman Act has some language that dates from 1890, and some language that dates from 2004, but the courts read the whole thing in pari materia. Sometimes statutory language comes to lose its force—whether through formal repeal, a sunset

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42 Hart’s “rules of adjudication” also count as rules of change in this sense; they re-
solve potential disputes in the law—does A or B own Blackacre?—by replacing the other-
wise-applicable legal reasons with an authoritative judgment. See HART, supra note 25, at 96–99.

43 HART, supra note 25, at 64.

44 HART, supra note 25, at 61 (citing R v. Duncan, (1944) 1 K.B. 713).


clause, or an informal doctrine of desuetude.\textsuperscript{47} But in each case, the statute ceases to be law only because other rules, which are also part of the law, tell us so.

This persistence in time isn’t a necessary feature of statutes; it’s a contingent, though also extremely sensible, feature of how our society chooses to treat them. As Easterbrook notes, we enforce as law the “[d]ecisions of yesterday’s legislatures”—a category that includes every Congress before the current one—to enhance the abilities of today’s. It’s “hard to tackle a problem if your law winks out of existence in two years or less.”\textsuperscript{48} Rather than require legislatures to reinvent the wheel with every new session, we simply treat existing statutes as valid until the rules of change are invoked—just as we assume, all else being equal, that the rules in the fourth game of the World Series are still the same as they were in the third.\textsuperscript{49}

The fact that a legal system has rules of change, of course, doesn’t mean that every actual change in the law will occur according to those rules. Nations get invaded, governments get overthrown, perfectly valid rules get abandoned or ignored, and so on. To a good positivist, what counts as law in a particular time and place depends on contemporary social facts. Just as society can change abruptly, arbitrarily, or unpredictably, so can the law. Even so, at any given time, the law as it stands imposes constraints on what will count as a valid means of change. To continue to adhere to that law is, in part, to recognize only those means of change as valid and legally effective. When a putative change violates those rules, we either accept the change and begin adhering to a new set of laws, or we reject it and continue our adherence to the old. This continued adherence to a preexisting set of laws, until changed through preexisting means, is what this paper calls “continuity.”

To take a more concrete example, suppose that tomorrow morning the President announced that “all state and local jaywalking laws are hereby repealed.” This isn’t something that, under our current rules of


\textsuperscript{49} Cf. HART, supra note 25, at 59 (presenting a similar example for the game of cricket).
law, the President can actually do. So, if we accept continuity, the natural response to this pronouncement is to regard it as legally ineffective—in the same way that, to quote Chief Justice Marshall, “an act of the legislature, repugnant to the constitution, is void.”

But it’s always possible that the President’s gambit would work. Suppose that officials start acting as if jaywalking laws had really been repealed, that codifiers start removing them from the books, and so on. If enough people turn out to accept the decree as valid—disregarding as irrelevant any criticisms based on prior rules—then at some point a positivist has to say that a new and slightly different set of laws have come into force in America. These laws would be very much like our old ones, except that now the President can repeal jaywalking ordinances (or, at least, could do so on that particular occasion). The new laws would represent a discontinuity in our legal tradition, a change that couldn’t be defended based on preexisting rules. But both sets of laws, new and old, would still contain their own rules of change, which are no less rules for sometimes being broken.

Without venturing any universal claims, it seems likely that every actually existing legal system respects some kind of continuity. Legal rules operate in futuro; the point of establishing them is to govern affairs prospectively, not just at the moment of enactment. To take no view on what counts as a valid change in the law—or to suppose that any change is a valid one, regardless of what the law was five minutes ago—renders the legal system an empty vessel. If you want there to be substantive rules that govern into the future, you have to place some constraints on when those rules should be considered to have changed; otherwise, you’re just playing Calvinball. And if you legally condition how the laws can be changed, then you can’t really adhere to those laws and at the same time give effect to a putative change that contravenes them—even if that change might be a good idea for other reasons. In other words, when setting up a system of laws, everyone believes in

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50 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

51 See Jed Rubenfeld, Freedom and Time 26 (2001); Easterbrook, supra note 48, at 1120; cf. Bergerco Canada v. OFAC, 129 F.3d 189, 192 (1997) (Williams, J.) (“At least until we devise time machines, a change can have its effects only in the future.”).

continuity. The only question is whether “we the living,” looking back, choose to share the same legal commitments.

2. What It Means for Rules to Change

Requiring that changes to legal rules be made in valid ways, as continuity does, requires an understanding of what counts as a legal rule, and what counts as a change.

This paper uses the term “rule” in an extremely capacious sense—as any consideration that might “screen[] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.” That includes precise and binding commands, flexible standards, value-based principles, forgiving guidelines, orders, norms, plans, and any other kind of instruction the law might potentially convey.

The counterpart to this broad understanding of “rule” is a somewhat narrow understanding of “change.” For this paper’s purposes, a rule “changes” only when it produces a different outcome when applied to the same circumstances. Legal rules might take as their inputs (or incorporate by reference) a variety of different things: empirical facts about the world, mathematical truths, social customs, perhaps moral judgments, and so on. Our conclusions about what the legal rules require might then change over time, based on our changing views of these other types of materials, without the rules themselves being any different. What you can’t do, though, is produce different outputs while keeping the inputs the same, unless the rules themselves have changed.

Many apparent changes to our law really involve only changes to inputs. Congress can suspend habeas “when in Cases of Rebellion or

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53 Easterbrook, supra note 48, at 1120.
54 Schauer, supra note 41, at 510.
55 This paper takes no position on the longstanding debate between “inclusive” and “exclusive” legal positivists over the status of laws purporting to incorporate moral standards. For a general description of the debate, see Leslie Green, Legal Positivism, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2013), http://plato.stanford.edu/archives/fall2013/entries/legal-positivism/.
Invasion the public Safety may require it”\textsuperscript{57}; the public safety might require a suspension at time \(t_1\) but not \(t_2\), and then again at \(t_3\). Likewise, depending on how one understands the word “cruel” in the phrase “cruel and unusual punishments,”\textsuperscript{58} it’s conceivable that a punishment that’s cruel at \(t_1\) (say, a rickety fourteenth-century guillotine) is no longer cruel at \(t_2\) (the improved French Revolution model) and becomes cruel again at \(t_3\) (when we’ve invented lethal injection).\textsuperscript{59} For the same reasons, a congressional power to “regulate Commerce” extends to commerce in microchips, even though they didn’t exist at the Founding;\textsuperscript{60} and on a \textit{Mathews v. Eldridge} understanding of due process,\textsuperscript{61} the process “due” depends on present facts and not past ones. None of these developments actually involves legal change, in the sense that this paper uses the term. From the standpoint of continuity, all the legal rules have stayed the same: the only difference is what we’re feeding into them.

This feature of legal rules also explains how they can sometimes turn out to frustrate their adopters’ expectations.\textsuperscript{62} Occasionally the correct application of a legal rule depends on facts about which its adopters had mistaken beliefs. But that’s no big problem, because the adopting accounted for that possibility by choosing a rule that depended on those facts—as opposed to structuring it some another way.

As an example, consider the Authorization for the Use of Military Force (AUMF), passed after the September II attacks.\textsuperscript{63} The AUMF doesn’t authorize the President to use force against specific people or entities, like “the Taliban and Al Qaeda.” Instead, it generally authorizes force against the “persons he determines planned” the September II attacks.\textsuperscript{64} If he discovers that Hezbollah was actually behind it all, then the AUMF authorizes force against Hezbollah, even if every Con-

\textsuperscript{57} U.S. CONST. art. I, § 9, cl. 2.
\textsuperscript{58} Id. amend. VIII.
\textsuperscript{59} For an insightful discussion of this clause, see John F. Stinneford, \textit{The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation}, 102 NW. U. L. REV. 1739 (2008).
\textsuperscript{60} Id. art. I, § 8, cl. 3.
\textsuperscript{64} Id. § 2(a), 115 Stat. at 224.
gressman who voted on it expected otherwise. That might seem surprising, but it's also the precise reason why a legislator would choose to write a statute in general terms; you do that only if you're more worried about getting the specifics wrong yourself than about the possibility that some future decisionmaker (here, the President) will get them wrong instead. When your worries tilt the other way, you pick more specific language, like “the Taliban and Al Qaeda.” As Christopher Green puts it, “[t]he choice of language is a choice about what sorts of changes should make a difference.”

By contrast, other changes in outcomes can’t always be defended as the product of the same rules. Take the ruling in Home Building & Loan Ass’n v. Blaisdell, approving a state statute delaying foreclosures on mortgages notwithstanding the Contracts Clause. While the Court was careful to note that the Clause’s requirements “are not altered by emergency,” it also suggested that “emergency may furnish the occasion for the exercise of power” already granted. Because, the Court said, the Contracts Clause implicitly reserved each State’s “authority to safeguard the vital interests of its people,” it therefore permitted “interference with contracts” to protect a State’s “economic interests.” In other words, when applied to the new and different “conditions of the later day,” the Clause permitted a different outcome than the Founders, “with the conditions and outlook of their time,” might have expected.

That sounds like an uncontroversial change in application. The problem is that it seems insufficiently faithful to historical fact, and in particular to whether the circumstances were all that different after all. As the Court recognized, the Clause was adopted in a period of extreme economic turmoil, not obviously distinguishable from that of

65 Green, supra note 62, at 583; cf. SHAPIRO, supra note 27, at 335 (describing a particular plan’s “economy of trust”).

66 290 U.S. 398 (1934).


68 Blaisdell, 290 U.S. at 425.

69 Id. at 426.

70 Id. at 434.

71 Id. at 437; see also id. at 434–35.

72 Id. at 443.

73 Id.

74 Id. at 427.
the Depression. And as Justice Sutherland pointed out in dissent, the Clause was targeted at “legislation designed to relieve debtors especially in time of financial distress.” Maybe the Clause failed to hit its own target. But if it did hit its target, and if such debt-relief laws really were unconstitutional as of the Founding, then the Court arguably failed to identify the relevant changes in inputs that made them no longer unconstitutional as of 1934. And if the Justices in the majority knew this and went ahead anyway, then they were trying to achieve a change in law without admitting it, under the cover of a mere change in application. Absent some other legal justification, that kind of change really does violate continuity.

B. Continuity with the Founding

As noted above, continuity may be a very common, if not universal, feature of legal systems. Originalism need not be. One could imagine a legal system in which there have been lots of little changes to the law (along the lines of the presidential jaywalking example), all of which are currently accepted as valid, and most of which weren’t accompanied by any general proclamation of a new legal regime. In fact, we can go beyond imagining: maybe most actually existing legal systems are of this type. What originalism demands, by contrast, is continuity with a specific and well-recognized founding moment. In the United States, that founding is the Founding, the adoption of the U.S. Constitution. To an originalist, then, the law to which we still adhere is the Founders’ law, the law as it stood on the adoption of the Constitution in 1788.

The idea that current law sometimes depends on past law is hardly unusual. What makes the continuity thesis special, though, is the way in which it connects the present to the past. The thesis selects the Founding as a unique moment of change in American law—a criterion by which all subsequent legal developments are measured. And while the thesis, on its own, says very little about what that law requires, the constraints it imposes are very real nonetheless.

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75 Id. at 453.
76 See Green, supra note 62, at §84 (discussing such a possibility, and explaining why it seems implausible).
77 See Fontana, supra note 33.
1. Contemporary Law and Continuity

As mentioned above, continuity with the Founding is a contingent, not a necessary, claim about our law. We might adhere to the Founders’ law, or we might not; this is something we have to establish (or refute) with help from our usual positivist toolbox, determining contemporary law based on contemporary social facts.

But that contemporary law may happen to incorporate, by reference, the law of the past in certain ways. That’s not an unusual thing for a legal system to do. By way of comparison, when disputes involve a foreign element, our choice-of-law doctrines often direct us to incorporate by reference the law of some other society. As Hamilton wrote to his fellow New Yorkers, the laws “of Japan not less than of New-York may furnish the objects of legal discussion to our courts.”⁷⁸ To figure out that Japanese law, our legal system might direct us to certain special sources. But usually it just tells us (or incorporates rules of private international law that tell us) to go and find out what law actually applies there.⁷⁹ In doing that, we again use our standard positivist toolbox (or, if you don’t like positivism, whatever philosophically superior method the science of jurisprudence can offer). To borrow a distinction made by Leslie Green, while the command to apply Japanese law is surely part of our legal system, the same isn’t true of the Japanese legal rule we then discover and apply: although U.S. officials “can decide whether or not to apply it, they can neither change it nor repeal it, and [the] best explanation for its existence and content makes no reference to [American] society or its political system.”⁸⁰ Our law handles Japanese law the way it handles a variety of other standards—including “logic,

⁷⁸ The Federalist No. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁷⁹ See, e.g., Restatement (Third) of Foreign Relations Law § 201 (defining a state as “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities”); id. § 205(3) (obliging courts to give effect to the acts of unrecognized states that “apply to territory under the control of that regime and relate to domestic matters only”); see also Restatement (Second) of Foreign Relations Law § 101 (looking to whether a revolutionary regime “is in control of the territory and population of the state,” or at least “a substantial part” thereof with “reasonable promise” of gaining more); id. § 113 (obliging U.S. courts to respect such a regime’s laws on “matters of an essentially private nature”).

⁸⁰ Green, supra note 55.
mathematics, principles of statistical inference, or English grammar”—all of which are “properly applied in cases,” and over which our “legal organs have applicative but not creative power.” In other words, with some exceptions discussed below, our own legal system typically takes no view on what the content of Japanese law might be, and just tells us to look and see.

The same approach can apply to the law of the past. (After all, “[t]he past is a foreign country: they do things differently there.”) Think of a property case involving a complex chain of title. Under the traditional maxim of nemo dat quod non habet—that one cannot give what he does not havethe validity of a present interest in property can depend on that of an old conveyance, which in turn depends on the law as it stood at the time. So we might need to know the law of some earlier era, determined through positivist (or other jurisprudential) means, to know who owns Blackacre today. We don’t use this rule because we’re forced to do so, in some dead-hand sense, or out of any slavish devotion to our ancestors. Instead, nemo dat is a part of our modern law, which we’ve chosen to suspend in particular cases and not others, and which we know to be law only because of social facts today. The content of that rule just happens to involve a cross-reference between today’s law and that of an earlier time; it tells us to look up past law, so we do.

Continuity with the Founding, then, works in largely the same way as nemo dat. It’s a rule of modern law, which instructs us to continue to adhere to the law of an earlier time: namely, the adoption of the Constitution in 1788. That’s why it’s problematic to argue, as many

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81 Id.
85 See, e.g., U.C.C. § 2–403 (protecting certain good-faith purchasers); id. § 3–305 (setting out the holder-in-due-course rule for negotiable instruments); see generally Alan Schwartz & Robert E. Scott, Rethinking the Laws of Good Faith Purchase, 111 COLUM. L. REV. 1332, 1335 (2011).
do, from the philosophical claim that present law depends on present acceptance—that it wouldn’t be our law if we, today, accepted something else—to a specific legal claim about the extent to which that law relies on older rules.\textsuperscript{87} Maybe incorporating past rules of law is just what we, today, conventionally do.

In figuring out the content of that law, we might have to make a number of difficult historical judgments—even after we’ve decided, based on jurisprudential considerations, what kind of evidence would matter. (Does the law of a given society depend on the practices of officials, understandings of the bench and bar, the conventions of ordinary people, . . . ?) But once we’d made those judgments, we’d know what law to apply—if, that is, we accept the continuity thesis.

2. Contemporary Law and the Founding

If the continuity thesis is right, then the Constitution occupies an extremely special place in American law, though perhaps not for the reasons we usually think. The key claim isn’t that the Constitution is supreme law, trumping any law of lesser stature—though that may also be true, and very important. The more salient claim, for present purposes, is that the Constitution represents a boundary in time, separating our current legal system from older systems that we’ve discarded. In fact, the Founding can enjoy this special status regardless of whether, at various times or in various places, we’ve actually departed from Founding-era law. Whatever the twists and turns of history, the continuity thesis might still be right as an account of the law today.

a. The Founding and Legal Discontinuities

Legal discontinuities occur all the time; what matters is how we handle them. The Constitution’s adoption in 1788 by nine state conventions may have violated the Articles of Confederation, which required the consent of all thirteen legislatures.\textsuperscript{88} Ratification might have

\textsuperscript{87} See, e.g., MEIKLEJOHN, supra note 18, at 3–4, 6–7 (arguing that present acceptance requires present-centered modes of interpretation); STRAUSS, supra note 13, at 36–38 (suggesting that originalism stems from an Austinian command theory of law rather than a conventional Hartian theory).

\textsuperscript{88} Compare U.S. CONST. art. VII with ARTICLES OF CONFEDERATION of 1781, art. XIII (“And the Articles of this Confederation shall be inviolably observed by every
also violated various state constitutions, which didn’t all permit amendments through that means. The American Revolution surely violated British law; the colonization of the Americas presumably violated the law of Native American societies; the Norman invasion may have violated Saxon law; and so on. But none of these arguments have any legal relevance today. For purposes of U.S. law, we simply don’t care. By contrast, it’s always legally relevant today whether a particular act of Congress, state statute, or judicial decision is consistent with the Constitution of 1788—even if we might have other legal reasons, discussed below, to leave some inconsistencies in place.

There are alternative ways of understanding U.S. law that reject continuity with the Founding. For example, on one version of Bruce Ackerman’s theory, the United States has had a series of legal regimes, like the numbered French Republics. Each regime started with a discontinuous change, a “constitutional moment,” that wouldn’t have been valid under the prior rules. And each such moment (Reconstruction, the New Deal, the Civil Rights Era) served as a new mini-founding—with our current system respecting continuity only to the start of the current regime, and no further.

The difference between these different accounts of U.S. law might be described in terms of “vulnerability.” If our system is really continuous back to, say, the Articles of Confederation, then any legal conclusion in our system is vulnerable to a claim that the law of 1781 actually requires something else. A completely persuasive showing that the Constitution violated the Articles, for example, would be devastating; the Constitution’s validity would be, in that sense, up for grabs. If our system is only continuous with the Founding, though, that demonstration would be legally irrelevant, regardless of which way it pointed.

State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”).

89 See Akhil Reed Amar, America’s Unwritten Constitution: The Precedents and Principles We Live By §8–60 (2012).


91 See Ackerman, Transformations, supra note 11, at 409; 1 Bruce Ackerman, We the People: Foundations 139 (1991) (describing a judge’s duty as “preserv[ing] the achievements of popular sovereignty during the long periods of our public existence when the citizenry is not mobilized for great constitutional achievements”).
(Maybe the Constitution is completely consistent with the Articles; either way, it’s just a historical curiosity.)

On the other hand, if our system is continuous back to, say, 1937, then claims about modern law aren’t generally vulnerable to Founding-era critiques. Whatever was part of American law as of 1937, according to our positivist toolbox, would be the law, regardless of whether it violated the rules as they stood in 1936. (On a similar note, consider Ackerman’s claim that the Fourteenth Amendment violated Article V.92 That claim would be legally irrelevant to someone we might call an 1868-originalist; it creates intellectual discomfort only for those whose legal commitments go further back in time.)

b. Departures from the Founders’ Law

How far back we’re willing to look—how far back our current regime goes—is a question of current law, not of history. As argued above, an originalist can’t argue for continuity with the Founding based on how the Founders thought about things; the argument has to be based on current social facts. But at the same time, a nonoriginalist can’t argue against continuity based on the various changes and developments that have occurred across history. Whether those really count as having changed our law, as we understand it today, is a contemporary legal question.

Rules can stay the same over time even when people frequently violate them. Legislatures pass unconstitutional laws, courts reach mistaken judgments, ordinary people commit crimes, and so on. Often our response is to say that those unlawful, erroneous, or invalid actions don’t cause our legal rules to change. (That’s what we mean when we say that an unconstitutional statute, a judgment without jurisdiction, or a fraudulent conveyance is “void.”) But sometimes another rule in the legal system “domesticates” an unlawful action, making it effectively valid even if it wasn’t valid ab initio. Sophisticated legal systems have a plethora of doctrines that do this: think of adverse possession, the enrolled bill rule, finality of judgments, statutes of limitations, the de facto officer or de facto government doctrines, stare decisis, and so on.

These doctrines are features of continuity, rather than exceptions. Because these domesticating doctrines have their own good title to validity in the system, so do the changes in the law that they approve *nunc pro tunc*.

In fact, a legal system can be continuous with the law of some earlier time, even if that older law was subsequently abandoned (in the positivist sense) for a different legal regime. As above, consider the analogy to choice of law. Our default rule, when dealing with a case involving Japan, is to determine any relevant rules of Japanese law using our standard positivist toolbox (or your favorite theory of jurisprudence, whatever that might be). But sometimes our own law will instruct us to do something different—to ignore what Japanese law *actually* is, according to the best methods of jurisprudence, in favor of what our legal system wants it to be. Hart presents the hypothetical of an English statute ordering continued recognition of Tsarist law, which obviously would have no force on the ground in Russia. 93 Or consider the long period in which the United States recognized only the Republic of China, and not the People’s Republic, when our courts were obliged to ignore (for some purposes, and not others) the fact that mainland China was governed from Beijing not Taipei. 94

The same can occur with respect to the past. Sometimes our current laws require us to ignore what the law *actually* was, in favor of what we *say* it was. For example, to a positivist, the correct analysis of English law during the Protectorate is that Oliver Cromwell was in charge; surely that would be our default answer, if the same events were happening today. But when the Restoration came in 1660, the English legal system regarded that year as the twelfth of the reign of Charles II, not the first. 95 For that purpose, as well as others, it disregarded actual legal changes that (according to our best methods of jurisprudence) really had occurred in between.

In American law, the canonical statement of this principle is found in *Texas v. White*, which addressed the status of Confederate-era legisla-

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95 See, e.g., *Declaration of Breda (Apr. 4, 1660), in 11 H.L. Jour. (1660) 7–8 (U.K.).*
tion in Texas.96 As the Court knew full well, when the statute in question was passed, it was

an historical fact that the government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a de facto government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid.97

As a matter of U.S. law, though, the task of determining Texas law during the Civil War era couldn’t be left to the default methods of empirical inquiry and pure jurisprudence. The Texas legislature had “constituted one of the departments of a State government, established in hostility to the Constitution of the United States,” and could not “be regarded . . . in the courts of the United States, as a lawful legislature, or its acts as lawful acts.”98 As a result, U.S. law interposed a separate set of doctrines—akin to those later applied to Red China—which accepted historically accurate Texas law for some private-law purposes but not others. In particular, the Court held,

acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; [while] acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.99

As these examples suggest, whether a legal system is continuous in theory isn’t the same as whether it’s actually been continuous in practice. What we’re obliged to maintain, as a matter of law, isn’t always

96 74 U.S. (7 Wall.) 700 (1869).
97 Id. at 733.
98 Id. at 732–33.
99 Id. at 733.
what our best jurisprudential theories would otherwise require, as a matter of pure reason and hard-edged fact. Instead, it might be that we’re committed to continuity with the Founding as a legal matter today, whatever the unusual course of history might show.

3. The Continuity Thesis and Substantive Law

If the continuity thesis is true, then we could roughly, and recursively, define U.S. law as follows:

1. All legal rules that were valid as of 1788, including rules of change, are presumptively valid today.
2. If a particular rule of change was valid at a given time, any change made by it then—whether creating a new rule, or amending or repealing some prior rule—is presumptively valid too.
3. No rules are valid except by operation of (1) and (2).

One feature of this definition is that it’s purely formal. It makes no particular substantive claims about the content of modern or ancient law, other than to describe how the two are connected. To find out the law as of 1788, we apply our standard positivist toolbox to social facts about the past. To find out what rules of change that law included, and what changes have been made since, we have to look and see.

The flip side of this relative indifference to substance is broad flexibility with respect to future policy choices. Extraordinary changes to the U.S. legal system—abolishing the courts, replacing the President with a dictator, instituting communism—can be achieved by anyone who can persuade two-thirds of each House and three-fourths of the States. Smaller changes, though still quite significant, can be achieved by anyone who can persuade Congress and the President: confiscatory taxes, massive trade barriers, terrifying wars of aggression on all sides. We can even create new rules of change; say, an Article V amendment to allow new amendments by national referendum. So long as we use the methods we’ve already got, we can change the law in any direction we choose.

This is another way of saying that the continuity thesis isn’t about substantive continuity with the past. The substantive consistency of the law over time is an important area of inquiry, especially for historians of law and society. But that’s not necessarily what the continuity thesis is after. A continuous system is continuous in a procedural, chain-of-title sense—not in the “ship of Theseus” sense of slow and deliberate evolution, of accretive rather than avulsive change. A system that’s continu-
ous with the law of 1788, and one that’s continuous with the law of 1790, might be virtually indistinguishable from each other. Similarly, a discontinuity in the law doesn’t have to be anything a sociologist would write home about. (A world where the President can repeal jaywalking laws by decree, but not anything else, isn’t that different from the world we live in now.) A legal system can survive plenty of discontinuities and still be called “the same legal system” in a substantive sense; we can talk sensibly about “the English legal system” as a single unit both before and after the Glorious Revolution, for example. But even the smallest change, if not authorized by preexisting law, means that a new set of laws is in force.

As a result, while it’s relatively open as to substance, the continuity thesis remains highly demanding. Consider, for example, the apportionment rule of Reynolds v. Sims, which requires all legislative districts in a State to have roughly the same number of residents. If one wants to affirm this rule as a correct statement of the law, one has to pick one of the following options:

• that this rule was part of the law as of 1788 (a hard argument to win);
• that it became part of the law in 1868, when the Fourteenth Amendment was validly adopted;
• that it became part of the law in 1964, when the Supreme Court decided Reynolds (and the Court had power to do this sort of thing, under rules that as of 1964 could themselves claim validity in this way, and so on);
• that it was validly adopted at some other point in time;
• that it’s the product of changing facts, which happened to serve as inputs to some other valid legal rule and which over time produced Reynolds as an output; or
• that the continuity thesis is false.

100 The only difference between the two would be that the former, but not the latter, is vulnerable to historical claims about changes occurring in between.

101 HART, supra note 25, at 123 (“[T]he expression ‘the same legal system’ is too broad and elastic to permit unified official consensus on all the original criteria of legal validity to be a necessary condition of the legal system remaining ‘the same.’”).


One of those options has to be correct—which is why the continuity thesis, if true, is a real constraint on the content of the law.

C. Continuity as a Feature of Our Law

The continuity thesis is a contingent claim about our legal system, not a necessary one. Whether it’s true today depends on our social conventions today, not on the Founders’ social conventions back then. So why might we think the thesis is an accurate description of modern U.S. law?

This paper won’t offer a full defense of the thesis. To be complete, such a defense would need a much more detailed theory of jurisprudence—in particular, which social conventions are relevant and how to identify them—than this paper can offer. Instead, it merely suggests, as an exercise in armchair sociology, some reasons why the continuity thesis might be a plausible component of our law.

Additionally, this paper is agnostic as to whether American social facts commit us to the continuity thesis in particular, or whether they commit us to other rules of law that turn out to be substantively equivalent to continuity with the Founding. For instance, maybe our social conventions commit us to certain sources of law—constitutions, statutes, treaties, common law, etc.—which happen to have certain properties, in virtue of which the recursive three-element definition in the previous Section ends up being true. Either way, the legal conclusions would be the same.

More importantly, the goal of this paper isn’t to convince anyone that the continuity thesis is true. In fact, if you come away from the paper convinced that continuity is false, then it’ll have been a success. The goal is to show why the continuity thesis is important, and why framing questions in this way—asking whether a given legal rule is or isn’t valid under the Founders’ law—might give us a better understanding of our contemporary constitutional debates.

1. Continuity in General

The American legal system, like many legal systems, does seem to accept continuity in the general sense: we treat our laws as persisting over time, until they’re properly changed. In some ways, it’s difficult to argue for this proposition, because it seems so basic and self-evident. As
noted above, it’s a natural consequence of accepting rules of change that we only accept those changes made in accordance with the rules.

Continuity is most visible in the American system with respect to statute law. As mentioned earlier, when we encounter an old statute like the Sherman Act, we generally don’t ask whether it’s too old to be law. Rather, it’s a “basic principle of law . . . that, unless explicitly provided to the contrary, statutes continue in force until abrogated by subsequent action of the legislature.”[^104] This is particularly clear with respect to repeals. Suppose that someone is prosecuted under an old but commonly used federal statute. It then turns out, to our surprise, that the statute had been deliberately repealed only a few years after its passage. If the defendant raises the issue properly, almost everyone would think this defense to be a good one—even though the repeal is ancient too, and even though the fact of repeal had fallen out of common knowledge (and had confused the codifiers).[^105] No matter how long a tradition we have of prosecuting people under this statute, and no matter how many court decisions have been rendered under it, the mere fact of unambiguous repeal would give many people pause. That only makes sense on a theory in which our law—including the repealer statute—continues in place until it’s properly changed.

This practice makes a lot of sense. Leaving the law in place until it’s validly changed allows people to know what it is, and avoids presenting a moving target to those authorized to change it. The same purpose helps to explain a number of traditional canons of construction—for example, that implied repeals are disfavored, or that statutes in derogation of the common law are narrowly construed.[^106] One of the most important powers of a lawgiver is the power to leave things alone, and that power is frustrated if the law changes under our feet.


[^105]: The same may also be true for the reverse situation, where we think something is repealed, but it isn’t. For decades, the compilers of the U.S. Code had left out a section of the Federal Reserve Act passed in 1916, in the belief that the provision had been repealed in 1918. In 1993, the Supreme Court held that this was a mistake; no repeal ever having occurred, the provision remained good law. See U.S. Nat’l Bank of Ore. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993) (addressing 12 U.S.C. § 92).

Indeed, this is often where originalist arguments derive much of their rhetorical force. In the oral arguments in *Hollingsworth v. Perry*, Justice Scalia repeatedly challenged Ted Olson to explain how the law had changed on same-sex marriage bans: “When do you think it became unconstitutional?”107 The implicit assumption is that some date is necessary. And whether that was true or not in the context of *Hollingsworth*, it gets at a more basic intuition. If we can’t explain how things have changed—whether through changed facts that serve as inputs to the rules, or valid changes to the rules themselves—then something seems wrong, and our argument seems to be more one of law reform than law.

2. Continuity with the Founding

If American law generally respects continuity, that’s not very surprising. The real question is, “continuity with what?” Do we accept recent alterations lacking any connection to a founding moment (as in the jaywalking example)? Or do we resist those kinds of claims, and try to ground our legal system on something further back?

This paper suggests that we date our legal system, and our legal continuity, from the adoption of the Constitution. American legal rhetoric concerning the Founding often seems to promote an ethical theory, in Bobbitt’s sense; a theory of American identity in which we are the Founders’ heirs, sharing in their political and moral tradition.108 But regardless of whether one accepts that idea, virtually everyone sees America as continuing a legal tradition that started with the Founders—as having inherited their legal system and as not having abandoned it. We treat the Constitution’s adoption as a crucial break with the past, and we don’t formally recognize any similar breaks occurring since.

This paper isn’t a full defense of the continuity thesis. That has to wait for a more fully fleshed-out jurisprudential theory. But without our having solved the field of jurisprudence yet, it’s worth surveying


our legal practices and seeing whether a commitment to continuity is plausibly among them.

a. Why not start earlier?

In theory, it’s possible that our continuous legal system goes even further back than 1788. Our law contains a number of rules that are older than that. Our treaty with Great Britain, made in 1783, is still regarded as valid by the State Department. 109 The Constitution itself made careful reference to preexisting legal relations—to treaties “made” by the Confederation government, 110 to “Debts contracted and Engagements entered into, before the Adoption of this Constitution,” 111 to “Territory and Property” already “belonging to the United States,” 112 and so on. And a number of state borders still depend on grants and charters dating back to the earliest settlements. 113

What makes the difference, though, is the issue of vulnerability. A rule that was law before 1788 can still be law today, so long as nothing abrogated it along the way. But saying that our system is continuous from some date before the Constitution means that we’re vulnerable to historical claims about the period in between—that we could, in theory, see any modern rule of law upset by events before the Constitution’s adoption. Because that’s not how we understand our law, our system isn’t continuous that far back.

The Constitution became law in 1788 through its ratification by nine States. 114 That violated the Articles of Confederation, which imposed different and conflicting requirements and which couldn’t be amended without unanimous consent. 115 The ratification process also violated various state constitutions, which imposed various constraints

110 E.g., U.S. CONST. art. III, § 2, cl. 1; id. art. VI, cl. 2.
111 Id. art VI, cl. 1.
112 Id. art. IV, § 3, cl. 2.
113 See, e.g., United States v. Old Dominion Boat Club, 630 F.3d 1039, 1041 (D.C. Cir. 2011).
114 See Lawson & Seidman, supra note 86.
115 See ARTICLES OF CONFEDERATION of 1781, art. XIII; ACKERMAN, TRANSFORMATIONS, supra note 11, at 34–36.
on amendment that the Article VII ratification conventions failed to satisfy.\footnote{See Ackerman, Transformations, supra note 11, at 36–39; Amar, supra note 89, at 58–60.} So, if our system were continuous back to the Articles (or before), then the adoption of the Constitution might not be a valid change, and the Constitution might not be valid today.

Some scholars have taken this to be an actual problem. One recasting of Ackerman’s theory, for example, would describe ratification as a valid move within the game (and not as a change to the rules), only because it was a five-phase constitutional moment, and five-phase constitutional moments are always valid moves.\footnote{See Ackerman, Transformations, supra note 11, at 66–68.} Alternatively, Akhil Amar has sought a different theory to explain the Constitution’s legality—such as that the widespread violation of the Articles rendered them nonbinding under international law,\footnote{Akhil Reed Amar, America’s Constitution: A Biography 29–33 (2005); see also The Federalist No. 43, supra note 78, at 297–98 (James Madison).} or that the conventions within the States were, for the time period at least, exemplars of popular sovereignty.\footnote{Amar, supra note 118, at 16–18, 308–11; Amar, supra note 89, at 60–61.}

But these responses seem insufficient. The Founders may have believed that the new Constitution was democratically legitimate (and therefore deserved obedience) without believing that it was legal under the preexisting rules.\footnote{See Stephen E. Sachs, The “Unwritten Constitution” and Unwritten Law, 2013 U. ILL. L. REV. 1797, 1825–28 (discussing this possibility); see also The Federalist No. 43, supra note 118, at 297.} For the same reasons, we’d need more evidence before concluding that constitutional moments in general were regarded as legally valid; they might have been seen as democratically legitimate but also legally discontinuous.

More importantly, though, in our legal system, these attempts to validate the Constitution itself are unnecessary. Nobody thinks that conclusive proof of a rupture with the Articles of Confederation would in any way threaten the legal order today. It’s like an argument that the Revolution was illegal under British law, or that the colonies were illegal under Native American systems of law. Of course they were! For legal purposes—that is, putting concerns of justice to one side—we just don’t care. What happened that long ago is generally irrelevant to our
law, unless something else causes it to matter. That’s characteristic of a system that’s only continuous back to a certain date, and no further. To the extent that law is a matter of social convention, our thoroughgoing agreement on the Constitution’s validity, regardless of what might have happened earlier, makes a real difference. The adoption of the Constitution is as far back as American law is willing to go.

b. Why not start later?

The harder question, by contrast, is whether we’re willing to go back even that far. Because continuity isn’t a substantive doctrine, each individual discontinuity might be too small for us to notice; yet American law might be so encrusted with them by now that we couldn’t even imagine what it’d look like without them. Or maybe the discontinuities are huge and obvious, but are also supported by intense political and legal consensus. Another reading of Ackerman’s theory, for example, would assert that constitutional moments really are ruptures, and that we’ve had several of them in our history—notably Reconstruction, the New Deal, and the Civil Rights era.

These events were clearly watersheds in the history of American law. But it’s not as clear that we regard them, today, as marking the start of Second, Third, and Fourth Republics in the French sense. From the limited perspective of the armchair sociologist, it seems like most people (not just ordinary people, but also lawyers, judges, and government officials) conceptualize these events as valid changes within a continuing legal system. Maybe that’s just because they’re ignorant of any historical controversy. But maybe it’s also because the predominant legal explanations of these events—consistent with the explanations given at the time—are based on consistency rather than disruption. The authors of the Federalist were willing, with a little hemming and hawing, to admit that the Articles were being violated and to defend the violation as justified. By contrast, the Fourteenth Amendment’s pro-

121 See, e.g., U.S. CONST. art. VI, cl. 1 (preserving the debts and engagements of the Confederation government).

122 See generally Ackerman, The Living Constitution, supra note 11.

123 See, e.g., The Federalist No. 43, supra note 118, at 297 (defending the violation on the ground that “institutions must be sacrificed” to “the safety and happiness of society,” based on “the absolute necessity of the case”—and adding only as an after-
ponents had detailed and well-grounded legal theories as to why the ratification process was proper under existing rules.\(^{124}\) (And, in my view, they were right.) The New Dealers didn’t claim to be replacing the original understanding with something better, but vindicating the Constitution from the mistaken readings of the \textit{Lochner} era.\(^{125}\) And the same is true of those who defended the Court’s civil rights decisions as vindicating the Fourteenth Amendment from the errors of \textit{Plessy}.\(^{126}\)

The official story of American law, in other words, is largely consistent with the continuity thesis. Some people treat \textit{Brown v. Board}'s statement that “[i]n approaching this problem, we cannot turn the clock back to 1868”\(^{127}\) as an official rejection of prior law by the Court.\(^{128}\) But that statement is clearly about current facts about education as inputs to a rule about equality: “this problem” is “the effect of segregation itself on public education,” and in solving it the Court quite obviously “must consider public education in the light of its full development and its present place in American life.”\(^{129}\) In any case, this discussion follows a several-page discussion of the original history,

\(^{124}\) See generally Harrison, supra note 92; Green, supra note 92.

\(^{125}\) See, e.g., Franklin Delano Roosevelt, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), \textit{in} \textit{1937 The Public Papers and Addresses of Franklin D. Roosevelt} 122, 126 (Samuel I. Rosenman ed., 1941) (criticizing the Supreme Court’s invalidation of New Deal measures as “amend[ing] the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so,” and calling for a Court that would uphold such measures by “enforc[ing] the Constitution as written”); see also Robert L. Stern, \textit{That Commerce Which Concerns More States Than One}, \textit{47 Harvard L. Rev.} 1335 (1934).


\(^{129}\) \textit{Brown}, 347 U.S. at 492–93.
which found that history ultimately inconclusive, thus necessitating the consideration of other factors.\textsuperscript{130} Even \textit{Blaisdell}, which arguably threw the Contracts Clause under the bus, couched its argument as only dealing with changed applications.\textsuperscript{131} If hypocrisy is the tribute that vice pays to virtue, then the Court’s efforts in \textit{Blaisdell} to give the appearance of applying prior law is strong evidence of those underlying commitments. To my knowledge, the Court has never openly proclaimed the abrogation or supersession of the known and acknowledged original content of a constitutional provision—as opposed to the originally expected applications.

Looking beyond official stories, moreover, the implicit attitudes of lawyers and legal academics regarding possible discontinuities reveals additional useful information about our conventions. For example, American lawyers and law professors feel absolutely no discomfort over the question whether America really is part of Great Britain—or whether it would become so again, if the Queen were to disavow the Treaty of Paris.\textsuperscript{132} But there remains a lingering discomfort, and a cottage industry of scholarship, around suggestions that the Fourteenth Amendment,\textsuperscript{133} the New Deal,\textsuperscript{134} or the decisions of the Civil Rights era\textsuperscript{135} departed from the prior rules. Even if those worries are ill-founded, they are entirely \textit{absent} with regard to departures from British law or the Articles of Confederation. Within the language of American law, it’s possible to discuss extremely odd questions—even, say, whether the State of West Virginia is unconstitutional\textsuperscript{136}—in a way that it’s

\textsuperscript{130} \textit{Id.} at 489–92.

\textsuperscript{131} \textit{See supra} text accompanying notes 66–76.

\textsuperscript{132} \textit{See Green, supra} note 102, at 340–41.

\textsuperscript{133} \textit{Compare, e.g.,} Ackerman, \textit{supra} note 91, at 99–119, \textit{with} Harrison, \textit{supra} note 92, \textit{and} Green, \textit{supra} note 92.


\textsuperscript{136} \textit{See Virginia v. West Virginia,} 78 U.S. 39 (1870) (holding that it is); \textit{accord} Vasan Kesavan & Michael Stokes Paulsen, \textit{Is West Virginia Unconstitutional?}, 90 Calif. L. Rev. 291 (2002); \textit{cf.} Ruthann Robson & J. Zak Ritchie, \textit{West Virginia Weekend: Is the
just not possible to discuss whether the Constitution itself is valid. That, too, tells us something informative.

c. *Continuity in Theory and Practice*

How much these considerations matter, and what one makes of the continuity thesis, may depend on a further question: how much stock you place on what lawyers and courts actually do in ordinary practice, as opposed to what they say they do in theory.

As a matter of everyday practice, it’s not clear how much we really adhere to continuity with the Founding. There are plenty of doctrines with shaky historical pedigrees, and the courts and officials of our system have to date spent relatively little effort on trying to shore them up. Some originalists argue, for example, that there are many people serving criminal sentences based on statutes inconsistent with the Founders’ Constitution; if that’s right, and if we’re not letting them go, how can that Constitution be the law? \(^\text{137}\)

But it’s a separate question, and a difficult one, how this affects our judgments about the law. Maybe a clear-eyed sociologist’s analysis of what lawyers and judges do, on a day-to-day basis, would produce a very different set of rules than the ones we think the law prescribes. (“Distort prior cases, advance political agendas, enforce elite opinion, discount the claims of ethnic minorities or the religiously observant,” etc.) It’s perfectly legitimate for scholars to call attention to a gap between our actions and our expressed beliefs, and to explain what adherence to the latter might require. In forthcoming work, I argue that it’s these expressed beliefs, rather than our everyday practices, that ground our legal commitments.\(^\text{138}\) If that’s right, then continuity with the Founding might be a requirement of our law, even if we don’t live it each and every day.


It should go without saying, moreover, that our legal system really has only a limited tolerance for practice unreconciled with theory. If you go into court and say, “well, Judge, the original Constitution did say that, but we changed it through an informal amendment in 1937, and besides, the plaintiffs are hostile to our progressive social vision,” you will lose. That’s an important feature of the American legal system, one that no serious analysis of our legal practices can ignore. To the extent that American law is a function of social facts, this seems like an important fact to mention—and one that makes the continuity thesis that much more plausible.

III. CONTINUITY AND ORIGINALISM

The continuity thesis, if true, may provide a good legal defense of originalism. If the Founders’ law is still our law today, then so is the law made by the Founders’ Constitution. Substantively, the continuity thesis doesn’t say much about that law, and so it’s more open, compared to other originalist theories, to different legal possibilities. But that’s a feature of the approach, not a bug. Viewed through this lens, a broad range of constitutional theories could be recast in originalist terms, with the ultimate choice among them based on facts in the historical record. By shifting the focus from the meaning of text to the content of law, the continuity thesis may offer a particularly plausible defense of originalism, and may also help resolve some of originalism’s most persistent internecine disputes.

A. Continuity and Original Methods

The continuity thesis entails a broadly originalist take on the law. Suppose that American law today is whatever it was at the Founding, plus valid changes. Some of that Founding-era law was the product of the Constitution, which added a number of important rules to the American legal system. Those legal rules remain the law today, except insofar as they’ve been validly changed. So the legal content of the Constitution today—the contribution it makes to the general stock of American legal rules—is still the contribution it made at the Founding, plus valid changes since then. And to the extent that the Constitution’s original legal content depended on what its words originally meant, preserving the law will usually involve preserving that meaning too.
This is an intuitive feature of originalism, and one that other scholars have highlighted, even if they haven’t made it the centerpiece of their approach.139 To use a silly example, suppose that some clause in the Constitution gave Congress power “to regulate the growing of corn.” And assume that in eighteenth-century America, “corn” was used as a general term for all cereals (think of Britain’s “Corn Laws”), not just maize. Anyone trying to establish the Founding-era content of U.S. law would conclude, absent some special reason not to, that the First Congress had power to regulate the growing of cereals like wheat and barley. Denying that power to the 113th Congress today, just because the conventional meaning of “corn” has narrowed over time, would be a change to the rules and not just a change in application; it would produce different outcomes on the same facts. (In some sense, it wouldn’t even be using the same text.140) Unless some special rule gives legal relevance to this evolution in language, that kind of change violates continuity.

Or, to take a less silly (and more current) example, consider the Recess Appointments Clause, which gives the President power “to fill all Vacancies that may happen during the Recess of the Senate.”141 One of the disputes in NLRB v. Noel Canning, currently before the Supreme Court,142 is whether the phrase “happen” means something more like “arise” (referring only to new vacancies that begin during the recess) or something more like “exist” (referring to all current vacancies, both new and old).143 The Clause could have specified either rule. On the continuity picture, what we want to know is what rule, if any, it did specify—and, more broadly, whether President Washington had the power to fill preexisting vacancies or not. Whatever recess-appointment

139 See, e.g., Balkin, supra note 62, at 36–37 (“If the law states a directive . . . we must preserve the original meaning to preserve the directive . . . that the law states. . . . [Otherwise], if the commonly accepted meaning of the words changes over time, the legal effect of the provision will change as well, . . . not because of any conscious act of lawmaking by anyone in particular but merely because of changes in how language assigns concepts to words.”).

140 Cf. Ludwig Wittgenstein, Tractatus Logico-Philosophicus 3.323, at 55 (C.K. Ogden ed., Harcourt, Bracé & Co. 1922) (1918) (“In the proposition ‘Green is green’—where the first word is a proper name and the last an adjective—these words have not merely different meanings but they are different symbols.”).

141 U.S. Const., art. II, § 2, cl. 3.

142 No. 12–1281 (U.S., cert. granted June 24, 2013).

143 See Brief of Respondent at 7, Noel Canning (No. 12–1281).
powers President Washington held are the ones that President Obama enjoys today—unless there’s been some other valid change in between.\textsuperscript{144} We investigate the original meaning of the words only in the course of determining the original legal rule.

There are other ways of using the text, of course. If we wanted to, we could use it “as a focal point for legal coordination in the manner of the rules of the road; as a flexible framework for common law elaboration; as a locus of normative discourse in a flourishing constitutional culture; or as one of many legitimate ingredients in a pluralist practice of constitutional adjudication.”\textsuperscript{145} Someone who took one of these views might still venerate the text, or even share Jack Balkin’s intention to “be faithful to the written Constitution as law” and to “accept it as our framework for governance.”\textsuperscript{146} (They’d just understand laws and frameworks differently than he does.) People using constitutional phrases to argue for social or political change often draw on views like these.\textsuperscript{147} The response of the continuity thesis isn’t that these things are impossible or absurd (they clearly aren’t), but rather that “that’s just not what we do around here.” Our way of relying on the Constitution as law is to adhere to the legal rules established by its enactment, until those rules are validly changed.

If all of that’s right, then the proper way to use the Constitution as a source of legal rules is something resembling “original methods” originalism. The intuition behind original methods, as opposed to more specific interpretive approaches such as original intent, original meaning, and so on, is that Founding-era law might have taken a position on which approach was favored—and, if it did, that approach ought to control. The basic question we’re trying to answer here, according to the continuity thesis, is “what was the law as of 1788, and how has it been changed since?” To the extent the Constitution helps answer that question, its Founding-era legal content depends on Founding-era rules governing enactments and interpretation—and the

\textsuperscript{144} For example, a long tradition of contrary practice, see Brief of Petitioner National Labor Relations Board at 35–38, Noel Canning (No. 12–1281); Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 HARV. L. REV. 411, 413 & n.4 (2012)—if, that is, such traditions can validly change the law.

\textsuperscript{145} Coan, supra note 34, at 1047.

\textsuperscript{146} Balkin, supra note 62, at 38.

same is true for each amendment. In other words, we’re not really asking what the Constitution originally “meant,” on a particular theory of meaning. Instead, we’re looking for what the Constitution originally did—what rules its enactment added to an existing body of law. Answering that question will involve plenty of questions about the text’s meaning and interpretation; but the key focus in the end is on the law, and not on the text.

1. What Text Says and What It Does

As lawyers, the first thing we usually want to know about an enactment is what it does to the law. That’s typically a function of what it says and means, but not always.

These ideas may sound obvious, but in fact they could be somewhat controversial. We often speak as if what we really want to glean from an enacted legal text is its meaning, through a process of interpretation. But as discussed above, that model can create confusion; the communicative content of a text isn’t the only feature, or even necessarily the most important feature, that matters to our law. Because meaning and law are distinct, we sometimes have reason to ignore or overlook our best guess at what an enactment means in the course of determining its legal effect. That practice isn’t any kind of invasion or usurpation of the legislature’s authority; instead, it enables legislative authority to act in a world already full of law.

a. The Difference Between Meaning and Law

An enactment’s legal content and its meaning are two different things. To illustrate this point with another silly example, suppose that long ago Congress passed a statute to the following effect: “Upon the enactment of any new statute, in which the respective numbers of vowels, consonants, commas, semicolons, and section symbols are all prime, all federal limitation periods shall be tolled for one year.”

Decades pass, and then one day someone realizes that a recent statute on an un-

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148 To head off any anti-entrenchment objections, see, e.g., Larry Alexander & Saikrishna Prakash, Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 CONST. COMMENT. 97 (2003), assume the Founders considered this hypothetical and included a special clause in Article I, Section 7, that “stuff like the prime-number statute would be okay too.”
related topic—say, regulating fisheries—meets the prime-number test. What happens to the limitation periods?

Whatever one thinks of legislative intent, it’s doubtful that the Senators and Representatives enacting the fisheries statute intended anything at all with respect to tolling. (Assume that everyone had forgotten that the prime-number statute existed, or no one tried counting, or . . . .) As a matter of communicative content, the fisheries statute doesn’t say anything about tolling; and its text, on any reasonable theory of meaning, doesn’t mean anything like “let’s regulate fisheries, and also toll some limitation periods.” An enactment’s meaning might depend in part on “settled nuances or background conventions that qualify the literal meaning,” and those settled nuances might be settled in part by other rules of law. But to say that the statute’s “meaning” includes something about limitations periods is to depart from standard usage; it’s simply too idiosyncratic to suggest that each individual statute, “on its own, already incorporates, reflects, and accounts for the entire legal universe.” The prime-number statute is just one more piece of law out there, which happens to be triggered in particular circumstances; it’s not the key to some gnostic message hidden in the fishery statute’s use of vowels and semicolons.

At the same time, though, it’s also clear that the new statute does something to limitation periods, based on the legal environment that exists at the time of enactment. If this is right, then the legal effect of enacting a particular text—what change is worked in the law, by virtue of its adoption—isn’t fully determined by that text’s meaning. (The same result holds if you see the older statute as really doing the tolling, and the new statute merely serving as an occasion therefor. Either way, the new statute’s meaning and its legal consequences aren’t identical.) And if that’s true, it seems likely that lawyers, when we look at the text of various enactments, ought to be primarily interested in what, under our legal system, those enactments will do to the law. What they say or mean matters only insofar as it informs that legal inquiry.

150 Sachs, supra note 106, at 1845 (rejecting this view).
151 See generally id. at 1843–47.
b. Legislators’ Choices, and Ours

Normally, of course, a statute’s legal consequences are inextricably related to its meaning. We want the law to change for reasons, and in particular for the reasons chosen by our elected representatives. At the very least, those representatives should be able to predict how their votes will change the law; otherwise, there’s no point in electing those representatives instead of others, because none of their decisions will matter anyway. That’s why the example of the prime-number statute sounds so silly. Any sensible society will have rules making its law depend, almost all of the time, on choices that its legislators consciously made.

But not absolutely all of the time. Our legislators don’t always act as conscientiously as we might like. In that case, we may need backup rules to tell us what happens if they fall down on the job—and when we should stop looking for our legislators’ conscious choices. When we apply these rules, we’re determining the law, and not looking for the meaning of a text.

Consider a more realistic example than the prime-number statute, namely our rules governing revival and repeal. At common law, if Statute $B$ repeals Statute $A$, and then $B$ gets repealed later on, $A$ springs back into force. One possible reason for this rule is to save the legislature the trouble of saying “and also revive $A$” all the time; instead, it can rely on settled legal understandings of how repeals are supposed to work. But the rule’s other function is to prevent legislators from making mistakes when they can’t remember everything that $B$ did. If $B$ is some monstrous statute replacing one complex legal regime with another (say, the Affordable Care Act), then repealing $B$ won’t actually restore the prior regime unless it also revives all those older laws too. The common-law rule solves that problem, restoring prior regimes by default.

By solving one problem, though, the rule creates another. Maybe, when they repeal $B$, the legislators are actually trying to wipe the slate clean on a particular topic. In that case, reviving $A$ will only mess

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153 See 1 BLACKSTONE, COMMENTARIES *90.
things up—and if B is really old, or they’ve forgotten that A is out there, they might not think to add “and don’t revive A.” In the abstract, it’s not clear which problem is worse; it depends on what we think legislators usually want to do when they repeal things, and which types of errors tend to be more common or more serious. As it happens, Congress took a stand on the issue in 1871, when it abrogated the common-law rule and declared that new repeals would no longer revive old statutes “unless it shall be expressly so provided.”

One way to read this provision—now codified at 1 U.S.C. § 108—is as an effort to influence linguistic practices by future legislators. As Larry Alexander and Saikrishna Prakash put it, such default rules “make it more likely that the actual meaning [of a new statute] will be consistent with the meaning suggested by” those rules. Legislators and their staffs might be influenced by § 108 when drafting a new statute, just as they might be influenced by popular dictionaries when choosing their words. But they’re not bound by the provision, any more than they’re bound to follow the definitions in Webster’s. What matters is whether, in the end, we can follow the statute’s meaning.

What this analysis leaves out, though, is that unlike a dictionary, § 108 is a rule of law. Like the general four-year statute of limitations or the accessory liability statute, it operates of its own force until some other rule of law intervenes. If a statute repealing B seems totally silent about reviving A, we follow § 108 and let A lie, even if we suspect that everyone in Congress was unaware of § 108’s existence—indeed, even if we suspect that some legislators might have predicted the opposite result. That’s why “we presume that Congress is aware of existing law when it passes legislation”, we call this a presumption because we suspect that in many cases, it’s going to be false. The pre-

157 See id.
160 Mississippi ex rel Hood v. AU Optronics Corp., 134 S. Ct. 736, 742 (2014) (emphasis added) (internal quotation marks omitted).
sumption is rebuttable, of course: “express[ ]” exceptions to § 108 are unnecessary if the new statute’s text and context are sufficiently clear.¹⁶² (For example, if B were a one-line statute that did nothing but repeal A, the only reason to repeal it would be to bring A back into force.)¹⁶³ But that’s equally true of every rule of law, not just interpretive rules. If a new enactment is sufficiently suggestive to work an implied repeal of an existing statute (or, in the case of common law, to overcome the anti-derogation canon), then we follow that suggestion; that’s the point of having implied repeals.¹⁶⁴ Otherwise, we keep on following the legal rules we already have.

c. Interpretation and Authority

At this point, the idea of having legal rules of interpretation might seem very strange, especially as applied to the Constitution. After all, the Constitution is supreme law. If we appoint some Framers and Rati-fiers to make supreme law for us—presumably because we think they’ll do a good job—then, the argument goes, we should apply whatever rules they wanted to give us.¹⁶⁵ Why should we listen to other rules of interpretation, if those rules would produce different answers than what the Constitution’s authors wanted? Why let common-law rules trump the Constitution’s authors, instead of the other way around?

In a memorable hypothetical, Alexander asks what would happen if lawmakers could “convey the norms they intend for us to follow telepathically.”¹⁶⁶ Legislatures wouldn’t fumble around with texts; they would think, and we would understand. In that science-fiction world, it’d be crazy to modify their telepathic instructions with any other rules

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¹⁶² See Marcello v. Bonds, 349 U.S. 302, 310 (1955) (refusing to require “magical passwords” for Congress to supersede a similar requirement); Lockhart v. United States, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (“When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, regardless of its compliance with any earlier-enacted requirement of an express reference . . . .”).

¹⁶³ The example is from Alexander & Prakash, supra note 148, at 99.

¹⁶⁴ See Marcello, 349 U.S. at 310.

¹⁶⁵ See Alexander, Simple-Minded Originalism, supra note 2, at 93–94.

¹⁶⁶ Alexander, Telepathic Law, supra note 2, at 142.
of interpretation; by hypothesis, we already understand things perfectly, so adding more rules could only sow confusion.

In some ways, though, this hypothetical proves our point. The whole problem with repeal and revival, for example, is that our lawmakers’ communications don’t always make things clear. The point of the default rule is to tell us what to do when the statutory text is unhelpful—and, by supplying answers in close cases, to give Congress a stable background against which to legislate in the future. If we could always get a perfect understanding of what the lawmakers are telling us, then we wouldn’t need texts, and we wouldn’t need legal rules governing the interpretation and effect of texts. But we can’t; so we do.

Societies have good reasons to use interpretive defaults, even though they might sometimes cause an enactment’s legal effect to diverge from the expectations of some of those who wrote it. In the case of § 108, for example, Congress definitely has to do some extra work when it wants the default rule not to apply; either add an express proviso, or give some other indication that can work an implied repeal. But the same could be said of every other law on the books. If Congress wants to create a new right of action but not provide federal-question jurisdiction, it needs to somehow make an exception to 28 U.S.C. § 1331.167 If it wants to create a new federal crime but not provide for accessory liability, it needs to let us know not to apply 18 U.S.C. § 2. Liberating Congress from the need to send these signals means depriving it of the ability to pass statutes of general application.

The same reasoning applies to default rules set by common law, rather than statute. Having an off-the-shelf default already in place serves a valuable purpose—even if, or maybe especially if, the legislators don’t remember that it’s there.168 The rule succeeds at its task precisely be-

168 Note the qualification of “already in place.” Alexander and Prakash challenge the idea that judges have “authority to create counterintuitive rules of interpretation that then require the Congress affirmatively to circumvent them.” Supra note 148 at 102. Letting judges invent new rules on the fly (“’be it enacted’ means ‘give judges a raise,’” etc.) represents a giant power grab that probably has no good normative defenses. But there are two reasons why that worry’s inapposite here. First, recognizing the force of common-law interpretive rules isn’t the same as giving judges a blank check to make up new ones. Whether and how judges can deliberately alter the common law (and then apply their alteration to past events) is a separate question, and it deserves a separate answer. Second, whether such interpretive rules are a good idea (with or without the power to make new ones) is also separate from whether the rules are currently
cause it keeps going until Congress signals to the contrary. That’s why we have the anti-derogation canon: rather than being a “judicial power-grab,” it lets legislators focus on the problems at hand, without forcing them to reinvent the wheel and rethink all the other canons of construction every time they pass a bill.170

More fundamentally, even if following these interpretive rules were bad policy, it’s something that’s clearly part of our positive legal practices, even as to the Constitution. The most famous Supreme Court decision in history, after all, involves the application of \textit{expressio unius} to the Court’s original jurisdiction in Article III.171 And we apply substantive common-law canons to the Constitution as well. At common law, for example, repealing a criminal statute abates any pending prosecutions thereunder;172 the authority for punishment disappears with the statute. Whether that theory is worth freeing people whose acts were criminal when committed is a choice society has to make, either in individual cases or by default. As it happens, Congress chose to set the opposite default for federal crimes, enacting a general savings statute that’s now codified at 1 U.S.C. § 109. Yet when the Twenty-First Amendment repealed the Eighteenth, the Supreme Court held that the old common-law rule abated prosecutions under the Prohibition laws.173 The amendment’s text said nothing about abatement,174 and if the congressmen who proposed it had thought about the issue (they probably didn’t), they might have assumed that their common practice would control. But the Court concluded that a mere statute couldn’t vary the powers granted by the Constitution, which ordinarily would be determined through the common-law principle against which § 109

valid as a matter of positive law in the United States. Showing that we \textit{ought} to defer more to legislators’ intentions doesn’t show that we \textit{do}.


170 See Sachs, supra note 106, at 1842.


172 See, e.g., Yeaton v. United States, 9 U.S. (5 Cranch) 281, 283 (1809).


174 U.S. CONST. amend. XXI, § 1 (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”).
was enacted.\textsuperscript{175} Once the constitutional authority for the Prohibition laws disappeared, the prosecutions had to disappear too—until the People, and not just Congress, said differently.\textsuperscript{176} One way or the other, there had to be a method of determining an amendment’s effect on pending prosecutions, which the common-law rule happened to supply.

It seems clear, as a historical matter, that the Founders understood the Constitution they were adopting to be supreme law. But the Constitution’s status as \textit{supreme} law doesn’t mean that it was the \textit{only} source of law. The Ratifiers weren’t omnipotent Austinian sovereigns, but officials appointed to make a certain decision, namely whether a particular enactment would be added to an existing legal tradition. We can understand the Constitution as breaking from the past in many respects without expecting it to declare a legal Year Zero and erase all other rules from the books.\textsuperscript{177} To the extent that the Constitution didn’t itself command new methods of interpretation\textsuperscript{178}—and, indeed, to find out whether it did so—a Founding-era lawyer would have had to apply the off-the-shelf interpretive rules of Founding-era law, \textit{whether the Framers and Ratifiers were fully aware of those rules or not}. Those rules might, in turn, have themselves taken as inputs the Framers’ and Ratifiers’ likely intentions and knowledge. But in this chicken-and-egg game, the rules come first.

Perhaps this outcome seems so strange as to encourage originalists to reject continuity. Our social conventions don’t have to be the same as the Founders’—so it’s conceivable that we, today, have a different legal system than they did, and that \textit{we} take the authors’ intentions as supreme. But if that’s not what the law provided at the time, then it’d be very odd for us to give the pronouncements of the Framers and Ratifiers even more legal effect than their contemporaries did. Why be more originalist than the Founders, or more Catholic than the Pope? In the absence of a clear modern consensus for this view of the law, it

\textsuperscript{175} \textit{Chambers}, 291 U.S. at 224.

\textsuperscript{176} \textit{Id}. This constitutes what, in other work, I’ve described as a “constitutional backdrop.” \textit{See generally} Sachs, supra note 106.

\textsuperscript{177} \textit{See} Sachs, supra note 106, at 1821–23.

\textsuperscript{178} For arguments that it did, see Christopher R. Green, \textit{“This Constitution”: Constitutional Indexicals as a Basis for Textualist Semi-Originalism}, 84 N.D. L. REV. 1608 (2009); Lawson & Seidman, supra note 7; Michael Stokes Paulsen, \textit{Does the Constitution Prescribe Rules for its Own Interpretation?}, 103 NW. U. L. REV. 857 (2009).
seems more consistent with our current conventions to look to the Constitution’s original legal content, as opposed to its original meaning.

Maybe we could imagine societies where there aren’t such default rules—where meaning is all there is, and where the law is entirely silent whenever meaning is unclear. But the way we handle written law, new enactments aren’t islands unto themselves. Instead, they’re submerged in a sea of surrounding law, with their legal content substantially determined by all the other rules around them.\textsuperscript{179} What matters isn’t just the “legislative intent” or “public meaning” of a single enactment, however understood, but rather “the meaning which the subject is authorized to understand the legislature intended”\textsuperscript{180}—with that authorization delivered through our existing legal rules.

2. Interpretation and Original Rules

If we’re interested in the Constitution’s original content, and not just its original meaning, then we have to determine that content by processing the text through the legal rules that were operative at the time. By way of analogy, consider what happens when we create a legal text today. As a text, as marks on paper, it could have a variety of meanings; we could read it as a proposal, parody, or prose poem, as a statement of our civic identity or a personal source of inspiration, and so on.\textsuperscript{181} But when determining its legal content—the change it works in the law, its contribution to the general stock of American legal rules—we look to our legal rules of interpretation, our process of taking texts and turning them into law. Those rules might incorporate the linguistic conventions of English or legalese; general canons for reading all types of legal documents (like \textit{expressio unius}), particular canons relevant to particular types of documents (like treaties, statutes, contracts, or wills), or more abstract notions concerning the relationship between text and law (like the balance between specific text and general purposes,\textsuperscript{182} the

\textsuperscript{179} See Sachs, \textit{supra} note 106, at 1838–42.

\textsuperscript{180} Scalia, \textit{supra} note 169, at 16–17 (emphasis omitted) (quoting JOEL PRENTISS BISHOP, \textit{COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION} § 70, at 57–58 (Boston, Little, Brown & Co. 1882)).

\textsuperscript{181} See Sachs, \textit{supra} note 120, at 1804.

relationship between written and unwritten law, \textsuperscript{183} the concept of historical gloss, \textsuperscript{184} or the liquidation of meaning over time \textsuperscript{185}).

The idea that enactments’ legal effect is determined by “rules” might suggest too neat a picture. As the above examples should indicate, this paper uses “rule” in a very broad sense. \textsuperscript{186} It’s absurd to think that American law in any period, from the Founding to today, offered a convenient off-the-shelf algorithm for mechanically converting language into law. But that doesn’t mean there aren’t better and worse answers about the legal content of particular written instruments. After all, special interests spend tons of money to influence the language of bills in Congress, which would be pointless if we lacked any predictable means of turning those texts into legal rules. The point here is merely that whatever methods we’ve got, according to our standard positivist toolbox, those are the ones we ought to use; failing to use them would be a legal error, and would produce mistaken judgments about what each new enactment does to the law.

One easy way to use the wrong rules is to pick them from the wrong time period. If we want to know how a new enactment affects today’s law, we have to consult today’s rules. The law of the United States in 2014 depends on social facts in 2014, including facts giving rise to legal rules governing the effect of 2014’s enactments. Those rules might incorporate by reference the rules of another time, per the continuity thesis, but then again they might not. Either way, processing a contemporary text through any method unsupported by those facts could produce a wrong answer on the law.

At this point, the analogy to originalist interpretation should be clear. If we want to know how the law stood upon the Constitution’s adoption in 1788—say, under the continuity thesis, because we think it matters for the law today—we need to determine the Constitution’s legal content through the legal rules that were around back then. Using anachronistic modern rules would mislead us as to the state of the

\textsuperscript{183} See Sachs, \textit{supra} note 120.

\textsuperscript{184} See Bradley & Morrison, \textit{supra} note 144.


\textsuperscript{186} See \textit{supra} text accompanying note 54.
law at the time, just like using anachronistic rules of language to read the word “corn.”

As before, the continuity thesis doesn’t say anything at all about what the substance of these original rules might have been. That’s an empirical question; we have to look and see. Maybe we’d find that the Founders chose “language capable of growth,”\(^1\) or that the Constitution’s original legal content really was designed to evolve along with linguistic usage. That’s not impossible, though it sounds like a bad idea: changes in language usually occur for reasons having nothing whatsoever to do with the law, and might upset all the reasons the enactors had for choosing some words instead of others. Unsurprisingly, as a matter of historical fact, it’s doubtful that the Founders had rules like that. Madison, for example, dismissed the idea outright:

> 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 in the code of law if all its ancient phraseology were to be taken in its modern sense!\(^2\)

The same is true for changes in the legal rules governing interpretation and effect. We might use different rules to determine legal effect in 2014 than they did at the Founding, but that doesn’t necessarily mean that the legal content of the Founding-era texts has changed. As an example, suppose that Congress had never enacted § 108, but that the common-law presumption had (validly) evolved over time, so that today a repeal won’t revive anything at all. One might accept such evolution as to future enactments without necessarily supposing that old statutes are revived and unrevived as time goes on, winking in and out of existence as the interpretive fashion changes. The same would be true if Congress had repealed and reenacted § 108 several times; absent clear indications otherwise, we’d assume that all of these changes were prospective-only. Whatever an old statute did to the law, it did at the

\(^{1}\) Bickel, *supra* note 128, at 63.

\(^{2}\) Letter from James Madison to Henry Lee (June 25, 1824), *in 3 Letters and Other Writings of James Madison* 441, 442 (Phila., J.B. Lippincott & Co. 1867).
time of its enactment; the rules it established then are still the rules, until they’re validly changed.¹⁸⁹

Focusing the inquiry on original legal content doesn’t mean treating the Constitution solely as a lawyer’s document, for use by a technically educated elite rather than by the people at large.¹⁹⁰ Maybe the prevailing legal methods directed lawyers to consult ordinary understandings, rather than technical ones; in that case, the ordinary understandings would control. Or maybe your favorite positivist theory identifies law through the conventions of ordinary people, and not just lawyers, judges, and officials; then those conventions are what matter, whether or not the experts would have agreed. But either way, the relevance of the Constitution to the law is a different thing than its relevance in popular culture or political morality. To the extent that we want to use this text as a ground for legal conclusions, the continuity thesis requires that we start by determining its legal content at the time of its enactment.

3. Original Legal Content and Rules of Change

The continuity thesis doesn’t limit us to the Founders’ rules of substantive law; their rules of change matter as well. Suppose, for example, that the Founders were Ackermanians avant la lettre, treating constitutional moments as legally valid amendments outside Article V. If that’s an accurate picture of Founding-era law, as determined through our

¹⁸⁹ In applying this framework, it’s important to distinguish between legal rules that determine the legal effect of an enactment and other legal rules that operate independently. For example, the common-law duress defense might affect the application of criminal laws without affecting their content; if the definition of duress (validly) evolves over time, we’d apply that new definition even in prosecutions brought under old criminal statutes. See Sachs, *supra* note 106, at 1880–82. And not all changes to the courts’ interpretive practices need to be understood as setting out new legal rules. Whether a statute enacted in 1977 creates a private right of action—as suggested by the liberal regime of *Cort v. Ash*, 422 U.S. 66 (1975), but not the stingier regime of *Alexander v. Sandoval*, 532 U.S. 275 (2001)—depends in part on whether we understand *Sandoval* to have altered the prior law or merely to have declared it more accurately. *Cf.* 1 BLACKSTONE, COMMENTARIES *70 (“[I]n such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation.”).

usual positivist toolbox, then that’s what the continuity thesis presumptively requires today—just as if they’d enacted “constitutional moments are okay too” in Article V½. When making that determination, of course, it’d be important to separate Founding-era claims about legal rules from similar claims about political morality; perhaps many Founders believed that constitutional moments were politically legitimate or morally appropriate means of change, but still not legally valid in the system they were creating. (Not all socially recognized obligations are legal ones; think of Hart’s example of removing one’s hat in church.\textsuperscript{191}) Accepting the continuity thesis doesn’t bind us to the Founders’ theories of morals or politics, except to the extent that those theories found expression in the Founders’ law. But if the law at the Founding really did provide for valid change outside Article V—and that means of change hasn’t been abolished since—then it remains a valid means of change today.

The same goes for claims that other sources, outside the text, can contribute to or even control our constitutional law. If the Founders’ law didn’t treat the text as the exclusive source of constitutional law, providing instead that other sources matter too (precedent, etc.), then the continuity thesis preserves these other sources’ authority as well. It might seem strange to call this approach “originalist,” since modern originalism usually rejects these sources or treats them as less important. But that’s because of the assumption, usually unstated, that the text was and is the supreme and exclusive source of constitutional law. If that wasn’t the case in 1788, and if that view only became prevalent sometime later—say, the 1840s, or during the Attorney Generalship of Ed Meese—then the label of “originalism” would start to seem inapt; modern originalists would be preserving, not the Constitution of 1788, but the law of some other time.

Many ostensible nonoriginalists—including, for instance, Justice Breyer—describe their claims about legal sources or interpretive methods as substantially based on evidence from the Founding.\textsuperscript{192} To the extent that they accept that the historical evidence controls, but think

\textsuperscript{191} HART, supra note 25, at 109.

\textsuperscript{192} See, e.g., STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 33 (2005) (presenting “a certain view of the original Constitution’s primary objective,” namely “as furthering active liberty, as creating a form of government in which all citizens share the government’s authority, participating in the creation of public policy”).
that it points in a different direction than modern originalists do, then we have an ordinary historical disagreement, which ought to be amenable to empirical research. Originalists should be happy to fight on those grounds, and to welcome such claims into the “originalist” tent. If someone’s basis for taking a “nonoriginalist” view (that America has a common-law constitution, that we experience occasional moments of higher lawmaking, that a variety of traditional sources and interpretive approaches should apply) is that so it was laid down in 1788, why shouldn’t we call these views “originalist” instead? Everything still depends on the history: if it turns out that the Founders didn’t have a common-law constitution, or didn’t choose language capable of growth, etc., then these views would have to be revised.

Consider how the continuity thesis might handle precedent. Some originalists care more about stare decisis than others; some view it as largely forbidden by the Constitution, while others make a case for toleration. But if our law is continuous with the Founders’ law, then we have another option: stare decisis might have been a legal rule at the Founding, and therefore still in force today. In that case, we’d care a lot about whether stare decisis at the Founding was a doctrine of judicial supremacy, or just one for the management of the courts; a requirement of the rule of law, or just a useful heuristic; something

193 See generally Strauss, supra note 13.
194 See generally Ackerman, Transformations, supra note 11.
195 See generally Powell, supra note 17; H. Jefferson Powell, Further Reflections on Not Being “Not an Originalist,” 7 U. St. Thomas L.J. 288, 292 (2010) (describing pluralistic interpretive practice as “in fact what constitutional law has been, as a descriptive matter, since Americans first began dealing with the existence of written constitutions”).
198 See Cooper v. Aaron, 358 U.S. 1, 18 (1958).
central to the “judicial Power,” 202 or a common-law doctrine abrogable by Congress; and so on. 203 Or, alternatively, we’d have to explain how stare decisis started out as one thing and wound up as something else. Either way, continuity helps us explain how a seemingly nonoriginalist doctrine can be part of our law, while preserving a fundamentally originalist approach.

B. Original Methods and the Rest of Originalism

The previous Section explained why the continuity thesis, if true, would yield something akin to an “original methods” originalism. This Section makes a stronger claim, namely that continuity is potentially a better ground for originalism than many others on offer.

Originalists are currently divided, on theoretical grounds, as to the proper method of interpretation. Some focus on the intentions of the Constitution’s authors, whether Framers or Ratifiers—that is, their intentions to communicate particular rules to the document’s readers. 204 (Few originalists today argue for intentions in the expected-application sense, sometimes attributed to Raoul Berger. 205) Others focus on the understandings of the Constitution’s readers—that is, either the actual understandings of the actual Founding-era public, or the “objective” meaning that ought to have been understood by a hypothetical figure (a reasonable layman, a reasonable lawyer, etc.). 206 While some scholars have proposed “original methods” in an attempt at synthesis, 207 that attempt hasn’t yet been entirely successful.

202 See Anastasoff v. United States, 223 F.3d 898, 900–03 (8th Cir.), vacated as moot on reh’g en banc, 235 F.3d 1054 (8th Cir. 2000).


204 See, e.g., sources cited supra note 2.


206 See sources cited supra notes 7–9.

The continuity thesis, however, may have more luck. As a legal claim, rather than a conceptual or normative one, it avoids some of the difficulties discussed in Part I. As a claim based in Founding-era law, moreover, it provides a means of reconciling the original-intent and original-meaning schools, while respecting some of the intuitions that have supported each.

1. The Current Impasse

For a long while, originalism has been divided between intentionalist and textualist schools—between those who emphasize the author’s original linguistic intentions, and those who emphasize the reader’s original understandings. The idea that this distinction makes little difference in practice has been around almost as long as the fight itself—and is believed by some of the participants, and not just their critics. But the longstanding nature of the disagreement makes a real difference. On a conceptual approach, for example, the defense of originalism depends crucially on discovering the One True Meaning of legal texts. If, instead, there are multiple contesting methods of interpretation, these conceptual defenses are far less plausible. Likewise, others have argued that the ongoing trench warfare gives the lie to originalism’s normative claims to constrain judges, or even to provide a usable interpretive approach. As the battle now stands, the two sides have been deadlocked, each afflicted by similar difficulties. And “original methods,” the most promising recent attempt to reconcile the two, is actually bogged down in the same debate.

208 See, e.g., Lawson & Seidman, supra note 7, at 57 (“In a large range of cases, the actual understandings of historically real authors, the actual understandings of historically real readers, and the hypothetical understandings of reasonable authors or readers will likely overlap.”).

209 See, e.g., Berman, supra note 10, at 47 (arguing that if “the author’s intended meaning is not the only possible meaning,” then it is “not the only possible target of interpretation,” and so “the argumentative burden appropriately falls upon the intentionalists” to prove that it is).

a. Two Problems with Intentionalism

Consider the intentionalist view of language. Texts are coded messages, and to decode the message correctly is to figure out what meaning the author was trying to communicate. Natural languages are just codes in common use; a word can have various conventional meanings in one language or another, but the true meaning of any particular text depends on what specific code the author was trying to use (which may turn out to be idiosyncratic).\footnote{See, e.g., Alexander & Prakash, supra note 2, at 974–82.}

This view has a certain intuitive appeal. When we treat something as a text, we treat it as if it has an author, and then try to figure out what that author might be telling us.\footnote{See id. at 976.} But the intentionalist view also creates two significant problems when applied to legal texts.

The first problem involves evidence. The author’s intended meaning, while perhaps knowable in theory, can be hard for other people to discover in practice—and it might require tough-to-find or unreliable evidence (private diaries, etc.). This makes the meaning of a legal text highly uncertain and revisable; we can never feel confident about the Constitution’s meaning, because a new, secret diary entry might always turn up tomorrow. As Jeffrey Goldsworthy argues, the meaning of a law “addressed to all or part of the general public must be publicly accessible, not private.”\footnote{Goldsworthy, supra note 8, at 48.} And we can’t use the law to regulate conduct effectively unless “its meaning is public, or at least publicly ascertainable”; penalizing people “for a failure to comply with hidden intentions is obviously unfair.”\footnote{Id.}

The second problem with intentionalism is that of joint authorship. When two authors compose a text together, they might have the same communicative intentions, but they also might not. (Think of the contracts chestnut involving the two ships Peerless,\footnote{Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Exch. Div.).} or the famous misunderstanding between New York and Swiss corporations over the meaning of the word “chicken.”\footnote{Frigaliment Importing Co. v. B.N.S. Int’l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (Friendly, J.) (“The issue is, what is chicken?”).}) In such cases, the intentionalist might
have to say that the text has no common meaning, or indeed no meaning at all—that in the absence of authorial intent, it’s all just “gibberish.”²¹⁷ But no one thinks that the provisions of the Constitution work that way. The Founders disagreed on whether the Ex Post Facto Clauses referred to criminal laws only, or to civil laws too;²¹⁸ yet we still give them legal effect. It’s simply not part of our legal practice to disregard clauses of the Constitution as gibberish. Indeed, given how narrowly the Constitution passed in various ratification conventions, there might be plenty of provisions that lacked a consensus meaning shared by the necessary majorities in each State. On a pure intentionalist view, those provisions are inkblots; but no lawyer would argue that, then or now.

b. Two Problems with Textualism

To avoid these problems, many originalists have given up looking for actual intentions in favor of constructing public meaning. The meaning of an enactment, on this view, isn’t determined by the actual intent of its actual authors—much less the actual understanding of actual readers²¹⁹—but rather by whatever a hypothetical reader would suppose the authors’ intentions to be, given a certain universe of evidence. (That the authors were speaking a particular language, in a particular time and place, amid a particular professional and legal context, etc.) By restricting the universe of evidence in this way, the public meaning approach replaces the potentially “fanciful” search for “actual but unexpressed intent” with the more promising activity of developing an “objectified intent,” based primarily on shared linguistic and legal conventions.²²⁰

Perhaps not every textualist would accept this definition, with its persistent reference to authorial intentions. But this framing is inevita-

²¹⁹ Which, of course, would reproduce the evidence and joint-authorship problems in spades.
As most public-meaning theorists recognize, legal instructions “can only be understood by reference to human intentions” of one kind or another. For instance, when the Seventeenth Amendment creates a procedure for filling “vacancies” in a state’s Senate representation, even the textualist knows that this procedure can be used for filling a single vacancy. That’s partly because people sometimes use words in that way—that is, people sometimes intend, when they speak like this, to communicate the singular as well as the plural. But mainly it’s because of what we think the Amendment was supposed to do, based on the public record—and therefore what someone writing this text, in particular, would likely have been intending to say.

Because public-meaning theories still rely on intentions, though, they can’t fully escape the problems faced by purely intentionalist theories. For one thing, when we define public meaning based on a certain universe of evidence, we have to motivate our choice of which types of evidence will or won’t be admitted, and how much our hypothetical reader knows. (Is she an ordinary person? A reasonable person? A reasonable and extremely well-informed person with advanced legal training?) It’s all well and good to ignore some evidence because it’s too unreliable or hard to access. But the normative case for excluding that evidence just shows that we’d be better off excluding it; it makes no difference to conceptual arguments about meaning. (Maybe we’d be


\[222\] Goldsworthy, supra note 8, at 48; Lawson & Seidman, supra note 7, at 54–55; Manning, supra note 220, at 433; Solum, supra note 9, at 185.

\[223\] Lawson & Seidman, supra note 7, at 54.

\[224\] U.S. CONST. amend. XVII, para. 2.

\[225\] Cf. 1 U.S.C. § 1 (noting that “words importing the plural include the singular”).

\[226\] The example is drawn from James Grimmelmann, Parsing the Seventeenth Amendment, LABORATORIUM, Jan. 2, 2009, http://laboratorium.net/archive/2009/01/02/parsing_the_seventeenth_amendment.

\[227\] See Alexander, The Why and the What, supra note 2, at 541.

\[228\] The same is true of considerations of fault, which are about moral duties, not language. See, e.g., Goldsworthy, supra note 8, at 47 (“When your utterance fails to communicate your meaning to your intended audience (through your fault, not theirs),
better off still if we stopped looking for meaning and ignored the text altogether.) If we’re constructing a hypothetical reader to search for authorial intentions—if that’s what she’s using the evidence for—then if we discover additional evidence that’s probative of those intentions, why shouldn’t we let her use it? What possible reasons could we have, as far as meaning goes, to keep her out of the loop?

One way to render this choice of evidence less arbitrary is to invoke the author’s actual intentions again, but in a more limited way. If an author addresses a text to the public, knowing that the audience can only access evidence that’s publicly available, then—the argument goes—the meaning of the text is its public meaning, as determined by the evidence that the audience has access to. But now we have two problems. First, we have to explain what we mean by “publicly available.” (Is it evidence that the intended audience actually can access? The evidence that the author thinks the audience can access? The evidence that a hypothetical, reasonable, highly resourceful audience member could access?) And second, we have to figure out what kind of evidence we’ll allow as to the author’s intentions as to audience, which might be just as obscure or unreliable as the communicative intentions we started with. (What if the text appears intended for one group, but a diary entry tells us that it’s really intended for another? What if two groups, the general public and the legal elite, each reasonably think that the text is intended for them? What if multiple authors thought they were addressing different audiences?) Kicking the evidence problem up a level of abstraction doesn’t actually solve it.

Similar problems crop up as to joint authorship. Suppose that there are two authors of a text, and that they intend different meanings of the same word. If the evidence we give the hypothetical reader is detailed enough to reveal this, then that reader will be just as confused as

but conveys some other meaning to them instead, that other meaning—and not your meaning—will generally be the meaning of your utterance.”).

229 See, e.g., Goldsworthy, supra note 8, at 48 (“Utterance meaning . . . depends on what the speaker’s meaning appears to be, given evidence that is readily available to his or her intended audience, including the sentence meaning of the utterance and other clues such as its context.”); Lawson, supra note 22, at 1826–27 (suggesting that “if there is good reason to think that a particular recipe was designed only for private rather than public consumption, then one must take account of both its original public meaning and its original private meaning to its intended audience,” but that if the intended audience was not private, then “[i]ts meaning . . . is its original public meaning”).
we are. No matter how hypothetically reasonable, a reader who knows that there are two ships *Peerless* still can’t tell which one the contract refers to, because there’s no conventional public meaning to use. And if there are two conventional public meanings (as may have been the case for “ex post facto”), then the same problem arises. Maybe one meaning is more conventional than the other; but in that case, we could solve the problem for the actual-intention theory the same way, by always picking the intention that the majority of authors held. Joint authorship, then, doesn’t give us any reason to prefer constructed readers and authors over actual ones. In other words, the main difficulties of the intentionalist approach apply equally to the textualist side—and the two schools are left in a standoff.

This discussion might seem bizarrely abstract. Most of the time—maybe almost all of the time—these narrow distinctions in theory will all produce no real difference in practice. But again, depending on how one argues for originalism, the theoretical distinctions might really matter. If the defense of originalism requires a One True Meaning, from which everything else is supposed to follow—a theory on which meaning just *is* authorial intent, public understanding, or what have you—then the continuing disagreement is a serious flaw.

c. The “Original Methods” Synthesis

One of the more promising attempts to resolve this disagreement is the recent work by John McGinnis and Michael Rappaport on original methods. Their claim is that the Constitution’s authors would have intended the text to be interpreted according to prevailing legal methods, and moreover that such methods would have been part of the interpretive toolkit of the general public or the hypothetical reader. Thus, the two contesting schools, authorial intentions and public meanings, largely wind up in the same place.

As a practical matter, that’s surely correct. In almost all cases, these various concerns will line up together rather than in opposition. But as a theoretical matter, the concept of original methods, on its own, un-

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231 See supra note 218 and accompanying text.
232 See sources cited supra note 207.
fortunately fails to fully bridge the gap. If the Constitution’s authors and readers attributed the same meaning to the text, then of course the different schools would reach the same result. But what if they didn’t? Suppose that some of the authors’ beliefs about interpretive conventions turned out, in the end, to be mistaken. (Maybe they thought that “ex post facto” would be given its technical meaning and limited to criminal law, but in fact the prevailing legal conventions—and thus the hypothetical reader—would apply a broader ordinary-language meaning instead.) In that case, the meaning intended by the authors would diverge from the meaning that’d be understood by reasonable readers—and which meaning you care about will matter.

The fact that the authors also intended their document to be read according to prevailing conventions, whatever they were, doesn’t necessarily make those conventions part of the authors’ communicative intentions in the way that the McGinnis-Rappaport synthesis requires. Suppose that the authors tried to communicate to readers a rule that invoked the technical sense of “ex post facto,” but failed to realize that their audience would use the ordinary-language sense instead. To the intentionalist, once we know what the authors meant, that’s the only proper interpretation of the text they wrote; the fact that they also expected their audience to use prevailing conventions along the way doesn’t mean that we should prefer a mistaken version of their instruction to the real one. Someone trying to communicate a recipe for fried chicken, in Gary Lawson’s famous example, might expect his readers to use standard interpretive conventions to understand the recipe. But if he gives idiosyncratic names to some of the ingredients, not realizing that those names are regionalisms that will only confuse his audience, he’s still intending to communicate to his readers the ingredients he has in mind, not whatever random ingredients they come up with. If we know what the author intended, and if we trust him to write a good recipe, why not follow his intentions, rather than someone else’s confused interpretation? One might think this view wrong-headed, but that would be entering the textualist-intentionalist debate, rather than resolving it.

In other words, original methods alone won’t settle this dispute. Any division between the “authors’ originally intended methods” and

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234 See supra note 218 and accompanying text.
235 See Lawson, supra note 22.
“the reasonable original readers’ methods” will start the whole fight all over again, and leave us no better off than before.

2. The Continuity Alternative

The continuity thesis might offer a better explanation of how original methods can bring the two camps together. Because it focuses on legal content, and not just meaning, the thesis is compatible with the intentionalists’ general interpretive theories. And because it requires adherence to Founding-era legal conventions, the thesis addresses many of the textualists’ concerns regarding a reader’s ability to discover the law.

a. The Legal Solution

As discussed above, the continuity thesis shifts the focus of originalism from the original meaning to the original law. Continuity is about preserving the law from an earlier time to today; we care about the meaning of an particular text only insofar as it informs the legal effect of that text’s enactment—that is, insofar as it makes a legal difference.

Importantly, the legal effect of a text is determined by reference to other legal rules governing interpretation and enactment, not just by reference to the One True Meaning. As a result, the law can supply an answer to the legal question without first having to solve all the problems of philosophy of language.

In contract law, for example, we sometimes choose to make a party’s legal obligations depend on relative fault, and not on the meaning of the instruments they’ve signed. So, if the Peerless hypothetical arose today, we might decide the case in favor of the later-departing ship, if the party favoring the earlier-departing ship ought to have known about the confusion but didn’t act to resolve it.236 As a legal rule, this settlement works perfectly well regardless of whether or not there’s a truth of the matter as to “what the contract means.” The legal content of contracts generally tracks their meaning—that’s why we care whether the parties sign them—but we don’t have to continue searching for meaning when the trail leads us off a cliff. In cases of confusion, when it makes sense to do something else, society can choose to have its con-

236 See Restatement (Second) of Contracts §§ 20, 201.
tracts adjudicated based on factors other than their “meaning,” intended or public.

The same is true of the Constitution. Regardless of which abstract theories of meaning we prefer, and regardless of whether the Framers or Ratifiers were aware of those theories or not, there may have been applicable rules of Founding-era law that governed the text’s legal effect. The claim here isn’t that the Constitution’s authors intended that their document be read according to those rules, or that any reasonable readers would use them—though both of these things may have been true. Nor is the claim that the original legal methods were somehow “baked in” to the communicative content of the Constitution’s words. (In the Peerless hypothetical, contract law acts as a replacement for shared meaning, not as a component thereof; we apply it regardless of whether the parties knew about its rules in advance.) We just want to know what the Constitution added to U.S. law, and the other rules of U.S. law may have had something to say about that.

As in the case of contracts, there are good reasons why our legal rules generally tell us to look to the authors’ intentions. (That’s why we appointed those people as authors, and not other people.) But there are also good reasons why the rules might tell us not to look for actual intentions too closely. For instance, the rules might solve the evidence problem by telling us that certain kinds of readily available evidence ought to be used in determining legal content, but that other kinds (like sworn testimony from members of Congress) ought not, regardless of our case-by-case judgment as to its reliability. Likewise, the rules might solve the shared-meaning problem by requiring us to hypothesize a single author of the entire enactment, even if we know that various clauses were actually written by different committees; or they might tell us to treat the most widely shared meaning of each provision as its only meaning, even when we know that there was disagree-

\[237\] See supra note 152 and accompanying text.

\[238\] See Regan v. Wald, 468 U.S. 222, 237 (1984) (“Oral testimony of witnesses and individual Congressmen, . . . can seldom be expected to be as precise as the enacted language itself.”).

\[239\] See Mariach v. Spears, 133 S. Ct. 2191, 2203 (2013) (“[A]n interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.”).
It’s okay for us to suspend our disbelief in these cases, because there’s valid law that tells us to.

As a result, continuity can accept, along with the intentionalist school, that interpretation might truly be the search for an author’s communicative intent. But, along with the textualist school, it can also limit that search by adding certain useful assumptions and rules of evidence. The important point is that, unlike traditional public-meaning theories, continuity offers a way of explaining what evidence of intent should matter and what shouldn’t: namely, the evidence that society has chosen to use, the evidence that matters under the law. Because the goal is to identify the law here and now, and not to identify meaning in the abstract, it’s far easier to justify limitations on what a decisionmaker may consider.

b. Is There Law to Apply?

The continuity thesis determines the legal effect of the Constitution by reference to other rules of U.S. law at the time of the Founding. That solution presupposes, of course, that there actually were any such rules of law that were available at the Founding to apply—and, in particular, that there were rules of U.S. law, as opposed to the law of some individual State. The Founding era was a time of extraordinary ferment, and Americans were deeply divided on first principles of law and politics. As a result, some argue that there was simply too much historical disagreement on interpretive methods for it to be plausible for us, today, to apply a single set of rules. Moreover, since the United States was in some ways created by the Constitution, the argument might go, originalists who try to use Founding-era U.S. law to interpret that Constitution are pulling themselves up by their own bootstraps.

These are reasonable arguments to make. Yet they’re also empirical claims, which can only be answered by reference to historical facts. At

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241 Cf. Cornell, supra note 190 (describing the variety of Founding-era interpretive approaches).

242 See Fontana, supra note 33, at 198 (suggesting, perhaps metaphorically, that “before the American Constitution there was no United States of America”).
the moment, the most plausible answer may well be that there was law at the Founding to apply, and that it was the law of the United States.

People in the Founding generation sometimes disagreed about the interpretive rules that should be applied to the Constitution. Is this new document more like a statute, or a state constitution? If it binds sovereign states, is it more like a treaty? Should it be construed broadly to achieve its objects? Or should it be read strictly to protect the contracting parties? We shouldn’t be surprised by this kind of disagreement—nor should we expect lawyers back then to have agreed with each other any more than lawyers do today.

But if the continuity thesis is true, then we’re not entirely at sea. For one thing, their disagreements are the ones that matter. To the extent that some questions were well settled at the time, and only became confusing after changes in language had obscured earlier understandings, recovering the original history can help solve questions rather than raise new ones. For another, even on questions on which disagreement was deep and widespread, there can still be a proper legal answer. How to turn social facts into legal rules is a hard question; the tools in our positivist toolbox are matters of ongoing jurisprudential debate. Yet we often find, in our own day, that we can hear legal arguments made by two sides and yet think that one side is clearly right, that their argument is the stronger one given our society’s legal conventions. The same is true of the past; the fact of disagreement doesn’t end the inquiry, but just puts us in the same position that we’d occupy if we were addressing a modern legal question on which people disagree. The evidence cited by Powell, for example, suggests that early interpretive practice was dominated by common-law methods of statutory interpretation, and that the treaty analogy gained particular prominence only after the Virginia and Kentucky Resolutions. If that’s right, then we may be able to resolve a number of interpretive questions well enough, even if the Founders lacked a full consensus.

If we can’t reach consensus on which side had the better argument, in the end it might not make much of a difference. Today, for example, there might be widespread disagreement over how much a court should consider the purpose of an enactment as opposed to the strict sense of its text (or, indeed, how much to rely on the Constitution’s

243 See generally Nelson, supra note 185; Powell, supra note 185.

244 See Powell, supra note 185, at 887, 923–24, 926–27.
original meaning and how much to rely on other sources). Some argue that this disagreement undermines an account of law as based on social facts. But each of us nonetheless manages to come to legal answers on many questions that seem to make more sense to us than the alternatives. If the worst that happens is that we reach some conclusions by consensus but end up disagreeing on others, then at the very least we’re no worse off, and we may still have narrowed the range of disagreement.

Maybe evidence of radical and thoroughgoing disagreement at the Founding, of the kind that wholly undermines the case for shared social conventions giving rise to legal rules, would make the project of continuity impossible. After all, if law is a matter of social fact, then some societies might simply lack the features necessary to generate legal answers. (The status of British law during the Revolution is a hard question, at least until it became clear which side was going to win.) But whether that much disagreement actually existed at the Founding is a historical question, and one that seems to have a ready answer. Even prior to the Constitution’s adoption in 1788, the United States of America was an independent confederated state, with a functioning government, officials, and courts. (John Jay, for example, hung around as the Confederation government’s Secretary of Foreign Affairs well after George Washington became President of the new government.) The Confederation might have functioned poorly, given the many defects of the Articles; but it existed, and it both generated and was governed by legal rules. As a result, it seems doubtful that the legal disagreements at the Founding were so fundamental as to eliminate the possibility of operative law.

In the same way, the existence of the United States as a real live government before the Constitution suggests that there was indeed some U.S. interpretive law to apply. After all, the legal system had to have some means of interpreting enactments like the Articles, or the various ordinances of the United States in Congress assembled. And at the time of the Founding, the theoretical divisions in state law may not have been as significant as they are today. The thirteen States all shared

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245 See Adler, *Interpretive Contestation*, supra note 29.

the English common-law tradition, and they all relied on common-law principles as both the common substrate of their law and the natural background against which to read Congress’s enactments. If half of the States had followed a wildly different legal tradition (like Louisiana, which uses the civil law), then maybe we’d have had a real problem. But the fact that people argued over which model to use—statutes and state constitutions, treaties, etc.—shows that they assumed some degree of consensus as to which interpretive rules would properly govern in each case.

3. Continuity and Constraint

Because of its focus on the law, instead of the text, the continuity thesis may also be able to resolve longstanding originalist disputes about “constraint.” The earliest modern originalists, such as Bork, Berger, and Rehnquist, placed enormous emphasis on the goal of constraining judges, in reaction to what they saw as a wild-and-crazy Warren Court. Since then, the advent of “new originalism” has largely downplayed constraint as a goal, but it still plays a significant role in common intuitions surrounding originalist theory.

The problem, as many others have pointed out before, is that the goal of “constraint” can be satisfied in many different ways, most of which look nothing at all like originalism. Any number of procedures will prevent judges from making willful decisions: flip a coin, always rule for the defendant, always follow the GOP’s or the Democrats’ political preferences, always decide in accordance with the original meaning of the French Constitution (or the U.S. Constitution with the Fifth and Fourteenth Amendments removed), and so on. If the only goal is to produce determinate results, then there’s no particular reason why we’d choose originalism as a means to that end. And it may well be that the Constitution’s original meaning itself licenses judicial discre-

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tion—or, even worse, that the sheer difficulty of recovering that meaning lets judges call any result “originalist.”250

Yet continuity also helps explain why originalism remains intuitively connected to constraint. The reason why coin-flipping or using the French Constitution seem so inapposite isn’t that they impose few constraints—they might be rather demanding—but that their choice of constraint is so unconstrained. We have no good explanation, from the perspective of constraint alone, why judges should choose to follow the Constitution’s original meaning as opposed to any other set of equally determinate rules, so long as all of them do it consistently. Continuity provides that explanation, because the source of constraint is the law, whatever that might be.

Judges, like all government officials, have to act according to law. Sometimes that law will provide a determinate rule, which every reasonable person would apply similarly. Sometimes the law provides a flexible standard (like “due care”251 or “within a reasonable time”252), leaving the judge to make a substantive judgment. There are costs and benefits to both, and society uses different techniques to achieve different purposes. If the law happens to give the judges plenty of room to play fast-and-loose, that’s our fault, not the judge’s fault. Following the law is the perfectly ordinary and naïve view of what judges are supposed to do—as expressed at a series of increasingly repetitive confirmation hearings.253 And viewing the problem this way answers the charge that judges are “just making it all up”—either the law authorizes them to make it up, or it doesn’t.

Originalism-as-continuity imposes few substantive requirements on the law; it leaves a great deal up to historical inquiry. Perhaps, as a policy matter, it allows judges to get away with too much.254 But the conti-

250 See Redish & Arnould, supra note 18 (making this argument).
252 FED. R. CIV. P. §(d)(1).
253 See, e.g., The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary, 111th Cong. 62 (2010) (statement of Elena Kagan) (“And I think that they laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.”); id. at 150 (“[W]ith respect to a statute, the only question is Congress’ intent and that’s what the court should be looking at, what Congress wanted the statute to apply to, how Congress wanted the statute to apply.”).
254 Cf. Redish & Arnould, supra note 18, at 1495.
nuity thesis stands or falls, not by whether it limits judicial creativity, but whether it’s an accurate statement of the law. And, in some ways, that’s the most important constraint of all.

C. Originalism and History

The continuity thesis offers a better argument for originalism than many others on offer. Unlike conceptual arguments, it doesn’t depend on identifying a single theory of interpretation or the One True Meaning of legal texts. And unlike normative arguments, it doesn’t depend on highly contestable claims about the consequences of the Constitution or about the values served by adhering to the text. Instead, continuity offers a legal argument for originalism, an argument that tries to be grounded in claims about our law.

More significantly, though, defending originalism on the basis of continuity suggests new ways of resolving ongoing debates between lawyers and historians. One of the common complaints about originalism is that it forces lawyers and judges to “play historian,” and to learn a great deal about fields (the Framers’ intentions, political conditions, patterns of linguistic usage) in which they lack real expertise. This is a perfectly fair critique. Originalism requires a great deal of historical knowledge, and the research producing that knowledge ought to be done well.

But if originalism is really based on continuity, rather than the meaning of a particular eighteenth-century legal text, then maybe there are other defenses available. In applying the continuity thesis, lawyers and judges would be doing something that’s eminently legal: determining what U.S. law was as of a particular date. That’s obviously a job for lawyers, albeit with the benefit of historians’ help.255

Moreover, it’s the kind of job that lawyers and judges engage in all the time. Cases involving complex chains of title might require us, as a result of the nemo dat maxim, to figure out whether A or B owned the land many years ago.256 Disputes over sovereign borders can depend on the proper construction of an old interstate compact or the Crown

255 Cf. Gary Lawson & Guy Seidman, supra note 7, at 50–51 (advancing a similar argument).

256 See supra notes 83–85 and accompanying text.
grant to Lord Baltimore. Suits alleging ex post facto violations require courts to determine what the law was at the time a crime was committed (which might have been many years ago, not what it is today. And so on. Our legal system contains various additional rules to make such inquiries less common—such as statutes of limitations, adverse possession, or the rule against perpetuities. But those rules are like the “domesticating” rules discussed above: they help us avoid inquiry into the past, but only because inquiry into the past would otherwise be a normal part of our legal reasoning.

Viewing the historical inquiry as just one component of ordinary legal practice also helps answer the criticism that originalism, and particularly continuity, is just too difficult to actually carry out. Like other original-methods theories, continuity layers an inquiry into methods on top of existing inquiries (like authors’ intent or public meaning) that might already be hard to conduct. And there are plenty of people who think that originalism is an impossible burden as it stands, without any additional complications. But while continuity might require more historical knowledge, in theory, than other versions of originalism, it’s not clear how often that knowledge is actually required in practice. For example, on most issues the public-meaning/authorial-intent distinction doesn’t even arise, because the meaning most likely intended by the authors was exactly what everyone else would have thought the words meant too. The distinction is important on theoretical grounds, if somebody’s making a conceptual argument for originalism based on the nature of texts or meanings or whatever, but it’s only occasionally relevant to actual constitutional disputes. The same is true of original methods; maybe they matter sometimes, but often they come to exactly the same answer you’d expect otherwise.

One might ask, of course, “how do you know they don’t matter?” But that’s where the defeasible nature of legal reasoning comes in. We read texts for their obvious signification, and if someone wants to argue that we’re doing it wrong, we wait for them to do so persuasively. In the meantime, we do what seems right on the evidence we’ve got. And finding out the standard interpretive methods in a given legal system at a certain time isn’t any harder, in the abstract, than comprehending a

\[\text{E.g., United States v. Old Dominion Boat Club, 630 F.3d 1039, 1041 (D.C. Cir. 2011).}\]

\[\text{E.g., United States v. Seale, 577 F.3d 566 (5th Cir. 2009).}\]
term of art in a contemporary trade;\textsuperscript{259} both require knowledge of conventions that are broadly held and at the same time potentially contested. (Indeed, translators of historical documents do this \textit{all the time}.)

Reconceptualizing continuity as a legal project, rather than a primarily historical one, doesn’t let us avoid the historical research by focusing on standard lawyers’ questions. Rather, it shows why the historical issues \textit{are} standard lawyers’ questions. We try all the time to answer questions of the form, “what was the law on topic X as of date Y?” On the continuity theory, that’s precisely what originalism does, for good or ill. And it’s also precisely what we do, albeit with a less-restricted universe of legal materials, when we answer questions of the form, “what is the state of the law on topic X \textit{today}”—questions that lawyers ought to be able to answer, if anyone can.

\textbf{CONCLUSION}

Originalism as continuity is, at the same time, both complicated and simple. It’s extremely complicated, because we have to know the content of the Founders’ law in its full glory—context, methods of interpretation, relevant rules of unwritten law, etc. But it’s also very simple, because it makes the basis for originalism very easy to understand: our law stays the same until it is properly changed. That ought to be the originalist’s slogan, because originalism is a theory of legal change.

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