# Written Constitutionalism, Past and Present

JONATHAN GIENAPP

Debates over constitutional originalism almost always center on meaning. Questions are typically focused, concentrated on the meaning of particular constitutional clauses at the moment of their inception: the Commerce Clause in 1787, the Second Amendment in 1791, or the Fourteenth Amendment in 1868. Given the prevalence of these investigations, theoretical and methodological debates over how to recover original constitutional meaning are concentrated on either the *kind* of meaning that should be targeted—original public meaning, original intended meaning, or original legal meaning—or *how* that meaning can be recovered—through conventional legal reasoning, corpus linguistics, or thick reconstruction of historical context.[1] Regardless, virtually all originalist theories of meaning uncritically presuppose the nature of the object possessing that meaning: they take as given what the Constitution itself *is* and, by implication, what it has always been. Although it might not be clear what the Constitution originally meant, it is straightforward what the original Constitution originally was. It just *is* the Constitution.

1. For originalist methodology, see Lawrence B. Solum, "Originalist Methodology," *University of Chicago Law Review* 84 (2017): 269–95. For historical critiques of originalist methodology, see Jonathan Gienapp, "Historicism and Holism: Failures of Originalist Translation," *Fordham Law Review* 84 (2015): 935–56; Jack N. Rakove, "Tone Deaf to the Past: More Qualms About Public Meaning Originalism," *Fordham Law Review* 84 (2015): 969–76; and Saul Cornell, "Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning," *Law and History Review* 37 (2019): 821–45.

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It is past time, however, to look beneath original meaning to the original Constitution itself. Originalist assumptions about the nature of the Constitution are utterly foundational to the theory; most of what defines originalism rests on these presuppositions. By assuming that the Constitution is a certain kind of object, defined by a certain set of characteristics, originalists enable originalism to appear as an intuitive way to interpret it. Yet, these originalist assumptions are unfounded. A careful look at the original Constitution and the history surrounding its creation shows that the Constitution was not, at first, clearly understood to have possessed many of the defining features that originalists often assume it must have. When the Constitution initially appeared, as Founding-Era Americans struggled to make sense of its essential characteristics, they often imagined it in ways quite different than how it is conceived of today. Many of the attributes that we would consider definitive of the Constitution emerged only later through searching debate and significant transformations in legal and constitutional understanding.[2] When it is presumed today, therefore, that the Constitution just *is* a particular way, that assumption often reveals more about how we have been accultured to speak a particular kind of constitutional language than about anything the original Constitution ever necessitated. Coming to terms with this early constitutional history casts profound doubt on originalists' just-so understanding of the Constitution's essential nature.

Of the various elements that define the orthodox originalist conception of the Constitution, none is seemingly more essential than the idea that the Constitution is an exclusively written text. Every other originalist assumption, in one way or another, seems to depend on it. Given the putative nature of the Constitution, this presupposition can seem perfectly justified, if not trivial. Yet, in reality, it is a cluster of unexamined and contestable commitments, masquerading behind a seemingly neutral description. Historical investigation enables us to see this. Although the founding generation certainly thought that their Constitution was, in a certain sense, written, there are vital differences between how they and modern originalists conceive of constitutional writtenness. There is, therefore, no better way to bring the unfounded originalist Constitution into sharp relief than to explore this particular, governing assumption.

What matters most is not that originalists emphasize the Constitution's writtenness, but rather the *conception* of writtenness that they attach to it. Almost across the board, they see the Constitution in avowedly positivist

2. On how debates during the decade following ratification helped forge fundamental constitutional assumptions, see Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, MA: Harvard University Press, 2018).

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terms: written law that was intentionally constructed, enacted, and commanded by authorized lawmakers.[3] From this perspective, the Constitution acquired its content through express addition. Before the delegates to the Constitutional Convention wrote anything down, the Constitution had no content. It only acquired content as the delegates added words to parchment. Those who have inherited that Constitution, decipher its content by interpreting the meaning of those words that were expressly enacted. The Constitution has whatever content past people willfully put there through writing. Only because originalists see the Constitution in such markedly positivist terms are they able to jump so effortlessly from the mere fact of the Constitution's writtenness to the much stronger, decisive belief that the Constitution's content is identical to the linguistic meaning of its text.

3. It is important to be clear on what is meant here by legal positivism. As a general matter, legal positivism stipulates that law derives its validity solely from the fact that it has been promulgated by legally authorized bodies. Law, from this view, is a human construction that is distinct from morality and determined based on social facts rather than merit. There are different ways to adopt a positivist orientation toward law, however. One standard way is to believe that law is whatever authorized lawmakers formally enact—which thus places special emphasis on the written commands of those particular legal authorities. As most originalists betray commitment to this kind of legal positivism—to constitutional law rooted in what has been positively written and enacted—that is the sense emphasized here. But there is a different way in which one could draw on legal positivism, which has recently informed the innovative work of originalists William Baude and Stephen Sachs. Rather than focusing principally on positive legal enactment at the Founding, Baude and Sachs follow H. L. A. Hart—the most influential legal positivist of the last half-century-plus—and instead look to social practice. Depending upon how one makes sense of the American Founding, and the legal system it produced, an emphasis on social practice might simply lead one back to the first sense of legal positivism—at the Founding, social facts might indicate that the law was just whatever certain authorized decision makers formally enacted. But if one understands law at the Founding in a different way, an emphasis on social practice could lead in a different direction—away from law-as-positive enactment and toward recognition that other kinds of law, irrespective of whether they were positively enacted, might have acquired the sanction of valid law as a matter of social fact. While, thanks to Baude and Sachs, this alternative form of legal positivism is now important to the originalism debate, the first kind of positivism—that sees law as the positive enactments of authorized lawmakers—has long been essential to originalism in seldom appreciated ways, and thus takes priority here. Discussion of the second kind of positivism that is central to Baude's and Sachs's recent work, will have to wait for another day. For Hart's theory, see H. L. A. Hart, *The Concept of Law*, 3rd ed. (originally published 1961; New York: Oxford University Press, 2012). For Baude and Sachs's "positive turn" originalism, see William Baude, "Is Originalism Our Law?" *Columbia Law Review* 115 (2015): 2349–408; Stephen E. Sachs, "Originalism as a Theory of Legal Change," *Harvard Journal of Law & Public Policy* 38 (2015): 817–88; and William Baude and Stephen E. Sachs, "Grounding Originalism," *Northwestern University Law Review* 113 (2019): 1455–91.

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Originalists' understanding of constitutional writtenness, however, is anachronistic, a species of modern constitutional thinking that they unwittingly and uncritically impose on the eighteenth century. Founding-Era constitutionalists by and large were not positivists. They tended to think that much of law was "out there"—like the principles of mathematics or natural philosophy—awaiting discovery through reason and observation. No doubt plenty of law was made by human beings, and understanding how different kinds of law interacted and fit together posed vitally important questions. But it was impossible to understand law—and most of all fundamental law, of which constitutions, as the highest municipal authority, were a central part—without understanding its non-positivist dimensions. To a degree that cannot be ignored, those who made the United States Constitution presupposed this conception of law and its attendant understanding of constitutional content. And even if positivist thinking began to creep in toward the end of the century, non-positivist assumptions lingered for decades to come.

If we are interested in understanding the *original* Constitution—the one that eighteenth-century actors made, recognized, and debated—then we must see their work from the non-positivist perspective that once predominated and that informed their choices. Only then can we begin to make sense of the written constitution that they presented to the world. If we choose to interpret the Constitution from any other perspective, then we choose to interpret something other than the original Constitution. Whatever merits that other Constitution might boast, it will not be original—and thus will not be the Constitution that originalists claim to be recovering and the only one that can be said to possess original meaning.

## Underlying Assumptions: Originalism, Writtenness, and Positivism

There are several kinds of originalism as well as perpetual debate over how unified the theory truly is.[4] Beneath all the variation, however, most originalists take for granted a particular conception of the Constitution, composed of several distinct elements. Particularly prevalent is the assumption that, because it is law, the Constitution is a conventional

4. Despite originalism's diversity, some claim that the theory remains unified, see Lawrence B. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate," *Northwestern University Law Review* 113 (2019): 1250–55, 1262–71, whereas others claim the opposite, see Thomas B. Colby and Peter J. Smith, "Living Originalism," *Duke Law Journal* 59 (2009): 239–307.

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legal instrument susceptible to familiar rules of legal interpretation.[5] Related to this idea, is the assumption that the Constitution is uniquely enforceable by the judiciary—that it comes hardwired with the ingredients of modern constitutional culture.[6] But no assumption is more foundational to originalism than the idea that the Constitution is essentially a written text: that the Constitution just *is* the document written during the summer of 1787 and amended thereafter.[7]

It is impossible to overstate how central the writtenness of the Constitution is to originalism.[8] To orthodox originalists, it is the instrument's defining attribute. The Constitution is not some mysterious omnipresence, amorphous jumble of customs and norms, or guiding spirit that morphs with the times; it is a tangible thing. You can carry the Constitution around in pocket form or see it behind glass at the National Archives. It is a physical document, compactly circumscribed in space.[9] All because it has been reduced to written form.

Because the Constitution is written, most originalists believe that its content is distinctively textual in nature.[10] This turns constitutional

5. See John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* (Cambridge, MA: Harvard University Press, 2013), 116–38; John O. McGinnis and Michael B. Rappaport, "The Constitution and the Language of the Law," *William & Mary Law Review* 59 (2018): 1321–412; Gary Lawson and Guy Seidman, "Originalism as a Legal Enterprise," *Constitutional Commentary* 23 (2006): 47–80; William Baude and Stephen E. Sachs, "The Law of Interpretation," *Harvard Law Review* 130 (2017): 1079–147. For criticisms of these assumptions, see Gienapp, *Second Creation*, 95–98, 117, 141–42, 281–85; and Saul Cornell, "The People's Constitution vs. The Lawyer's Constitution," *Yale Journal of Law and the Humanities* 23 (2011): 295–337.

6. See, for example, Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *University of Chicago Law Review* 70 (2003): 887–982. For a strong counter, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

7. I focus exclusively on the original eighteenth-century Constitution and put aside later amendments to it. Although originalists have explored the latter subject in depth—the Reconstruction amendments especially—the bulk of their theorizing has applied to the original Constitution, and, with few exceptions, they deny that later amendments systematically reconstituted the existing Constitution. For one exception, see Akhil Reed Amar, *The Bill of Rights: Construction and Reconstruction* (New Haven, CT: Yale University Press, 1998).

8. See Andrew W. Coan, "The Irrelevance of Writtenness in Constitutional Interpretation," *University of Pennsylvania Law Review* 158 (2010): 1025–46; and Thomas B. Colby, "Originalism and Structural Argument," *Northwestern Law Review* 113 (2019): 1303–6.

9. Akhil Reed Amar, "A Few Thoughts on Constitutionalism, Textualism, and Populism," *Fordham Law Review* 65 (1997): 1657.

10. Lawrence B. Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning," *Notre Dame Law Review* 91 (2015): 15, 25–26; Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, rev. ed. (originally published 2004;

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interpretation into a narrow exercise in drawing meaning from words, of trying to decipher the Constitution's "communicative content"—that is, "the meaning actually communicated. . .by the words on the page."[11] Originalists admit that the Constitution means more than what its bare words convey: its language often implies more than what it says, and context helps enrich, disambiguate, and clarify its expressions.[12] Some constitutional provisions, they add, might communicate meaning at a high level of generality.[13] In certain instances, moreover, those clauses might be irreducibly ambiguous or vague, requiring what they call constitutional construction.[14] None of these qualifications, however, change the basic fact that, for orthodox originalists, constitutional meaning is exclusively accessed through and derived from the constitutional text. The only point of entry is the text: all interpretive activity goes through it and the entire universe of constitutional content is tethered to it. As one leading originalist reminds (adapting Chief Justice John Marshall's famous adage), "*we must never forget it is a text we are expounding*."[15] The commitment to be ruled by the Constitution is the commitment to be ruled by its words. "The central premise of originalism," explain Steven Calabresi and Saikrishna Prakash, "is that the text of the Constitution is *law*."[16]

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Princeton: Princeton University Press, 2014), 102–11; Akhil Reed Amar, "The Document and the Doctrine," *Harvard Law Review* 114 (2000): 45–48; and Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: West, 2012), 16. Equating the Constitution with a form of linguistic communication explains the growing fascination with corpus linguistics; see Thomas R. Lee and James C. Phillips, "Data-Driven Originalism," *University of Pennsylvania Law Review* 167 (2019): 261–336.

11. Lawrence B. Solum, "Communicative Content and Legal Content," *Notre Dame Law Review* 89 (2013): 484–507; and Randy E. Barnett, "The Gravitational Force of Originalism," *Fordham Law Review* 82 (2013): 413–17, quote at 413.

12. Solum, "Originalist Methodology," 286–91; and Randy E. Barnett, "The Misconceived Assumption about Constitutional Assumptions," *Northwestern University Law Review* 103 (2009): 617–26.

13. Michael W. McConnell, "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution," *Fordham Law Review* 65 (1997): 1280–81; Randy E. Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* 45 (1999): 644–45; and Eric J. Segall, *Originalism as Faith* (New York: Cambridge University Press, 2018), 91–102.

14. Keith E. Whittington, "Constructing a New American Constitution," *Constitutional Commentary* 27 (2010): 119–38; Lawrence B. Solum, "The Interpretation–Construction Distinction," *Constitutional Commentary* (2010): 95–118; and Randy E. Barnett and Evan D. Bernick, "The Letter and the Spirit: A Unified Theory of Originalism," *Georgetown Law Journal* 107 (2018): 10–18.

15. Randy E. Barnett, "Underlying Principles," *Constitutional Commentary* 24 (2007): 413.

16. Steven G. Calabresi and Saikrishna B. Prakash, "The President's Power to Execute the Laws," *Yale Law Journal* 104 (1994): 551.

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The Constitution's writtenness is so foundational to originalism because it structures the theory's bedrock account of constitutional fixity and change. It is because the Constitution *is* written that constitutional meaning is fixed at the moment of enactment and, therefore, why originalist interpretation is necessary. Originalists reckon, for one thing, that the Constitution's meaning is fixed *because* it is written. "[G]iven the way language works," leading originalist Lawrence Solum has maintained, "the communicative content of a writing is fixed at the time of drafting."[17] Related, if different, originalists claim that the Constitution is written to *ensure* that its meaning is fixed. A constitution can only achieve its chief purpose as fundamental law—to constrain those in power—if its meaning is fixed and it can only be fixed if it is written.[18] Whether the byproduct or the point of having a written constitution, fixed constitutional meaning is tethered to the written form. This orientation is neatly captured by Solum's influential summary of originalism's two core commitments: the "fixation thesis"—which asserts that the Constitution's meaning is fixed at the time of writing—and the "constraint principle"—which contends that this meaning should constrain contemporary constitutional practice. Both ideas presuppose and are extensions of the idea that the Constitution is essentially written. What is fixed and what should constrain is the same thing: the "linguistic meaning" of the "constitutional text."[19]

As a written constitution both inherently creates and is meant to ensure fixed meaning, it naturally entails originalist interpretation. As Keith Whittington has contended, "originalism is required by the nature of a written constitution."[20] "[B]y committing ourselves to a written constitution," Randy Barnett echoes, "we commit ourselves to adhere to the original meaning of the text and any later amendments," because a written constitution "establishes or 'locks in' a rule of law from that moment forward." Accordingly, "adopting any meaning contrary to the original meaning

17. Lawrence B. Solum, "Triangulating Public Meaning: Linguistics, Immersion, and the Constitutional Record," *Brigham Young University Law Review* 6 (2017): 1626. See also Gary Lawson, "On Reading Recipes. . .and Constitutions," *Georgetown Law Journal* 85 (1997): 1823–36; Saikrishna B. Prakash, "The Misunderstood Relationship Between Originalism and Popular Sovereignty," *Harvard Journal of Law and Public Policy* 31 (2008): 485–91.

18. See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999), 56.

19. Solum, "The Fixation Thesis"; and Lawrence B. Solum, "The Constraint Principle: Original Meaning and Constitutional Practice" (unpublished manuscript). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 (accessed October 30, 2020).

20. Whittington, *Constitutional Interpretation*, 156. See also Mark D. Greenberg and Harry Litman, "The Meaning of Original Meaning," *Georgetown Law Journal* 86 (1998): 571.

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would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself." Therefore, a commitment to recovering "original meaning follows naturally…from the commitment to a written text."[21] Most originalists have connected the dots in much the same way.[22]

The ascendance of public meaning originalism, for many years now the dominant version of the theory, has only enhanced the importance of constitutional text. Champions of this brand of originalism contend that modern interpreters are only required to adhere to the Constitution's original public meaning—what its words would have originally communicated to an average reader—and are therefore not beholden to the original intentions of the Constitution's authors or the original expected applications that were presumed to follow from what they wrote.[23] The meaning of the words themselves, and nothing else, bind us today.[24] In privileging the Constitution's words over other possible sources of historical evidence, this obsessive focus on public meaning has especially stressed the textual nature of the Constitution.[25] But this has marked only a change in degree. Early, pre-public meaning originalists defined the Constitution in avowedly textual terms as well, in large measure to combat the Supreme Court's supposed willingness to identify unenumerated constitutional rights.[26] More

21. Barnett, *Restoring the Lost Constitution*, 4, 103, 108.

22. See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 145; Saikrishna B. Prakash, "Unoriginalism's Law Without Meaning," *Constitutional Commentary* 15 (1998): 529–46; and Vasan Kesavan and Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," *Georgetown Law Journal* 91 (2003): 1130–33.

23. On the shift to public meaning originalism, see Jonathan Gienapp, "Constitutional Originalism and History," *Process: A Blog for American History*, March 20, 2017. http://www.processhistory.org/originalism-history/ (accessed March 25, 2021); and Keith E. Whittington, "Originalism: A Critical Introduction," *Fordham Law Review* 82 (2013): 378–87.

24. Public meaning originalists constantly distinguish between the meaning of the Constitution's words and their application to concrete legal circumstances. See Jack M. Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011), 6–7, 12–13, 100–104; Greenberg and Litman, "The Meaning of Original Meaning," 586–97; Christopher R. Green, "Originalism and the Sense–Reference Distinction," *St. Louis University Law Journal* 50 (2006): 555–627; Barnett, "Misconceived Assumption about Constitutional Assumptions"; and Steven G. Calabresi and Julia T. Rickert, "Originalism and Sex Discrimination," *Texas Law Review* 90 (2011): 1–2, 9.

25. Colby, "Originalism and Structural Argument," 1303–6.

26. See, for example, Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1–35; and Edwin Meese, III, "The Law of the Constitution," *Tulane Law Review* 61 (1987): 986. Responses to these criticisms revealed the importance of constitutional text to early originalists; see Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975): 703–18; and John Hart Ely,

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recently, meanwhile, even those originalists who have claimed that knowledge of original legal methods should supplement evidence of original semantic meaning readily accept that the Constitution's *words* are the fixed object of constitutional interpretation.[27]

All of these claims about writtenness and textualism betray the most crucial assumption of all: originalists' avowedly positivist conception of constitutional content. It is not simply that the Constitution's content is derived from its language. What doctrinaire originalists consistently presuppose is that constitutional content is something that is expressly made, something that is actively brought into the world by human agents. The Constitution acquired content through express addition. Delegates to the Constitutional Convention wrote down words; ratifiers approved those words; later generations amended some of them. The *only* content that the Constitution has is that which authorized decision makers, at different moments in the past, actively put there. Constitutional content is positively created.[28] And it is because of *this* assumption that orthodox originalists attach such significance to the fact of writtenness and make sense of that fact in the way that they do.

Because the Constitution's content is distinctively textual, it is distinctively positivist (and vice versa). This is how originalists, without much reflection, can see the Constitution on the model of a statute: written law enacted by authorized lawmakers.[29] This is also why originalism is so often compared to textualism in statutory interpretation. Justice Antonin Scalia, for so long originalism's leadind public champion, routinely claimed that they were alike in kind, and countless originalists have followed suit.[30] Only because originalists are such positivists are they able

*Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), ch. 1–2.

27. On how this commitment unites rival forms of originalism, see Solum, "Fixation Thesis," 7–8; Sachs, "Originalism as a Theory of Legal Change," 822, 828–29; and John O. McGinnis and Michael B. Rappaport, "Unifying Original Intent and Original Public Meaning," *Northwestern Law Review* 113 (2019): 1373.

28. Steven D. Smith, "Reply to Koppelman: Originalism and the (Merely) Human Constitution," *Constitutional Commentary* 27 (2010): 192–93, 198–99; and Jeffrey A. Pojanowski and Kevin C. Walsh, "Enduring Originalism," *Georgetown Law Journal* 105 (2016): 126–28. On the positivism of modern legal thinking, see Suzanna Sherry, "Natural Law in the States," *University of Cincinnati Law Review* 61 (1992): 171–72.

29. Some originalists even expressly draw the analogy, see John O. McGinnis and Michael B. Rappaport, "Unifying Original Intent and Original Public Meaning," *Northwestern Law Review* 113 (2019): 1396–99.

30. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 3–47; and beyond that, see Kesavan and Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History,"

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to conflate originalism and textualism with such ease. Calling attention to the Constitution's writtenness thus signals a comprehensive understanding of constitutional content: how the Constitution acquires and possesses it.

Originalism is therefore uniquely predicated on the Constitution being written. Originalist Stephen Sachs has recently called to revise this orthodoxy, but in so doing has otherwise confirmed the tenet's utter ubiquity.[31] In fact, it is the broader omnipresence of this assumption in American constitutional culture that helps explain originalism's strength. Originalists stress the writtenness of the Constitution more than anyone, yet non-originalists breathe vitality into this foundational assumption.[32]

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But how do originalists actually justify the premise itself: not that a written constitution necessitates originalism,[33] but that the Constitution itself simply *is* the text that was positively written in 1787 and amended thereafter? The conviction typically rests on tacit assumption and bare stipulation. In the vast majority of instances, the argument derives from logical inference: that the Constitution is definitively written because that is just the kind of thing it is. All one needs to do is look at it. "The central feature of the document—the first thing one notices about it, if not a dolt or a

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1127–33; Scalia and Garner, *Reading Law*; and Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* (New York: Cambridge University Press, 2017), 129–33.

31. Stephen E. Sachs, "Originalism without Text," *Yale Law Journal* 127 (2017): 156–69. Sachs's work, along with that of his frequent co-author William Baude, has broken off in a less textualist direction and will be examined in greater depth in forthcoming work. They have diverged from orthodox originalism in refusing to see the Constitution as a discrete text, let alone a form of linguistic communication, opting instead to see the Constitution as a legal enactment embedded in a wider field of preexisting law. In attempting to take seriously what the founding generation took the law to be, they have therefore elected not to see the Constitution in strictly positivist terms. To refer back to the discussion on the distinct varieties of legal positivism in note 3, through a positivist account of the founding, based on the period's own legal-social practice, Baude and Sachs have settled on a distinctive understanding of the original Constitution that places less emphasis on enacted text. See Baude and Sachs, "The Law of Interpretation," 1137–38; Baude and Sachs, "Grounding Originalism." However accurately they recapture Founding-Era constitutional assumptions, for our purposes here, they are the exception that proves the rule. Virtually all originalist scholars and jurists remain committed to a text-centered version of originalism.

32. See David A. Strauss, "Does the Constitution Mean What It Says?" *Harvard Law Review* 129 (2015): 16–20; Richard Primus, "Unbundling Constitutionality," *University of Chicago Law Review* 80 (2013): 1081–82, 1090–91; Thomas C. Grey, "The Constitution as Scripture," *Stanford Law Review* 37 (1984): 13–17; Andrew W. Coan, "The Foundations of Constitutional Theory," *Wisconsin Law Review* (2017): 843–45; and, especially, Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988), 27–37.

33. For a classification of the justifications of this premise, see Coan, "Irrelevance of Writtenness in Constitutional Interpretation," 1031–46.

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mystic," Michael Stokes Paulsen has proclaimed, "is its written-ness."[34] Most of the time, however, originalists do not even offer these kinds of assertions. Instead, they straightforwardly describe the Constitution *as* the "constitutional text," as if it is self-evident that the two descriptions are identical.[35]

Some originalists have offered a more specific justification, arguing that the Constitution refers to itself as a text. Here they fixate on "this Constitution": a phrase that appears twelve times in the document, most notably in the Supremacy Clause.[36] The Constitution identifies that "*this* Constitution"—not some other Constitution—is supreme law.[37] But the next inference is the crucial one: "this Constitution" apparently means "this *written* Constitution," because through this phrase, "the Constitution's text prescribes fidelity to a specific, exclusive, defined, determinate written text."[38] Indeed, as Akhil Reed Amar has observed, the Constitution "is a text with four proverbial corners. It actually uses words like 'this Constitution' to describe itself as a document."[39] Although "this Constitution" tautologically identifies "this Constitution" as authoritative, one would already have to assume that the Constitution has solely taken written form to jump so effortlessly to "this written Constitution." Nothing, meanwhile, about the fact that office holders swear an oath to "this Constitution," explains what "this Constitution" is.[40] Much like other assertions that the Constitution simply is a text, then, the self-presentation argument rests on tacit assumption as well. Christopher Green's analysis has probed deeper. He weds "this Constitution" to the document's use of indexicals—words like "here" and "now" whose references change based on context—to contend that the Constitution "embodies…a theory of its own nature" in presenting "itself as a historically situated text."[41] But this linguistic analysis focuses

34. Michael Stokes Paulsen, "How to Interpret the Constitution (And How Not To)," *Yale Law Journal* 115 (2006): 2049.

35. Solum, "Originalist Methodology," 272.

36. United States Constitution, Article VI.

37. See, for example, Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 285; Michael Stokes Paulsen, "Does the Constitution Prescribe Rules for Its Own Interpretation?" *Northwestern University Law Review* 103 (2009): 864–69; and Barnett, "Gravitational Force of Originalism," 417–18.

38. Paulsen, "Does the Constitution Prescribe Rules for Its Own Interpretation?" 859.

39. Amar, "A Few Thoughts on Constitutionalism, Textualism, and Populism," 1657.

40. Emphasizing the oath, see Christopher R. Green, "'This Constitution': Constitutional Indexicals as a Basis for Textualist Semi-Originalism," *Notre Dame Law Review* 84 (2009): 1643–48; and Christopher R. Green, "Constitutional Truthmakers," *Notre Dame Journal of Law, Ethics and Public Policy* (2018): 523-24.

41. Green, "'This Constitution,'" 1674, see esp. 1624–28, 1637–57.

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on why the Constitution's meaning might have been locked at the moment of adoption, not why that meaning is already itself exclusively textual.[42] By using the Constitution's formal language to limn its nature, key aspects of that nature are already presupposed.

These kinds of arguments dominate originalist terrain, but sometimes originalists appeal to history. The Constitution is distinctively written, they argue, because Founding-Era Americans consciously created a novel brand of constitutionalism rooted in the written word.[43] The founding generation did not just write constitutions, they did so with the express intention of fixing constitutional rules in place in order to break from Britain's uncertain unwritten customary constitutionalism. One of the central goals of the Revolution was to concretize the fundamental law of a sovereign people in determinate, textual form. Originalists have therefore been fond of invoking Chief Justice John Marshall's own account of this process in *Marbury v. Madison*: "[A]ll those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written Constitution, and is consequently to be considered. . .as one of the fundamental principles of our society."[44] Originalists often claim merely to be channeling Marshall and, by extension, the founding generation's own understanding of their constitutional order.[45]

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It is curious how little thought originalists have given these rival forms of justification. Rather than weighing them, they seem to take comfort in the following reasoning: the founding generation meant to fix the Constitution by reducing it to writing; and if not, that does not matter because writing a constitution down fixes authoritative law in durable

42. Ibid., 1648–53, 1657–68, compare with 1653–57.

43. See Whittington, *Constitutional Interpretation*, 47–61, 124–27; Richard S. Kay, "Constitutionalism," in *Constitutionalism: Philosophical Foundations,* ed. Larry Alexander (New York: Cambridge University Press, 1998), 27–39; Herman Belz, *A Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective* (Lanham, MD: Rowman & Littlefield, 1998), 1–39; Kurt T. Lash, "Originalism, Popular Sovereignty, and *Reverse* Stare Decisis," *Virginia Law Review* 93 (2007): 1440–41; and Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010), 48–54, 222–26.

44. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–178 (1803).

45. See, for example, Calabresi and Prakash, "The President's Power to Execute the Laws," 551–52; Michael Stokes Paulsen, "The Irrepressible Myth of *Marbury*," *Michigan Law Review* 101 (2003): 2739–42.

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language. That is just how things work. Writing a constitution down necessarily transforms constitutional content into linguistic content. The important question is what interpreters should do with that text. Originalists' defense of the Constitution's distinctively written and positivist character is, therefore, more assumed than defended. It is unnecessary to work out *why* the Constitution is the text positively written in 1787 and amended thereafter, because it just obviously is so.

But what if originalist logic and Founding-Era history pointed in distinct directions? What if Founding-Era Americans thought that writing a constitution did not change or settle its essence in the ways that originalists assume? What if eighteenth-century constitutionalists were not strictly positivists, and the Constitution they made presupposed that perspective? What if, in short, the original Constitution, as the founding generation understood it, was fundamentally different than the original Constitution as originalists understand it?

Originalists have never seriously confronted these questions. With regard to meaning, they have invented many ways to discount the views of the Founders: to explain why we are bound by the Constitution's textual meaning alone, and not by what its framers originally intended or expected to follow from it. But these evasions hardly ever focus on the original Constitution. Can we really disaggregate the original Constitution—the thing itself—from the conceptual world in which it originally appeared? Can we call something the "original Constitution" even if nobody at the Founding would have recognized it? Originalists have never justified why they can impose a Constitution, defined by a set of characteristics and assumptions distinct from what we find at the Founding, onto the eighteenth-century past and call it the "original" Constitution.

None of this might matter if Founding-Era constitutionalism more or less aligned with our own. Originalists could blithely assume that their views on writtenness, positivism, and the like were perfectly justified, warranted thanks to significant overlap in constitutional thinking, past and present. Which is why it is so meaningful that the Founders' Constitution was very much not our Constitution; that the two are worlds apart. In seeing how differently eighteenth-century Americans initially conceived of writtenness and the character of law, we can see why originalists have, in fact, been dodging the most important question of all: What *is* the "original" Constitution? Is it a purely modern imposition, something contrived by modern jurisprudence and therefore unknown to the founding generation? Or, more intuitively, is it the thing that the founding generation consciously breathed life into? Historicizing the early Constitution forces originalists to confront their unfounded constitutional assumptions.

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## Historicizing Written Constitutionalism at the Founding

When we examine the original Constitution and the generation that made it, we find a different set of constitutional assumptions at work than those on which doctrinaire originalism relies. At the Founding, most aspects of constitutionalism were deeply contested, not least because the federal Constitution was such a novelty with no obvious analogues. On foundational matters, the Founding generation disagreed as deeply as Americans always have. Thanks to a shared general orientation toward constitutionalism, however, there was often tacit agreement over *how* to conduct (or at least begin) many of these disagreements. And it was these guiding assumptions, and the conceptual scheme they made, that are so at odds with so much originalist thinking. By virtue of how they understood constitutionalism, Founding-Era Americans did not automatically see their Constitution in many of the ways that orthodox originalists assume natural and essential. This was especially true when it came to constitutional text. Whereas virtually all originalists see constitutional writtenness in conspicuously positivist terms, the founding generation largely saw constitutional writtenness against a non-positivist understanding of law.

None of this, at initial glance, is easy to see. It might seem as though nothing was quite as obvious as the simple fact that the federal Constitution was written. To the generation who made that Constitution, moreover, written constitutions were familiar. The Constitution of 1787, it might be assumed, was surely alike in kind to the myriad other written constitutions Americans had long known—not just the state constitutions that were first written in 1776 or the Articles of the Confederation that soon followed, but also the various charters that had governed the colonies since the seventeenth century. By 1787 in English-speaking America, there was nothing mysterious about written constitutions.

This gloss, however, mistakenly assumes that just because Founding-Era Americans wrote their constitutions down, they understood those constitutions in ways we might expect. It has been too easy to assume that wherever there were written constitutions, one readily finds written constitutionalism *as we know it*. Revolutionary Americans recognized that their constitutions were written, but their *conception* of constitutional writtenness was worlds apart from how written constitutionalism is so often understood today. They did not assume that writing constitutional principles down automatically altered their legal status, transformed constitutional content into linguistic content, or erected sharp textual boundaries between what was *in* and what was *outside* of a constitution. None of these things naturally followed from merely having a written

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constitution.[46] Founding-Era Americans did not share modern originalists' avowed positivism; therefore, they assumed that written constitutional provisions worked in concert with and bled seamlessly into a broader field of non-positive fundamental law derived from several sources. Plenty constitutional content was constituted by text; but plenty was not. It was, therefore, not possible to reconstruct a constitution's full content solely from what had been written. To think otherwise at the Founding was to misunderstand how constitutionalism worked.

Erasing these differences between our written constitutionalism and that of the Founders, moreover, erroneously affords the Constitution a clarity that it originally lacked. It presupposes that certain essential constitutional features simply inhere in writtenness, and that the kind of written constitutionalism with which we are so familiar was a natural byproduct of the original Constitution simply having been written. The Constitution as we know it, however, depends on attaching a particular theory of constitutionalism to it: one that the founding generation did not initially share. Prior to 1787, one can find scattered commentary anticipating something like our brand of written constitutionalism,[47] but these solitary examples were overwhelmed by contrary opinion. And although attitudes toward writtenness no doubt began to change beginning in the 1790s, older habits lingered for decades to come.[48] It took *work* to see the Constitution as we do today: to see its content in such positivist, linguistic terms and its boundaries in such sharply textual terms, and to see it as an independent source of law. Seeing all of this required internalizing a contingent theory of constitutionalism, one that defined what kind of content that Constitution had and where that content derived from. It would be a colossal mistake to confuse the original Constitution with that later theory. Before our way of thinking about the Constitution became intuitive, it was in no way automatically assumed that "this Constitution"—that conspicuous phrase found in the document we have come to know so well—picked out an object that was coterminous with what had been written down.

46. Gienapp, *Second Creation*, 20–23.

47. Two prominent examples are: [Thomas Paine], *Four Letters on Interesting Subjects* (Philadelphia: Styner and Cist, 1776), 15, 18; and James Iredell to Richard Dobbs Spaight, August 26, 1787, in *The Papers of James Iredell*, ed. Don Higginbotham, Donna Kelly, and Lang Baradell, 3 vols. (Raleigh: North Carolina Division of Archives and History, 1976), 3:307–9.

48. For a valuable discussion of some of the ways in which these longstanding habits endured, see Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought before Modernism* (New York: Cambridge University Press, 2011), 67–116.

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The Constitution was originally conceived, ratified, and interpreted from a historical perspective that, in significant ways, is incompatible with modern legal thinking. There is no recovering the original Constitution that the Founders knew, and therefore, the original Constitution that existed in fact, without first recreating, from the ground up, their non-positivist understanding of written constitutionalism.

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It is all too common to treat the appearance of Americans' first constitutions—drafted in the states beginning in 1776—as a sharp departure from what came before.[49] By this telling, Revolutionary Americans consciously rejected the unwritten, customary, evolving British constitution that they had long known in favor of something entirely different: constitutions that would be fixed through writing. This fails to grasp how Americans had previously understood and experienced the British constitution, however, and, because of that, how seamlessly prior constitutional habits informed the native constitutions that replaced it.[50]

The constitutional work of 1776 manifestly drew on prior experience. When Americans began devising regular legal governments that year, they set out less to create something radically novel than to build on their existing institutions.[51] Written constitutionalism, moreover, was nothing new; it was all eighteenth-century Americans had ever known.[52] Of course, the ancient British constitution that American constitutions replaced was commonly thought of as unwritten and customary (even if

49. See, for example, Amar, *America's Constitution*; and Whittington, *Constitutional Interpretation*, 47–61.

50. Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1660–1830* (Chapel Hill: University of North Carolina Press, 2005), esp. 3–10, 203–6; Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004), 186–96; Linda Colley, "Empires of Writing: Britain, America and Constitutions, 1776–1848," *Law and History Review* 32 (2014): 243–44; William E. Nelson, *The Common Law in Colonial America, Volume IV: Law and the Constitution on the Eve of Independence, 1735–1776* (New York: Oxford University Press, 2018), 155; and Gienapp, *Second Creation*, 23–35.

51. Nelson, *Common Law in Colonial America*, 4:6, 150–54; Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition, 1765–1776* (originally published 1972; New York: W. W. Norton, 1991); and Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (originally published 1969; Chapel Hill: University of North Carolina Press, 1998), 312–18.

52. Donald S. Lutz, ed., *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998), xxi–ii; Wood, *Creation of the American Republic*, 268–69; and Nikolas Bowie, "Why the Constitution Was Written Down," *Stanford Law Review* 71 (2019): 1397–508.

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it often took its form in various celebrated texts).[53] But for American colonists, the British constitution that they so revered was filtered through and largely instantiated in their various colonial charters: documents that had established colonial governments while securing the protection of English liberties.[54] Given that their constitutional lives had long been organized around these authoritative texts, for Americans, the act of writing new constitutions hardly marked a departure from the familiar, fueling some magical, instantaneous transformation from inchoate, unwritten constitutionalism to neatly focused, textual constitutionalism.[55] To the contrary, it was only natural for Revolutionary Americans to imagine their new state constitutions as logical successors to their charters.[56] That Connecticut and Rhode Island, the remaining non-royal colonies, did not even draw up new constitutions but merely updated their existing charters underscores the perceived continuity.[57] "Our transition from a state of political subjection to Great-Britain, to independence, and sovereignty, was almost imperceptible," Connecticut jurist and politician Zephaniah Swift would later testify. "Tho we were witnesses to a most singular revolution, yet we experienced. . .no convulsion in our domestic government."[58] If the writing of constitutions in 1776 marked a decisive break with the past, we would expect to find relentless testimony to this fact.

53. John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (Dekalb: University of Northern Illinois Press, 2005), 28–40; Kramer, *People Themselves*, 9–34; and, more generally, J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (originally published 1957; New York: Cambridge University Press, 1987); and J. W. Gough, *Fundamental Law in English Constitutional History* (New York: Oxford University Press, 1955), ch. 2–4.

54. Bernard Bailyn, *The Ideological Origins of the American Revolution* (originally published 1967; Cambridge, MA: Harvard University Press, 1992), 189–93; Mary Sarah Bilder, "Colonial Constitutionalism and Constitutional Law," in *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz*, ed. Daniel W. Hamilton and Alfred L. Brophy (Cambridge, MA: Harvard University Press, 2009), 31–36; and Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 35–49, 58–63, 98–99.

55. Kramer, *People Themselves*, 39–41; and Hulsebosch, *Constituting Empire*, 170–71.

56. Wood, *Creation of the American Republic*, 271; David Ciepley, "Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism," *American Political Science Review* 111 (2017): 424–27; and Hulsebosch, *Constituting Empire*, ch. 6. On the overlap between charters and constitutions, see Colley, "Empires of Writing," 246–47.

57. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, expanded ed. (originally published 1980; New York: Rowman & Littlefield, 2001), 64–65.

58. Zephaniah Swift, *A System of the Laws of the State of Connecticut: In Six Books*, 2 vols. (Windham: John Byrne, 1795), 1:57.

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Americans were not shy about drawing out the perceived significance of every aspect of their experiment in independent self-government. Yet there is no such testimony. The silence is deafening.

Because the initial continuity was immense, it was especially important how Americans had understood the meaning of writtenness under the British constitution. Their charters had been written but, crucially, they had been treated as neither a comprehensive nor an exclusive repository of constitutional content. For one, this was because colonial Americans believed that the fundamental constitution that governed their lives was as much practical as textual.[59] It had long been standard in British constitutionalism to locate constitutional prescriptions in the structure of governance, something colonial Americans routinely drew on.[60] The Declaration of Independence claimed, with no tension, that "our constitution" was mutually comprised of "our Charters" and "the Forms of our Governments."[61] Because of these ingrained habits, the act of writing new constitutions following independence did not immediately disrupt the tendency to see constitutions and their content in structural terms. For years to come, the word "constitution" continued to describe an assemblage as much as a boundary or writing.[62] And, in fact, the delegates to the Constitutional Convention primarily referred to what they were creating as a system rather than a text: an interlocking structure that they were *building* more than a strict legal code that they were *writing*.[63]

More important still, Americans had viewed their written charters in non-comprehensive terms because of how they understood fundamental law. As Mary Sarah Bilder has explained, early American "charter constitutionalism" had "a different assumption about the purpose of. . .written words." In charters, "words represented principles," but "principles were not defined and limited entirely by the words."[64] The charters were written, but their content was not reducible to the meanings of their words. Rather, the colonists' "several charters and compacts" were, as the Continental Congress suggested, tightly intertwined with underlying fundamental law, such as "the immutable laws of nature" and "the principles of the

59. Barbara A. Black, "The Constitution of Empire: The Case for the Colonists," *University of Pennsylvania Law Review* 124 (1976): 1157–211, esp. 1198–203.

60. Bailyn, *Ideological Origins*, 67–77.

61. Declaration of Independence, July 4, 1776.

62. Mary Sarah Bilder, "The *Ordeal* and the Constitution," *The New England Quarterly* 91 (2018): 136–43; Mary Sarah Bilder, "The Emerging Genre of *The Constitution*: Kent Newmyer and the Heroic Age," *Connecticut Law Review* 52 (2021): 1267–68.

63. Gienapp, *Second Creation*, 61–62.

64. Mary Sarah Bilder, "Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter," *North Carolina Law Review* 94 (2016): 1552, 1590.

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English constitution."[65] Silas Downer thus proclaimed, in an attempt to rouse Rhode Island's inhabitants against British policy, that "[t]he great charter of liberties, commonly called *Magna Charta*, doth not *give* the privileges therein mentioned, nor," he went on, "doth our *Charters*, but must be considered only declaratory of our rights, and in affirmance of them."[66] Independence did little to disrupt this basic conceptual relationship between written constitutional standards and pre-existing fundamental law.

These attitudes toward constitutional text, however, were not just a byproduct of the peculiarities of British constitutionalism and the habits it had inculcated, vital though those were. Revolutionary Americans thought this way about the sources and content of fundamental law because, like so many others in the eighteenth century, they understood law in strikingly non-positivist terms.[67] "[R]ight, and not power, is the source of law," declared an American writer in characteristic fashion in 1777.[68] Law was not simply the command of the sovereign, nor was it exclusively the positive enactments of lawfully authorized bodies (such as legislatures). Law was believed to be an ordered body of principles that accorded with the immutable tenets of reason and justice and that existed, to a significant degree, beyond the contingent control of human actors. It was as much found as made.[69]

These assumptions were grounded in the pervasive belief that underlying all human law was natural law: pre-existing, universal, unchanging, and divinely sanctioned.[70] It was often called the law of reason because its core principles could be abstractly known through "right reason."[71] No doubt natural law was distinct from positive human-made law (often

65. October 14, 1774, *Journals of the Continental Congress, 1774–1789*, ed. Worthington C. Ford et al., 34 vols. (Washington, DC: Government Printing Office, 1904–1937), 1:67. See also Reid, *Ancient Constitution*, 28–40; Lutz, *Origins of American Constitutionalism*, 58–63, 67–69; and Jack P. Greene, *The Constitutional Origins of the American Revolution* (New York: Cambridge University Press, 2011), 18, 74–75.

66. Silas Downer, *A Discourse at the Dedication of the Tree of Liberty* (1768), in *American Political Writing during the Founding Era, 1760–1805*, ed. Charles S. Hyneman and Donald S. Lutz, 2 vols. (Indianapolis: Liberty Fund, 1983), 1:100.

67. For a valuable discussion, see Jud Campbell, "Natural Rights and the First Amendment," *Yale Law Journal* 127 (2017): 290–94.

68. "Messieurs Powars and Willis," *Independent Chronicle*, Boston, Sept. 4, 1777, 1.

69. Wood, *Creation of the American Republic*, 291–305.

70. R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015), 2–4; and Philip Hamburger, "Natural Rights, Natural Law, and American Constitutions," *Yale Law Journal* 102 (1993): 922–30.

71. James Wilson, "Lectures on Law," in *Collected Works of James Wilson*, ed. Kermit L. Hall and Mark David Hall, 2 vols. (Indianapolis: Liberty Fund, 2007), 1:529; and Swift, *System of the Laws of the State of Connecticut*, 1:39.

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called civil or municipal law). Natural law had governed human beings in the state of nature—that pervasive Enlightenment thought experiment—but entry into civil society had produced a new kind of law grounded on human consent.[72] That said, when eighteenth-century Americans reasoned about their fundamental law in civil society, these two kinds of law (natural and civil) often blended together.[73]

Even though they rested on what might have seemed contradictory criteria—natural law on the immutable dictates of reason and justice, civil law on the consent of the political community—they reinforced one another. For one thing, it was widely assumed that civil law should conform to natural law. As James Wilson, the leading constitutionalist from Pennsylvania, stressed, "municipal laws are under the control of the law of nature."[74] Even more important, the manner in which consent was understood in the Anglo-American tradition harmonized these potentially clashing standards of authority. The imagined character of municipal law ended up emphasizing rather than undercutting a non-positivist approach to all law. In the English-speaking world, the common law was so venerated because custom was believed to be the strongest evidence of popular consent.[75] What had been customarily accepted—since time immemorial—was presumptively lawful.[76] "[C]ustom," Wilson explained, carried the mark of "internal evidence, of the strongest kind, that the law has been introduced by common *consent*," and, moreover, underscored "that this consent rests upon the most solid basis—experience as well as opinion."[77] Long usage was considered the best evidence of consent. But custom was also considered the best evidence of what reason required. By drawing on the wisdom of the successions of the ages, the common law promised to work out the inner logic of the law. Because the "common-law mind"[78] so elegantly fused consent and reason in the domain of municipal

72. Jud Campbell, "Republicanism and Natural Rights at the Founding," *Constitutional Commentary* 32 (2017): 87–90.

73. Campbell, "Natural Rights and the First Amendment," 253, 290–93; and Bernadette Meyler, "Towards a Common Law Originalism," *Stanford Law Review* 59 (2006): 581.

74. Wilson, "Lectures on Law," 1:523, and more generally 500–25.

75. James R. Stoner, *Common Law and Liberty Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992), 5–10; Parker, *Common Law, History, and Democracy in America*, 70–71.

76. Pocock, *Ancient Constitution and the Feudal Law*.

77. Wilson, "Lectures on Law," 1:470. For an insightful reading of how Wilson reconciled the seeming radical break marked by contemporaneous consent with the continuity of customary consent, see Parker, *Common Law, History, and Democracy*, 89–92.

78. On the "common-law mind," see David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (New York: Cambridge University Press, 1989), 36–49, 85–87; David Thomas Konig, "James Madison and

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law, it was not especially difficult to imagine that the common law might also help reveal the dictates of the law of reason itself.[79] The artificial reason of the common law and the law of reason (natural law) thus worked in harmony. The common law worked out the deeper logic of consent, while identifying the best evidence of the content of natural law,[80] all of which meant that, in eighteenth-century Anglo-America, the laws of consent, custom, and reason, rather than moving in distinct directions, converged on similar fundamental principles and a similar non-positivist conception of law.

This proved especially true when discussing fundamental law: the standard against which all claims to power and right were ultimately judged and which laid the basis for American constitution-making. Fundamental law was distinct from positive law, common law, or natural law, but was also the site where aspects of each most clearly merged.[81] It was where potentially distinct sources of legal authority—popular consent, custom, and the dictates of reason and justice—harmonized. Fundamental law derived both its authority and content from each, picking out and fusing their essential mandates into a set of general legal principles that undergirded all constitutional systems. These were the "fundamental Principles of law" that James Otis and so many other Americans invoked so conspicuously and confidently during the Revolutionary Era.[82] These principles were based on "the great Law of Reason. . .deducible from the Nature of Things," and known based on custom, "right reason," "principles of justice," and "the dictates of common sense."[83] Rather than

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Common-Law Constitutionalism," *Law and History Review* 28 (2010): 509–12; and Stephen A. Conrad, "James Wilson's 'Assimilation of the Common-Law Mind,'" *Northwestern University Law Review* 84 (1989): 186–219.

79. William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 34–35.

80. Helmholz, *Natural Law in Court*, 89–93, 96–98; and Thomas C. Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," *Stanford Law Review* 30 (1978): 853–54.

81. Kramer, *People Themselves*, 10–12. The common law and the British constitution were often blended together; see Pocock, *Ancient Constitution and the Feudal Law*, chs. 2–3; and Hulsebosch, *Constituting Empire*, 28–32.

82. James Otis, "John Adams's Notes on the First Argument of the Case, Feb. 1761," in *Collected Political Writings of James Otis*, ed. Richard Samuelson (Indianapolis: Liberty Fund, 2015), 6.

83. Philanthropos, *Maryland Gazette*, April 27, 1748, in *Exploring the Bounds of Liberty: Political Writings of Colonial British America from the Glorious Revolution to the American Revolution*, ed. Jack P. Greene and Craig B. Yirush, 3 vols. (Indianapolis: Liberty Fund, 2018), 2:1221–22; Theophilus Parsons, *The Essex Result* (1778), in *American Political Writing during the Founding Era*, 1:487; Swift, *System of the Laws*, 1:50–51.

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separating positive from non-positive law, fundamental law fused them together, which meant that fundamental law was, to a decisive extent, non-positive in character.[84]

Given this prevailing understanding of law, when Americans wrote their first constitutions following independence, and later when they wrote the federal Constitution in 1787, it made little sense to treat their written words as constitutive of all their content. No doubt much of these constitutions' content was constituted by text. As was the case with the charters that preceded them, the state constitutions relied on textual provisions to frame the government and specify crucial aspects of its operations. The federal Constitution followed in style, using text where it was necessary. There was no existing legal referent in customary or fundamental law that could specify the composition of the various branches of government, such as the number of executives or senators, the federal ratio of representation, or the number of legislative bodies. These kinds of rules, and many more, needed to be positively stipulated. But just because *some* constitutional content was constituted by text did not mean that all of it was. Much of the text was non-constitutive, merely reinforcing or calling attention to pre-existing powers, principles, or rights. Nor, moreover, did it mean that the constitution was fully integrated in the text; that is, that all relevant constitutional rules and principles could be derived from it. The constitutional text was presumed to be embedded within a broader web of fundamental law that was not, by definition, exclusively textual in nature. In sharp contrast to a strong positivist understanding of constitutional content, Revolutionary Americans presupposed that their written constitutions effectuated, elaborated on, and harmonized with the general principles of fundamental law. American constitutions both codified new fundamental law and presupposed its independent existence without drawing sharp distinctions along the way. Supreme authority rested, with no contradiction, on popular consent as well as on the dictates of right reason.[85]

Originalists often assume a false dichotomy: that the Constitution's text is either exclusive and comprehensive, or unimportant. This binary would have baffled the founding generation. Constitutional text obviously mattered; much constitutional content directly derived from it. Yet, given

84. Grey, "Do We Have an Unwritten Constitution?" 715–16. Crucially, then, Founding-Era Americans presupposed an understanding of fundamental law that distinguished them from standard natural law theorists and modern Dworkinians (those who champion the legal philosophy of Ronald Dworkin).

85. Wood, *Creation of the American Republic*, 291–305; and William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* 76 (1978): 928.

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the nature of fundamental law, that text was necessarily embedded in a wider field of legal authority; which meant that much constitutional content was not reducible to that text.

In a world so deeply shaped by the idea of non-positive and general fundamental law (a concept that has since disappeared), the seamless interaction of enacted text with pre-existing, given law made intuitive sense. To see written constitutionalism any differently simply misunderstood the character of fundamental law. As John Quincy Adams wrote in 1791, "the Constitution of a country is not the paper or parchment upon which the compact is written." Rather, "it is the system of fundamental laws, by which the people have consented to be governed, which is always supposed to be impressed upon the mind of every individual, and of which the written or printed copies are nothing more than the evidence."[86]

Given this, evidence of Founding-Era Americans' non-positivist understanding of fundamental law abounds. Three particular areas of constitutional understanding and practice are especially revealing: the nature of rights, judicial review, and the delegation of national power. Evidence drawn from each demonstrate the unfamiliar way in which the founding generation imagined the nature of written constitutionalism.

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With regard to constitutional rights, the text was merely the marker of the underlying idea, not constitutive of the idea itself. "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records," Alexander Hamilton declared. "They are written, as with a sunbeam, in the *whole* volume of human nature."[87] Accordingly, the first declarations of rights that accompanied several of the state constitutions were understood to *declare* rather than *create* fundamental rights.[88] That only about half of the new states compiled these declarations confirms as much. Citizens of New Jersey or South Carolina would have been shocked to learn that they lacked the fundamental rights that had been codified in Virginia or Delaware.[89]

86. Publicola [John Quincy Adams], "Letters of Publicola, III," in *Writings of John Quincy Adams*, ed. Worthington Chauncey Ford, 7 vols. (New York: Macmillan, 1913–1917), 1:74; also see 86–87, 108.

87. Alexander Hamilton, *The Farmer Refuted: or, A More Impartial and Comprehensive View of the Dispute Between Great-Britain and the Colonies* (New York: James Rivington, 1775), 38.

88. Gienapp, *Second Creation*, 50–51; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 306–8; and Wood, *Creation of the American Republic*, 271–73.

89. The following state constitutions included declarations of rights: Virginia (written before its constitution), Delaware (contained in a separate document), Pennsylvania,

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Years later, this kind of thinking remained as pervasive as ever. In 1787, William Paca, former governor of Maryland and signer of the Declaration of Independence, assumed that constitutions as much instantiated as delineated fundamental law. In a series of newspaper essays, he asked if Americans, when resisting British tyranny, had "rested the rights of America on the[ir] charters or compacts? Or did they deduce them from a higher source, *the laws of God and nature*?" Indeed, he asked rhetorically, "Did any *patriot* or *judge* broach the absurd doctrine, or make the absurd position, that the people could exercise no other rights or powers, except those mentioned and defined in their respective charters, compacts and constitutions?"[90] The next spring, during the ratification debates, John Dickinson echoed Paca. He vigorously denied that constitutional "records"—that is, "any characters drawn upon paper or parchment, those frail remembrancers"—could adequately capture the scope of the constitutional "system" under evaluation.[91]

Countless more examples could be stacked one on another, but one especially revealing episode from the Constitutional Convention drives the point home. When considering whether to include a prohibition against ex post facto laws, several delegates balked. Oliver Ellsworth of Connecticut asserted that such laws were automatically "void of themselves," and that "there was no lawyer, no civilian who would not say that."[92] Even more emphatically, James Wilson complained that including such a prohibition would show Americans to be "ignorant of the first principles of Legislation," or that they were "constituting a Government which will be so."[93] The prohibition was ultimately included on precautionary grounds, but nobody disputed Ellsworth's or Wilson's deeper point: that ex post facto laws were *already* prohibited no matter what the Constitution said, because such laws violated general principles of law.[94]

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Maryland, North Carolina, Massachusetts, and New Hampshire (not its provisional constitution written in 1776, but its revised one written in 1784).

90. Publicola [William Paca], "To Aristides," *Maryland Gazette* (Annapolis), June 28, 1787, 2.

91. Fabius IV [John Dickinson], *Pennsylvania Mercury*, April 19, 1788, in *The Documentary History of the Ratification of the Constitution,* ed. Merrill Jensen, John Kaminski, Gaspare J. Saladino, Richard Leffler, and Charles H. Schoenleber, 34 vols. (Madison: State Historical Society of Wisconsin, 1976–), 17:183–84.

92. Oliver Ellsworth, August 22, 1787, in *The Records of the Federal Convention of 1787*, ed. Max Farrand, 4 vols. (New Haven, CT: Yale University Press, 1911–1937), 2:376.

93. James Wilson, August 22, 1787, in *Records of the Federal Convention*, 2:376.

94. Mary Sarah Bilder has demonstrated that Madison's later Convention notes were likely composed at least two years after the fact; Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015), ch. 7–9. And important questions have been raised about how the notes defined ex

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The debate, strikingly, was not about the creation of constitutional content, and, in fact, presupposed that some things would be part of the Constitution regardless of what was enacted. The Constitution's "ex post facto" clause was a paradigmatic example of non-constitutive text. Ellsworth and Wilson were among the most sophisticated legal thinkers in the nation—each soon would be appointed to the Supreme Court—and they assumed that the Constitution that they were making would be embedded in a wider field of general fundamental law, composed of a diverse array of materials—some expressed, some not; some positively enacted, some already part of the social contract—none of which could easily be separated from the rest.[95] Indeed, this *had* to be the case for their comments to make sense. They were not operating under the assumption that "this Constitution" picked out a textually circumscribed object. That was not how constitutionalism worked.

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Early American judicial behavior is just as revealing. It is almost incomprehensible, in fact, unless we set it against a non-positive understanding of written constitutionalism and fundamental law. We are often told that the distinctive American brand of judicial review was a byproduct of written constitutions: that judges only claimed the authority to strike down legislative enactments because they could point to the novel American invention of a written constitution.[96] This was the story that John Marshall famously told in *Marbury v. Madison* in 1803 after all. Yet Marshall, following on the heels of other jurists, was capturing how thinking had evolved more recently. Judicial review was not inherently tied to writtenness, certainly not at first.[97] As a conceptual matter, all judicial review required was the idea of constitutional repugnancy: that acts in violation of the constitution were null and void.[98] This concept, however—which

post facto laws; see John Mikhail, "James Wilson, Early American Land Companies, and the Original Meaning of 'Ex Post Facto,'" *Georgetown Journal of Law & Public Policy* 17 (2019): 87–89. However, there is no reason to doubt the notes' portrayal of what these prohibitions implied about the relationship between constitutional text and content.

95. Founding-Era Americans assumed that long-standing fundamental common law rights (including prohibitions against ex post facto laws but also the right to habeas corpus and jury trial) were already inherent in the social contract on which the polity was based. See Jud Campbell, "Judicial Review and the Enumeration of Rights," *Georgetown Journal of Law & Public Policy* 15 (2017): 579–80.

96. See, for example, Prakash and Yoo, "The Origins of Judicial Review," 916–18.

97. Douglas E. Edlin, "Judicial Review without a Constitution," *Polity* 38 (2006): 345–50; Kramer, *People Themselves*, 50–52, 125–27.

98. Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *Yale Law Journal* 116 (2006): 502–66; and Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008).

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was hardly new—implied nothing specific about the nature or content of the constitutional standard in question. During the years following independence, when Revolutionary-Era judges evaluated (and sometimes nullified) state laws, they treated general legal principles, various forms of legal authority from natural law, to common law, to the law of nations, as well as fundamental legal standards such as equity, right reason, and natural justice as inherent parts of the state's fundamental law.[99] And they did so without any indication that they were referring to something other than the constitution or what *it* mandated. These were neither distinct nor competing sources of law.

A few examples tell the story. In New Jersey in 1780, in *Holmes v. Walton*, the state supreme court struck down a statute permitting a six-man jury, no matter that nothing written in the state's constitution required otherwise, on the basis that it was "contrary to the constitution, practices and laws of the land."[100] In the 1786 Rhode Island case, *Trevett v. Weeden*, Weeden's lawyers successfully challenged a statute denying him a jury trial on the grounds that it violated "the constitution." In so doing, they suggested that the state's "constitution" as much consisted of the "fundamental laws" and rights that had been central to "the English constitution" and Rhode Island's colonial experience under it, as anything expressed in the charter. In addition, they argued, "[t]here are certain general principles that are equally binding in all governments" that the statute in question infringed. The judges agreed, declaring the law "repugnant and unconstitutional" for violating the "laws of the land."[101]

Then there was *Rutgers v. Waddington*, a case that came before the Mayor's Court of New York in 1784, which illustrated how the law of nations interacted with state constitutional law. Elizabeth Rutgers sued Joshua Waddington under the state's controversial 1783 Trespass Act that was designed to punish former loyalists. During the War for Independence, Waddington had occupied the Rutgers family brewhouse, one of several pieces of abandoned property that the British army had

99. William Michael Treanor, "Judicial Review Before *Marbury*," *Stanford Law Review* 58 (2005): 455–562, esp. 473–97; and Hulsebosch, *Constituting Empire*, 189–202.

100. Austin Scott, "*Holmes vs. Walton*: The New Jersey Precedent," *American Historical Review* 4 (1899): 456–69, quote at 458. The court's opinion has not been found, but this was the argument made by the defendant's counsel, and the defendant prevailed. Also see Wayne D. Moore, "Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases," *Constitutional Commentary* 7 (1990): 352–58, although Moore problematically treats the various sources of law identified in the case as distinct.

101. James M. Varnum, *The Case, Trevett against Weeden*… (Providence: John Carter, 1787), 11, 14, 23, 35. For more, see Bilder, *Transatlantic Constitution*, 188–90.

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commandeered, and the new law allowed Rutgers to sue for back rent.[102] Alexander Hamilton, who represented Waddington, argued that the statute was unconstitutional because it violated the peace treaty between the United States and Britain, which pledged to respect loyalist property rights and, more importantly, the law of nations—the body of legal principles that governed relations between nations and permitted, via the laws of war, armies to use abandoned property during wartime.[103] The "law of nations," he explained, was "the law of nature applied to nations," which meant that its principles could be discovered, as with natural law, through "Reason," and, as with the common law, by consulting the "opinions of Writers" and "the practice of Nations." This law was enforceable in New York because "it results from the relations of Universal society" and because "our constitution adopts the common law of which the *law of nations is a part*."[104] James Duane, who decided the case, accepted the thrust of Hamilton's argument as well as the deeper logic for which it stood.[105] Because it was assumed that authoritative sources of law ultimately harmonized, Duane interpreted the Treason Act narrowly so as not to violate the law of nations, upholding the statute while denying the plaintiff relief. This creative interpretation offered a glimpse into how Founding-Era legal assumptions so often worked. Because fundamental law was not, by its nature, exclusively positive or written, its sources of law were neither sharply distinct nor opposed. This was how early defenders of judicial review instinctively made sense of written constitutions.

This thinking carried over past ratification of the federal Constitution. Hamilton and Duane were assuredly not alone in assuming that the law of nations was incorporated into American constitutionalism. Throughout the 1790s, it was widely believed that this law was binding on the national

102. Peter Charles Hoffer, Rutgers v. Waddington*: Alexander Hamilton, the End of the War for Independence, and the Origins of Judicial Review* (Lawrence: University Press of Kansas, 2016).

103. Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 5 vols. (New York: Columbia University Press, 1964–1981), 1:296–306; and Hoffer, Rutgers v. Waddington, 65–71, 77–79. On the law of nations generally, and its importance to the Revolutionary Era, see David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," *New York University Law Review* 85 (2010): 934–46; Peter Onuf and Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814* (Madison: University of Wisconsin Press, 1993).

104. Goebel, *Law Practice of Hamilton*, 1:363, 367–68, emphasis in original. The New York Constitution formally recognized the common law as it stood at the onset of hostilities with Britain; see The Constitution of New York (April 20, 1777), Art. XXXV.

105. Goebel, *Law Practice of Hamilton*, 1:306–12, 400–405, 418.

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and state governments, particularly when it concerned treaty obligations.[106] Constitutional partisans who otherwise deeply disagreed—such as Hamilton, James Madison, Thomas Jefferson, and Edmund Randolph—as well as the nation's pre-eminent early jurists—John Jay, James Wilson, and James Iredell—repeatedly declared that the law of nations was part of the law of the land of the United States.[107] As Jay put it in a characteristic grand jury charge: "the Laws of Nations make Parts of the Laws of this, and of every other civilized Nation." "They consist," he went on, giving voice to the conception of law on which so much eighteenth-century legal thinking was based, "of those Rules for regulating the Conduct of Nations towards each other, which resulting from right Reason, recieve [*sic*] their obligation from that Principle and from general Assent and Practice."[108]

For Supreme Court justices such as Jay, drawing on the law of nations was but one way in which a non-positive understanding of fundamental law shaped their approach to the Constitution. It is simply impossible to comprehend the reasoning that emanated from the early Supreme Court from the perspective of our brand of written constitutionalism.[109] In numerous cases, the justices appealed to general jurisprudence to elaborate the Constitution. In one case, William Paterson consulted "the principles of justice and the dictates of the moral sense" to determine what accorded with "right reason and natural equity."[110] In another, William Johnson deemed a state action void based "on the reason and nature of things."[111] While, in yet another, Samuel Chase defended a prohibition based on what was "contrary to the great first principles of the social compact" and what "the general principles of law and reason forbid."[112] These justices did not think that these standards to which they appealed were superior to the Constitution, nor did they treat them as encompassing—as we might anachronistically assume—an unwritten constitution that supplemented

106. David M. Golove and Daniel J. Hulsebosch, "The Law of Nations and the Constitution: An Early Modern Perspective," *Georgetown Law Journal* 106 (2018): 1595–98, 1605–39; and Casto, *Supreme Court in the Early Republic*, 130–41.

107. Golove and Hulsebosch, "The Law of Nations and the Constitution," 1616–23.

108. John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790, in *The Documentary History of the Supreme Court of the United States, 1789–1800*, ed. Maeva Marcus et al., 7 vols. (New York: Columbia University Press, 1985–2007), 2:29.

109. On this point, see Casto, *Supreme Court in the Early Republic*, 2, 34–35, 157–59, 192–93; Kramer, *People Themselves*, 42–44.

110. *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 255 (1796) (Patterson, J., opinion).

111. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., opinion).

112. *Calder v. Bull*, 3 U.S. (3 Dallas), 386, 388 (1798) (Chase, J., opinion).

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the written one.[113] Investigating these complimentary sources of law provided different ways of accessing the fundamental authority that the Constitution created, recognized, and sanctioned. Because the Constitution was fundamental law, the justices assumed that it demanded an appeal to the general principles of law. This was what Chase was getting at when he declared in *Ware v. Hylton* that "laws should not be repugnant to the Constitution, or fundamental law."[114] We have been socialized to dwell on Chase's use of "or," and to ponder if these were distinct standards in people's minds. But that is the wrong question to ask. As the Constitution was fundamental law, it recognized the non-positive elements inherent in law. There were no sharp breaks or discontinuities to account for or think through.

Too often, early Supreme Court decisions are read in light of our familiar conceptions of constitutionalism and law, our own legal questions, and our long-standing disputes over interpretation. When we do this, however, we obscure the justices' own understanding of constitutionalism, and, from there, misconstrue what they were really trying to say. Decades later, it became common for Supreme Court justices to interpret the Constitution as they would a statute.[115] But that marked a dramatic change. And we still have a hard time seeing what preceded that positivist revolution.

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Still more revealing yet, was how the founding generation imagined the delegation of government power, particularly in the context of forming a new national government for the American union. To this point, we have principally focused on Founding-Era attitudes toward rights. In the face of this evidence, one might be tempted to distinguish between rights and state power and claim that because the former was understood in non-positive terms, the latter could not be. Rights were grounded in nature and preceded the formation of government; the point of government was to secure those pre-existing rights. To achieve this end, constitutions needed to be precise, expressly enumerating those few powers that the government required. A broad commitment to rights, therefore, might have placed more emphasis on the express writtenness of constitutions, not less. This distinction between rights and powers, however, fails to capture Founding-Era

113. In this regard, I disagree with Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* 54 (1987): 1167–76.

114. *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 223 (1796) (Chase, J., opinion).

115. Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990), 121–61; Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), 172–99; Gordon S. Wood, "The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less," *Washington and Lee Law Review* 56 (1999): 801–9.

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thinking. Powers, no less than rights, remained linked to pre-textual constitutional foundations. Debates over the delegation of national power show how.

These disputes demonstrate as well that, even as some Americans began emphasizing the exclusivity of constitutional writtenness following 1787, lurking beneath this new emphasis was a commitment to a set of eighteenth-century assumptions that, in essence, denied the very logic of textualist-positivist constitutionalism.[116] In short, as Americans bitterly divided over the scope of delegated national authority under the federal Constitution, they agreed that that government's power was a function, not of what had been written into the Constitution, but of the nature of the underlying union. The Constitution did not simply mean what its language said; its meaning might change depending on the kind of polity it happened to represent.

The essential framework through which Founding-Era Americans made sense of the delegation of national power was social contract theory. This system of thought imagined a hypothetical two-step process through which individuals formed a political nation. First, individuals formed themselves into a social compact (a body politic). Second, having formed a polity, they agreed to a form of government (a constitution).[117] "The first 'collection' of authority," John Adams explained, was an "agreement" among individuals "to form themselves into a *nation*, *people*, *community*, or *body politic*."[118] Then, "[t]he society being formed," James Wilson explained, next came "the formation of a government."[119] What proved inescapable at the time—and is largely invisible now—was the tight connection between the two steps: the nature of the body politic determined how the constitution of government should be interpreted. As bitterly as early Americans would come to disagree over how to interpret their Constitution *and* the nature of their federal union, they tended to agree on the *relationship* between the two. To interpret the Constitution meant first establishing the kind of union, and people, that it governed. As dramatically as the answers diverged, they often proceeded from a common underlying premise, one that presupposed that the Constitution's meaning could not be reduced to or recreated from its written content. The same

116. On the emerging emphasis on constitutional writtenness, see Gienapp, *Second Creation*, ch. 2–7.

117. Campbell, "Republicanism and Natural Rights at the Founding," 87–90; and Donald S. Lutz, "From Covenant to Constitution in American Political Thought," *Publius* 10 (1980): 103–6.

118. John Adams, *A Defence of the Constitutions of Government of the United States of America* (Philadelphia: Hall and Sellers, 1787), 6.

119. Wilson, "Lectures on Law," 1:554.

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constitutional words yielded different constitutional content depending on what or whom the Constitution spoke for. Deciphering what the Constitution said required, not a theory of interpretation or language, but a theory of federal constitutionalism.

The tight relationship between the federal Constitution's content and the nature of the federal union primarily centered on the issue of enumerated federal power. It is common to recite that the Constitution sets up a government of limited and enumerated powers, not least because many people at the Founding were fond of this incantation.[120] What this description fails to specify, however, is whether national power is limited *to* the enumeration, and, if so, why? Originalists and other modern constitutionalists often believe that national authority is limited to those powers enumerated *because* that is what the constitutional text says. In so doing, however, without realizing it they erase part of the original Constitution. At the Founding, many believed that national power was not limited to the enumeration, and, every bit as important, those who did believe that it was limited to the enumeration did not think so because the written Constitution, on its own, said so. This is a complex story that cannot receive full treatment here, but we can at least sketch the outlines of the debate to illuminate the common, non-textualist assumptions on which it was based.

Leading Founding-Era nationalists, drawing on social contract theory, believed that national power was not limited to the enumeration of federal powers because a national people, speaking for a national polity, had ratified the Constitution.[121] James Wilson had delineated this theory in the 1780s.[122] Even under the Articles of Confederation, he contended, the national government enjoyed more power than had been enumerated because the act of separation from Britain had created, not thirteen separate states, but a single nation, and with that, a national people: the people of the United States. Accordingly, although some national powers were "expressly delegated" through the Articles, others "*result*[*ed*] *from the union of the whole*."[123] The scope of the government's authority was partly a function of the social compact that preceded it. In this case, independence

120. David S. Schwartz, "A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism," *Arizona Law Review* 59 (2017): 575–79, 581–84; and Richard Primus, "The Limits of Enumeration," *The Yale Law Journal* 124 (2014): 578–79, 587–94, 614–19.

121. For more on nationalist constitutionalism at the founding, see Jonathan Gienapp, "In Search of Nationhood at the Founding," *Fordham Law Review* 89 (2021): 1783–1813.

122. Jonathan Gienapp, "National Power and the Presidency: Rival Visions of Federalist Constitutionalism at the Founding" (University of Florida Press, forthcoming 2021), 144–45.

123. James Wilson, *Considerations on the Bank of North-America* (Philadelphia: Hall and Sellers, 1785), 10; Articles of Confederation and Perpetual Union, Article II.

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had created a national polity, which necessarily meant that the government created to act in its name enjoyed more authority than the individual states could delegate.

At the Constitutional Convention, this nationalist theory directly informed the construction of the new federal Constitution. Wilson and his allies tolerated the enumeration of legislative powers that ended up in the Constitution because, as long as it was understood that the Constitution was preceded by a national social contract, and thus spoke for a national people, to their eyes that enumeration would be merely illustrative, not exclusive. The final Preamble, drafted by leading nationalist Gouverneur Morris, explicitly recognized the existence of a national polity, establishing the people of the United States, rather than the people of the separate states, as the sovereign agent, while also specifying a series of general national purposes for which the Constitution was being established. By nationalists' understanding, therefore, Article I was not *constitutive* of federal power but merely an expression of what many of those powers happened to be.[124]

In the years following ratification, nationalists confidently defended their vision of national union and power. In the debate over Alexander Hamilton's proposed national bank, nationalists emphasized that the character of the union determined the scope of national power.[125] "Adverting to the act by which the United States became a free and independent nation," John Vining of Delaware declared, the United States "derive[d] all the powers appertaining to a nation."[126] Similarly, Fisher Ames, the sardonic representative from Massachusetts, claimed that the Preamble (which was frequently emphasized by defenders of the bank) "vested Congress with the authority over all objects of national concern or of a general nature."[127] Whether the national government could charter a national bank, Vining, Ames, and so many others believed, came down to the question that Wilson would pose on the Supreme Court in 1793 in *Chisholm v. Georgia*: "do the people of the United States form a Nation?"[128]

124. Gienapp, "In Search of Nationhood at the Founding"; and John Mikhail, "The Necessary and Proper Clauses," *Georgetown Law Journal* 102 (2014): 1096–106, 1121–28.

125. On the bank debate, see Gienapp, *Second Creation*, ch. 5.

126. John Vining, February 8, 1791, in *Documentary History of the First Federal Congress of the United States of America, 4 March 1789–3 March 1791*, ed. Linda Grant De Pauw, Charlene Bangs Bickford, Kenneth R. Bowling, and Helen E. Veit, 22 vols. (Baltimore: The Johns Hopkins University Press, 1972–2017), 14:472.

127. Fisher Ames, February 3, 1791, in *Documentary History of the First Federal Congress*, 14:389. On bank defenders' use of the Preamble, see Jonathan Gienapp, "The Myth of the Constitutional Given: Enumeration and National Power at the Founding," *American University Law Review Forum* 69 (2020): 207–9.

128. *Chisholm v. Georgia*, 2 U.S. 419, 453 (1793) (Wilson, J., opinion).

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Wilson's answer, which John Jay echoed in a separate opinion, captured nationalists' thinking. Properly read, the Constitution revealed that "the people of the United States intended to form themselves into a nation for national purposes," because "they established the present Constitution" in their "collective and national capacity."[129] Because a constitution had to be read in conjunction with the terms of the social contract, interpreting the federal Constitution turned on the nature of that prior compact. Because the people of the United States had formed a nation and set up the federal Constitution to act in their name, therefore, that constitution delegated all distinctively national powers to the government it established.[130]

Nationalists' ideological opponents—those who rallied around the opposition Republican Party being formed by Thomas Jefferson and James Madison[131]—vigorously challenged nationalists' conclusions, insisting, in sharp contrast, that federal power was strictly enumerated. Yet, although they reached a radically different conclusion, Republicans shared a guiding premise. They agreed with nationalists that the question had to be settled by the nature of the underlying compact.[132] They pressed the Constitution's writtenness into service, but ultimately rested their case on a rival account of union. In so doing, they conceded that the Constitution's text could not, on its own, limit powers to those enumerated. Just as nationalists believed, the delegation of power was determined by the nature of the social contract.

In broad terms, Republicans defended two distinct positions. The first, most readily associated with Jefferson, simply denied the existence of a national polity or national social contract, either before or after the Constitution had been ratified. Consequently, the federal Constitution was not, in fact, a constitution at all, but rather a compact among sovereign states. As Jefferson asserted in 1798, in protest of the Alien and Sedition Acts, the Constitution was a "compact under the style and title of a Constitution for the United States." The Constitution's own style and title were misleading. Its Preamble, which seemed to establish a national polity, was not to be taken at face value. Instead, the "several states composing the United States of America," Jefferson argued, "[had] constituted a General Government for special purposes, delegat[ing] to that

129. *Chisholm v. Georgia*, 2 U.S. 419, 465, 470 (1793) (Wilson, J. and Jay, J., opinions).

130. For a fuller discussion, see Gienapp, "In Search of Nationhood at the Founding."

131. On the rise of the Republican opposition, see Gordon S. Wood, *An Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Cambridge University Press, 2009), 140–73.

132. For more, see Jonathan Gienapp, "In Search of Nationhood at the Founding"; and Campbell, "Republicanism and Natural Rights at the Founding," 109–11.

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Government certain definite powers" while "reserving. . .the residuary mass" to themselves.[133] Compact theory (as this position came to be called) was, in effect, the nationalist position inverted.[134] The federal government's authority was limited to those powers strictly enumerated *because* the Constitution had been agreed to by the separate states rather than the people of the United States. Power was limited to the text, *not* because of the text or something inherent to written constitutionalism, but because of what preceded the text. As Jefferson himself conceded, if the Constitution's own style and title were in fact accurate, then the national government would have claim to more authority than if they were not. Under the two scenarios, the Constitution's text would be identical, yet the amount of power delegated would not be. The exact same text, the exact same words, could delegate radically different sums of authority, all depending on the nature of the political community for whom that text spoke. Regarding at least this much, Jefferson assumed that nationalists were right.

The second Republican position, articulated most forcefully by Madison, fell in between the strong nationalist and Jeffersonian views, yet ultimately rested on the same basic logic. Defenders of this intermediate position recognized national sovereignty, accepted that the Constitution was, in fact, a constitution (not merely a treaty styled as one), and, therefore, acknowledged that there was a national social contract. In each of these respects, they broke with hardline Jeffersonians. But even if, like nationalists, defenders of this intermediate position recognized a national social contract, they accounted for its origins much differently. The national polity was not a compact among individuals, created through the act of independence, they argued, but rather a compact formed by the states' individual decisions to divest their authority through the act of ratifying the Constitution. The national social contract, in other words, did not predate the Constitution—as Wilson, Jay, Vining, and so many others had claimed—but came into being alongside the new federal charter. Ratification was, therefore, not an exercise of a pre-existing national

133. Thomas Jefferson, "Resolutions Adopted by the Kentucky General Assembly," November 10, 1798, in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, Charles T. Cullen, John Catanzariti, Barbara B. Oberg, and James P. McClure, 45 vols. (Princeton: Princeton University Press, 1950–), 30:550.

134. On compact theory, see Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill: University of North Carolina Press, 1999), 237–45; Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (New York: Cambridge University Press, 2008), 190–234.

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people's sovereignty, but in fact the act that had brought the nation into legal existence.

Madison had hinted at some of these arguments during ratification, but he made the case most fully in the "Report of 1800," written in defense of the Virginia and Kentucky Resolutions (the latter in which Jefferson had laid out his own argument).[135] The Virginia Resolutions had asserted that "the powers of the Federal Government" were "no farther valid than they are authorized by the grants enumerated in that compact."[136] But only because those powers "result[ed] from the compact, to which the states are parties."[137] Here, however, Madison was clear to differentiate his argument from compact theory. He recognized that the term "states" had several distinct meanings. When invoking it, he referred, not to the thirteen separate political units, but to the peoples within them: "the people composing those political societies, in their highest sovereign capacity" who had received and ratified the Constitution.[138] Although the states did not maintain sovereignty after ratification, because the state polities had been the original font of national sovereignty, the federal government's authority was confined to "a particular enumeration of powers."[139]

What this necessarily partial account of early debates over national power and union reveals, is that "this Constitution" did not—and could not—simply describe the express constitutional text. Set in the foundational context of social contract theory, "this Constitution" described the entwined relationship between the formation of the polity and the constitution of the government. The constitution of government could not be read apart from the terms of the underlying social contract. What the Constitution *said* was a function of the kind of a people and union it spoke for. And the Constitution's own text could not resolve this foundational issue; it could not, on its own, specify what kind of a union stood behind it. To know what the Constitution communicated necessarily required a theory of constitutional union and sovereignty.

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In probing Founding-Era attitudes toward rights, judicial review, and the delegation of national power, it becomes apparent just how dramatically

135. For Madison's ratification arguments, see James Madison, "The Federalist 39," in *Documentary History of the Ratification of the Constitution*, 15:380–86.

136. James Madison, "Virginia Resolutions," December 21, 1798, in *The Papers of James Madison, Congressional Series*, ed. William T. Hutchinson, William M. E. Rachal, and Robert Allen Rutland, 17 vols. (Chicago: University of Chicago Press, 1977–1991), 17:189.

137. Ibid.

138. James Madison, "The Report of 1800," in *Papers of Madison*, 17:309

139. Ibid., 17:315.

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early constitutional assumptions diverge from those undergirding orthodox originalism. The positivist brand of written constitutionalism upon which almost all variants of originalism depend is at odds with how members of the founding generation comprehended the nature of a written constitution. The original Constitution that originalists purport to recover is not the original Constitution that the Founders identified, described, and debated.

## The "Original" Constitution

What does this Founding-Era history mean for originalism? Given the vagaries of the theory and how its champions deflect most argument, it is important to unpack how this historical evidence interacts with originalism's core claims. At first blush, I assume that most originalists would suspect that the evidence presented here poses few difficulties for their theory. They might be tempted to dismiss almost all of it on the grounds that it is evidence of the Founders' views on how to interpret the Constitution, and therefore distinct from the original Constitution itself.

Originalists are fond of doing just this. Just as they are quick to disaggregate the Constitution from the subjective intentions of its authors or ratifiers, they are eager to disaggregate the Constitution from the interpretive assumptions that members of the founding generation layered on top of it.[140] Public meaning originalism has proved so enduringly popular because it has seemingly helped separate an objective Constitution from the subjective and highly divergent things that its authors, ratifiers, and early interpreters thought of it. Almost everything that happened at the Founding is just so much baggage that can be cleaved off. None of it, originalists suggest, is constitutive of the original Constitution.

But were originalists to claim that the evidence presented here merely revealed Founding-Era interpretive attitudes, that would be a profound category mistake. We have *not* been considering Founding-Era views on interpretation, but rather Founding-Era views on *what* was being interpreted. The evidence collected here speaks to *what* people originally took the Constitution to be. This question was surely intertwined with interpretive attitudes, because one settles on interpretive methods based on what kind of thing they take themselves to be interpreting. But the

140. See, for example, Scalia, *A Matter of Interpretation*, 3–47; Kesavan and Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," 1127–33; Barnett, "The Misconceived Assumption about Constitutional Assumptions." A minority of originalists claim that original meaning is tethered to original interpretive methods, although their assumptions about methods are problematic; see Gienapp, *Second Creation*, 116–23.

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two—interpretive object and methods for interpreting that object—should not be confused, especially given originalists' long-standing obsession with separating the Constitution from the attitudes that originally accompanied it. The Founders' non-positivist attitudes toward writtenness, law, and national power cannot be dismissed as mere views on interpretation. Nor were they merely background assumptions or interpretive backdrops.[141] They were beliefs about what the Constitution *was* and, based on that, what kind of content it had. These kinds of beliefs were inextricably intertwined with the *original* Constitution itself. The Constitution had no meaning, content, boundaries, substance, or identity but for these kinds of beliefs. There was no Constitution without an accompanying constitutive theory that specified its content, boundaries, and nature. The kinds of Founding-Era beliefs presented here are evidence of *that* kind of constitutive theory: of the constitutive theory that was originally attached to the Constitution. To ignore those beliefs and that theory is simply to ignore the original Constitution, to decide that some other Constitution, divorced from the Founding, is the one that we should care about instead.

Too often, originalists treat the Constitution as an object outside of history, one that is easily separated from the world in which it was made and can be plainly viewed without any imposition or constructive work on the part of the modern interpreter. This is a version of what I have called the constitutional "myth of the given": the idea that the Constitution self-presents as a clearly defined object.[142] But that givenness is a myth. The Constitution's core identity, not simply its meaning, was as touched and shaped by history as anything else, and in far deeper ways than originalists usually recognize or acknowledge. The *original* Constitution was entangled in countless ways with a host of constitutive assumptions that originally gave it shape, content, and logic: assumptions pertaining to core constitutional concepts such as the nature of liberty, governance, the delegation of authority, and, of course, constitutionalism itself, as well as assumptions about the nature of constitutional content, boundaries, and identity. The original Constitution had no existence outside of a field of thick constitutional understanding. The Constitution is and was a historical object. There is, therefore, no separating early constitutive assumptions from the object itself, no cleaving off eighteenth-century baggage from the essential core. Not, that is, without fundamentally transforming the Constitution in the process.

141. On constitutional backdrops, see Stephen E. Sachs, "Constitutional Backdrops," *George Washington Law Review* 80 (2012): 1813–88.

142. Gienapp, "The Myth of the Constitutional Given," 183–85, 210–11.

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Originalists' favored move—to disaggregate the original Constitution from original constitutive attitudes toward it—amounts, in fact, to *changing* the original Constitution. To treat the Constitution as exclusively written and decidedly positivist is to *give* it an identity, with particular content and boundaries, different than the one it originally possessed. It is to engage in reauthoring the Constitution anew, wrenching it into the present just as any living constitutionalist might. It certainly does not amount to *just looking at* the Constitution, as it simply was in 1787. Stipulating that the Constitution's meaning is the meaning of its words, is not to passively interpret it, but to construct it. Treating the Constitution as though it is akin to a statute, and thus presuming that textualism and originalism are alike in kind, is not to take it for what is it, but to transform it into something new. Declaring that the national government's powers are only those constitutionally enumerated, utterly irrespective of the union and people it might represent, is not to respect what it says, but to determine what it says. Each of these activities involve imposition and erasure. They amount to substituting one constitutive theory of constitutionalism for another, in some cases turning the original Constitution into an object that would have been largely unrecognizable to those who made it. That is not originalism, but its antithesis—that is giving the Constitution characteristics and content that it originally lacked, based on how we have been socialized to see it. That is molding a Constitution rather than merely recovering one.

Originalists could, of course, respond that their original Constitution is purely stipulated, and therefore has little to do with the actual Constitution that existed in history. One gets the sense that they might move in this direction, especially when they claim, as they increasingly do, that originalism is a theory of law, not history, and that history cannot decide what the law is.[143] What historians might feel is relevant to understanding the original Constitution—how it was made, why it was ratified, how it was initially debated and understood—is irrelevant to what jurisprudence deems legally significant. This is a familiar originalist trick. Not only does law choose to focus on just the text, rather than on what eighteenth-century people thought about it, law also decides what, from the eighteenth-century past, is relevant to the modern legal questions that originalists seek to answer. Once again, originalists sharply separate out

143. William Baude and Stephen E. Sachs, "Originalism and the Law of the Past," *Law and History Review* 37 (2019): 809–20. For an attempt to distinguish legal meaning from historical meaning, see Lawrence B. Solum, "Intellectual History as Constitutional Theory," *Virginia Law Review* 101 (2015): 1111–64. For a critique of originalist efforts to escape history through law, see Jack M. Balkin, "Lawyers and Historians Argue About the Constitution" (unpublished manuscript), 28–37. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670280 (accessed November 17, 2020).

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portions of the past from the worlds in which they were once embedded, confident that they can do this without cost and that historians (and others) are simply confused about what they are doing.

But there is a major caveat in order here. Originalists could redeem this jurisprudential claim if, and *only* if, they concede that when they say "the original Constitution" they in fact mean a stipulated modern legal fiction that should not be confused with the actual eighteenth-century Constitution that real people made, ratified, and debated at an actual moment in time. That would be a remarkable concession. For one, it would cut against basic intuitions about what the originalism debate has forever been about. If originalism really equates to recovering the "original meaning" of a decidedly non-original Constitution, then we have seemingly disappeared into word play. Originalists have never claimed that the Constitution is its text *because* modern jurisprudence says so; they say the Constitution is its text because they assume that the Constitution just is its text—and always has been. It would be a dramatic development for them to claim otherwise. For another, this concession would directly undercut originalism's long-standing aims. Originalism has always been a theory of *recovery*: it claims simply to find and delineate the Constitution *as it is*.[144] If it turns out that originalists in fact stipulate a constitution, then originalism will be just another theory—like all versions of living constitutionalism—that is derived from evolved convention (in this case the conventions of modern jurisprudence and law). Originalists are loath to accept this. Jack Balkin has argued that originalists can happily erase the distinction between originalism and living constitutionalism.[145] Yet, most originalists recognize that doing so would compel them to abandon most of the goals that have long oriented and sustained commitment to the theory. To hold living originalism at bay, originalists have depended on a thick conception of the original Constitution and an implicit belief that that conception of the Constitution is moored to the Founding. It is no surprise, then, that originalists have never—and likely never will—concede that their version of the Constitution is a modern stipulation, predicated on modern assumptions, that they impose on the past.

Originalists, therefore, cannot ignore how the founding generation conceived of the Constitution, not without dramatic concessions that they have not yet been willing to make. If the goal is to recover original

144. See, for example, Whittington, *Constitutional Interpretation*, 15; Barnett, *Restoring the Lost Constitution*, 389–95; Lawson, "On Reading Recipes. . .and Constitutions," 1823–25; Kesavan and Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," 1127–33; Prakash, "Misunderstood Relationship Between Originalism and Popular Sovereignty," 485–91; Green, "Constitutional Truthmakers."

145. Balkin, *Living Originalism*.

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meaning, then that means recovering the original Constitution, and there is no separating the original Constitution from the constitutive assumptions that initially breathed life into it, that determined the kind of thing it was, the kind of content it possessed, where its boundaries lay, and its relationship to law. Many of these assumptions were important, but few were as critical as how the founding generation understood the Constitution's writtenness: the non-positivist attitudes that they brought to bear on it and the social contract theory that they believed informed it. It is not possible to speak of the *original* content of the *original* Constitution without first establishing the assumptions that constituted each. Originalism cannot escape that history, no matter how hard they try.

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