Originalism as a Theory of Legal Change

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(This is a preliminary sketch/outline of the project. Since it’s in the early stages, I’d particularly appreciate structural advice. Is the argument persuasive? Does it bite off more than I can chew? Does it get bogged down in one place or another? Is there too much originalist inside baseball? Etc.)

Originalism is usually understood as a theory of interpretation—a claim about how we should read legal texts, and in particular the text of the U.S. Constitution. This paper would argue for a different understanding. Originalism is better understood as a theory of our law: a claim about the sources and content of U.S. law, and in particular about the validity or invalidity of different kinds of legal change.

On this view, the core underlying premise of originalism is something I call the continuity thesis: that “our law stays the same until it is properly changed.” To this thesis, originalists add the further premise that “our law is their law, plus proper changes.” More formally, originalism-as-continuity holds that the law of the United States can be recursively defined as (1) the law as it stood upon the Constitution’s adoption in 1788, together with (2) any subsequent legal changes that were valid under the law as it stood when they were made. Put another way, to say that our system is legally continuous with that of the Founding generation is just to say that there have been no discontinuities since then, no legal revolutions of the kind that occurred when the colonies threw off the British yoke or the States adopted the Constitution in place of the Articles.

This continuity theory isn’t offered as a definition of originalism, in the lexicographer’s sense, but as a particularly plausible or informative understanding of originalism. Originalism has usually been advanced as a conceptual claim (a necessary truth about interpreting written documents), or as a normative one (about good consequences or respecting important values). But neither of those claims is wholly persuasive. The continuity thesis suggests that originalism might be better conceptualized as a legal claim, capable of being advanced as a consequence of other commitments we have about our system of law.

This paper also isn’t about proving or disproving either originalism or the continuity thesis. Instead, it tries to clear away some of the theoretical underbrush, clarifying different grounds one might have for taking one position or another and hopefully pushing scholars toward more productive areas of debate. As a statement of current American law, the continuity thesis might be true or false. This paper merely argues that, if it is true, continuity would represent the best reason to be an originalist—and, if it were false, the best reason not to be one.

The argument would proceed as follows:
I. **Originalism isn’t really about interpreting texts, but about the content of the law.**

   A. “Conceptual” defenses of originalism, based on philosophical claims about the nature of interpretation, can’t succeed on their own. They depend on other claims about the content of our law.

   i. Whatever method of reading the text we use, that method can be rendered irrelevant depending on what else is in the law.

      a. Suppose that, according to your favorite originalist method, you read the Constitution to say X.

      b. Someone like Bruce Ackerman might say, “Sure, the original Constitution said X, but we changed it to Y during Reconstruction and/or the New Deal.” An originalist might protest that those changes go beyond (the original meaning of) Article V. But that’s not a problem for Ackerman, who can just say that our political system happens to permit certain kinds of informal or extraconstitutional changes; Article V doesn’t get the last word.

      c. Someone like Mitch Berman (or David Strauss, or Richard Fallon, or Philip Bobbitt) might say, “Sure, the original Constitution said X, but the text of the Constitution isn’t the exclusive source of constitutional law. Con Law also comes from judicial precedents, common-law understandings, longstanding traditions and practices, the ethos of America, norms of prudence, etc.”

   2. Whether these kinds of arguments are ruled out depends on jurisprudential commitments, not just interpretive ones.

      a. We tend to think of all such disputes as involving “constitutional interpretation.” But “interpretation,” in the sense that conceptual defenses use it, is about *reading* the law; it “comes into play when there is a possibility of argument as to the [law’s] meaning.” (Endicott.) But once “there is no question as to how a person is to be understood,” then interpretation is over. (“If, on the best interpretation, the law requires you to do what is reasonable, you will need a technique other than interpretation in order to identify the reasons at stake.”) (But see Greenawalt.)

      b. Maybe we’re all so intuitively committed to the text of the Constitution being supreme law (on which more below) that we forget what a non-interpretive legal dispute might look like. (Cf. Shapiro’s *Legality*, which assimilates theoretical disagreement about the law to disagreement about
methods of interpreting texts; cf. Brennan on the First Amendment.) The text of the Constitution might well be supreme law, but not because there aren't any conceivable alternatives.

(i) Think of analogous disputes in Britain. Whether the UK has really become part of the EU, such that EU law trumps UK law regardless of what Parliament says, can't be settled by interpreting various acts of Parliament. You can call that a fight about “interpretation” of legal practices writ large, but that’s a non-standard usage—and, in any case, it’s certainly not a fight about texts.

c. Jurisprudential disputes are the real ballgame, because basically no one disagrees about interpretation anyway.

(i) Most everyone buys Solum’s thesis that original meaning “contributes” to the law in some way.

(ii) Only a vanishingly small number of people really think we should look to “contemporary meaning” as opposed to “original meaning”—whether for theoretical reasons, like Meiklejohn and Bell, or for prudential ones, like Redish. (See below for why such arguments are weird.)

(iii) Arguments that we should use judicial precedents or traditional understandings as grounds to depart from the Constitution’s original meaning are rarely intended as serious claims about the meaning of language. (How could a judicial decision or shifting normative considerations change the meaning of a written document? Why don’t any other written documents in the world, including written constitutions that are no longer in force, have their meaning change in this way? Etc.)

(iv) Instead, they’re usually intended as claims about different sources of law, or different factors to be weighed by decisionmakers—or, if not, could be redescribed that way without loss of generality. Framing them that way would help us understand what we’re disagreeing about when we disagree (and, perhaps, help us to stop disagreeing).

3. The correct method of interpretation might itself be determined by various rules of law.

a. To a legal positivist, law depends on social facts. (This paper wouldn’t defend that thesis, but would just assume it. How natural lawyers, Dworkinians, etc., might understand originalism is a different question.)
b. On this account, whether Rule $X$ is valid or not as a matter of French law depends heavily on facts about French society, not just conceptual truths.

c. Suppose that the French legal system were thoroughly committed to non-originalist interpretation of the French Constitution, in principle as well as in practice. An originalist might criticize that choice on policy grounds, but not on legal grounds, at least not without renouncing positivism. (How could the entire society be getting its own law wrong?)

d. Even if the French are suffering from some kind of conceptual error, that fact would be of basically no relevance to a student of French law. All sorts of laws might be based on mistaken reasoning of one kind or another (tobacco subsidies, rent control, etc.), but that doesn’t stop them from being laws.

e. As Frank Easterbrook put it, believing in non-originalist interpretation is like believing in infant baptism—“Hell yes, I’ve seen it done!” Given that a great many legal systems have written constitutions but appear to function in non-originalist ways, the claim that originalism is necessarily or conceptually required by a written constitution is hard to credit. (Cf. Coan on Writtenness.)

f. If originalism depends on social facts in other countries, then why shouldn’t it depend on social facts here too? How do we know that the U.S. isn’t like France? That’s an empirical claim, and it can’t be settled by conceptual ruminations about the nature of interpreting texts.

B. “Normative” defenses of originalism, based on particular values that it might serve, actually undercut many intuitions on which originalists rely—unless originalism already happens to be required by our law.

i. Originalists usually don’t describe themselves as doing law reform.

a. Originalism is typically presented as a restorative project, one that rescues the true law from the subsequent mistakes that have obscured it. That might mean reversing the occasional mistaken precedent, but only in order to apply the actual law of the United States in place of a mistake.

b. But if our law really has changed since the Founding, then the call for a return to an original understanding (plus lawful amendments) is a call to depart from U.S. law, not to apply it. The fact that the departure happens to involve a return to some prior state of affairs doesn’t make it any
less of a departure. (The modern-day Tory, who calls for the restoration of British sovereignty, is clearly proposing a change to the law, not just its proper enforcement.)

c. One could justify originalist departures from current law in various ways—that the Founders’ law (plus valid amendments) is substantively awesome, that a particular amendment procedure constrains judges or will generate good consequences in the future, that the whole thing serves abstract values of liberty or popular sovereignty, etc. But one could also encourage judges and officials to depart from current law to achieve plenty of other potential goals—such as reducing famine abroad, preventing ecological catastrophe, avoiding nuclear war, or obeying the categorical imperative or divine will.

d. Originalists tend to find such departures problematic regardless of the substantive merits of any individual cause (and without stooping to argue over which goals are more worthwhile than others). They don’t want to be known as one more interest group trying to enshrine its politics in constitutional law. That makes it harder to believe that originalism is itself simply an even-better-justified form of departure from present law.

2. Some people see this tension as evidence of originalists’ bad faith—or, at least, confusion about the nature of their own project. (See, e.g., Post & Siegel, Originalism as a Political Practice.) But a more charitable reading would see most originalist accounts as sharing an underlying but only occasionally articulated premise, namely that originalism is entailed by widely held—indeed, naïve and ordinary—views about our legal system today. (Cf. Alexander, Simple-Minded Originalism.) And, as Matt Adler argues, both originalists and nonoriginalists often fail to make these kinds of views explicit.

3. This isn’t to say that there’s anything necessarily defective about normative cases for originalism. (Though many of them might fail on their own terms, cf. Berman.) If it turns out that originalism is a good idea, then it’s a good idea. But many people—officials, judges, lawyers, conscientious citizens—want to know what the law is, not just what it ought to be, or what first-order practical reasoning would tell us to do in the absence of our particular legal constraints. (Cf. Schauer, Formalism.) If normative justifications for originalism have nothing to say to these people, then that’s a problem with the justifications.

II. Continuity Explained.

A. If originalism is really a theory of the content of our law, then what theory is it? I suggest continuity.
B. In a continuous legal system, the legal rules at some time \( t \) remain in place until they are properly changed. Because the legal system itself defines what sorts of changes are proper, even the broadest changes can remain consistent with the initial rules, so long as they’re made in a valid way. (A legal system includes both substantive rules and rules of change, and you can use the latter to change both kinds of rules—think of formal amendments to Article V, etc.) The one thing you can’t have in a continuous system, at least once it gets up and running, is a discontinuity—a change to the law that couldn’t have been defended as proper under the rules as they stood before the change took place.

1. A continuous system is continuous in a procedural, “chain of title” sense, not in the substantive sense of slow or deliberate evolution. Extraordinary changes to the U.S. legal system (making the Senate the highest court, replacing the President with a dictator, instituting communism) can be achieved by a single Article V amendment. So long as you can explain the validity of the new arrangement based on rules that preexisted its adoption, continuity in my sense is satisfied.

2. Likewise, a continuous legal system that dates from some time \( t \) might still be a lot like the system that existed before \( t \); it just contains some new elements that can’t be validated under the old rules. That degree of substantive similarity is a different issue than what I’m talking about.

C. To be more precise (at the risk of being pedantic), one might say that a foundationalist is someone who believes in a Founding, i.e., a single \( t \) from which our law has been continuous for most of U.S. history. A multifoundationalist believes in multiple discrete small-f foundings, and therefore multiple \( t \)'s (1781, 1788, 1868, 1937, 1968, etc). An antifoundationalist believes that there are no \( t \)'s for which continuity is true, or just way too many to count—a sort of “permanent revolution” in the law.

D. In this typology, originalism is foundationalism for \( t = 1788 \); that is, the law of the United States is continuous from and after the adoption of the Constitution.

1. Legal revolutions can occur all the time. The adoption of the Constitution violated the Articles of Confederation (and various state constitutions); the American Revolution violated British law; the colonization of the Americas presumably violated the law of various Native American societies; the Norman invasion may have violated Saxon law, etc. The important question is whether, under our society’s legal rules, we care about the violation or not.

2. If continuity is true, the Constitution occupies a special place in American law in two senses: not only is it supreme law (i.e., trumping any law of lesser stature), but it represents a boundary between our current legal system and older legal systems that we’ve discarded. The fact that the Revolution was il-
legal under British law has basically no legal relevance today. By contrast, it is always legally relevant whether a particular act of Congress, state statute, or judicial decision is consistent with the Constitution—even if there might be other reasons, like standing doctrines or stare decisis, to leave some inconsistencies in place.

a. There are alternative ways of understanding U.S. law that would reject continuity. For example, on one version of Ackerman’s theory, the United States has had a series of legal regimes (like the numbered French Republics), each of which started with a discontinuous change—a constitutional moment—that wouldn’t have been valid under the prior rules.

b. Maybe it’s possible to have a legal system that’s nowhere continuous, such as a view of law as an “argumentative practice” or “popular contestation” (cf. Berman). In that kind of system, the rules of the game are always changing. Those changes might be more or less predictable in a sociological sense, but they wouldn’t be governed by preexisting legal rules.

E. A few clarifications:

1. “Rules” here is used in a very broad sense, as including standards, principles, guidelines, etc. Any sort of instruction that a legal system might provide counts as one of “the rules.”

2. Changes to the rules should be distinguished from a far more common phenomenon, namely the same rules producing different outcomes based on different states of the world.

   a. Often legal rules depend in application on empirical facts about the world, or on other kinds of rules (like foreign law, social customs, or rules of morality) that are incorporated by reference. Those facts or incorporated rules might change, causing the legal answers to change, without any actual change to our law.

   b. For instance, if Congress can only suspend habeas “when in Cases of Rebellion or Invasion the public Safety may require it,” it’s obvious that the public safety might require a suspension at time $t_1$ but not $t_2$, and then again at $t_3$, etc. Likewise, depending on how one interprets the word “cruel” in the phrase “cruel and unusual punishments,” it’s conceivable that a punishment that’s cruel at $t_1$ (say, a rickety fourteenth-century guillotine that rarely works on the first try) becomes non-cruel at $t_2$ (during the French Revolution) and then cruel again at $t_3$ (when we’ve invented lethal injection).
Legal rules make outputs supervene on inputs. You can have different inputs produce different outputs, but you can’t have different outputs while keeping the inputs the same, unless the rule has changed.

(i) This is why it’s possible for the original meaning of a rule to diverge from the authors’ original expectations about how that rule would be applied in practice. A rule’s application can depend on facts about which the authors had mistaken beliefs. But the authors accounted for that possibility by making their rule fact-dependent, as opposed to structuring it some another way.

(ii) For example: the AUMF doesn’t authorize the President to use force against “the Taliban and Al Qaeda,” but against the “persons he determines planned” the 9/11 attacks. If he discovers that Hezbollah was behind it all, then the AUMF authorizes force against Hezbollah, even if every Congressman who voted on it expected otherwise. That’s why Congress chose to write the statute in general terms; they were more worried about their own potential for error than about the possibility that a future decisionmaker (here, the President) would fill in the wrong specifics. When they use more specific terms in the statute, it’s because their concerns go the other way round. (Cf. Chris Green, “the choice of language is a choice about what sorts of changes should make a difference”; Scott Shapiro, “economy of trust.”)

d. Most claims that “our law has changed since 1788” involve claims of this type. A power to “regulate Commerce” extends to commerce in microchips, even though microchips didn’t exist at the Founding. Or, on a Mathews v. Eldridge reading of “due process,” how much process is “due” might depend on facts about the present rather than the past. Etc. Those kinds of changes aren’t what I’m talking about.

e. There are also “changes” that result from indeterminacy, esp. the kind that results from trying to apply an old rule to new facts that weren’t anticipated (eg, how does the Fourth Amendment apply to Internet surveillance). This isn’t what I’m talking about either. As Hart points out in discussing “vehicles in the park,” this problem is endemic to practical reasoning, and it affects rules that are two days old as well as those two centuries old. Moreover, the legal system also has some instructions for lawyers, judges, and officials about what to do in cases of uncertainty, in which case these “changes” could fit easily into the continuity story.

3. That the rules stay the same over time doesn’t mean that no one ever violates them. Congress can pass unconstitutional legislation, judges can get decisions wrong, ordinary people commit crimes, etc. The point is that those un-
lawful or legally invalid actions don’t actually cause the legal rules to change—unless something else in the legal system “domesticates” the action, making it effectively proper even if it wasn’t proper \textit{ab initio}. (Think of adverse possession, the enrolled bill rule, finality of judgments, statutes of limitations, the de facto officer or de facto government doctrines, stare decisis (on which more below), etc.) Those don’t represent exceptions to continuity, because any changes they produce are justified based on rules that are already part of the system.

4. My claims about continuity are focused on the law of the United States, not the law of any particular State (much less all of them).

a. State laws and constitutions can and have changed over time, in ways that weren’t necessarily valid under the preexisting law. (Cf. \textit{Texas v. White, Luther v. Borden}, etc.)

b. State law is required to be consistent with U.S. law, per the Supremacy Clause, but it’s not a product of or derived from U.S. law, in the way I’m using the term. We discover the law of North Carolina the same way we discover the law of Mexico, by looking to actual social conventions in North Carolina. On this usage, “N.C. law” can change without “U.S. law” changing at all.

(i) That’s not to say U.S. law is always silent about state law. In case of a civil war in a state, Congress could, for example, decide to give its imprimatur to one rival government over another. See \textit{White, Luther, the creation of West Virginia}, etc. But Congress’s action just makes the chosen state government the lawful government \textit{for purposes of U.S. law}, not for ever and for always. (See Hart’s discussion of England recognizing the Tsarist govt over the Bolsheviks.)

(ii) Individual states may or may not be originalist about their own constitutions. States are required to be “Republican” per Art. IV, and they face various other requirements under the U.S. Constitution, but it’s not obvious that those requirements add up to originalism. (Maybe, like some of the original thirteen, they don’t even need written constitutions!) Canada isn’t originalist, but we could make Canada a state—as the Articles of Confederation offered—without necessarily requiring them to change their state-constitutional practices.

(iii) That said, perhaps the legal systems in many states actually do subscribe to some version of continuity, starting with the adoption of their most recent state constitution.
F. To illustrate how this works: if you want to claim, say, that congressional districts have to be roughly equipopulous (Reynolds), you need to claim:

1. that this was so as of 1868 (and that the 14A was validly adopted, etc.);

2. that the rough-equipopulousness rule was validly adopted at some point since 1868 (e.g., because the Supreme Court had power to do that sort of thing, under rules in 1964 that themselves could claim validity in this way, etc.);

3. that new facts, which happen to serve as inputs to other valid rules, have caused this to be the case; or

4. that continuity is false.

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

III. Continuity yields something resembling an “original methods” originalism.

A. If continuity is true, then the legal content of the Constitution today is whatever it was at the time of adoption, plus proper changes. That means the original legal content of the Constitution—whatever rules were added to U.S. law by its adoption—is by and large its legal content today.

1. The Constitution’s legal content would have been determined by original methods of legal interpretation. The text would have had been given its legal meaning, the meaning that a properly informed lawyer would have taken from it at the time.

   a. These lawyer’s methods might have included general canons for reading all types of legal documents (e.g., *ejusdem generis*), particular canons relevant to particular types of documents (like treaties or statutes), or more abstract notions concerning the relationship between text and law (like liquidation of meaning over time).

2. Focusing on the legal content of the Constitution doesn’t mean treating the Constitution solely as a lawyer’s document, for use by a technically educated elite rather than by the people at large.

   a. For one thing, the prevailing legal methods might well have directed lawyers to consult ordinary understandings rather than technical ones. (Cf. Powell.) In that case, the ordinary understandings would control, even if there were more technical alternatives on offer.
b. But even if not, the relevance of the Constitution in law is a different thing than its relevance in popular culture or political morality. People can make claims based on the Constitution (esp. the Preamble) without purporting to describe its legal effect.

B. Treating the Constitution’s original legal content as remaining valid over time is largely equivalent, in practical terms, to giving its language a stable and continuous meaning.

1. Suppose that some clause in the Constitution gave Congress power “to regulate the growing of corn.” And suppose that in eighteenth-century English, “corn” was used as a general term for all cereals (think of Britain’s “Corn Laws”), not just maize. Someone trying to establish the content of the law at the time of the Founding would conclude that Congress had power to regulate the growing of wheat and barley. Declaring that power absent today, just because the conventional meaning of “corn” has narrowed over time, would be a change to the rules and not just a change in their application; it would produce different outcomes on the same facts. (Cf. Wittgenstein on different symbols.)

2. That kind of change violates continuity—unless there’s some other rule in the system that causes the law to take current patterns of linguistic usage as one of its inputs. That kind of rule is conceptually possible, but really weird, since language usually evolves for reasons unrelated to the law. (That’s also why the Founders almost certainly didn’t have such a rule; cf. Madison on changes in language.)

3. This is an intuitive feature of originalism, and one that many scholars have highlighted implicitly, even if they didn’t make it an explicit feature of their approach. (E.g., Balkin.)

C. Continuity also means that the authority of other potential sources of law (judicial precedents, traditional understandings, the Framers’ substantive purposes, the demands of social justice, etc.) would be determined based on the state of the law at the Founding, plus proper changes since then.

1. If the Founding generation would have said that the text isn’t the exclusive source of constitutional law, and that these other sources matter as well, then a continuous legal system would preserve their authority. On the other hand, if the Founders wouldn’t have accorded that kind of authority to such sources, then those sources don’t have such authority today, unless we violate continuity or unless we can find an occasion on which that authority was properly conferred.
2. It might seem strange to call this an “originalist” view, since originalism usually involves the denial (or at least the comparative unimportance) of these sources’ authority. But that’s because of the assumption, usually unexpressed, that the text was and is supreme and exclusive law (on which more below). If that wasn’t the case in 1788, and if that view only became prevalent sometime later (say, the 1840s, or the appointment of Ed Meese), that fact would be hard for modern originalists to swallow; they would be preserving, not the Constitution of 1788, but the law of some other time.

3. Many ostensible non-originalists (eg, Breyer) in fact try to base their claims about legal sources or interpretive methods on evidence from the Founding. To the extent that they buy continuity, but think it cashes out differently, we have an ordinary historical disagreement, which hopefully would be amenable to empirical research. Originalists should be happy to fight on those grounds, and to welcome claims like this into the “originalist” tent. If someone’s basis for thinking, say, that America has a common-law constitution (per David Strauss) is that so it was laid down in 1788, why shouldn’t we call that an originalist view?

D. As an illustration, think of how this cashes out with regard to stare decisis.

1. Some originalists care more about stare decisis than others. But attempts to integrate stare decisis with original meaning usually involve either some arbitrary line-drawing (cf. Scalia) or some unusual prudential judgments (cf. McGinnis/Rappaport).

2. If our law is continuous with the Founders’ law, though, then we have another option: stare decisis might just have been one more rule of the system at the Founding. In that case, we’d care a lot about whether stare decisis was at the Founding a doctrine of judicial supremacy (Cooper v. Aaron) or just one for the management of the courts (Lincoln on Dred Scott); a requirement of the rule of law (Casey) or just a useful heuristic (Caleb Nelson); a common-law doctrine that’s abrogable by Congress (Paulsen) or something central to the ‘judicial power’ (Alexander/Schauer).

3. Or, alternatively, we’d have to explain how stare decisis started out as one thing and wound up as something else.

4. Either way, continuity helps us explain how you can have a theory about right answers and a doctrine to handle wrong answers at the same time.

IV. Continuity offers a particularly sensible grounding for originalism.

A. Originalists are currently divided, on theoretical grounds, as to the proper method of interpretation.
1. Some focus on the intentions of the Constitution’s authors (whether the Framers or the Ratifiers)—that is, their semantic intentions, intentions to communicate particular rules to the document’s readers. (Basically no one self-consciously argues for intentions in the expected-application sense, the way Raoul Berger did.)

2. Others focus on the understanding of the Constitution’s readers—that is, the “objective” meaning that would have been understood by a member of the general public at the time, or a reasonable member of the public, or a reasonable reader familiar with legal conventions, or …

B. McGinnis and Rappaport have proposed “original methods” in an attempt to reconcile those two camps, but it doesn’t quite work on its own.

1. Their claim is that the Constitution’s authors would have intended it to be interpreted according to prevailing legal methods, and moreover that such methods would have been part of the interpretive toolkit of the general public or the hypothetical reader. Thus, both approaches wind up in the same place.

2. Suppose, though, that some of the authors’ beliefs about interpretive conventions were mistaken. (Say they assumed that a given phrase, like “ex post facto,” would be given its technical meaning, but in fact the prevailing conventions applied the ordinary-language meaning instead.) In that case, the meaning intended by the authors would diverge from the meaning that would have been understood by a reasonable reader—and which meaning you care about will matter.

3. The fact that the authors also intended their document to be read by an audience that would use prevailing conventions, whatever they were, doesn’t necessarily make those conventions part of the authors’ semantic intentions. On this hypo, the authors tried to communicate to readers a rule that invoked the technical sense of “ex post facto.” To an intentionalist, once we know what the authors were trying to say, that’s the proper interpretation of the text they wrote. (Someone trying to communicate the combination to her luggage might hope that the recipient will use the right numbers, even if what she remembers are the wrong ones. But that’s different from a case where she intends to say the right numbers and misspeaks.) One might think this view wrong-headed, but that would be entering the textualist/intentionalist debate, rather than resolving it.

C. Continuity offers a better explanation of how “original methods” can bring the two camps together. The intentionalists can be right about language, even while the textualists are more right about the law. [Note: This may get a little too deeply into the weeds of interpretive theory; let me know if so. —ed.]
1. Consider the intentionalist view of language. Texts are coded messages, and to decode the message correctly is to figure out what meaning the author was trying to communicate. Natural languages are just codes that are in common use; a word can have various conventional meanings in one language or another, but the true meaning of any particular text depends on what specific code the author was trying to use (which may have been idiosyncratic).

2. The intentionalist view has two difficulties as applied to legal texts:

   a. Evidence: The author’s intended meaning, while by no means unknowable in theory, is often difficult to discover in practice, or may require resort to hard-to-find or unreliable evidence (private diaries, etc.). This makes the actual meaning of a legal text highly uncertain or revisable, which creates various real-world problems.

   b. Joint Authorship: When two authors jointly compose a text, they may have different intentions, in which case the text has no meaning, or at least no single meaning. (Think of the two ships Peerless.) But no one thinks that a provision of the Constitution—say, the Ex Post Facto Clause—is meaningless just because people disagreed as to its meaning at the time.

(i) Given how narrowly the Constitution passed in various ratification conventions, there might be a number of provisions that lacked a consensus meaning shared by the necessary majorities in each state. On a pure intentionalist view, those provisions are inkblots. (Or maybe the whole Constitution is, if you need to have a shared meaning that runs throughout the whole enactment.) But no lawyer would argue that, then or now.

3. By contrast, conventional meaning (or “public meaning”) is defined as what a reader would suppose the author’s intentions to be given a limited universe of evidence—that the author was speaking a particular language, in a particular professional context, in a particular time and place, etc.

   a. No matter what textualists might say, public meaning is properly framed in terms of the author’s intent. (See Alexander/Prakash, Nelson.) For instance, when the Seventeenth Amendment creates a procedure for filling “vacancies” in a state’s Senate representation, a textualist knows that this procedure can be used for filling a single vacancy. That’s partly because people sometimes use words in that way—i.e., we happen to know that people sometimes intend to communicate the singular as well as the plural. But mainly it’s because of what we think the Amendment was supposed to do, and therefore what someone writing this text, in partic-
ular, would likely have been intending to say. (See Grimmelmann on ambiguity & computational linguistics.)

b. Often we care about a word’s conventional meaning too. Suppose a poor English speaker labels his candy bars “Fat Free,” in an honest attempt to communicate that they contain lots of delicious fat at no additional cost. We might still want the FDA to step in, because many readers of the label will mistakenly assume that it indicates an absence of fat. (Cf. Berman.) But once we know the speaker’s intentions, we’ll naturally use (our best guess at) the intended meaning rather than the conventional one, and we wouldn’t infer that other similarly-labeled products he sells are free of fat either.

4. Public meaning theories are supposed to avoid the problems of intentionalist ones, but they don’t.

a. Evidence: Any theory resting on public meaning has to be able to motivate its choice of what evidence of meaning will or won’t be accepted. (Is this an ordinary person, a reasonable person, a reasonable and extremely well-informed person with advanced legal training, etc.) Absent a good explanation for this choice, public meaning is an arbitrary departure from intended meaning.

b. Joint Authorship: Assume that the two authors of a text have different intended meanings. If the evidence provided to the hypothetical reader is sufficient to reveal this, then that reader, too, will be unable to assign a single “public” meaning to the text. In the Peerless case, for example, a reasonable reader might be aware that there are two ships Peerless, one leaving in October and the other in December. The shift to public meaning doesn’t establish which one the contract refers to. (Even if the October-favoring party were more at fault than the other, because he ought to have known—but didn’t—that the other had December in mind, that doesn’t answer any questions as to public meaning.)

5. Continuity solves these problems by shifting the focus from the text to the law.

a. Continuity preserves the law from an earlier time to today. So we care about the meaning of an earlier legal text only to the extent that it informs the legal effect of that text’s enactment—i.e., to the extent that it makes a legal difference.

(i) Texts can have meanings without having any legal content to speak of. (E.g., a statute reading only “This statute shall henceforth be in
effect.” As a sentence, that’s not meaningless, but as a change to the law, it’s an empty breath.)

b. The law can have rules that solve problems related to interpretation without first solving all the problems in philosophy of language.

(i) For instance, in contract law, we might make a party’s legal obligations depend on fault, and not just on meaning. So, in the hypo above, there could be a binding contract as to the December ship Peerless, because the October-favoring party was at fault and the December-favoring party wasn’t. (See Restatement (2d) of Contracts §§ 20, 201.) The legal content of contracts might generally track their intended meaning—that’s why we care whether the parties sign them—but that content doesn’t have to be exclusively determined by the texts’ meaning, whether intended or public.

c. If there were legal rules to apply in determining the legal content of the Constitution—rules appropriate to the construction of all legal documents, of enactments analogous to the Constitution, etc.—then those rules might apply regardless of which theory of meaning we prefer, and regardless of whether the Framers or Ratifiers were aware of those rules or not.

(i) The claim here isn’t that the authors intended that their document be read according to those rules, or that the original legal methods were otherwise “baked in” to the linguistic content of the words they used. (In the Peerless hypo, Restatement § 20 acts as a replacement for shared meaning, not a component of that meaning; it gets applied regardless of whether the parties knew about the rule in advance.) The claim is just that we’re interested in what the Constitution added to U.S. law, and that other rules of U.S. law may have had something to say about that.

(ii) As in the case of contracts, there are good reasons why our legal rules generally tell us to look to the authors’ intentions. (That’s why we appointed those people as authors, and not other people. Cf. Alexander, Manning/Raz.) But there are also good reasons why the rules might tell us not to look for actual intentions too closely.

(I) For instance, the rules might solve the shared-meaning problem by requiring us to hypothesize a single author of the entire enactment, even if various clauses were actually written by different committees; or they might tell us to treat the most
widely-shared meaning of each provision as its only meaning, even when we know that there was disagreement.

(II) Likewise, the rules might solve the evidentiary problem by telling us that certain kinds of readily available evidence should be used in determining legal content, but that other kinds (like sworn testimony from a document’s authors) should not, regardless of our case-by-case judgment as to its reliability.

(iii) Some argue that, as a historical matter, the interpretive rules used at the Founding did look to the authors’ intentions, but did so only on the basis of publicly available evidence, like information about the prior legal regime, the public debate surrounding a measure, the content of other statutes or legal texts, and so on. That would be a different concept of “public meaning,” as “publicly available meaning”—the meaning that a member of the public could access, if they were so inclined. This would be a wholly plausible way of writing and reading constitutions.

d. Continuity can accept, along with the intentionalist school, that interpretation is the search for an author’s communicative intent. But, along with the public-meaning/reasonable-reader school, it can also limit that search by adding certain assumptions and rules of evidence. The important point is that, unlike public meaning generally, continuity offers an explanation for what evidence of intent should matter and what shouldn’t: namely, the evidence that would matter under the law.

D. Some people deny that there were, at the Founding, any applicable rules of law to apply here. But that’s not quite right.

1. Some argue that there was simply too much historical disagreement on interpretive methods to suggest that we can apply a single set of rules. (Cornell?) But continuity can tolerate a certain amount of interpretive disagreement.

a. People in the Founding generation often disagreed about what set of interpretive rules should be applied to the Constitution. Is it more like a statute (or state constitution) or more like a treaty? Should it be construed broadly to achieve its objects, or strictly to protect the contracting parties? Etc. We shouldn’t be surprised by this, or expect lawyers back then to have agreed any more than lawyers do today.

b. But, if continuity is true, then their disagreements are the ones that matter. Many of our disagreements are much newer, and might involve questions that were entirely settled at the time. If so, then the questions
should be equally settled today (subject to the caveats above about changing inputs).

c. Moreover, even on questions on which they disagreed, there can still be a proper legal answer, if one side had the better of the argument. The fact of disagreement doesn’t end the inquiry; it just puts us in the same position that we’d occupy if we were addressing a modern legal question on which people disagree.

d. Maybe radical and thoroughgoing disagreement, of the kind that undermines the case for shared social conventions which can give rise to legal rules, would make the project of continuity impossible. But whether that amount of disagreement existed is a historical question. Given that the U.S. seemed to have a functioning legal system at the time, that degree of disagreement seems unlikely.

2. Alternatively, some argue that, even if people tended to agree on the appropriate methods, there wasn’t any U.S. law (other than the Constitution) in 1788 that the methods could have been part of. (Fontana?)

   a. Even prior to the Constitution’s adoption in 1788, the United States of America was an independent confederated state, with a functioning government, officials, and courts. That government might have functioned poorly, but it existed, and it was both governed by and generated legal rules.

   b. Additionally, at the time of the Founding, the thirteen states shared the English common law tradition and relied on common-law principles as the common substrate of their law and the natural background against which to read enactments of the United States in Congress assembled. If the thirteenth state had been Louisiana or Japan, with a wildly different legal tradition, then maybe we’d have a real problem. But the fact that people argued whether the Constitution should be read more like a statute (or a state constitution) or more like a treaty shows that they assumed some degree of consensus as to which interpretive rules would govern in each case.

E. Even if there were applicable rules, some might deny that the Constitution should be bound by them.

   1. Larry Alexander’s argument goes something like this. If the Constitution is supreme law, then it trumps other kinds of law. And if we appoint some Framers and Ratifiers to make supreme law for us (presumably because we trust them to make better rules that we would on our own), then we should
apply whatever rules they wanted to give us, regardless of what other legal rules might be around.

2. But the Constitution’s status as supreme law doesn’t mean that it’s the only source of law. The Framers and Ratifiers weren’t omnipotent Austinian sovereigns, but delegates with a limited commission, appointed to decide whether a particular enactment should be added to an existing legal tradition. We can treat the Constitution’s enactment as breaking from the past without declaring a legal Year Zero and erasing all other rules on the books. To the extent that the Constitution didn’t itself command a different method of interpretation (cf. Green, Paulsen)—and, indeed, in order to determine whether it did so—a Founding-era lawyer would have applied standard off-the-shelf interpretive rules, whether the Framers and Ratifiers were aware of those rules or not. Those rules might, in turn, have themselves taken as inputs the likely intentions or state of knowledge of the Framers or Ratifiers. But in this chicken-and-egg game, the rules come first.

3. Moreover, the argument from appointment ignores all the reasons discussed above for having legal rules occasionally supersede the intended meaning of texts (avoiding evidentiary problems, overcoming a lack of shared meanings, etc.). These are good reasons to sometimes treat a document’s legal content as distinct from the rules the authors intended to lay down, even if one generally trusts the authors to lay down good rules. If we could depend on perfect communication of perfectly shared intentions from the authors to us (say, in Alexander’s example, by telepathy), then we wouldn’t need rules like this. But we can’t, so we do.

4. At its core, this objection is really jurisprudential rather than interpretive, in the sense discussed above. Are the intended commands of the Framers and Ratifiers supreme law, whether their contemporaries thought so or not? Our social conventions don’t have to be the same as the Founders’, so it’s conceivable that we, today, have a different legal system than they did, and that ours takes the authors’ intentions as supreme. But it would be very odd for us to care more about the Framers’ and Ratifiers’ intentions than those who appointed them. (Cf. Powell.) Why be more Catholic than the Pope? In the absence of a clear modern consensus for this view of the law, it seems more consistent with our current conventions to look to the Constitution’s original legal content, rather than to its originally intended meaning.

F. Continuity makes better sense of originalist claims about “constraint.”

1. The early originalists (Bork, Berger, etc.) placed enormous emphasis on constraining judges, in reaction to what they saw as a wild-and-crazy Warren Court. Since then, New Originalism has largely downplayed constraint as the
goal, but it still plays a significant role in common intuitions surrounding originalism.

2. As others have pointed out before, any number of theories can equally well constrain judges from making willful decisions. (See Lawson—flip a coin, always rule for the defendant, always follow the GOP’s political preferences, always decide in accordance with the original meaning of the French constitution, etc.).

3. The reason why those other theories seem obviously flawed is that the choice of constraint is unconstrained. We have no good explanation, from the perspective of constraint, why judges should choose to follow the original meaning of our Constitution as opposed to any other set of rules (so long as all of them do it consistently).

4. Continuity provides that explanation, because the source of constraint is the law, whatever that might be. Judges have to act according to law; and if the law happens to give you plenty of room to play fast-and-loose with history, that’s our problem, not the judge’s problem. This is the perfectly ordinary and naïve view of what judges are supposed to do (cf. all recent confirmation hearings). And it answers the charge that they’re “just making it all up”—either the law authorizes them to make it up, or it doesn’t.

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

V. Continuity is a plausible candidate as component of our law.

A. Continuity is a contingent feature of our legal system, not a necessary one. Whether it’s true today depends on our social conventions today, not on the Founders’ social conventions back then. So why might we think it’s true today?

1. This paper won’t offer a full defense of continuity, which would require a much more detailed understanding of which social conventions are relevant and how to identify them. Instead, it’ll suggest some reasons why continuity might be a plausible component of our law, through an exercise in armchair sociology.

2. Also, this paper is agnostic as to whether our social conventions commit us to continuity per se, or whether they commit us to other things that then entail
a commitment to continuity. (I’m not even sure how we would tell.) For in-
stance, maybe our conventions commit us to certain sources of law—
constitutions, statutes, treaties, common law, etc.—which happen to have
certain properties, in virtue of which continuity ends up being true. Either
story works for me.

B. In general, we treat our laws as persisting over time, until they are properly
changed.

1. [Note: I find this a little hard to argue for, because it seems so basic. Suggestions
appreciated!—ed.]

2. When we encounter a really old statute (say, the Sherman Act), we generally
don’t ask whether it’s too old to be law. We might want to know whether it’s
been abrogated since its enactment, but age alone won’t erase it.

   a. We don’t have a doctrine of desuetude in the U.S. Cf. Sutherland on
Statutory Construction § 34:1 (“It is a basic principle of law that unless
explicitly provided to the contrary, statutes continue in force until abro-
gated by subsequent action of the legislature.”).

   b. But even if we did have a desuetude doctrine, that wouldn’t change our
practice of continuity. Desuetude would just be one more method of
legal change that’s proper within the system. The only question would
then be where the desuetude doctrine comes from—whether it was law
at the Founding, or whether it properly became law since then.

   c. Even those who support an informal concept of desuetude wouldn’t ap-
ply it to old statutes across the board. Think of repeals. If someone
were prosecuted under an old but commonly used federal statute, which
(it then turns out, to our surprise) was repealed shortly after its passage,
almost everyone would think the defendant shouldn’t be imprisoned—
even though the repeal is ancient too, and even if the fact of repeal had
fallen out of common knowledge.

3. This practice makes a lot of sense, because leaving the law in place until it’s
properly changed allows people to know what it is, and avoids giving the leg-
islature a moving target.

   a. Cf. the canons against implied repeal, or in favor of narrowly construing
statutes in derogation of the common law. (Cf. David Shapiro.)

   b. The basic distinction between lawmaking and law execution/application
assumes that our law persists over time, with only certain prescribed
means of change. (Those can include common-law evolution, judicial
promulgation, etc., depending on what our rules of change happen to be; but in the meantime, things stay the same.)

4. Some describe originalism as an ethical theory in Bobbitt’s sense, a theory of American identity in which we are the Founders’ heirs, sharing in their moral tradition. (Jamal Greene.) But regardless of whether one accepts that idea or that form of American identity (Greene doesn’t), virtually everyone sees America as continuing a *legal* tradition that started with the Founders, as having inherited their legal system and not yet having broken from it.

   a. This is where originalist arguments get much of their rhetorical force. Cf. Scalia’s dialogue with Ted Olson in the oral argument of *Hollingsworth v. Perry*: “when did it become unconstitutional?” If we can’t explain how things changed—whether as a proper change to the existing rules, or through changed facts that an existing rule takes as inputs—then our argument seems to be more one of law reform than law.

C. We treat the Constitution’s adoption as the crucial break with the past.

   i. Why not start earlier?

      a. Plenty of stuff that’s older than 1788 is still part of our law. For instance, our treaty with Britain from 1783 is still regarded as valid in both countries. (Cf. the references in Article VI to treaties “made, or which shall be made,” to debts and engagements already contracted, etc.) What matters is whether the old stuff determines the validity of the new, or vice versa.

      b. The usual account of the Constitution’s adoption is that it violated the Articles of Confederation (which required unanimous consent to amend, not the nine states’ consent required by the Constitution’s Article VII). It also violated various state constitutions, which were substantively inconsistent with the Constitution and which imposed constraints on amendment that the Article VII ratification method failed to satisfy.

      c. One version of Ackerman’s theory starts the clock in 1781, and then describes what happened in 1787–1788 as a valid move within the game (and not as a change to the rules) because constitutional moments are always valid moves.

         (i) Amar’s response to this claim is to search for a different theory that would make the Constitution’s adoption legal without recourse to any constitutional moments. (For instance, the international-law consequences of the widespread violation of the Articles, as well as various popular-sovereignty principles within the states.)
But that seems unlikely on its own terms, and it also fails to distinguish claims about political morality from claims about law. People in the states may have believed that the new Constitution was democratically legitimate (and therefore deserved obedience) without believing that it was legal under the pre-existing rules. In fact, it looks like they did.

For the same reasons, we should be hesitant to conclude that constitutional moments were regarded as legally valid moves; they might have been thought of as invalid but democratically legitimate.

d. More importantly, nobody thinks that the validity of the legal order today would be in any way threatened by conclusive proof of a rupture with the Articles of Confederation. It’s like an argument that the Revolution was illegal under British law, or that colonization was illegal under Native American systems of law. Of course they were! We just don’t care. (There might be lingering worries about claims of justice vis-à-vis Native Americans, but almost no one thinks there’s any legal issue about whether the laws of the Iroquois Nation still apply throughout New York, any more than whether the laws of the Roman Empire are binding there.) To the extent that law is a matter of social convention, this kind of thoroughgoing agreement makes a difference.

2. Why not start later?

a. Another way to read Ackerman’s theory would accept that constitutional moments are ruptures, and would assert that we’ve had several of them—notably the adoption of the 14A (which allegedly violated Article V’s requirements) and the New Deal (which didn’t pretend to satisfy them).

b. From the perspective of the armchair sociologist, there are a few preliminary observations one can make:

(i) Most people (most lawyers, most judges and officials) don’t think of the 14A or of the New Deal decisions as the beginning of Second or Third Republics in the French sense. Instead, they think of these events as normal changes within a continuing legal system.

(ii) That may partly be due to ignorance of any controversy as to their validity. But it’s also largely due to the absence of any such claim by those who proposed or defended the changes.
(I) The authors of the Federalist were willing to admit, after some hemming and hawing, that the Articles were being violated, and to defend the violation.

(II) By contrast, the proponents of the 14A had detailed and well-grounded legal theories as to why the ratification process was valid under existing rules. And they were right. (See John Harrison.)

(III) Likewise, the New Dealers didn’t claim to be violating the original understanding, but vindicating it from the mistaken readings of the Lochner era. (Cf. Holmes, Brandeis, Stern, etc.) Even Blaisdell, which threw the Contracts Clause under the bus, first made an argument based on original history, making sure to note that the Constitution’s “grants of power . . . are not altered by emergency.” If hypocrisy is the tribute that vice pays to virtue, then the Court’s effort to apply prior law is strong evidence of those underlying commitments.

(IV) Some people treat Brown v. Board’s statement that “we cannot turn the clock back to 1868” as an official rejection of originalism by the Court. But that statement is clearly about current facts as inputs to the rules (“We must consider public education in the light of its full development and its present place in American life throughout the Nation”), and in any case only followed a discussion of the original history, which found that history inconclusive. To my knowledge [and I’d appreciate your suggestions here! —ed.], the Court has never openly proclaimed its own reading as trumping the original meaning of a constitutional provision, as opposed to original expected applications.

(iii) The kind of lingering discomfort among constitutional scholars that surrounds any suggestion that the 14A broke the rules (or that the New Deal did so) is totally absent in the case of British law or the Articles of Confederation. That, too, tells us something informative.

3. A full defense of continuity has to wait for a more fully fleshed-out description of which social conventions matter, and what (in the modern U.S.) those conventions happen to be. But it’s worth noting one final point, which is that reactions to continuity may depend on how much stock you place on what lawyers and courts actually do in practice, versus what we say we do in theory.
a. Maybe a clear-eyed analysis of what lawyers and judges do in practice will produce a very different set of rules (follow prior cases, advance political agendas, enforce elite opinion, discount the claims of ethnic minorities or the religiously observant, etc.). But it’s perfectly legitimate for scholars to call attention to a gap between our actions and our expressed beliefs, and to explain what adherence to the latter might require.

b. Moreover, our system really does have only a limited tolerance for practice unreconciled with theory. If you go into court and say, “well, Judge, the original Constitution did say that, but we changed it through an informal amendment in 1937, and besides that, the plaintiffs are hostile to our progressive social vision,” you will lose. That is an important fact about our legal system, one that no serious analysis of American legal practices can ignore.

VI. Consequences of Continuity

A. If we accepted continuity as the grounding for originalism, what else would follow? This section identifies two possibilities.

B. Originalism and History.

1. One of the common complaints about originalism is that it forces lawyers and judges to become historians, and to learn a great deal about fields (the Framers’ intentions, or past patterns of linguistic usage) in which they lack expertise.

2. But if originalism is based on continuity, then those lawyers and judges are doing something eminently legal: determining what U.S. law was as of a particular date. (Cf. Lawson/Seidman, Originalism as a Legal Enterprise.)

3. That’s obviously a job for lawyers, albeit with help from historians. And it’s one that lawyers and judges engage in all the time.

   a. Cases involving long chains of title might require us to figure out whether A or B owned the land at some prior time.

   b. Disputes over sovereign borders can depend on the proper construction of an interstate compact from the 1830s, or the Crown grant to Lord Baltimore, or whatever.

   c. Suits alleging ex post facto violations require courts to determine what the law was at the time a crime was committed, not what it is today.
d. Etc.

4. We have various rules to make inquiries like these less common—such as statutes of limitations, adverse possession, or the rule against perpetuities. But those rules are like the “domesticating” rules discussed above: they help us avoid inquiry into the past, but only because inquiry into the past would otherwise be a normal part of our legal reasoning.

5. Viewing the historical inquiry as just one component of the legal inquiry more generally helps answer the criticism that continuity is just too difficult to carry out in practice.

a. Continuity, like other original-methods theories, layers an inquiry into methods on top of existing inquiries (like authors’ intent or public meaning) that might be difficult to conduct. And there are plenty of people who think that originalism is already an impossible burden as it stands.

b. But while continuity might require more historical knowledge, in theory, than other versions of originalism, it’s not clear how often that knowledge is actually required in practice. For example, on most issues the public meaning vs. authorial intent distinction doesn’t even arise, because the meaning most likely intended by the authors was exactly what everyone else would have thought the words meant. The distinction is really important on theoretical grounds, if somebody’s making a conceptual argument for originalism based on the nature of texts or meanings or whatever, but it’s only sometimes relevant to actual constitutional disputes. The same is true of original methods; maybe they matter sometimes, but often they come to exactly the same answer you’d expect otherwise.

(i) One might ask, “how do you know they don’t matter?” But that’s where the defeasible nature of legal reasoning comes in. We read texts for their obvious signification, and if someone wants to argue that we’re doing it wrong, we wait for them to do so persuasively. In the meantime, we do what seems right on the evidence we’ve got. And, of course, finding out the standard interpretive methods in a given legal system at a certain time isn’t any harder, in the abstract, than finding out the public meaning of a term; both require knowledge of conventions that were broadly held and at the same time potentially contested. And yet translators of historical documents do this all the time.

c. Reconceptualizing continuity as a legal project, rather than a primarily historical one, doesn’t let us avoid the historical research by focusing on
standard lawyers’ questions. Rather, the point is that the historical issues are standard lawyers’ questions. We try all the time to answer questions of the form, “what was the law on subject X as of date Y?” On the continuity theory, that’s precisely what originalism does, for good or for ill. And it’s also precisely what we do when we answer questions of the form, “what is the state of the law on subject X today”—we’re just using a date-restricted universe of legal materials.

C. Originalism for the rest of the law.

1. Debates over originalism have traditionally been confined to people “doing con law,” with occasional forays into the statutory-interpretation field.

2. But if continuity is true, there’s lots of non-constitutional law that might be informed by what U.S. law was in the past.

   a. For instance, in determining whether the law of nations is part of our law, it seems relevant that so many people in the Founding generation thought it was (cf. Hamilton, Pacificus #1). Were they wrong? Or has it changed since? If the answer to these questions is no, then fidelity to a continuing legal system might require those inclined to support originalism to consider different answers to these questions.

VII. Conclusion

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